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WINTER 2020

NAVIGATING **EPCRS**

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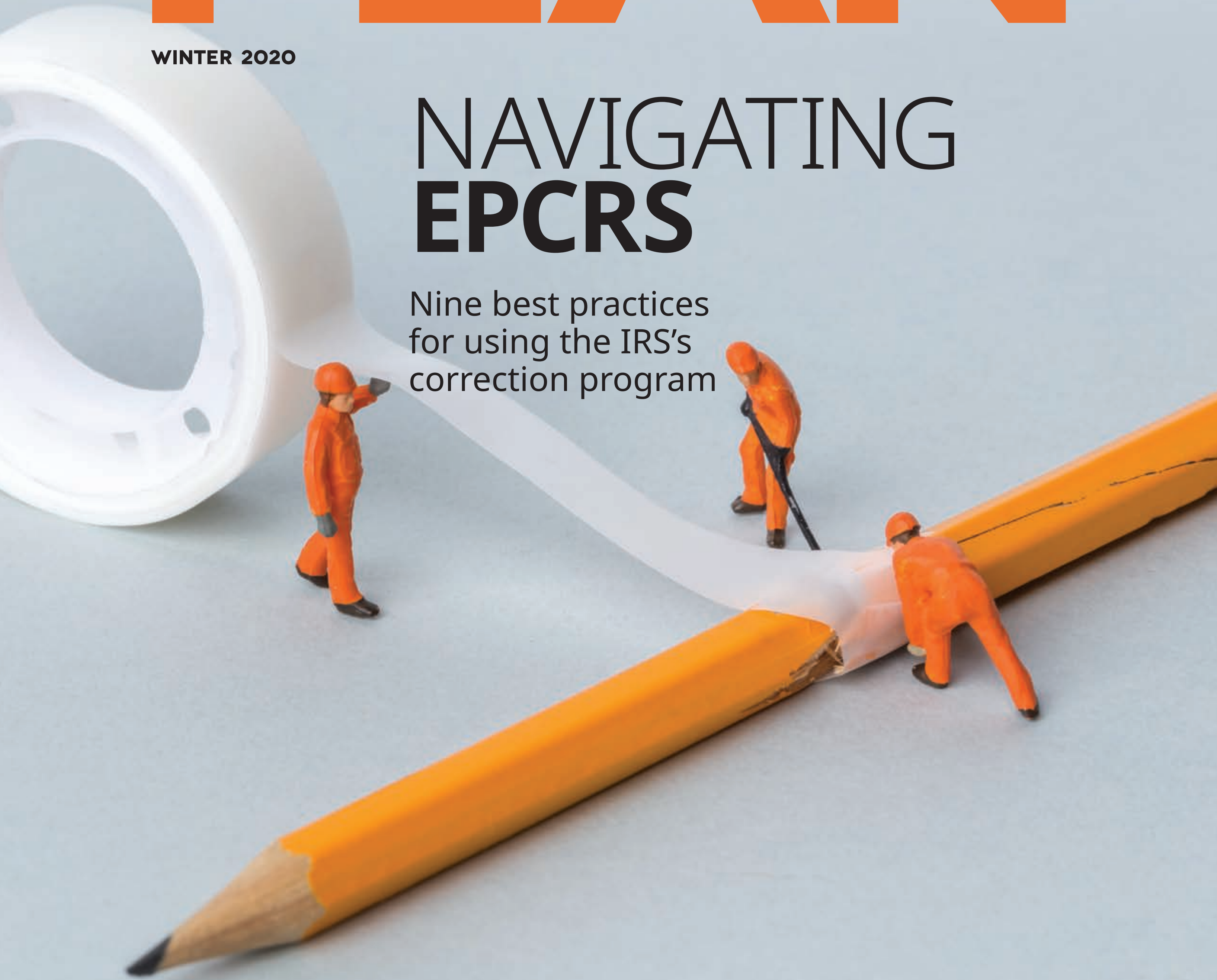

ASPPA Annual conference wrapup

A new generation of ARA leaders

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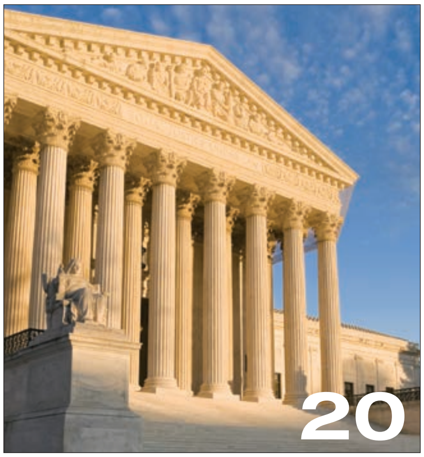

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A Season of Change at DOL

How will recent changes affect retirement professionals?

As the new year begins, retirement professionals involved in the administration of ERISA plans are looking at a different Labor Department.

Starting at the top, Eugene Scalia was sworn in as the 28th Secretary of Labor on Sept. 30. Scalia served as DOL Solicitor during the administration of President George W. Bush. In that post he was responsible for all DOL litigation and legal advice on administrative law and rulemaking – including, of course, ERISA. While in private practice, Scalia represented the U.S. Chamber of Commerce and other litigants in their successful challenge to the Obama administration's fiduciary rule in 2018.

This means that Scalia is the first Labor Secretary in the 21st Century to take office with significant knowledge of ERISA and prior experience as a DOL official. (No, I'm not counting the four Deputy Secretaries who served as Acting Secretaries on a temporary basis.) Scalia's immediate predecessors Alexander Acosta (2017-2019) and Tom Perez (2013-2017) both served as Assistant Attorney General for Civil Rights at the Justice Department. Hilda Solis (2009-2013), previously a member of the House of Representatives, focused on workplace safety and wage and hour issues at the DOL. And Elaine Chao (2001-2009) has long focused on transportation issues, not employee benefits.

Time will tell, of course, but it seems likely that Scalia's knowledge of ERISA and familiarity with how retirement plans are administered could result in quicker action on existing regulatory initiatives at the Department. These include:

- the new fiduciary rule that is harmonized with the SEC's Reg BI;
- the new proposed rule allowing electronic delivery of participant notices that was unveiled at ASPPA Annual in October (see page 24 of this issue); and
- follow-up guidance on the final Association Retirement Plan rules (which expanded the use of open MEPs) that took effect Sept. 30.

It also means that Preston Rutledge, Assistant Secretary for the Employee Benefits Security Administration (EBSA), may find that his new boss is a knowledgeable and enthusiastic supporter of future regulatory or subregulatory guidance that the industry would welcome – like much-needed guidance on missing participants, for example. It's also reasonable to expect that Scalia will be more vigorous than his predecessor in advancing President Trump's deregulatory agenda at DOL.

Scalia's swearing-in as Labor Secretary was followed by a reorganization of the EBSA on Oct. 1.

The changes included the addition of a third Deputy Assistant Secretary reporting to Rutledge. That new position oversees the EBSA's 10 regional offices. Amy Turner, a 23-year EBSA veteran, was appointed to fill it.

Significantly, the Principal Deputy Assistant Secretary, who is a political appointee, now has oversight of the Office of Exemption Determinations and the Office of Regulations and Interpretations – functions that had been performed by the Deputy Assistant Secretary who hails from EBSA's career staff. Previously the Principal Deputy Assistant Secretary directed EBSA's policy, legislative and research functions; those responsibilities remain. Jeanne Klinefelter Wilson, who was appointed by President Trump in 2017, will remain in that role.

Lastly, the position of Deputy Assistant Secretary for Program Operations, held by EBSA veteran Tim Hauser, has been retitled Deputy Assistant Secretary for the National Office. Responsibilities include oversight of the Office of Enforcement; Office of Technology and Information Services; and the office of Outreach, Education and Assistance. Hauser continues in that role.

So what's it all mean?

More Consistent. EBSA's regional offices had significant autonomy in the past, with different priorities and different approaches. On a national scale there was little uniformity in their approach to things like missing participant audits and other enforcement activity. Having one career official with the sole responsibility of overseeing the regional offices should lead to more centralized and standardized enforcement policies and procedures in the long term.

More Nimble. Having a political appointee in charge of regulatory initiatives likely will make EBSA more responsive to executive orders and other edicts from the White House.

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

JOHN ORTMAN
EDITOR-IN-CHIEF

BY MIRIAM "MISSY" MATRANGOLA

ASPPA's Secret Sauce: Community

ASPPA's conferences offer a perfect example of what makes us truly special.

As we face the doldrums of winter, it helps me to remember a happy moment or good time. For me, watching Jim Nolan, our Immediate Past President, belting out Fats Domino's "Kansas City Here I Come" at ASPPA Annual's Tuesday night karaoke competition is just such a moment. That, along with others dressed in their Woodstock outfits that night, brings a smile to my face.

Are you wondering what this has to do with the business of ASPPA?

Every day we go to work we are faced with changes – in technology, in laws, in who we work for, in who we work with, and in our job descriptions. One thing that stays consistent is the community at ASPPA. Jim singing and those people dressed in fun costumes are part of that community.

While ASPPA is a professional organization whose goals are to educate retirement plan professionals and to create a framework of policy that gives every working American the ability to have a comfortable retirement, it is so much more. Like at many conferences, at ASPPA Annual you first pick up your registration in a large foyer outside a grand hall. When I walked into that hall the first day of the conference, I could feel the buzz of energy and excitement as fellow members became reacquainted with other attendees they had not seen in a while. Members were there for the education and CE credit – but also to be with their friends.

The ASPPA community is a place where you can form study groups. It is where you find people to use as your "phone a friend" when you have a question that you can't find in the *ERISA Outline Book* and you don't want to ask your boss since you think you should know the answer. The ASPPA community is a place where you can find friends to travel with, to do mud runs with, to sing Karaoke with, to go axe-throwing with. And yes, all of that is true. There are ASPPA members who do and have done all those things together.

Most people join ASPPA because of our great education programs; I know I joined after getting my designation. So how do you get from education to community, should you want to? You can volunteer or go to a conference. Last year Jim Nolan mentioned in his PC columns the many different volunteer opportunities that ASPPA offers. Getting on a committee can introduce you to more people as you learn more.

One way to volunteer in your own area is through an ASPPA Benefits Council. There are 19 ABCs, which have boards and hold educational meetings throughout the year. My first volunteer job was with the Greater Philadelphia ABC. It allowed me to meet other professionals to ask questions of, and as I became program chair, I got to meet national speakers. I can still remember when we wanted Fred Reish to speak at a conference. The board said, "Call Fred Reish." And I thought, "I can't call Fred Reish – he's famous." Just so you know, his secretary picked up! But I did get to meet him and introduce him at the conference.

Going to a conference may not seem like a way to become part of the community, but it can be. At ASPPA Annual, for example, there is a session for first-time attendees. This is a place to meet other members who may not know anyone at Annual either. The first time I went to Annual I didn't know anyone, and it was extremely overwhelming. I am amazed that I know people when I go now! But it took time and effort. I always try to introduce myself to the people sitting beside me hoping to get to know someone new.

If you can't attend ASPPA Annual, there are other great conferences: the LA Advanced Pension and 401(k) Conference, The Women in Retirement Conference, the ASPPA Eastern Regional Conference and the ASPPA Cincinnati Conference. They are smaller, so it's easier to create that sense of community. You can also volunteer to be on these committees.

Let me know if you are ready to join the community. I can help – but I can't do a mud run! Reach me at mm@atlanticpensionservices.com. PC

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BY BRIAN H. GRAFF

An Open Mind About Open MEPs

At a time when there seems to be little bipartisan support for anything on Capitol Hill, Multiple Employer Plans stand out.

Ironically, one of the most popular provisions in the SECURE Act also turns out to be one of the most controversial among industry professionals.

That's the proposal regarding "open" Multiple Employer Plans (MEPs). Proponents have long maintained that open MEPs would help close the current coverage gap and provide a more efficient means for more employers to offer a retirement plan and provide additional ways for providers to serve that market.

That's why the American Retirement Association has – with some important conditions – supported the concept. Our recent comment letter to the Labor Department noted that open MEPs hold the potential to increase efficiencies, manage costs more effectively, reduce burdens on employers, and improve retirement outcomes for the American workforce, and that extending the availability of MEPs is a positive development in expanding retirement plan coverage for working Americans.

> "The DOL and the IRS will play a key role in mitigating the costs and complexities with respect to the expansion of open MEPs."

However, while it is our belief that open MEPs could have a positive impact on closing the retirement plan coverage gap, it also has the potential to be a negative disruption for the current business models of many in our industry, notably TPAs and plan auditors, for whom the effective consolidation of multiple ERISA plans into one could well diminish current revenue flows, as it reduces the number of individual plans to which they provide that support.

At a time when there seems to be little bipartisan support for anything on Capitol Hill, MEPs stand out. There is, and has been, strong support on both sides of the aisle for the concept. The opportunities afforded by the design were acknowledged in President Trump's 2018 admonition to the Labor Department to consider changes to the current boundaries, and that ultimately resulted in new regulations expanding Association Retirement Plans.

As you might expect, over the years we've had hours and hours of discussions with our members, plan sponsors, providers and advisors, as well as with regulators and legislators, to craft the best possible application of the open MEP concept to help expand workplace retirement plan access to the millions of working Americans who have now gone a generation without that opportunity. We've done that with both a sensitivity to the need for those solutions and the potential disruption to the valuable support provided by our members.

We've fought for – and won – the retention of a fiduciary involvement by the plan sponsor in the selection and monitoring of the MEP provider, and we've continued to press for the Labor Department's oversight role with regard to MEP providers, as well as broad authority to conduct investigations and audits of open MEP service providers to protect plan participants from fraud and abuse.

As we head to press, the fate of the SECURE Act, much less the provisions regarding MEPs/PEPs, remains uncertain, but it seems likely that legislative and regulatory interest in, and support for, the concept will endure. Competition in the marketplace ultimately will determine whether open MEPs are economically viable, and the DOL and the IRS will play a key role in mitigating the costs and complexities with respect to the expansion of open MEPs.

The American Retirement Association remains committed to creative ways to help close the retirement plan coverage gap, sheltered and supported by prudent oversight, and fueled by private sector engagement and innovation. And, whatever interim disruptions in product or process may result from the expansion of open MEPs, I am confident that the committed professionals in our industry will not only survive, but thrive as we continue to find new ways to help build America's retirement. PC

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


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RMD Compliance Concerns for Plan Sponsors

Failure to satisfy the RMD requirements can result in costly compliance errors.

BY GARY BLACHMAN & SHALINA SCHAEFER

At age 70½, the IRS requires plan participants to begin taking required minimum distributions (RMDs) from all employer-sponsored retirement plan accounts funded with pre-tax contributions. The RMD rules also apply to IRA-based plans such as SEPs, SARSEPs and SIMPLE IRAs, and to inherited Roth IRAs when someone other than a spouse is a beneficiary.

Since RMDs can significantly wear away accumulated retirement savings, it is essential to minimize them if possible. However, RMDs and the withdrawal process are quite complicated. Fortunately, there are some solutions that can be implemented to protect plan sponsors and their participants.

If the IRS discovers an RMD violation upon audit, the consequences for the plan sponsor can be severe. A plan sponsor's history of not correctly processing RMDs can lead to disqualification of the entire retirement plan. Fortunately, the IRS does not rush toward plan disqualification and typically permits the plan sponsor to correct the error in a way that is least harmful to plan participants. Even still, the IRS can make the life of a plan sponsor extremely uncomfortable if RMD failures are discovered upon audit. Following are four tips to avoid that situation.

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How to Calculate RMDs

Your RMD is calculated by dividing the balance in your tax-deferred accounts as of Dec. 31 of the immediately preceding calendar year by a life expectancy factor prescribed by certain IRS tables in IRS Publication 590-B. There are three life expectancy tables:

- The Uniform Lifetime Table is used to calculate RMDs during your lifetime unless your sole designated beneficiary is your spouse who is more than 10 years younger than you.
- The Joint and Last Survivor Table is used to calculate RMDs during your lifetime, but only if your sole designated beneficiary is your spouse who is more than 10 years younger than you. This table produces a lower RMD payment in recognition of the longer life expectancy of your spouse beneficiary.
- The Single Life Expectancy Table is used to calculate RMDs after your death with respect to your beneficiaries.

The RMD must be calculated separately for each IRA owned by an individual, but the total RMD amount can be withdrawn from one or more of the IRAs. This same aggregation rule applies to 403(b) contracts. However, RMDs from other types of retirement plans, such as 401(k) plans and 457(b) plans, must be taken separately from each of those accounts.

1. REVIEW CURRENT RMD PROCESSES AND IDENTIFY COMPLIANCE CONCERNS

Plan sponsors can benefit from taking a proactive approach to review records of current and former employees and determine any compliance concerns with processing RMDs. When errors are identified, the plan sponsor should take prompt action under the IRS's correction procedures to preserve the plan's qualified status. As part of the correction process, the plan sponsor can also request waiver of the penalty tax on behalf of affected participants. In an effort to encourage compliance, the IRS has made these correction procedures fairly straightforward and much less costly to the plan sponsor than correcting an error under IRS audit.

2. ESTABLISH AND FOLLOW MISSING PARTICIPANT PROCEDURES

Sometimes RMD errors occur because the plan sponsor is unable to locate former employees who are due an RMD. In these situations, the IRS has issued field guidance that directs examiners not to challenge a plan for failure to comply with the RMD rules in cases where the plan has taken specific steps to locate the participant and those steps have not been effective. A plan sponsor that adopts and follows the guidance considered by IRS examiners should be able to demonstrate its efforts to locate missing participants and avoid sanction under audit.

3. ADOPT A DEFAULT RMD PAYMENT PROCEDURE

Plans that are not subject to qualified joint and survivor annuity rules generally may be amended to provide that RMD payments will be automatically distributed to employees who do not respond within a certain timeframe. This aids in plan compliance and protects the participant who would be subject to the 50% penalty tax for failure to timely take an RMD payment. This amendment requires coordination with the recordkeeper, and even if the plan may permit automatic distributions, not all recordkeepers are administratively able to make distributions without participant consent.

4. EDUCATE PARTICIPANTS ABOUT THEIR RESPONSIBILITY TO TAKE RMDs

As with most plan provisions, it is extremely important for plan sponsors to educate their employees regarding RMDs, particularly as the employees approach retirement age. Plan sponsors should work with their recordkeeper to ensure that employees receive notification of their requirement to begin taking RMDs, and the potential penalties for not taking RMDs.

A failure to satisfy the RMD requirements can result in costly compliance errors for both participants and plan sponsors. For this reason, it is important for plan sponsors to provide appropriate education so that participants fully understand the RMD rules. PC

Editor's Note: *The is the first of a two-part series on RMDs. Look for Part 2, on taxpayer concerns with RMDs, in the Spring issue.*

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Congress Seeks to Help with Student Loans

Solutions to the student loan/retirement saving conundrum abound on Capitol Hill.

BY JOHN IEKEL

Education and retirement security. The path to one may come at the expense of the other – quite literally. Many students – and some parents, too – take loans to pay for the college education that will help young people to establish a career. But those loans must be paid off, which causes many to delay saving for retirement.

The executive branch is well aware of the issue. In 2018, the IRS issued a private letter ruling (PLR) permitting a 401(k) plan to be amended to include a student loan benefit program. The IRS issued that PLR to Abbot Labs, which had set in place a program through which full- and part-time employees who qualify for the company's 401(k) and who also contribute 2% of their eligible pay toward student loans are eligible to receive an amount equivalent to the company's match deposited into their 401(k) plan. Program recipients receive the match even if they do not make any 401(k) contribution of their own, and the program does not require them to do so.

In the PLR, the IRS allowed the amendment to the plan and said that student loan repayment nonelective contributions under the program would not violate the "contingent benefit" prohibition.

The Treasury Department subsequently followed up in its 2020 priority guidance plan, stating its intention to issue guidance on student loan payments and qualified retirement plans and 403(b) plans.

ON CAPITOL HILL

In Congress, lawmakers in both chambers and hailing from both parties are seeking to help address the student loan conundrum and provide relief to those who have taken loans, as well as help them save for retirement earlier.

Two bill are currently pending in the Senate Finance Committee. The first appears to build on the IRS's 2018 PLR. The Retirement Parity for Student Loans Act (S. 1428) authored by Sen. Ron Wyden (D-OR), Ranking Member of the Senate Finance Committee, would allow 401(k), 403(b), SIMPLE and governmental 457(b) retirement plans to make matching contributions to workers as if their student loan payments were salary reduction contributions. It seeks to address the current-law stipulation whereby employers can only make a matching contribution to a 401(k) if an employee is also making contributions.

Under Wyden's bill, plan sponsors could choose to offer such a program, but would not be required to do so. If a plan chooses to offer this option, however, the benefit must be made available to all workers eligible to make salary reduction contributions and receive matching contributions on those salary reduction contributions. The benefit would apply only to repayments of student loan debt that was incurred by a worker for higher education expenses, and employees would be required to provide evidence of their student loan debt payments.

The bill stipulates that the rate of matching for student loans and for salary reduction contributions must be the same. In addition, special rules would apply if a worker makes both salary reduction contributions and student loan repayments, such that student loan repayments would only be taken into account to the extent a worker has not made the maximum annual contribution to the retirement plan.

Similarly, the Retirement Security and Savings Act of 2019 (S. 1431) authored by Sen. Rob Portman (R-OH) also includes a provision that would allow matching contributions for qualified student loan payments under certain circumstances.

And lastly, Sen. Bernie Sanders' (I-VT) College for All Act (S. 1947) introduced in June would eliminate tuition and fees at all public four-year colleges and universities, as well as make community colleges, trade schools, and apprenticeship programs tuition- and fee-free. It also would forgive outstanding federal student loans, which amount to $1.6 trillion owed by 45 million Americans. Rep. Pramila Jayapal (D-WA) sponsored the House version of Sanders' bill, H.R. 3472. PC

DOL Focuses on Small-amount Force-out Rules

The Department's "lost souls" enforcement efforts are expanding to include active investigations.

BY BOB TOTH

The IRS, DOL and the PBGC have been engaged in a joint agency effort to deal with the seemingly intractable issue of "missing participants" – that is, what do you do with a defined contribution account balance when the participant cannot be found? To the regulators, this "lost souls" problem had become a particularly urgent concern when it involved returned or uncashed checks following a plan termination distribution or from the payment of required minimum distributions (RMDs).

2014 GUIDANCE FROM DOL

The DOL was the first in with guidance, issuing Field Assistance Bulletin 2014-01, outlining the fiduciary obligations to find missing participants in terminated defined contribution plans. It identified four "required" search steps which a fiduciary must follow when dealing with a terminated plan's missing participants:

1. send a model notice by certified mail to the participant's last known address;
2. check "related" plan and employer records;
3. check with named beneficiaries; and
4. use free electronic tools.

Since then, the DOL has added two more requirements to that list: (1) interview co-workers to find the missing participant's location; and (2) all of the steps taken must be documented.

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PBGC'S EXPANDED MISSING PARTICIPANT PROGRAM

This joint-agency effort subsequently resulted in the development of rules to permit terminating DC plans to turn over their assets to the PBGC for them to find lost participants. The so-called "Expanded Missing Participant Program" is available to plans that are not covered by the PBGC.

Congress authorized this program under the PPA, and final regulations were issued at the end of 2017. (If you want details on how this useful program works, the PBGC maintains a website on it at https://www.pbgc.gov/prac/missing-participants-program.)

2017 IRS GUIDANCE ON RMDS

The IRS followed suit by issuing guidance in October 2017 describing the efforts that plan administrators need to take when required minimum distributions were returned or left uncashed. Under those rules, a plan administrator would not be viewed as violating the RMD rules for these participants if it took the following steps to find the missing participants:

- search plan and related plan, sponsor and publicly available records or directories for alternative contact information;
- use any of the following search methods: a commercial locator service, a credit reporting agency, or a proprietary internet search tool for locating individuals; and
- attempt contact via United States Postal Service (USPS) certified mail to the last known mailing address and through appropriate means for any address or contact information (including email addresses and telephone numbers).

RECENT EXPANSION AT DOL

These enforcement efforts focused on termination distributions and required minimum distributions. However, the DOL began to add these "lost participant efforts" to their active investigations for all other distributions. The DOL began demanding that employers monitor returned participant statements to determine whether participants can be located, and that employers update their records annually for current addresses for terminated employees. The DOL also insisted that a fiduciary breach has occurred if these ad hoc requirements are not followed, and that forfeiting missing participant balances is a prohibited transaction.

According to DOL staff, many of these concerns arose from their finding bad-actor employers that actively ignored terminated participants in order to defeat their ERISA rights.

These efforts at finding lost participants have now been expanded in efforts to make sure that the small-amount force-out rules under plans are being fully met. Under ERISA and the Code, an employer cannot force out a participant's account balance until the participant's normal retirement date, typically age 65. The exception to this rule is that the plan may adopt a plan term under which the participants' "small amounts" may be forced out of the plan. The employer may cash out sums of less than $1,000 or force a rollover into an IRA of amounts of up to $5,000. The sponsor can have no discretion once this rule is adopted by the plan – it must always be done.

> "The DOL has expressed concern that participants are somehow being disadvantaged by a plan's failure to timely comply with these force-out rules."

The DOL has expressed concern that participants are somehow being disadvantaged by a plan's failure to timely comply with these force-out rules. This approach makes little sense, given that accelerating a force-out will inevitably put the participant at a disadvantage, in that:

- if they receive cash, it will be immediately taxable– and often subject to a 10% penalty; and
- forcing sums into an IRA can disadvantage the participant with higher-cost investments than are available in the plan, and without the advantage of the plan's fiduciary oversight of investments.

Nonetheless, this effort is being pursued. Consider advising your clients and their recordkeepers to review their force-out procedures, and to follow them – which will include, by the way, engaging in the same lost participant procedures that were established when checks remained uncashed following plan terminations and RMDs. PC

Bob Toth, a longtime member of ASPPA, has practiced employee benefits law since 1983. He is the principal in the Law Office of Robert J. Toth, Jr., LLC, in Fort Wayne, IN, a Fellow of the American College of Employee Benefits Counsel, and author of "The Business of Benefits" blog.

MARIAN WEYO / SHUTTERSTOCK.COM

To Freeze or Not to Freeze, That is the Question

What are the advantages and disadvantages of freezing a plan?

BY KIM CORONA

Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune,
Or to take arms against a sea of troubles,
And by opposing end them?

— *Hamlet*, William Shakespeare

We are in the business of helping clients with those slings and arrows of outrageous fortune. Clients who set up defined benefit/cash balance plans are experiencing outrageous fortune, which is why they come to us for retirement plan strategies to maximize their tax deferral (think of taxes as slings and arrows). We take up arms (Code Section 401, as an example) and eventually, we do end them (think of the retirement plans as "them," and eventually they all do come to an end).

Any student of Shakespeare is aghast by now. But we have our talking points, specifically the ending of defined benefit/cash balance plan contributions.

While this article focuses on cash balance plans, the rules are the same for traditional defined benefit plans. Also, this article does not address the administrative and compliance issues associated with a plan freeze.

BACKGROUND

You work with a plan sponsor who maintains a 401(k) profit sharing plan. They come to you late in their fiscal year and ask how they can contribute more money into their plan. Since you have already designed a great plan using safe harbor and cross-testing features, the answer lies in establishing a cash balance plan.

You take last year's census and forward it to your actuary. The resulting combo plan design looks great, and you present it to the client. In your presentation, you explain a few things that work differently in a cash balance plan compared to the 401(k) profit sharing plan that the sponsor already knows. One of those things is the way the so-called permanency requirement works.

The permanency requirement is referenced in Treas. Reg. Sec. 1.401-1(b)(2), which really doesn't say much. Rev. Rul. 69-25, Rev. Rul. 72-239 and the IRM 7.12.1.3 provide a little more detail. The quick summary is that if a cash balance plan doesn't exist for 10 years, there is a presumption by the IRS that the plan was not established to be permanent. The sponsor must then demonstrate that there is an underlying business necessity that resulted in the plan termination. Facts and circumstances must be presented. Such events as insolvency or bankruptcy, mergers and acquisitions that could not have been foreseen when the plan was established, and the establishment of a successor plan typically qualify. These are not the only qualifying events, and we should be able to extend this IRS list to include, for example, a major downturn in the plan sponsor's industry.

SCENARIO #1

Our sponsor loves the combo plan design, sets it up and at the end of the second year, her spouse initiates a divorce. She is going to need to keep more assets liquid and not tied up in a retirement plan. What do you tell the sponsor? Is there a permanency issue if the cash balance plan is terminated after

> “There should be no permanency issues when reducing the amount of benefits being earned or when freezing a plan, even early on in its life.

3 years in this case? Possibly, yes, under the IRS presumption, terminating at this time could disqualify the plan.

The divorce is an isolated event. You recommend that the sponsor freeze the cash balance plan. When more money is available to resume contributions, cash balance credits can resume by an amendment. Does such a freeze trigger any permanency issues?

SCENARIO #2

A second plan sponsor, who came to you a year later with the same fortune, calls you just two days after hearing from our soon-to-be divorcee. It is actually the daughter of the sponsor's owner who reaches out to let you know her dad passed away 3 weeks ago. At age 30, she will become the new owner of the business.

Since this plan design was based upon a single older owner benefitting at the Section 415 limit, his passing destroys your superior plan design. Furthermore, this new owner is still repaying college loans, and is not in a position to contribute to a cash balance plan; the DC limits are sufficient. What do you tell the plan sponsor? Is there a permanency issue if the cash balance plan is terminated after 2 years in this case? Possibly, yes, under the IRS presumption, terminating at this time could disqualify the plan.

Another potential case for a permanency issue in this scenario is the language in the Treas. Reg. that uses as an example a pension plan that is abandoned after fully funding a benefit for an owner. Would the IRS deem this case to fit that example? Or would this case instead be considered an acquisition? If so, there is no permanency issue.

Given the situation for this client, you recommend that the sponsor freeze the cash balance plan for a few years, at which time her student loans are expected to be repaid. At that time, cash balance credits can resume by an amendment. Does such a freeze trigger any permanency issues?

A VERY BRIEF ANALYSIS

If we look back to our Treas. Reg., it states that the employer can change a plan at any time. An amendment to reduce or eliminate cash balance credits is just a change to the plan. There should be no permanency issues when reducing the amount of benefits being earned or when freezing a plan, even early on in its life.

Our scenarios focus on situations where a total cessation of credits was needed. There are also circumstances where a reduction is preferable. Perhaps the client just needs to scale back the size of contributions, either for a few years or permanently. Many considerations for reducing credits are the same as for freezing them. Either option requires advance notice to participants and is a change to the plan terms.

One major difference is that a reduction can be designed to satisfy the minimum participation test, which is often necessary. Consider a typical plan design where most NHCEs receive an annual cash balance credit that just satisfies the meaningful benefit requirement each year. If such a plan is frozen, it will likely fail the minimum participation test (which is based upon those meaningful benefits) in the year of the freeze (unless, for example, 40% of plan participants are HCEs who had much higher cash balance credits).

GENERIC IMPLICATIONS OF A PLAN FREEZE

1. Participants must be notified at least 15 days (45 days if there are more than 100 participants) before a reduction, or elimination, of their cash balance credits. Consider the impact of providing such notice to staff.
2. New cash balance credits will not be added to participants' accounts. Interest credits will continue to be earned. Vesting service will continue to be earned.
3. New employees will not be allowed to enter until the plan is unfrozen, so some employees are covered and some are not.
4. Because of the actuarial nature of the funding requirements, it is possible that the employer may still have to make contributions if the assets underperform. Since often plans that freeze are not well funded, there is substantial risk that employer contributions will still be required.
5. If a well-funded plan is frozen, all participants must become immediately 100% vested, regardless of their service.
6. All administrative requirements, including valuations and PBGC premiums, continue as usual.

7. If a plan is frozen for several years, it may fail the minimum participation test (based on meaningful benefits) and may need to be amended to provide cash balance credits to a group of participants (but not necessarily all.)

GENERIC ADVANTAGES OF A PLAN FREEZE

1. A plan freeze might allow a plan to continue while eliminating employer contributions for a while. "A while" would be determined by asset performance and the funded status at the time of the freeze. If assets earn 8% on average, the plan could certainly remain frozen for some time. If assets earn at the cash balance interest crediting rate net of fees, the plan could also remain frozen for some time with no employer contributions, but not indefinitely.
2. A freeze is a good way to buy time to determine an optimal retirement savings strategy in the light of recent events.
3. A freeze can be reversed at any time (keeping Section 436 restrictions in mind).

GENERIC DISADVANTAGES OF A PLAN FREEZE

1. The perception of staff is a consideration. They will see that something is being taken away in their compensation packages (but of course, there may be other things offsetting, like more expensive health care benefits). New hires will have different benefits than current employees do.
2. The profit sharing plan will need to pass the nondiscrimination testing on its own, without the benefit of the current cash balance credits. If the cash balance plan is well-funded, based upon the way the funding liabilities are calculated, continuing cash balance credits could be funded by existing assets, which could reduce the amount the employer has to deposit for the profit sharing source.
3. Note that Items 5 and 7 in the "Generic Implications" list above are generally disadvantages. **PC**

Kim Corona, EA, MSPA, FCA, is an actuary with Cash Balance Actuaries, LLC, in Excelsior, MN. She worked on her first cash balance design and valuation spreadsheet 20 years ago as an actuarial assistant and since then has serviced all types of qualified retirement plans in themicro-size plan market.


EQUAL JUSTICE UNDER LAW


GARY BLAKELEY / SHUTTERSTOCK.COM

Full Court 'Press'

The nation's high court will hear three ERISA cases in this year's term.

BY NEVIN E. ADAMS, JD

After more than two years without hearing a single ERISA case, the U.S. Supreme Court will decide three of them during its current term. Here's a look at what's at stake.

IBM V. JANDER

In *Ret. Plans Comm. of IBM v. Jander*, the Court agreed to consider whether the "more harm than good" pleading standard established by *Fifth Third Bancorp v. Dudenhoeffer* can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.

The plaintiffs in the case alleged that the IBM defendants failed to prudently and loyally manage the plan's assets and adequately monitor the plan's fiduciaries.

Under the *Fifth Third* standard, plaintiffs must "plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."

Jamie Fleckner, chair of Goodwin Proctor's ERISA litigation practice, points out that there was a decline in this kind of stock-drop litigation following the *Dudenhoeffer* decision. But he notes that the 2nd Circuit's *Jander* decision appeared to allow a loophole that, if allowed to stand, may mark a return to the rapid pace of litigation involving company stock, particularly if there is a market downturn and more stocks held in DC plans decline in value.

ERISA attorney Nancy Ross, a partner at Mayer Brown LLP in Chicago, notes that the *Dudenhoeffer* "more harm than good" standard "leaves a lot of discretion for the courts, and places them in the role of judging business decisions" as much as fiduciary conduct. "The revised standard collides head on with the responsibility of a fiduciary to be prudent, not prescient," she explains, going on to note that it has not produced "clarity as to what this standard requires of fiduciaries in real world circumstances."

It seems at least possible that the Supreme Court might clarify *Dudenhoeffer*, particularly regarding whether a plaintiff must plausibly allege that no prudent fiduciary "would have," rather than "could have," viewed action as more likely to cause harm than not. As ERISA attorney Matthew Russell of Morgan Lewis & Bockius LLP notes, "'Would' suggests what an average, prudent fiduciary would do, while 'could' suggests the realm of possibility, making the latter standard more difficult for plaintiffs."

The Court heard oral arguments in the case Nov. 6, 2019.

INTEL CORP. V. SULYMA

While each of the cases under review has the potential for a dramatic impact on advisors, *Intel Corp. Inv. Policy Comm. v. Sulyma* may be the one "most ripe for the Supreme Court to go beyond the questions asked and create new law," says the Wagner Law Group's Tom Clark.

The original lawsuit was filed in November 2015 by former Intel employee Christopher Sulyma. It charged that Intel's investment committee boosted the $6.66 billion profit-sharing plan's allocation for hedge funds in the firm's target-date portfolios from $50 million to $680 million, while at the same time the allocation for hedge funds in the diversified global fund rose from $582 million to $1.665 billion, and private equity investments from $83 million to $810 million, between 2009 and 2014.

The suit claimed that participants were not made fully aware of the risks, fees and expenses associated with the hedge fund and private equity investments, or of the underperformance of the company's target-date and global diversified funds compared to their peers, and that as a result participants "suffered hundreds of millions of dollars in losses during the six years preceding the filing of this Complaint as compared to what they would have earned if invested in asset allocation models consistent with prevailing standards for investment experts and prudent fiduciaries."

The essence of IBM's response is that Sulyma can't bring suit because the plan disclosures gave him "actual knowledge" of all information necessary to challenge the Intel plans' investments and fees – even though he claimed not to have read them or remember whether he had read them.

In fact, "actual knowledge" is not defined in ERISA, and although courts have attempted to define its meaning, they have arrived at differing interpretations. In this case, the 9th Circuit determined that it requires a showing that the plaintiff was "actually aware of the nature of the alleged breach more than three years before the plaintiff's action was filed."

Mayer Brown's Ross notes that the case "essentially eviscerates the more limited time period for challenging fiduciary conduct, as it is very difficult to show even with discovery that a plaintiff actually read the plan disclosures." Adds Russell of Morgan Lewis & Bockius, "A ruling in Intel's favor could have a widespread impact on the potential exposure of plan sponsors and fiduciaries in similar lawsuits. Holding that plan participants have 'actual knowledge' of plan disclosures sent to them in compliance with ERISA's regulations could extinguish some claims altogether, and halve the defendants' potential exposure in others."

The Court heard oral arguments in the case Dec. 4, 2019.

JEJIM / SHUTTERSTOCK.COM

THOLE V. U.S. BANK

The last case involves a suit by participants in U.S. Bank's pension plan who, after the plan fiduciaries alleged mismanagement resulted in $750 million in losses to the plan, brought suit – even though they have not yet suffered any individual harm.

At issue was U.S. Bank's 2007 decision to invest all $2.8 billion of its pension fund's assets in what was described as "high-risk" equities, including more than 40% in its own proprietary mutual funds, "even though they were more expensive than similar alternatives." This, the plaintiffs alleged, not only "flouted" ERISA's prohibited transaction rules, but also "violated basis fiduciary principles of prudence and loyalty."

When the markets crashed in 2008, the plan lost $1.1 billion, which the plaintiffs claim was $748 million more than an "adequately diversified plan would have." That loss "left the plan reeling," they claim, and "virtually overnight the plan went from significantly overfunded to 84% underfunded."

The 8th U.S. Circuit Court of Appeals rejected those claims, noting that the bank's pension plan had recovered (thanks in no small part to a substantial contribution to the plan by the employer) and was now in a healthy financial condition (more precisely, it was overfunded), which meant the participants hadn't suffered any actual losses.

Ross explains that the *Thole* case raises an important standing question regarding DB plans. "If participants can challenge plan funding without showing an actual risk of harm, the litigation floodgates will open every time plan funding takes a dip," she says. "That upsets the fundamental balance at the core of ERISA in protecting promised benefits while limiting a plan sponsor's risk of liability if it pays what it commits to."

The Court is scheduled to hear oral arguments in the case on Jan. 13, 2020. PC

Am I Smarter Than a *What?*

ASPPA Annual 2019 celebrated 50 years of peace, love and pension geekdom.

By John Ortman & John Iekel
Photography: Event Photojournalism

The 1,000-plus attendees at the 2019 ASPPA Annual Conference were treated to a jam-packed program agenda, networking opportunities and the kind of camaraderie that has been an ASPPA Annual hallmarks for years.

Attendees at this year's conference chose from 90 workshops in four specialized tracks — TPAs, Recordkeepers, Defined Benefit, and Business Owners and Managers — and five general sessions featuring the foremost thought readers in the industry. And at Tuesday night's concert, ASPPA Nation rocked out to a concert by "Groovin' on Tour," marking the 50th anniversary of Woodstock.

Other features of this year's conference included the biennial Meetings on the Hill with members of Congress and staff, a rousing "Are You Smarter Than a Pension Geek?" general session, a sneak peek at the revamped QKA credential coming in 2020, a larger-than-ever exhibit hall, and a 4.01K Fun Run/Walk.

DOL Unveils New E-Delivery Safe Harbor

Addressing the conference on Oct. 22, the Honorable Preston Rutledge, Assistant Secretary of Labor for the Employee Benefits Security Administration, announced the agency's optional electronic delivery safe harbor for retirement plans.

The proposal – which fulfills a key component of President Trump's August 2018 Executive Order on retirement security – would allow plan administrators who satisfy specified conditions to provide participants and beneficiaries with a notice that certain disclosures will be made available on a website.

"Electronic disclosure has been a priority issue in the retirement benefits world for a number of years," said Rutledge. "As you know, ERISA requires that employers provide workers with a number of disclosures containing important information," he said. "These rules specify not only what information be disclosed to plan participants, but DOL regulations also prescribe how that information should be disclosed to participants."

Rutledge noted that rules EBSA issued in 2002 created a safe harbor that permitted electronic disclosure to workers who affirmatively consent to it, or who are using computers as an integral part of their job duties. "Stakeholders over the years have raised concern with the effectiveness of the 2002 safe harbor," said Rutledge, adding that "specifically, stakeholders have said that the safe harbor is out of date and restrictive, especially the affirmative consent requirement."

The proposed safe harbor would be in addition to the 2002 safe harbor, thus allowing plan sponsors and administrators to choose between the two safe harbors or use both safe harbors, selecting the best approach for their plan population.

"We've heard repeatedly from employers and plan service providers that they can use enhanced technology to improve workers' disclosures. In addition, electronic disclosure can create efficiencies, cost reductions that do not exist when disclosures must be delivered by mail in paper. So, we recognize that a lot has changed since that safe harbor was issued in 2002," said Rutledge, continuing, "Today, plan participants want and expect greater access to information electronically."

Individuals who prefer to receive disclosures on paper would still be able to request paper copies and to opt out of electronic delivery entirely. Moreover, administrators may not default disclosures to electronic formats without first notifying – via paper – the ability to opt for paper disclosures.

The proposal acknowledges that in the case of a company-provided email, or a company-issued mobile smartphone (with a data plan) and corresponding mobile phone number could also be used to satisfy this condition. Alternatively, the proposal also allows an employee to provide a different, personal email address to the administrator.

DOL Assistant Secretary Preston Rutledge at the Oct. 22 Government Update general session.

American Retirement Association CEO and ASPPA Executive Director Brian Graff said to Rutledge that "as an organization that has been working with the departments to try and improve and make more sensible disclosure rules for retirement plan participants, we just want to thank you for your leadership" in the matter.

The DOL expects the proposal to expand use of internet technology to furnish covered disclosures to workers and to result in approximately $2.4 billion net cost savings over the next 10 years for ERISA-covered retirement plans by eliminating materials, printing and mailing costs associated with furnishing printed disclosures, Rutledge noted. Graff said that he thought that the DOL economists are correct that "we're talking about billions of dollars that are going to be to the benefit of American workers' retirement savings."

Good News and a MEP Update from Treasury's Carol Weiser

Carol Weiser, Benefits Tax Counsel at the Treasury Department, announced some good news about the deadline for amending plans for the newly final hardship withdrawal regulations at the conference.

Weiser clarified that the deadline for amending preapproved plans to incorporate the September 2019 final rules on hardship distributions is being extended.

The amendments must be made by the due date of the employer's tax return that includes Jan. 1, 2020, Weiser said, even if the amendment is effective before that date. Practitioners had been concerned that if plans changed their hardship withdrawal policies and procedures to follow the final rules in 2019, they may be faced with an unreasonably short period of time in which to amend the plan to reflect those new policies and procedures – such as the due date for the 2019 tax return.

Turning to the July 2019 IRS/Treasury proposed rule on MEPs, Weiser described regulators' efforts to mitigate the adverse impact of the one-bad-apple-rule under Code Section 413. Noting that the tax code has always defined a MEP as a single plan in which multiple employers participate, Weiser added that the regulations under Section 413 apply to each participating employer – and that if one participating employer has an issue with its plan, that has the potential to "taint" the entire MEP.

"There was a concern that this created a disincentive for employers to participate in a MEP, and we were directed to see what we could do to try to mitigate that disincentive – without interfering with the basic principles governing qualified plans," she said. "So the regulations that we proposed do provide for an opportunity for the administrator of a MEP to take action

Pinnacle COO Amanda Iverson (L) and facilitator Shannon Edwards, President of TriStar, spoke about "crucial conversations."

At Sunday's Washington Update, CEO Brian Graff was joined by the ARA's General Counsel Allison Wielobob, Chief Government Affairs Officer Will Hansen and Director of Legislative Affairs Andrew Remo (R-L).

ERISA attorneys Derrin Watson (L) and Craig Hoffman broke down the DOL's new rules on MEPs and ARPs.

to deal with an employer that either is not responding to a qualification issue or the administrator knows there is a qualification issue."

"The basic fix is that the plan administrator would be able to facilitate a spinoff and a termination of the plan attributable to that employer. But there are a number of conditions that are designed to ensure that this is not a situation in which the plan administrator is acting precipitously," Weiser said. "The proposed regulations specify a number of steps that the plan administrator would have to follow – basically a series of notices that the administrator would have to provide the employer about corrective steps that must be taken." The threshold requirements used in this procedure are based on those under the IRS EPCRS program, she noted.

Best Practices in Mitigating Distribution Risks

Overpayments, paying the wrong person, violation of timing rules… is it worth being involved with distributions given all the associated risks?

The answer, said workshop presenter Kelly Marie Hurd, Director of Plan Consulting at Qualified Retirement Plan Services, is "probably not, but what choice do you have?"

Signing Authority

Signing authority is one of the important functions that distributions entail. Taking on signature authority has advantages (faster turnaround time and control over final instructions) as well as disadvantages (liability and the possibility that it may be necessary to deal with unhappy participants).

An additional factor to consider regarding signing authority, observed co-presenter Robert Richter, the American Retirement Association's Retirement Education Counsel, is that one is a fiduciary if one has authority or control over plan assets. "You don't have to have discretionary authority to be a fiduciary. If you have authority over plan assets, you are a fiduciary," he

MATRANGOLA WELCOMED AS 2020 PRESIDENT

ASPPA welcomed Miriam ("Missy") Matrangola, Esq., QKA, QPA, as the 2020 President of the organization during the Oct. 20 Business Meeting kicking off the 2019 ASPPA Annual Conference.

Matrangola has worked in the industry since 1984, and has been an ASPPA member since 1997. She is the President of Atlantic Pension Services, Inc., an independent, non-producing TPA in Kennett Square, PA which she founded in 1992.

A member of ASPPA's Leadership Council since 2016, Matrangola also has been active in The Greater Philadelphia ASPPA Benefits Council and has served as ABC Co-Chair and Regional Conferences Co-Chair.

Joining Matrangola as ASPPA Officers for 2020 are:

- *President-Elect:* Frank Porter
- *Vice President:* Natalie Wyatt
- *Immediate Past President:* James R. Nolan

In addition, Shannon Edwards, ERPA, QPA, QKA, APR, was elected to the sole open seat on the ASPPA Leadership Council. Edwards is the owner and President of TriStar Pension Consulting in Oklahoma City, OK.

"Missy" Matrangola, ASPPA's incoming President, thanked her predecessor Jim Nolan for his service to the organization.

ASPPA members braving the rain during this year's meetings on Capitol Hill.

said. And that authority and control is different than control over management or administration of the plan.

Authentication

Another critical function is authentication. "There are sophisticated fraudsters out there," Hurd warned. There are some ways to confirm that one is dealing with an actual participant, although they are not perfect and do entail some pitfalls:

- phone verification of information (although someone who has stolen an identity may have this anyway);
- sending information through company email address (although this is not helpful with terminated participants); and
- delay distribution requests until verification (but recognize that adding time can create stress).

One best practice, Hurd said, is to require that all requests come through a verified plan sponsor contact. But that too has a downside, she noted: "not every client is going to want to do that." Among the reasons for that:

- it may not go over well with all clients;
- it may mean placing an additional burden on someone who may already have a lot on their plate; and
- clients may have the feeling that they are paying you to deal with the matter.

Paper vs. Electronic

Whether to use paper forms or use electronic means to receive requests "is another issue that has been coming up," said Hurd. "In our experience," she said, "paper is more familiar for participants, especially older participants." She noted that there are advantages to electronic requests; for instance, she said, the fact that online requests have stronger authentication requirements is "a strong reason" for electronic requests. But she also noted that there are disadvantages; for instance, it may be challenging for participants who lack technological expertise to access electronic forms, and electronic notifications may not reach the correct person.

Distribution

Hurd emphasized the importance of knowing the rules, remarking, "You need to know what the rules are in order to be able to follow them." She and Richter recommended promoting training in a way that makes people familiar with the nooks and crannies of every requirement. Hurd added that her firm has made updating everything on the website an important last step.

Spousal Consent

Hurd and Richter identified a variety of issues concerning spousal consent. One is verification. Said Richter, "There is a risk that when you send a check, if it goes to someone else, the plan may be liable. Things to remember about spousal consent include that it must:

- be in writing;
- provide that no change may be made without spouse's consent or it must expressly permit changes without spousal consent;
- acknowledge the effect of the election; and
- be witnessed by a plan representative or a notary public.

Panel Reveals TPA Magicians' Secrets

TPAs do a lot of things. But the end result – employees and clients served well – doesn't happen by magic. Or does it? A panel of TPA executives Justin Bonestroo, Senior Vice President, CBIZ; Shannon Edwards, President, TriStar Pension, LLC; and William Presson, Executive Vice President, EGPS, Inc. – pulled back the curtain on some best practices behind the magic.

Technical Resources

The panelists use a variety of ways to deploy technical resources in fulfilling and supporting their functions.

"As a national firm, it's important that our work product has consistency," said Bonestroo. One way that CBIZ does that is that it has put together an electronic group to share questions and answers across the country. This, he said, saves the amount of time spent if the same question comes up repeatedly in different parts of the country. He added that the resource also helps them to be proactive and better make companywide decisions. Presson added that EGPS similarly has set up an email group and is building an internal resource to handle frequently asked questions. TriStar Pensions, too, has a resource to whom staff can pose questions, Edwards said.

TriStar uses technical resources in an additional way, Edwards told attendees. They require that every employee – even support staff – take the QKA exam and really learn the material; further, they require staff to participate in webinars after they earn their designations to stay sharp.

An additional technical concern is meeting remote employees' needs. Presson called it their "biggest challenge" and said that having electronic versions of resources available to employees is one

Moderated by Bob Kaplan, this year's Ask the Experts panel featured Brian Furgala, Kizzy Gaul, Jennifer Swets, Kelsey Mayo and Tom Finnegan (L-R).

No you didn't: Contestant Andrew Behnke shows off his HP-12C tattoo. In the display window: his ASPPA membership number.

key. "It's a huge issue," Bonestroo agreed, adding that "communication is key."

Time Tracking

Keeping track of time serves a variety of purposes, the panelists observed. They told attendees that it helps with:

- gauging how much time an employee is spending with a client;
- boosting revenue;
- adjusting how employees can best spend their time;
- determining how well-trained employees are;
- determining whether staffing is adequate and additional staff need to be hired;
- setting billable rates; and
- knowing which clients contact the service provider most frequently.

Setting Goals

Panelists set goals on employee-specific as well as macro levels. Presson said that EGPS sets goals throughout the year, and tracks compensation and adjusts it based on how well goals are being met. TriStar Pensions, on the other hand, works together as a team to set firm goals for the year and do what is necessary to meet them, Edwards reported.

Staff Growth

Panelists also shared some of their firms' approaches to new employees and staffing in general. Presson said that EGPS handles training internally, but also circulates a calendar of in-house and externally provided educational opportunities every Friday. TriStar Pensions tries to make sure that employees are happy in

HOCHMAN, FORBES WIN 2019 ASPPA AWARDS

ASPPA honored Rich Hochman and Stephen Forbes with prestigious industry awards during the Oct. 20 opening session.

Hochman was awarded the Harry T. Eidson Founders Award for 2019. An industry veteran with more than three decades of experience, he is a Past President of ASPPA and was the recipient of ASPPA's Educator of the Year Award in 2012. He is best known as Managing Director of the McKay Hochman Co. He is a frequent speaker at industry forums, authors articles on retirement plan issues, and provides practitioner input to the IRS.

In addition, the 2019 Educator's Award was presented to Stephen Forbes, JD, LLM. An ERISA attorney and educator with 33 years of experience practicing and teaching in the retirement plan area, Forbes is currently completing a book on retirement plan corrections. Previously he was Vice President of SunGard Relius in charge of Relius Education. At SunGard, he taught seminars, conferences and web seminars on retirement plan compliance, design, and correction.

ASPPA Executive Director Brian Graff presented the Eidson Award to Rich Hochman.


Ludwig

order to retain them, Edwards reported. And CBIZ focuses on how work is being performed. "It's more than hiring people. It's also how it's getting done," Bonestroo said.

DB Regulatory Update

At their defined benefit regulatory update, speakers Tom Finnegan and Kelsey Mayo took attendees on a fast-paced tour of recent regulatory developments. Here's a look at three key developments.

Retiree Lump Sum Windows

In Notice 2019-18, the IRS reversed earlier guidance effectively prohibiting retiree lump sum windows, said Finnegan, a VP at CBIZ Retirement Plan Services. The IRS said it will not update previous regulations as indicated in IRS Notice 2015-49, which effectively ended those windows because they fail to satisfy the minimum distribution rules.

So why would a plan sponsor take advantage of the change in Notice 2019-18 and reinstate or implement a lump sum window? Finnegan touched on two reasons:

- the windows offer an opportunity to settle plan obligations, reducing financial statement volatility and reducing ongoing PBGC premiums; and
- to reduce administrative costs.

However, Finnegan cautioned that lump sum windows do create some unique challenges and potential drawbacks. First of all, lower take-up rates are typical, usually around 25%.

Second, they can cause anti-selection and lead to higher long-term costs. Typically, both healthy retirees and those in poor health tend to choose the most valuable option, Finnegan explained. Healthy retirees are more likely to reject the lump sum and continue annuity payments based on their healthy life expectancies — which is the more expensive choice for them. And retirees in poor health will welcome the opportunity to take a lump sum based on *their* life expectancies, which is the more expensive choice for *them*. All this could make an eventual annuity purchase for the remaining retirees in the plan substantially more expensive, Finnegan said.

And lastly, administration of retiree lump sum windows is complex, including benefit limits, MASDs, consent requirements, and more.

U.S. Sen. Bob Casey (D-PA) meets with ASPPA members in his Capitol Hill office.

EPCRS Changes Affect DB Plans

While most of the new provisions expanding the Self-Correction Program under the IRS's EPCRS program applied to DC plans, some of those provisions do apply to DB plans as well, noted Mayo, lead benefits attorney at the Poyner Spruill LLP law firm.

First, Mayo noted, is the expansion for retroactive amendments. "You may be able to use the new, expanded SCP to correct a DB plan without having to go into the Voluntary Compliance Program," she noted.

Also, all VCP filings must be done via the Pay.gov website, Mayo noted. Form 8950 is on Pay.gov. After figuring out the fee, it can be paid directly on Pay.gov, she said. The rest of the filing can be attached in pdf form, she said, but warned that there is a 15 megabyte size limit on attachments. Any pages over that limit must be faxed — that's correct, *faxed* — to the IRS.

Determination Letter Expansion and Hybrid Plans

In Rev. Proc. 2019-20, the IRS implemented a limited expansion of its determination letter program, Mayo said. After shutting the program down a few years ago, the agency is now accepting applications for certain individually designed hybrid plans for a 12-month period that began Sept. 1, 2019. (Merged plans are also included, she noted.) The IRS will be ruling not only on the hybrid plan provisions, but on everything else, Mayo noted. "It's a very generous waiver of any errors that they find with respect to the hybrid plan provisions," she said. "So if you do have a hybrid plan that you don't want to go onto the prototype for some reason, I would strongly consider putting it into the determination letter program."

See You in Chicago!

Remember to mark your calendar — after a long run at National Harbor, next year ASPPA Annual will move to Chicago, Oct. 25-28. See you there! PC

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NAVIGATING EPCRS

Nine best practices for using the IRS's correction program.

BY PHILLIP LONG

PLANS USE THE IRS'S EMPLOYEE PLAN COMPLIANCE RESOLUTION SYSTEM (EPCRS) to correct various challenges arising with retirement plans. Some of us may have consulted with EPCRS more than we wish, in some cases maybe so frequently that we've stopped referring to EPCRS's text and begun advising from memory! However, given EPCRS's detailed provisions, plan consultants and administrators should consider the text carefully.

This article describes some best practices and points to remember when using EPCRS in order to best position yourself in working with your plan administrators and the program.

01 KNOW EPCRS'S LIMITS

First, EPCRS's correction powers are not limitless. For most plan administrators, there are two avenues of correction: self-correction (SCP) and correction with the IRS's approval (VCP). (This article will not discuss "Audit CAP," which is a program under EPCRS used once a plan is under audit.) If the plan can meet EPCRS's eligibility and other requirements for SCP or VCP, then the IRS will not treat the plan as failing to meet the Code's requirements (e.g., Code §§ 401(a), 403(b), 408(k), or 408(p)). Sounds simple enough? Possibly, not. In using EPCRS, consider the following issues:

- ***Don't assume a plan administrator can always self correct a matter.*** A plan using SCP instead of VCP must meet SCP's numerous requirements (discussed below) in order to receive protection. A plan using SCP should document that it meets each of the EPCRS requirements.
- ***Make sure the plan is eligible under EPCRS.*** Only qualified plans, 403(b) plans, SIMPLEs and SEPs are eligible to participate, regardless of the plan's coverage under ERISA. Governmental 457(b) plans may seek provisional relief under EPCRS (and have some relief in the Section 457(b) regulations). Nonprofit 457(b)s plan generally aren't eligible for relief. Some types of nonqualified plans fall under an entirely different set of IRS guidance for correction. Don't use EPCRS for the wrong plan type!
- ***EPCRS is only binding on the IRS.*** The event triggering EPCRS's use may also be an ERISA fiduciary breach. A correction that is sufficient to the IRS under EPCRS may not be sufficient in a participant's opinion (with potential for litigation) or in the Department of Labor's opinion.

Thus, EPCRS is not a tool for plan administrators to use casually. Plan administrators should ensure EPCRS covers the particular plan issue (particularly when SCP is used) and understand that the program is only binding on the IRS.

02 CHOICE OF CORRECTION METHODOLOGY MAY BE A FIDUCIARY DECISION

For ERISA plans, ERISA Section 404 states that a fiduciary must operate the plan "in accordance with the documents and instruments governing the plan," and plan administrators often use EPCRS to remedy mismatches between the plan's operations and its governing instruments. Directing a particular correction can involve a discretionary decision under EPCRS, and it is possible that such discretion can be a fiduciary act under ERISA, which attaches fiduciary responsibility to the extent that someone "exercises any discretionary authority or discretionary control respecting management of such plan." However, this rule doesn't make all action with EPCRS "fiduciary" because, under Department of Labor Interpretive Bulletins, mere "recommendations to others for decisions with respect to plan administration" is not a fiduciary act.

Thus, making the decision on how to correct and directing the correction to occur could be a fiduciary act because that person may be exercising discretionary control over plan assets. Once fiduciary liability attaches, the decision must be made in the best interests of the plan and its participants and not the interests of the employer or service provider. Service providers that do not intend to be fiduciaries for plan corrections should limit the discussions to guidance provided by EPCRS, and allow the plan administrator to direct the correction.

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03 KNOW THE SCP REQUIREMENTS

Plan administrators often prefer SCP, when available, because it requires no involvement with the IRS and avoids an IRS filing fee. However, SCP is not a free-for-all procedure, and EPCRS requires a number of requirements for SCP to apply. EPCRS may not allow SCP based on factors such as (1) plan type; (2) whether the plan has practices and procedures; (3) the extent of the issue; and (4) whether the plan has a "favorable letter." (One issue that is not crystal clear in EPCRS is whether SCP is available for terminated plans.) To be eligible for SCP, the plan:

- Needs to be a Code § 401(a), § 403(b), SEP or SIMPLE plan.
- Cannot be "under examination," except for "insignificant" errors. Note that significant errors in the process of being corrected when an IRS audit begins may be moved to Audit CAP unless the correction is "substantially complete." EPCRS offers guidelines on significant versus insignificant.
- Must have established practices and procedures (formal or informal) designed to promote and facilitate overall compliance.
- If the plan is a SEP or SIMPLE, must use an IRS-approved document and must have only "insignificant" errors.
- Depending on the age of the issue, might need to involve only insignificant issues and might need a "Favorable Letter."
- May be limited in its ability to correct through retroactive amendments.

This list shows that SCP's requirements are numerous and require several judgment calls. The decision of whether or not SCP is available is not a "shoot-from-the-hip" decision; rather, it is one the plan administrator should make carefully.

One of SCP's advantages is also a disadvantage: The ability to correct without IRS approval means there is always a possibility that the IRS will later (e.g., on audit) disagree with the approach to SCP. If a plan administrator is not comfortable with self correction, then they could file a VCP and receive the IRS's approval of the correction. However, as discussed next, even the approach to filing a VCP requires strategy.

"THE POSSIBILITY THAT THE MATTER CAN **BE REFERRED FOR EXAMINATION RESTRICTS THE** ABILITY OF A PLAN ADMINISTRATOR TO **WITHDRAW A VCP ONCE IT IS FILED WITH ALL** NAMES INCLUDED."

04 CAREFULLY CONSIDER THE VCP APPROACH

Plan administrators should consider the options for filing a VCP carefully. First, the plan administrator should decide if they should use EPCRS's anonymous filing procedures. EPCRS allows VCP filings to be filed either with the plan administrator and plan name included or excluded. By filing a VCP including the plan administrator and plan name, the IRS, except in unusual circumstances, will not open an examination while the VCP is pending. However, if the plan administrator and IRS cannot come to an agreement (and the VCP is withdrawn or closed without resolution), then the IRS may refer the case to Employee Plans Examinations. The possibility that the matter can be referred for examination restricts the ability of a plan administrator to withdraw a VCP once it is filed with all names included.

Alternatively, plan administrators may file anonymously, without the plan sponsor or plan name included. By filing anonymously, the plan administrator has much more freedom to withdraw the filing should the IRS and plan administrator not come to agreement.

Withdrawing the filing forfeits any filing fee, but the IRS doesn't know the plan sponsor or plan name and has nothing to refer for examination. However, this freedom comes at a price: A filing under the anonymous procedures does not prevent a concurrent audit of the plan. Should the plan be audited while an anonymous VCP is pending, the VCP would end and the plan would be moved to the Audit CAP program. Plan administrators should understand their options and choose the filing method carefully.

Second, plan administrators should scour the plan for any other possible issues and include them in the VCP filing. Including all errors obtains a VCP compliance statement for all issues disclosed (avoiding any uncertainty associated with an SCP correction). The plan administrator also obtains the most "bang for their buck" in the filing fee since the fee is currently based on the plan's asset size and not the number of errors disclosed.

Finally, including all errors can avoid any VCP surprises. If the plan administrator discovers an additional error after submitting the VCP filing to the IRS and later asks to amend the VCP filing to include the new issue, then the IRS retains the discretion to reject the amendment. If the IRS discovers an unrelated failure while the request is pending, the failure generally will be added to the failures under consideration, but the IRS retains the discretion not to include the matter in the VCP and, in some cases, can apply the rules of Audit CAP (which would likely result in a much more costly correction).

05

RETROACTIVE AMENDMENTS ARE NOW MORE LIBERALLY ALLOWED

EPCRS's overarching correction objective is to put the plan in the same place as if the error had never occurred. One way to meet the objective is to change the plan terms to match what occurred operationally. EPCRS has allowed retroactive amendments in the past under limited circumstances, and those correction methodologies remain. However, in the most recent version of EPCRS, the IRS greatly expanded the ability in SCP to adopt a retroactive amendment by allowing: (1) a retroactive amendment to make the written plan document match the plan's operations ("Operational Amendments"); and (2) a retroactive amendment to add missing required provisions (such as interim amendments) ("Plan Document Failure Amendments"). However, as always, the devil is in the details!

For Operational Amendments, the plan must meet several requirements. First, the amendment must result in an increase of a benefit, right or feature. Second, the increase in the benefit, right or feature must be available to all eligible employees. And finally, providing the increase in the benefit, right or feature must be permitted under the Code and satisfy EPCRS's general correction principles.

For Plan Document Failure Amendments, the plan must also meet several additional requirements for SCP. First, the error cannot involve the initial failure to adopt a qualified plan or the failure to adopt a written 403(b) plan document timely. Second, Plan Document Amendment Failures are significant failures, meaning they must be corrected within a prescribed time frame (generally, within the two plan years following the year in which the error began, with some exceptions), the plan must have a "Favorable Letter," as defined in EPCRS, and the plan cannot be a SEP or SIMPLE IRA.

In applying either methodology, don't forget that the plan still must meet SCP's general requirements.

06

LIMITS OF LOAN CORRECTIONS

The most recent version of EPCRS finally allowed for correction of many participant-loan administration errors through SCP. For most loan issues, the correction can proceed: (1) via a deemed distribution in the correction year (i.e., issue a 1099-R for the year of correction); or (2) through a reformation of the loan's provisions. However, not every loan issue can be self corrected. For example, loan limit issues, maximum repayment periods and amortization issues under Code § 72(p)(2)(A)–(C) and certain spousal-consent issues cannot be self corrected.

Furthermore, depending on the client's risk tolerance, a VCP may still be preferable for correction of any loan issue, because of the following considerations:

- A self-corrected loan issue is not eligible for correction under the Department of Labor's Voluntary Fiduciary Correction (VFC) Program. The Department specifically allows plan administrators to correct plan loan fiduciary issues in the VFC Program, but only after the IRS approves the correction in VCP.
- With respect to a defaulted loan that can be reamortized over the remaining loan period, note that the IRS's position is that the employer should pay a portion of the corrective payment on behalf of the participant equal to the interest that accumulates as a result of such failure. A VCP could specifically request this provision not be applied.
- In the correction of a defaulted loan through reamortization, don't assume that the promissory note's interest rate governs in determining the interest that accumulates as a result of the late payments. Under EPCRS, interest on late payments are generally determined at a rate equal to the greater of either the plan loan interest rate or the rate of return under the plan. A VCP could make clear that the plan administrator would, for example, apply only the note rate.

07

MULTIPLE EMPLOYER PLANS

The subject of Multiple Employer Plans (MEPs) has been a recent hot topic in the employee benefits world: the IRS recently issued guidance regarding the "one-bad-apple" rule, the Department of Labor seeks to redefine how unrelated employers can join together as one defined contribution plan under ERISA, and Congress is considering "open" MEPs. For MEPs, the EPCRS submission must be made by "the plan administrator (rather than any contributing or adopting employer) ... with respect to any plan failures." Also, "[t]he request must be with respect to the plan, rather than a portion of the plan affecting any particular employer." Thus, at this point, the MEP plan administrator controls the decision to file a VCP.

08

THE PRESCRIBED CORRECTION METHODS ARE TECHNICALLY 'SAFE HARBORS'

EPCRS's appendices contain a host of specific instructions on how to remedy issues that arise in a plan's operations, with the main goal to "restore the plan to the position it would have been in had the failure not occurred." However, remember those methods are "safe harbors" and are deemed to be "reasonable and appropriate methods." A plan could pursue a correction methodology other than one specifically described in the appendices. Be aware that any "non-safe-harbor" methodologies would have to be justified with the IRS if it should review the correction. If the plan administrator files a VCP filing, she may be able to negotiate the IRS's agreement to an alternative, non-safe-harbor methodology. If the plan administrator uses an alternative methodology in SCP and the plan is later audited, the plan administrator could find him- or herself justifying the alternative correction with the auditing agent, with little negotiating power!

Thus, particularly in SCP, there is much value in following the safe-harbor correction methodologies. However, in either a safe-harbor or non-safe-harbor correction, earnings adjustments (discussed next) create uncertainty.

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09 THE EARNINGS ADJUSTMENT

Whichever route used – a safe harbor or some other corrective methodology – any amount that involves determining a dollar amount will almost always involve an earnings adjustment. Earnings adjustments help "restore the plan to the position it would have been in had the failure not occurred." The phrase "adjusted for earnings" appears more than 100 times in EPCRS, and adjusting for earnings can make the simplest correction much more complicated. For example, if a participant should have received a 10% nonelective contribution for a prior plan year but didn't, then EPCRS generally requires the plan administrator to contribute an amount equal to 10% of that participant's allocation compensation for the plan year. However, if the plan administrator discovered this error in 2020, for example, and the contribution should have been made March 1, 2018, then the simple calculation is much more complicated, because EPCRS requires computation of the participant's earnings from March 2018 to the date the plan administrator contributes the amount.

EPCRS provides guidelines for determining earnings, but those guidelines are often difficult to apply in a world of participant-directed plans, particularly if an issue spreads over several plan years. Some users of EPCRS may focus on the EPCRS's permission to use the Department of Labor's VFCP Calculator as a quick method to compute earnings. Don't fall into the trap of thinking a correction is automatically entitled to use that calculator. In computing earnings, remember the following rules:

- Seek first to compute the actual earnings as part of the full correction. EPCRS is explicit that "the mere fact that correction is inconvenient or burdensome is not enough to relieve a plan administrator of the need to make full correction."
- In certain justified circumstances, "full correction may not be required," when "it is unreasonable or not feasible."
- Reasonable estimates may be used in calculating appropriate correction when either: (1) it is possible to make a precise calculation but the probable difference between the approximate and the precise restoration of a participant's benefits is insignificant and the administrative cost of determining precise restoration would significantly exceed the probable difference; or (2) it is not possible to make a precise calculation (for example, where it is impossible to provide plan data).
- Only after reasonably finding that full correction is not required and concluding that it is not feasible to make a reasonable estimate of what the actual investment results would have been can a reasonable interest rate for earnings be used. For this purpose, the VFCP Calculator's interest rate is deemed to be a reasonable interest rate.

Thus, only after going through those analytical steps can a plan administrator justify using the VFCP Calculator for earnings. A prudent plan administrator would document why actual earnings could not be used when using an alternative method.

CONCLUSION

EPCRS is a valuable tool to keep a plan in compliance with the law. EPCRS is not unlimited, and even within EPCRS, the plan administrator must make, justify and document many decisions (for example, SCP versus VCP, the choice of correction methodologies, or how to compute earnings). Some of these decisions may also be fiduciary decision. Advisers should be consultative in using EPCRS, but ultimately, let the plan administrator make all decisions needed. **PC**

Phillip Long is an attorney in Greensboro, NC. The views in this article are his own and are educational and not legal, tax or investment advice.

Taking The Stage

A new generation of ARA leaders takes the stage at the WiRC conference in Chicago.

By Nevin E. Adams, JD

Photos by Krystyn Johnson & Beking Joassaint

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For the first time in it's history,

in its history, earlier this summer leadership from all five of the American Retirement Association's sister organizations were together on a single stage – but that wasn't the most extraordinary aspect of this event.

The event was the Women in Retirement Conference (WiRC) – the combination of two unique events: the ASPPA Women's Leadership Business Conference and NAPA Connect. And there, for the first time in its history, not only were leaders of all five member associations on stage – those leaders were all women.

Those leaders – Kris Coffey, President of the National Tax-deferred Savings Association (NTSA); Marjorie Mann, President-Elect of the Plan Sponsor Council of America; Miriam (Missy) Matrangola, President-Elect of the American Society of Pension Professionals & Actuaries (ASPPA); Lauren Okum, President-Elect of the ASPPA College of Pension Actuaries (ACOPA); and Jania Stout, President of the National Association of Plan Advisors (NAPA) – each long-time volunteer members of their respective associations – brought decades of experience and a unique perspective to the attendees, who alternated between rapt attention and enthusiastic applause throughout the discussion.

'UP' BEAT

Moderator of the panel – and Co-chair of WiRC Janine Moore, Retirement Practice Leader – HUB Texas, asked the panel what kept them up at night, and while one generally assumes that sentiment with fears, this group had a positive perspective.

For Coffey it's that "tsunami" of retirement money rolling out of plans – one that to her presents an enormous opportunity, one that she thinks will produce new careers for advisors. Acknowledging that the flow to individual accounts might present a challenge for recordkeepers, she pointed to the emerging popularity of health savings accounts (HSAs) – and a potential future combination (visually, if not legally) with traditional retirement balances as yet another opportunity.

She also envisions the opportunity to develop a specialization aligned with specific professions: serving as an advisor to attorneys, or to accountants, or perhaps nurses, perhaps in the way that NTSA focuses on teachers as a way to signal a more personalized connection to those professions and their focus. This would allow you to partner with them before and during their distribution cycle, she explains, as well as new hires just entering the profession(s).

NAPA's Stout said those movements are why advisors should "look really hard" at how they partner with recordkeepers, and consider what additional services – and how much more efficiently – they might be able to offer those services if the money stays in the plan, such as managed accounts, or "virtual" advice. Thinking outside the traditional box could allow advisors to create value with terminated participants in the plans today. To be truly successful, she counsels that advisors should partner with recordkeepers. "It can't be us versus them," she stressed.

LISTEN AND EARN

Working together was a theme echoed by Matrangola, who emphasized the need to work together to show value with regard to emerging products like HSAs. "As a TPA you have to understand what your value proposition is, and what you can do for your plan sponsor clients and advisors," she noted. "Nobody likes doing notices, and cash-out distributions – the HR staff is stretched thin. It's important to look at your book of business, and find things your clients will let you do for them," she explained. "The key is listening." Practice tip: She notes that could include putting a "Do you know we do ____?" notice on invoices.

As a plan sponsor herself, Mann said it was important to anticipate what the needs are – that "sometimes the job description doesn't include everything you might worry about." This can actually help plan sponsors better understand their responsibilities.

"You have to talk about things holistically," Stout explained. "HSAs are a savings vehicle," she said, reminding the audience that it was an attributed that some plan sponsors hadn't yet focused on. Particularly at a time like today when fees are being squeezed. She points out that at her firm they used to bundle everything in under a flat fee arrangement – education oversight, investment advisory, etc.

That's now changing, going to an a la carte approach, she said, noting that the emphasis

Clockwise from top right: Kris Coffey, 2019 President of the National Tax-deferred Savings Association (NTSA); Marjorie Mann, 2019 President-Elect of the Plan Sponsor Council of America; Jania Stout, 2019 President of the National Association of Plan Advisors (NAPA); Lauren Okum, 2019 President-Elect of the ASPPA College of Pension Actuaries (ACOPA); and Miriam (Missy) Matrangola, 2019 President-Elect of the American Society of Pension Professionals & Actuaries (ASPPA).

"It's important to look at your book of business, and find things your clients will let you do for them. The key is listening..."

– Miriam (Missy) Matrangola, ASPPA

tends to be cyclical, from bundling to unbundled, and back again. Today that a la carte approach helps Stout not only differentiate her firm's services, but to add value by being consultative. The process forces her to place – and justify – a value for those services. She also told the group that she was a "big believer" in what she referred to as stewardship reports, rather than a cost of living adjustment. The stewardship report recounts what's been done over the two years of their service contract: key components, participation, deferrals. "It's risky," she acknowledged. "You're asking for a raise."

The bottom line, she recommended; "Tell them what you're going to do, do it, tell them what you've done."

COVERAGE CONCERNS

For larger plans, the traditional goal of benefit designed to "attract and retain," hoping to encourage valued workers to stay until retirement holds true. Smaller plans are often more focused on providing benefits for the business owner. However, Okum notes that even though many small plans maximize the benefits for owners, they are also required to provide larger benefits for employees, who are therefore much better off than those without such a plan.

Mann noted that retirement finances are the "basis of our economic system in this country." She noted that plan sponsors are concerned about the financial wellness of their workforce, and as a result there are plans that are starting to auto enroll at rates as high as 7% and even 10%. "They don't want folks to think that 3% is enough," she emphasized. The reasons are as much here and now as retirement's "then and there." Employers "want to help workers," Mann said, citing increasing stress levels among current employees, as well as debt management issues, and that means that these programs "have to be more than retirement focused."

What else keeps these leaders up at night? Legislation – and the impact, both good and potentially not so good, it might have on those benefit programs. "The thing to remember with any law is that there are always opportunities," Matrangola explained. "Not as bad as we think, and maybe good." What's important, she noted, is to read the laws and talk to your representatives – look at how it might impact your business – and what, if necessary, you can do to pivot.

As an example, Okum reminded the group about concerns that recent tax cuts would reduce incentives to contribute to retirement plans. "Turns out," she explained, "especially with S Corps, there are new ways to maximize benefits."

CYBER 'SPACE'?

Also keeping these leaders awake – cybersecurity. Stout acknowledged that it's a big deal – one that concerns her more than fiduciary issues, in fact – and one that is beginning to affect advisors. "We rely on recordkeepers to provide data and there's a lot of data," she acknowledged. Her firm has not only required every recordkeeper they work with to do a "cyber audit," but documented that they went through that process.

Mann confirmed that, certainly from a plan sponsor perspective, this was a top risk concern. She noted that the increased emphasis on privacy protection – citing specifically recent developments in California – presents challenges for employers overall. She explained that while there may not be a current, or at least not explicit, fiduciary requirement on this, since all fiduciary actions must be in the best interests of participants, there is an argument to be made that that duty extends to being careful about their data – and in the hiring of firms to which that data is entrusted.

While this extraordinary group came from different places, with different backgrounds, and got involved with this industry at different points in time, the inevitable question for this remarkable group was, "How did you get to this position of leadership?"

Ironically, certainly in view of their divergent starting points, a thread of commonality emerged. Nearly all found themselves at an event sponsored by one of the ARA associations, where they connected with someone who (eventually) connected them with the planning for that event, that (eventually) produced an invitation to participate in leadership.

As Mann explained it, the goal wasn't to be in leadership, it evolved from their involvement – and, for most, it began with a connection at an event – such as the Women in Retirement Conference. Closing out the panel, Coffey challenged the attendees – but it holds true for everyone, but especially to those who have been part of one of the ARA associations – to find just one new person at that next event you attend to whom you can "pay it forward."

You may have a hand in creating tomorrow's leaders! PC

Are You Benchmarking Your Funds Correctly?

The *Tibble and Brotherston* decisions established new benchmarking rules for plan fiduciaries. Here's what it means to named fiduciaries of ERISA plans.

BY R.L. "DICK" BILLINGS

If you grew up in the mid- to late '70s like me, you know well the many detective movies starring Clint Eastwood – certain phrases from which have become part of the American lexicon. Two come to mind: *"A man has to know his limitations"* and *"Do I feel lucky? Well, do ya, punk?"*

One limitation with which we all struggle is that we are creatures of habit. We get used to something and then stick with it. For named fiduciaries of ERISA retirement plans, Modern Portfolio Theory (MPT) may be one. This concept has been around so long, we just take for granted that all one must do is satisfy MPT and all is well. However, two recent court decisions are now requiring fiduciaries of participant-directed 401(k) and ERISA 403(b) plans to change how they traditionally benchmarked their funds.

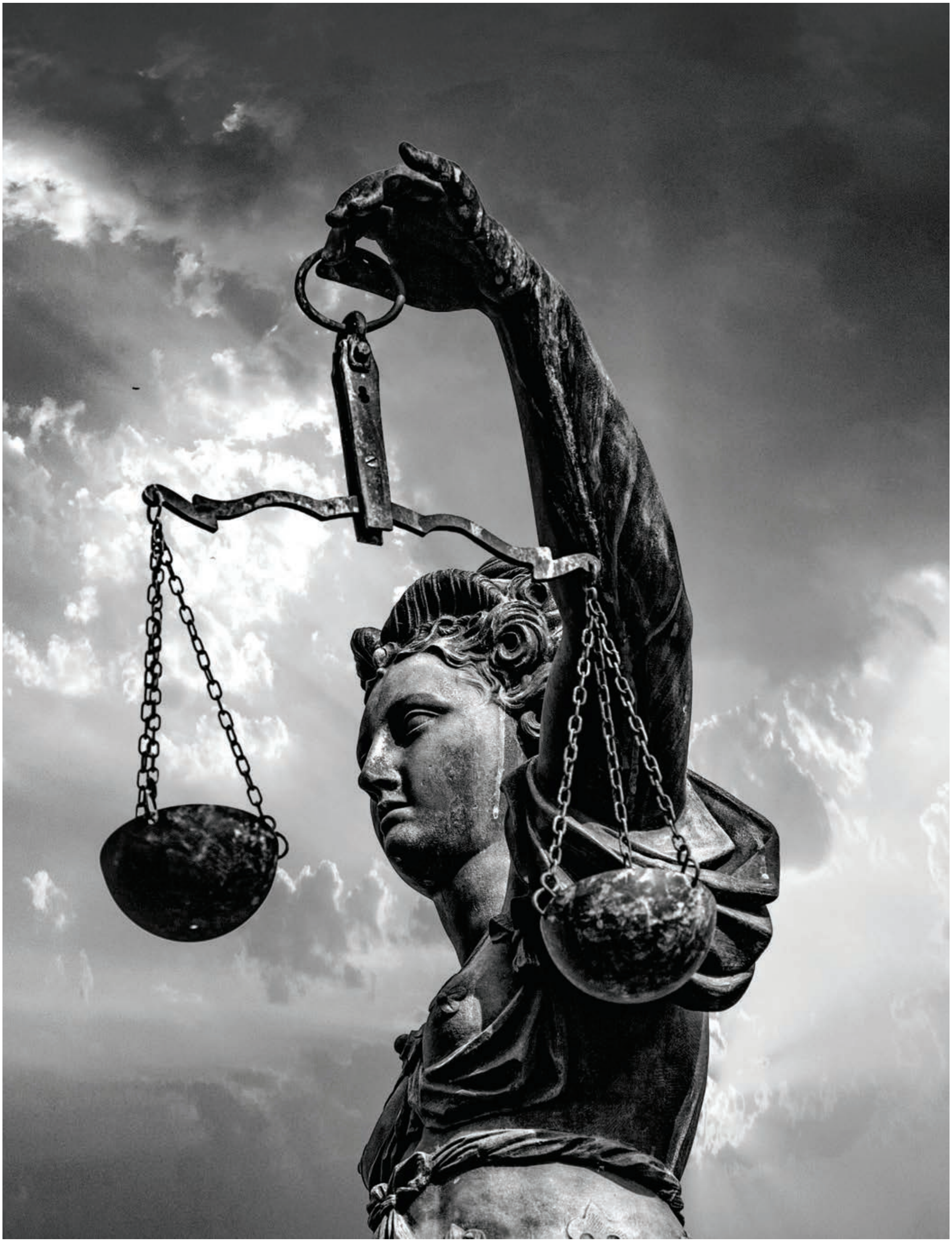
A little history. MPT was introduced by Nobel Prize-winning economist Harry Markowitz in a 1952 essay. His theory was that it was possible to construct an efficient frontier of optimal portfolios offering the maximum possible expected return for a given level of risk. In other words, based upon statistical measures like variance and correlation, an individual's return is less important than how the investment behaves in the context of the entire portfolio.

Many software programs used today by investment advisors for retirement plans utilize MPT as their primary algorithm. Primary reliance on MPT when reviewing funds for "efficiency" raises potential liability issues, not just for outside investment advisors, but for plan sponsors as well.

Is MPT – created 67 years ago – still relevant today? Absolutely. But with regard to an ERISA-covered retirement plan in which participants must make their own investment decisions – not so much. Let's look at these two court decisions to see how MPT, while a very valuable tool, does not work so well in most plans today – especially if you are the named fiduciary[1] of a participant-directed plan.

TIBBLE V. EDISON INTERNATIONAL

It's likely that you are at least vaguely familiar with *Tibble*,[2] a case decided 9-0 by the U.S. Supreme Court in 2015 in favor of the participant-plaintiffs. The decision was based upon ERISA's fiduciary duty, which the Court explained is



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derived from the common law of trusts. This duty "provides that a trustee has a continuing duty – separate and apart from the duty to exercise prudence in selecting investments at the outset – to monitor, and to remove, imprudent trust investments. The American Bar Association later made this statement: "Under *Tibble*, ERISA does not require the cheapest investment, but if a more expensive investment is selected, fiduciaries must document (in the minutes, consultant reports and graphs, emails, etc.) their consideration of both investments and state the reasons why a more expensive investment is in the plan's overall best interest."[3]

BROTHERSTON V. PUTMAN INVESTMENTS

This case was decided by the 1st U.S. Circuit Court of Appeals in 2018,[4] also in favor of the plaintiff/participants. The main thrust of the decision concerned whether the burden of proof falls to the defendant once a loss is proven. But in determining the amount of the loss, the court set an important standard. They said that a fiduciary can "easily insulate itself" from liability by "selecting well-established, low-fee and diversified market index funds" or, for a fiduciary that wants to select funds that try to beat the market, "it too will be immune as long as it follows a prudent selection and monitoring process."

Along the same line of what was expressed in *Tibble*, the appeals court said that a well-established index fund is, in effect, a safe harbor for named fiduciaries. Again, this does not preclude the use of an active fund, but the fiduciary must prove that it is prudent to do so. In January 2019, Putnam petitioned the U.S. Supreme Court to review the 1st Circuit's decision. In the fall term that started this last October, the Supreme Court declined to review the case. So for now, the appellate court's decision remains.

PRUDENCE AND LIABILITY

From the standpoint of a plan sponsor/named fiduciary, two issues are evolving:

1. The *Tibble* case emphasizes that retirement plan fiduciaries must use the common law of trusts as guidance when reviewing the plan's investments, and must document their process to prove that a more expensive investment is prudent.
2. The *Brotherston* case emphasizes that a retirement plan fiduciary can "easily insulate itself" from liability by using a well established index fund. This is in harmony with the *Tibble* ruling. *Brotherston* said – implicitly, not explicitly – that if a retirement plan fiduciary is going to use any mutual fund other than a well established index fund to insulate oneself from fiduciary risk (i.e., lawsuits, audits, complaints, etc.), one must be able to prove that it was prudent to use an actively managed fund over that index fund.

Some more history: Just what is the "common law of trusts"? While it evolves from English common law and versions of it have been around in this country for many

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> "Share class will now make a substantial impact, causing many high-fee funds that tack on 12b-1 marketing fees or other expenses to be downgraded."

years, it first appeared as a set of formal rules written by the American Law Institute (ALI) in 1935.[5] Due to law changes, these rules were "restated" in 1952 and again in 1987. The current formal name for this latest set is, "Restatement of the Law 3rd – Trusts." While it is not the "law" per se, if one looks at ERISA, much of its language regarding trust responsibilities is lifted verbatim from those ALI publications. ALI trust language has been cited thousands of times in ERISA court decisions – *Tibble* being just one example.

Between *Tibble* and *Brotherston*, the courts are saying to all named fiduciaries of retirement plans: If you are going to use actively managed funds, you have to prove that it is prudent to do so; and, for you to do this, you must compare an active fund to a well established, comparable index fund.

Unfortunately, many investment evaluation reports simply compare the active fund with all the other actively managed funds in that asset class. Here the courts are saying, in effect, that they, like "Restatement of the Law 3rd – Trusts," do not care about the other actively managed funds. Each mutual fund must stand on its own and must be compared to an appropriate index fund.

NEW MORNINGSTAR FUND RATINGS

Here's another recent development that every named fiduciary should know about. Effective Oct. 31, 2019, Morningstar®, with its famous (or infamous) Star Ratings, changed its system to allow fees to play a much bigger role.

Under Morningstar's old system, high-fee funds that failed to beat a market index could still earn high ratings as a result of several factors that aren't entirely intuitive – an analyst might approve of the fund's management process, for instance, or other "pillars" that Morningstar evaluates (i.e., people, process, parent, performance and price).

Share class (different cost structures for the same exact mutual fund) will now make a substantial impact, causing many high-fee funds that tack on 12b-1 marketing fees or other expenses to be downgraded. If your current investment fund lineup is based on the earlier version of Morningstar® ratings, *now* would be a *really* good time to re-review! And make sure each individual fund is compared to its appropriate index.

CONCLUSION

In my former life as a TPA, when a plan sponsor/named fiduciary wanted to do something "outside the norm" (a relative term, of course!), I always told them the same thing: In tax court, "you are guilty until proven innocent." In other words, is the action worth defending? If an IRS or DOL audit ever results in governmental sanctions, how much does the named fiduciary (again, usually the employer) want to fight the government? Even if a plan sponsor/named fiduciary is ultimately successful, it will take a long time (months, if not years) and many thousands of dollars, as well as a few sleepless nights.

If you are your plan's named fiduciary, it is critically important to understand just how your investments are being evaluated for their "efficiency." Each one must stand on its own – you cannot just say that you have a balanced and well diversified portfolio of investment choices, as described under MPT. Whether you rely on outside advisors, be they fiduciaries or non-fiduciaries, you, as the named fiduciary, are responsible unless you delegate the named fiduciary position to an outside expert.

So now, as the named fiduciary overseeing and being responsible for your plan's investments, "Do you feel lucky?" PC

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FOOTNOTES

[1] 29 U.S. Code §1102, Chapter 18, Subchapter 1, Subtitle B, Part 4. Establishment of Plan; (a)(1) & (2).
[2] https://www.scotusblog.com/case-files/cases/tibble-v-edison-international/
[3] https://www.americanbar.org/groups/real_property_trust_estate/publications/ereport/rpte-ereport-winter-2019/erisa--thou-shall-not-pay-excessive-fees-/
[4] https://www.govinfo.gov/app/details/USCOURTS-mad-1_15-cv-13825/summary
[5] https://www.ali.org/publications/show/trusts/

Becoming a Hybrid Consultant

Here's how a longer-term focus on clients' key performance metrics and goals can win you a seat at the table.

BY PATRICK WILLIAMS

In "Are You a Hybrid Consultant?", my article in the Summer 2019 issue of *Plan Consultant*, the focus was on illustrating why it is essential for businesses and leaders to get engaged and understand the underlying issues that are affecting their employees. This follow-up article highlights the problems employees are struggling with today and the steps needed to transform yourself into a hybrid consultant.

THE ROLE OF FINANCIAL WELL-BEING

There is a massive gap between the employee benefits currently being offered and what employees actually need. Here is a portrait of the average American today:

- 30% of all American employees are in a negative cash flow position, going deeper into debt and allocating which bills to pay.[1]

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> For today's employees, the financial stressors are paying bills, no savings, high debt, no planning, and no purpose or impact at work."

- The average American employee has less than $400 in an emergency fund.[2]
- The average American employee is spending 25% of their take-home pay on consumer debt.[3]
- Half of all Americans are not contributing to their retirement accounts.[4]

It is easy to see that traditional retirement plans don't address these issues. The problem is financial scarcity, and it can have a massive negative effect on any company – undermining employee safety, engagement and retention. A delayed retirement can cost the employer $50,000 per employee per year in additional benefits and health care costs.

Financial well-being is a term that has been used loosely and all too frequently in our industry. While it lacks any formal definition, we will define financial well-being as the balance between having a healthy state of well-being today while preparing financially for tomorrow. It's not about being wealthy; it's a state of psychological well-being in which one feels in control of today's finances and tomorrow's.

Employees' financial stressors are paying bills, no savings, high debt, no planning, and no purpose or impact at work. For business leaders to be successful, they must address the issues of their employees; collectively, they make up their community. For business leaders and employees to enjoy success together, they must effect change to the community, then together reap the rewards of success.

THE HYBRID CONSULTANT'S VALUE PROPOSITION

Gone are the days of retirement advisors whose value proposition was fees, funds and fiduciary knowledge, or employee benefits consultants whose only solutions to rising health care costs incorporated passing along premium increases, a change in plan design or a move to a new carrier.

The role of a "hybrid consultant" is creating success and significance for the employer, employee and the community. Through this approach, your value proposition to the organization is an employee-centric approach to benefits focusing on:

1. your ability to identify and address the immediate needs of the employees;
2. a detailed process and procedures that document your strategy;
3. identifying the key performance metrics and goals of the organization;
4. managing existing vendor relationships;
5. delivering financial savings to the P&L statement, the individual and the community.

The climate for change is here – suffice to say that if the business leadership hasn't hit rock bottom with the effects of the rising cost of health care, deficient strategic planning or key performance metrics with their current consultants or vendors, or inadequate understanding of the retirement readiness problem and how it affects the organization financially, you will not have a successful outcome working with that client.

As part of your vetting process, there are several approaches you can take to introduce your value proposition. Incorporating a series of wedge questions such as, *"When you met with your current consultant for your quarterly strategy and tactical meetings, were you happy with the key performance indicators and impact on your P&L?"* (You can learn more about this approach from the book *The Wedge: How to Stop Selling and Start Winning*, by Randy Schwantz.)

IMPLEMENTING A DATA-DRIVEN PLAN

Through your discovery process, you will gain insight and business intelligence on the pain points within the organization. They will provide guidelines for identifying key performance metrics and drafting goals relevant to the organization.

The contractual agreement should outline those key performance metrics and goals, creating a timeline and process to meet those objectives. The result is a 36-month plan for the employer to use as a roadmap with you and their vendor relationships for process improvement.

Through this approach, your planning process will eliminate that

"A proper debrief is an affirming, positive experience; it is also where we begin the practice of accountable leadership."

annual focus on benefits, providing a longer-term focus on key performance metrics and the goals of the organization.

Meetings should be held quarterly. They are debriefings, and function as the process of productive evaluation of the quality of the decisions everyone on the team made, from planning through execution, concerning the objectives the team set out to achieve.

A debrief is not a gruesome sport or a place of blame or shame. Quite the opposite – the debrief is where you can celebrate your victories as well as learn from your failures. You do this to build your cohesive teams and improve going forward. A proper debrief is an affirming, positive experience; it is also where we begin the practice of accountable leadership.

The first step is to conduct a survey of the employees, including an incentive for all employees to complete the survey questionnaire. The delivery mechanism for this effort is a benefits platform that requires the enrollment of all the employees and is designed to address the basic needs of employees.

Managing vendor relationships will be critical during this process. The message is that it is no longer business as usual. The client hired you to perform many functions, including being an advocate for the firm with no conflict of interest and a liaison to the business leadership in delivering outcomes. Most benefit consultants have not been required to provide any performance or strategic planning for the organization, let alone any type of accountability for results.

Initial meetings will comprise reviewing data on the survey, claims data and retirement plan readiness. The claims data you receive from the health plan must identify the potential gaps in coverage for participants. Allow for analyzing procedures and pricing of common or frequent events together, which can lead to direct contracting with physicians groups. Data will become the focal point for every decision with the client going forward.

Data will provide a narrative for us to see what is happening in the employees' lives. For example, if 30% of the employer community is struggling with cash flow issues, they won't be around for long, and if they are, they won't be very engaged in their jobs.

DELIVERING SOLUTIONS

Empathetically understanding the people whose actions generate your data helps guide you to communicate with them better. Think of them as characters in your data story. They either help the organization achieve its goals or contribute to falling short of it. They are, in other words, either heroes or adversaries of your data.

The assembly of technology tools and your ecosystem of vendors will reflect the client's needs. Incorporating solutions such as credit card counseling, budgeting, financial planning and Social Security and

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FOOTNOTES

[1] Gallup, *State of the Global Workplace: Employee Engagement insights for business leaders worldwide*, 2013, p. 50.
[2] FINRA Investor Education Foundation.
[3] Bankrate: "Survey: 3 in 10 Americans have more credit card debt than emergency savings," Feb. 13, 2019.
[4] Bloomberg: "Half of older Americans have nothing in retirement savings," March 26, 2019.

Medicare education will allow you to segment your population and deliver meaningful education to employees in need.

Employee benefit solutions such as online help with physical therapy and mental health, diabetic solutions and pharmacy benefit carveouts will have an immediate care delivery impact on the organization – and in some cases, significant financial savings.

Pharmacy benefits make up one-third of the total health care spend of an organization; in some cases, you can expect to save up to 50% of the total spend by transitioning to a fiduciary pharmacy benefit manager. Five years ago, there were fewer than 10 pharmacy benefit managers that called themselves "fiduciary PBMs," meaning they provide drugs at cost, charging only an admin/dispensing fee. Today when you Google that term, you will find more than 75 firms in that space. The results can include saving hundreds of thousands of dollars a year.

Summary reports to the business leadership defining your efforts to effect change within the business leader community will further illustrate your value proposition to the organization.

CONCLUSION

Marc Benioff, CEO of Salesforce, was once quoted as saying, "We need a new generation of executives who understand how to manage and lead through data. And we also need a new generation of employees who are able to help us organize and structure our business around that data."

The sun is setting on the traditional approaches used by most consultants. Those who are quick to adapt to data and apply a holistic approach to the deployment of solutions to the issues affecting today's employees will have a seat at the table with business leaders. **PC**

Patrick Williams, AIF®, CHSA, is the founder of Williams Group, LLC, a registered investment advisory firm based in Palm Beach Gardens, FL. He has more than 30 years of retirement and employee benefit experience.

Comprehensive Financial Planning as an Employee Benefit

Planning for retirement is a conversation that far surpasses what we currently provide our participants.

BY BRIAN KALLBACK

SUBBOTINA ANNA / SHUTTERSTOCK.COM

"Yeah, hey, I want to travel south this year…"

– Layne Staley, Alice in Chains, "I Stay Away"

I agree, Layne. As I look outside my window and see the Halloween snow falling (ugh), I think about traveling south someday… maybe for a whole January once the kids are out of the house… maybe for three or four months once my wife and I retire…

I've already put this dream into my retirement plan. Based on current prices on Vrbo.com and Airbnb, I know what my expenses will be for Phoenix or Florida or the Caribbean. I'm planning today to make this dream a reality tomorrow.

Based on my IRAs and 403(b), I project my future income. It's helpful to see, but it isn't the complete picture. I need to save a certain amount of money to reach my goals. Yet, the dashboard on my provider's portal only provides what I need to save into the retirement plan and further projections if I increase my contributions. There is no mention of when I will begin receiving Social Security benefits, how to budget, what debt to pay off first, whether my risk management strategy is adequate, an estate planning strategy, and so on and so on.

Comprehensive planning for retirement is a conversation that far surpasses what we, as recordkeepers, TPAs and plan providers, provide our participants. Individual sessions may be led by salespeople who have products to sell or by entry-level employees who are using these education meetings to learn their craft. "According to employers, the number one financial challenge facing employees is credit card and other debt" (PLANSPONSOR, 2018).

Yet, many education sessions involve canned presentations on enrollment, compounding and asset allocation. How can employees focus on retirement when they are stressed out about short-term issues? We educate around the summit while our participants are focused on the foothills.

In addition to challenges facing participants, these factors are taking a toll in the workplace in the form of stress (79%), the inability to focus on work (64%), physical health concerns (36%) and absenteeism (34%) (PLANSPONSOR, 2018). "There's even some data to suggest that better financial wellness for employees reduces turnover, because when people have a better relationship with their money and their income, they're less likely to job-hop to another employer who offers them a small raise" (Kitces, 2019).

It's time for plan sponsors to consider adding comprehensive financial planning as an employee benefit.

Comprehensive financial planning

“We educate around the summit while our participants are focused on the foothills.”

“does much, much more than simply tell you where you should be investing your money. But, in 9X% of employee education sessions with 401k plans, that’s what you get – how and where should you invest, and that simply doesn’t cut it” (Hull, 2018).

According to the CFP Board, “financial planning is a collaborative process that helps maximize a client’s potential for meeting life goals through financial advice that integrates relevant elements of the client’s personal and financial circumstances.

“Relevant elements of personal and financial circumstances vary from client to client, and may include the client’s need for or desire to: develop goals, manage assets and liabilities, manage cash flow, identify and manage risks, identify and manage the financial effect of health considerations, provide for educational needs, achieve financial security, preserve or increase wealth, identify tax considerations, prepare for retirement, pursue philanthropic interests, and address estate and legacy matters” (CFP Board, *Code of Ethics and Standards of Conduct*, Oct. 1, 2019).

Says Greg Hayes, Senior Advisor for Retirement Plan Management at IronHorse Wealth Management in Des Moines, IA, “having a financial planning benefit means each employee is able to work with a planner on their specific situation, including debt. This allows employees to feel more control of their finances, which can directly reduce stress and workplace productivity problems as related to finances.”

Moving to a comprehensive financial planning offering will mean making changes to our education strategies. We may need to upgrade our workforce by hiring financial planners, create new education materials, increase the compensation we offer to educators, view education as a priority rather than a low-margin activity, and gain introductions to external financial planners who may wish to serve in this capacity.

Hiring a salesperson to masquerade as a fiduciary planner is putting the fox in the hen house. A comprehensive financial planner who acts as a fiduciary has shown results in advancing positive financial behavior, such as “setting long-term goals, calculating retirement needs, retirement account diversification, use of supplemental retirement accounts, retirement confidence, and higher levels of savings in emergency funds” (Blanchett, 2019, p. 32). Some salespeople – especially in the 403(b) market – would rather sell annuities, whole life insurance or rollovers than serve participants. “The number one thing,” according to Hayes, “is that the planner would need to be a fiduciary.”

Finally, providing fiduciary, comprehensive financial planning may help satisfy the portions of ERISA 404(c) concerned with “participants being informed, directing their own investments, and receiving sufficient information to make informed decisions” (Manganaro, 2018).

No matter whether you enjoy Alice in Chains or not, “traveling south” this year or any year requires more planning than simply understanding your retirement plan.

(Note: I am not an attorney… I was a history major, so I think I’m good at interpreting primary sources… check with your ERISA attorney.) PC

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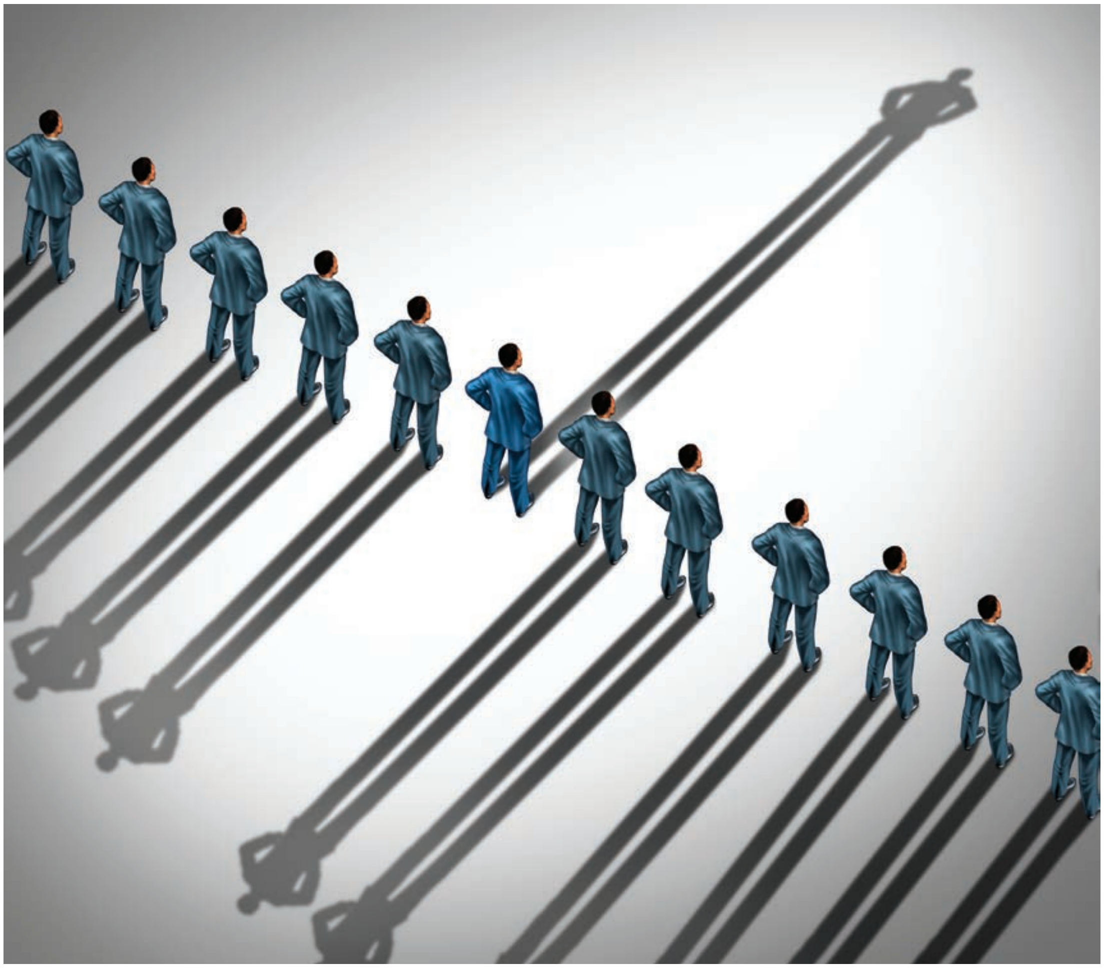

Self-Directed Brokerage Accounts Within a 401(k) Plan

What issues should be considered if a client is looking to add or expand the SDBA accounts available in its plan?

BY TOM SWAIN

The typical 401(k) plan sponsor offers a mutual fund lineup of about 20 funds to invest participant and employer contributions. But even with that level of flexibility, hands-on investors are likely asking for more options, including self-directed brokerage accounts (SDBAs).

The Profit Sharing Council of America reports that the percentage of 401(k) plans with SDBAs is growing, and is now above 20%.[1] SDBAs offer participants greater flexibility in investment options: more types of investments to choose from; more asset classes available, including alternative asset classes such as real estate and commodities; and, with certain plans, access to lower-cost investments. This greater flexibility offers plan participants more diversification and more refined investment strategies across all of their personal investment accounts. It also allows participants to hold relatively tax-inefficient investments in their 401(k) plan accounts, reducing their current annual tax bill.

The typical hands-on investor among your participants usually earns more, works with a personal financial planner and has more personal wealth–and that is often a good description of the company's leaders. In addition, these hands-on investors might also be members of the plan's retirement committee. However, SDBAs within a 401(k) plan are not for everyone. What issues should a plan sponsor consider if they are looking to add or expand the SDBA accounts available in their 401(k) plan?

FIDUCIARY CONSIDERATIONS AND PARTICIPANT IMPACT

If the plan sponsor has not already implemented SDBAs as an investment option for participants, the first questions to answer are:

- Is adding an SDBA feature really necessary?
- Are there asset classes that can be added to the current fund lineup to accomplish the objective?
- How big is the group of hands-on investing participants vs. other participants in the plan?
- Are the hands-on investing participants requesting SDBAs so that they can work with their personal financial advisors?

The flip side of the hands-on investor group is the general makeup of the eligible participant population. Recognize that the Department of Labor requires that all participants must be given the right to invest their 401(k) account through a self-directed brokerage account if the plan offers this feature. As a result, all eligible participants must be notified of the SDBA option, including related fees and account charges.

We know that most participants should stay away from self-directing their retirement accounts. They lack the time, discipline or willingness to do it themselves through ongoing research and actions to effectively manage their SDBA. They may be unwilling to hire an advisor due to cost, they may have an incomplete understanding of risk and return in asset classes, and they may engage in emotional investing, all leading to poor investment outcomes. The latest Charles Schwab SDBA Indicators Report bears this out: it showed that participants who work with an advisor have higher balances, a more diversified asset mix, and less exposure to individual stocks than non-advised participants.[2]

Also, the Department of Labor has expressed concerns regarding the range of investments that should be made available due to risk and return, reasonableness of fees charged by an advisor, and using investments through the brokerage window. ERISA Section 404(c) has a specific exclusion for investments where the risk of loss exceeds the participant's account balance.

Carefully evaluating the participant group may cause some plan sponsors to limit investments in SDBAs to only a percentage of the total account, and restrict or prohibit investments in limited or general partnerships, options, futures and other derivatives, margin trading and other forms of investments with potential risk.

Finally, choosing the broker and negotiating the broker's fees and other charges may be a fiduciary act, particularly if the fiduciary is limiting the number of advisors and brokerage firms available to one or a select few.

If SDBAs are added or enhanced within the plan, other plan enhancements should be implemented as well. Combining plan enhancements benefits all participants of the plan at once and makes administrative costs associated with the changes as cost effective as possible.

Plan sponsors and named fiduciaries may be under the impression that implementing self-directed brokerage accounts minimizes fiduciary risk, but there can still be fiduciary obligations that can trigger liability if they are not met. Beyond ongoing fiduciary risks, there can be significant operational issues that are unique to 401(k) plans with SDBAs.

OPERATIONAL ISSUES

Historically, SDBAs have been a feature of 401(k) plans sponsored by law firms and medical practices, but they have now become much more prevalent, though with restrictions on the brokerage firm and advisors that are available.

As the Schwab survey indicates, plan participants with larger account balances prefer to work with personal investment advisor who knows their full financial picture and participates in their lifetime financial planning. If

> "Beyond ongoing fiduciary risks, there can be significant operational issues that are unique to 401(k) plans with SDBAs."

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> "If plan participants can select their own investment advisor for their accounts, maintaining the plan becomes more complex and more expensive to administer."

plan participants can select their own investment advisor for their accounts, maintaining the plan becomes more complex and more expensive to administer.

MORE COMPLEXITY

Most recordkeepers and administrators have developed their own automated and proprietary solution for SDBAs, catering to larger employers, which represent the majority of plan sponsors offering an SDBA option in their plan. A single brokerage firm approach for SDBAs significantly limits the investment advisors available to the participant, so this approach is unlikely to work for participants with larger balances, who often are also the key leaders within the organization.

Allowing those key leaders to work with their personal investment advisor forces the benefits team or administrative staff to maintain these separate accounts manually. That involves a number of additional steps, many or all of which are manual:

- Excluding participants with outside brokerage firms from the payroll feed and deposits to the recordkeeper for the rest of the plan
- Separate checks or electronic transfers to each individual brokerage firm
- Logging all transactions and verifying receipt with each individual brokerage firm
- Resolving any issues that arise with the individual brokerage firm
- Providing separate, aggregate reporting of all plan participants for compliance testing
- Taking on the role of the plan's recordkeeper in developing personal plan statements for each participant with a separate self-directed brokerage account, summarizing annual activity in the plan account

In this manual environment, those participants who self-direct through a separate brokerage firm are "off line" in that:

- they do not have access to an online 401(k) participant portal;
- participant service and support is provided by the employer's internal staff; and
- they may not receive a participant summary statement (an ERISA requirement) unless it's provided by the plan sponsor.

MORE EXPENSIVE

The manual processes involved in working with multiple brokerage firms creates additional internal expense and additional compliance and fiduciary risk for an organization that chooses to work around their recordkeeper's limitations. The plan sponsor may also incur additional hard dollar expense by hiring its accountant or another third party administrator to consolidate and summarize the assets held across all accounts for the plan in total and reconcile to participant accounts, a necessary step for completing the plan's Form 5500 annual disclosure filing. Also, if the plan sponsor's 401(k) plan has more than 100 participants, this expense becomes an annual, necessary expense for a full scope audit as required by ERISA when there is no certified trust statement covering all assets held by the plan.

RESOLVING ISSUES

When choosing to add or expand the availability of SDBAs in a 401(k) plan, it can feel like "No good deed goes unpunished." However, solutions are available that offer greater flexibility to participants at reasonable cost and reduced fiduciary risk, including one – the Professionals Choice Retirement PlanTM product – offered by Findley and Strategic Retirement Partners (SRP). PC

Tom Swain, FSA, EA, FCA, MAAA, is an actuary with Findley, in its Nashville office.

FOOTNOTES

[1] Plan Sponsor Council of America 61st Annual Survey.

[2] Charles Schwab SDBA Indicators Report™, reporting on participant activity within 137,000 self-directed brokerage accounts held at Schwab.

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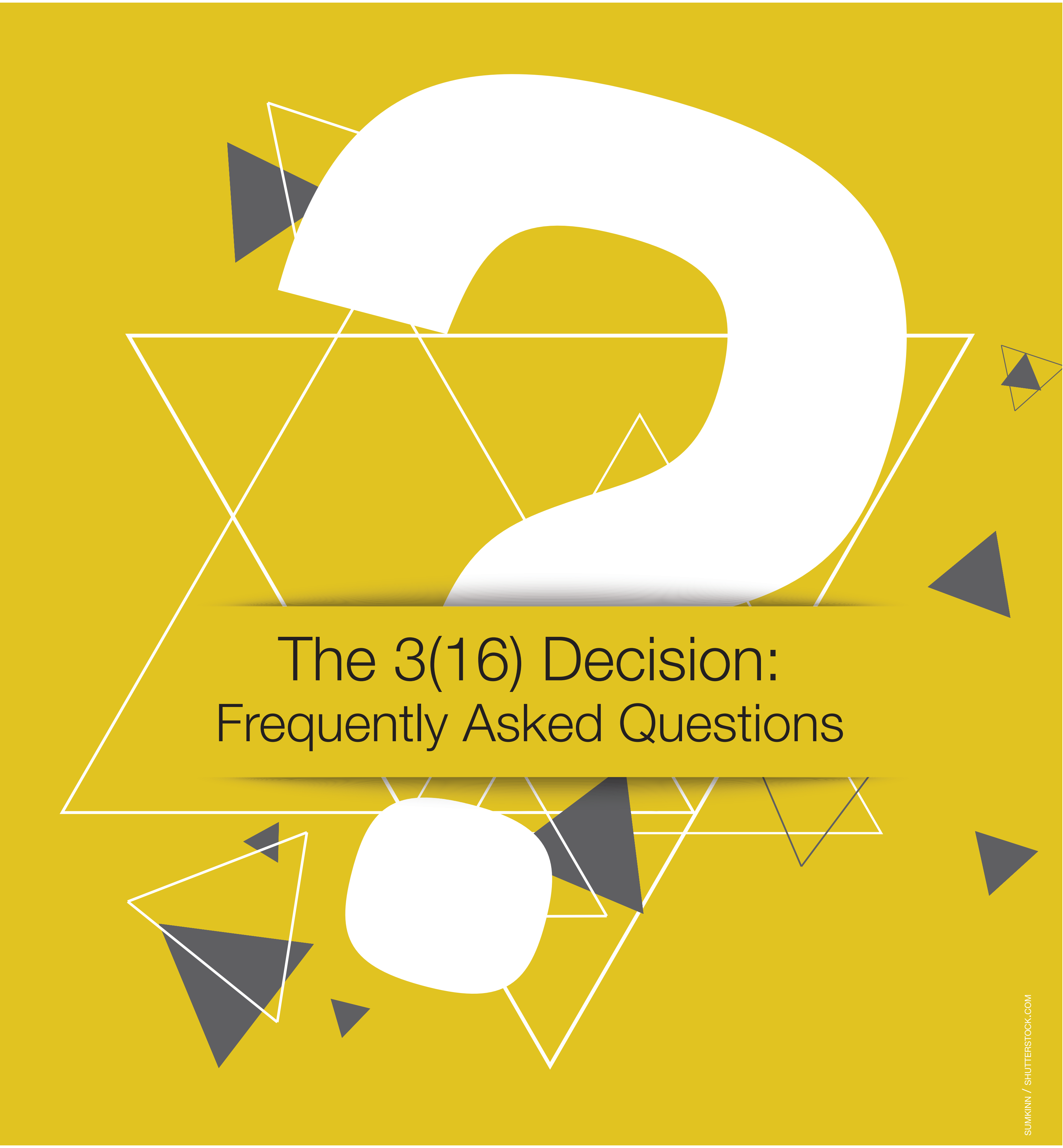

The 3(16) Decision: Frequently Asked Questions

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Before you jump into the 3(16) market, here are some important factors to consider so you can get some idea of what creating a 3(16) product will cost.

BY SUSAN PERRY

In this installment in our series of articles on 3(16) fiduciary services, I thought I'd share some of the questions I've been asked about 3(16) work and provide some answers to those questions. My theory is that if some TPAs are asking, maybe more of you have these questions as well. So, here goes…

CAN I MAKE ENOUGH ADDITIONAL REVENUE IF I ADD 3(16) SERVICES TO OFFSET THE LIABILITY?

First, can you charge extra for 3(16) services? Absolutely. Next, can you charge enough to offset the liability? Well, how much risk are you really taking?

Yes, I understand you will become a fiduciary. Most advisors figured out how to be fiduciaries. They put process and procedures in place and moved on when they thought the DOL regulations would require them to become fiduciaries. You too, can put processes and procedures in place to protect yourself. Analyze what processes and procedures you'll need, figure out the time involved, and estimate the cost of implementation and programming.

Next, look for a good insurance policy. Make sure it is going to cover your risk of lawsuit, your risk of settlement with IRS or DOL during an audit, and hopefully any IRS or DOL correction program fees. Once you know the cost of this insurance policy and the deductible that will go with it, you'll have a good start at knowing how much your risk is going to cost you. Many TPA E&O policies specifically exclude 3(16) services, or anything fiduciary in nature, so be careful!

Once you've completed these steps, you'll have a pretty good idea of the cost of the liability. It's now up to you to evaluate the fees you think you can charge versus the cost to determine if you can do this business profitably.

HOW MUCH DOES IT COST TO GET INTO THE 3(16) BUSINESS?

Initially, you'll have to pay for a lawyer to assist you with contracts. Most ERISA attorneys today have created enough contracts for 3(16)s for to use with their clients that this shouldn't be too expensive. That being said, you could end up creating contracts for a single employer plan, a MEP (i.e., more than one employer in the same plan) where all members of the MEP are required to use your services and a MEP where each member gets to decide if they want to use your services. If you will work with non-ERISA 403(b) plans or nonqualified plans, you'll need to modify your contract language – potentially for each state in which you work. And then there are tribal plans, Puerto Rico plans, and plans for marijuana-related companies. In other words, you could end up with a lot of different contracts that you have to pay an attorney to help you create. So be clear on what types of plans you want to work with.

You'll have to pay for Errors & Omissions/Fiduciary Liability Insurance/Employee Dishonesty coverage. You may have to pay for an ERISA bond as well.

Those are the hard dollar costs that you'll need to incur no matter what services you provide. But there are soft dollar costs as well. First, you have to spend some time analyzing what services you'll want to provide. I break the services into these categories:

- Payroll/contribution assistance
- Money-out approval (i.e., loans, distributions, RMDs, corrective distributions, hardships, etc.)
- Eligibility calculations and enrollment kit mailings
- Notice mailings
- Government forms signing (i.e., 5500s, 8955-SSAs, 5330s, etc.)
- Conversion assistance
- New plan assistance
- Plan administration (i.e., everything above plus whatever else comes up)

Are you going to offer any of these services? If so, which ones and to what degree? Let's take payroll/contribution assistance. I have seen the following options:

- Log into the payroll system, get the data, reformat it and upload to the recordkeeper
- Require the client to send the data to the 3(16), which reformats it and uploads to the recordkeeper
- Periodic review of existing 180° payroll integration relationship to ensure proper data is transmitted
- Tracking deposits to ensure they are made timely, with no assistance offered for the actual transmission

Next, you'll have to figure out how you want to deliver these services. What procedures will need to be created? Will you have your existing staff assigned to a plan take on these added responsibilities? If not, will you have to add staff? Do you need to build software – to the best of my knowledge there isn't any 3(16) software in the marketplace – and if so, what will the timeframe and estimated cost be? Does your firm use one of the few plan document services that has a plan document that contains language to allow 3(16) services to occur, or will you need to change your document

> "The clients who have 3(16) services usually love the ease and convenience even if they sometimes dislike paying extra for it."

provider or add a 3(16) amendment to the base document?

Now consider how you'll market this product. What changes need to be made to your web presence? What about changes to your social media footprint? Will you need printed marketing materials? How will you change your proposals? Will your existing sales team be able to sell this product or will you need to add to the team?

Before you jump into the 3(16) market, all of these factors should be considered so you can get some idea of what creating this 3(16) product is going to cost. The truth is, it's going to cost you something to add this product line to your business model. The more in depth you intend to go with this service, the more it's going to cost.

SHOULD I CREATE ANOTHER COMPANY FOR MY 3(16) SERVICES?

That is not a requirement; you can certainly do 3(16) services inside your TPA. But there are many reasons to create a new company. Here's the one I think you should consider.

Let's assume that you are the 3(16) on a plan that gets sued over excessive fees. You get named in the lawsuit because all fiduciaries to the plan are named. Luckily, you have E&O insurance so your insurance company pays – after your deductible is met, of course – for your lawyer to sit through the trial and represent you. At the end of the trial, your only costs are your deductible since no judgment was made against you. However, at your next insurance renewal, your E&O insurance carrier either drops you or increases your premium significantly.

If your TPA and 3(16) are the same company, that means your entire TPA business is either uninsured for E&O or your cost of doing business just went up substantially. If your 3(16) is a separate company, your exposure and possible premium increase should be lessened. The additional cost of creating an LLC and filing a tax return sure seems worth it to me.

Analyze the risk of one company versus two, talk to your lawyer and insurance carrier, and make an informed decision.

ISN'T 3(16) A FAD OR A GIMMICK?

When I speak around the country about 3(16) services, I like to ask about 3(16) services. If I'm talking to TPAs, how many offer 3(16)? If I'm talking to advisors, how many of their clients are asking about 3(16)? Back in 2014, there was very little awareness of 3(16) among TPAs, clients and advisors. Today, if I ask this question, more than half of the room will probably indicate that either they are providing 3(16) services or clients are buying 3(16) services.

I'd argue that with the increasing sophistication of plan sponsors, 3(16) is not a fad. It's here to stay if for no other reason than most clients don't want to mail out notices themselves and notice mailing is typically sold as a 3(16) service. We see questions about 3(16) services on RFPs. We see advisors, specifically the specialist advisors, promoting 3(16) services to clients. The recordkeepers are improving their systems to handle 3(16) service providers. And the clients who have 3(16) services usually love the ease and convenience even if they sometimes dislike paying extra for it.

Is 3(16) a marketing gimmick? My clients don't want to mail out their own notices. They don't want to transmit their own payroll information each pay period. They forget to cash out terminated participants and get in trouble with their CPA auditors. They forget to mail out notices to participants who then complain to the DOL. If for no other reason than getting the work done, my clients love 3(16) services.

The degree to which some of the fiduciary liability is transferred from the plan sponsor to the 3(16) is subject to seemingly endless debate. I've heard people argue both sides of this issue with passion. But, the point is this: clients want it. They'll pay for it. The advisors will endorse adding it. And most clients that have 3(16) services won't give it up to move to a firm that won't offer them a similar product.

3(16) services may not be right for every plan sponsor… what service is?… but they are here to stay. PC

Susan Perry, ERPA, CPC, QPA, QKA, QPFA, is the President of Fiduciary Outsourcing, LLC. She has more than 25 years of experience managing daily valuation recordkeeping as well as managing a TPA with more than 25 employees.

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BY WILL HANSEN

What Can We Expect in 2020?

Even though the focus in Washington will be on the election, the hope is that Congress will continue to debate policies to improve upon an already successful retirement system.

We are officially in an election year – 2020. Typically, in an election year, the legislative wheels slow down a bit as elected officials focus on reelection. And on the regulatory side, it mainly depends on what, if any, legislation was passed in the prior year.

Overall, from the legislative branch, we will see a lot of talking and not much actual implementation of legislation. On the regulatory side, we will see some progress on a handful of retirement-related projects.

Even though there won't be much action on new laws, I do expect there to be a handful of committee hearings that focus on retirement policy. Sen. Portman and Sen. Cardin have introduced legislation that contains 57 retirement-related provisions. Both sit on the Senate Finance Committee and could request a hearing on this comprehensive piece of legislation.

Rep. Neal, chairman of the powerful House Ways & Means committee, will most likely introduce a number of retirement-related bills. He will undoubtedly hold hearings on those bills. And, of course, we still have the multiemployer plan crisis lingering, and I'm sure elected officials will use that issue as a rallying cry to drum up their base on both sides of the aisle.

The federal agencies will stay busy in 2020. In October 2019 the Department of Labor released a proposed rule that would create a process for plan sponsors to provide for electronic disclosures versus paper disclosure of required plan documents. I expect this rule to be finalized in the first half of 2020 and allow plan sponsors to immediately implement the new rule.

In addition, I am still hopeful that the DOL will release sub-regulatory guidance on how plan sponsors can locate missing participants. The DOL has increased its audits of plans that may have a high number of participants who are hard to locate. The retirement community has asked the DOL to provide some form of guidance to ensure they are doing everything in their power to locate these individuals. The DOL has promised additional information on how to locate missing participants, and I've heard that this project is gaining momentum.

> "I am still hopeful that the DOL will release sub-regulatory guidance on how plan sponsors can locate missing participants."

At the IRS, we could see a proposed rule that would assist plan sponsors in providing a contribution to a retirement plan for individuals who are focused on repaying their student loans. In August 2018 Abbott Laboratories received a private letter ruling from the IRS that allows the company to provide a nonelective contribution to the retirement plan for individuals who are repaying their student loans. Almost immediately, several groups requested that the IRS release guidance that would be broadly applicable across the plan sponsor community. While at first the IRS was hesitant to commence a regulatory project on this topic, they quickly reversed course and the project was added to their 2020 guidance plan. The intersection between retirement savings and student loan debt has been a hot topic for several years. I would expect any guidance from the IRS on this topic to advance the usage of this plan design feature, but ultimately legislation will need to be enacted to ensure that all plan sponsors have that option.

Even though the focus in Washington will be on the election in November 2020, I'm hopeful that Congress will continue to debate policies to improve upon an already successful retirement system. The ARA's Government Affairs team will continue to update our new advocacy website (araadvocacy.org) with all of the happenings in Washington.

Wishing all of you a fulfilling 2020! PC

Will Hansen is the American Retirement Association's Chief Government Affairs Officer.

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