AN OFFICIAL PUBLICATION OF ASPPA

PLAN CONSULTANT

FALL 2016

The 'Big Wind' Behind Multiple Employer Plans

- The Fiduciary Rule's Impact on TPAs
- ASPPA: Into the Future
- Retirement Calculators

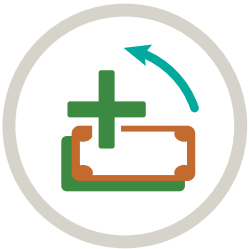
OUR AUTOMATIC ROLLOVER SOLUTION REALLY IS THAT EASY

HOW DO I GET STARTED?*

Our dedicated resources and flexible solutions help you take care of past employees while reducing plan expenses in 3 easy steps.

Step 1: Sign Service Agreement

Step 2: Send Us Participant Information



Step 3: Transfer Funds to Millennium to Establish an IRA

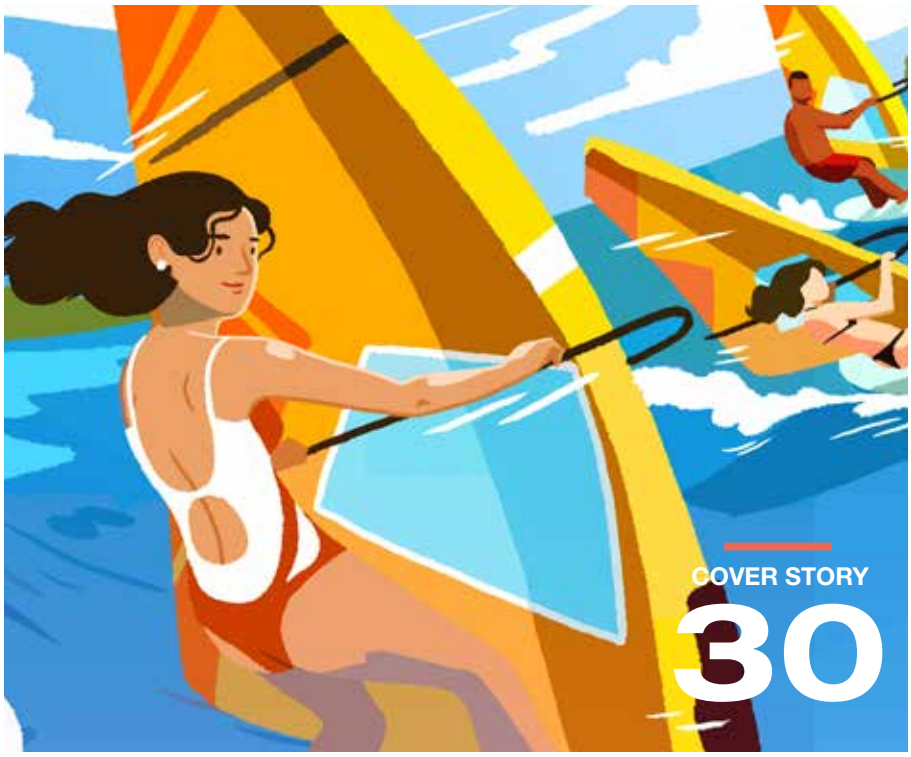
15 YEARS OF BUSINESS

Visit our new website at **www.mtrustcompany.com**

MILLENNIUM TRUST COMPANY
THE SMART ALTERNATIVE

* Plan Sponsor must make appropriate disclosures and notifications to plan participants, and may utilize the notification services of Millennium Trust Company to satisfy safe harbor requirements. Millennium Trust Company performs the duties of a custodian and, as such, does not provide any investment advice, nor offer any tax or legal advice.

PLAN CONSULTANT



Contents

SUMMER 2016

ASPPA IN ACTION

6 From the President
JOSEPH A. NICHOLS

22 ASPPA History Online

45 New and Recently Credentialed Members

58 Upcoming Conferences

60 Government Affairs Update
CRAIG P. HOFFMAN

The 'Big Wind' Behind Multiple Employer Plans

If proposed legislation eliminates perceived obstacles to MEPs, look for the floodgates to open.

BY PETE SWISHER

FEATURE STORIES

26 The Impact of the DOL Fiduciary Rule on TPAs

We must take care to clearly delineate roles to avoid potential prohibited acts.

BY JJ MCKINNEY

36 ASPPA: Into the Future

Our final excerpt from the ASPPA history book looks to the future.

BY JACK EL-HAI

42 Retirement Calculators — Are We Asking Them To Do Too Much?

Calculators can help participants, but information without action doesn't lead to success.

BY JOE REESE

10 18 48

COLUMNS

04 Letter from the Editor

08 Code, Read
REGULATORY/LEGISLATIVE UPDATE
BRIAN H. GRAFF

TECHNICAL ARTICLES

10 Helping Employers Prepare for New Overtime Rules
REGULATORY
DAVID WOODARD AND KARLA ANDERSON

14 The Keys to a Successful Plan Termination
ACTUARIAL
GLORIA LESMEISTER

18 The New Fiduciary Rule's Effect on Call Center Staff
RECORD KEEPING
MARY ONEYEAR

20 Will *Spokeo* Open the Flooodgates?
LEGAL
GARY BLACHMAN AND LAUREN DAVIS

24 Proposed Changes to Form 5500 Would Expand Reporting
REPORTING
JOHN ORTMAN

PRACTICE MANAGEMENT ARTICLES

46 Constructing the Optimal Retirement Plan Vehicle
WORKING WITH PLAN SPONSORS
JASON BROWN

48 Civilty and Professionalism in the Office, Part 1
ETHICS
LAUREN BLOOM

50 Earning Trust in the Higher Education Market
MARKETING
DAVID RAY

53 The Recordkeeper's Perspective on Mergers and Acquisitions
BUSINESS PRACTICES
ABIY FISSEHA

56 6 Tips on Handling Client Errors
SUCCESS STORIES
ILENE H. FERENCZY

PLAN CONSULTANT

Published by

ASPPA
Making Retirement Plans Work
Part of the American Retirement Association

Plan Consultant is published quarterly by the American Society of Pension Professionals & Actuaries, 4245 North Fairfax Drive, Suite 750, Arlington, VA 22203. For subscription information, advertising, and customer service contact ASPPA at the address above or 800.308.6714, customerservice@USAretirement.org.

Postmaster: Please send change-of-address notices for *Plan Consultant* to ASPPA, 4245 North Fairfax Drive, Suite 750, Arlington, VA 22203.

Cover: Chris Danger Illustration

A Different Kind of MEP

Is it time to consider retiree-only open MEPs?

As Pete Swisher points out in our cover story, MEPs are emerging as an important tool of national retirement policy, for a number of good reasons — they're relatively simple, they may improve coverage and they can ease the burdens of plan sponsorship for employers, to name a few.

And if you accept the premise that our industry is a wholly owned subsidiary of the federal government (that is, it was created by and is governed by federal laws and regulations), it's important to note the degree of support for open MEPs inside the Beltway. That includes several legislative proposals on Capitol Hill, a White House proposal released earlier this year, and support from the Labor Department as a way to close the retirement coverage gap.

As a result of these factors, it seems safe to say that MEPs will continue to gain traction in the marketplace, and that they have a promising future.

So let me throw another log on the fire: a special type of open DC MEP for retirees only.

Think about the needs of employees — informational and otherwise — during the accumulation phase. Now think about the needs of retirees as they begin the decumulation phase. They're vastly different.

Generally speaking, recent retirees who don't want to keep their retirement savings in their former employer's plan or cash out are pretty much limited to rolling their assets over into an IRA. But what if there were another choice — a plan designed for retirees, with features designed for their needs and interests?

That would be an open defined contribution retiree-only MEP.

A retiree-only MEP, sponsored by employers, would enjoy all the advantages of scale and leverage that conventional DC plans enjoy. That means a wide range of investment options at reasonable fees. It means good investment advice and the best retirement income insurance products, all designed with a laser focus on retirees, not employees still in the accumulation phase. Starting to sound good?

That's not even the best part. Retiree-only open MEPs would create a competitive new market segment focused on retirees, not employees — spurring the development of new retiree drawdown strategies, post-retirement pooling approaches, custom offerings and a range of new ideas and products to help retirees that we can only guess at now. These might include holistic solutions of which retirement savings decumulation is only a part. Social Security planning? Medicare and Medicare supplemental options? Finding remote part-time employment? Specialized financial education for seniors?

> "Retiree-only open MEPs would create a competitive new market segment focused on retirees, not employees."

One of the hallmarks of our industry has always been the remarkable innovations and creative solutions that flow from a dynamic, competitive marketplace. Are retiree-only open MEPs the next big thing?

Comments, questions, bright ideas? Email me at jortman@usaretirement.org. PC

JOHN ORTMAN
EDITOR-IN-CHIEF

ASPPA History Book Coming Soon!

Look for your copy of *"Leading the Evolution: ASPPA's 50 Years at the Forefront of the Retirement Industry,"* starting the last week of this month. ASPPA members attending this year's ASPPA Annual Conference will receive their copies at the conference. And don't forget to check out the new photos, documents and videos on the ASPPA history website, at asppa50.org.

National tpaday™

Celebrating excellence in 401(k) plan administration

John Hancock has declared October 18th **National TPA Day™**

We understand the value and expertise that you bring to the retirement industry by:

- designing **customized plan solutions** to improve outcomes;
- staying on top of **legislative and regulatory changes**;
- offering **compliance expertise** and ensuring ongoing plan obligations are met;
- delivering **best-in-class service** for a plan and boosting retention;
- providing local market insights and **referral opportunities** to financial representatives.

Thank you to all the dedicated plan consultant professionals for all you do to make 401(k) plans work the way they should.

10.18.16

John Hancock® RETIREMENT PLAN SERVICES

BY JOSEPH A. NICHOLS

I'll Get by With a Little Help From my Friends

As the year winds down, it's anniversary party time.

Plan Consultant has a very patient editor. I have to admit that this column, my last as ASPPA President, was woefully late. I have had a bit of writer's block.

For past articles I have been inspired by certain ASPPA events — a phone call about our 50th anniversary year, a discussion about professionalism or an ARA meeting. Don't get me wrong — there have been many events since my last column. I showed off the beautiful and up-and-coming Kansas City to the ASPPA LC in May. I also attended the energetic Philadelphia regional conference and hung out with an extremely talented group of ASPPA women leaders in New Orleans. The last couple of months have also included trips to DC for our Governmental Affairs Committee meetings — one where our GAC staff and volunteers further strengthened our credibility and voice with the IRS, DOL and on Capitol Hill — and Chicago for the ACOPA LC meeting. Throw in a 17-day family vacation, and I know what you are thinking: How can you not find inspiration within that list of activities? Well, it finally hit me on the way home from my latest trip to DC.

Thanks to a very inflexible (and inconvenient) policy of one of the major air carriers, I had to plan a special trip to DC to bring my daughter home. What at first was an inconvenience turned into a delightful visit. I traveled the night before so that there was plenty of leeway to accommodate the very minimal chance (insert sarcasm here) there might be a travel delay. This put me in DC on the morning of our monthly ASPPA LC conference call. I thought it would be fun to do the call from the ARA offices.

Well, fun it was. All I can say is that our staff is all class. The positive energy in the office is always flowing — it's no wonder the same energy is seen throughout all our ASPPA activities. I would put the work they do to educate our members above any other not-for-profit out there. We are very fortunate to have a team with such dedication and drive — and who are incredibly talented and fun! So thank you to all the staffers who make ARA and ASPPA so great!

Speaking of ASPPA activities, in my first column I mentioned "The Party" in October! ASPPA is now officially 50 years old, and we are going to have one heck of a gala in in few weeks. The Annual Conference Committee has put together yet another thought-provoking and entertaining agenda. The Washington Update crew is putting together a program that is bound to top last year's performance. There are also a few new activities planned for this year too. Look for updated social media activities, as well as a sponsor's corner and business owners and managers break-out rooms.

Then there is the anniversary gala on Tuesday night! A sit-down dinner will celebrate ASPPA's history and recognize past leaders, and then culminate with a performance by the Beatles tribute band Rain. And do not, I repeat, do not forget to come to the gala dinner in your best 1960s attire. Tie-died shirts and bell bottom jeans are much easier to pack than any of that business casual stuff. I am looking forward to a groovy time with everyone in DC!

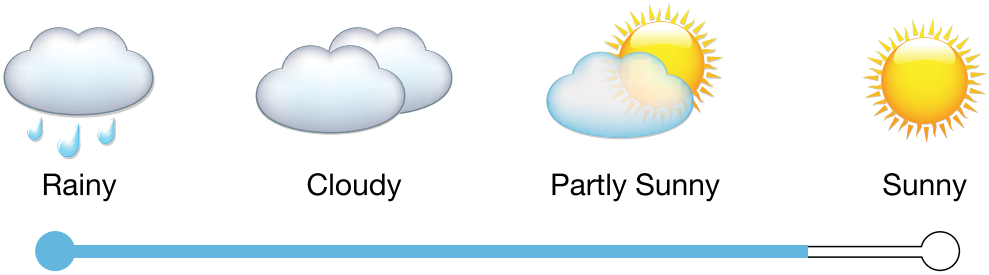
As my year as ASPPA President comes to a close, I would like to take this opportunity to thank two presidential colleagues: Kyla Keck, who guided ASPPA before me, and Rich Hochman, who will guide ASPPA next year. All ASPPA leaders are committed to making our organization the premier association for retirement professionals. I may be biased, but none have done it with more heart and determination than Kyla and Rich.

I would also like to thank Brian Graff for his dedication and tireless effort. The following statement would be a cliché if it were not so intensely true: ASPPA would not be where it is today without Brian's leadership and his constant drive to protect the profession so loved by our members.

Finally, I want to wish Judy Miller the best of retirements. It is time for Judy to reap the benefits of the system she has worked so hard to build and protect. Judy, you are most excellent! PC

Joseph A. Nichols, MSPA, ASA, EA, MAAA, is ASPPA's 2016 President. A senior director with FTI Consulting's Pension Consulting Services group, he has provided pension actuarial services to a wide range of plan sponsors for more than 25 years.

clear view of retirement, improving outcomes



We keep participants on course toward a funded retirement.

What makes our approach to retirement readiness so effective is that it's so personalized. At any time, participants can check their own retirement forecast to get an idea of whether they're on course toward a funded retirement and, if not, what steps they can take to improve it. Think how much more engaged your clients' participants would be with this kind of actionable guidance. To learn more, call **888-401-5826** or visit **trsretire.com**.

TRANSAMERICA®
Retirement Solutions

REGULATORY/ LEGISLATIVE UPDATE

Code, Read

At the presidential level, the retirement plan industry seems to face a choice between two unpleasant options — a choice that is probably familiar to most American voters.

BY BRIAN H. GRAFF

The 2016 general election is upon us, a knock-down, drag-out fight between two intensely polarizing figures — Hillary Rodham Clinton and Donald J. Trump — vying for votes among an increasingly polarized electorate.

In this intensely partisan political atmosphere, it is easy for the topic of saving for retirement to get shunted aside. After all, both parties claim to share the desire for Americans to have a financially secure retirement, even if they have differing views on how to achieve that goal. Not that you'd get a sense of that since arguing about how to get there does not conveniently fit into the network news' 30-second soundbites, as do so many of the other more controversial political issues currently at the fore.

As a consequence, we have precious little to go on to deduce how the candidates feel — or even what they are saying — about the savings habits of Americans and what, if anything, they believe needs to be done to the private employer-based retirement system. You won't find retirement listed on either candidate's website as a main policy topic, even though in Gallup polling for the past 15 years Americans have consistently flagged having enough money in retirement as a top financial concern.

On the other hand, both candidates have released comprehensive proposals to reform the tax code. The results here are not encouraging for retirement savings. Candidate Clinton wants to collect more than $1 trillion in new revenue over the next decade, primarily through new taxes on high-income earners (which might encourage the formation of tax-deferred retirement programs, particularly among small businesses), but also through various curbs in the retirement savings incentives that we have seen in the past budget proposals of President Obama. Things like limiting the value of the retirement savings tax deferral to a deduction rate of 28% and putting a dollar cap on the amount of money an individual can save in tax-preferred retirement accounts.

In short, Clinton's tax proposals are a decidedly mixed bag. The incentives her proposals would provide for increased retirement savings are largely indirect (presuming high-income earners would be more inclined to create and use retirement savings vehicles, like 401(k) plans), while her stated proposals that directly impact retirement savings, if enacted, would almost certainly be a negative impact on those programs.

Candidate Trump's tax proposal — which in many ways mirrors the tax reform blueprint released by the House Republicans — predictably takes the opposite approach, though one that could be equally as damaging to retirement savings. Trump's plan calls for significant cuts in the statutory tax rates on both the wage and investment income, cuts that could well reduce the incentive for business owners and other workers to save for their retirement through vehicles like the 401(k). Additionally, Trump claims to pay for these cuts by "reducing or eliminating most deductions and loopholes available to the very rich," and specifically targets the tax exemption on life insurance for high-income earners.

> "In this intensely partisan political atmosphere, it is easy for the topic of saving for retirement to get shunted aside."

At the presidential level, anyway, the retirement plan industry seems to face a choice between two unpleasant options (a decision that is probably familiar to most American voters right now). That is why it is more important than ever that each and every one of us continue to stress on Capitol Hill the importance of the private sector retirement system, the efficiencies of the 401(k) in helping to provide financial security, and how critical the current retirement savings incentives are in supporting the retirement security of tens of millions of Americans — no matter the election outcome. PC

Brian H. Graff, Esq., APM, is the Executive Director of ASPPA and the CEO of the American Retirement Association.

CEFEX
CENTRE FOR FIDUCIARY EXCELLENCE

ASPPA Retirement Plan Service Provider

ASSESSMENTS PERFORMED BY CEFEX, CENTRE FOR FIDUCIARY EXCELLENCE, LLC.

SERVICE PROVIDER EXCELLENCE ASPPA

The following firms are certified* within the prestigious **ASPPA Service Provider Certification** program. They have been independently assessed to the ASPPA Standard of Practice. These firms demonstrate adherence to the industry's best practices, are committed to continuous improvement and are well-prepared to serve the needs of investment fiduciaries.

Actuarial Consultants, Inc.
Torrance, CA | acibenefits.com

Alliance Benefit Group of Illinois
Peoria, IL | abgill.com

Alliant Employee Benefits
New York, NY | alliant.com

Altigro Pension Sevices, Inc.
Fairfield, NJ | altigro.com

American Benefits Systems, Inc.
San Antonio, TX | simpkinsassoc.com

American Pensions
Charleston, SC | american-pensions.com

Aspire Financial Services, LLC
Tampa, FL | aspireonline.com

Associated Benefit Planners, Ltd.
King of Prussia, PA | abp-ltd.com

Atessa Benefits, Inc.
San Diego, CA | atessabenefits.com

Atlantic Pension Services, Inc.
Kennett Square, PA | atlanticpensionservices.com

Beacon Benefits, Inc.
South Hamilton, MA | beacon-benefits.com

Benefit Management Inc.
Providence, RI | unitedretirement.com

Benefit Planning Consultants, Inc.
Champaign, IL | bpcinc.com

Benefit Plans Plus, LLC
St. Louis, MO | bpp401k.com

Benefit Plans, Inc.
Omaha, NE | bpiomaha.com

Benefits Administrators, LLC
Lexington, KY | benadms.com

Blue Ridge ESOP Associates
Charlottesville, VA | blueridgeesop.com

BlueStar Retirement Services, Inc.
Ponte Vedra Beach, FL | bluestarretirement.com

Cetera Retirement Plan Specialists
Walnut Creek, CA | firstallied.com

Creative Plan Designs Ltd.
East Meadow, NY | cpdltd.com

Creative Retirement Systems, Inc.
Cincinnati, OH | crs401k.com

Delaware Valley Retirement, Inc.
Ridley Park, PA | dvretirement.com

DWC ERISA Consultants, LLC
St. Paul, MN | dwcconsultants.com

Fiduciary Consulting Group, Inc.
Murfreesboro, TN | ifiduciary.com

Great Lakes Pension Associates, Inc.
Farmington Hills, MI | greatlakespension.com

Ingham Retirement Group
Miami, FL | ingham.com

Intac Actuarial Services, Inc.
Ridgewood, NJ | intacinc.com

July Business Services, Inc.
Waco, TX | julyservices.com

Kidder Benefits Consultants, Inc.
West Des Moines, IA | askkidder.com

Moran Knobel
Bellevue, WA | moranknobel.com

National Benefit Services, LLC
West Jordan, UT | ndsbenefits.com

Niles Lankford Group Inc.
Plymouth, IN | nlgpension.com

North American KTRADE Alliance, LLC.
Plymouth, IN | ktradeonline.com

Pension Associates International
Barreal de Heredia, Costa Rica

Pension Financial Services, Inc.
Duluth, GA | pfs401k.com

Pension Planning Consultants, Inc.
Albuquerque, NM | pensionplanningusa.com

Pension Solutions, Inc.
Oklahoma City, OK | pension-solutions.net

Pentegra Retirement Services
Columbus, OH | pentegra.com

Pinnacle Financial Services Inc.
Lantana, FL | pfslink-e.com

Preferred Pension Planning Corp
Bridgewater, NJ | preferredpension.com

Professional Capital Services, LLC
Philadelphia, PA | pcscapital.com

QRPS, Inc.
Raleigh, NC | qrps.com

Qualified Plan Solutions, LC
Colwich, KS | qpslc.com

Retirement Planning Services, Inc.
Greenwood Village, CO | rpsplanadm.com

Retirement Strategies, Inc.
Augusta, GA | rsi401k.com

Rogers Wealth Group, Inc.
Fort Worth, TX | rogersco.com

RPG Consultants
Valley Stream, NY | rpgny.com

Savant Capital Management
Rockford, IL | savantcapital.com

Securian Retirement
St. Paul, MN | securian.com

Sentinel Benefits & Financial Group
Wakefield, MA | sentinelgroup.com

SI Group Certified Pension Consultants
Honolulu, HI | sigrouphawaii.com

SLAVIC401K.COM
Boca Raton, FL | slavic.net

Summit Benefit & Actuarial Services, Inc.
Eugene, OR | summitbenefit.com

TPS Group
North Haven, CT | tpsgroup.com

Trinity Pension Group, LLC
High Point, NC | trinity401k.com

ASPPA
Making Retirement Plans Work
Part of the American Retirement Association

*as of September 1, 2016

For more information on the certification program, please call 416.693.9733.

Helping Employers Prepare for New Overtime Rules

New DOL regulations effective Dec. 1 will significantly increase the threshold compensation necessary to satisfy the FLSA white collar exemptions.

BY DAVID WOODARD AND KARLA ANDERSON

As a general rule, the Fair Labor Standards Act requires covered employers (most employers are covered) to pay employees an overtime rate of one and one half times their regular hourly rates for all hours worked over 40 in a workweek. As with most rules, there are exceptions.

The U.S. Department of Labor (DOL) long ago adopted regulations defining a few positions that are exempt from the overtime rule. The most common exemptions are referred to as the "white collar exemptions." They include executive, administrative, professional, outside sales, highly compensated and some computer employees. To qualify for one of these white collar exemptions, the employee must generally meet three requirements: (1) with the exception of outside sales employees, be paid on a "salaried" basis; (2) perform certain duties applicable to particular exemption; and (3) meet a minimum compensation threshold.

The DOL recently updated its overtime regulations, primarily by increasing the minimum compensation necessary to satisfy overtime exemptions. The revised overtime regulations go into effect on Dec. 1, 2016. Every employer should assess whether or not positions it has classified as exempt from overtime will remain so after December 1.

Employers should also take this opportunity to assess whether they have properly classified employees as exempt based on the duties they perform. A quick review of the white

collar exemptions will aid employers in evaluating their classification decisions and put the revisions into perspective.

PAID ON SALARY BASIS

With the exception of outside sales employees, the white collar exemptions require that employees be paid on a "salary basis." This is not as simple as it sounds. To pass the salary basis test, an employee must be paid a predetermined and fixed salary that is not subject to reduction based on variations in the quality or quantity of work performed, nor may deductions be taken from the exempt employee's salary based on partial day absences. Rather, with few exceptions, an exempt employee must be paid his or her full predetermined salary for any week in which the employee performs work, no matter the actual number of days or hours worked.

As mentioned, there are a few exceptions to the rule prohibiting salary deductions from exempt employees, but they are not always easy to apply — and failure to apply them correctly may result in a lost exemption and exposure to overtime liability.

For example, an employer may make salary deductions when the employee fails to work one or more full days due to sickness or disability if the deduction is made in accordance with an employer's bona fide plan, policy or practice of providing compensation for salary lost due to illness. Deductions may sometimes be made for unpaid disciplinary suspensions of one or more full days. As a general rule, no salary is owed for weeks in which an exempt employee performs no work. However, checking voicemail and email, returning a call, or performing even minor administrative tasks while an employee is "off duty" could constitute the performance of work that triggers salary payment obligations.

More is required to fit an employee within an overtime exemption than merely paying the employee on a salary basis. The employee's position must also satisfy an exemption's "duties test," as set out below.

DUTIES TEST

The Executive Exemption

The executive employee must be paid on a salary basis, and the employee's primary duty must be managing the enterprise or a department or subdivision of the enterprise. Additionally, the employee must customarily and regularly direct the work of at least two employees and have the authority to hire or fire, or the employee's suggestions and recommendations as to hiring, firing, or a related change of status must be given particular weight.

The DOL regulations provide that "management" tasks include conducting interviews, selecting, and training of employees; setting and adjusting rates of pay and hours worked; planning, apportioning or directing other employee's work; maintaining production or sales records for use in supervision or control; evaluating employees' for promotion recommendations; handling employee complaints and grievances; disciplining employees; planning the work; determining techniques or type of supplies or equipment to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of employees or property; budgeting; and monitoring or implementing legal compliance measures.

The Administrative Exemption

To fall within this exemption, an employee must be paid on a salary or fee basis and his or her primary duty must be performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. The office work referred to under this exemption is not the routine paperwork and assistance you might think of as being performed by an administrative assistant.

The regulations are clear that an employee must perform work directly related to management or general business operations of the employer. Working on a manufacturing production line or selling a product in a retail or service establishment does not qualify. Examples of qualifying duties are those performed in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; and legal and regulatory compliance.

The employee's primary duties must *also* include the exercise of discretion and independent judgment on matters of significance. Some factors to consider under this exemption are whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; carries out major assignments in conducting the business operations; performs work that substantially affects business operations; has authority to commit or bind the employer in matters that have significant financial impact; and has authority to waive or deviate from established policies and procedures without approval.

The Professional Exemption

The professional employee must be paid on a salary basis (with a few exceptions for doctors, lawyers and teachers) and must: (1) perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by prolonged, specialized, intellectual instruction and study; or (2) perform work that is original and creative in a recognized field of artistic endeavor, or (3) teach in a school system or educational institution. The professional employee's work must require the consistent exercise of discretion and

judgment, or require invention, imagination, or talent in a recognized field of artistic endeavor. The exemption requirements are usually met by lawyers, doctors, CPAs, engineers, architects, pharmacists but frequently not by those in mechanical arts or skilled trades.

The Computer Exemption

To qualify for the computer exemption, a computer employee must be paid on a salary or fee basis or hourly at a rate of at least $27.63 per hour and must work as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field. The exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment such as computer help desk or IT support specialist.

The Outside Sales Exemption

An exempt outside salesperson must be customarily and regularly engaged away from the employer's place of business and have a primary duty of making sales, or obtaining orders or contracts for services or for the use of facilities. Outside sales employees are not subject to the salary basis test.

The Highly Compensated Individual Exemption

This exemption applies to employees who are paid a significantly higher minimum compensation than employees falling within the other white collar exemptions. The employee must also customarily and regularly perform at least one exempt duty or responsibility of an executive, administrative, or professional employee. The exemption does not apply to non-management production line workers and employees who perform work involving repetitive operations with their hands, physical skill, and energy no matter how high their salary is.

MINIMUM COMPENSATION

The new DOL overtime regulations do not change the duties tests for the white collar exemptions. They do, however, significantly increase the threshold compensation necessary to satisfy the exemptions. Formerly, the minimum salary for the executive, administrative and professional exemptions was $455 per week ($23,660 annually). The new regulations raise the salary threshold to $913 per week ($47,476 annually). The revised regulations do permit employers to make up for a small deficiency in the salary requirement for executive, administrative, and professional exempt employees with quarterly nondiscretionary bonuses. In essence, employers may make a catch-up payment of up to 10% of the required salary as long as it is made within one pay period following the end of a quarter.

For example, an employer may still satisfy the minimum compensation requirement for the salary basis test if the employer, in each pay period, pays at least 90% of the minimum salary, and, at the end of a quarter, makes up for the shortfall with a nondiscretionary bonus in the next pay period. Obviously, the catch-up payment counts only toward the prior quarter's minimum salary, not the salary for the quarter in which the payment is made.

Highly compensated employees must be paid total annual compensation of at least the 90th percentile of full-time salaried workers nationally, which is currently $134,004. The required compensation must be paid on a salary or fee basis of at least $913 per week, which may not include board, lodging, other facilities, payments for medical insurance, life insurance, retirement plans, or other fringe benefits. Employers who pay at least $913 per week may rely on bonuses, commissions, or incentive payments to satisfy the highly compensated employee test.

The new rule includes a mechanism for automatically updating the salary and compensation levels for exempt employees every three years, with the first update to take place in 2020. Therefore, employers much stay vigilant to ensure their exempt employees are paid properly.

NEXT STEPS

The significant minimum compensation increase required for white collar exemptions will likely mean that employers will need to increase salaries for some employees to maintain exempt status. Employers should carefully analyze whether it is worth the cost to increase salaries versus reclassifying employees as non-exempt and managing overtime exposure in the traditional manner.

We also recommend that employers take this opportunity to assess whether they have properly classified employees as exempt based on the duties they perform.

If currently exempt employees are reclassified, employers should remember to that the newly reclassified employees will need to be trained on timekeeping procedures, and other payroll procedures applicable to non-exempt employees. PC

David Woodard is a partner in Poyner Spruill LLP's employment law group, in the firm's Raleigh, N.C., office. He represents employers before state and federal courts and administrative agencies in all types of employment and benefits litigation, including discrimination, harassment, retaliation, wrongful discharge, wage and hour, benefits denial and fiduciary breach claims.

Karla Anderson is an associate with Poyner Spruill LLP in the firm's Raleigh, N.C., office. She represents private and public employers in a wide range of employment matters, including defending various discrimination claims in state and federal court as well as preparing employers' affirmative action plans, drug testing policies and employee handbooks.

ASPPA

Making Retirement Plans Work

Part of the American Retirement Association

ASPPA VIRTUAL CONFERENCE

WINTER EDITION

DECEMBER 8, 2016

The conference may be virtual,
but the **information** and **insights** are **real.**

WWW.ASPPA-NET.ORG

The Keys to a Successful Plan Termination

Completing a plan termination can appear daunting, but being prepared and considering the difficult questions before you start can help you complete it more efficiently.

BY GLORIA LESMEISTER

Over the course of the last few years, there have been two significant changes in how plan terminations are handled: increased project management needs and changes in the annuity marketplace.

In the old days, the actuary was the administrator, actuary and annuity bid vendor; data and plan provisions were less complicated. With more players and more complexities, there is a need to make sure all players are meeting intermediate deadlines so that the plan termination can close near the target date.

On the annuity side, there are not as many annuity providers bidding. It can be very difficult to find competitive (or any) bids for certain groups, particularly if the group includes terminated vested participants and certain plan designs like unlimited lump sums, cash balance accounts or employee contributions. This difficulty can become an issue for a plan of any size if a single participant elects an annuity, or for a non-PBGC covered plan if a participant cannot be located.

This difficult annuity marketplace is affecting decisions such as whether to allow retirees to have an opportunity to elect lump sums. The IRS has discouraged offering lump sums to retirees effective July 9, 2015. In a plan termination buyout, retirees are more attractive to annuity providers, so annuitizing retirees at plan termination may make it easier to obtain bids for the active and terminated vested participants who elect annuities.

There are two other noteworthy changes. The first is a decreasing trend in applying for IRS determination letters before plan assets have been distributed. In the past, it was much more common for plan sponsors to wait to receive an IRS determination letter before distributing assets. Today more plan sponsors want to move quickly on the plan termination once the decision has been made. This trend may change after the IRS revamps the determination letter process next year.

Second, last year the PBGC expanded some of the requirements for filing for the Form 500 and Form 501. The Form 500 must be filed at least 60 days in advance of distributing plan assets. The Form 500 now must include a copy of the Notice of Intent to Termination and samples of the Notice of Plan Benefits. The Form 501 is filed after all assets have been distributed and must include proof of distributions. The PBGC is gathering more information in their endeavor to ensure plan participants get the proper benefits.

ADVICE FOR THE ACTUARY WHOSE CLIENT IS CONSIDERING A PLAN TERMINATION

First, don't feel like you have to go through this alone. Take advantage of the experience of others to avoid some common pitfalls. For example, consider the following questions when planning your timeline:

> "In the old days, the actuary was the administrator, actuary and annuity bid vendor; data and plan provisions were less complicated."

1. Have all accrued benefits been certified?
2. Are there complicated provisions, such as employee contributions, legacy provisions that apply to subset of population, etc.?
3. If the plan assets will not be sufficient to cover the plan liabilities, is there a majority owner who will forfeit part or all of his or her own benefit to cover the shortfall?
4. Does the plan meet the SPD threshold regarding literacy in a foreign language? Does the plan administrator need materials translated?
5. Have any unions been involved with the plan in the last 5 years?
6. Are there unresolved issues such as uncashed checks, domestic relations orders that are not yet qualified, uncompleted disability claims, illiquid assets without potential buyers, or missing participants?
7. Do any participants reside outside of the United States?
8. Second, there are some great resources on the Internet, including the PBGC web page on plan terminations at http://www.pbgc.gov/prac/terminations.html.

WHAT CAN A PLAN SPONSOR DO TO PREPARE FOR A PLAN TERMINATION?

To determine whether the plan is ready to be terminated, the plan administrator should complete the following tasks.

1. Gather all executed plan documents and amendments from the inception of the plan.
   a. Review "deemed cash-out" language to determine whether non-vested participants are eligible for 100% vesting upon plan termination.
   b. Review plan termination language including how excess assets will be distributed.
2. Ensure all compliance for the plan is up-to-date.
   a. The Summary Plan Description should include the impact of the plan freeze and should have been distributed to participants.
   b. The PBGC premiums and Forms 5500 should be filed and current.
   c. All required amendments should have been adopted.
   d. If there are any operational issues (one of the most common issues is that minimum required distributions after a participant attains age 70½ have not been made), ensure they are addressed either though self-correction or a Voluntary Correction Program (VCP).
3. At a minimum, track down all data for participants who were in the plan from the earlier of 6 years prior to the proposed plan termination date or the plan freeze, including any documentation of lump sum payments or non-vested status.

4. Locate any "missing" participants.
5. Determine a strategy to liquidate and value any illiquid assets (*e.g.*, an insurance product may have a surrender charge).
6. Engage any unions to confirm if they have any concerns which could delay the termination.
7. Explain the process to stakeholders — it is a long process with many required notices and timing depends on responses to government filings which are outside the control of the plan sponsor.
8. Explain the cost to the stakeholders — it is dependent on elections of plan participants and the pricing of the final annuity. While assumptions can be made for these items, the actual cost is unknown and cost estimates should be provided as a range to illustrate the sensitivity of the costs to variables such as percentage of lump sum elections and increasing or decreasing interest rates.

WHAT PARTICIPANT DATA ARE NEEDED?

The participant data needs are dependent on the plan design. First there is the usual indicative data:

- Name
- Identification number
- Address
- Date of birth
- Date of participation
- Vesting service
- Accrual service
- Historical pay and hours, if used by plan
- Date of termination
- Beneficiary information (name, identification number, address, date of birth and relationship to participant)

For participants already in receipt of their benefits, data items include:

- Benefit commencement date
- Benefit amount and form
- Spousal waivers
- Copy of canceled check or bank statement with participant name and amount

> "Today more plan sponsors want to move quickly on the plan termination once the decision has been made."

There are also items which apply less frequently:

- Disability status
- Death coverage charge information
- Employee contributions
- Qualified Domestic Relations Orders (QDROs)
- Rehire information

In addition, there is the phenomenon that data constantly changes. Participants move, submit claims for disability, die, quit, get married and divorced during the plan termination process. To be done efficiently, responsibilities must be defined clearly for each role.

In verifying that the proper data has been collected, compare items to the plan's detailed provisions:

- Compensation definitions
- Service definitions, including rounding methods defined in the plan
- Break-in-service rules
- Suspension of benefits rules for rehired retirees or those active participants continuing employment past age 65

Other items needed include:

- Actuarial equivalence definitions
- Top heavy status
- Optional form descriptions
- Pre-retirement death benefit descriptions

Some provisions may have changed over the life of the plan. Changes may be applied to a portion of the population (*e.g.*, active participants) or may be applied to all participants who have not yet commenced their benefits.

These items will be the focus of the PBGC audit. Also note the PBGC will require the sponsor to track down all data that is not impossible to recover (*e.g.*, destroyed by fire or flood).

MISSING PARTICIPANTS

A missing participant is a participant or beneficiary who is unable to be located by the plan administrator after a diligent search. In the absence of proof of death, the missing individuals are assumed to be living and must have a benefit covered by an annuity contract or transferred to the PBGC.

ERISA §4050.4 requires a diligent search for each missing participant. A diligent search:

1. begins not more than 6 months before the Notices of Intent to Terminate, NOITs, are issued;
2. includes checking with the participant's designated beneficiaries and alternate payees; and
3. includes use of commercial locator services.

In a standard plan termination, the PBGC requires the following notices to be sent to plan participants:

- Notice of Significant Reduction of Rate of Benefit Accrual, 204(h) notice
- Notice of Intent to Terminate, NOIT
- Notice of Annuity Information, NOAI (may be at same time as NOIT)
- Notice to Interested Parties (precedes the IRS Form 5310 filing)
- Election packages

- Notice of Plan Benefits (precedes the PBGC Form 500 filing)
- Supplemental Notice of Annuity Information, SNOAI, if annuity provider not listed
- Notice of Annuity Contract

Due to the high number of individual communications, it is common for the plan sponsor to explain the overall process in a cover letter to the participants or host employee meetings. Due to the timing of finalizing the annuity contract, it is also common for a "goodbye from the trust/welcome to the annuity provider" letter to be sent to participants prior to the filing of the Form 501.

INFORMATION NEEDED TO COMPLETE PBGC FORMS 500 AND 501

First of all, always go to the PBGC website and download the current forms. I believe we will see additional changes in the forms as time passes. As they stand today, the following information will need to be collected:

- The earliest and latest dates that the Notices were provided
- Split of consensual (usually over $5,000) and nonconsensual lump sums by count and value
- For participants who received a lump sum, copy of canceled check or bank statement with name and amount
- For participants covered by the annuity purchase, a copy of written information containing contact information and group contract number(s) for the annuity provider and a list of participants
- Reconciling participant counts from previous valuation report (reported on Schedule SB) to PBGC Form 500 and 501 counts.

POST-TERMINATION WORK

The PBGC requires the plan sponsor to maintain the participant and plan data for 6 years after the PBGC Form 501 filing. It is important that information gathered during the plan termination process is kept in an accessible way for this period.

> "Don't feel like you have to go through this alone. Take advantage of the experience of others to avoid some common pitfalls."

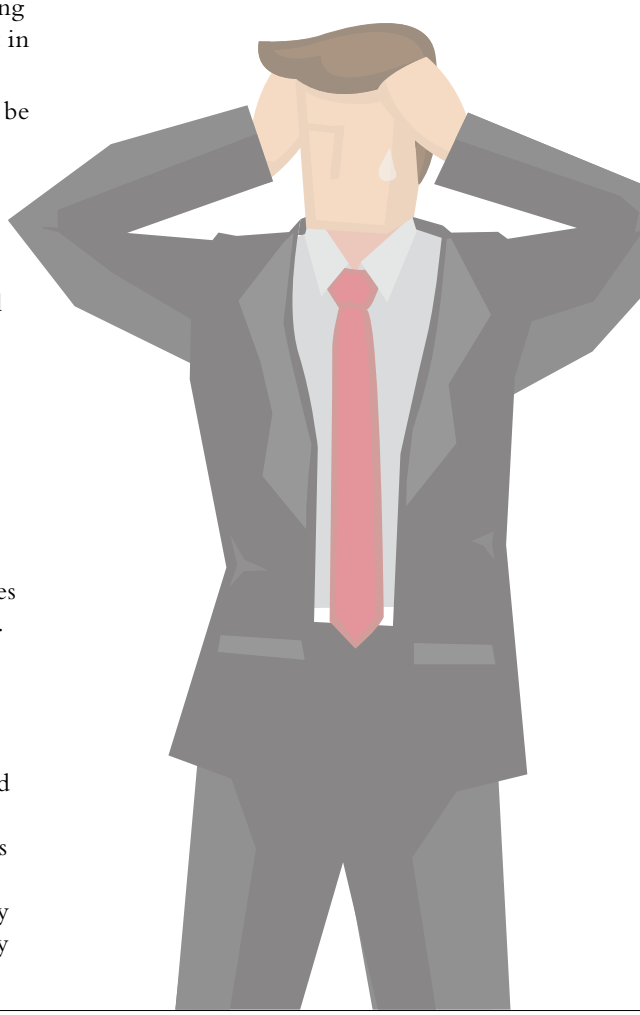
In addition, other tasks need to be completed:

- The final actuarial valuation and Schedule SB reflects the plan year through the plan termination date.
- Form 5500s are required until the plan assets are zero.
- PBGC premiums are paid until the benefit liabilities are completely paid.
- There is a variable premium exemption after the plan termination date.
- The flat rate premium is prorated if the benefit liabilities are paid out prior to year-end.
- Since the fees for these items were normally paid from the trust, the company needs to budget for the post-plan termination services to be paid from company assets.
- U.S. GAAP accounting results go to zero after the final settlement (usually the annuity purchase) and there are usually discussions with the auditor in order to disclose the plan termination appropriately.

POST-TERMINATION AUDITS

If the plan covers at least 300 participants, a PBGC audit is automatic. If the plan covers fewer than 300 participants, the odds are estimated to be 50/50 that the plan will be audited by the PBGC. PC

Gloria Lesmeister, FSA, EA, MAAA, has been a retirement actuary for more than 25 years, including leader of the Center of Excellence on Defined Benefit Plan Terminations at Buck Consultants, LLC. She has been a speaker on plan terminations at national actuarial conferences and is usually working on at least three plan terminations at any given time.



The New Fiduciary Rule's Effect on Call Center Staff

How will providers cope with the new liabilities associated with allowing call center employees to answer questions regarding rollover and distribution options?

BY MARY ONEYEAR

When the DOL's new fiduciary rules take effect in April 2017, call center personnel will be faced with many new challenges. Quite possibly, the largest and most complex will be how to handle participant questions and conversations on rollovers. It is likely the current practice of most call centers would cause them to be fiduciaries under the new rules. If a call center representative provides investment advice to the participant, the service provider (and the employee) will become a fiduciary under ERISA.

Of course, with fiduciary status comes fiduciary liability. How will retirement plan providers react? How will these changes affect their organization and/or their relationship with advisors? What new training will be needed? How will providers and advisors service plan sponsors and participants in this new landscape?

To determine what is now investment advice under ERISA, the new fiduciary rules set forth a broad definition specifically targeting conversations about rollovers. In general, a person will be considered to have provided investment advice to a participant when the person receives a fee (direct or indirect) for providing a "recommendation" concerning rollovers. This includes

whether or not to roll over, what amount to roll over, the form of rollover, and which service provider to utilize.

Two key determinants are whether the communication is a "recommendation" and the context of the conversation. A recommendation is generally defined as a communication that someone would reasonably perceive as a suggestion to take (or not take) a particular course of action. So imagine that a participant calls a TPA about a distribution and the call center employee suggests a rollover to a particular IRA provider where the IRA provider pays a fee to the TPA for new accounts referred. The TPA itself (and the employee) will be deemed to be a fiduciary under ERISA for providing investment advice to the participant.

A result that may become common is to no longer accept IRA referral fees and focus on educating participants about their rollover options. Per the new rules, the DOL has mostly kept what was considered education under DOL Interpretive Bulletin 96-1. Allowable education can include reviewing available distribution options and the features of those options. This means a call center employee will be able to present the different options available without becoming a fiduciary.

This tightrope walk between education and advice is not new to the call center environment. This is a similar line that's been taken in the past when discussing investments. Call center managers train their employees to stay away from providing investment advice. Additional training will certainly be needed on how to comply with the new regulations, and this additional training is sure to put added cost and staffing strains on providers.

NO MORE ADVICE

Even with additional training, the liability of allowing call center employees to answer questions regarding rollover and distribution options could prove too much for some providers. Most call center employees have spoken to participants who have absolutely no idea what do to about their distribution and are asking, and maybe even begging, for guidance. Human nature makes it hard not to sympathize with the participant and offer assistance. If this service has become frequent and routine, it may be an expectation of participants to learn their distribution options and hear advice on possible next steps. Ending this type of service without proper plan sponsor and participant education may be viewed as a decrease in service and value. Therefore, care should be taken to design your communications around informing and educating relevant parties on the new regulations and how they affect the new service model.

EMPLOYEES WITH SPECIAL TRAINING

TPAs and providers may assign a specially trained group of employees to lead the rollover conversations. This is a current practice for some TPAs, as retention specialists are already utilized in speaking with participants on keeping their funds in the plan or rolling over to a proprietary IRA.

TPAs AND PLAN ADVISORS

Similar to training a certain group of employees, other call center employees are trained to refer participants to the plan's retirement advisor. The inclusion of a plan advisor brings additional considerations. For instance, if a plan sponsor is paying all the administrative fees, could it be justified to recommend a rollover to a more expensive IRA? In some cases, advisors may be relegated to advising on the funds within a plan. There has been widespread discussion whether these new rules will result in advisors unwilling to work with participants with smaller account balances. Due to this, it is possible more participants will leave their money in the plan after leaving employment, especially those with small account balances. From the perspective of a TPA or plan sponsor, this may result in more participants to track, an increased potential of a plan audit, and more annual notices to mail.

DATA GATHERING AND LOGISTICS

Providing recommendations also opens up the question of logistics. How will call center employees gather the information required to provide a responsible recommendation that is in the best interest of the participant? Having to act in the best interest of the plan participants will mean more time is needed to collect and analyze the necessary information. Staffing, systems and processes may be an issue. Some commentators believe this reality will lead to more growth in the robo-advisory industry.

At this time, call center managers and employees seem to have many more questions than answers. It is certain we will continue to see more on this topic as the April 2017 effective date approaches. The challenges and uncertainties call centers face with the new rules are numerous, but we believe providers will rise to the challenge with new and innovative solutions. PC

Mary Oneyear, QKA, is a retirement plan specialist for Heartland Retirement Plan Services (HRPS). She serves clients through her experience in internal technology systems and trains staff on all aspects of customer service.

Will *Spokeo* Open the Floodgates for Participant Claims?

A recent SCOTUS decison raises the bar on technical violations of statutory rights.

BY GARY BLACHMAN AND LAUREN DAVIS

The U.S. Supreme Court decision in *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. 2016) could potentially have a very substantial impact on future class action litigation, including lawsuits under the Employee Retirement Income Security Act of 1974 (ERISA). In its May 2016 decision, the Supreme Court held that a consumer could not sue Spokeo, Inc. for mere technical violations of the Fair Credit Reporting Act of 1970 (FCRA), but opened the doors for claims to proceed in other federal cases based on statutory violations. After *Spokeo*, we can expect claimants to focus more on alleging a "concrete" injury, and defendants to argue that purely technical violations of federal statutes should not proceed in federal court.

After reversing the lower court decision, the Supreme Court sent the case back to the 9th Circuit to fully consider whether the claimant, Thomas Robins, properly alleged the type of injury that would allow his suit to move forward. A favorable decision for Spokeo could limit participants from recovering for violations under many federal statutes including the ERISA. On the other hand, allowing Robins' lawsuit to proceed based on certain technical violations could open the doors to increased litigation when participants have not suffered any actual harm.

WHAT IS SPOKEO?

Spokeo, Inc., a consumer reporting agency, operates a "people search engine," and collects publicly available information about individuals from numerous sources such as real estate listings, phone books and social network sites. Spokeo's profiles are available on the Internet and can be used by employers to conduct background and credit checks to evaluate prospective employees.

The FCRA requires that consumer reporting agencies "follow

reasonable procedures to assure maximum possible accuracy of" consumer reports.[1] It also provides liability for "[a]ny person who willfully fails to comply with any requirement of the Act with respect to any" individual. Congress designed FCRA to hold companies accountable for inaccurate information published on the Internet.

WHAT IS ROBINS' BEEF WITH SPOKEO?

Robins discovered that his Spokeo profile contained inaccurate information and filed a federal class action lawsuit alleging Spokeo willfully failed to comply with FCRA's requirements. He alleged that Spokeo reported he had a greater education level and more professional experience than he actually had, that he was financially better off than he actually was, and that he was married (he was not) and had several children (he did not have any). These errors constituted a problem for Robins because they could make him appear overqualified for the positions he was seeking or suggest that he might be unwilling to relocate because of his responsibilities to a nonexistent family. But were these allegations enough to bring a lawsuit in federal court?

The district court dismissed Robins' complaint, holding that since he could not show any actual injury from the inaccurate information published about him, he could not sue in federal court. On appeal, however, the U.S. Court of Appeals for the 9th Circuit reinstated his case and held that Robins could pursue his claim because "a plaintiff can suffer a violation of statutory right without suffering actual damages." The 9th Circuit held that Robins adequately alleged sufficient injury for standing and had the legal right to bring his case in federal court.

The Supreme Court agreed to hear Robins' case. The question before the high court was whether Congress created a right to sue in federal court based on a technical violation of a federal statute when the claimant (*i.e.*, Robins) has not suffered a concrete injury.

> The Supreme Court was specific that alleged injuries must be "real" and not "abstract."

THE SUPREME COURT'S DECISION

In a 6-2 decision, the Supreme Court held that the 9th Circuit's standing analysis was incomplete as to whether there was a concrete injury and instructed the lower court to review whether Robins had the right to sue in federal court. The high court explained that Robins needed to demonstrate an "injury in fact," which means a "real world" harm from Spokeo's publication of inaccurate information about him rather than a mere technical violation of the federal FCRA statute. The Supreme Court stated the injury needed to be both "concrete and particularized," and that the 9th Circuit's analysis did not address both requirements.[2] The Court held that for an injury to be "particularized" it "must affect the plaintiff in a personal and individual way," and that Robins had successfully met this first requirement.[3]

However, an injury must also be "concrete," which means that it must be "real" and not an "abstract" injury. The Supreme Court also noted that concreteness includes both "tangible" and "intangible" harm. For example, not having access to information Congress requires to be public (*i.e.*, summary plan description) may be a "concrete" injury even if intangible and the risk of harm "may be difficult to prove or measure."[4]

The Supreme Court recognized that any risk of real harm must rise to a level above speculation, but the question becomes where to draw the line. Since the 9th Circuit did not analyze whether Spokeo's alleged FCRA violations satisfied the "concreteness" requirement, the Supreme Court sent Robin's case back for the lower court to do just that.

WHAT DOES *SPOKEO* MEAN FOR EMPLOYERS?

The *Spokeo* decision did not create a bright-line rule for companies hoping to defend against "gotcha" claims when there is a technical violation of a federal statute without any concrete harm. However, it did provide some good news for employers looking to defend against these types of claims.

The Supreme Court was specific that alleged injuries must be "real" and not "abstract." This will be helpful to plan administrators defending against participant claims, for example, that plan documents were not provided within 30 days of a written request and where the participant suffered no actual harm. The ERISA provides a discretionary $147 penalty per day against plan administrators for failures to provide plan documents upon request and allows participants their day in court for these violations.

However, if a participant requests a summary plan description (SPD) and does not receive the requested copy within the statutory timeframe, has the participant suffered a real injury? If the participant obtained a copy from a co-worker, then it would appear that the plan

1 15 U.S.C. Section 1681e (b).
2 Slip Op. at p. 7.
3 Id. at 7.
4 Id. at 8-9.

administrator's failure to provide requested documents is merely a "bare procedural violation" divorced from any concrete harm. At a minimum, the *Spokeo* decision will likely make it more difficult for participants to bring lawsuits against employers where the only injury alleged is a statutory violation and there is no evidence of real and concrete harm.

WHAT DOES *SPOKEO* MEAN FOR PARTICIPANTS?

A decision by the 9th Circuit in favor of Spokeo could make it much more difficult for participants to recover for violations under ERISA. However, the Supreme Court did provide some good news for participants with respect to potential class action litigation under a variety of federal statutes including the ERISA. Specifically, the Supreme Court acknowledged that intangible injuries based on violations of a statutory right "can be sufficient in some circumstances to constitute an injury in fact."[5] This is important for numerous ERISA claims involving less obviously concrete injuries.

As noted above, it is not uncommon for a participant to request an SPD and for various reasons not receive a copy within 30 days. After *Spokeo*, if a participant could demonstrate that he or she was unable to request a loan from his or her retirement plan to pay for medical expenses because the SPD and loan policy were not provided timely, then this would appear to satisfy the "concreteness" requirement.

After *Spokeo*, participants must demonstrate a real and concrete injury. However, it is still unclear how much is needed to demonstrate such injury. Arguably *Spokeo* may have tightened up the requirements to file a lawsuit and may limit frivolous claims based on technical violations.

The bottom line: Participants seeking to file federal class actions will need to be even more creative when arguing that their alleged injuries are connected to technical violations of their statutory rights. PC

Gary Blachman is a partner in the employee benefits and executive compensation group at Thompson Hine, LLP. His practice focuses on fiduciary and legal compliance requirements applicable to ERISA-governed retirement plans. Gary served as the ASPPA General Conferences Co-Chair and is a past president of the Cincinnati ABC Chapter.

Lauren Davis is a summer law clerk in the employee benefits and executive compensation practice group at Thompson Hine, LLP. Lauren is entering her third year at The Ohio State University Moritz College of Law.

5 Slip Op. at p. 10.

THE 2016 ERISA OUTLINE BOOK

Print & Online Editions Available

Sal L. Tripodi, J.D., LL.M.

www.asppa.org/EOB
800.308.6714

EOB
ERISA OUTLINE BOOK

ASPPA
Making Retirement Plans Work
Part of the American Retirement Association

REPORTING

Proposed Changes to Form 5500 Would Expand Reporting

Are you ready for the most substantial set of changes since 2009?

BY JOHN ORTMAN

The three federal agencies responsible for the Form 5500 Series (the DOL, Treasury, and PBGC) issued proposed changes to the 5500 and schedules on July 11. The proposed regulations greatly expand the scope of information required to be reported on Form 5500 by virtually every type of employee benefit plan. The changes would apply for plan years beginning on or after Jan. 1, 2019.

The most significant changes to the Form 5500 Series since 2009, the proposed revisions and expansion would affect many aspects of Form 5500 compliance for retirement plans, including substantial changes to the Form 5500 schedules. In addition, DC plans would face new reporting requirements, and a new Schedule J for group health plans would be created.

CHANGES FOR RETIREMENT PLANS

The proposed changes applicable to retirement plans include:

- Standardized reporting on Schedule H, Line 4a, to facilitate compliance with regulations and guidance governing delinquent participant contributions and loan repayments.
- Expansion of Schedule H to include questions on fee disclosures, leveraged asset acquisitions, annual fair market valuations, designated investment alternatives, investment managers, plan terminations, asset transfers, administrative expenses, uncashed participant checks, SPDs, and other topics (including salaries; audits, record keeping, trustee and custodial, actuarial, legal and valuation fees; and trustee expenses, including for travel and meetings). Whether these expenses were paid by the plan directly or were charged against participant accounts would also be reported. Schedule H would also distinguish between assets held for investment and those that were sold during the year.
- Schedule I would be eliminated; small plans that currently file Schedule I would generally have to file Schedule H instead.
- Changes to direct filing entity (DFE) reporting, including what information about DFEs and their underlying investments needs to be reported by both the plan and the DFE.
- A separate Schedule C would be filed for each service provider, and revisions would more closely align the schedule with the service provider fee disclosure rules. Also, the Schedule C filing requirement would be extended to some small plans currently exempt from filing it.
- New information on plan terminations, mergers, and consolidations.

- Changes to Schedule G requiring more uniform and detailed information on loans, fixed income obligations and leases in default, including swaps, options and derivative transactions.
- The return of Schedule E (which was dropped in 2009) to improve information collected on ESOPs.
- Other questions where the IRS has found significant noncompliance, including whether a plan complies with the participation requirements of Code Section 401(a)(26), made minimum required distributions to 5% owners under Section 401(a)(9) and provides for designated Roth contributions under Section 402A.
- Adding new questions to the actuarial schedules MB and SB.
- Information on the named fiduciary under ERISA Section 3(21).

New information would be reported on DC plan coverage and "performance," including whether:

- any disqualified person under ERISA Section 411 was permitted to serve the plan;
- the plan is a participant-directed account plan and if so, whether the plan provided participants with the fee disclosures required by Treas. Reg. Section 2550.404a-5;
- the employer sponsoring the plan paid administrative expenses that were not reported as service provider compensation on Schedule C or a plan administrative expense on Schedule H;
- the plan or its affiliates provided any services to the plan in exchange for direct or indirect compensation;
- the plan had any leveraged investment acquisitions and information regarding any acquisitions;
- the accountant orally or in writing communicated various governance issues discovered during the audit;
- the plan is a frozen DC plan;
- the plan engaged in any nonexempt prohibited transactions and information regarding those transactions;
- the plan is a SIMPLE 401(k) plan;
- the plan has a participant-directed brokerage account, and how many participants are using such accounts;
- the plan has a qualified default investment alternative;
- the plan is selecting church plan status under Code Section 410(d); and
- the plan provides financial education and financial advice for participants.

NEW INFORMATION FOR DC PLANS

The proposed regulations would add new questions to the Form 5500, Form 5500-SF and Schedule R about participation, contributions and asset allocation by age and participant-level diversification in DC plans. Questions include the number of participants:

- making catch-up contributions;
- investing in default investment options;
- maximizing the employer match;
- deferring compensation;
- with account balances as of the beginning of the plan year; and
- who terminated employment during the plan year and had their entire account balance distributed.

IRS-ONLY QUESTIONS ADDED BACK

The proposed rule also includes IRS-only compliance questions that would be added to the 2016 forms and schedules, as well as additional IRS-only items proposed for subsequent years.

Some background: With the advent of DOL electronic filing in 2009, certain questions were eliminated from the Form 5500 pertaining to the tax code because the IRS lacked the authority to require electronic filing. The IRS added many of those questions back (as well as some new ones) in the 2015 Form 5500 — but later instructed filers to ignore those questions for the 2015 plan year after the American Retirement Association and others raised concerns about them.

The proposed changes include those and other questions — most notably a requirement that trustees sign Schedule H and Form 5500-SF, attesting under penalty of perjury that the form and accompanying documents are true, correct and complete. Some of those questions could become effective prior for plan years prior to 2019.

HEALTH PLAN SERVICE PROVIDER INFORMATION

The proposed changes would add a new Schedule J for group health plans that, among other things, would ask group health plans to provide the name, address, telephone number, EIN and related national registry numbers of all plan service providers that are not otherwise reported on Schedules A or C. These include TPAs and "claims processors," including insurers ASO contracts and managers of mental health benefits, substance use disorder benefits, pharmacy benefit/drug provider and wellness programs and independent review organizations.

Many of the questions on the new Schedule J are related to compliance with various federal laws, including the Affordable Care Act (ACA), HIPAA and GINA, including specific questions about SPD compliance. Detailed claims data are requested as well. Filers would indicate the types of health benefits offered and the funding method, including information about participant and employer contributions, and whether the plan is insured, uses a trust, or pays benefits from the employer's general assets. Schedule J would also collect information about COBRA coverage and insurer refunds, and would ask whether the plan claims grandfathered status under the ACA and is a high-deductible health plan, HRA or health FSA.

In addition, the exception from the Form 5500 filing requirement has been eliminated, making all group health plans subject to Form 5500 reporting regardless of size. PC

The Impact of the DOL Fiduciary Rule on TPAs

While we are not often in a position to recommend investments or provide advice for a fee, we must take care to clearly delineate roles to avoid potential prohibited acts.

BY JJ MCKINNEY

Pension administration firms have been through a litany of regulatory changes affecting their way of doing business. When the DOL's final fiduciary rule was published in April, many may have been thinking, "Finally — a set of regulations that leaves me alone."

In our unique role with qualified plans, our fiduciary capacity generally stops with typical administration tasks such as compliance testing, preparing Forms 5500, allocation calculations and facilitating plan distributions at the specific direction and authority of the plan administrator. While we are not often in a position to recommend investments or provide advice for a fee, we must take care to clearly delineate roles to avoid potential prohibited acts.

> "As service providers, we cannot ignore the most suitable platforms where our staff can be at their best for plan operation."

FIDUCIARY IRA

The original intent of ERISA is preserved in the final rule, and serves to provide clarity and additional requirements. Involving the IRA advisor in the definition of fiduciary is probably the biggest disruption in the final rule, but embracing the IRA is not without sound reason. First, due to the increasing number of retirees, IRAs have gained hundreds of billions (if not trillions) of dollars from former qualified plan assets.

Second, the IRA may not be in the best interest of the investor compared with a qualified plan. In a recent article in *Forbes*, "7 Reasons Not To Roll Your Orphan 401(k) to an IRA," Nancy Anderson made a couple of key points that are particularly pertinent in today's environment. Among them: The investment cost in a qualified plan can be considerably less due to economy of scale, which means more compounded growth over time, often better and simplified investment menus, and a fiduciary advisor on hand for guidance.

While the traditional pension administration firm does not typically provide investment advice for a fee, their administrators may be engaged in conversations with terminated participants about what to do with their accounts. The regulation is clear that educating a participant on options is not a fiduciary act, but a recommendation like, "Rolling your 401(k) money into an IRA is the best option to consolidate your retirement assets into one account" could be interpreted as advice — or worse, bad advice. Furthermore, the distribution from the qualified plan produces a processing fee and helps maintain the goodwill of the plan sponsor by cleaning up old balances from the plan.

Additionally, several IRA providers have surfaced over the years operating in compliance with DOL regulations to facilitate small-balance and lost-participant cleanup from qualified plans. A TPA may provide alternatives to the plan administrator for an IRA provider for this service and receive compensation as a result. The IRA provider is possibly named both in the plan's adoption agreement and Summary Plan Description with appropriate disclosure. In this case, the IRA provider decision may be a recommendation to the plan fiduciary by the service provider.

INVESTMENT PLATFORMS

While the final regulations provide a safe place for service providers to present investment platform options without considering that a fiduciary act, the catch looks more like a baton toss to the service provider rather than the offering of a few platform options that may serve the interests of the service provider as well as the plan sponsor.

For example, assume the trusted advisor for a plan contacts the TPA firm requesting information on platforms that would fit a particular plan. Several factors influence the best fit:

- expenses paid by the plan;
- services offered to the plan fiduciaries and participants;
- efficient use of platform for the service provider;
- revenue sharing to offset service provider costs; and
- participant online enrollment and retirement preparation tools, etc.

As service providers, we cannot ignore the most suitable platforms where our staff can be at their best for plan operation. The most familiar platforms also happen to provide more advantageous revenue sharing agreements since they carry larger books of shared business. All revenue sharing, both kept and offset, is disclosed to the plan sponsor, but serves both parties' interests equally by presenting one platform over another in order to win the business. Likewise, the trusted advisor in this case may be in an arrangement that pays more revenue than an alternate platform as a result of our presented selection — even though the compensation is disclosed and reasonable for the services that the advisor provides.

GOOD FAITH TO THE TRUSTED ADVISOR CLIENT

We understand "ERISA-speak" better than most investment brokers and advisors, and can navigate the various "if… then… then… only if… then" statements that are all too familiar in the pension world. First, help each advisor understand the duty and liability of a fiduciary and the means to mitigate risk that may be available, like partnering the plan with a fiduciary advisor and taking a different role with the case.

> "Involving the IRA advisor in the definition of fiduciary is probably the biggest disruption in the final rule, but embracing the IRA is not without sound reason."

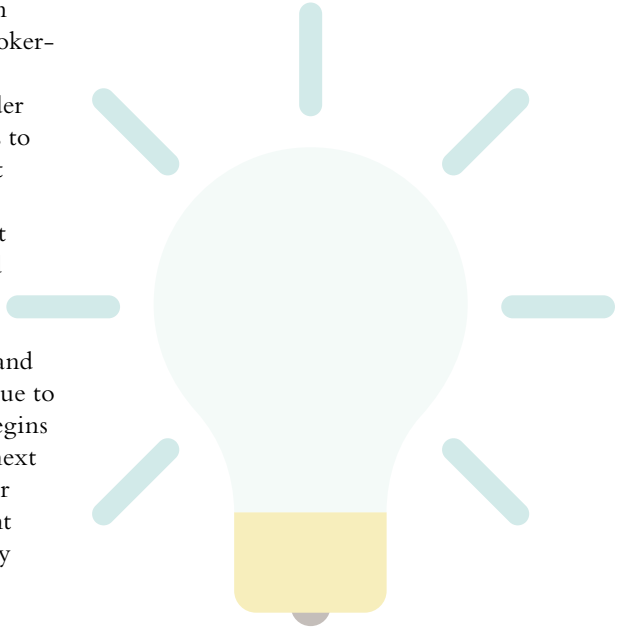
Second — and this may seem odd — make sure the broker/advisor verifies protocol for qualified plan representation with the parent broker-dealer or advisory firm.

Third, disclose service provider affiliations with various platforms to collectively present a best-interest solution to plan sponsors.

Advisors who have significant blocks of business in the qualified plan space have most likely been educating themselves using the proposed rule, public comments and final rulemaking, and will continue to stay informed. As enforcement begins and regulators move on to their next focus, and as advisors engage their first plan, we can be the consistent reminder to focus on the fiduciary requirements.

Finally, fiduciaries under ERISA §3(16) are fiduciaries to the plan, and like all ERISA fiduciaries are held to the highest standard of conduct. The service provider might not be engaged as a fiduciary, but actions trump contracts. Pension administration service providers help the plan administrator operate the plan in the best interest and for the exclusive benefit of the plan participants and beneficiaries. Don't overlook the exclusive benefit rule when educating participants, conducting searches for appropriate platforms, helping prepare advisors for their important role, and remaining in line with our duty regarding prudent plan governance. PC

JJ McKinney, CPC, ERPA, QPA, QKA, is a principal and chief operations officer of Retirement Strategies, Inc., a service provider for employer sponsored retirement plans of varying sizes and types. Plan consulting, education and advocacy for the private pension system are his professional passions.



ASPPA
Making Retirement Plans Work
Part of the American Retirement Association

2016 ASPPA ANNUAL CONFERENCE

celebrating

Fifty

years

at the Forefront of America's Retirement Industry

OCTOBER 23–26, 2016

GAYLORD NATIONAL
NATIONAL HARBOR, MD

The 'Big Wind'

Behind Multiple Employer Plans

by Pete Swisher

A venture capitalist was once asked, "What do you look for in a venture opportunity?" His answer: "A big wind, a great idea, and a simple solution." MEPs are a simple solution with a big wind behind them, and it seems likely that they will play a significant role in the future of the retirement system. This article explores the forces behind the "big wind" and where that wind might carry us.

CONGRESSIONAL SUPPORT FOR MEPs

Multiple bills have been presented to Congress over the past few years that are supportive of MEPs, and that support is bipartisan. Some of the bills have been updated and presented a second time. They include:

- S.A.V.E. Act of 2011, reintroduced in 2015
- SAFE Retirement Act of 2013
- Cooperative and Small Employer Charity Pension Flexibility Act of 2013
- USA Retirement Funds Act
- Retirement Security Act of 2014, reintroduced in 2015.

The proposals share an underlying premise: "open" MEPs — those open to any employer, regardless of whether they are related to other employers in the MEP — should be treated as single plans under ERISA. The purpose of such legislation is to override a 2012 Department of Labor (DOL) advisory opinion[1] that said open MEPs are not single plans for ERISA purposes, but must instead be treated as individual plans sponsored by each employer.

Here is a summary of provisions included in these proposals:

- **Open MEPs are single plans.** Open MEPs would be single plans for ERISA purposes, regardless of whether or not the adopting employers share a "pre-existing organizational relationship," also referred to as "commonality" or "nexus" in DOL guidance.
- **No "bad apple" rule.** The "one bad apple" Treasury regulation[2] would be either eliminated or mitigated. This rule states that a disqualifying defect by any one adopting employer in a MEP disqualifies the entire MEP, and some cite this rule as a reason not to create or adopt a MEP.
- **Audit relief for new MEPs.** An audit would not be required in a startup MEP until the number of participants exceeded a certain threshold, such as 500 or 2,500. The purpose of this provision is to help spur new MEP creation, since the need for an audit is a significant hurdle in new MEPs.

WHAT DOES IT MEAN THAT AN OPEN MEP IS NOT A SINGLE PLAN UNDER ERISA?

The practical implication of a MEP that is not a single plan for ERISA purposes is that each employer must separately satisfy ERISA's requirements, and in particular the annual report (Form 5500, including the audit requirement for large plan filers) and ERISA Section 412 bond requirements.

The DOL's concerns about open MEPs seem to revolve around a desire to ensure that ERISA's protections are properly available to MEP participants. The annual report and audit are public documents intended to ensure that participants have a proper accounting from plan fiduciaries; the bond protects participants from fiduciary theft and dishonesty; therefore, by disallowing single plan treatment, the DOL ensures that these important protections remain intact.

THE PRESIDENT'S 2016 OPEN MEP PROPOSAL

In early 2016, the White House issued a press release saying that the president would ask Congress to pass legislation allowing open MEPs to be treated as single plans under ERISA. The proposal would also allow self-employed individuals, including independent contractors, to participate in MEPs. Contractors are always excluded from plans today because of the exclusive benefit rule of Code Section 401(a)(2), which requires a plan to be available only to the employees of the employer. Contractors are not employees, so including them would be a disqualifying defect under current law.

Allowing the inclusion of contractors is thus a cool idea, though not as simple as it sounds. How, for example, would nondiscrimination testing be affected in a plan that includes contractors? Would all of ERISA's notice requirements apply to contractors? Where would contributions come from, and how must they be tracked and accounted for? Any legislation would need to address such issues, but on its face this proposal could be a significant potential benefit for the nation's 17 million self-employed individuals.

The president's proposal would also include an important restriction: it would only be available to employers who have never had a plan before, or have had one fewer than three years. There are several possible motives for seeking this restriction, but the explanation offered by the White House is a desire to avoid "cannibalizing" the existing system.

The proposal would create a new plan type that would not be subject to the bad apple rule or the DOL's commonality requirement.

THE MOVEMENT TOWARD STATE-RUN MEPs

There is a thought pattern among some in Congress that the way to close the coverage gap is to let the states lead in creating mandates, since there is little appetite for new mandates at the federal level. Regardless of what anyone in Washington thinks, the states are

1 DOL Advisory Opinion 2012-04A.
2 Treas. Reg. Sec. 1.413-2(a)(4)(iv).

clearly moving *en masse* to require small employers to sponsor some kind of retirement plan. The typical proposal creates either a state-run MEP or a state-run individual retirement account (IRA) program with automatic enrollment ("auto-IRA") as a default. More than half of the states have proposed or are actively considering such legislation.

DOL Support for Government-Run Open MEPs

In 2015, President Obama directed the DOL to issue guidance in support of states' efforts to start payroll-deduct auto-IRAs and open MEPs. The DOL responded by issuing guidance in November 2015 stating that auto-IRA programs[3] are not subject to ERISA's strict provisions if they are run by a state government. At the same time, the DOL issued guidance[4] saying that the inability to treat an open MEP as a single plan for ERISA purposes did not apply to MEPs run by state governments.

The DOL's choice to favor state-run plans over plans run by the private sector might, with perfect reasonableness, be viewed as a political maneuver intended to bypass the legislature in moving the retirement system toward government control. Simple wording changes to the November guidance could have helped clear the way for a unified public-private effort to close the coverage gap and marshalled the resources of the private sector, just as the creation of Section 401(k) marshalled resources to create one of the most successful pension systems on the planet — something that government alone would never have accomplished on its own.

The point worth noting for purposes of understanding the MEP environment is that the guidance is favorable to MEPs as a tool of national retirement policy.

A CLOSER LOOK AT THE 'WIND' BEHIND MEPs

Republicans and Democrats in both the House and the Senate are coming out in support of MEPs. The president and the DOL, in limited fashion and with a preference for government control, are supporting MEPs. State legislatures are passing or considering legislation requiring employers to have retirement plans, and considering MEPs as a default program.

Multiple employer plans are clearly being viewed by parties across the political spectrum as an important tool of social policy. Change is coming, and MEPs will be a significant factor in that change. The logical question is, why?

MEPs are Simpler

Some in the retirement industry may have been looking at MEPs from the wrong direction. The assumption is that creating a MEP is all about cost. But how will that be helpful? We already have low-cost vendors, and there is no room for the cheapest vendors to get much cheaper. Industry data show that pricing is on a precipitous decline due to intense competition and consolidation. Pricing, in other words, is falling rapidly even without multiple employer plans; MEPs by themselves simply will not move the cost needle much further, though they will help.

But internal plan cost is not the only problem employers want to solve. They also want to save time, energy, and headaches. They want to know that their plan is being run properly and their participants' best interests are looked out for. They want good service. And they want professional fiduciaries and service providers who accept accountability for doing so, on paper, legally. And they want all this in a nice, neat, simple, cost-effective package. That's what a MEP does: It creates a simple, cost effective way for employers to let professionals and independent fiduciaries handle the plan so they can focus on their businesses.

Since MEPs are genuinely simpler, they are a superior plan design versus a single employer plan in many respects. Put yourself in the role of an adopting employer who is being told by her advisor and TPA that ERISA is scary, the 401(k) is complicated, and the employer must appoint fiduciaries, hold meetings, read the plan document, learn rules, create processes, and document everything carefully. Most employers want no part of this; they simply want someone to handle it for them, and the extent to which this happens in a MEP — by virtue of having a central appointing authority and professional (usually) fiduciaries — cannot be duplicated in a single employer plan.

So MEPs are simpler; the simplicity is real; clients respond to it — that's why MEPs are poised for growth.

THE REGULATORY VEIL

There are very few MEP experts for the simple reason that there are very few MEPs. To be an expert at something, one must do it often. And few in the U.S. have had a chance to do MEPs often. Misinformation therefore abounds, and most in the retirement industry feel that the sense of certainty they require is behind a veil — they can almost see it, but not quite. Yet the legal situation is not particularly complicated. Cross-testing,[5] for example, is much more complicated. And most of the uncertainty revolves around open MEPs. (I will not attempt to clear up that uncertainty here — I merely relay what is known about certain rules where there seems to be confusion.) Following is a summary of some key points that come up regularly.

3 An "auto-IRA" is a payroll-deduct IRA program with automatic enrollment. The automatic enrollment provision would ordinarily cause such a program to be subject to ERISA under DOL rules; the new guidance under 29 CFR 2510.3-2(d) relaxes the rule, but only for state-run plans.

4 Interpretive Bulletin 2015-02, 29 CFR 2509.2015-02.

5 Cross-testing is a form of non-discrimination testing under IRC Section 401(a)(4) that requires a complex methodology for calculating and testing contributions or benefits.

Open MEPs are Not Single Plans Under ERISA

"Open" MEPs (open to any adopting employer, whether connected to other adopters or not) that do not meet the Department of Labor's criteria for single plan treatment[6] are treated as separate plans for each employer, with all the compliance consequences this entails — in particular, the need for separate audits, ERISA fiduciary bonds and Forms 5500. All of ERISA's rules must be satisfied for such plans as if they were single employer plans. Therefore, one should not attempt to start an "open" MEP and treat it as a single multiple employer plan for ERISA purposes.

Prior to the issuance of Advisory Opinion 2012-04A, the industry was uncertain about the DOL's position on open MEPs. The industry now has certainty.

Closed MEPs Are Single Plans Under Both ERISA and the Code

"Closed" MEPs that do meet the DOL's criteria for treatment as a single plan operate with a single audit, bond and 5500. They are "Section 413(c) plans" under the Internal Revenue Code and single plans for ERISA purposes.

The IRS Has its Own Rules

The IRS rules for MEPs fall under IRC Sections 413(c) and 414(l) and the regulations thereunder. A number of old, large MEPs have been operating under these rules for decades. These are plans that predate ERISA, securities law, and most tax law. Such plans generally have favorable determination letters from the IRS going back decades, and thus enjoy a high degree of certainty that their plans, as written, are in compliance. The plan documents therefore provide a reasonable starting point for clearing up questions about the IRS rules concerning MEPs, and decades of operational history provide further clarity. Thus, there is little or no uncertainty about how to apply the IRS's MEP rules.

The 'Bad Apple' Rule is Not So Bad

The "one bad apple rule" of Treasury Regulation 1.413-2(a)(4)(iv) is not as big a deal as everyone seems to think it is. The rule says that any qualification failure by any adopting employer disqualifies the entire plan. Sounds scary, but how often does the IRS disqualify plans for compliance failures? Almost never. Instead, plan fiduciaries must ensure that defects are corrected in accordance with EPCRS.[7] And the preamble to the "bad apple" regulation suggests that offending adopters who refuse to correct their mistakes may be spun out and dealt with separately. The IRS disqualifies plans because of their owners' greed and stupidity, not ADP test failures.[8] Proposed legislation in Congress would eliminate or mitigate the "bad apple" rule, but it is debatable whether such legislation is actually needed.

Treatment of Forfeitures and 414(l)

In a MEP, do Company A's forfeitures have to be available to pay Company B's benefits? And must John Smith's 401(k) account balance be available to pay for Jane Doe's distribution, a result that is obviously nonsensical and contrary to other laws, such as the anti-alienation provision of ERISA?[9] A literal reading of Treasury Regulation Section 1.414(l) would suggest so. Here is the language [emphasis by author]:

"…(1) Single plan. A plan is a "single plan" if and only if, on an ongoing basis, **all of the plan assets are available to pay benefits to employees who are covered by the plan** and their beneficiaries… A plan will not fail to be a single plan merely because of the following:

…(iii) Several employers, whether or not affiliated, contribute to the plan,

…(v) Separate accounting is maintained for purposes of cost allocation but not for purposes of providing benefits under the plan.

…However, **more than one plan will exist if a portion of the plan assets is not available to pay some of the benefits.** This will be so even if each plan has the same benefit structure or plan document, or if all or part of the assets are invested in one trust with separate accounting with respect to each plan."

So if even "a portion of the plan assets" is not available pay just "some of the benefits," the plan is not a single plan even if it uses just one plan document for all adopters. Therefore, based on a simple reading of the regulation, Employer A's forfeitures and other assets must be available to pay Employer B's liabilities, and John's account balance must be available to pay for Jane's QDRO.

Needless to say, this interpretation makes no sense in a defined contribution (DC) plan, and would probably invalidate the existence of *all* DC MEPs, whether open or closed, if it were applied. Fortunately, the answer is fairly simple: There are long-standing MEPs with plan document language stating that forfeitures are handled on an employer-by-employer basis, and that John Smith's balance is for John only, and can't be used for Jane; and, as noted previously, these plans have favorable letters of determination going back decades. Also, forfeitures come from contributions, and contributions are determined on an employer-by-employer basis in a Section 413(c) plan (*i.e.*, a MEP), by statute.

DB MEPs ARE A GREAT IDEA, BUT THEY'RE NOT SELLING

Defined benefit MEPs are so cool… but do not appear to be poised for growth for two reasons. First, the Section 414(l) rule (above) says that all

6 DOL Advisory Opinion 2012-04A.

7 Employee Plans Compliance Resolution System, as defined under IRS Revenue Procedures at irs.gov.

8 A failure to correct for Average Deferral Percentage test failures by December 31 of the subsequent year, thereby incurring penalties under EPCRS.

9 ERISA Section 206, which protects a participant's account from anyone who might want a piece of it under nearly all circumstances.

assets must stand behind all liabilities, thereby creating a "joint and several liability" for adopting employers that gives some new adopters pause despite the low cost and incidence of real-life liability events (like the Great Recession of 2008-2009, when some DB MEP adopting employers went belly up). Also, the accounting rules make it expensive, from a P&L expense accounting standpoint, for some companies subject to FASB[10] rules to adopt a DB MEP. Therefore, in practice, few new adopters join these programs, and no new ones are being formed. If you want a cool structure for DB plans, look instead to group trusts.

WHERE DO WE GO FROM HERE?

It seems likely that MEPs will continue to gain traction in the marketplace. It also seems likely that some states will start MEPs, and that some associations or other groups will start new MEPs in the near future. If new legislation is passed to eliminate some of the perceived obstacles to new MEP formation, the floodgates will open, and every provider and advisor in the U.S. will suddenly want to offer MEPs. Just as "3(38)" sounded like an odd caliber of ammunition to most advisors 10 years ago, yet now is commonplace, MEPs will assume a significant role in the future of the retirement industry in the years to come. PC

Pete Swisher, CPC, QPA, TGPC, is the senior vice president and national sales director for Pentegra Retirement Services. He is known nationally for his work on retirement plan governance. Pete is the author of 401(k) Fiduciary Governance: An Advisor's Guide.

10 Federal Accounting Standards Board, the rules of which are found under the Accounting Standards Codification (ASC).

ASPPA: Into the Future

BY JACK EL-HAI

This article was excerpted from Leading the Evolution: ASPPA's 50 Years at the Forefront of the Retirement Industry*, to be published this month. For more about ASPPA's history and* Leading the Evolution*, please visit the ASPPA history website at http://asppa50.org/.*

In 2001, when ASPPA President John Parks reviewed his year in office, he pondered what the future held for the organization. "I don't really know," he noted in his column in the Society's newsletter, "but what is certain is that the speed of change will continue and will probably accelerate… I became a member of ASPPA about a quarter of a century ago. At that time there were a few hundred members struggling with a multitude of issues, not the least of which was existence. The challenges continue, but the mission is better defined and now recognized by government and industry players. We stand on the shores of a vast economic and technological future alive with opportunity."

The funny thing about the future is that it just keeps coming. The future of ASPPA that Parks described, with its accelerating pace of change and all of its economic and technological potential, did arrive, but it came with even more complexity and promise than he imagined. And there's plenty more of it to come.

GROWTH VIA DIVERSITY

In the second decade of the 21st Century, ASPPA emerged as a force uniting many varied professionals in the retirement plan business. "We have become the go-to organization for the entire retirement plan industry, every aspect of it," says 2011 President Tom Finnegan. The membership now includes the entire range of professionals who work to support the private retirement system. "It's everyone from financial advisors to insurance agents, attorneys, administrators, accountants, actuaries — the whole gamut," says 1980 President Brendan O'Farrell, who has witnessed ASPPA's full evolution. "That makes us a stronger organization because we cover all the bases. We must remember why we're here — it's not to do math. It's to see to it that when old Fred can't work anymore, he doesn't have to sleep under a bridge or eat dog food. The private pension system for years has been most responsible for the difference between poverty or financial adequacy in retirement."

> "We have become the go-to organization for the entire retirement plan industry, every aspect of it."
>
> *— Tom Finnegan, 2011 President*

To better reflect the growth of its members in a wide range of retirement plan professions, ASPPA in 2015 restructured itself under an umbrella organization, the American Retirement Association, and four 'sister" organization: ASPPA, ACOPA, NAPA, and NTSA. The reorganization established a close affiliate relationship between the member groups, with each having independence, equal status, and its own credentialing standards and procedures. "We set out on this strategy to become the most pertinent organization for retirement plan professionals — to make membership in the organization essential to any retirement plan professional's success," says ASPPA Executive Director Brian Graff, who also serves as CEO of the American Retirement Association. "Now all of the affiliate organizations

> The private pension system for years has been most responsible for the difference between poverty or financial adequacy in retirement."
>
> *— Brendan O'Farrell, 1980 President*

are fully integrated, with the American Retirement Association helping govern and coordinate the work of the affiliates."

In late 2015, nearly 23,000 people were part of the larger organization, compared with about 10,000 just five years earlier. "That's a significant amount of growth," Graff says. "It has given us the ability to provide a much higher level of services. For example, our communication with members is much more frequent and thorough than it was five years ago."

Through this restructuring, ASPPA's core values have not changed. "High quality education and credentialing, high standards, commitment to our principles of helping Americans save for retirement — especially small-business Americans and employees — it's all still with us," observes 2006 President Sarah Simoneaux. "Those principles were there when I joined, and they're the same today. That's what makes us able to grow without having to compromise our values."

A reason behind ASPPA's health and growth is the strength of its volunteer community. "You've got so many passionate people who constantly raise their hands to donate time and effort," says longtime volunteer (and 2016 ARA President) Marcy Supovitz. "You don't find that in many organizations." The pool of that passion is seemingly inexhaustible. "If you think about the hours that members donate multiplied by our billable rates, that probably adds tens of millions of dollars to the organization," says 1998 President Karen Jordan.

Those members give time to ASPPA for a reason. "It's important to remember the passion of ASPPA members and how they grab onto ideas and celebrate them," says 2009 President Stephen Dobrow, "how they work and work to make things come off, and how they combine together to form lifelong friendships. It's called 'ASPPA passion' — and we've managed to accomplish a lot because of it."

EFFECTIVE ADVOCACY

ASPPA members, legislators, regulators, and industry leaders look to ASPPA for guidance because it remains fervent and knowledgeable about the private employer-based retirement plan system that is

Witnesses at a Senate Finance Committee in Sept. 2011 included Judy Miller, ASPPA's Director of Regulatory Affairs.

> "There is no other organization that brings together the education, the networking, and the advocacy. ASPPA does a fantastic job of bringing together all three of those benefits, and that's what makes it unique."
>
> *— Marcy Supovitz, 2016 ARA President*

Participants in the 2009 "March on the Hill" series of meetings with members of Congress and retirement policy staffers.

important to millions of people, one that offers effective incentives to persuade people to prepare for their retirement future. "I know the benefits of us being enthusiastic about it as well as being experienced in how the system works," says Judy Miller, ASPPA's longtime Director of Retirement Policy, who retired this summer.

"We've worked very hard to educate Congress and the public about the efficiency of the tax incentives for retirement plans to show that these tax deductions aren't tax exemptions," Finnegan says. "When we lobby on behalf of our positions, we don't present ourselves as a trade organization trying to protect the turf of our membership," he explains. "We go in lobbying for the private retirement system and for improvements and enhancements to the system, because in the end it's the only system that's ever worked to get Americans to save for retirement. ASPPA looks to enhance the system for everybody rather than to enhance the pockets of its members." That gives ASPPA credibility. "If your target audience — legislators, regulators, or whomever — feels that you're constantly saying the same thing repeatedly and refusing to listen to the other points of view they're hearing, you're not going to get anywhere," Miller says. "We have the reputation of being willing to work out a compromise, getting the best deal we can for our members, without trying to force a position that will be impossible to achieve immediately. People see us as honest for understanding the areas that we talk about and for being willing to try to be a partner instead of a sledgehammer. Our goal is to help people understand how the system works, because if they understood it, we think they'd be supportive of our positions. And many of them are. We want to increase the numbers of that group."

Today, ASPPA is uniquely rooted in the retirement plan landscape. "ASPPA is really a steward of the industry," Supovitz says. "There are other organizations that do some of the job in the education side of the business, and in the networking side. But there is no other organization that brings together the education,

the networking, and the advocacy. Nothing compares to ASPPA in having a presence on Capitol Hill. It does a fantastic job of bringing together all three of those benefits, and that's what makes it unique."

"If there had never been an ASPPA, we'd have a very different and probably not as successful private pension system," says 2004 President Bruce Ashton. Perhaps there would be fewer benefits for owners and employees in a retirement program. Fewer small businesses would set up such plans. In addition, retirement plan professionals may be working in an industry that nightmarishly faces more regulation that is unwarranted, unnecessary, and burdensome. "That said, if there hadn't been an ASPPA, there would have had to have been an ASPPA. Somebody would have had to create an organization like ASPPA," Ashton observes.

THE YEARS AHEAD

In its advocacy efforts, ASPPA is likely to increase in importance as an influencer of retirement policy. "Looking ahead, the government really needs help in deciding where retirement funds for Americans are going to come from," Dobrow says. "We have a big bubble of people who need to have a dignified retirement. Without ASPPA being there, I wonder how that's ever going to occur. So I see us being closer to government and getting more deeply into retirement issues even than we are now."

Graff compares the critical importance of retirement policy in the years ahead with the importance of health care policy in the past. "Now a lot of attention in state legislatures, as well as in the federal government, has switched to retirement policy," he says. "That's both good and bad. The good news is that people are focused on it. The bad news is that the issue has become much more political than ever before. In the past, retirement policy was very wonky and there was only a handful of people who focused

Brian Graff on ASPPA's Future

Brian Graff, ASPPA's Executive Director since 1996, spends much of his time thinking about the future, as well as strategizing and advocating to ensure that the future is bright for ASPPA's members and America's retirees. What are his views on the organization's future?

Q: What are ASPPA's goals for the next five years?

GRAFF: One is to successfully manage our growth. We want to make sure that we continue to provide the high quality of services and benefits to our members. There's a danger, whenever you grow, that you lose touch with members' needs, and we have to strive to make sure we don't. Another goal is to recognize the political nature of the national discussion of retirement policy and to develop our political operation so we can continue to be a leading voice in the retirement debate. Because our ultimate goal is to help Americans save for retirement, we need to stay mindful of that and keep working toward solutions that allow Americans to effectively manage their savings all the way through retirement, not just to retirement.

Q: Do you foresee any changes in the types of retirement plans that Americans use?

GRAFF: As an organization, we have to figure out how to make the defined contribution system, to which 401(k) and 403(b) plans belong, behave more like the defined benefit programs common in the past. Defined contribution plans are portable and offer reduced risk to employers, but defined benefit plans are predictable. The challenge is to meet the needs of employees and retirees with products and services that will allow them to more effectively manage their money before and during retirement.

Q: What do you believe will always remain constant in ASPPA?

GRAFF: One constant is the commitment of the membership to the organization and how our growth and future success is tied to members' commitment and involvement as volunteers.

Q: ASPPA has undergone great growth in recent years. What's the next phase for the organization?

GRAFF: I think the next phase is really related to regulations from the Department of Labor that expand the definition of an ERISA fiduciary. The rule is intended to enhance the professionalism of anyone who works with people on their retirement savings. One of ASPPA's fundamental goals has always been to enhance professionalism among people in the industry. Now things are coming together, and this rule will expand that professionalism and require greater professionalism for people working with retirement savings. It all goes hand in hand with the opportunity for our organization to expand its reach and enhance professionalism beyond our current reach, among people working with individual retirees to manage their money. That, I think, is the next frontier for ASPPA to consider.

on it. Now we have to effectively balance the politics as well as the policy. That will be a huge new challenge.

"For example, we're facing a future in which political contributions and fundraising, plus doing events back home with members and their members of Congress in their districts, becomes much more critical," says Graff. "Twenty-five years ago, that wasn't needed at all, and five years ago it was needed only a little. You can't advance on your issues unless you are able to leverage the political side and make sure your arguments get heard. So the fact that we have members in every state, and in every district in the United States, will be a huge advantage for us. The commitment of our members recognizing that they need to be involved working with us will be incredibly important."

As ASPPA involves itself in the retirement policy debate to the organization's full potential, employers and workers will notice the difference. "Small businesses will come along and really provide good benefits to their workers, and that's critical if we want people to be able to save for their comfortable retirement," Graff says. "If they don't have meaningful opportunities to save in the workplace, they're simply not going to save."

While some regulation of the industry may be good, too much would be bad. ASPPA is uniquely positioned to help the government walk the fine line between those extremes because it understands the challenges of small businesses and employees. "Many people have absorbed the message to save for retirement," says Simoneaux, "but what are we going to do with Baby Boomers who are going to live to 100? How do we provide guaranteed income for retirement as well as protection against inflation when people do start drawing from their retirement funds? Being a member of ASPPA really amounts to being a part of that conversation, because we're going to have that discussion over the next five to ten years."

Simoneaux is a big believer in the youngest generation of employees and its ability to confront the most pressing of the retirement policy questions. "They represent what ASPPA has embodied for a long time," she says. "ASPPA is about saving, work/life balance, globalization, volunteerism — everything that young workers pay attention to. They're perfectly matched with what ASPPA will be doing. The economy is changing, but we've been through that before. ASPPA represents much of the entrepreneurial spirit of small business. And we are uniquely positioned to grow stronger over the next 20 years and help people build a successful retirement."

THE VITAL ROLE OF EDUCATION

To continue to help Americans retire with security and confidence, ASPPA will support the stronger education of plan participants. "Gone are the days when we all had a pension, with a check arriving in the mail every month," says Ashton. "Today we lay the burden on the individual to take charge of their retirement money. The question arises: How will people actually use their money in retirement? That leads to more questions about how the law will support them, how will financial products support them, and, most importantly, how will education support them? We need to have a much more aggressive education program."

Here's where huge educational opportunities exist for ASPPA, an organization founded on the principle of educating retirement plan professionals to the fullest. "We need to be part of the effort to teach people how to retire and what they need for retirement, and to integrate that into their daily lives and understand the consequences if they don't plan," says 1996 President Mike Callahan. "All the dynamics of saving, investing, planning, and retiring are so complex. We have a big opportunity to help with that as an organization."

ASPPA, which is so experienced and skilled at making its members as knowledgeable as possible in their varied retirement plan professions, may well take on the responsibility of opening its educational arms to a public desperate to learn more about retirement, and in many cases unprepared to retire. "We can't continue to ignore them," says ASPPA member Ilene Ferenzcy. "At the very least, we need to make sure that upcoming generations are saving for retirement. Beyond that, we need to fill the gap between what they have and what they need."

In the past, ASPPA has met such challenges of the future by expanding its horizons — defining "pension professionals" more broadly, adding new focuses of activity such as government affairs, and reshaping its educational outreach through novel ways of teaching and examining members and creating new professional designations — and then applying its longtime values to the new horizons. ASPPA has only helped members and strengthened the organization by taking this flexible approach to whatever the future holds.

Will the ASPPA of the future look much different from today's organization? "ASPPA will grow, and it will take on other partners," says 2007 President Chris Stroud, "but I don't see it changing its mission. And I can't imagine my life without ASPPA." PC

Jack El-Hai, the author of Leading the Evolution, *is a professional writer and the author of numerous works, including* The Nazi and the Psychiatrist *and* Non-Stop: A Turbulent History of Northwest Airlines.

Retirement Calculators — Are We Asking Them To Do Too Much?

While retirement calculators can provide information to participants, information without action doesn't lead to success.

BY JOE REESE

Imagine you're a participant sitting in a 401(k) education meeting. You hear this:

- "Start saving early"
- "Try to save at least 10%"
- "Don't put all your eggs in one basket"

Eggs? What does that even mean? Suddenly you feel overwhelmed, and fear that retirement preparedness is unrealistic.

Then you hear this: "Use our online retirement calculator to see how you're doing." That sounds like a good thing to do and, better yet, it sounds easy. So you go to your 401(k) provider's website, and after answering a few basic questions, you come away with either reassurance that your life in retirement will be just fine, or the sobering reality of sleepless nights ahead.

Is that the end of the story? For many participants, it may be.

A Google search for "retirement calculator" produces a staggering 13.5 million results. Most if not all major 401(k) providers and recordkeepers have at least one retirement calculator on their website. Even the U.S. Department of Labor's website has one.

Recently, several news articles focused on a study conducted by a group of researchers at Texas Tech University. The study analyzed 36 retirement calculators using a hypothetical case study of a couple in their late 50s who earn $50,000 each and plan to retire at age 65 and 63. The study concludes that, "in most cases, the available offerings are extremely misleading" and provide flawed projections estimating greater odds of having enough money in retirement.

A BALANCING ACT

These retirement calculators are interactive, and differ widely in the level of input required by the user. In developing these tools for participants, programmers are forced to perform a balancing act of making the calculator simple and easy enough for the average participant to use while still providing actuarially sound projections. The fact is, a retirement projection is complex, and the many assumptions used all have significant impacts on the results that are produced.

> "The fact is, a retirement projection is complex, and the many assumptions used all have significant impacts on the results that are produced."

Everyone working with plan sponsors and participants should open up several different retirement calculators and see what their numbers look like, if only to experience first-hand what the average participant experiences when using these tools.

Many retirement calculators use general defaults for personal information like investment returns, retirement date, income replacement, inflation and life expectancy. The assumptions used can vary widely and have a profound impact on results. However, participants often lack the financial knowledge to feel comfortable overriding these assumptions to more accurately reflect their life circumstances.

Of course, to increase the calculator accuracy, there are many more personal variables that can be taken into consideration: Are your savings pre-tax, Roth, or some combination of the two? Are you married? Do you plan on working part-time in retirement? What will your lifestyle look like in retirement? Where do you plan on living? Taxes will have a meaningful impact on your net monthly benefit. Your current health and family history also ties into your potential health care costs in retirement. Do you own your home, and will it be paid off? The list goes on and on.

So the challenge we face is that if the calculator is too simple and uses too many defaults, the projections may be misleading. But if the calculator is more robust and requires too much input from the participant, there's the reality that the calculator may not be used at all.

And while there is a definite benefit to the objectivity of retirement calculators, they do inherently ignore the fact that different people will have different emotional relationships with money. Calculators cannot account for a person's past financial experiences or feelings about money. Fully funded outcomes could be the result of overzealous assumptions when entering data, just as a negative past experience could cause quite the opposite. Some of this is obviously unavoidable, but it does set the stage for a knowledgeable and engaged advisor to add value to the interaction and process.

WHAT TO CONSIDER WHEN OFFERING A RETIREMENT CALCULATOR

It seems that retirement calculators are often treated as though they're all the same. But as studies have shown, this is not the case. It is important that all the underlying assumptions are made clear to the plan sponsor and the participant. Only then can a participant determine whether the analysis is accurate for his or her particular circumstances. For a major life decision like retirement, can participants afford to have their individual projection off by hundreds of thousands of dollars? Even a small

error, compounded over 20, 30 or 40 years of retirement projections, could render a dramatically inaccurate answer. At some point we may face a participant holding a computer printout and saying, "The website told me I could retire — but I can't!" Then what?

SHARED RESPONSIBILITY BETWEEN PLAN SPONSOR AND PARTICIPANT

What if we assume that retirement calculators are largely accurate and simple enough to be used properly by participants? The next question is whether or not the participant will use the information and successfully implement an appropriate solution.

The likely answer is no. Human behavior and tendencies tell us that procrastination and inertia tend to get in the way. Even if we assume that the calculator and the data input by the participant are both 100% accurate, there is a likelihood that the participant will not take action.

After World War II, employer-sponsored retirement plans were typically defined benefit plans. Companies promised employees a specified and guaranteed income throughout retirement. However, increasing life expectancy, falling interest rates, market volatility and increased regulation elevated the risk and financial burden of DB plans on employers. Due to those factors, DB plans have been replaced by the defined contribution plan as the primary source of income in retirement for American workers.

While DC plans successfully remove pension risk from the employer, the pitfalls of relying on these plans are clear. Participants in DC plans today are required to be knowledgeable in many areas, and typically lack the necessary expertise. Companies that had DB plans often hired prudent experts to help them with the tasks we now expect, perhaps irrationally, the average participant to both understand and execute. This can be a daunting task, to say the least.

> "At some point we may face a participant holding a computer printout and saying, "The website told me I could retire — but I can't!" Then what?"

What we need is a new DC approach that addresses the shortcomings of DB plans while adopting some of their better features. The question is, how can this best be achieved?

It should start with an overall assessment of retirement readiness for the participants. Participant success metrics provide a picture of what the retirement future looks like for employees and can be helpful in identifying future goals for the plan. Quantifying success for the plan sponsor also provides service providers with an excellent opportunity to further highlight their value proposition.

Once the plan sponsor understands its plan's success rate, it is equipped to make thoughtful changes to plan design to improve the retirement readiness of their participants. These can include adding or improving automatic enrollment and escalation features, stretching the match structure, and adding a managed account solution. Instead of just presenting the concept of auto enrollment and escalation, we need to embrace these features and champion them with the plan sponsor. While it starts with the plan sponsor, it ends with the participant taking personal responsibility to save enough to ensure a secure retirement. How do you accomplish that?

Not with retirement calculators. The answer lies in re-adopting some of the better features of DB plans:

- providing an actuarially sound goal;
- focusing the participant on outcomes instead of investment returns;
- allowing the participant to provide additional information without requiring it; and
- managing the investments based on the participant's needs and goals throughout their investment lifetime.

In other words, you have to make it accurate and easy, and put participants in a position to achieve success simply by not removing themselves from the solution. While retirement calculators can provide information to participants, information without action doesn't lead to success.

Even if all the flaws were removed, retirement calculators can only do so much. We need to find a better way. There is far too much riding on it. PC

Joe Reese is the managing sales director for the western U.S. at Unified Trust Company. He also serves and oversees the midwest and west coast territories as an institutional retirement consultant. Joe has held various sales and management positions within the employee benefits industry, focusing on the qualified plan marketplace for the last 16 years.

Welcome

New & Recently Credentialed Members!

MSPA

Susan Burnett
Donna Hamaker
Devin Schmelzer
Andrew Slezak
Josiah Thornton
Karl Willman

CPC

Scott McCarthy

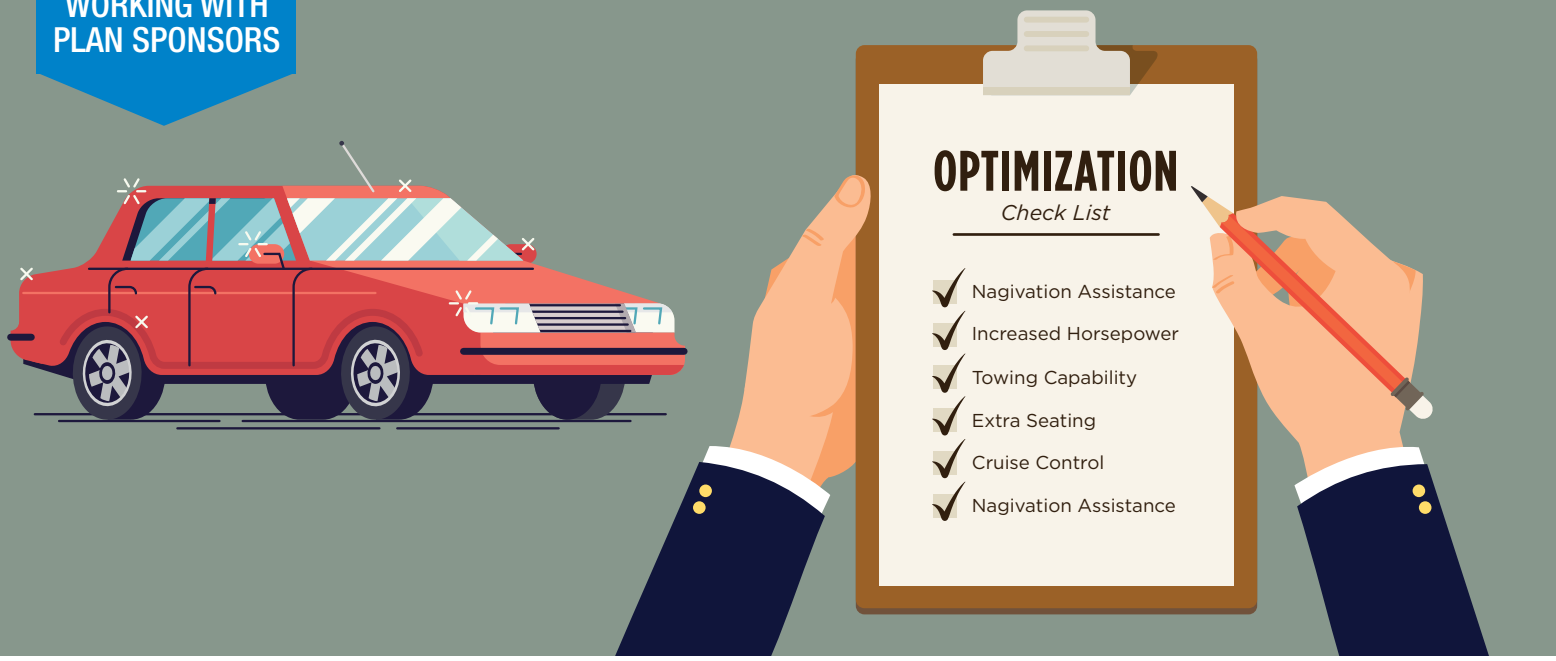
QPA

Anthony Allred
Jennifer Ash
Sharon Austin
Kiersten Bartlein
Kyle Bauer
Gary Boettigheimer
Shannon Brake
Christopher Bryant
Christopher Cannizzaro
Lauri Carlson
Gregory Citro
Markie Dodson
Brian Downey
Peter Flores
Sara Foote
Dennis Golden
Carla Hagen
Hope Heffner
Adjon Hysaj
Sarah Keenan
David Kirkham
Linh Luu
April Mitchell
Daniel Moran
Stacey Richard
Andrea Rogers
Jessica Rollan
Mary Roque
Brian Smith
Rebecca Smith
Jennifer Stralkowski
Tyler Thornton
Carolyn Vaeth
Benjamin Venable
Tanya Weaver
Pui Yeung
Suzette Young
Deborah Ziegler
Bojana Zivak

QKA

Erika Amaro
Melissa Arnold
Ashley Balazowich
Helen Barajas
Travis Barker
Stephanie Bowles
Daniel Bradley
Shawna Brown
Christopher Bryant
Alethea Cababa
Laurie Carter
Andrea Castro
Jennilee Chan
Emily Cole
Harrison Coleman
Adam Cuvellier
Linda Dilena
Markie Dodson
Brian Downey
Erica Farland
Sonya Garrison
Tommie Graszl
Jessica Grunzke
Dylan Gulrich
Heather Gunter
Adam Hohs
Debra Hyman
Adjon Hysaj
Nicole Johnson
Matthew Kadeg
Timothy Kucharski
Carlos Lamas
Mark Lester
Yongyi Li
Patrick Maguire
Warren Marchant
Toni Martin
Jason McDermott
Harley Monk
Jacob Morris
Brenda Moulden
Colleen Murphy
Matthew Nelson
Marques Nielson
Brianne M. Noonan
Brady Onsager
Kristine Pigman
Maria Pupillo
Andrea Rogers
Tyler Rogers
Jenny Schmidt
Matthew Schojan
Andrew Secula
Kayla Siegworth
Tracy Smith
Kelly Snowiss
Sara Tallard
August Wagner
Ashley Whetstone
Jon Williams
Joy Williams
Kasey Wolters

WORKING WITH PLAN SPONSORS



Constructing the Optimal Retirement Plan Vehicle

Which features and customized parts can make the ride smoother for participants and best help them reach their retirement destination?

BY JASON BROWN

Over the years, I have always visualized structuring the design of a retirement plan in a similar capacity to building an automobile. This mental picture probably came about because both are commonly referred to as "vehicles." One vehicle you drive around to get to your desired location; the other you drive to get you to your preferred retirement destination. In building either vehicle, there is always a basic chassis that is utilized and then specific features are built upon that foundation to customize and create the vehicle design that is best suited to fulfill the purchaser's needs. The finished product that rolls out of the garage is expressly dictated by the intended usage and performance requirements.

This process applies not only when building new retirement plans from the ground up, but also in rebuilding and modifying existing plans that have been utilized for a number of years. In most circumstances, an existing retirement plan was built based upon the initial goals of the decision maker years ago and created with the options that were available at that time; however, many retirement plans never get reexamined to see if the plan design is still aligned with what the plan sponsor needs today. Here are some of the more prevalent considerations with regard to vehicle utilization and how incorporating some "customized parts" can help better accommodate company goals in building, or rebuilding, their optimal retirement plan vehicle.

SUPERCHARGERS AND TURBOCHARGERS FOR MORE HORSEPOWER

Whether driving a 1960s "muscle car" or a more modern high-performance sports car, the

name of the game is horsepower. Many small business owners and professional groups want "muscle" to allow for higher rates of deferral, heightened capacity for employer contributions and enhanced levels of tax deductibility. This sentiment can also hold true for large plans as well — some plan sponsors making sizable amounts of employer contributions would like to achieve these goals, but are not aware of what can be accomplished by modifying plan provisions. In essence, these companies are already filling the tank with gas (contributions), but they could get better performance from their engine if they allocated the contributions in a different manner. Depending on the overall objectives of the plan sponsor, the following options can be added to increase the power of deferrals, employer contributions and tax efficiency.

- **Safe Harbor Match or 3% Safe Harbor Nonelective** — This will enable highly compensated employees (HCEs) to defer to the 402(g) limit of $18,000 (or $24,000 if age 50+)
- **New Comparability** — This is a great profit-sharing classification allocation strategy to help supercharge employer contributions for business owners and other HCEs. It is especially effective from an economic standpoint when paired with the 3% safe harbor nonelective.
- **DC/DB Combination** — If a plan sponsor is looking to seriously add horsepower and to "redline the tachometer," then this is a great option to consider. It allows for significantly higher levels of contributions for the business owners and tax-deductible employer contributions.

EXTRA TOWING AND SEATING CAPACITY

Today, retirement readiness for plan participants is an ever-increasing consideration for plan sponsors. Many want the ability to "haul" more participants to their retirement destination, as many participants are not wanting to make the drive on the own. One of the primary features that can be added to help achieve this goal is auto-enrollment. This provision will ultimately get more participants saving for retirement, and in most circumstances, will also help bolster the overall average deferral percentage (ADP) of the retirement plan. An additional benefit of increased deferrals is that HCEs will be able to defer more, as there is a direct correlation for testing purposes between what they can defer as a group compared with non-HCEs. If the plan design is already utilizing auto-enrollment, evaluate whether the opt-in rate of deferral being utilized is sufficient. Typically, the deferral percentage stated in the plan document is lower than needed for participants to properly prepare for retirement and maximize employer matching contributions. Studies have shown that participants are not necessarily averse to the amount of deferral at which they are automatically enrolled — for example, the decision to remain in the plan is essentially flat when comparing opt-in deferral rates of 3% and 6%.

Another consideration, if the plan sponsor is willing to commit to making employer contributions and wants to offer HCEs the ability to max out their deferrals without ADP testing restrictions, is implementing a qualified automatic contribution arrangement (QACA). This provision incorporates auto-enrollment with safe harbor contribution options of matching $1 for $1 on the first 1% and $.50 on the $1 on the next 5% (max liability of 3.5%), or the 3% safe harbor nonelective. One benefit of this arrangement is that the plan sponsor can have a 2-year vesting schedule on these types of safe harbor contributions as opposed to having an immediate vesting requirement with the traditional safe harbor contribution arrangement.

CRUISE CONTROL AND NAVIGATION ASSISTANCE

In keeping with the retirement readiness concept, there are additional features that can make a vehicle's ride even smoother for plan participants and help improve the success rate in reaching their retirement destination. Many retirement plan participants never change the deferral rate of their contributions after entering a retirement plan, and most are not very confident in their ability to select an appropriate allocation mix for their investments. Plan provision concepts like auto-escalation and re-enrollment help to automatically increase participant deferrals and assist with participant investment diversification. Both of these features can greatly improve the consistency of a participant's ride and enhance the chances of reaching their desired retirement plan destination. These concepts are especially effective when coupled with a well strategized Qualified Default Investment Alternative (QDIA).

The primary key in building the optimal retirement plan vehicle for plan sponsors essentially comes down to understanding their goals for plan utilization and not assuming they understand or like the provisions they currently have in place. Whether building a brand new vehicle from scratch or rebuilding one already in use, there are numerous upgrades that can be installed to help build the optimal retirement plan for plan sponsors and participants to drive (or ride) toward retirement. PC

Jason Brown, APR, CBC, is a principal at Benefit Plans Plus, LLC. He has more than 16 years of experience in the retirement plan industry, including business development, consulting, administration and retirement plan advisory work. Jason also serves on the Plan Consultant Committee.

ETHICS

Civility and Professionalism in the Office, Part 1

Incivility damages morale, harms working relationships and destroys organizational commitment. Here are some tips on fostering civility in the office.

BY LAUREN BLOOM

In the Summer 2016 issue of *Plan Consultant*, I addressed the pension professional's responsibility of courtesy and cooperation under Precept 8 of the American Retirement Association's Code of Professional Conduct. That article focused on how the ARA Code requires a pension professional to provide professional services "with courtesy," and to "cooperate with others" when engaging with clients, other professional advisors, regulators and competitors. That article focused on relationships with people outside the pension professional's office. This article will address civility in the office, offering a few thoughts on how Precept 8 applies in that setting.

According to press reports, civility in the American workplace is declining

at an alarming rate. A 2013 *Harvard Business Review* article by Christine Porath and Christine Pearson reported that 98% of workers surveyed complained of experiencing incivility on the job. In 2011, half of those surveyed said that they had been treated rudely at least once weekly, up from 25% in 1998. A 2014 survey by Weber Shandwick and Powell Tate (in partnership with KRC Research) revealed that 70% of Americans believe that incivility has "reached crisis proportions," with large businesses considered to be uncivil by 53% of Americans. Similarly, a 2016 survey by the Associated Press-NORC Center for Public Affairs Research finds that 74% of Americans think manners and behavior in the United States have deteriorated over the past several decades.

No one enjoys working in an uncivil environment, except perhaps the offenders who create the unpleasant atmosphere. Bosses, it seems, are most often to blame. Whether through impulsiveness, an intent to bully, a misplaced desire to motivate or simple thoughtlessness, managers offend and frighten their subordinates when they indulge in uncivil behavior. Bosses who fail to set a courteous tone can poison the culture of an entire company. Employees observe and emulate their supervisors' bad behavior, and incivility becomes the unattractive norm.

Most business leaders acknowledge that incivility is wrong in concept. But they may fail to understand how incivility damages a business' bottom line. Employees who witness incivility or, worse, are subjected to it themselves often suffer a loss of productivity. In some instances, they deliberately diminish their work effort, curtail their time in the office or reduce the quality of their work after an uncivil encounter. More commonly, they lose work time worrying about distressing incidents or going out of their way to avoid ill-mannered colleagues. Some employees even experience symptoms of PTSD after an uncivil encounter.

Incivility damages morale, harms working relationships and destroys organizational commitment. It hampers creativity; employees who have been mistreated are less likely to have original ideas and more reluctant to offer suggestions. Incivility can even affect employee retention. In various surveys, 12-20% of employees reported having left a job to escape uncivil treatment.

Incivility can also create serious HR problems. Porath and Pearson cite one study, conducted by Accountemps and reported in *Fortune*, disclosing that managers and executives at *Fortune* 1,000 firms devote about 13% of their work time to repairing employee relationships and otherwise mitigating the harm caused by incivility. That time and effort that could certainly be put to more positive use. And when incivility — a supervisor's unkind teasing about an employee's gender, race or physical appearance, for example — creates legal issues, the costs of defense can be significant.

If the harm to office relationships wasn't bad enough, an uncivil atmosphere can also drive customers away. Porath and Pearson report that participants in an experiment who thought they saw a bank representative publicly reprimanding a subordinate said they were 75% less likely to use that bank's services in the future than participants who didn't witness the harsh exchange. It didn't matter if the reprimand was arguably justified or overheard through a closed door. Customers were uncomfortable watching the bank's employee being mistreated, and inclined to take their business elsewhere.

In this context, Precept 8's instruction to "provide professional services with courtesy" takes on a new significance. For pension professionals, treating clients courteously is almost certainly a "no-brainer." Engaging politely with a client's other professional advisors makes good business sense. The obvious risks of discourtesy to regulators usually outweigh any momentary temptation.

The trick is to maintain the same level of courtesy and cooperation in the office as outside it. Faced with the pressures of complex technical challenges, tight deadlines, frustrating clients, unreliable plan data and limited project budgets, a pension professional can hardly be blamed for snapping at a subordinate now and then. However, the pension professional who routinely uses the pressures of work to justify bad behavior may find, between diminished employee productivity and loss of clients, that discourtesy is a luxury he or she can't afford.

So, how to avoid incivility? Some uncivil acts — temper tantrums, finger-pointing, profanity, bigotry, scapegoating, lying, sarcasm, favoritism — are obvious mistakes to avoid. Other discourtesies are more subtle. Routinely taking credit for subordinates' work, missing deadlines, failing to respond to questions or requests for help, coming in late, and skipping meetings can all erode a civil culture over time. Even something as seemingly minor as answering emails in a meeting or failing to pay attention to a subordinate's presentation can seem uncivil if it conveys contempt for others.

In the next issue, we'll take a look at the positive side of civility, focusing on things the pension professional can do to enhance courtesy and cooperation in the office. PC

Lauren Bloom is the general counsel & director of professionalism, Elegant Solutions Consulting, LLC, in Springfield, VA. She is an attorney who speaks, writes and consults on business ethics and litigation risk management.

Earning Trust in the Higher Education Market

These tips can help you be more competitive in the college and university sector.

BY DAVID RAY

With nearly $500 billion in retirement assets, the higher education sector offers significant growth opportunities to plan consultants.[1] Colleges and universities face challenges across a number of fronts, and one thing they especially need help with is managing their retirement plans. Both institutions and the faculty and staff they employ can benefit from the retirement planning expertise consultants offer.

Specializing or expanding in the higher education market is appealing. But those new to the market should keep in mind that this segment isn't just an extension of the corporate 401(k) market. While the two markets share similarities, there are significant differences as well. By understanding and addressing the unique needs of colleges and universities, you can better position yourself to stand out and make a difference.

WHAT MAKES THE HIGHER EDUCATION MARKET DIFFERENT?

The higher education market has typically been underserved by plan consultants because of the complexity of these institutions' retirement plans and the regulatory

1 Source: LIMRA Secure Retirement Institute, Not-for-Profit Market Survey (NFP), first-quarter 2016 results. Based on a survey of 28 companies.

environment that shapes them. At some colleges and universities, investment menus can have more than 100 options — making them difficult to manage for plan sponsors and overwhelming for faculty and staff. These options may be offered by multiple providers that may or may not be coordinating with each other. The 403(b) plans sponsored by non-profit institutions also have different rules and regulations than corporate 401(k) plans.

Responsibility for managing these labor-intensive plans often falls to administrators who juggle many responsibilities, including their roles as fiduciaries. Universities also tend to be consensus-driven institutions. Securing buy-in for plan goals and strategies can be time-consuming and requires careful attention to relationships. As a result, making changes to plans or vendors can take substantially longer than it would in a corporate 401(k) environment.

Change is necessary, however, as most universities are dealing with significant financial pressures, including concerns about the sustainability of tuition revenue and state support. Institutions remain committed to offering a range of workplace benefits, including retirement plans that help faculty and staff achieve lifetime income.

POSITIONING YOURSELF FOR SUCCESS WITH HIGHER EDUCATION CLIENTS

The upside of the complexity facing colleges and universities is that most institutions need expert guidance when it comes to managing their retirement plans. You will stand out if you demonstrate that you understand the college or university's unique needs and challenges, and that you have solutions to address them. The following recommendations can help you put your best foot forward.

Understand the Institution's Needs

College and university administrators want to work with people who understand the issues affecting their institutions. In addition to concerns about their retirement plans, they face challenges around health care costs, succession planning and helping older faculty members (reluctant retirees) get comfortable with the idea of retirement.

You can show that you're an engaged ally by responding to these challenges. In some cases, you may have valuable advice to offer or a connection to another consultant who can help on issues related to health care, succession planning or managing the transition to retirement. Offering relevant advice and solutions will go a long way in earning administrators' trust.

Work in a Consultative Manner

Recent research by the Corporate Executive Board suggests that across all industries, purchasing committees typically average five or six people.[2] At colleges and universities, the number of benefits committee members can be double that. These individuals will have varying levels of experience with retirement plan administration and fiduciary obligations. Some may be trained HR professionals or finance professors, but others may be humanities professors, vice provosts or administrators who don't have specialized knowledge of retirement plans and investing.

As the number of people on a committee rises, so does the potential for conflict. The people serving on the investment committee may have differing opinions about how plans should be structured and what investment options should be offered. Investment committee members may also represent different groups of employees (*e.g.*, faculty or staff) within the institution. You'll need to understand the decision-making dynamic, including which figures are most influential on campus, and demonstrate that you can work collaboratively, educate members of the committee, leverage key relationships and bring along decision makers who may resist change at first.

Specifically, consultants can play a key role in making sure that committee members:

- discuss rather than avoid important issues related to their plan;
- address specific areas where committee members disagree; and
- ensure that all members have a voice and that their voice is heard.

Offer Solutions to Help Sponsors Meet Their Fiduciary Responsibilities

Plan sponsors are still grappling with newer 403(b) regulations and requirements that are making the 403(b) more similar to the 401(k). For instance, institutions need help with making their plans audit-ready. They are also assessing new service models offered in the higher education space — a response to both changing regulations and how their plans are

"Plan sponsors are still grappling with newer 403(b) regulations and requirements that are making the 403(b) more similar to the 401(k)."

2 Karl Schmidt, Brent Adamson, Anna Bird, "Making the Consensus Sale," *Harvard Business Review*, March 2015 (https://hbr.org/2015/03/making-the-consensus-sale).

structured. Plan sponsors should know that the implementation of new service models — such as sole recordkeeping — may help protect ERISA-based plans from future fee-related lawsuits.

Consultants can help all clients navigate these waters, and be especially helpful to those administrators who may not have investment and compliance expertise. Establishing processes to help institutions meet their fiduciary obligations and finding ways to make these processes more efficient and timesaving will be a valuable and welcome service.

Focus on Outcomes

Colleges and universities want to get their faculty and staff to and through retirement. Perhaps more than in most sectors, leaders in higher education understand the importance of making sustainable retirement income — not just asset accumulation — the goal of retirement savings. They want to take further steps to ensure that all faculty and staff, from highest-paid to lowest-paid, have access to lifetime income options and can take advantage of them. To that end, employers want to work with partners who can provide participant education and advice geared to helping faculty and staff create a retirement income stream they can't outlive.

When recommending changes to an institution's plan, show how these changes can affect retirement outcomes, particularly the goal of sustainable retirement income. For example:

- How might reducing the number of investment menu options raise engagement levels?
- How will targeted communications programs help faculty and staff who need the most help?
- How can certain retirement income solutions provide all faculty and staff with monthly income for life?

Work with the plan sponsor to establish goals for the plan, and show how plan design, employee engagement, the plan's investment menu and your recommended plan management approach will help achieve those goals.

> "Leaders in higher education understand the importance of making sustainable retirement income — not just asset accumulation — the goal of retirement savings."

Understand and Communicate Best Practices and What Peers Are Doing

Higher education is a competitive sector. Plan sponsors want to make sure they are offering a retirement plan that matches or exceeds what peers are offering. A competitive, well-structured plan can improve recruiting and help older faculty members transition to retirement. Understanding the higher education benefits landscape and best practices across colleges and universities will earn the confidence of potential clients and build support for your recommendations.

CONCLUSION

The opportunity to advise college and university retirement plans is a potentially rewarding one. Winning their business will require a deep understanding of how their institutions work, the challenges they face, and their goals for their faculty and staff. Implementing the recommendations above will help you to be more competitive in the higher education sector, and position you to be a trusted partner in helping college and university faculty and staff get to and through retirement. PC

David Ray is a vice president and the national sales manager for institutional development and sales at TIAA, leading the company's pension sales efforts on a national basis. He has more than 29 years of experience in the employee benefits field, with an emphasis on pension funds, retirement benefits and deferred compensation plans.

The Recordkeeper's Perspective on Mergers and Acquisitions

A look at four scenarios that can occur after an ownership transaction between retirement plan sponsors.

BY ABIY FISSEHA

There are complex recordkeeping and compliance issues that arise during ownership transactions between sponsors of defined contribution plans. As a matter of due diligence, these issues are important in the implementation and ongoing evaluation of the decisions made during pre-merger or acquisition planning. This article focuses on four plan scenarios that can occur after an ownership transaction between retirement plan sponsors:

- the seller's plan is maintained;
- the seller's plan is terminated;
- the seller's plan is merged into the buyer's plan; and
- a sub-group is spun off.

THE SELLER'S PLAN IS MAINTAINED

There can be various valid reasons that can compel the buyer to maintain the seller's plan, including an avoidance of full vesting due to plan termination and

the desire to retain separate plans for union employees or other subgroups. It is prudent to involve legal counsel in discussions to consolidate or terminate plans to avoid the focus on compliance and operational efficiency from obscuring some critical implications of merging or terminating the seller's plan.

That said, it is wise to continue to vet the rationale to maintain a separate plan for the seller during the coverage transition period[1] since it is normally not possible to fully evaluate the recordkeeping, compliance and practical operational implications of maintaining separate plans during the early planning stages.

If the seller's and buyer's plans are required to be tested as plans of a single employer[2] after the merger or acquisition, then the coverage and non-discrimination tests for contributions and other plan features should be evaluated during the transition period. The evaluation should include the Benefits, Rights and Features (BRF) test, which is the test that determines if certain features others than contributions are discriminatory and is one of the tests that can easily be overlooked if compliance testing is automated or standardized around the routine annual tests.

It is crucial that the responsibility for the compliance tests is clearly delegated during the transition period if each plan has separate recordkeepers. "Off radar" plans and employee groups can create major compliance failures that go on for years and accrue significant liability to the employer. Some of the issues that should be addressed when delegating compliance test responsibilities include data sharing, defining who handles the BRF test since that is best done as one overview that compares plan features, and responsibility for the aggregated testing if each plan does not pass the coverage test on its own. If the plans do not pass coverage separately and need to be tested as a single plan, or if plan features need to be standardized due to BRF test failure, the rationale to keep the plans separate should be evaluated within the new context.

"It is crucial that the responsibility for the compliance tests is clearly delegated during the transition period if each plan has separate recordkeepers."

Another issue to evaluate during the transition period is the possibility of using a single plan to provide different contribution allocation arrangements. Since the IRS rules and most pre-approved plan documents provide a high degree of flexibility in how employer contributions are allocated, it may be possible to design a plan that meets the employer's desire to segment contribution rates by location, employer group or other aspects within a single plan if the non-discrimination tests[3] can be passed.

There is also the issue of the "same desk" rule to consider. Carefully review the "same desk" rules since getting retained by the buyer does not automatically shut off distributions of certain money types[4] for participants. The rule was relaxed under Rev. Proc. 2000-27 to allow distributions if the seller's plan is maintained by the seller after an asset sale and certain conditions are met. Generally, participants in the seller's plan who are hired by the buyer can take a distribution if the transaction is for less than 85% of the *assets* between unrelated entities.

PLAN TERMINATION

Stock purchase transactions have different due diligence and timing implications than asset purchase transactions. Asset purchases do not normally create successor plan sponsor obligations for the buyer, and the issues to be addressed are less complex. However, a stock purchase is considered ownership takeover and can result in the buyer becoming a successor plan sponsor to the seller's plan unless plan termination is executed before the close of the ownership transaction. The implications of being a successor sponsor are significant, and include the requirement to retain certain protected benefits and to credit prior service with the seller. Also, outright termination of the seller's plan is no longer an option after the close the corporate transaction unless the buyer is also willing to terminate its own plan, which leaves a plan merger as the only option. Since plan termination timing can be critical based on the type of transaction, the recordkeeper should establish a protocol to get involved in the pre-merger or acquisition evaluation to make sure that its tasks in terminating the plan can be executed on a timely basis.

1 IRC §410(b)(6)(C)(ii). The coverage transition rules allow the buyer to maintain a separate plan for the seller without having to worry about the coverage and non-discrimination testing implications for a period that generally ends at the end of the plan year following the plan year of the merger or acquisition transaction.

2 Qualified plans are required to be tested as plans of a single employer if the plan sponsors are considered to be in either in a controlled group (IRC §414(b) & (c)) or affiliated service group (IRC §414(m)).

3 The General Test (401(a)(4) Test) may be required for non-uniform allocation within a single plan.

4 Note that the contribution types affected by the "same desk" rules are salary deferral, QNEC, QMAC, and safe harbor contributions. These contributions are subject to statutory in-service distributions limitations. Generally, a termination or severance from employment needs to occur to take a distribution before age 59½.

If the seller's plan is to be terminated, there are basic and somewhat complex tasks that need to be executed. The basic tasks include termination amendments and final Form 5500. The more complex tasks include filing IRS Form 5310 to get a Letter of Determination (LOD) on the plan termination and ensuring that the terminating plan's document incorporates all required amendments. Filing Form 5310 is not a requirement and the decision is normally made in consultation with legal counsel. From the plan sponsor's perspective, filing a termination LOD can be a reasonable and risk-mitigating action, especially if there are high-risk issues such as asset reversion to the plan sponsor. Also, with the elimination of the ability to obtain LODs for individually designed plans after initial qualification,[5] it is possible for termination LODs to become more of a necessity to plan sponsors in the future.

PLAN MERGERS

One of the main issues the recordkeeper has to deal with in plan mergers is the protected benefits[6] of the plan being merged. The EGTRRA-mandated IRS regulation issued in 2005[7] significantly reduced the number of protected benefits in defined contribution plans, but there are still key protected features that have operational impact, such as a Qualified Joint Survivor Annuity (QJSA) option for merged money purchase plans and in-service distributions. The protected features should be identified and procedures and systems modified to accommodate them.

Another key issue that requires careful evaluation is the crediting of prior service by the buyer to employees of the acquired entity. If a stock purchase creates a controlled group that includes the buyer and seller, then crediting service is generally required. Looking at it from the participants' angle, prior service credit is expected if severance from employment has not occurred.[8] Providing prior service credit is discretionary, but it does occur in asset acquisitions. If prior service credit is to be granted, the recordkeeper should work closely with the plan sponsor and the seller to capture the hire dates of the seller's employees and code them as employees of the seller for future identification.

It is also important to retain the reference to the entities with prior service credit in the plan document in subsequent restatements. Since it is likely that the seller may not have data for all employees who have worked for it, the buyer may wish to add a step in the hiring process to identify employees who have worked for acquired entities. Not being able to systematically identify employees who have been granted prior service credit can result in enrolment delays and vesting errors, incurring liability and correction cost.

SPIN-OFFS

A plan spin-off within the context of an employer-level merger or acquisition occurs when a plan sponsor sells a division to another entity. The spun-off plan can then be either maintained separately or merged into the buyer's plan. Using the coverage transition period to further evaluate the need to maintain separate plans is applicable. One issue to highlight in this case is the potential partial termination for the seller's plan. If the transaction creates a successor plan sponsor by either creating a new plan for the spun-off entity to accept assets or by merging assets into the buyer's existing plan and continue vesting and eligibility credits, then a partial termination does not occur in the seller's plan. If the assets of the spun-off entity stay in the seller's plan, involving a transaction between unrelated entities, then the employees will have severance from employment with respect to the seller and a partial termination can occur. It is prudent to document that a partial termination analysis has been done.

FIDUCIARY IMPLICATIONS

The active involvement of the recordkeeper in consulting the plan sponsor or others tasked with due diligence responsibility is valuable. However, the recordkeeper and other parties playing a role in plan-related due diligence should be cautious about certain aspects of their work triggering fiduciary status and conflict. The risk of triggering fiduciary status with certain actions has been there all along, but the DOL's new fiduciary rule has cast a wider net in defining who is considered a fiduciary. The new rule does not specifically deal with roles and decisions that are made as a result of mergers and acquisitions, but the general concepts of the rule could extend to such an event.

In general, caution is warranted if any of the parties involved in the due diligence stand to financially gain from merger related decisions (*e.g.* the recordkeeper getting assets transferred to its platform or rollover recommendations are made to participants who can take distributions). It is prudent to clearly split the tasks and analysis related to compliance and operational aspects from the decision to evaluate investments and the recordkeeping platform. PC

Abiy Fisseha, CPC, CFP®, is a principal and consultant with Milliman's Employee Benefits Practice. He has been involved in plan administration and consulting for defined contribution plans for more than 17 years.

5 Revenue Procedure 2016-37, IRS Announcement 2015-19, Revenue Procedure 2015-6 – Section 8 (ability to request separate LOD for plans using pre-approved documents).
6 §1.411(d)-4 Section 411(d)(6)
7 https://www.irs.gov/retirement-plans/guidance-on-the-anti-cutback-rules-of-section-411-d-6.
8 IRC §414(a)(1), Notice 2002-4

SIX TIPS ON HANDLING CLIENT ERRORS

Doing more than applying Band-Aids to benefits boo-boos.

BY ILENE H. FERENCZY

Everyone in this business knows that it is nearly impossible to flawlessly administer a retirement plan. The rules are too extensive, the regulations too numerous, and the issues too broad for perfection. "Simplification" efforts by Congress and the federal agencies only lead to more complexity. In addition, the government is schizophrenic in its approach — wanting to encourage retirement savings on the one hand, and ruing the loss of tax dollars due to deferral of income on the other.

The result is that all service providers to retirement plans face the need to fix errors on a nearly continuous basis for their clients. This article is meant to share some of the basic techniques to plan corrections that help the process move forward effectively and efficiently.

TIP #1: GET ALL THE FACTS BEFORE LAUNCHING CORRECTION ACTIVITIES

One of the most common mistakes in handling plan corrections is to move forward immediately and without much consideration into the holistic approach of the correction process. This is part of our desire to be helpful and to assure our clients that all will be okay. We leap into action without thinking it through. However, it is critical that the practitioner get a clear and complete view of what is really going on before taking the path to corrections.

The best tool in your toolkit here is your curiosity. Ask questions, then ask more questions, then ask more questions. What the client thinks is relevant is not necessarily correct. She may be leaving important points out or adding issues to the mix that are irrelevant. Furthermore, remember the TV show, *House*? Dr. House, a diagnostician, used to say, "Everyone lies." He's correct. People hate looking stupid or at fault, and are prone — even subconsciously — to color the story to make themselves look better. By asking questions, you have a better chance of seeing inconsistencies and finding out nuances that you should know at the front end.

TIP #2: TAKE TIME TO THINK IT THROUGH

The tendency to go quickly to the fix-it part of the process continues once you have obtained the facts. Before you can discuss corrections, you need to thoroughly analyze what you have and how one part may affect the others. For example, suppose that

a client tells you that no top-heavy contribution was made. But the facts tell you that the plan failed ADP testing and the plan sponsor fixed the problem by depositing a QNEC. Can the QNEC solve the top-heavy problem? Or maybe there was another error that you need to fix with a contribution, and the corrective top-heavy contribution can fix the other error, too, thereby killing two birds with one stone.

If you do not thoroughly consider all the aspects of a case, you may find that correcting the error on which you are concentrating may cause another problem to arise. For example, suppose that the client comes to you with a mistaken allocation to a participant, and you immediately decide to revise the allocation. However, because you did not think the entire situation through, you did not consider that correcting the allocation results in the plan failing nondiscrimination testing. By thinking through the entire process, you can examine and resolve not just the obvious problems, but also those that may be more inchoate.

Last, spending time with your Sherlock Holmes hat on will help you think straight. Lots of times, you start a correction process with an idea in mind, and it is hard to dislodge that idea even when faced with contrary evidence. Giving yourself time may clear your mind and allow you to see the details that you missed on the first pass. Running a case by another person also helps with this. You would be surprised by how stating the facts out loud to someone else will help you see things more clearly.

TIP #3: DON'T LOOK FOR MIRACLES, BUT BE CREATIVE

It is not unusual when discussing corrections with other practitioners to hear someone say, "I know a guy who…" and then proceed with a story about a miraculous result obtained through discussions with the IRS or DOL — a result that you know in your heart is either not what likely happened or is based on facts not in evidence.

When framing corrections, it is advantageous to understand what the IRS or DOL wants to achieve from a plan correction, what is acceptable to the relevant agency, and what is not acceptable. Revenue Procedure 2013-12, the basis of the IRS's Employee Plans Compliance Resolution System (EPCRS), and the subsequent Revenue Procedures 2015-27 and 2015-28 discuss principles of correction, and outline preapproved fixes for many errors. On the DOL side, the Voluntary Fiduciary Correction Program (VFCP) gives similar indications of what the DOL looks for in correcting fiduciary breaches and prohibited transaction issues. These guidance items should always be your starting point. While you are not required to use these corrections, you need to be prepared to defend any alternatives as being appropriate to the error at hand.

Nonetheless, the procedures should not fully constrain one from considering other alternatives that might be acceptable. Thinking outside the box may be helpful in framing a correction that is more palatable to the client, while still acceptable to the government. Remember, however, that there is always risk in using a fix that is not preapproved, and consider whether a government filing is recommended even if the error may be self-corrected under the procedures.

TIP #4: ALWAYS GET YOUR IDEAS OUT FIRST

Even though the IRS generally tries to help practitioners frame reasonable corrections in EPCRS, the reviewer is not as motivated to creatively help your client as you are. And once an idea plants itself in the reviewer's mind, it is harder to dislodge it and plant your own concept than it is to get your idea on the table first. Therefore, it is almost always best for you to get your correction method proposed before the IRS has the opportunity to suggest what it is thinking. In VCP, this is part of the submission materials. However, do not wait for an auditor to propose the correction in Audit CAP, the program that is used if the error is found during an IRS examination. Think it through, figure out the best reasonable approach for your client, and outline the options as you see them.

Even if you end up engaging in negotiations on the correction method, if you propose your way of thinking as an alternative to what the IRS has put forth, you will likely find that the compromise position is closer to your ideas than not.

On the VFCP side, remember that there are no negotiations or discussions, and no alternatives to the correction methods outlined in the procedure are acceptable. Therefore, you need to follow the VFCP instructions *to the letter* if you are to take advantage of that program.

TIP #5: KNOW WHEN TO GET A LAWYER INVOLVED

At the risk of sounding like I'm hawking our wares, there are times when a lawyer's assistance can be invaluable, and you should take advantage of those situations. Here are some of the things that lawyers can provide:

- **Attorney-client privilege.** While there are some other types of privileges for tax advisors, none is as broad as the attorney-client privilege. If there are reasons the parties want to make sure to protect the confidentiality of communications, then having an attorney is important.
- **Review of closing agreement documentation.** A closing agreement with the IRS is a contract. It should be reviewed by someone who looks at contracts for a living and knows how to make sure that they are binding on the parties.
- **Pursuit or protection from litigation.** If an error was

made by a practitioner, then it is likely that the client will at least consider whether the practitioner is financially liable. Acting and communicating in a proper manner may reduce the risk of litigation or at least protect the practitioner to the greatest extent possible. If your plan sponsor client is considering litigation against a prior TPA or another service provider, you should take any necessary action to help preserve the right to make a claim against the responsible party. In particular, the sponsor should be watching the statute of limitations while the correction process is pending to be sure that it is not expiring, thereby eliminating any possible claim. Finally, if you are the one who has made the error, your lawyer should assist you in solving the problem without making admissions that can be used against you in court or increasing your potential liability, while preserving your errors and omissions coverage.

- **Getting cooperation of the parties.** Unfair though it may be, sometimes having an attorney is valuable to get everyone to do what is needed. There are those who just cooperate more readily if there's a lawyer's voice in the room.

TIP #6: DON'T DO WHAT YOU DON'T KNOW

The worst thing you can do in dealing with plan issues is to make additional errors. These kinds of errors may be technical in nature, such as failing to properly repair the problem or creating other violations. You could also make a mistake by proposing or accepting a correction that does not optimize the resolution for your client. For example, you could agree unknowingly to an IRS-proposed correction that costs the client more than other acceptable alternatives. That makes the client's problem your problem — not a result that we would recommend.

CONCLUSION

These suggestions are not the only tricks of the trade, but following them can go a long way toward increasing the success of fixing client errors. Think things through, plan carefully, know what you are doing, and get help if you need it. PC

Ilene H. Ferenczy, CPC, is the managing partner of Ferenczy Benefits Law Center LLP in Atlanta, where she advises clients on all types of employee benefit plan issues. Ilene particularly focuses her practice on qualified retirement plans, benefits issues in mergers and acquisitions, and advising third-party administrators of employee benefit programs on technical and practice issues.

PLAN CONSULTANT

Build Up Your CE Credits via *Plan Consultant* Quizzes

Did you know that each issue of *Plan Consultant* magazine has a corresponding continuing education quiz?

Each quiz includes 10 true/false questions based on articles in that issue. If you answer seven or more quiz questions correctly, ASPPA will award you three CE credits. And you may take a quiz up to two years after the issue of *PC* is published. This makes *Plan Consultant* quizzes a convenient and cost-efficient way to earn valuable CE credits anywhere, anytime.

Visit:
www.asppa-net.org/Resources/Publications/CE-Quizzes
to get started!

GAC Update

BY CRAIG P. HOFFMAN

GAC Meeting with DOL Focuses on Fiduciary Rule

One concern: The rule's platform communication "exception" may not cover TPAs.

The ASPPA/ARA Government Affairs Committee (ASPPA GAC) has been busy over the last few months representing the interests of our members in Washington, DC. As part of that process, as issues arise, we meet with government regulators to convey our concerns. In addition to these ad hoc meetings, once each year we have separate, more formal meetings with the IRS, DOL and PBGC. Those annual meetings were held recently. They provided an opportunity for our committee members to meet face-to-face with the officials who have a great deal of influence over how the nation's retirement policy is determined.

This year's meeting with the DOL was particularly insightful. As might be expected, it focused on implementation of the final regulation redefining who is a fiduciary under ERISA by virtue of providing investment advice. This regulation officially became effective June 8, 2016. The date on which it actually becomes applicable, however, has been delayed until April 10, 2017. Additionally, the Best Interest Contract (BIC) Exemption has a transition period that runs through the end of 2017 with fewer compliance requirements. Needless to say, the regulation and related exemptions are very complicated and are still being analyzed by ASPPA GAC. As part of that analysis, it has become clear that there are a number of issues that could benefit from further clarification.

One issue of particular concern to ASPPA members that was discussed with DOL officials at our recent meeting is a provision in the regulation dealing with investment platforms and recordkeeping services. The regulation provides that communications that simply market or advise plan fiduciaries of the availability of an investment "platform or similar mechanism" do not generally rise to the level of being fiduciary investment advice. It is becoming increasingly apparent, however, that this platform communication "exception" does not extend to circumstances where an individual (such as a TPA) makes an actual recommendation to a plan fiduciary that a particular investment platform be selected for use by the plan. (This may be the case even if there is no specific recommendation as to which investments on the platform should be offered as designated investment alternatives.) In particular, if the TPA firm receives compensation in connection with making the platform recommendation, that firm (and the person who made the recommendation) will be considered to be an ERISA fiduciary. This could be a problem for TPA firms that wish to avoid fiduciary status.

Compensation for such a recommendation could come directly from the plan sponsor. More likely, however, is that the administration firm is compensated "indirectly" in a way that relates to the recommendation. Indirect compensation (referred to as "revenue sharing") is often paid by a platform provider to a TPA for ancillary work done by the administration firm (such as shareholder servicing). If the recipient of the indirect compensation "recommended" the platform provider to the plan sponsor, it will be difficult, if not impossible, to avoid fiduciary status. In these circumstances, it is likely the firm will be considered to be receiving third-party payments in connection with a plan transaction, which is generally classified as a prohibited transaction in violation of ERISA §406(b)(3). There are ways to avoid the prohibited transaction in these circumstances, such as by using a "Frost Bank" offset arrangement described in ERISA Advisory Opinion 97-15A (*i.e.*, where the normal fee is offset by the indirect compensation) or by making use of the Best Interest Contact Exemption. Even if the prohibited transaction is avoided, the TPA remains a fiduciary under ERISA.

The DOL has promised further guidance to help clarify the meaning of the final regulations. Sub-regulatory guidance is expected in the form of Q&As that will be published on the DOL website. ASPPA GAC intends to work with DOL to help focus the guidance on issues of particular relevance to ASPPA members such as the platform communication exception. PC

Craig P. Hoffman, APM, is General Counsel for the American Retirement Association.

leading the evolution

ASPPA'S 50 YEARS AT THE FOREFRONT OF THE RETIREMENT INDUSTRY

THANK YOU

to the firms that sponsored ASPPA's 50th Anniversary History book

PLATINUM

John Hancock RETIREMENT PLAN SERVICES

Broadridge

Matrix FINANCIAL SOLUTIONS

GOLD

AEGIS PENSION SERVICES

charles SCHWAB

CUNA MUTUAL RETIREMENT SOLUTIONS

Drinker Biddle

EMPOWER RETIREMENT

envisage INFORMATION SYSTEMS

FIS

Nationwide is on your side

OPENCHECKS TRUST

The Standard

TD Ameritrade

VOYA FINANCIAL

SILVER

Actuarial Consultants, Inc.
Actuarial Systems Corporation (ASC)
Alliance Benefit Group LLC
Benefit Plans Administrative Services (BPAS)
Brucker & Morra, APC
Lincoln Financial Group
McCaw Salesberry Retirement Solutions, LLC
PAi (Plan Administrators, Inc.)
Pollard & Associates, Inc.
Qualified Plan Consultants, Inc.
Simoneaux & Stroud Consulting Services
Summit Benefit & Actuarial Services, Inc.
The Nolan Company
TRI Pension Services
Trucker Huss, APC
Unified Trust Company
United Retirement Plan Consultants, Inc.
Weaver Partners, Inc.

VISIT ASPPA HISTORY ONLINE AT ASPPA50.ORG