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COVERSTORY

30 | WHAT'S IN A NAME?

Is participant data a plan asset subject to ERISA fiduciary protections? Here's a look at the current status of the issue—and some tips for minimizing the potential liability arising from the use of participant data.
By Christine P. Roberts

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FEATURES

24 | WE'RE ALL IN SALES NOW

The new role of the TPA as a sales consultant.
By Dawn Hynes

38 | FIDUCIARY CHECKUP

An annual checklist can help your plan sponsor clients ask the right questions about their fiduciary responsibilities.
By R.L. "Dick" Billings

ASPPA IN ACTION

08|FROM THE PRESIDENT
Let's Talk About GAC
By Frank Porter

11|NEWLY CREDENTIALED MEMBERS

62|INSIDE ASPPA
Let's Get to WiRC!
By Amanda Iverson, Leah Hill & Megan Crawford

64|GOVERNMENT AFFAIRS UPDATE
What's in store for retirement policy in the new Congress?
By Will Hansen

COLUMNS

06|LETTER FROM THE EDITOR

10|REGULATORY / LEGISLATIVE UPDATE
Freedom of Choices
By Brian H. Graff

TECHNICAL ARTICLES

12|COMPLIANCE / ADMINISTRATION
Getting out of a MEP or PEP is generally easy, but there are pitfalls to watch for.
By Pete Swisher

14|LEGISLATIVE
COVID Relief Law to Affect Retirement Plans
By Ted Godbout

16|REGULATORY
Where Have You Gone, Joe Participant?
By Alison J. Cohen

18|RECORDKEEPING
Business Acquisitions: The Seller's Perspective
By John Ortman

20|ACTUARIAL / DB
The 2020 DB Roller Coaster
By Charles D. Steingas

22|LEGAL / TAX
The 'Terror' of 401(k) Litigation
By Nevin E. Adams, JD

PRACTICE MANAGEMENT ARTICLES

46|SECURE ACT
Retroactive Plan Adoption Under the SECURE Act
By Kelsey Mayot

50|BUSINESS PRACTICES
A TPA's Guide to Business Metrics
By William C. Presson & Megan Crawford

52|WORKING WITH PLAN SPONSORS
Solo(k) to Full Plan: Avoiding the Growing Pains
By Geoffrey M. Strunk, Esq. & Lee Bachu

54|MARKETING
Five Keys to Crafting an Intentional Virtual Experience
By Sheri Fitts

56|ETHICS
How Do You Handle Conflicts of Interest?
By Lauren Bloom

58|EDUCATION
QKA, Reinvented
By Jake Linney

60|SUCCESS STORIES
Communicating Complex Topics
By Lorraine Dorsa

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THE IRS SMALL-PLAN AUDIT PROGRAM

It's been 30 years since ASPPA fought the good fight—and won. **By John Ortman**

This year marks the 30th anniversary of one of the greatest victories in ASPPA's storied history. Here's what happened.

It all started in 1989, when the IRS started to attack the actuarial assumptions the profession had been using since ERISA was enacted in 1974. At the time, it was permissible for partners in law firms, partners in medical practices, etc., to have their own individual DB plans. An IRS Assistant Commissioner and several others in the agency decided that these plans were inappropriately sheltering income and that they were taking deductions that were far too large. But instead of pursuing presumed abuses on a case-by-case basis, as would have been indicated under ERISA, the IRS issued a blanket mandate for the use of new IRS-specified assumptions.

To enforce its mandate, the IRS began a massive audit program across the country aimed at very large law firms that had multiple DB plans and small professional corporation plans. When the IRS auditors found irregularities in a plan, they imposed retroactive penalties, and ASPPA members would sometimes be sued by their clients.

Chet Salkind, ASPPA's Executive Director, immediately perceived the audit not only as an attack upon the small business pension plan system, but also an assault on the membership of ASPPA, especially the pension actuaries for the plans that were being audited. Salkind, along with Government Affairs Committee chair Fred Reish and his partner Bruce Ashton, determined to do something to prevent this overreaching abuse of authority by the IRS.

Reish and Ashton wrote a popular booklet that discussed what the IRS was doing, the legal issues involved, the practical issues involved, how to handle an audit, how to deal with the cases that members' clients were involved in, and how to fight the audit program.

Meanwhile, Salkind filed FOIA requests to obtain audit-related documents from the IRS. Several of them told a damning story. "One indicated that they wanted to raise $666 million in revenues from the small plan audits, and when you worked out the numbers, that assumed they were going to reject the interest and retirement age assumptions in about 90% percent of the plans," Salkind remembered in 2011. "The document indicated they weren't dealing with the audits on an individual basis but were grossly imposing the new assumptions and doing it retroactively. It would have done serious harm to our members involved in small plans, and their clients."

ASPPA also adopted the approach of meeting with IRS officials in person to find a solution to the crisis. In 1991, Reish and ASPPA President Pat Byrnes met with IRS Assistant Commissioner John Burke to discuss the poor relations between the agency and the private sector, especially in the small-plan DB pension plan market.

Later that year, those discussions led to a settlement program for the actuarial audits that many ASPPA members were able to take advantage of in order to close small cases inexpensively—and eventually to the creation of today's IRS remedial correction program and the DOL's voluntary fiduciary correction program. Perhaps more importantly, they marked the beginning of a long process in which ASPPA was able to form mutually beneficial good relations with the IRS and other federal agencies.

How did it all end? Ultimately, in 1995, the courts vindicated ASPPA's members and the private sector by ruling that the IRS had been wrong in its approach. The IRS abandoned the small-plan audit program, and most plans had no penalties imposed upon them. As I said, one of ASPPA's greatest victories.

(By the way, there are also some significant legislative anniversaries coming up this year. I'll dig into those in a future column.)

Questions, comments, bright ideas? Email me at jortman@usaretirement.org.

Editor

LET'S TALK ABOUT GAC

The success of ASPPA's advocacy process depends on the efforts of members who are willing to get involved—like you. **By Frank Porter**

The two main goals of ASPPA are to educate retirement plan professionals and create a framework of public policy that gives every working American the ability to have a comfortable retirement. ASPPA fulfills these goals by offering members extensive educational products and services, paired with a strong advocacy operation that puts us at the center of any legislative debates that could affect our members and impact how Americans save for retirement.

This highly functioning advocacy operation is comprised of both ARA staff and the efforts of volunteers. While the "March on the Hill" at the ASPPA Annual Conference may come to mind as a key advocacy effort, there are many other important ways that you can get involved and have a voice for our industry.

In order to help you become more informed and be part of the advocacy process, I thought it would be important to explain each of the committees and sub-committees within the framework of the Government Affairs Committee (GAC) and ways to get involved.

The Government Affairs Committee. The GAC represents ASPPA in communications with the executive branch, Congress and government agencies concerning the views and policies of ASPPA, as ultimately established by the Leadership Council, regarding relevant legal issues, legislation, regulatory affairs and other matters of professional concern. Committee members research issues and develop position papers and testimony for submission to these groups. In addition, GAC is responsible for notifying ASPPA members of important legal and regulatory developments through the issuance of various publications and ASPPA *asaps*.

ASPPA *asap* Committee. The purpose of the ASPPA *asap* committee is to produce content on current topics deemed noteworthy for ASPPA members. This committee provides the technical and grammatical edits and is comprised of individuals who are excellent at writing and editing.

DOL Subcommittee. The purpose of the DOL subcommittee is to monitor the DOL's audit, enforcement, interpretive and regulatory activities concerning pension benefit plans. Members of this subcommittee frequently have the opportunity to actively interact with the DOL through ASPPA's comment letter process and engage in topical discussions through conference calls. Participation in the DOL subcommittee provides its members the opportunity to stay current on issues affecting retirement plans, plan sponsors, fiduciaries and their service providers.

IRS Subcommittee. The purpose of the IRS subcommittee is to monitor the audit and enforcement activities of the IRS, as well as to analyze formal, informal and proposed guidance issued by the IRS and Treasury.

Plan Documents Subcommittee. The purpose of the Plan Documents subcommittee of the Administrative Relations committee is to monitor the audit and enforcement activities of the IRS, DOL and Treasury with respect to plan document matters. This committee is typically made up of individuals who are involved with the creation or preparation of plan documents both on an individually designed basis as well as a mass submitter basis.

Reporting & Disclosure Subcommittee. The purpose of the Reporting & Disclosure subcommittee is to monitor the reporting and disclosure requirements of the IRS and DOL with respect to qualified plans, and to analyze formal, informal and proposed guidance issued by the DOL, IRS and Treasury relating to plan reporting matters (generally including the Form 5500 series, Form 8955-SSA and other Forms, as well as participant and plan sponsor notice and disclosures).

W. Frank Porter, APA, QKA, QPA, is the Head of Institutional Development at Empower Institutional. He serves as ASPPA's 2021 President.

At Large Members Committee. The At Large Members committee is designed for ASPPA members who currently have a limited amount of time to volunteer with GAC or who are developing or desire to develop an expertise in government affairs. Participation in this committee is a great way to receive quarterly updates from government affairs leaders and staff on what is happing on the Hill and with the agencies.

GET INVOLVED TODAY

Hopefully, this provides you with a solid framework of the structure of GAC. If you see a committee that is right for you, then go to the ASPPA website and sign up by completing the volunteer form and note the area you have a particular interest in.

We recognize that the success of GAC depends on the efforts of its volunteer members. This is in large part based on individuals like yourself who are willing to get involved. I highly recommend doing so, as it is a great way to connect with likeminded individuals and make a difference in our industry. PC

MARK YOUR CALENDAR

ASPPA WEBCASTS

April

7 **403(b) and 457(b) Characteristics and Plan Design Options** — 1 CE
with **Maggie Younis, CPC, TGPC, ERPA, APA, APR**

14 **DB Provisions of the American Rescue Plan of 2021** — 1 CE
with **Karen Smith, MSPA**

21 **IRS Audits and DOL Investigations: A Toolkit for Survival** — 2 CE
with **Heather B. Abrigo, Esq., APM**

May

5 **Coverage: The Foundation for Non-Discrimination** — 1 CE
with **J. Tyler Wilson, QPA, QKC, QKA**

June

2 **Form 5500: Update, Troubleshooting and Audit Triggers** — 2 CE
with **Stephen W. Forbes, J.D., LL.M.**

16 **Plan Document Issues for 2021** — 1 CE
with **John P. Griffin, JD, LLM**

July

14 **RMDs Are Back in 2021** — 1 CE
with **Robert M. Richter, J.D., LL.M., APM**

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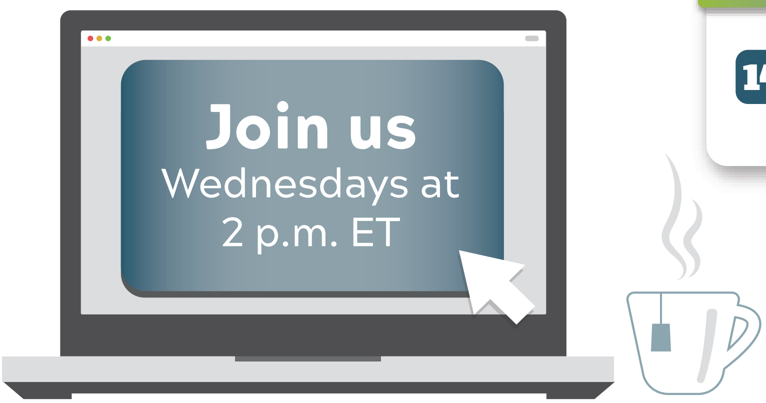

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Dates and/or topics may change.

ASPPA ASEA

FREEDOM OF CHOICES

These days ESG is no longer just about "doing good." It has become an integral consideration, particularly with regard to best practices in corporate governance. **By Brian H. Graff**

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

Perhaps the most controversial retirement guidance to emerge from the Labor Department under the Trump administration was its proposed "Financial Factors in Selecting Plan Investments," more commonly referred to as the "ESG rule."

The DOL first proposed the rule on June 23, stating that it was "concerned that some investment products may be marketed to ERISA fiduciaries on the basis of purported benefits and goals unrelated to financial performance" and that "ESG investing raises heightened concerns under ERISA." The proposal received more than more than 1,100 written comments and more than 7,600 form letter responses—including one from the American Retirement Association.

The concerns expressed were varied, but most revolved around the same concern we expressed: that the Labor Department's proposal—more specifically its strident commentary about the lack of relevance of environmental, social and governance factors by fiduciaries—would, at a minimum, discourage any consideration of those options, and might well provide fodder for the plaintiffs' bar against those who had embraced the option under previous guidance. We argued specifically that the guidance should not discourage ERISA fiduciaries from being allowed to consider ESG factors and that otherwise-appropriate investments should not be prohibited from qualifying as Qualified Default Investment Alternatives (QDIAs) simply because they also consider ESG factors.

> "YOU SHOULD NOT HAVE TO ENLIST THE SERVICES OF AN ERISA ATTORNEY TO DETERMINE WHICH INVESTMENTS ARE APPROPRIATE FOR YOUR PLAN."

Incredibly, the final rule still claimed to be necessary in order to "separate the legitimate use of risk-return factors from inappropriate investments that sacrifice investment return, increase costs, or assume additional investment risk to promote non-pecuniary benefits or objectives."

We were not alone in viewing those words as deliberately designed to have a "chilling" effect on the consideration of ESG investments. We were therefore encouraged by the Biden administration's March 10 announcement that it would not enforce that rule (or the Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, which included similar comments about ESG considerations). In fact, in announcing that decision, Principal Deputy Assistant Secretary for the Employee Benefits Security Administration Ali Khawar acknowledged that, "These rules have created a perception that fiduciaries are at risk if they include any environmental, social and governance factors in the financial evaluation of plan investments, and that they may need to have special justifications for even ordinary exercises of shareholder rights."

"Socially responsible" investments have long struggled to make inroads with retirement plan menus (at least outside of the non-profit sector, anyway), though today's ESG focus has moved well beyond those "do well while doing good" days. However, despite a plethora of surveys that indicate that workers, and most particularly younger workers, desire access to these options, just 2.6% of private sector plans offered ESG funds as investment options in 2019, according to the Plan Sponsor Council of America's most recent survey.

These days ESG is no longer just about "doing good." It has become an integral consideration, particularly with regard to best practices in corporate governance. It's a choice that plan fiduciaries—and the plan participants whose interests they serve—should be allowed to continue to prudently consider. Put simply, you should not have to enlist the services of an ERISA attorney to determine which investments are appropriate for your plan. And that, sadly, is the predicament that the rule in its current form creates for plan fiduciaries.

We will, of course, continue to be actively engaged with the Labor Department on this issue—working to ensure that plan fiduciaries have the freedom to prudently consider relevant investment criteria—and that American workers continue to have freedom among those choices. PC

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GETTING OUT, PART 1

Getting out of a MEP or PEP is generally easy, but there are pitfalls to watch out for. **By Pete Swisher**

Editor's Note: This is the first of a two-part series on best practices in getting out of a MEP, PEP or PEO. Part 2, on exiting a PEO, will appear in our Summer issue.

A criticism of multiple employer plans (MEPs) in years gone by was that they were like Hotel California—you could check out, but you could never leave.[1] For the most part, this was an uninformed notion, except in the case of a defined benefit MEP. DB MEPs are subject to MEP-specific funding rules[2] whereby each employer's funding obligations are calculated separately, but the overall funding of the plan is a joint and several liability of all participating employers (PEs). It is therefore not appropriate, in a DB MEP, to allow a PE to leave the plan without funding its portion of shared liabilities on the way out. In effect, this "withdrawal funding requirement" can feel like a huge surrender charge to an underfunded PE that wants out.

DB plans, and therefore DB MEPs, are on the decline. Yet DB MEPs have left this legacy "Hotel California" perception that all MEPs have big surrender charges or obstacles to leaving. This is false… mostly.

WHERE TO FIND WITHDRAWAL FEES AND RESTRICTIONS

Some MEPs do, in fact, have surrender penalties or restrictions. The details can be found in multiple places:

- **The fee schedule.** This should be a "uniform" schedule that applies to all PEs, and will generally list any fees for withdrawing from the MEP.
- **The plan document.** MEP base documents generally have language about withdrawal rights.
- **Joinder or service agreement(s).** PEs sign one or more documents agreeing to various aspects of the MEP, including an agreement to abide by the terms of MEP bylaws or administrative procedures.
- **408b-2 fiduciary disclosure.**[3] This document is often the service agreement and fee schedule but may be a separate document.

Usually, any withdrawal fees will be modest—for example, hourly charges or a flat fee like $750, similar to what many recordkeepers charge in single employer plans. Something to be aware of is language with respect to the following:

- **Withdrawal rights.** Withdrawal may be subject to approval of the plan administrator. This is common language in MEP documents. As a practical matter, there is little likelihood that this language, in and of itself, would lead a MEP administrator to refuse to permit an employer to withdraw, and it makes sense that the plan administrator should have some control in the event of misbehavior of an employer. But a good practice for MEP construction today is to reserve to each PE the right to terminate participation at will, subject to reasonable provisions for correction of defects.
- **A large withdrawal fee such as a basis point charge.** This is a common feature of DB MEPs but highly unlikely to appear in modern defined contribution plans, though some older documents may have such language lurking in them.

WHAT HAPPENS TO ORPHAN PES AND PARTICIPANTS?

Who is responsible for terminated participants with balances ("terms") in a MEP? Older MEPs used to tout this as an advantage for PEs because employers find it attractive not to have fiduciary responsibility for people who no longer work for them. Participants in some MEPs moved into "term" status upon termination and were treated separately, with responsibility for them accepted by the MEP fiduciaries.

Keeping "terms" in the plan after termination of participation by their former employers is still possible today (i.e., not prohibited by existing guidance) and is an interesting point for MEP-builders to consider. It is a way to reduce leakage and provide for a built-in rollover retention tool without having to do a rollover. Under this approach, the MEP vendor holds onto more accounts and assets over time. As a practical matter, however, MEP providers today tend to keep "terms" grouped with their employers, including upon withdrawal from the MEP. Employers might like this approach because they no longer have to worry about their terminated employees, and possibly because they can avoid an audit at some future date due to having fewer eligible participants, or they might dislike this approach because it erodes their purchasing power when hiring their new vendor upon leaving the MEP.

TERMINATION IN A MEP REQUIRES A SPINOFF

It used to be easy for an employer to "terminate" its portion of a MEP—it simply stopped participating and did not start a new plan. Today, terminations are handled via spinoff: a PE that no longer wishes to offer a plan to employees spins off and terminates the new single-employer plan. Some commentators have suggested that this is a complicated and expensive process—another "Hotel California" problem for employers—but most experienced MEP providers handle the spinoff and termination with a level of cost and pain that is similar to what the PE would experience if terminating a single employer plan.

CONCLUSION

Leaving a defined contribution MEP is easy in most cases—generally no more costly or painful than leaving any other vendor relationship. But employers considering a MEP should watch for unfavorable language in service agreements or other documents regarding withdrawal rights and costs. **PC**

PEPs: The Next Big Thing?

The year 2021 is upon us, and with that, the SECURE Act's much-anticipated pooled employer plans are coming online. Will they be a game-changer, or slow to get off the ground?

A recent report by Cerulli noted that although PEPs have received significant attention for their potential to transform the retirement plan landscape, they face several headwinds, ranging from conflicting employer priorities to complex administrative requirements and a need for competitive pricing to gain traction.

Of course, one factor that was not contemplated when the SECURE Act was enacted was the impact of a global pandemic. The report explains that small business owners frequently cite cost and the need to prioritize other benefits as obstacles to establishing a workplace retirement plan. Given that many small businesses are closing because of the pandemic, this concern rings true. Additionally, "As individuals stress about caretaking, their own health, or their children's hybrid learning schedules, retirement planning has taken a backseat to conversations about wellness and flexible work policies," the report notes.

In this context, Cerulli anticipates that employers without a retirement plan will be reticent to join a PEP, and the solution will be "sold, not bought" for this cohort. The firm also notes that small business owners seeking to provide retirement coverage have no shortage of current options, from SEP and SIMPLE IRAs to competitively priced single employer plans, offered by firms looking to bundle. *— Ted Godbout*

Footnotes

[1] From the song "Hotel California," in case you were raised in darkness.
[2] IRC Section 413(c)(4).
[3] As required under 29 CFR 2550.408b-2.

COVID RELIEF LAW TO AFFECT RETIREMENT PLANS

The new law includes relief for multiemployer and single employer plans. By Ted Godbout

President Biden signed the $1.9 trillion COVID relief bill into law on March 11. The 600-plus page American Rescue Plan Act of 2021 (ARPA) contains numerous provisions affecting nearly every sector of the economy, including retirement plans.

The bill had been approved by the Senate on a party-line vote of 50-49 (with one Republican senator absent) and by the House of Representatives on a near party-line vote of 220-211, with Rep. Jared Golden (D-ME) the lone Democrat voting no.

The final version of the law includes the Butch Lewis Emergency Pension Plan Relief Act, which provides multiemployer and single employer plan relief. It does not include a previous provision that would have frozen the cost-of-living adjustments (COLAs) for the annual contribution limit for DC plans and for the maximum annual benefit under a DB plan (see below).

MULTIEMPLOYER PLAN UNDING RELIEF

Special financial assistance program: A key component of the Butch Lewis multiemployer relief package is to create a "special financial assistance" program under which cash payments—or grants—will be made by the PBGC to financially troubled multiemployer plans.

Those grants will come from Treasury's general fund rather than from the PBGC's existing multiemployer revolving fund. As such, money will be transferred from the general fund to a new fund within the PBGC and then disbursed to plans. The Congressional Budget Office estimates that the grants will total $86 billion.

Eligible multiemployer pension plans include plans in critical and declining status, and plans with significant underfunding with more retirees than active workers in any plan year beginning in 2020 through 2022. Plans that have suspended benefits and certain plans that have already become insolvent will also be eligible.

The PBGC will be required to publish requirements for the grant applications within 120 days of the date of enactment, and applications will have to be submitted by Dec. 31, 2025. During the first two years after enactment, the PBGC is permitted to give priority to plans with large, expected assistance and plans expected to face insolvency within five years.

Adjustments to funding standard account rules: Following the 2008 financial crisis, multiemployer plans were allowed to amortize investment losses from 2008 or 2009 over a period of 30 years. Under the legislation, for investment losses or reductions in regularly scheduled employer contributions, a plan could use a 30-year amortization base to spread out losses over time. This provision is effective for plan years ending on or after Feb. 29, 2020.

Other multiemployer plan relief provisions include:

- temporary delay of designation of multiemployer plans as in endangered, critical or critical and declining status; and

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"WHEN THE BILL WAS BEING DEBATED ON CAPITOL HILL, THE ARA SUCCEEDED IN GETTING A PROVISION ELIMINATED THAT WOULD HAVE FROZEN THE ANNUAL COLAS FOR OVERALL CONTRIBUTIONS TO DC PLANS AND FOR THE MAXIMUM ANNUAL BENEFIT UNDER A DB PLAN."

- temporary extension of the funding improvement and rehabilitation periods for multiemployer pension plans in critical and endangered status for 2020 or 2021.

The legislation also increases premium rates for multiemployer plans to $52 per participant starting in calendar year 2031, with the premium rate indexed for inflation.

SINGLE EMPLOYER PLAN FUNDING RELIEF

The Butch Lewis Act provides single-employer plan funding relief by extending the amortization period for funding shortfalls and the pension funding stabilization percentages. It also modifies the special rules for minimum funding standards for community newspaper plans.

Extended amortization for single employer plans: The legislation sets all previous plan funding shortfalls to zero, thus permitting a "fresh calculation" of plan funding deficiencies. These newly calculated shortfalls and all future funding shortfalls will be paid off over a period of 15 years rather than the current-law period of seven years.

Extension of pension funding stabilization percentages for single employer plans: To preserve the stabilizing effects of smoothing, the provision revises the specified percentage ranges for determining whether a segment rate must be adjusted upward or downward. The specified percentage range for a plan year will be determined by reference to the calendar year in which the plan year begins, as follows:

- 90% to 110% for 2012 through 2019
- 95% to 105% for 2020 through 2025
- 90% to 110% for 2026
- 85% to 115% for 2027
- 80% to 120% for 2028
- 75% to 125% for 2029
- 70% to 130% for 2030 or later

If the average of the first, second or third segment rate for any 25-year period is less than 5%, it wil be deemed to be 5%. In addition, for purposes of the additional information that must be provided in a funding notice for an applicable plan year, an applicable plan year includes any plan year that begins after Dec. 31, 2011, and before Jan. 1, 2029. The provision is effective for plan years beginning after Dec. 31, 2019.

SECTION 162(M) LIMIT

In general, final version of H.R. 1319 broadens the $1 million deductibility cap under Code Section 162(m) to expand the definition of "covered employee" to pick up the five highest compensated employees, without regards to principal executive officer, principal financial officer or those required to be reported to shareholders under the Securities Exchange Act by reason of such employee being among the three highest compensated officers for the tax year. This change is effective for tax years beginning after Dec. 31, 2026.

Furthermore, the existing Code section specifying that a "covered employee" includes those who were covered employees of the taxpayer (or any predecessor) for any preceding taxable year beginning after Dec. 31, 2016, still applies for purposes of the CEO, CFO and the three highest compensated officers (the "once-a-covered-employee, always-a-covered-employee" rule).

COLA FREEZE REMOVED

When the bill was being debated on Capitol Hill, efforts by the American Retirement Association succeeded in getting a provision eliminated that would have frozen the annual COLAs for overall contributions to DC plans and for the maximum annual benefit under a DB plan, effective for calendar years beginning after 2030. The provision also would have applied to the limit on the annual compensation of an employee that may be taken into account under a qualified plan.

"This was a tremendous victory for the ARA and the retirement plan system. The government affairs team worked tirelessly to make this happen knowing that it would have been extremely challenging to get this fixed in the future, especially without the support of unions which were exempted from the freeze," stated Brian Graff, CEO of the American Retirement Association. "We will no doubt be dealing with similar issues in the future and the support of ARA membership will be critically necessary in our ongoing mission to protect and strengthen our nation's retirement plan system." PC

WHERE HAVE YOU GONE, JOE PARTICIPANT?

Best Practices and Warnings From the DOL **By Alison J. Cohen**

Mrs. Robinson is so proud of herself. She completed her annual census and additional plan data forms, and submitted them to Garfunkel Pension Services two weeks before the deadline.

In just a few shorts weeks, her assigned consultant, Simon, calls her to review the testing results. Most everything went smoothly, but Simon lets Mrs. Robinson know that, based on the participant count, the plan will need to be audited in 2021. Once Mrs. Robinson finds out how much a typical audit report costs, she becomes highly motivated to figure out why, with only 75 employees, they could have over 120 participants in the plan. After reviewing the participant data with Simon, Mrs. Robinson learns that there are a lot of terminated participants lingering in the plan and that she should have been forcing them out of the plan. Some of these folks have been gone for years and she has no clue where to find them.

RED FLAGS: THERE IS A PROBLEM

In January 2021, the U.S. Department of Labor published Compliance Assistance Release No. 2021-01 regarding the investigation process and the errors that the DOL will look for regarding terminated vested participants. Although the focus of the Release was on DB plans, the red flags that the DOL highlighted apply to all plans and should concern Mrs. Robinson because many of these flaws apply to her plan. Warning flags include:

- More than a small number of missing or nonresponsive participants
- Systemic errors that cause missed pay status due to required minimum distributions or death benefits
- Inadequate procedures for identifying and locating missing participants and beneficiaries
- Inadequate procedures for notifying terminated vested participants nearing normal retirement age of the right to commence payment of benefits
- Inadequate procedures for contacting terminated vested participants who are approaching the start of required minimum distributions
- Inadequate procedures for addressing uncashed distribution checks
- Absence of procedures for handling undeliverable mail and/or emails

Depending on whether Mrs. Robinson's company has engaged in mergers or sold divisions, data may be incomplete or entirely missing from HR records. So, exercising best practices can keep the plan lean and efficient and out of the red flag zone.

WHAT HAS MRS. ROBINSON DONE WRONG?

Mrs. Robinson failed to understand about the plan provisions related to forced cash-outs and automatic rollovers. In 2005, the IRS modified the rules regarding the handling of terminated vested participants. Such provision, once elected in the plan document, must be followed (it's not optional). So not complying with the cash-out rules in the plan is an operational failure.

The plan sponsor can generally elect one of two procedures in the document. First, the plan could have forced cash-outs only. This means that only terminated vested participants with a vested balance of $1,000 or less can be forced out of the plan by the plan administrator. If this is not done quickly after the participant leaves the company, a problem can arise with uncashed checks remaining outstanding. So the plan administrator should make sure it verifies the participant's address at termination and initiate the clearance of these accounts on a quarterly basis. Telling the participant to keep the plan up to date on address changes is not a bad idea either, as is providing in the SPD that it is the participant's obligation to keep the plan advised of where benefits can be delivered.

The second design option is to have automatic rollovers. Any terminated participant with a vested account balance between $1,001 and $5,000 can be forced out of the plan and into an IRA that is set up by the plan administrator on the participant's behalf. One interesting design choice for this option is to exclude rollover funds when calculating the vested account balance. Here's how this would work: Suppose Dustin becomes eligible for the plan and rolls $10,000 over from his prior employer's plan. During his employment, Dustin only defers $1,000 before he terminates service. Although his total vested account balance is $11,000, the plan administrator can exclude the rollover and consider his vested account balance to be less than $5,000. So, the entire $11,000 can be automatically rolled over to an IRA. With this design option, Mrs. Robinson may be able to force out a large enough number of terminated vested participants to be considered a small plan again and avoid the required plan audit.

WHAT ARE THE DOL'S RECOMMENDED BEST PRACTICES?

In further guidance from the DOL, best practice examples were outlined and should be carefully considered by Mrs. Robinson.

Maintain Accurate Census Information

- Contact participants, both current and terminated, and

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beneficiaries on a periodic basis to confirm their contact information.
- Include contact information change requests in all plan communications.
- Flag undeliverable mail/email and uncashed checks for follow-up.
- Maintain and monitor an online platform for the plan that participants can use to update contact information for themselves.
- Provide prompts for participants and beneficiaries to confirm contact information upon login to online platforms.
- Regularly request updates to contact information for beneficiaries, if any.
- Regularly audit census information and correct data errors.
- If changing recordkeepers, ensure that addresses transfer fully and completely.

Implementing Effective Communication Strategies
- Use plain language and offer non-English language assistance where appropriate.
- State up front and prominently what the communication is about.
- Encourage contact through websites that can prompt confirmation of contact information.
- Communicate information about how the plan can help eligible employees consolidate accounts.

Missing Participant Searches
- Check related plan and employer records for participant, beneficiary, next of kin/emergency contact information.
- Check with the designated plan beneficiaries for information about the participant's location.
- Use free online search engines, public record databases, and social media.
- Use a commercial locator service, a credit-reporting agency, or a proprietary internet search tool.
- Attempt contact with the participant via U.S. Postal Service certified mail or private delivery service.
- Attempt contact with the participant via email, telephone, text messages, and social media.
- Death searches (e.g., Social Security Death Index).
- Ask colleagues of the missing participant who may still be employed, or not, if they can assist with the location process.
- Register missing participants on public and private pension registries with privacy and cyber security protections (e.g., National Registry of Unclaimed Retirement Benefits).

Documenting Procedures and Actions
- Prepare written policies and procedures to ensure they are clear and result in consistent practices.
- Document key decisions and the steps and actions taken to implement the policies.
- For plans that use a third party administrator or recordkeeper for communications, ensure that this vendor is performing participant location services and work with them to identify and locate any missing participants.

CONCLUSION
Mrs. Robinson has some work to do. She must review her plan document and figure out whether an amendment is in order to help her meet her goal. Then she needs to review all of the terminated vested participants in the plan to identify those for whom she has good addresses and those for whom she needs to start the search process. The last part is probably going to be the most difficult piece: Mrs. Robinson needs to create her own procedures and determine not only how she's going to fix the current problems, but how she will ensure that the plan will remain in compliance moving forward.

So, where have you gone, Joe Participant? Mrs. Robinson will soon find out and the plan will be the better for it. PC

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BUSINESS ACQUISITIONS: THE SELLER'S PERSPECTIVE

The founder of a 35-year-old TPA looks back at the process of selling his firm. **By John Ortman**

Editor's Note: This is part of a continuing series providing an insider's look at mergers and acquisitions in the retirement industry.

Founded in 1984, Billings and Company was a mid-sized TPA in Sioux City, Iowa with 20 employees and about 400 plans. In January 2019, owner R.L. "Dick" Billings sold the firm to RHI, which has since rebranded as Definiti. In this Q&A, he shares his perspective as the seller in a business acquisition.

PC: You've said that your way of viewing what the seller goes through is that there are three phases that you have to pass through: the emotional, the actual trigger and then the aftermath. So, let's start with the emotional part. What do you mean by that?

BILLINGS: First, you have to accept the fact that you're not immortal. One of two things will happen first: you will either die or reach a point that you want to, or must, get out of your business. So you need an exit plan no matter your age. I had so many retirement plan clients over the years who had built successful businesses, but they just couldn't let it go. Their business consumed their life. As a result, many found themselves in their 70s or 80s finally realizing they wanted out of their business, but having no real exit plan.

For most of us, I believe a time comes when we say to ourselves, "*Okay, I want to do something different.*" My wife and I founded the company together, and a main concern was

"IT'S IMPORTANT TO SEPARATE THE EMOTION FROM THE FACTS ON THE GROUND, I.E., THE MONEY, THE SALE, THE DETAILS. IF YOU DON'T, YOU WILL NEVER SELL THE BUSINESS."

what would happen to our employees. We had owned Billings and Company for 35 years and we cared about them very much.

One of my proudest accomplishments has been bringing employees into the retirement plan business who had no idea what it was; yet they ended up making it their lifelong career. I now had to give all that up, all the teaching and mentoring. I really was going to have to just move on in my life. At some point, you just have to say to yourself, *"I need to let go."*

It's important to separate the emotion from the facts on the ground, i.e., the money, the sale, the details. If you don't, you will never sell the business. So, let's say you never sell. Now you're 80 years old. Now you're 90. Whether you have changed your mind or you simply can't do it physically, that time will come. Do you want to just lock the doors and walk away with nothing financially? Someone will no doubt buy it, but they will be paying you pennies on the dollar because they know it's a fire sale.

You might say, *"I'm never going to sell my business because I love it. I love my job. I love what I do."* But the day will come that you're either going to die or be unable, physically or mentally, to continue. That is not the time to consider your exit plan. And not planning ahead will most likely negatively affect your employees.

PC: Let's move on to what you call pulling the actual trigger.

BILLINGS: Okay, you've made this emotional decision to sell. Now again, it's like anything else; buying your first home, getting married—this will be a major life change. You just have to say, "Now is the time to set a date." You want to have as much control over that date as possible, but that control is going to be limited. I'll give you my own example: I wanted to push the sale into the next calendar year for tax purposes, which I was able to accomplish.

Like anything else in life, you want to maintain control as much as you can. There will no doubt be unanticipated things that will happen during the process. When that happens, you might say, *"I'm going to walk away from this deal."* And that's okay. But once you've pulled the trigger, the chips are going to fall where they may. That's just the way it is.

PC: And the aftermath phase?

BILLINGS: So again: getting married, buying your first home or car—are you going to have buyer's remorse, or in this case, seller's remorse? In other words, did you make the right decision?

I was 59 when I sold the firm—pretty young, I think, in terms of selling a business. I would rather have sold it maybe at age 62 or 65, or maybe even later. But at the same time, here's somebody holding a check out, and there was more than one firm interested. I didn't want to pass that up on the assumption that 5 or 10 years down the road there would still be people out there willing to buy our business.

In my particular case, two family members were involved who were employees. One was laid off; the other stayed for a year and then moved on. But they both landed fulfilling jobs thereafter. Was this the right decision? Of course, like the other things I mentioned, you really don't know until after it's done. But based upon the facts at the time, you make the best choice you can. Fortunately, my wife came to this conclusion before me… she was ready to retire!

After you go through the process of deciding it's okay to sell and do what you can to negotiate the terms, you have to say to yourself: *"If this sale goes through, someday it will be final and I have to be happy with the result."* You cannot go for the next 20 years saying, *"Boy, I sure wish I hadn't sold the company when I did and how I did."* You have to be able to move on.

I started my firm when I was 24. I was hungry. We needed money to feed our young family. But then there came a time when I said to myself, *"You know what? I'm making decent money. The house is paid off, the kids have gone through college, and so forth. I don't feel like working so hard anymore."* Let's say for the sake of discussion that this happens to you in your 60s. You're still in good health and all that good stuff, and you still like what you're doing. But is what you're doing the *only* thing in your life that means something to you?

In my own case, I bought into another retirement plan business where we all work from home. I am now able to write articles that have been published—something I always wanted to do. I can now contribute more time to my local parish. And finally, we now have more time to travel. PC

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THE 2020 DB ROLLER COASTER

Here's how defined benefit plans reacted to COVID-19 in 2020. By Charles D. Steingas

Twenty-twenty was a wild and crazy year for a multitude of reasons. And if you sponsored a traditional defined benefit plan, cash balance plan or 412(e)(3) plan, you had many decisions to make to ensure that the plan continued to run smoothly.

PLAN DESIGN CHANGES

Most DB plans require a certain number of hours to be worked during a plan year before a benefit is accrued. Usually it's 1,000 hours (the maximum allowed by law), so the timing of the COVID-19 pandemic in early spring required some quick thinking if the plan sponsor wanted to lower benefits, and in turn the contributions required to provide those benefits. If the plan year is the calendar year, most 40-hour-per-week employees will hit 1,000 hours in early June. A 204(h) notice to tell employees of the decrease in future benefits is required 15 days in advance of the decrease for small plans with under 100 participants. Plans with 100 or more participants must notify employees at least 45 days in advance of the decrease, so the timing was even tighter for those plan sponsors.

The most common decrease in benefits is to fully freeze the plan so no new benefits accrue during the plan year. Under normal circumstances, freezing a plan is only done to underfunded plans to give the plan sponsor a chance to catch up on funding before the plan is unfrozen or immediately prior to terminating the plan. The IRS does not usually allow plan sponsors to freeze and unfreeze plans each year, as the plan could be found to be in violation of the definitely determinable requirements for DB plans.

However, since the COVID crisis was hopefully a once-in-a-lifetime event, most experts agreed that freezing the plan early in 2020 was a prudent thing to do because the future was so uncertain. And the ability to unfreeze it at the end of the year would be there if things calmed down and the plan sponsor was willing to fund the plan and provide benefits to employees.

There were other concerns like 401(a)(26) minimum meaningful benefit rules for frozen plans to consider as well, but due to the passage of the SECURE Act, most plans that have been around for 5 years or more got an automatic pass on 401(a)(26). And plans that chose to unfreeze were able to meet the 401(a)(26) requirements either way. More than half of our clients who froze their plans early in 2020 unfroze them by the end of the year.

Some plan sponsors decided to take the plan freeze a step further and terminate their DB plan. To do so, the plan sponsor must have a valid reason to terminate the plan. Usually plan terminations occur because the plan has run its course and no longer meets the required objectives, but plan terminations also occur when the ownership of the plan sponsor changes or the plan becomes prohibitively expensive such that it endangers the ability of the plan sponsor to stay in business. So if the plan sponsor's business was shut down due to COVID-related factors, most experts agreed that terminating the plan would not be frowned upon by the IRS no matter when it was originally set up. The requirement in Treas. Reg. 1.401-1(b)(2) is that the plan sponsor must *intend* to sponsor the plan permanently when it is set up.

Unlike 401(k) plans, DB plans do not have a requirement that when a plan is terminated, a new one cannot be set up for 12 months. So a few plan sponsors took advantage of the COVID crisis to reduce liability, terminate their current DB plans, and then set up a new one. The IRS position on such an arrangement is beyond the scope of this article, but doing so is a little risky unless the plan sponsor can prove they had a legitimate reason to terminate the prior plan.

Plan sponsors also had to deal with a flurry of new laws that were passed in 2020 to help businesses and employees cope with COVID-related issues. So DB plan sponsors needed to decide whether:

- they were going to allow increased loan limits (or even to allow loans in the first place);
- they were going to amend their plan to allow for in-service distributions as early as age 59½; and
- these new options were only going to be for COVID-related distributions or if they were going to allow them for everyone going forward beyond 2020.

PLAN ADMINISTRATOR AND TRUSTEE CHANGES

In most small plans, the decision-maker for the plan sponsor is also the plan administrator and the trustee. But for large plans, that isn't always the case. Regardless, plan administrators had decisions to make in 2020 as well. If money was tight or service was not up to par, should they be negotiating or shopping for new providers like a different actuary, different TPA, different auditor, etc.?

Trustees needed to consider whether a new investment policy statement was required. Should the plan consider a change in investment advisor or custodian? Do dips in the stock market translate to buying opportunities? As interest rates drop, does it make sense to continue asset liability matching?

In my experience, most plans stayed the course when the markets went crazy and were able to reap the rewards. However, the decisions about how to deal with things going forward are even harder since the stock market is at an all-time high and interest rates for corporate bonds are at all-time lows. Many trustees have been taking advantage of those low interest rates to increase equity exposure and hope for higher returns, but most of them have chosen to simply stay the course and not add any additional investment risk.

"WITH EACH CRISIS COMES LEARNING AND PREPARATION FOR THE NEXT ONE."

SUMMARY

The COVID-19 crisis came upon us so quickly, and there were more serious issues for companies than their DB plans. However, with each crisis comes learning and preparation for the next one. As actuaries, TPAs, accountants, advisors, attorneys and plan sponsors, we should be ready to help our clients make fast and appropriate decisions.

This time the crisis happened at a time when many changes could be made during the plan year that affected the current year as well as future years. Back in 2008, when the financial crisis occurred right at the end of the year, we didn't have as many options with the current year. People who acted quickly came out of things well in the following years. The next time a big event occurs, the markets and businesses may not recover as quickly, so it will be even more important to be ready. PC

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THE 'TERROR' OF 401(K) LITIGATION

Here's hoping that, knowing the threat of litigation exists, plan fiduciaries continue to take the time to be thoughtful, deliberate and prudent in the exercise of their duties. **By Nevin E. Adams, JD**

So much of our lives have been disrupted by the COVID-19 pandemic—but the pace of 401(k) litigation, it seems, has, if anything, accelerated.

Now, some may find the label "terror" in the title extreme. In fact, it hadn't really occurred to me until I read the response of defendants to a suit slapped on Genentech Inc. and the plan fiduciaries of its $7.6 billion 401(k) plan last fall. In a response to that excessive fee suit, the defendants' attorneys referred to this suit—and others like it—as "an *in terrorem* attack on fiduciaries and employers seeking sweeping monetary and injunctive relief geared toward disrupting employee benefit relationships and causing protracted, expensive litigation."

"*In terrorem*," Latin for "into/about fear," has a legal context—a legal threat, really—one generally voiced in hope of compelling an action (or lack of action) without resorting to a lawsuit or criminal prosecution. It normally arises in regard to a provision in a will which threatens that if anyone challenges the legality of the will or any part of it, then that person will be cut off or given only a

> "AS THE DEFENDANTS IN THE GENENTECH RESPONSE NOTE, 'FIDUCIARIES THAT MANAGE 401(K) PLANS ARE GETTING SUED NO MATTER WHAT THEY DO.'"

dollar, rather than what is left to them in the will.

While that may (or may not) be an accurate characterization of that particular litigation, the motivations of the plaintiffs' bar on these matters are surely as diverse as the plans and plan designs they challenge, if not the experience, expertise and expectations of the individual firms themselves. Indeed, having had the opportunity to discuss these matters with a few over the years, I am persuaded that some at least are indeed fighting what they honestly believe is the "good fight."[1] They see evidence of inattentive fiduciaries manipulated (or motivated) by unscrupulous providers, sometimes over a period of years, if not decades, all to the financial detriment of participants who must work (and save) all the more to compensate for the "theft."

However, in the process they have sought to create presumptions of imprudence that (in my opinion) aren't. They'd have us (or more precisely, a judge) believe that active management is not only inherently inferior to passive approaches, but unacceptable, that RFPs not only must be conducted, but at a minimum must be conducted on a 3-year cycle, to accept that recordkeeping fees are prudent only if assessed as a function of participant count (as though size and complexity of the plan's investments and design shouldn't be a consideration), that extrapolated averages of published plan fees are sufficient to set a benchmark of reasonability, that a stable value option is superior to money market, except when money market is better than stable value, that they provide too many options for participants to choose from… or too few. Indeed, as the defendants in the Genentech response note, "Fiduciaries that manage 401(k) plans are getting sued no matter what they do."

When the dust "settles" in these cases—sometimes over decades, but of late more rapidly—most still produce nothing but a monetary "arrangement"—the amount nearly always significantly less than the damages alleged, and the per participant recovery relatively small.[2] The plaintiffs' attorneys get somewhere between 25% and a third of that recovery—which is deemed reasonable[3] since they often labor long and without compensation until a settlement or adjudication is reached, though it is often tens of millions of dollars when it happens.

Those suits that do go to trial generally seem to turn out in favor of the plan fiduciary(ies), either because the substance behind the plaintiffs' claims is found to be insufficient, or the actions of the plan fiduciaries are determined to clear the admittedly high bar of ERISA's prudence. It's easy to overlook that result because, as human beings, we are inclined to see a settlement in manners as heinous as those alleged as an admission of culpability, if not guilt, whatever the legal disclaimers. Regardless, while the proceeds that flow to the plaintiffs' counsel surely offset the investment of time and effort getting to that point, there's little question that some of it simply goes to funding the next suit…

As with any apparently profitable enterprise, this current wave of 401(k) litigation has attracted new entrants—and copycats—not only in actions, but in the very language employed in their filings. Based on their record to date, it's doubtful that they will enjoy much success under the full scrutiny of adjudication—but then, that may not be their objective.

Ultimately it takes time, patience—and yes, money—to stand up to this threat.

But here's hoping that, knowing the threat exists, plan fiduciaries continue to take the time to be thoughtful, deliberate and, yes, prudent in the exercise of their critical duties, that they take the time to document that work—that they do so with the involvement and engagement of wise counsel—that they find ways to share the fruits of that diligence with those they serve—and that in so doing, they deprive the plaintiffs' bar of any rational basis upon which to bring, much less prevail in, these pursuits. PC

Footnotes

[1] There's no question that 401(k) fees have declined over the years—and while the plaintiffs' bar would surely like—and some are, perhaps entitled—to claim credit for at least some of that, fees decline for any number of reasons, though plan fiduciaries, writ large, are more sensitive to the issue these days. Then again, the costs of this litigation are being paid by someone, and insurers have not traditionally been known to long absorb the impact of such things to their bottom line—indeed, some have already taken to asking pointed questions of employers in the course of questionnaires that would seem to have little to do directly with the insurance coverage sought.

[2] The named plaintiff(s) generally are accorded $10,000 to $25,000 each for their time and trouble in representing the class.

[3] Though that never takes into account the time, effort, expense and opportunity costs for the employers that must devote time and treasure to the litigation.

We're All in Sales Now

The new role of the TPA as a sales consultant

By Dawn Hynes

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The small to mid-market retirement plan landscape in which third-party administrators compete has undergone fundamental changes since the emergence of TPAs as a dominant force in the late ’80s and early ’90s.

Originally an outsource solution enabling large recordkeeping providers to become more efficient in administering micro market retirement plan business, the TPA industry has taken on a life of its own— just look at the success of ASPPA! Many TPA firms have enjoyed phenomenal success, having participated from the outset in partnering as preferred TPAs with the leading platforms and seeing their businesses flourish and grow—beyond their expectations—and setting the “gold standard” for aspiring TPAs that are newer entrants to the marketplace.

Today, competition has intensified and margins have thinned as services have become commoditized in many respects. The emergence of national TPAs, with purchasing power and economies of scale coupled with sales organizations dedicated to procuring advisor businesses, imposes new competitive challenges for the local and regional TPAs that have shaped the industry.

These distribution trends have only been amplified by the pandemic, making the imperative for TPAs to establish proactive sales functions, either at the owner level or with additional layers of sales and marketing staff, all the more urgent as a way to ensure continued growth.

Large national TPAs reported that if they had not had sales consultants in place to execute a proactive advisor prospecting strategy in 2020, they would never have hit their sales targets. The pandemic grounded wholesalers’ travel and closed broker-dealer offices, significantly curtailing inbound leads and making proactive advisor outreach all the more vital to TPAs’ sales success.

Many of the larger regional TPAs began adding sales staff years ago as a preemptive competitive move to grow their business. Today, they concur that it is a necessity. Given the distribution trends that have been accelerated by the pandemic, TPAs intent on taking their business to the next level must have a dedicated sales consultant function.

Ways TPAs Are Structuring a Proactive Sales Consultant Function

A sales consultant focus requires dedicated time. Owners who have been successful in this regard report at least one person in the firm spending 75% to 100% of their time on sales and marketing-related activities.

TPA owners that are growth-oriented are making this happen in one of three ways. A segment of TPA firm owners have built their operations’ infrastructure in such a way that they can personally step into a more dedicated sales role. Other owners with multiple partners have been able to divvy up responsibilities, with one or more partners running day-to-day administration and at least one partner focused almost exclusively on sales. Finally, the larger regionals and many aspiring regional TPAs have taken the next step, adding dedicated sales professionals to assume a full-time sales role.

For TPAs able to make the shift to sales consultant, the rewards are significant, according to advisors who see the role of the TPA as expanding in today's rapidly changing marketplace.

We have seen success with all of the above models. TPAs that are able to achieve a proactive sales focus using one of the above formulas report adding 100 to 150 new plans per dedicated sales consultant a year, including 2020.

For TPA firms with just one owner, the hurdle is the highest. These entrepreneurs are wearing multiple hats—administrator, payroll specialist and HR consultant, just to name a few. And if they have any energy left at the end of the day—sales consultant.

What is the average TPA to do? Start small, develop a plan of action and stay consistent in your focus are keen words of advice from TPA owners who have made progress in increasing their sales success and business success, proportionally.

Strengthen Your Operations Team to Operate Without You

The prerequisite to an owner stepping outside the confines of their administrative responsibilities is a stellar "A-team" of operations and administrative leaders to whom they can entrust the day-to-day operations of the firm.

"Start by building an incredible team of operation specialists to run your day-to-day administration," says Shannon Edwards, President of TriStar Pension Consulting, who credits her internal administrative leaders with freeing her up to focus 80% of her time on marketing and sales. "This past year, I've been able to make great strides, building my firm's brand through industry involvement with ASPPA and direct outreach to advisors. This would not be possible if I didn't have such strong internal bench strength."

Define the Sales Consultant in Terms of Role with the Advisor

Today, advisors are truly looking for TPA partners who will be part of their team, advising them on platform solutions as much as plan design, and be that first-call resource that they consult with upon securing a prospect. TPAs and advisors report that when they partner on a client opportunity, close ratios skyrocket.

Susan Conrad, Chief Client Experience Officer and Director of Retirement Advisors at Plancorp, says her firm's advisors use TPAs on cases of all sizes, not just small plans. "The larger the client, the more I need a TPA," she says. Having a TPA partner is like having a consultant on staff, says Conrad, who goes to her TPA partner, Benefit Plans Plus, as her first call on any new client opportunity. In situations where they present to a prospective client jointly, she notes, their close ratio is 100%, which speaks volumes to the power of partnership.

"Beyond the technicalities of plan design, which are crucial, our TPA partner provides market intelligence and helps us evaluate service provider options and models, to design an effective sales proposal—they really are sales consultants, in the truest sense of the word," Conrad reports.

Articulate Your Value

It is incumbent upon TPA owners to communicate to advisors what their value is, not only in ensuring smooth, ongoing plan operation, but also in producing a higher close rate for advisors.

This requires TPA owners to spend dedicated time crafting a 10-minute value proposition presentation that can be delivered to advisors, reinforcing the need to work with a specialized plan consultant (i.e., a TPA) and the specific reasons they should be working with you and your firm in particular. Successful TPAs will have this value proposition committed to memory and be ready to deliver it convincingly and with brevity.

Top 10 Marketing and Sales Strategies

With face-to-face meetings as rare as they are today, the way we as an industry communicate this message will continue to change. TPAs need to put their marketing hats on and begin to develop new ways of reaching advisors and communicating this message. Below are the top 10 marketing and sales best practices we see successful TPAs employing today to achieve sales growth.

1. Develop a pitch book that articulates your value. Start by crafting your value proposition in a pitch book format. This is a tool common to sales professionals and is used routinely by wholesalers and advisors alike. TPAs should likewise prepare a pitch book that they can deliver to any first-appointment advisor or wholesaler, articulating the benefits of working with you as a specialized plan consultant and the central role you play in jointly winning and servicing retirement plan business. Emphasize benefits to the advisor, including higher close rates, better retention rates, improved plan design solutions, more satisfied plan sponsors and improved advisor productivity.

2. Position your firm as a resource to advisors. Serving as a resource to advisors and wholesalers is a common best practice exemplified by TPAs who are effectively functioning as a sales consultant. In every element of your marketing campaign, from newsletters to advisor outreach, make every effort to educate advisors and serve as a resource to help them write more retirement business. Offer to make introductions, provide technical assistance, help with installation paperwork and train new advisors. This approach, premised on making the advisor or wholesaler more successful, will solidify your position as the first resource they will turn to when new business opportunities arise.

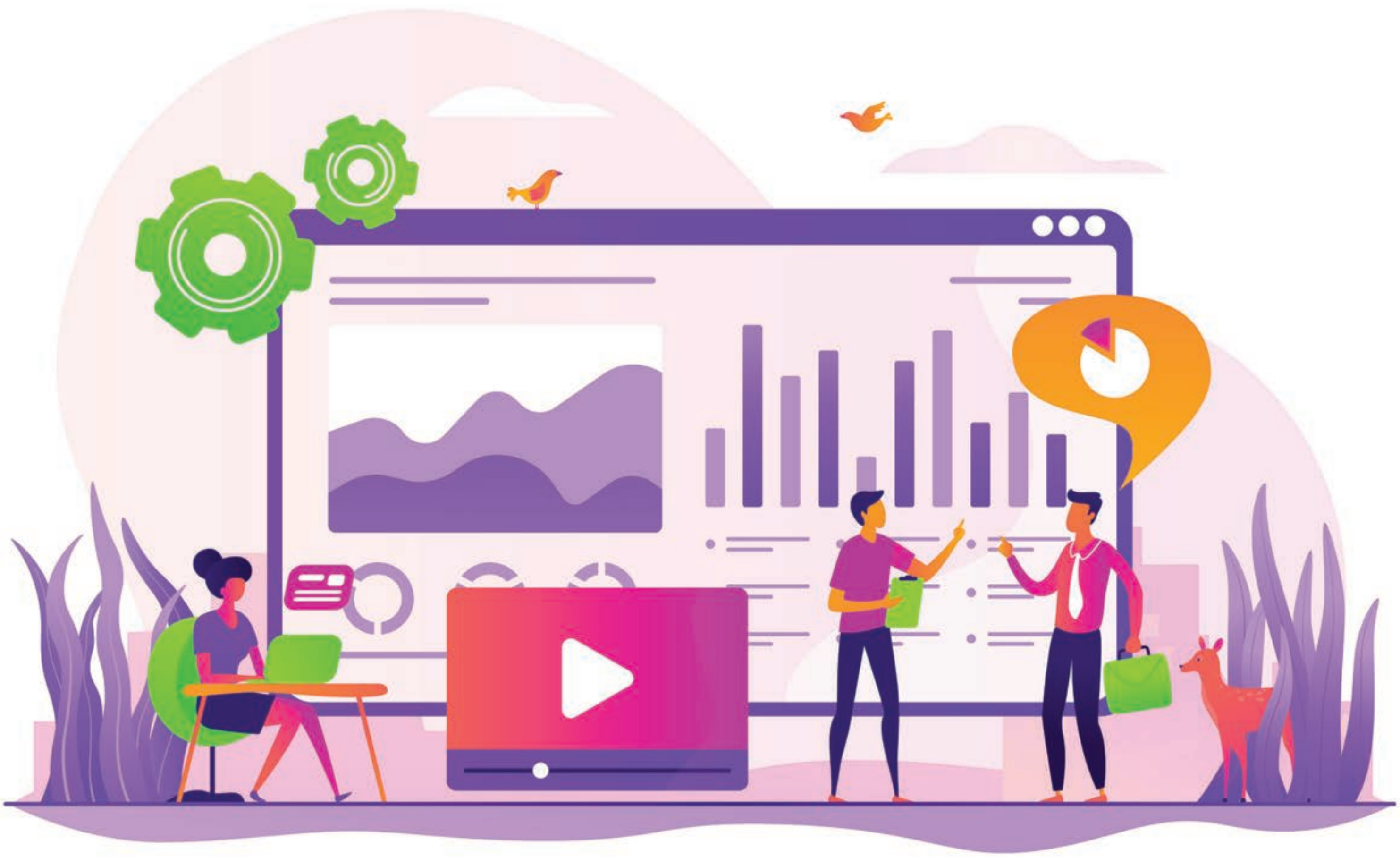
3. Develop a plan, start small and make incremental goals that get you to your destination. For TPAs that aren't being proactive in calling on advisors or haven't yet established a consistent communication campaign to cultivate new advisors, the advice is simple: Develop a plan, start small, and as you experience more and more success, you'll be encouraged to take the next step, as has been the case with so many TPA owners.

If you're not able to devote all your time to sales at this point, make incremental goals that get you to your destination. Schedule uninterrupted time on your schedule a few mornings and afternoons each week, and keep that appointment the same way you'd keep a new client appointment. At the end of the day, a disciplined focus on cultivating new advisors and sources of distribution will make all the difference in where you take your sales efforts and business.

4. Be proactive and consistent. The most common mistake we see TPAs make is not being either proactive or consistent in calling advisors, especially retirement advisors with significant assets. Many of these advisors are open to being approached by TPAs, but TPAs very rarely call on them. Advisor feedback is that if a TPA does call, they often call only once or twice. Top advisors emphasize that in the same way they cultivate plan sponsors over time with regular communications, TPAs must approach advisors in the same consistent manner to be effective.

5. Expand your distribution reach into new channels. Beyond recordkeeping and DCIO channels, successful sales consultants are constantly thinking about developing new sources of distribution for their firm. Whether it be establishing partnerships with payroll firms active in your market, developing new partnerships with CPAs, or honing in on a specific broker-dealer channel and deliberately seeking out new advisors, the successful TPA is continually focused on expanding their network. Also, consider organizing your efforts with some type of sales tracking software. These tools can help regiment your efforts and quantify results.

6. Join industry groups and associations. Industry involvement has been key for many TPA owners in terms of getting their name out into the public square, opening the door for new introductions. Perhaps this includes assuming a more prominent role in our industry or joining an association



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that caters to advisors and plan sponsors (i.e., local Chambers of Commerce, HR associations, CPA societies, etc.). Make a deliberate effort to extend your sphere of influence and develop new referral sources around a shared membership in these national and local organizations.

7. Develop and launch a coordinated multimedia campaign starting with regular emails. Whatever the format of your preferred communication, consistency is the most important element of a successful communications campaign. Many traditional sales-oriented TPAs like monthly email blasts because they afford advisors the opportunity to reply easily. TPAs who are consistent in leveraging this approach say they get frequent advisor replies saying, "thank you" and "by the way, I have a case for you to look at."

8. Add monthly advisor newsletters as the core of your campaign. TPAs should have a monthly newsletter that they deliver to advisors that is brief and contains timely content. Set a standard format that is easy for you to populate each month. Positioning yourself as a subject matter expert, without being overly technical, will make you an invaluable resource to advisors. Remember, the key is staying in front of advisors so that when they have a case, you are top-of-mind.

9. Take advantage of social media's growing popularity to grow your network and brand. While many of us are old school, you can't argue with success. Social media is the next frontier of advisor sales. Establish a company page in addition to your personal page, and invite advisors and plan sponsors to follow you. TPAs who have launched efforts on sites like LinkedIn report growing their following from zero to 500-plus in a year's time. Those delivering value-added content report inbound calls with new business inquiries.

However, don't just rely on calls coming to you. Again, be proactive in all you do; don't wait for the phone to ring. Take it a step further and message new advisor and plan sponsor contacts to schedule one-on-one introductory meetings or to join an educational Zoom

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Just as you have to invest in training and credentialing administrators or change your administrative structure to include functional processing teams at a certain point in your growth, the same is true with sales.

meeting you are hosting, for example, on a topic that will help advisors sell more business.

10. Build your sales team over time. As you progress in your efforts, taking small steps to make big progress, you'll realize more success and be encouraged. Take the next step and hire a junior marketing person, perhaps from within your own ranks. Charge this new recruit with taking up the mantle of your social media efforts. Grow your posts from weekly to daily. Do more outreach via LinkedIn's messaging capability to schedule new appointments. You'll see your sales results increase proportional to your activity.

Similarly, as you see more success, consider adding a full-time sales person or a marketing support person to fortify your efforts. As your advisor network grows, you'll want to continue to pick up the phone on the first or second ring and service advisors and wholesalers in such a way that you remain their go-to source for all new business inquiries.

Only you can decide the right point to add sales staff to your team. TPAs who have crossed this hurdle and taken their practice to the next level on a plan-count basis advise others to think about building their sales team in the same light as building a solid operations team. Just as you have to invest in training and credentialing administrators or change your administrative structure to include functional processing teams at a certain point in your growth, the same is true with sales. The first step may be a leap of faith, but with the right people and commitment to grow and employ best practices, the results will pay dividends for your practice for years to come.

For TPAs able to make the shift to sales consultant, the rewards are significant, according to advisors who see the role of the TPA as expanding in today's rapidly changing marketplace.

Recordkeeper Consolidation

Consolidation among recordkeepers will create expanded service opportunities for a new breed of specialized plan consultants. For those able to master the distribution conundrum, "the opportunities in a consolidating marketplace are broadening not narrowing for TPAS, as I see it," says Ellen Lander, Founder of Renaissance Benefit Advisors Group.

Lander, who manages $1.5 billion in retirement plan assets with an average plan size of approximately $50 million, says of the need for TPAs, "I need the services they can provide now more than ever. My firm works with many non-U.S. entities and controlled groups of corporations as well as certain types of plan sponsors with very unique workforces. Many of the large, national recordkeepers are not willing or able to provide some of the specialized services we need to have done for our clients."

Lander adds: "TPAs—I prefer to refer to them as 'specialized consultants'—are invaluable resources and RBA's clients understand that, just as we sometimes need to bring in ERISA counsel, we may also need to bring in specialized assistance from other consultants. One example would be to assist with the testing for a controlled group who has multiple plans for multiple entities, especially when they are with different recordkeepers."

Service Quality and the Advent of 3(16)

Higher service quality and the advent of 3(16) is moving TPAs up market into the bundled marketplace.

Steven Puckett, a VP at Gateway Retirement Consulting LLC, is a top advisor with $1.05 billion in assets under management and an average plan size of $16.2 million. TPAs are integral to Puckett's efforts, not just for cases with complex plan designs but across the board. "Having a TPA involved in ongoing service offers a higher and better quality of service than without one," Puckett notes.

While he agrees that TPAs add value in DB/DC carve-out situations and new comparability designs for plans in the under-100-employee market, he views their role as expanding upmarket. "I think the advent of 3(16) services is taking TPAs into the larger marketplace," Puckett says. "We are starting to see TPAs involved in bundled products as a 3(16)."

From Administrator to Sales Consultant

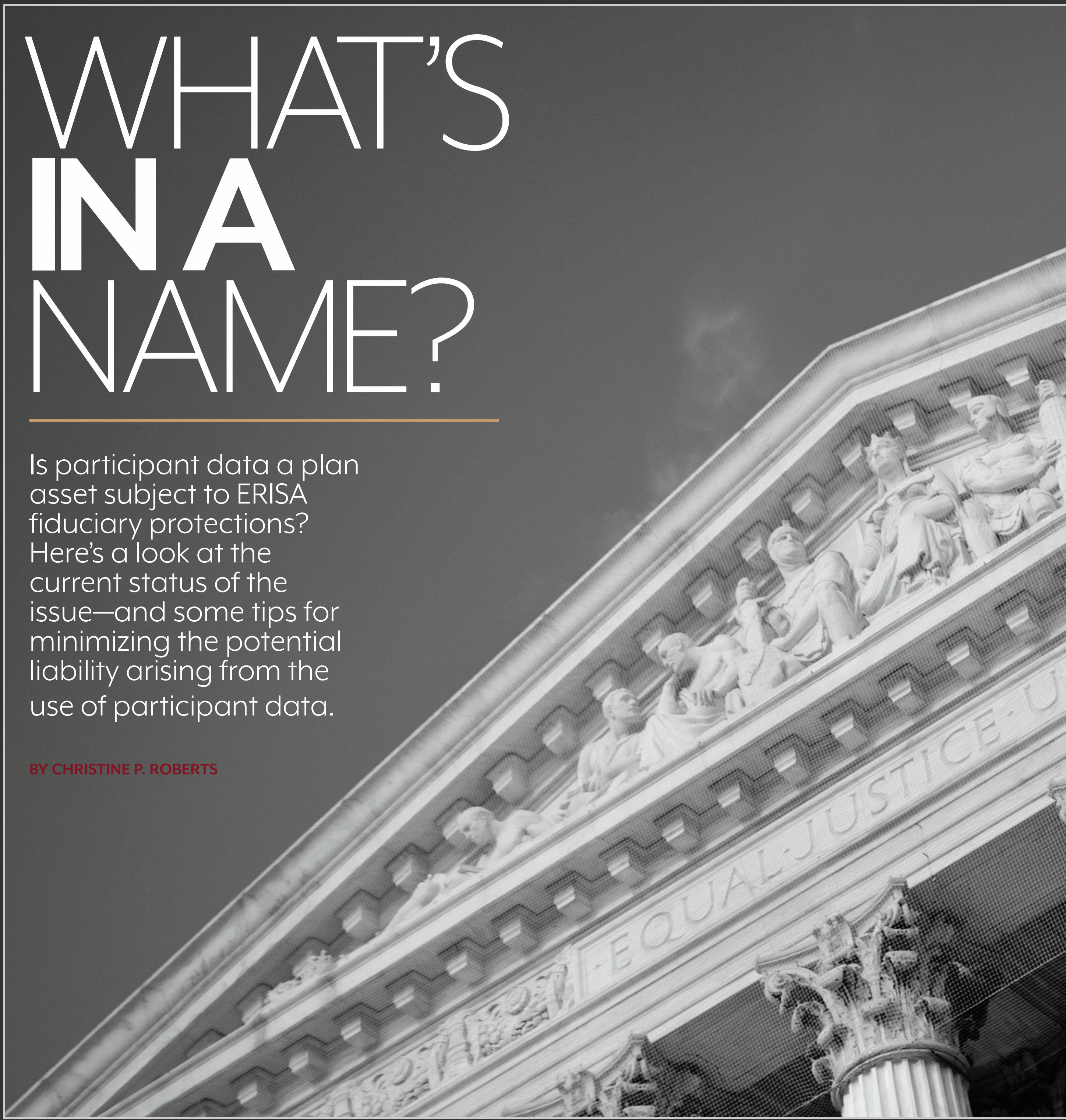
The retirement plan landscape is changing dramatically and so is the role of the TPA, by virtue of necessity. No longer small plan administrators, these stalwart professionals, who have helped shape the retirement plan industry, are vital essentials to plans of all sizes and advisors of all types.

As the sales game in the industry advances to the next level in 2021 and beyond, and we look to what the future holds for our industry, making the shift from administrator to sales consultant will define the success of the TPAs that make our industry work, now more than ever. PC

WHAT'S **IN A** NAME?

Is participant data a plan asset subject to ERISA fiduciary protections? Here's a look at the current status of the issue—and some tips for minimizing the potential liability arising from the use of participant data.

BY CHRISTINE P. ROBERTS



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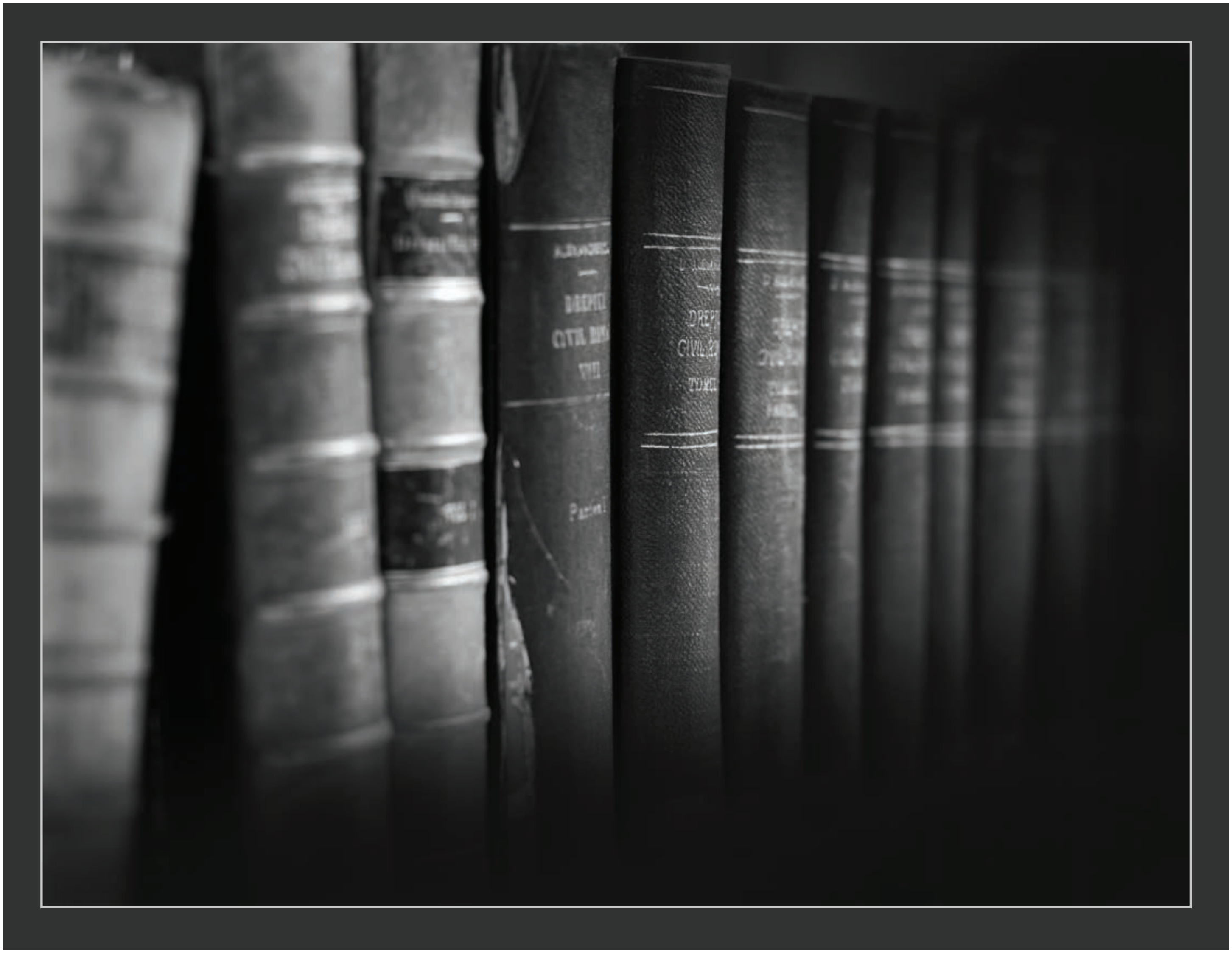

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RECENT HIGH-PROFILE CASES INVOLVING THIRD-PARTY THEFT OF 401(K) PLAN ASSETS HAVE BROUGHT HEIGHTENED FOCUS TO THE ISSUE OF SECURING RETIREMENT PLAN DATA FROM OUTSIDE HACKERS AND IDENTITY THIEVES.

While the cybersecurity focus is on attacks from outside the plan, a growing litigation trend now posits that misuse of plan participant data is occurring within the plan itself, when recordkeepers and other service providers use confidential plan data in order to identify participants who may be susceptible to offers of non-plan products and services such as IRAs, financial planning advice, insurance products, and other financial instruments. The key allegation on which these claims rest is that the participant data is a plan asset subject to ERISA fiduciary protections.

This article discusses the legal issues underpinning the trend and outlines best practices that plan sponsors and service providers can adopt to minimize potential liability arising from use of participant data.

THE ERISA CLAIMS AT ISSUE

The notion that access to participant data triggers ERISA fiduciary duties first gained prominence in class action lawsuits brought against 403(b) plans maintained by Vanderbilt University and other large educators. The trend

IN THE CASE INVOLVING THE SHELL 401(K) PLAN, THE PLAINTIFFS DIRECTLY ASSERT FIDUCIARY BREACH AND PROHIBITED TRANSACTION ALLEGATIONS AGAINST THE PLAN'S RECORDKEEPER.

has now migrated to 401(k) plans with the *Harmon v. Shell Oil Company* case, filed in 2020. The lawsuits, most of which have been brought by the St. Louis firm of Schlichter Bogard & Denton, allege that the recordkeeper's use of participant data for their own enrichment, rather than simply for fulfilling contracted services, violated ERISA's exclusive benefit rule and thus was a fiduciary breach on the part of the plan fiduciaries. Under the exclusive benefit rule, plan assets must be used for the exclusive purpose of providing benefits to plan participants or defraying reasonable expenses of administering the plan.[1]

The suits also allege that mining the participant data in order to market non-plan products and services was a prohibited transaction under ERISA[2] in that a party in interest (the recordkeeper), used a plan asset (the participant data) for their own enrichment through sale of non-plan products and services.

The categories of information at issue in the Shell Oil lawsuit include "home and cellular phone numbers, work and personal email addresses, investment history, identity of their investments, account balances, investment contribution amounts, age, income, marital status, call center notes, and access to knowledge of 'triggering events' such as when a Plan participant is nearing retirement."[3]

Alongside the novel plan asset claims, the class actions allege fiduciary breach arising from excessive plan investment and service fees, too numerous investment options, and, in the 403(b) context, multiple recordkeeping relationships.

In the lawsuits against the university 403(b) plans, plaintiffs sought recovery only from the plan fiduciaries (such as the plan committees and individual named fiduciaries themselves) for having permitted misuse of the participant data by plan service providers. However, in the case involving the Shell 401(k) plan, the plaintiffs directly assert fiduciary breach and prohibited transaction allegations against the plan's recordkeeper, Fidelity Investments Institutional Operations Company, Inc. (FIIOC). Specifically, they allege that FIIOC exercised authority and control regarding the management and disposition of the confidential participant data, and since that data is a plan asset, FIIOC fits within one of the "functional" definitions of a fiduciary under 29 U.S.C. § 1002(21)(a)(i).

Among the allegations in the Shell Oil case is that FIIOC used Salesforce customer relationship management (CRM) software to mine plan participant data for opportune points at which to offer plan participants non-plan products or services, and that representatives of affiliate Fidelity companies then reached out individually to plan participants.[4] They also allege that the revenue that the Fidelity defendants derived from non-plan services and products is "significant and often represents multiples of the record keeping fees" received, with rollover of plan assets to Fidelity IRAs driving the bulk of the additional revenue.[5]

In making the case that the participant data is an asset, the plaintiffs point to the value that could be derived from "a data set of intimate knowledge of financial and personal information combined with insider knowledge of exploitable trigger events," such as reaching retirement age, and point to numerous instances in which Fidelity took legal steps to protect similar compilations of client data. In arguing that the data is uniquely a plan asset, they note that the data is the byproduct of administering the plan and providing benefits to participants, through fulfillment of plan recordkeeping functions.[6]

HOW ERISA (DOESN'T) DEFINE PLAN ASSETS

The statutory text of ERISA contains a number of circular definitions, and the definition of plan assets is among them, providing in relevant part: "the term 'plan assets' means plan assets as defined by such regulations as the Secretary [of Labor] may prescribe."[7] Plan asset regulations published to date are not especially helpful in this context. The regulations that define the point in time at which employee salary deferral contributions become "plan assets" do not speak to the substance of the assets, only their handling. Nor do the "look through" regulations, which define when assets belonging to an entity in which a plan has an equity interest, become an asset of the plan itself.[8]

In situations falling outside the scope of the plan asset regulations, the definition of plan asset is governed by "ordinary notions of property rights under non-ERISA law" existing at the time ERISA was enacted in 1974.[9] Per the Advisory Opinion, this would include "any property, tangible or intangible, in which the plan has a beneficial ownership." Furthermore, the Advisory Opinion states that he process of identifying plan assets should encompass "consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved."

PLAN SPONSORS AND THEIR SERVICE PROVIDERS CANNOT AFFORD TO SIMPLY MONITOR THIS ISSUE UNTIL A FEDERAL COURT CONCLUDES THAT PARTICIPANT DATA IS A PLAN ASSET, BECAUSE THAT DAY MAY BE SOME TIME IN THE FUTURE.

This phrase from the Advisory Opinion would appear to suggest that the "parties" to an ERISA plan—most relevantly to this discussion, fiduciaries on the one hand, and service providers on the other—could negotiate and contract around the plan asset status of an intangible such as participant data. It also suggests that what the parties say and do in respect to the intangible asset will reflect on its plan asset status (or lack thereof).

MIXED OUTCOMES AT COURT

Against that background, how successful have litigants been in classifying participant data as a plan asset? The outcomes to date have been mixed.

In *Divane v. Northwestern University* (2018 U.S. Dist. LEXIS 87645, N. D. Ill. May 25, 2018), plaintiffs did not succeed in characterizing participant data as a plan asset. Observing that plaintiffs cited no legal precedent recognizing a property right in such information, the court expressly declined to be first to hold that information is a plan asset for purpose of ERISA: "[t]he Court has no doubt that a compilation that TIAA has on participants has some value (to TIAA, at least) but the Court cannot conclude that it is a plan asset under ordinary notions of property rights." Citing to another case that referred to loss of private information as "an abstract injury," it concluded that the participant data was not an asset because it was not something the plan could "sell or lease in order to fund retirement benefits." In addition to rejecting the effort to classify participant data as a plan asset on its merits, the court dismissed the plaintiff's fiduciary breach and prohibited transaction claims as well. The Seventh Circuit Court of Appeals upheld the dismissal without directly addressing the participant data claims on their merits.[10]

In litigation over the Shell 401(k) plan, plaintiffs have asserted that the participant data is highly valuable in and of itself, and specifically to Fidelity, and have pointed to specific damage to one plaintiff who, at Fidelity's data-based incentive, rolled funds from a lower cost plan fund to a more expensive Fidelity IRA option. They assert that the Salesforce database exposes other participants to solicitations of non-plan products and services that may not be in their best interests. However, they are fighting an uphill battle in asking a court to define plan assets for ERISA purposes, which is a task that has been reserved for Department of Labor regulations.

Also of note have been terms contained in settlement agreements reached in *Cassell v. Vanderbilt University* (No. 3:16-cv-02086, M.D. Tenn.) and *Kelly v. Johns Hopkins University* (No. 1:16-cv-2835, D. Maryland). The settlement agreement in the Vanderbilt case prohibits current recordkeeper Fidelity from using information about plan participants that was acquired in the course of providing recordkeeping services in order to market or sell products or services unrelated to the plan, unless the plan participant initiates the request for the products or services. The settlement agreement also requires the Vanderbilt plan fiduciaries conduct a request for proposal for a new recordkeeper, and that any agreement reached with that recordkeeper also prohibit it from using confidential plan data to make any unsolicited contact with participants about non-plan services or products.

The settlement agreement in the Johns Hopkins case requires plan fiduciaries to pursue a request for proposal process for a new recordkeeper, requesting only proposals in which the recordkeeper agrees to refrain from soliciting current plan participants for purposes of selling non-plan products or services, unless the plan participant initiates the request themselves. These terms must also be present in any final agreed-upon contract for recordkeeping services. In the litigation involving Shell Oil's 401(k) plan, plaintiffs' amended complaint also cites a number of other instances in which fiduciaries of large 403(b) plans had demanded similar terms be met by their recordkeepers and other service providers.[11]

Arguably, per the terms of the DOL Advisory Opinion on plan asset status, contractual terms like these, which recognize that participant data may only be used for plan purposes without participant consent, would support the conclusion that the data is an asset of the plan and subject to fiduciary protection under ERISA.

LESSONS AND BEST PRACTICES

Some observers are of the view that the debate over participant data as a plan asset is somewhat overblown. Recordkeepers have always factored into their fees a certain amount of revenue they hope to realize by capturing IRA

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rollovers from plan participants. Some have even gone so far as to refer to recordkeeping as a loss leader for gathering rollover assets.[12] If recordkeepers had limited their marketing efforts to rollovers, the notion of participant data as a plan asset might have been slower to develop. It would have developed, nonetheless, particularly in light of the Department of Labor's acknowledgment that advice to roll assets from an ERISA plan to an IRA generally is fiduciary in nature.[13] However, as fee compression in the industry has entrenched, the number and types of products and services marketed to plan participants have increased, as has the frequency of contacts. This has drawn the attention of plaintiff's counsel to the use of participant data as a potential litigation target, and it is unlikely that this trend will reverse itself, especially against the backdrop of increasing legislation around data privacy, such as with the GDPR and the California Consumer Privacy Act, and the aforementioned trend of outright theft of 401(k) plan assets.

Clearly, confidential information gathered by a plan provider can be exploited whether or not it is has status as an ERISA asset. Plan sponsors and their service providers cannot afford to simply monitor this issue until a federal court concludes that participant data is a plan asset, because that day may be some time in the future. They must be proactive and take steps now with regard to participant data that are in the best interests of plan participants. Below are recommendations for plan sponsors and other fiduciaries, as well as for recordkeepers and service providers.

For Plan Sponsors and Other Fiduciaries

Step 1: Disclosure from service providers

- In a request for proposal process, and with current recordkeepers and other service providers (collectively, "providers") plan sponsors must find out what participant data the providers gather and how they use it, and what revenue results from the use. They should specifically ask if the provider uses CRM software to mine participant data and, if so, determine what use it makes of the information gleaned.
- Every new service provider or vendor who creates or acquires participant data must provide that information

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at the outset of the relationship, and renew it when circumstances change, such as use of different software, etc.

Step 2: Negotiation

- With a new provider, the plan sponsor should consider the Vanderbilt and Johns Hopkins' settlement provisions "best practices" and determine whether it can prohibit use of data to sell a non-plan service or product without first having been initiated by a plan participant.
- Plan sponsors that do not have the leverage to enforce such a restriction should request that the providers allow participants to affirmatively opt-in to use of their data. In the health sphere, HIPAA already requires an opt-in before hospitals and other health care providers may send marketing and fund raising materials to patients they see. Similarly, the California Consumer Privacy Act requires an affirmative opt-in before personal data may be collected or used by an entity that is covered by the Act.
- If providers derive a financial reward from use of participant data, plan sponsors and other fiduciaries must determine whether that revenue is factored into the recordkeeping and other service fees charged to the plan. If it is not, they should negotiate fee offsets and/or rebates.

Step 3: Disclosure to participants

- Whatever arrangement is reached with the provider—whether no outreach or opt-in only—communicate that to participants. Without disclosure about provider use of participant data, plan participants may assume provider outreach with non-plan services and products is part of the plan service package and therefore sanctioned by their employers. This increases potential liability to the fiduciaries.
- Make it clear that the company does not sanction or vouch for non-plan products or services and that they have options for those products and services on the open market.
- If the use of participant data is required in order for a recordkeeper to provide financial wellness services, disclose what information is gathered and how it is used. Make sure the minimum necessary information is gathered in order to provide the wellness services.

Step 4: Mitigation of damages

- In any instance in which a provider has made use of participant data for non-plan functions, including but not limited to instances in which the provider has realized revenue as a result, fiduciaries should consult with ERISA counsel and with their fiduciary liability carriers, if any.

For Third Party Administrators and Other Providers

- Assume your clients have a fiduciary level of responsibility with regard to data on plan participants. Catalogue the ways in which you create and receive such data, what you do with it, and what revenue, if any, that you derive from it that is not directly related to your plan services and functions.
- If you are currently using and profiting from access to participant data, disclose this to your existing clients, as well as the impact it has on fees for your plan-related services. Be prepared to negotiate fee adjustments to account for revenue based on participant data.
- If you are an ERISA § 3(16) fiduciary, you must carefully examine the written terms of your services agreement and the specific scope and nature of your fiduciary role. It is likely limited to reporting and disclosure duties, such as Form 5500 preparation and plan document maintenance. However, you should confirm that it does not undertake additional fiduciary duties such as overall management of the plan, which would incorporate responsibility for participant data as an asset. You should also be careful to disclose in your services agreement the uses you make of participant data, whether they generate a revenue stream, and whether they offset other charges or expenses.
- If you are a named fiduciary under ERISA § 402, you have your own fiduciary duty towards plan participants with regard to plan assets, and should assume that your use of participant data must be in the best interests of plan participants, and may not be used to enrich you or your business beyond reasonable compensation for services received. Your fiduciary status will extend to the engagement of other service providers, so you must follow the fiduciary best practices outlined above in regard to engaging those providers. In this regard, note that named fiduciary status is required in order to serve as a pooled plan provider for a pooled employer plan, per proposed regulations.[14] PC

Footnotes

[1] 29 U.S.C. § 1103(c)(1); Internal Revenue Code Section 401(a)(2).
[2] 29 U.S.C. § 1106 and Code § 4975
[3] Plaintiffs' First Amended Complaint – Class Action at pp. 59-60, 3:20-cv-00021 (S. Dist. Texas, May 21, 2020).
[4] Plaintiffs' Opposition to Fidelity Defendants' Motion to Dismiss, at pp. 6, 12, 3:20-cv-00021 (S.D. Tex., July 6, 2020).
[5] Plaintiffs' First Amended Complaint – Class Action at p. 69, 3:20-cv-00021 (S. Dist. Texas, May 21, 2020).
[6] Plaintiffs' Opposition to Fidelity Defendants Motion to Dismiss, at pp. 11-15, 3:20-cv-00021 (S.D. Tex., July 6, 2020).
[7] 29 U.S.C. § 1002(42).
[8] 29 C.F.R. §§ 2510.3-102(a)(1); 2510.3-101.
[9] Dept. of Labor Advisory Opinion 1993-14A; see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).
[10] 2020 U.S. App. LEXIS 9277 (7th Cir. Ill., Mar. 25, 2020).
[11] Plaintiffs' First Amended Complaint – Class Action at p. 57, 3:20-cv-00021 (S. Dist. Texas, May 21, 2020).
[12] *Securian Financial's Ted Schmelzle: Why Fee Compression Comes at a Price*. 401k Specialist magazine, July 30, 2019.
[13] Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 82798 (Dec. 18, 2020).
[14] Registration Requirements for Pooled Plan Providers, 29 CFR §2510, 85 Fed. Reg. 72934 (Nov. 16, 2020).

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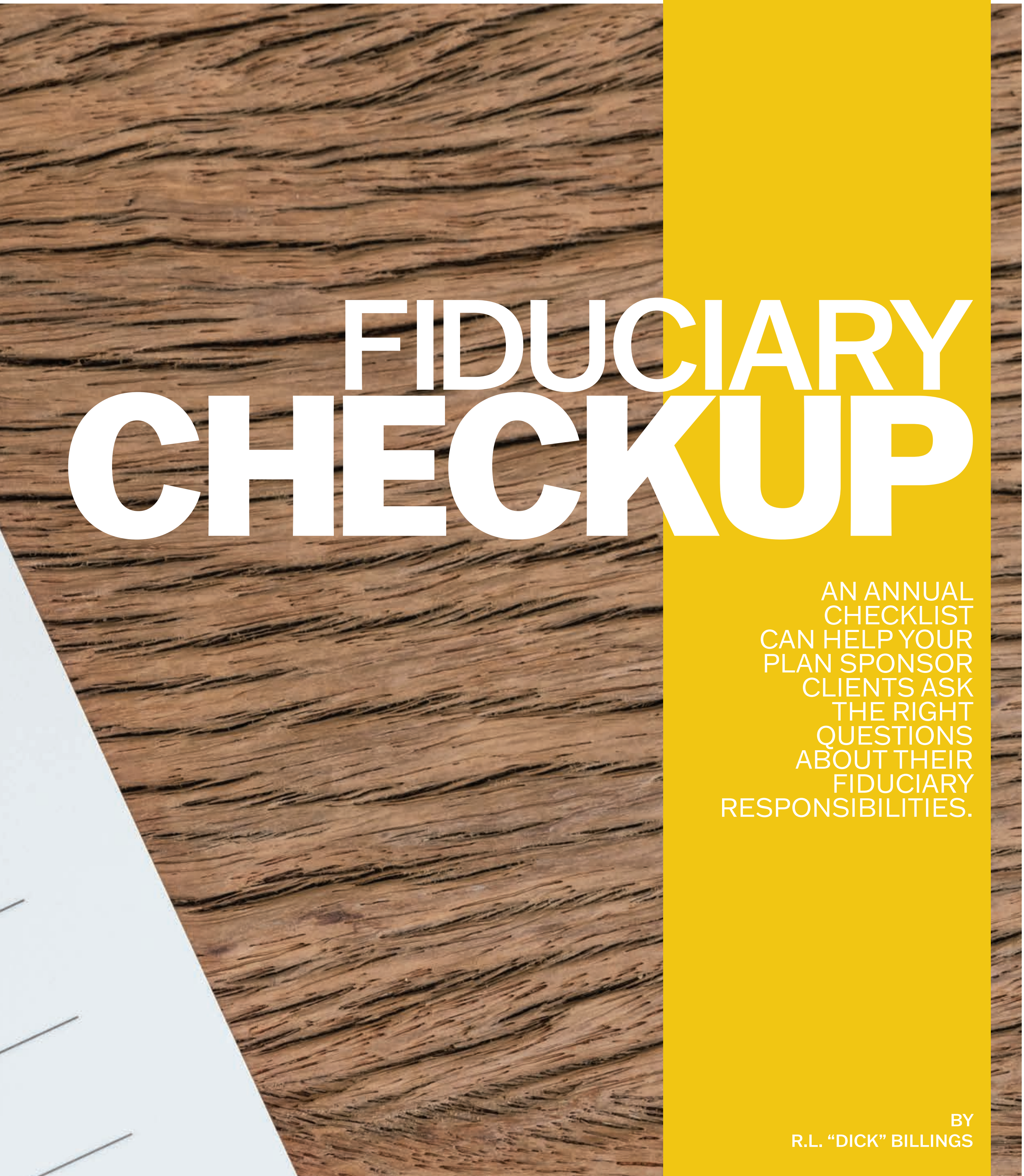

FIDUCIARY CHECKUP

AN ANNUAL CHECKLIST CAN HELP YOUR PLAN SPONSOR CLIENTS ASK THE RIGHT QUESTIONS ABOUT THEIR FIDUCIARY RESPONSIBILITIES.

BY
R.L. “DICK” BILLINGS

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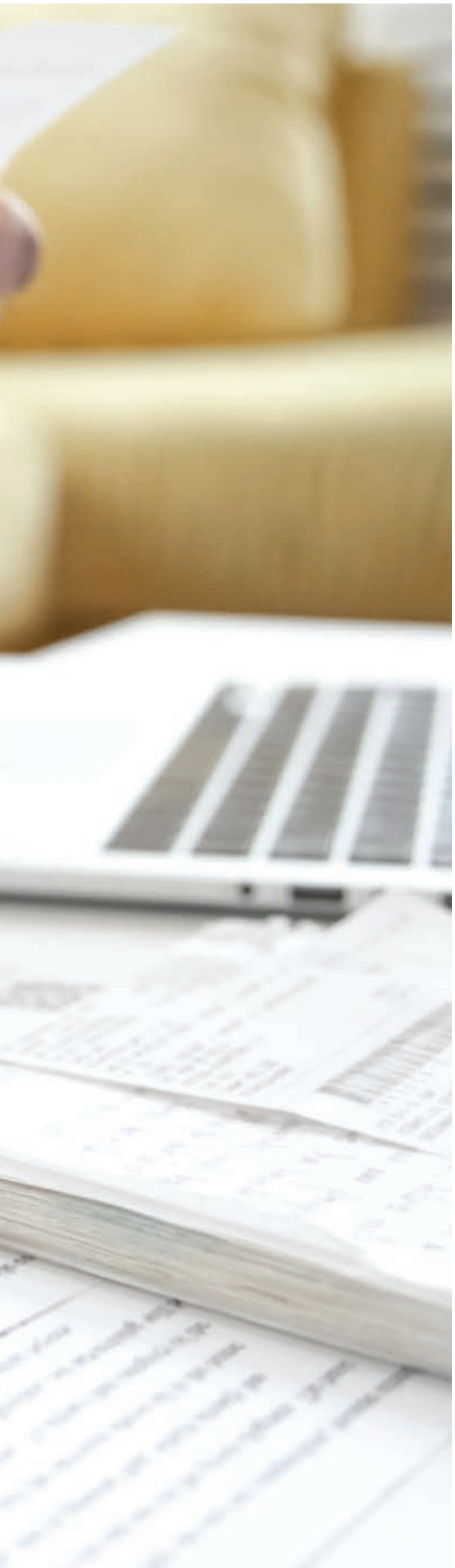

IT'S LIKELY THAT WITH ALMOST ALL OF YOUR CLIENTS, THE EMPLOYER/PLAN SPONSOR IS THE ENTITY CHARGED WITH MANAGING AND OVERSEEING THE UNDERLYING QUALIFIED RETIREMENT PLAN.

My experience has been that explaining to employers and plan sponsors how to properly discharge their fiduciary responsibilities becomes a very tricky proposition. This is not because the plan is so hard to oversee or has so many special issues, but because:

1. Most employer/plan sponsors do not know how to properly oversee their 401(k) or 403(b) plan, nor do they have time or desire to learn how to do so.
2. Outside vendors, such as the investment advisor, administrator, CPA, etc. are doing their best to "help" but they are either not a fiduciary, or if they are, their fiduciary oversight only covers a limited part of the employer/plan sponsor's responsibilities. Some think that if their plan retains at least one fiduciary, the entire plan is covered… this would be wrong!

So, what's a plan sponsor to do? The easiest option is to get them to legally outsource virtually all their fiduciary responsibilities to a vendor that will accept all fiduciary matters under ERISA §402 (named fiduciary) and §3(16) (plan administrator). This protects them, and it protects you.

It's likely that you do not provide all the retirement plan services that are discussed below. And it's likely that you don't want to get into services your firm does not already provide. But even if your firm does not provide these other services, a welcomed value-add would be helping educate your clients in all areas so they ask the right questions.

We vendors are always looking for something to differentiate us from our competitors. Providing your retirement plan clients wholistic information helps them understand how the plan works. It will pay dividends in the long run as your client is eventually encouraged to move, and it will build

TO SATISFY ERISA'S PRUDENT PROCESS RULE, AN IPS SHOULD BE SPECIFIC, WITH SOME LANGUAGE ALLOWING FOR FIDUCIARY FLEXIBILITY AS NECESSARY.

goodwill in the event your firm makes an administrative mistake.

Assuming your employer/plan sponsor client chooses to retain their responsibilities as the named fiduciary, let's look at a checklist you can give them so they can "do it themselves." But first, let me expand on two points that every employer/plan sponsor needs to understand:

1. Under ERISA regulations, and confirmed by the U.S. Supreme Court in the *Tibble* decision,[1] an employer/plan sponsor has an ongoing fiduciary obligation to monitor and oversee the plan's health. I say "health" because plan oversight and management is much more than just reviewing the investments, ensuring that everyone received their proper match and making sure the IRS 5500 Series Form is filed timely. These issues are certainly helpful in keeping a plan "healthy," but they are relative minor tasks in the larger scheme of managing a qualified retirement plan.
2. Typically, 401(k)/403(b) plans allowing participant investment direction (almost all of them nowadays) have the following vendors helping plan sponsors with certain aspects of the plan's management:
   a. investment advisor – investments
   b. TPA – discrimination testing and preparing the Form 5500
   c. daily recordkeeper – maintains 24/7 internet access for plan participants
   d. directed trustee – confirms plan assets (if not outsourced to trust company, plan sponsor retains this duty)
   e. outside ERISA attorney or CPA – helps with various issues as they arise

I list these vendors to illustrate a point: None of them are taking on the respective managerial fiduciary responsibilities attributable to the company's owners, officers or Board of Directors. Each vendor typically "stays in their own lane" and has little interaction with the other vendors. If one or more vendors helps an employer/plan sponsor handle their managerial tasks (e.g., quarterly meetings with the investment advisor), those are just additional vendor services that provide no actual relief of a plan sponsor's fiduciary risk, nor does it necessarily help them to *understand* what is presented so they are able make informed decisions.

Even if one or more of these vendors is a fiduciary, it will only be for issues "in their own lane." This is because very few vendors take on the named fiduciary responsibilities under ERISA §402(a). If a vendor takes on the office of ERISA §3(16) plan administrator, it is only taking on those tasks accepted in writing—which is almost always less than of all of the ERISA-required §3(16) responsibilities. Fiduciary responsibilities under ERISA §402 are being left with the employer/plan sponsor as well.

So if your client is the named fiduciary in charge of their plan's overall health, here is a list of *managerial* duties that must be addressed constantly and consistently.

GOVERNANCE STRUCTURE

Governance structure has to do with how issues are deliberated and documented.

"The document always controls"! The documents in question here are typically expressed nowadays as one legal instrument separated into two physically separate documents: the adoption/joinder agreement and a "base" document. The former contains plan provisions peculiar to that plan. It is also the document signed by the employer and trustee. The base document contains boilerplate information, is quite lengthy, and is not signed by any party.

One must look to both documents to find what directions they contain about a plan committee and/or investment committee. If either document addresses specifics, the plan sponsor must follow its language. If it is more generic, then the plan sponsor is left to set up its own governance regime.

Once committees are formed, here are just a few issues that must be addressed. These issues will almost never be written into the plan documents:

1. Who will be on the committees and how will they be appointed?
2. Will members rotate off periodically, and in what fashion?
3. How often will they meet, and will attendance be mandatory?
4. What qualifications or educational background must they have?
5. What initial and ongoing fiduciary training will be offered?
6. Will all committee members be voting members, or only some of them?
7. How will minutes be taken and memorialized with documents discussed during said meeting?

INVESTMENT POLICY STATEMENT (IPS)

The IPS governs how investments are reviewed and benchmarked.

Have the plan sponsor ask themselves, "Why are our plan's investments the way they are today?" If no good answer can be found, they have one of two problems:

- no written IPS exists; or
- a written IPS exists, but it is not followed. This second problem is worse than the first!

ERISA regulations require all plan fiduciaries to employ a "prudent process"[2] when making fiduciary decisions. Overseeing a plan's mutual funds is indeed a fiduciary act. If your client's plan is ever audited, or a participant (and his attorney) asks, "Why do we have the investments we do?", the IPS will be the first document to which they will turn. If the plan is found to have no prudent process, or an ignored written IPS, that will be the basis for any governmental sanctions or lawsuit damages.

To satisfy ERISA's prudent process rule, an IPS should be specific, with some language allowing for fiduciary flexibility as necessary. Determining how specific and how flexible will be the challenge. The IPS must have sufficient detail giving fiduciaries specific actions to take if a particular mutual fund does not meet the written criteria, with flexibility that allows the fiduciaries to respond to developmental changes in the investment marketplace to such an extent that funds should be prudently added or deleted for other reasons.

Regardless of the language within any particular IPS, any prudent checklist must include reviewing the document's actual language from time to time. New investment products are introduced; participant demographics change; new laws and regulations are created. If the language of the IPS is

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not thoroughly reviewed annually, then it should be at least every other year. Any review of an IPS must be done with direct input not only from the investment advisor (whether a fiduciary or not), but also with the assistance of an attorney well versed in ERISA regulations.

FIDUCIARY INSURANCE

This provides protection against fiduciary breaches.

As noted above, owners, officers and Board members of a company that sponsors a qualified retirement plan are all fiduciaries, even if they never touch the plan. Many companies carry "Directors and Officers" (D&O) insurance for liability protection. But most D&O policies specifically *exclude* fiduciary breaches under ERISA. So here are two issues for your plan sponsor to consider:

1. If they do not have D&O insurance, encourage them to get it and tell them to make sure it applies to ERISA-covered retirement plans.
2. If they do have D&O Insurance, encourage them to make sure it applies to ERISA-covered retirement plans. If it does not, they should purchase a separate policy.

While there is not universal agreement, I suggest advising your client to not pay fiduciary insurance premiums from plan assets. Remind them that paying from company assets creates an additional tax deduction! (Note: Also remind them that fiduciary insurance has nothing to do with the ERISA-required "10% of assets" bond. These bonds do not cover any employer/plan sponsor fiduciary liability.)

DOCUMENT VAULT

This provides one place where all plan-related documents are stored. A plan sponsor should never assume that each vendor will properly retain the plan's related documents. Unless a vendor agrees in writing to retain all plan documents, the employer/plan sponsor remains responsible.

Every year, your client needs to ask, "Is there a central location where we can find all plan-related documents?" including:

1. Signed Adoption Agreement
2. Subsequent plan amendments

3. Base plan document
4. IRS Determination or Opinion Letter, as applicable
5. ERISA "10%" fidelity bond
6. Summary Plan Description
7. Loan policy
8. Individual participant loan documents
9. Investment Policy Statement (IPS)
10. Qualified Domestic Relations Order (QDRO) policy
11. All annually-required participant fee disclosures and notices
12. All participant enrollment documents
13. All "signed" vendor service agreements
14. All documents reviewed and discussed at any Committee meeting
15. Benefit payout documents of all former plan participants
16. All IRS or DOL correspondence
17. Each vendor's annual report

A PLAN SPONSOR SHOULD NEVER ASSUME THAT EACH VENDOR WILL PROPERLY RETAIN THE PLAN'S RELATED DOCUMENTS.

If an up-to-date "vault" does not exist, *the employer/plan sponsor needs to do this ASAP*. During any review, it is common to find documents that should exist but do not; or they exist but have never been signed! Remember, an unsigned legal document is not a legal document at all; it simply does not exist in the eyes of the law. If a signed legal document cannot be found, have your client consider entering into any applicable amnesty program with the federal government.

It is important to understand how long these documents must be retained, either by the employer/plan sponsor or the outside vendor. ERISA §107 requires fiduciary plan documents, contracts and agreements, participant notices and compliance documents to be kept at least six years from the date the report was filed. In addition to storing documents over these six years, what process will be employed to purge those documents when appropriate?

Participant-level benefit determinations are slightly different. ERISA §209 states that employers should maintain employee records "sufficient to determine the benefits due or which may become due to such employees." Therefore, any documents substantiating an employee benefit (e.g., distribution) should be maintained pretty much forever. These documents would include individual benefit applications, TPA annual reports with participant-level data, adoption/joinder agreements and amendments, and "base" plan documents. As a former TPA owner, I lost count of how many times I had a client with a long-terminated employee who came looking for his or her retirement plan distribution (because we filed an 8955-SSA on this employee many years back). The employer/plan sponsor may be sure this participant was paid out in full already. But if relevant records cannot be located, legal action by the participant could ensue.

To recap, the plan sponsor's annual checklist consists of items that fall into four categories:

1. plan governance;
2. Investment Policy Statement;
3. fiduciary insurance; and
4. document vault.

Here's some simple advice for every employer/plan sponsor: Whether they outsource virtually all their fiduciary responsibilities, decide to retain them all or somewhere in between, if they just ask about these four items, they will be well on their way to satisfying ERISA's required "highest standards."[3] On behalf of the plan's underlying participants, that is the goal, is it not? PC

Footnotes
[1] *Tibble et al v Edison International et al*, No. 13-550 (2015)
[2] 29 U.S. Code § 1104(a)(1)(B)
[3] *Ibid*

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RETROACTIVE PLAN ADOPTION UNDER THE SECURE ACT

How you will address the challenges of the newly expanded ability of companies to adopt a retirement plan? Now is the time to plan ahead. By Kelsey Mayo

The SECURE Act meaningfully expanded a company's ability to adopt a retirement plan, but that expansion does not come without challenges.

Prior to the SECURE Act, a plan was required to be adopted within the company's tax year in order for the company to take a deduction for that year. For example, assume that ABC Co., a C-corporation, has a calendar year tax year. ABC ends the year with an extraordinary profit margin, which is great, except when figuring the government's portion of those profits, and many owners in this situation, given a choice, would elect to increase retirement plan contributions for the tax year to offset the business' taxable income.

If the company had already adopted a plan, increasing contributions generally was a viable option as long as the contribution and deduction limits were not already maxed out. If, however, the company had not yet adopted a retirement plan (or perhaps was now interested in adopting a new cash balance plan), the owners might be out of luck. If the business owner was aware of how well the company was performing, then the owner might have had time to adopt a plan prior to the end of its tax year. However, owners of businesses in this situation often discovered how well the business had performed only after the tax year closed—when it was too late to adopt a new plan.

Before the SECURE Act, there was no way for this business owner to retroactively adopt a profit sharing plan or cash balance plan, employer contributions to which would create a nice deduction against the tax amount due.

THE NEW RULE

Under the SECURE Act, an employer can adopt a plan even after the end of its tax year. Specifically, the plan may be adopted at any time prior to the deadline for filing the employer's tax return (including extensions) for that taxable year. This means the applicable deadlines are as follows (assuming a calendar year tax year):

Entity	No extension of tax return	Extended tax return	Deadline to adopt plan if tax return is extended
C-corporation, sole proprietorship or single-member LLC	April 15	Oct. 15	Oct. 15
S-corporation, partnership or multi-member LLC	March 15	Sept. 15	Sept. 15

"ON THE BUSINESS SIDE OF THE EQUATION, THE NEW PROVISION CHANGE MAY CHANGE THE TIMEFRAME IN WHICH PLANS ARE ESTABLISHED SIGNIFICANTLY."

This retroactive adoption option is available for tax years beginning after Dec. 31, 2019—meaning this was first applicable to tax years beginning in 2020 (and, for a calendar year taxpayer, ending on Dec. 31, 2020)—so we are just now in the midst of our first major retroactive plan adoption season.

Assuming a calendar year tax year, ABC Co. could feasibly adopt a profit sharing plan or cash balance plan in April 2021 that would be effective Jan. 1, 2020. This allows ABC to close its books on Dec. 31, 2020, review and evaluate its financial performance for 2020, and then, with the benefit of hindsight, evaluate the impacts of implementing a retirement plan for that year. Thus, if a company finds it has performed better than expected and is faced with a larger tax bill than anticipated, it can mitigate that tax by adopting a plan, and making a deductible employer contribution to a qualified retirement plan.

Since the period to adopt a plan includes any extension of the company's tax return, as noted in the table above, a business that extends its tax return may be permitted to adopt a plan as late as Oct. 15 of the following tax year. This is a welcome change that will encourage employers to adopt plans and increase the number of individuals covered by plans. It does not, however, come without some challenges.

THE CHALLENGES

Funding Deadlines

Even though the law permits a company to adopt the plan as late as its tax return due date, the practical deadline may be earlier. If the company is looking to adopt a money purchase pension, target benefit, or defined benefit pension plan (including a cash balance plan), the plan must be in place and funded by Sept. 15. In addition, funding after this date may subject the plan sponsor to excise taxes. Thus, a business owner who waits until late September or early October to evaluate the past year's performance may find this retroactive adoption practically unavailable.

Government Filings

Form 5500 filings are required for retirement plans. The deadline for filing or requesting an extension for a calendar year plan is July 31 of the following year. Considering that employers now have the option to retroactively adopt a plan as late as Oct. 15, an employer may decide to adopt a plan *after* the deadline for requesting an extension of the time to file a Form 5500 for that year.

The IRS and DOL are coordinating and working to address this conundrum. Possible resolutions might include offering special extensions of the Form 5500 for the first plan year of a retroactively adopted plan, waiving the Form 5500 filing for the retroactively adopted first plan year, or some other solution. Until guidance is issued, to the extent a company knows by the initial Form 5500 filing deadline that it will retroactively adopt a plan, it would be prudent to file the Form 5500 or request an extension of the deadline via Form 5558.

The initial premium filing with the Pension Benefit Guarantee Corporation (PBGC) for a pension plan is based on when the plan is adopted. Therefore, a similar conundrum of needing to file before the plan is adopted should be avoided. However, PBGC is also evaluating whether and how its filing forms need to be revised to address these retroactively adopted plans, and guidance may be forthcoming.

Client Onboarding

On the business side of the equation, the new provision may change the timeframe in which plans are established significantly. Before the SECURE Act, plans were certainly established on short timelines near the end of a tax year, but there was still time after the year-end to fund that plan and start up the administration. Cash balance plans generally underwent a much longer selling cycle, where a company might consider whether to adopt a plan over months or even years, reluctant to adopt in the absence of certainty about company performance.

The SECURE Act may transform this cycle by compressing the sales cycle to a matter of days (or hours?!) rather than over several months or years. And because the funding deadline may be the same day as the deadline to adopt the plan, the trust must be established and processes put in place much more rapidly.

However, every plan vendor knows how critical it is to ensure that the plan sponsor understands the plan and its ongoing obligations related to it (particularly for cash balance and other DB plans). A client faced with having to pay a substantial amount to the IRS on Sept. 15 may plead for assistance as late as Sept. 15. This is no time for shortcuts. The client must be presented with all the pros and cons of such an action and vendors will need to be sure implementation of the plan is feasible.

One solution: invest now in creating a plan for this situation—in particular, determining which other plan vendors will be prepared to partner with you to get the plan in place. Furthermore, what materials will you make sure the client has (such as fee disclosures, funding illustrations, etc.)? Are there any special representations or disclaimers you want to add to your service agreement now pertaining to this situation?

Implementing a plan in this compressed cycle will certainly present new challenges. Thinking now about how you want to address them will make those implementations more successful for you and your clients. PC

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DWC – THE 401k EXPERTS
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dwc401k.com

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**as of March. 05, 2021*

A TPA'S GUIDE TO BUSINESS METRICS

Set your firm up for success with these key metrics.

By William C. Presson & Megan Crawford

Why use metrics and Key Performance Indicators (KPIs)? Because you can't control what you don't measure. By putting metrics and KPIs into place, you can reach your goals effectively and efficiently. It is not too late to get these metrics in place for 2021!

So what are business metrics and KPIs? They are simply a measurement to track some aspect of your business activity. Key Performance Indicators are business metrics that are related to a specific strategic goal. Generally, metrics are tactical and KPIs are strategic.

FINANCIALS

Tracking your financials is possibly the most important KPI. Revenue and expenses by month is an excellent way to look at the company's position. Using a spreadsheet, we recommend measuring:

1. Your base plan for the year.
2. Your "stretch" plan for the year. In other words, what a great year would look like.
3. Your revised plan for the year. This would be any forward-looking revisions because of changes in regulations, the business environment or your situation.
4. Prior year actual amounts. This shows last year's numbers.
5. Current year actual amounts. This is entered monthly.

Each month, you enter the actual amounts, and the spreadsheet can automatically calculate the variance to each row above. You will be able to monitor any major swings and see quickly how close you are to what you expected.

Along with reviewing your month-to-month revenue and expenses, it's also important to look at your gross and net profit margins. Gross profit margin reflects how successful a company's executive management team is in generating revenue. It will tell you the percentage of profit that can be used to cover your business expenses.

Net profit margin will show you what percent of each dollar earned ends up as profit. This is a great way to look at long-term business success and see whether your income exceeds the costs of running your business. If you have a negative net profit margin, the cost of running your business is too high. You will need to look at where to cut some expenses or work on increasing your sales revenue.

It is important for you to set a goal for where you want these numbers to be and check them monthly to ensure you are staying on track.

CUSTOMER LOYALTY

While healthy financials are certainly important, it's also key to track your Net Promoter Score (NPS). NPS was created in 2003 by Fred Reichheld with Bain & Company. It is a measurement of a customer's likelihood of recommending a product or service on a scale of 1-10. A 9 or 10 is considered a promoter and a 6 or below is considered a detractor. The NPS compares the percentage of promoters to the percentage of detractors. This is a simple, streamlined way to measure customer loyalty. The keys to using this are to be consistent with measuring and consistent with following up.

Firms can gather the data either through phone calls, on paper or through an email.

"BY PUTTING METRICS AND KPIS INTO PLACE, YOU CAN REACH YOUR GOALS EFFECTIVELY AND EFFICIENTLY. IT IS NOT TOO LATE TO GET THESE METRICS IN PLACE FOR 2021!"

Be sure to develop a plan to follow up immediately with anyone who gives a score of 6 or less. These clients are already angry or disappointed. They are very likely leaving no matter what you do. But you can learn why and look to fix the problem. You might also be able to dispel the anger. You will still have a former client, but it might be one that says, "at least they tried."

TURNAROUND TIME

Speaking of keeping clients happy, a couple of years ago we added turnaround time goals to our annual administration process. When we say turnaround time, we mean the time it takes for the client to get us the data and the time it takes for us to complete different pieces of the administration after we receive the data.

When setting these goals, it is important to decide which pieces to assign turnaround times to. For example, we set short turnaround goals for doing the initial census scrub and longer ones for running allocations and completing the necessary testing. This helps ensure that we get back to the client for any missing information within a few days while the request for data is still fresh in their minds. It also assures them that we receive everything we need to keep their administration moving (and get them the final contribution they are dying to get)!

Setting these goals enabled us to measure two key things. First, that we are getting the work done timely after we receive the data from the client. And second, we can finally track where the issues are, both on our end and on our client's end. If we have an employee who is past due on the turnaround time goal, we can see that quickly and address it one-on-one. Perhaps it was something that had to be addressed with the client, or the employee didn't know how to complete something. By addressing these issues quickly, we can keep things moving so we don't get to 5500 due date time and have several issues to deal with all at once.

Turnaround time goals are also a great way to help your administrators prioritize their work. If you set turnaround goals, it gives them a clear view of the incremental dues dates you set. It is a great step for them to easily decide which client has something coming due, instead of just knowing they are all due 7/31!

EMPLOYEE SURVEYS

Not only is our clients' happiness important, so is our employees' happiness! There are several studies which show that when employees are happy at work, they are more motivated and more productive. That high satisfaction all leads to a long-term commitment to your company. Retaining your talent long term is essential for your business. Also, high satisfaction leads to better quality of work and accuracy, which is so important in the financial services world.

So how can we find out what motivates our employees and what keeps them engaged? It's quite simple... all we need to do is *listen* and be ready to take action. By giving your employees an opportunity to be heard, you will be able to get the feedback you need to fix processes, deal with team issues, and learn what each employee appreciates and needs from you the most.

The simplest way we have found to get employees to give us this feedback is through employee surveys. These surveys have enabled us to address our employees concerns, shift work items to make sure workloads are appropriate, and understand what keeps our employees going!

PROSPECTING

Of course, after we get done with worrying whether clients and employees are happy, we want to work on prospecting to keep our business growing! Every business is driven by prospects. In the retirement plan business, our services are relatively high-ticket items. So, it is critical to monitor who sends you business and who is considering hiring you. Many workflow or customer relationship management (CRM) systems will do this. Which system you choose and how you choose it isn't as critical a factor as *whether* you do it. Find a way that fits your business to keep up with each person and all your interactions with that person.

Lead nurturing is a tactic of staying in touch with your prospect to improve your chances of closing the business. This would include phone calls, emails and visits. Your system should let you see at a glance how and when you've contacted your prospects.

Finally, you need to prioritize your leads. There is no reason to spend time on someone who has zero chance of sending you business.

CONCLUSION

We would like to leave you with a quote from Albert Einstein: "Not everything that can be counted counts, and not everything that counts can be counted." While technology today enables you to count and measure more than we ever thought possible, we urge you to stick to five or six metrics that make the most sense to you. PC

SOLO(K) TO FULL PLAN: AVOIDING THE GROWING PAINS

It's important to understand the issues associated with a conversion *before* it occurs. Here's a helpful overview. **By Geoffrey M. Strunk, Esq. & Lee Bachu**

The owner-only 401(k), commonly referred to as a "Solo(k)," is a type of 401(k) plan that benefits only the owner and spouse of a small business where that business has no other employees eligible for the plan. It comprises a robust segment of the retirement plan industry.

This article examines what happens when a Solo(k) plan sponsor who started a business with no employees achieves success and decides to hire additional employees. This event forces a Solo(k) to transition into a "full plan," which greatly affects: (1) eligibility for the plan; (2) mandatory testing of benefits provided under the plan; and (3) annual federal reporting for the plan. Failure to consider these changes *before* that first employee is hired can easily lead to expensive compliance failures, so it is important to prepare for this event before it occurs.

PLAN ELIGIBILITY AND ENROLLMENT

As suggested above, once a Solo(k) plan sponsor hires employees, it dramatically affects the operation of the retirement plan. The specific provisions of the Solo(k) at issue should be reviewed before that first hire occurs, but most Solo(k)s are designed to require an employee to be at least age 21 and work at least 1,000 hours during a 12-month period before he or she must be allowed to participate in the plan. Consequently, there often is at least a 12-month period of time between the employee's hire date and "entry date," the date that the employee must be offered the ability to enroll in the plan.

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"A PROVISION IN THE SECURE ACT GREATLY EXPANDS THE 401(K) ELIGIBILITY PROVISIONS APPLICABLE TO "LONG TERM, PART-TIME EMPLOYEES." PRESUMABLY, THIS DEVELOPMENT WILL FORCE MANY SOLO(K)S TO BECOME FULL PLANS."

Failure to offer and, if desired, enroll an eligible employee in the plan can be an expensive error to resolve. In general, correction of this failure requires the plan sponsor to fund additional plan contributions for the benefit of the improperly excluded employee. Such contributions include not only a share of any missed employer contributions, but also an amount that is intended to compensate such employee for the loss of his or her ability to make elective deferral contributions to the plan plus lost earnings.

MANDATORY TESTING

A Solo(k) may benefit only the plan sponsor's owner(s), so it is exempt from many of the tests intended to ensure that plan benefits are being provided fairly to all non-owner employees of the plan sponsor. However, conversion of a Solo(k) into a full plan triggers the application of this testing. This includes the application of the Actual Deferral Percentage (ADP) test, the Actual Contribution Percentage (ACP) test and the top-heavy test.

The ADP test restricts the elective deferrals that highly compensated employees (5% or greater owners and employees who make at least $130,000) (HCEs) may contribute to the plan. This results from a comparison between the HCEs' deferrals and the non-HCEs' deferrals. In similar fashion, the ACP Test limits the matching contributions that may be made to a retirement plan on behalf of HCEs as compared to non-HCEs.

The top-heavy test ensures that the value of key employees' (generally, officers and owners) accounts do not exceed 60% of the total plan value. One result of a failed top-heavy test is that a required employer contribution must be made for the benefit of each non-key employee in the amount of 3% of their compensation.

A Solo(k) converting to a full plan will frequently fail all three tests. However, one potential solution to this problem is to incorporate a 401(k) safe harbor provision into the plan. Generally, a safe harbor plan "buys" its way out of the ADP, ACP and top-heavy tests by providing each eligible employee with a fully vested employer contribution of either:

- 3% of compensation; or
- a matching contribution equal to at least 100% of the first 3% deferred plus 50% of the next 2% deferred.

The safe harbor contribution is likely to be similar in amount to what would have to be contributed due to the plan's top-heavy status anyway. However, by adopting the safe harbor design, HCEs can still defer into the plan the maximum dollar amount permitted by law.

ANNUAL REPORTING

Another issue when a Solo(k) converts into a full plan concerns the filing of the Form 5500. Almost all retirement plans are required to file one of the Form 5500 series informational returns annually in order to identify the plan sponsor and communicate certain operational and financial aspects of the plan to the government.

The briefest and easiest of the Forms 5500, the Form 5500-EZ, Annual Return/Report of One-Participant Retirement Plan (Form 5500-EZ), is reserved for Solo(k)s. Furthermore, for any reporting period for which a Form 5500-EZ eligible plan has an end-of-year asset value of less than $250,000, it is not necessary to file any Form 5500-EZ at all. Consequently, some Solo(k) sponsors with a plan asset value of less than $250,000 may not even realize that the Form 5500 filing requirement applies to them. Regardless, once a Solo(k) transitions into a full plan, it is no longer eligible to file a Form 5500-EZ and generally must instead annually file a more complicated Form 5500-SF, Short Form Annual Return/Report of Small Employer Benefit Plan.

Failure to timely file a Form 5500 can result in costly penalties of up to $150,000 per return to the IRS and up to $2,233 per day with no maximum limit to the DOL. Consequently, it is incumbent upon the sponsor of a full plan to understand the Form 5500 filing requirements and ensure that they are satisfied properly.

CONCLUSION

It's not possible to cover every relevant detail of a Solo(k)'s conversion into a full plan in this space. For example, one omission concerns a provision in the SECURE Act that greatly expands the 401(k) eligibility provisions applicable to "long term, part-time employees." Presumably, this development will force many Solo(k)s to become full plans.

The goal of this article is not to educate the reader about every detail of a Solo(k) converting to a full plan, but to impart general awareness of the issues. It's important that responsible retirement plan professionals understand the issues associated with a conversion *before* it occurs. PC

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UP YOUR GAME!

Five keys to crafting an intentional virtual experience. **By Sheri Fitts**

It's unlikely that organizations will reopen their offices in full during the first half of 2021—or even possibly later this year. Even if they are open, many firms have asked clients not to visit their offices altogether, at least until the COVID-19 vaccine has been broadly distributed. Nonetheless, your clients expect you to be responsive, and meetings still need to be scheduled. Our current and future reality is Zoom. Though we all miss our clients and friends and look forward to the day when we can meet again in person, some level of virtual communication seems to be a "sea change" that's unlikely to be reversed.

How well are you adapting to this new competitive landscape? Here are five keys to crafting a more *intentional* experience. ("Intentional" is not new-age fuzziness; it's the sense of doing things with a clear purpose and focus.)

1. PROJECT TRUSTWORTHINESS

Trust takes time to build, but just a nanosecond to lose. In the virtual world, trust can easily be lost if you treat meeting management haphazardly. The only way for your brand to gain trust in the virtual space is to actively communicate your purpose, integrity and client advocacy with far greater precision than before. Therefore, intention matters when building a virtual experience, as well as the logistical/technical details on how you deliver that experience.

2. START WITH THE END IN MIND

What's primary purpose for your next meeting? Is it to educate or persuade sponsors about an emerging regulation or governance concern? Do you want to invite audience participation to address a participant challenge? Knowing the purpose upfront will help guide you to the right format for your meeting, whether it's to be interactive or directed by a single speaker.

Construct and distribute an agenda for the meeting in advance, with roles and responsibilities clearly delineated. For example, a plan sponsor or

"IN A WORLD OF EMOJIS AND INSTAGRAM, IMAGES ARE RAPIDLY ECLIPSING THE WRITTEN WORD IN SERVICE TO COMMUNICATING A BRAND."

advisor will typically host quarterly reviews, leaving little airtime for the TPA, who often has something of great value to contribute. So TPAs need to use their timeslots wisely and efficiently. (Of course, TPAs also need to think through how they will make their own hosted presentations more intentional.)

3. PROMOTE ENGAGEMENT

The challenge with virtual meetings is that you lose a lot of your ability to read non-verbal cues from your listeners. When explaining a complex idea, for example, how do you confirm with the group that your message is getting across, and keep them from checking out? Are cameras on?

That's why you need arrive to your meeting early and prepare. Before you go live, think about how you'll invite and distribute comments and reactions to what is being said. Are there different constituencies attending, each having a slightly different reason for attending?

Don't forget the basics of maintaining good posture and eye contact with the camera. Be present and lean directly into the screen with the camera at eye level, so that you fill the space. Leaning back in your chair or looking off to the side or, if you're standing in front of the camera, fidgeting in place, will amplify any nervousness. And don't forget to pay attention to your "resting" face when someone else is speaking.

4. LEVERAGE THE VIRTUAL EXPERIENCE AS AN EXTENSION OF YOUR BRAND

In a world of emojis and Instagram, images are rapidly eclipsing the written word in service to communicating a brand. The quality of each broadcast, even down to whether you're using native or virtual backgrounds on a green screen, speaks volumes about your firm's culture and collective personality. What you decide to display behind your screen presence needs to be intentional. For example, some teams use a corporate office stock image to disguise the fact they are broadcasting from their bedroom or a broom closet. More native backgrounds show artwork or books, a guitar collection, a surfboard—or even a sleeping cat on the couch.

Improving your virtual experience will require an investment of time and money in better video and audio equipment, and possibly modern video editing software and coaching help. Some business owners will throw up their hands at this point, and say, "Not another dollar for marketing!" But think of it this way: Much of your travel budget will likely go unused this year, and (for roughly the cost of a plane ticket and a two-night hotel stay) can be reallocated to upgrading your online presence.

Finally, for high-value meetings with important economic consequences, you may want to bring back some proven brand-building tactics from the "Before Times." Folks who know me know that I often throw out polka-dotted socks at in-person meetings to reward participation. For a recent big virtual meeting, I worked with a client to send a pre-meeting kit containing a book on leadership, notebook and pens, water bottles, etc. These gestures show you care, are willing to invest in relationships, and pay attention to detail.

5. MANAGE THE INTERFACE AS A WELL-DEFINED JOURNEY

A virtual meeting or presentation is an opportunity to show how well you do what you do, but it can be sabotaged if you simply have a one-sided conversation, punctuated with deadly PowerPoint slides. The key is managing the visual interface to engage your audience and draw them in.

That's why I advocate *"minimal viable PowerPoint"* (MVP) for most meetings, unless you're presenting to a large, anonymous group. Audiences have become more discerning over the past few years, and hiding behind a boring slide deck no longer cuts it. When you invite someone to present in Zoom, change things up by manipulating gallery settings, giving individual participants "the floor," uninterrupted by crosstalk or talking heads. (And for all that's good and holy, learn how to "mute all" when someone is speaking. Home computer or laptop microphones vary widely in quality.)

If you team-sell, using live production apps can bring slides or specific gallery members to life, helps professionalize the online experience, and entertains and engages your audience. Ecamm Live and mmhmm are two that I've been testing out. And in longer sessions, don't forget to toss in a 10-minute break at key intervals. During my breaks I usually play lo-fi music (acoustic rock or jazz) to maintain continuity within my virtual auditorium.

As you contemplate a return and reinvention to "business as usual" post-COVID, I often separate the concept of intentional virtual experiences in terms of what folks can do from a marketing (what to do "now" that's timely) versus a branding (what to do "forever," or what's timeless) perspective. We all now have the opportunity to produce more intentional virtual meetings that integrate thoughtful marketing, sharper branding—and, ultimately, more effective selling—into the forefront of our businesses. PC

PROFESSIONALISM AUDIT: HOW DO YOU HANDLE CONFLICTS OF INTEREST?

Working through conflicts of interests can be challenging, so it's important to do so with care.

By Lauren Bloom

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This article continues our series on questions that might be relevant to a professionalism audit. One question that can easily be overlooked is how conflicts of interests are managed. Working through conflicts can be challenging, so it's important for employee benefits professionals to do so with care.

The first step in managing a conflict of interest is recognizing that it exists. Conflicts occur between two clients when circumstances prevent the employee benefits professional from providing full, unbiased service to both. So, for example, an employee benefits professional might encounter a conflict when providing services to the buyer and seller in a negotiated purchase and sale of a company with one or more benefit plans.

Conflicts need not be directly adversarial. For example, a conflict could arise if an employee benefits professional took on too much work and could not timely and carefully complete required filings for two clients. If the professional chose to favor one client's filing over the other for either timeliness or quality, a conflict would arise.

Conflicts can also arise, though perhaps less often, between the interests of a client and those of the employee

> "IF PROFESSIONALS WERE NEVER PERMITTED TO WORK IN SETTINGS INVOLVING CONFLICTS OF INTEREST, IT COULD BE DIFFICULT OR EVEN IMPOSSIBLE TO CONDUCT BUSINESS."

benefits professional. So, for example, an employee benefits attorney who agreed to argue a point of law for a prospective client that contradicted arguments previously made by that attorney for a former client might make a lot of money in the new engagement. However, that attorney's interest in the fees would conflict with the interests of the former client in having the attorney's previous arguments stand.

If professionals were never permitted to work in settings involving conflicts of interest, it could be difficult or even impossible to conduct business. Consequently, working in such settings is permissible when a conflict of interest can be managed appropriately. Ethics experts sometimes distinguish between actual and potential conflicts of interest (*i.e.*, situations where a conflict definitely exists as opposed to when conflicts could arise but have not yet done so), but often recommend managing such conflicts the same way regardless of whether they are actual or potential.

Some professions, the legal profession being one example, advise their members against participating in situations where even the appearance of a conflict exists. The ARA Code of Conduct is not so strict. However, it does require employee benefits professionals not to provide professional services in situations involving an actual conflict of interest unless certain conditions are met.

Having identified an actual conflict of interest, the employee benefits professional should first determine whether he or she can still act fairly despite it. If the professional concludes that his ability to act fairly is impaired by the conflict, he or she should decline or withdraw from the engagement. In some situations, though, the employee benefits professional might be able to provide neutral advice ("my opinion is my opinion") to both clients. Proceeding despite an actual conflict is subjective—only the professional can assess his own state of mind—but it's wise to consider how credible that decision would seem if evaluated objectively by a third party.

After the employee benefits professional decides that (s)he can act fairly despite the conflict, (s)he must disclose the conflict to all of her clients involved. The ARA Code requires the disclosure to be "full," so it's important to be thorough. How much disclosure is enough depends on the circumstances but, again, it's smart to consider how an objective third party might evaluate the disclosure. It's normally more prudent to over-disclose than to withhold information about a conflict that might later prove to be important.

After the conflict has been disclosed, all of the affected clients should expressly agree to having the employee benefits professional perform the requested services. If any client disagrees, the professional should decline the engagement or withdraw. It's normally a good idea for the employee benefits professional to get client consents in writing, both to avoid misunderstandings and to document compliance with the ARA Code.

Finally, an employee benefits professional may become aware of a significant conflict between a client's interests and those of a third party (for example, another professional advisor to the client's plan). The ARA Code requires the employee benefits professional to advise the client and "include appropriate qualifications or disclosures in any related communication." Again, what conflicts are "significant" and what qualifications or disclosures are "appropriate" depends on the circumstances. In most cases, however, the employee benefits professional is wise to err on the side of disclosing too much rather than too little, so long as the disclosure is factual and does not appear to maliciously undermine the client's relationship with the third party. A call with the employee benefits professional's attorney may be an advisable precursory step toward meeting this requirement of the ARA Code.

When managing an actual conflict of interest, an employee benefits professional is wise to consider how the conflict might evolve and how management of it might be perceived in hindsight. It can be tempting to minimize the potential harm a conflict could inflict when a plum engagement is on the line, but taking on work involving an actual conflict can be risky from the professionalism and legal standpoints. If the professional proceeds, reevaluating the conflict periodically and documenting key decisions and client consents in real time can provide valuable proof later than the professional was careful to manage the conflict appropriately and comply with the ARA Code. PC

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QKA, REINVENTED

A look inside ASPPA's revamp of the QKA credential. **By Jake Linney**

By the time ASPPA decided to redevelop the Qualified 401(k) Administrator (QKA) program, the retirement industry had changed considerably since the credential's debut. Administration and recordkeeping firms had consolidated, the roles of the retirement plan professional had functionalized, and the world was becoming digital.

The redesign was accomplished by researching the training needs of the retirement plan industry, applying professional learning theory, and restructuring the curriculum. Here's a closer look at the process.

TRAINING NEEDS OF RETIREMENT PLAN FIRMS AND THEIR EMPLOYEES

We started by meeting with ASPPA members and the retirement plan firms in the industry. Two interactions from that phase stand out to me that really clarified the focus of what we wanted the redesigned QKA program to be.

In the first interaction, I talked with an account manager at one of the country's largest recordkeepers. She was approved to pursue the QKA program by her manager, but she never got started. She said she took one look at the DC-1 study guide and found it so daunting that she wanted nothing to do with the program. She even had questions come up during her job that were covered in the DC-1 course, but instead of studying the topic she would try look up the details on Google… not the best way to find technical ERISA information.

On another trip to a recordkeeper, I talked with someone who had just received the QKA designation. I was excited to find someone so enthusiastic entering our field. We started talking pensions, and during our conversation she asked me with a confused look, "What happens when a 401(k) plan is disqualified, anyway?" I was really bothered by this question, as plan qualification is one of the core competencies that all QKAs should know and understand. Yet this excited new QKA holder missed out on the entire concept. It was apparent that the DC-1 and 2 did not get the key basic points across necessary for basic plan understanding.

So at the outset, we wanted the QKA program to be easy to use and and focus on the core skills needed to understand retirement plans.

With the direction of the course set, we could now use ASPPA's Retirement Plan Academy team to create an education program that both the employer and employee wanted.

USING PROFESSIONAL DESIGNERS TO MEET THE PROGRAM GOALS

The ASPPA Retirement Plan Academy team includes professional instructional designers working to develop our education programs. This was an important step for ASPPA because historically we used volunteer members to develop the courses. This worked when the courses were made up of a study guide and exam, but an evolution was necessary when ASPPA moved to digital education. An instructional designer is trained in both adult learning education (usually through a master's degree) and in the software programs that are used to create the digital education. The learning theory is used to structure a course so that the learners can get started easily and the information is presented in a way that is retained for years instead of being forgotten as soon as someone passes a test.

For example, when we address the consequences of plan disqualification in the redesigned QKA, we start with a theoretical case study to catch the learner's attention. In the case study, plan participant Bernie Wolcott, without asking anyone for advice, takes $550,000 out of his company's 401(k) plan and puts it in his bank account.

> "IN 2020, MORE THAN 1,000 PEOPLE SIGNED UP FOR THE PROGRAM, AND HUNDREDS OF THEM HAVE ALREADY PASSED BOTH EXAMS AND BECOME QKAS."

Once we have the learner's attention, we can provide the important content in a meaningful way. In addition to the online format, we also include PDF resource guides that can be printed out, saved and used in the future. Providing the material digitally in different ways, for different learning styles, allows easy access to the education—making ASPPA membership more obtainable.

With the design in place, we then relied on the expertise of top retirement plan experts to fill out the structure of the program so that topics were introduced logically.

EASY PROGRAM PROGRESSION

We now had in place the market research for what we wanted the course to do and the professionalization of the course development. We also had three retirement plan experts work on the QKA program: Robert Richter, Bob Kaplan and myself. We determined which areas of content should be covered in the program, and also determined the learning progression of the course with the instructional design team.

Previously, the QKA designation was made up of two exams—DC-1 and DC-2—that were created before the massive popularity of 401(k) plans. The DC-1 was constructed as an exam for defined contribution plans generally, not 401(k) plans, and the DC-2 exam consisted of the 401(k) topics. Take testing, for example: the DC-1 contained coverage testing (because it is applicable to all DC plans) while ADP testing was covered in DC-2 (because it only applies to 401(k) plans.) Today this thought process is counterintuitive.

We redesigned the QKA program by organizing topics into 18 small, concise content chunks. These became our modules, each of which is presented in a 1-to-2-hour online course with a corresponding resource guide.

Then, from those 18 digital courses, we developed a progression between two exams, QKA-1 and QKA-2. QKA-1 covers the day-to-day management of 401(k) plans, and QKA-2 covers the annual compliance of 401(k) plans. This new progression is intuitive and natural for an individual as they progress in their job, whether they are administrators, account manager, salespeople or compliance testers. It also makes it easier for people to get started, and leads to a smoother experience of taking the exams—and more people wanting to become ASPPA members.

QKA SUCCESS

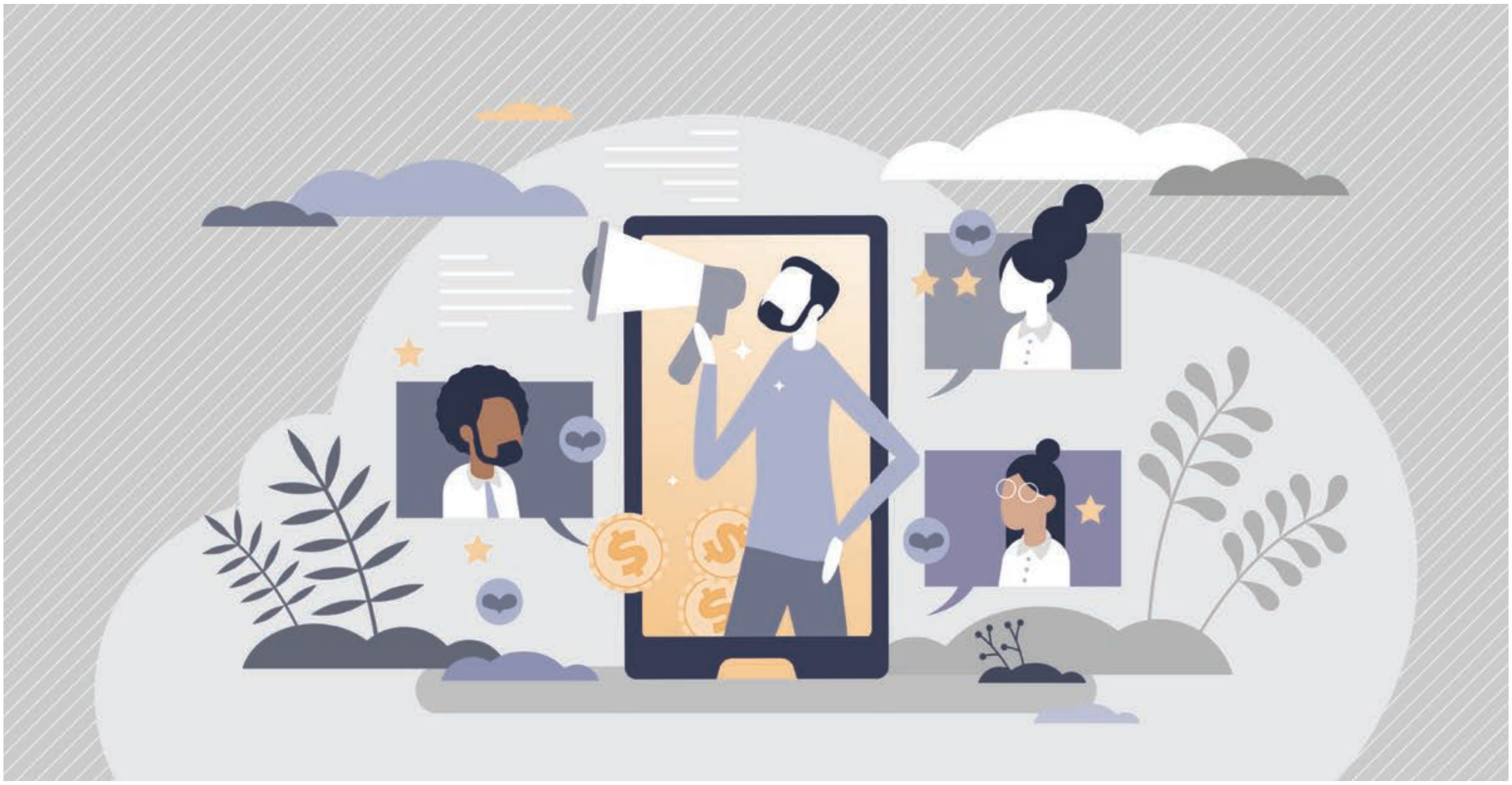
The results of the redesigned QKA programs have exceeded all expectations. In 2020, more than 1,000 people signed up for the program, and hundreds of them have already passed both exams and become QKAs. The feedback has been tremendous as well. Here is one of my favorites from an anonymous learner: "Studying for this test with this format has been fantastic. Much easier to comprehend the info than reading from a textbook."

The redesign of the QKA program has been an unqualified success and it was a tremendous team effort that came together with support from the entire association. PC

More Info Online!

QKA
QUALIFIED 401(k) ADMINISTRATOR

To learn more about the new QKA credential, visit https://asppaqka.org



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COMMUNICATING COMPLEX TOPICS

The retirement plan world is rife with complex concepts that can be a challenge to communicate. But doing that well can be a differentiator for you. **By Lorraine Dorsa**

Editor's Note: This is the first in an ongoing series of articles on communicating difficult topics.

The retirement plan world is full of complex issues that can be hard to explain. But this does not mean you should tip-toe around them; you just have to be a better communicator.

Communication happens only when the information being imparted by the speaker is received and understood by the intended audience. This may seem obvious, but it is often overlooked. The mere fact that information has been transmitted does not mean that communication has happened.

Technical types—and admit it, the retirement plan world is full of technical types—can get so immersed in addressing every detail and laying out every possible option that they do not realize that the person they think they are communicating with has no idea of what the subject is or why it is important.

Communication skills, like all other skills, can be learned. It requires some attention, effort and practice, but we can all be better communicators.

WHO IS THE AUDIENCE?

In the retirement plan world, there are several major audiences, each with its own view of the plan and how it fits in with the rest of the world:

- Plan sponsors
- TPAs and recordkeepers
- Professionals such as financial advisors, CPAs, attorneys
- Plan participants

Communication is not just in one direction and from one group to another. Each of these groups has information it needs to impart, either within the group or outside of it, and information it needs to receive. Just being aware of the different interests and experiences of each player should help the sender craft the message so the recipient will understand it and can react appropriately.

WHAT IS THE INTENDED GOAL?

Sometimes a message is simply informational, and no action is expected. Other times action is

"THE MERE FACT THAT INFORMATION HAS BEEN TRANSMITTED DOES NOT MEAN THAT COMMUNICATION HAS HAPPENED."

required—the recipient needs to make a decision or take some action.

Every message should clearly state its goal, and state it early in the message. It should be composed so that right from the beginning the recipient is aware of its relevance, its importance and what action is expected so he or she can read it with that goal in mind. If there is a deadline, this should be stated upfront as well.

IS THE RECIPIENT FAMILIAR WITH THE ISSUE OR DO THEY NEED TO BE EDUCATED FIRST?

Some communications are really part of a stream of similar communications—think annual data requests or Form 5500 filing instructions. In these cases, the recipient may be familiar with the issue, and may have dealt with it or a similar issue before and only need an update and perhaps a reminder.

Communications about new issues or about a change that has happened since the last communication are more complex. For example, a change in law or regulation may require a decision by the plan sponsor and action by the TPA and recordkeeper. It may also have an impact on the participant experience.

In these cases, it is important that the communication include both the immediate message (issue and action required) and an explanation of the issue. If the issue is complex, the immediate message may include only a short summary of the issue and refer to a subsidiary communication that provides a more thorough explanation.

Communications which impact more than one audience often require several different messages, each customized for its intended audience. The plan sponsor may need to understand how the issue affects the plan as a whole and perhaps make a decision; a plan participant may only need to understand how the issue affects him or her.

HOW SHOULD IT BE EXPLAINED?

Those of us in the retirement plan business need to remember that while we deal with technical and industry-specific issues every day, our clients do not. They are focused on running their businesses, and while they care about their retirement plan, it is not a day-to-day priority.

Burying the message in the details is a common mistake for professionals and a source of frustration for clients. Don't be guilty of this—review your message from the point of view of the recipient, use short, simple explanations if at all possible, be crisp and to the point.

WHICH MEDIUM IS MOST APPROPRIATE?

Some communications lend themselves to certain media. A quick reminder works well in an email or perhaps a text; a detailed analysis often requires a more formal document that the recipient can read and review at his convenience.

Even when addressing the same issue, multiple forms of communication may be required.

Using plan restatement as an example, the initial communication to the plan sponsor may be an email alerting them to the need to restate their plan and the time period in which it must be restated. This may be followed up by a more formal written document explaining the restatement process and laying out plan provisions that need to be selected and how each selection would impact the plan. Subsequent communications may be additional documents and/or phone calls or Zoom meetings to further explain the restatement process and plan provisions and answer questions the plan sponsor may have. Final communications may be emails or other reminders to make sure that the plan sponsor has made the elections, reviewed the document and signed it as appropriate.

WHAT ACTION IS REQUIRED?

If action on the part of the recipient is required, the specific action and the method of taking such action should be stated clearly. A simple question asked in an email can be answered via a simple response to the email. A more complex situation may require the recipient to follow a specific procedure; if so, the procedure should be laid out clearly.

Continuing with the example of a plan restatement, the initial email and the more formal document explaining the restatement process and options may be informational only. They should state that while no immediate action is required, the plan sponsor should review the materials carefully and be prepared to make decisions and take actions to complete the restatement process at a such and such a time.

Later communications should refer to the initial communications and expand on them by explaining how the plan sponsor can make the elections, how the restated plan document will be provided and the date by which it should be signed.

CONCLUSION

Communicating the complex concepts inherent in the retirement plan world can be a challenge. But communicating well and clearly can put you ahead of the pack. PC

LET'S GET TO WIRC!

After months of working to revise its event model for 2021, the Women in Retirement Council's event planning committee is excited to share our plans for 2021! **By Amanda Iverson, Leah Hill & Megan Crawford**

Just one short year ago, we were in New Orleans for the 2020 Women in Retirement Conference (WiRC). During those incredible days in January 2020, we connected with our peers and learned so much from sessions that challenged us to grow like "Dare to Lead," "Digital Persuasion—How to be as Influential Online as You are in Person" and "How to Work with and Lead People Not Like You."

Many of us left New Orleans with new (or deepened) WiRC connections, changed perspectives, and refreshed attitudes. We were ready to go out and conquer the world with a passionate group of "CoWiRCers" (WiRC conference community members) cheering us on. None of us could've imagined how much all of our lives would change in just a few months.

By late 2020, it had become clear that a large in-person conference in early to mid-2021 could not happen safely. Being creative problem-solvers, the WiRC planning committee began to brainstorm and rework our plans for 2021. After many months of the committee working to revise our event model for 2021, we could not be more excited to share our plans for this year!

The 2021 WiRC event lineup will be focused on how to thrive in the areas of Leadership, Marketing, Practice Management, and Personal Growth—the core subjects of WiRC. For each of the events scheduled in 2021, we are shifting our focus from how to survive to how to thrive in 2021. We've even developed ways to increase interactivity between our valuable CoWiRCers! Aggressive goals, we know! But the result of aggressive goals and a lot of planning is a 2021 lineup that should make everyone excited and optimistic about our collective growth over the next year.

THIRD THURSDAYS WITH WIRC

As 2020 progressed, and we all shifted our patterns and routines because of the pandemic, the WiRC planning committee recognized the need and desire for continued engagement among the CoWiRCers. Thus, "Third Thursdays with WiRC" were born. Women from ASEA, ASPPA, NAPA, NTSA and PCSA began gathering virtually to dig deeper into the topics from the 2020 conference and to support one another and collaborate on addressing new challenges facing all of us.

For 10 months in 2021, we will continue the Third Thursdays with WiRC sessions. During these virtual events, we will utilize small breakout groups to help develop name-to-face recognition. Over the past 6 months, we've learned that these more intimate settings provide CoWiRCers the opportunity to speak up and engage in constructive dialogue. To sweeten the pot, we've planned fun and interactive extended virtual sessions each quarter.

Our goal is for attendees to gain a handful (or more!) of new industry contacts that they can look forward to seeing in person at the ASPPA Annual Conference (Oct. 17–20 at National Harbor, MD) and the NAPA 401(k) Summit (Sept. 12–14 in Las Vegas). For 2021, we will also gather in-person twice for a WiRC brunch (free to members) to kick off each conference.

Those who attend our virtual events will have a head start on networking and a unique opportunity to make the most of each conference by picking up where they left off with their CoWiRCers from their time spent at Third Thursdays—in person.

January's Third Thursday session kicked off the year with the topic, "HerStory: Leadership and Growth of Women in Retirement." This session showcased the journeys of four seasoned women professionals in the retirement industry and the value of mentorship in their success. More than 100 attendees (actuaries, advisors, ERISA attorneys,

> "FOR EACH OF THE EVENTS SCHEDULED IN 2021, WE ARE SHIFTING OUR FOCUS FROM HOW TO SURVIVE TO HOW TO THRIVE IN 2021."

client relationship managers, TPAs and plan sponsors) discussed how to discover opportunities, strengthen network connections and sharpen skills to propel success.

February's Third Thursday debuted our first extended virtual event: "THRIVE in 2021 with WiRC: A Virtual Wellbeing Experience." This 90-minute session focused on personal growth and creating a mindset that will help us thrive in 2021. And it wasn't just another virtual event. We started off with a hands-on cooking class focusing on easy-to-prepare foods with ingredients that support optimizing our energy, followed by an interactive session focusing on physical wellbeing as the cornerstone of our health. The end goal is to be more fully engaged in our life and work heading into 2021.

And this is just the start! We have so many other fantastic sessions being planned for 2021. Did we mention these virtual events are free for all sister organization members? This is an amazing added benefit to your membership! New events will be posted monthly, so keep your eyes peeled! And don't forget—we have a couple of important resources to help you stay in the loop with WiRC events. We post all new events on the WiRC website (https://womeninretirement.org/). You can also interact with fellow CoWiRCers in our LinkedIn group, Women in Retirement Conference. To join the group, search for us on LinkedIn, then click "Request To Join"! This group is a great place to network with professionals across the retirement industry to help build and grow your business. We encourage you to share your story and your experiences, and ask questions!

While early 2021 continues to look a bit different than we are used to, we are so excited about a WiRC year where we can create meaningful industry relationships between strong women in our industry, helping all of us thrive in all we do! To that end, we say "Bring It! Let's Get to WiRC!" PC

BUCKLE UP!

What's in store for retirement policy in the new Congress?
By Will Hansen

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

It has been nearly a decade since the Democratic party controlled both the White House and both chambers of Congress, as they now do. Despite the narrowest of margins the Democrats now possess, it is likely we will see massive bills enacted into law in the 117th Congress—either on a bipartisan basis or via the reconciliation process, which allows the Senate to pass budget-related legislation by a simple majority vote (51) instead of the standard 60-vote threshold necessary to advance most legislation in that chamber.

Reconciliation is a wonky procedural maneuver that both parties have utilized to implement legislation. Most recently, the GOP used this process to pass the Tax Cuts and Jobs Act of 2017. And most notably, the Democrats used it to pass the Affordable Care Act in 2010.

On Capitol Hill today, it has become more difficult to corral enough members of both parties to support larger pieces of legislation. Whether it is bipartisan or partisan, I do believe we will see new retirement policy signed into law that will continue to advance the cause of ensuring a secure retirement for all Americans.

"THE AMERICAN RETIREMENT ASSOCIATION HAS LONG SUPPORTED LEGISLATION THAT WOULD CLOSE THE COVERAGE GAP BY INCREASING INDIVIDUAL ACCESS TO WORKPLACE RETIREMENT PLANS."

One example of legislation that could advance in this Congress is the Automatic Retirement Plan Act (ARPA). The American Retirement Association has long supported legislation that would close the coverage gap by increasing individual access to workplace retirement plans. ARPA would require most employers to provider a retirement plan product to employees, with sensible exceptions to small employers and new businesses trying to get on their feet. Plus, the legislation could be paired with tax credits that would cover the cost to operate the plan for most small employers during the first few years. The lead sponsor of ARPA, House Ways & Means Committee Chairman Richie Neal (D-MA), is passionate about ensuring that Americans can save for a secure retirement.

The expansion of the Savers Credit has been discussed as a likely policy to advance, along with expansion of retirement plan coverage via ARPA. In short, the Savers Credit is a tax credit for low to moderate income individuals who are saving for retirement. The credit is not well known and is underutilized because it is a non-refundable tax credit. Many low to moderate income individuals do not carry a tax burden and therefore do not need to use the credit to lower their taxes. An expansion of the Savers Credit would enable more individuals to utilize the credit by adjusting the adjusted gross income limits currently applied and making the credit refundable. Specifically, the proposal would allow the credit to be refundable if the amount is applied to an IRA or 401(k) account. The implementation of ARPA with the expansion of the Savers Credit would bring millions of new Americans into the workplace retirement savings system.

During this Congress we may also see the advancement of a comprehensive retirement package that contains dozens of smaller provisions that will improve upon the private sector retirement marketplace. Senators Rob Portman (R-OH) and Ben Cardin (D-MD) continue to work together on legislation, and Chairman Neal and Ranking Member Kevin Brady (R-TX) have teamed up on a retirement package as well. The bills have several provisions that are identical, setting up an opportunity to move forward with a bipartisan bill, similar to the SECURE Act in December 2019.

Besides retirement policy, expect a lot of posturing but also quick action as Congress tackles the economic recovery and implementation of the Biden administration's top policy goals. The ARA will continue to push policies that enhance retirement security in America. In the meantime, buckle up—it will be a bumpy ride. PC

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