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SUMMER 2022

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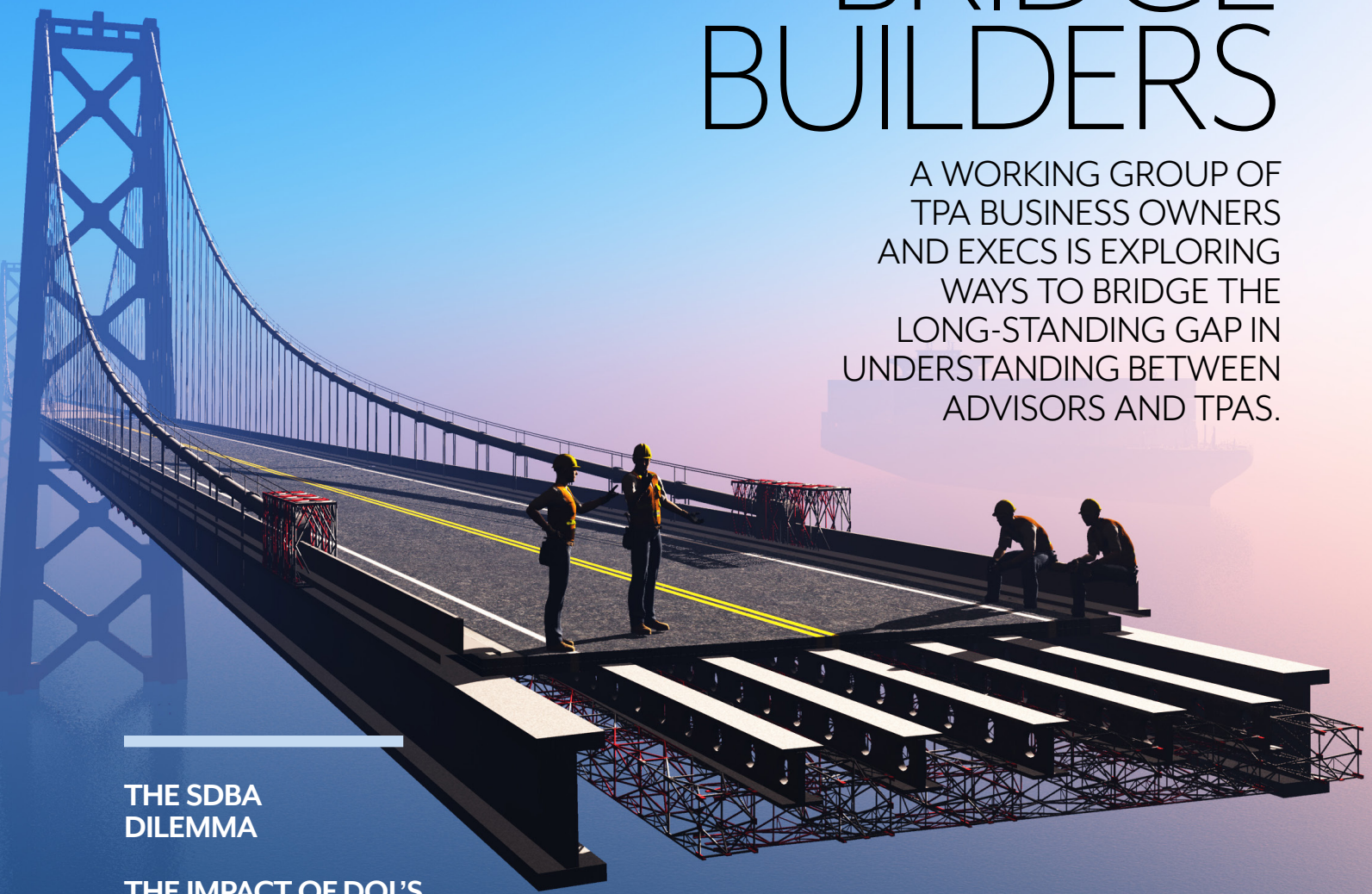

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> "PenChecks is proud to expand its partnership with and support ASPPA's educational programs because we believe that highly motivated and well trained professionals are essential to sustaining excellence across the retirement industry. Over the last three years, we've seen a significant increase in the number of applicants, reinforcing our belief that developing qualified industry ambassadors will lead to continued industry innovation and thought leadership — areas in which PenChecks believes deeply."
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STILL LEADING THE EVOLUTION

Increasingly, ASPPA and its ARA sister organizations are tapping the natural synergies that exist between them **By John Ortman**

Commonly referred to as "the ASPPA history book," the hardcover book published in 2016 to commemorate ASPPA's 50th anniversary actually bears the title, *Leading the Evolution: ASPPA's 50 years at the forefront of the retirement industry*. One of its primary themes is the recounting of repeated instances of initiatives undertaken by ASPPA members down through the years that changed the trajectory of the profession. These include the Joint Board, the President's Commission on Pension Policy, the IRS small-plan audit program, and more.

Today, within the larger context of the American Retirement Association, that tradition continues. For example, the cover story in this issue, "Bridge Builders," takes a behind-the-scenes look at a group of ASPPA and NAPA members that's tackling the dysfunction plaguing far too many TPA/advisor partnerships, bluntly assessing the root causes and crafting solutions designed to overcome the challenges that exist.

That effort is just one of several similar cooperative initiatives undertaken by the ARA sister organizations since the ARA umbrella was created in 2015. These include the highest-profile venture, the Women in Retirement Conference (WiRC), the first year of which marked the first time that two of the sister organizations (ASPPA and NAPA) were brought together at one conference. And this year, the Plan Sponsor Council of America (PSCA) joined WiRC, marking the first time PSCA has participated in a joint ARA sister-run event.

Other joint ventures by the ARA sister organizations include:

- **The Women in Retirement Council.** In addition to planning the annual Women in Retirement Conference, the Council (made up of representatives from all five ARA sister organizations) created the Thrive mentoring program and the monthly Third Thursday with WiRC virtual networking sessions. The Council also partners with the EngageWomen.org non-profit organization.
- **The ERISA 403(b) Conference.** The inaugural event in Washington, DC this October is co-branded by NAPA and NTSA and was planned by members of both organizations.
- **PSCA's CPSP credential.** A significant factor driving the growth of PSCA's Certified Plan Sponsor Professional credential is NAPA, ASPPA and NTSA members bringing their plan sponsor clients into the program.

> "ONE OF THE ASPPA HISTORY BOOK'S PRIMARY THEMES IS THE RECOUNTING OF REPEATED INSTANCES OF INITIATIVES UNDERTAKEN BY ASPPA MEMBERS DOWN THROUGH THE YEARS THAT CHANGED THE TRAJECTORY OF THE PROFESSION."

Look for more joint efforts by the ARA sister organizations in the future as the natural synergies among them are tapped—to everyone's advantage.

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

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IF WE 'RISE & SHINE' WE COULD 'EARN' A MORE SECURE RETIREMENT

Recent developments on Capitol Hill have set the stage for pension reform legislation that is expected to pass Congress later this year. **By Brian H. Graff**

As we head to press, the U.S. Senate's HELP Committee, for the first time in a decade, did its first retirement "markup"—sending what has to be the best legislative acronym in history—the "Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg" (a.k.a. RISE & SHINE) Act (S. 4353)—on for consideration by the full Senate.

That preceded—by mere hours—the Senate Finance Committee's release of the Enhancing American Retirement Now (EARN) Act, its counterpart to the House-passed SECURE 2.0—a massive piece of legislation that also includes a number of key provisions supported by the American Retirement Association.

Among the nearly 70 provisions contained in the $38 billion EARN Act are a number backed by the American Retirement Association, including the Starter K, an enhanced Saver's match, enhanced tax credits for the cost of new plans (similar provision included in SECURE 2.0), a new stretch match 401(k) safe harbor, reform of family attribution rules (similar provision included in SECURE 2.0), top-heavy relief for excludable employees (similar provision included in SECURE 2.0), allowing 401(k) safe harbors to replace SIMPLE plans mid-year, hardship distributions for emergencies, allowing retroactive deduction of profit-sharing increases after the end of the year, and providing permanent rules relating to the use of retirement funds in the case of disaster.

Provisions currently contained in EARN would also permit a retirement plan service provider to provide employer plans with automatic portability services and provide a $500 credit to small employers (100 or fewer employees) that adopt that automatic portability arrangement. But it also contains a number of provisions that are substantially similar to the House's SECURE 2.0 legislation passed in March, including allowing 403(b) plans to participate in multiple employer plans (MEPs) and pooled employer plans (PEPs), treating student loan payments as elective deferrals for purposes of matching contributions, allowing higher catch-up limits after age 60, permitting a retirement plan to rely on an employee's certification that the conditions for a hardship distribution are satisfied, increasing the age for required beginning date for mandatory distributions, expanding the Employee Plans Compliance Resolution System (EPCRS), and implementing a safe harbor for corrections of employee elective deferral failures.

Yes, incredible as it seems in the midst of the apparent vitriol and rancor between political parties, retirement legislation continues to be an area of common ground.

WHAT'S NEXT?

Once the Senate bills are merged (and there will likely be some negotiations there) and approved later this summer, perhaps early fall, we expect that it will be merged with the bill passed by the U.S. House of Representatives (what's been labeled SECURE 2.0, though its actual name is Securing a Strong Retirement Act) in March by a margin of 414-5. That will, in turn, set the stage for a final bill, which is expected to pass, though most likely not until later this year, probably in a lame-duck session after the November elections.

Not that there aren't differences to wrangle; RISE & SHINE/EARN currently lacks a number of key provisions that are found in SECURE 2.0—and vice versa.

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

However, probably the biggest difference is that RISE & SHINE/EARN does not currently include the mandatory auto-enrollment provision for business with more than 10 employees included in SECURE 2.0, but the language in RISE & SHINE instead looks to include an automatic reenrollment provision for every three years. RISE & SHINE/EARN also includes a sidecar emergency savings component of up to $2,500 that would be linked to DC plans, while SECURE 2.0 does not include such a provision.

Make no mistake—despite current differences, the respective bills overlap in significant ways, in no small part due to the ongoing conversations we have had—and continue to have—with those on the Hill.

With your input, the active involvement of our Government Affairs Committees, and the support of our Political Action Committee, we're continuing to make amazing strides in building a more secure retirement for millions of working Americans! PC

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THE CALL THAT EVERY TPA DREADS

Plan termination is probably one of the most difficult processes we deal with as service providers. Here's a refresher that may help. **By Shannon Edwards & Theresa Conti**

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Years ago, my sister used to work for me. She was an excellent senior plan administrator. Our clients loved her. However, there was one type of call that made her grumble like Oscar the Grouch. When a client called and said they wanted to terminate their plan, she would smile while on the phone with the client then hang up the phone and groan. I will never forget the day she walked into my office and announced, "The next time a client calls to tell us that they want to terminate their plan, we should fire them immediately and help them find a new TPA."

I would be lying, and you probably would be too, if I said I didn't feel the same way. Admit it: When a client calls to terminate their plan, you know it's going to be painful no matter how many times you try to set their expectations and explain to them that terminating a plan is not as easy as flipping a light switch. It can be long and painful. No one understands why they can't have their money immediately; the plan sponsor doesn't understand why they must keep paying for your services.

Every time a client wants to shut down their plan, my sister's words ring in my ears. Plan termination is probably one of the most difficult processes we deal with as service providers. Typically, clients are terminating their plan for a "reason." Those reasons are usually not pleasant ones. Maybe their business is down or bankrupt. That can make the client difficult to deal with and get in touch with. There may be an acquisition taking place. This adds stress to the business owner while they are also trying to terminate their retirement plan.

"NO MATTER HOW WONDERFUL YOUR PROCESSES ARE OR HOW GREAT YOUR CUSTOMER SERVICE SKILLS ARE, PLAN TERMINATIONS ARE PAINFUL FOR EVERYONE."

Clients never seem to realize that terminating a plan takes time. We typically tell clients to count on *at least* 6 months to terminate the plan and get through the entire process. Let's talk about the process.

The first step is to adopt the resolution and amendment to cease contributions and terminate the plan. The plan termination effective date must be determined. Often in the case of termination during acquisition, the plan stays in effect until the acquisition date. Participants need to be notified of the plan termination via a Summary of Material Modifications. The recordkeeper/custodian also needs to be notified. The TPA helps identify the deadlines, effective dates and items that need to be completed. We have our clients complete a termination election form to help us identify the items relating to dates that need to be determined and help with the process.

After the effective dates and deadlines are determined and the termination process starts, the next step is to ensure that all contributions are deposited to the plan until the date of termination. This includes both employee deferral contributions and any employer contributions (including safe harbor contributions through the termination date). We must also use up any remaining plan forfeitures in accordance with the plan document. Based on the plan document, they may be used to offset contributions owed to the plan, or to pay fees related to the plan or reallocated to plan participants.

For the year of termination, the plan must also complete non-discrimination and compliance testing. This needs to be done in case of failures. Any excess contributions may need to be distributed before the final distributions are processed. All participant account balances become fully vested.

A distribution form for each participant with a balance in the plan must be obtained. This can be difficult if previously terminated participants were not previously paid out and must be located. Having a lot of previously terminated employees who need to be notified and found can slow down the plan termination process.

Due to additional fees and expenses that may be allocated to plan participants, the final termination distributions should be processed at the same time so that all participants share in those expenses. My favorite conversation with plan sponsors as it relates to this is when the owner wants his or her distribution processed "right away" even before all forms have been collected. That could result in a serious discrimination issue, especially if fees are allocated to the participants or the market takes a serious drop.

We tell our clients up front that we will continue to bill the annual administration fee until the final Form 5500 is filed. It is often hard for them to understand the difference between the effective date of the plan termination versus the actual plan termination date based on the final distribution of the plan assets. Administrative service fees and other fees required for the operation of the plan may be paid from the plan assets. Non-settlor expenses can be allocated to each individual participant's account pro-rata or paid from the forfeiture account if the plan document so allows. Other fees, known as settlor expenses, cannot be paid from plan assets and must be paid by the plan sponsor. We estimate the final plan fees and review them with the client at the start of the termination process so there are no surprises at the end. Often, we make them prepay the charges.

Finally, after all participants are distributed, the final Form 5500 needs to be completed and filed. This can be difficult if the plan sponsor is hard to contact.

What if the plan sponsor goes missing? A plan is considered an orphan plan if the sponsor no longer exists, cannot be located or has abandoned the plan and more than 12 months have elapsed since any contributions or distributions have occurred. There are steps that can be taken to terminate this type of plan, including having a fiduciary take over the plan to terminate it. If that can't happen, then EBSA should be notified, and the plan can be terminated under the Abandoned Plan Program.

Partial plan terminations can also occur during the plan year. If the TPA has been receiving complete and accurate census information, it is often easy to determine whether a partial plan termination has occurred during the plan year. As a best practice, we review the partial plan termination status each year for all our clients when we do the year end testing. If one has occurred, we make the affected participants fully vested and make any necessary adjustments to their distributed account balances.

No matter how wonderful your processes are or how great your customer service skills are, plan terminations are painful for everyone. Participants want their money ASAP. Plan sponsors want to be done with it immediately, and you don't want to field call after call asking why it's not done yet.

In the end, I guess you could do as my sister suggested and fire them. However, sometimes it's better to just smile, be empathetic and understanding—and do the very best you can to help your client one last time. **PC**

ARE STATE PLANS MEETING EXPECTATIONS?

State-run plans were intended to not only fill the gaps, but also to serve as a catalyst to employers that do not offer plans to do so. Are they having the desired effect? **By John Iekel**

More and more stiches are being added to the patchwork quilt of state-operated retirement plans intended to provide coverage to those whose employers do not. But how strong are those threads? Are those plans meeting the expectations of their proponents and those who put their trust in them?

DOLLARS AND CENTS

University of Michigan researchers say that as of June 1, 2018—just over six months after employers with 50 or more employees were to have registered with OregonSaves, the first state-run retirement plan—assets were more than $3.5 million and 954 employers had registered. Three years later to the day, the amount of assets was 132 times as high, and the number of registered employers was 178 times as large.

CalSavers had a 2021 befitting the Golden State. Registered employers more than tripled; Californians actively saving more than doubled; the number of funded CalSavers account holders rose 127%; and participants' assets increased five-fold.

WHAT ABOUT EMPLOYERS?

State-run plans were intended to not only fill the gaps, but also to serve as a catalyst to employers that do not offer plans to do so. Are they having the desired effect?

The requirement that employers not offering plans make CalSavers available to employees is helping encourage such employers to offer a plan themselves, says CalSavers Retirement Savings Board Executive Director Katie Selenski. "Early evidence suggests that the state's mandate for employers that don't offer a retirement plan to join CalSavers may be driving sizeable growth in private retirement plan adoption among employers. We are encouraged by this apparent expansion of quality retirement plan access and look forward to more research on this positive development," she says in the Board's report. Troy Montigney, Vice President, State-Facilitated Retirement Plans for Ascensus strikes a similar tone, remarking, "Skeptical employers were promised these plans would be easy to facilitate, and that has proven to be the case.

"State-run plans don't appear to be having the adverse impact on qualified plan uptake opponents worried they might," says Montigney, adding, "Many employers go with the state-run plan, but many others consider and adopt 401(k)s or other qualified options. The intent of state laws establishing retirement savings mandates isn't to force employer adoption of state-run plans—it's to expand employee access by giving their employers yet another option to help them meet the basic need to save for a more secure retirement."

That's how it's worked in California, according to Kristen Carlisle, General Manager of Betterment at Work. "We've seen a lot of inbound interest to adopt a 401(k) program. In many cases, these are employers who have not had a retirement program in place and are making moves to institute one now." She added, "In 2021, Betterment at Work saw a 76% year-over-year increase in California companies adopting low-cost, accessible retirement plans, which we credit in part to an increased interest from employers in finding high-quality retirement plan options as the CalSavers deadline approached."

"EARLY EVIDENCE SUGGESTS THAT THE STATE'S MANDATE FOR EMPLOYERS THAT DON'T OFFER A RETIREMENT PLAN TO JOIN CALSAVERS MAY BE DRIVING SIZEABLE GROWTH IN PRIVATE RETIREMENT PLAN ADOPTION AMONG EMPLOYERS."

— Katie Selenski, *Executive Director, CalSavers Retirement Savings*

And employers there are motivated by more than simply the need to comply with the requirement that they register or start a program, Carlisle indicated. "At this point, a retirement solution is table stakes when it comes to offering benefits in a tight labor market. Beyond retirement plans, employees are looking for benefits from employers that will support their entire financial journey, including wellness stipends, employer–sponsored emergency savings funds, etc. Interestingly enough, we're seeing interest in these types of benefits from small employers trying to stay competitive in the hiring and talent retention market."

"Expanding opportunities like this not only helps workers themselves, it also supports small businesses in their efforts to attract employees," said Connecticut Gov. Ned Lamont (D) in a press release regarding MyCTSavings.

"We've also learned that programs will be as successful as their underlying employer and employee data," says Montigney. "Usually this involves two or more state agencies coming together to determine which employers are subject to the state mandate; then it's up to individual employers to fulfill their role in supplying employee data that lets the state-run plan create engaged, long-term savers."

THE BIG PICTURE

Are state-run plans meeting expectations? "Largely, yes," says Montigney. "They have already empowered nearly 500,000 Americans to save over $400 million for their futures, and very soon we'll be talking in terms of millions of savers and billions in assets.

"It's increasingly clear the shifting of the retirement savings burden from employer to employee has left millions of people and entire industries behind. State-run plans were designed to be another tool in the toolbox to address this looming crisis, and they are reaching populations that have historically lacked access to workplace retirement savings in the era of qualified plans," Montigney says.

It's working in the Golden State, Selenski indicates; she said in the Board's 2021 report that it "can't begin to capture the impact the program is beginning to make in the lives of hard-working Californians."

OregonSaves is especially beneficial to lower-income people, say researchers, and the typical participating employee works in an industry with low wages and high turnover. In addition, they say, by April 2020, the implied participation rate was 59.5% and younger employees were less likely to do opt out. "Overall, we conclude that OregonSaves has meaningfully increased employee savings," they write.

LOOKING AHEAD

"The state-run retirement plan industry is still relatively small and highly collaborative, so we're always refining best practices together," says Montigney, adding, "As an industry we're only just beginning to test other program features and models to see how effective they'll be… things like employer enforcement where state statute permits it, and programs that are voluntary rather than mandatory."

It may be relatively small, but it continues to grow. MyCTSavings, the Connecticut program, was launched on March 24.

Colorado and neighboring New Mexico announced on Nov. 9, 2021 that they are pursuing a formalized partnership agreement for the Colorado Secure Savings Program and New Mexico Work and $ave. It is the first such arrangement between states, and creates the first auto-enroll IRA multi-state program in the United States. Vestwell will administer the joint program, as it does the state-run retirement plans in Oregon, Maryland and Connecticut.

Montigney reports that in 2021 the Illinois Secure Choice state team secured the state government's imprimatur to expand its mandate from employers with 25 or more employees to those with five or more. "It's an incredibly exciting time for the program, because 60% of eligible employers will be invited to register in two phases between now and November 2023," says Montigney.

And in the first six days of 2022, measures were introduced in the legislatures of Mississippi, Missouri and Rhode Island that would establish retirement plans run by the state, or by third parties with which the state contracts. And both chambers of the Hawaii legislature on May 3 said aloha to a bill that would establish a state program that would be unique among its counterparts—employees would have to opt in, and a retiree would be among the members of the board administering the program. **PC**

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IRS UPDATES RMD RULES FOR QUALIFIED PLANS

A proposed rule on required minimum distributions clarifies SECURE Act changes.

By Gary Blachman & Austin Anderson

On Feb. 24, 2022, the IRS issued proposed regulations that address, in large part, changes to the required minimum distribution (RMD) rules made by the Setting Every Community Up for Retirement Enhancement (SECURE) Act.

The proposed rule affects qualified 401(a) plans, 403(b) plans, governmental 457(b) plans and IRAs. It updates regulations under Code Sections 401(a)(9), 402(c), 403(b), 457, 408, and 4974, replacing the previous question-and-answer format and incorporating changes made by the SECURE Act and other statutory amendments made since the RMD regulations were issued in 2002.

The proposed rule applies as of Jan. 1, 2022. The existing regulations will apply to the 2021 calendar year, but in applying them taxpayers must take into account a reasonable, good faith interpretation of the SECURE Act's changes. Compliance with the proposed rule for 2021 will satisfy the reasonable, good faith standard. Since RMDs were suspended for 2020, relief is not required for that year.

BACKGROUND

The SECURE Act made two major changes to the RMD rules:

- For any employee born on or after July 1, 1949, the required beginning date (RBD) for RMDs was increased from age 70½ to age 72. This change was effective for all retirement plans and IRAs on Jan. 1, 2020.
- Effective for employees who die after Dec. 31, 2019 (or after Dec. 31, 2021, for governmental plans and collectively bargained plans), if the employee dies before distribution of their entire interest in the plan and has designated beneficiaries who are not "eligible designated beneficiaries," then full distribution must be made within 10 years (not 5 years) of the employee's death and the life expectancy rules are no longer available. This change was effective for most retirement plans and IRAs on Jan. 1, 2020, and for governmental plans and collectively bargained plans on Jan. 1, 2022.

10-YEAR RULE FOR DESIGNATED BENEFICIARIES IN A DC PLAN/IRA

The proposed rule keeps the rule that allows an employee's interest to be distributed over the designated beneficiary's life or life expectancy. However, in the case of a DC plan, that rule is available only if the designated beneficiary is an "eligible designated beneficiary," defined as follows:

- A "designated beneficiary" means any individual designated as a beneficiary by the employee.
- An "eligible designated beneficiary" means a designated beneficiary of an employee who, on the date of the employee's death, is their surviving spouse, their child who has not reached the age of majority, disabled, chronically ill, or not more than 10 years younger than the employee.

The proposed rule provides that an eligible designated beneficiary also includes a beneficiary of an employee who dies before Jan. 1, 2020. However, if an eligible designated beneficiary dies on or after that date, the successor beneficiary will be treated as a designated beneficiary.

The proposed regulations set forth rules for identifying designated beneficiaries and eligible designated beneficiaries, including:

- A beneficiary does not need to be specified by name to be the designated beneficiary, as long as they are identifiable from the designation (e.g., children in equal shares).
- Rights under a will or state law do not make a person a designated beneficiary.
- The age of majority is generally age 21, with a special rule for DB plans.
- Default designations in a plan can create a designated beneficiary.
- A designated beneficiary must be an individual (e.g., not an estate). Generally, if a non-individual is designated, there is no designated beneficiary, even if individuals are also designated (except for see-through trusts). The RMD rules have not changed for non-individual beneficiaries.
- If there are multiple designated beneficiaries and at least one of them is not an eligible designated beneficiary, the employee is treated as having no eligible designated beneficiary (unless any designated beneficiary is an eligible designated beneficiary due to being a child or in certain cases for disabled or chronically ill eligible designated beneficiaries).
- An individual who has not attained age 18 is disabled if, as of the date of the employee's death, the individual has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or to be of longtime and indefinite duration.

"THE PROPOSED RULE CONFIRMS THAT THE REQUIRED ACTUARIAL ADJUSTMENT DOES NOT APPLY TO A 5% OWNER, AND, AS UNDER THE EXISTING REGULATIONS, DOES NOT APPLY TO GOVERNMENTAL AND CHURCH PLANS."

- An individual determined by the Social Security Administration to be disabled is deemed to be disabled for purposes of the proposed rule.

It is important to note that the separate account rules for beneficiaries under the existing regulations still apply. If these rules are met, each beneficiary is treated as the sole beneficiary of the employee's account and the rules relating to the treatment of multiple beneficiaries outlined above will not apply.

SPECIAL RULES FOR TRUSTS

The proposed rule provides significant additional guidance on trusts as beneficiaries. It keeps the see-through trust concepts from the existing regulations under which certain beneficiaries of a see-through trust are treated as beneficiaries of the employee. The proposed rule also adds guidance for determining which beneficiaries of a see-through trust are treated as beneficiaries of the employee, including many more sample fact patterns than under existing regulations. The IRS' stated intention in providing this guidance is to minimize the need for taxpayers to request private letter rulings.

DISTRIBUTIONS AFTER THE EMPLOYEE'S DEATH

For DC plans and IRAs, the RMD rules that apply at the death of an employee will depend on whether the employee has reached the employee's RBD and whether the employee's beneficiary is a designated beneficiary, eligible designated beneficiary, or non-individual beneficiary.

If an employee dies *before* their RBD, then:

- An eligible designated beneficiary will receive distributions over their lifetime. A plan can instead provide that distributions will be made under the 10-year rule. Alternatively, a plan can permit an eligible designated beneficiary to elect to receive distributions either over their lifetime or under the 10-year rule, and specify a default rule if a timely election is not made.
- A designated beneficiary must receive a full distribution under the 10-year rule.
- A non-individual beneficiary must still receive a full distribution under the 5-year rule.

If an employee dies *after* their RBD, then:

- An eligible designated beneficiary must receive benefits at least as rapidly as they were being paid to the employee.
- A designated beneficiary must receive a full distribution under the 10-year rule. In an unexpected twist, however, the designated beneficiary must also take annual distributions under the life expectancy rule until the account is fully distributed under the 10-year rule.
- A non-individual beneficiary must still receive a full distribution under the life expectancy rule.

The proposed rule additionally provides that a full distribution from the plan must be made by the earliest of the following dates:

- The end of the 10th calendar year following the calendar year in which an eligible designated beneficiary dies. If the eligible designated beneficiary is receiving benefits over their life expectancy at death, their beneficiary must also take distributions under the life expectancy rule until the account is fully distributed under the 10-year rule.
- If the eligible designated beneficiary is the child of the employee who has not yet reached the age of majority as of the employee's death, the end of the 10th calendar year following the calendar year in which the child reaches the age of majority.
- The end of the calendar year in which the applicable denominator would have been less than or equal to one if it were determined using the eligible designated beneficiary's remaining life expectancy, if the appliable denominator is determined using the employee's remaining life expectancy.

The proposed rule also adds a modified version of the general rule that applies if an employee has multiple designated beneficiaries. Rather than determining the applicable denominator using the designated beneficiary with the shortest life expectancy, the proposed rule uses the life expectancy of the oldest designated beneficiary.

RMDS FROM DB PLANS

The proposed rule did not make significant changes to the DB plan RMD requirements.

For employees who retire after attainment of age 70½, the SECURE Act did not change the requirement that benefits be actuarially increased to take into account the period after age 70½ in which the employee was not receiving any benefits under the plan. In other words, the SECURE Act did not change the age of this actuarial adjustment from age 70½ to age 72. In addition, the proposed rule confirms that the required actuarial adjustment does not apply to a 5% owner, and, as under the existing regulations, does not apply to governmental and church plans.

Other changes under the proposed rule that apply to DB plans include:

- An exception to the 5-year rule was added so that a plan will not fail to comply merely because payments by the plan are restricted by Section 436(d) (which requires limitations on accelerated benefit distributions).
- Additional circumstances under which annuity payments under a defined benefit plan may increase were added by the proposed rule, including as a result of benefits suspended for a retiree on account of reemployment, and for an insolvent plan or for a participant or beneficiary of a plan in critical and declining status whose benefits have been suspended in some circumstances.
- While the age of majority under the proposed rule is generally 21, a DB plan may have a different age of age of majority definition if adopted prior to Feb. 24, 2022.

ROLLOVERS

The proposed rule makes clear that if an employee dies before their RBD, any distribution made during the year of the employee's death is an eligible rollover distribution. Moreover, if the 5- or 10-year rule applies, any distribution made prior to the 5th or 10th year is an eligible rollover distribution. Any amount distributed in the 5th or 10th year, however, is considered an RMD.

If the participant dies after their RBD or the life expectancy rules apply, then the distributions made under the life expectancy rule are not eligible for rollover. This includes distributions made during the year that an employee dies, if the RMD was not made prior to the employee's death.

403(B) AND 457(B) PLAN CHANGES

The proposed rule amends the regulations for 403(b) plans and 457(b) plans to generally conform to the SECURE Act changes that apply to qualified plans. One exception is recognition that the SECURE Act's exception from the 10-year rule for existing qualified annuity contracts applies in the case of a 403(b)(9) retirement income account even if a commercial annuity is not used.

Importantly, the preamble to the proposed rule states that the IRS is considering additional changes to the RMD rules for 403(b) plans so the rules more closely follow those for qualified plans. For example, the IRS has invited comments on a potential change that would require each 403(b) plan to force a required minimum distribution as is currently required for qualified plans and 457(b) plans. This would be a significant change and may pose significant practical challenges for many 403(b) plan sponsors.

NEXT STEPS

Plan sponsors should consider how these changes will affect their plan administration, procedures and processes, documentation, and employee communications. While plan documents, summary plan documents and administrative practice will generally need to be reviewed and amended to address the changes by Dec. 31, 2022 (or Dec. 31, 2024 for governmental plans), plans must be administered in accordance with the proposed rules now (and for 2021 must be administered in good faith compliance with the SECURE Act and existing regulations). **PC**

DRIVING BETTER OUTCOMES VIA NEW THINKING

A cross-functional team effort at Ascensus is helping savers make better and more informed decisions. Here's a look inside. **By Carl Negin**

Participants can now access and manage their retirement plan account whenever and wherever they desire. Offering that access is now considered table stakes. But understanding how those savers access their retirement plan—and studying their savings behaviors across mobile and desktop tools—is essential to designing a best-in-class experience.

At Ascensus, Senior Vice President of Digital Experience Scott Lind and his team have been leveraging the organization's expertise to design a way to focus on driving better outcomes for the firms' clients and partners. "It's not just about access anymore—we've been incorporating design thinking techniques, behavioral economics principles, and lean experimentation to deliver the right information at the right time," Lind notes.

Here's a look at what Lind and his team have learned.

DRIVING BETTER OUTCOMES THROUGH MESSAGING

Ascensus' initial efforts focused on getting savers to increase their contributions. They noticed most participants who used the company's retirement calculator tended to increase their savings rate, but the team wanted to see if it could boost the number of participants who increased their savings rate through different messages developed using behavioral economics principles. This

"MORE INTERACTIVE EXPERIENCES GUIDED BY BEHAVIORAL ANALYTICS ALLOW PARTICIPANTS TO BETTER UNDERSTAND THEIR ACTIONS AND CONSEQUENCES."

was the organization's first attempt at large-scale A/B testing.

Participants received one of two messages on the participant dashboard:

- **"When did you last check how things are running?"** This theme saw 124% more users go to their retirement outlook tool, and 48% more participants increased their retirement savings.
- **"Don't miss the moment."** This theme saw 68% more users go to their retirement outlook tool, and 70% more participants increased their retirement savings.

In another test, Ascensus was able to drive an increase in participation among employees who were eligible but not yet contributing, using an email campaign based on behavioral messaging. As expected, most of the people who signed up had been eligible for less than a year, but what was surprising is that 25% had been eligible for more than two years. (Further study of the factors driving that dynamic is underway.)

DISCOURAGING DECISIONS WITH NEGATIVE OUTCOMES

Next, the team focused on participants who were considering lowering their contribution rate to help them better understand the long-term impact. When a participant lowered their rate in the mobile app, a pop-up provided personalized data on the immediate impact on their paycheck compared to the long-term financial impact on their monthly income in retirement.

As a result, 30% of participants who planned to use the tool to lower their contribution rate decided to cancel the transaction and stick with their current rate.

DESIGN THINKING AND LEAN EXPERIMENTATION

Design Thinking (to generate insights) and Lean Experimentation (to learn what works) also played key roles, Lind says, transforming both the company's approach to user engagement and the skills and backgrounds of the teams driving the change.

More interactive experiences guided by behavioral analytics allow participants to better understand their actions and consequences. As a result, user experience specialists and data scientists have assumed integral roles in the development and implementation of new features. Lind notes that these roles work in tight collaboration with product, technology, sales and service teams.

"For most people, their workplace retirement plan is their largest financial savings vehicle," Lind notes. "So, some of our next projects will focus on finding better ways to enhance the use of our financial wellness tools to help savers gain a broader picture of their savings future."

KEY TAKEAWAYS AND LEARNING ACROSS SAVINGS VEHICLES

Ascensus is leveraging its design experiences to drive better saver outcomes in the company's other lines of business as well. The form's READYSAVE 529 mobile app, deployed for Section 529 education savings account users, tested an app-based savings comparison feature that drove an 18% increase in one-time contributions. In addition, simple changes like better positioning the benefits of the Ugift® feature for family and friends—also available on the app—led to a 30% increase in education gift contributions.

Overall, Lind says the company is pleased with the initial results, which are proving to help participants make better and more informed decisions. He notes the importance of several key principles they have learned:

- Clearly define what a feature is meant to accomplish.
- Make small changes to get an early signal on what works, and then build based on that.
- Test what you're not confident will work.
- Measure your success.
- Use high-visibility solutions like banners sparingly—a little can go a long way.

"We all bring different approaches to tasks and interact differently with the goods and services we consume. That's just human nature," Lind observes. "Employing cross-functional teams in your creative and design process lets you take advantage of those differences and brings even greater diversity of thought and experience to the process." PC

PUBLIC PENSIONS IN THE KEYSTONE STATE

Pennsylvania's public pension system is unique among the states. Here's a deep dive.

By John Vargo & Charles Eberlin

The Commonwealth of Pennsylvania has a long and rich history of public pension plans dating back 100 years. Within the state's 67 counties are communities designated as Cities, Townships and Boroughs. These vary in size from the City of Philadelphia with a population of 1.6 million to small Boroughs of fewer than 100 residents.

None of this makes the Keystone State unique. Rather, the uniqueness occurs because most of these municipalities sponsor their own retirement plans. Most often this is in the form of two defined benefit pension plans—one for uniformed employees like police officers and the other for non-uniformed employees such as road workers and administrators. And while most municipalities sponsor two DB plans, many sponsor more.

With such a fragmented local government structure and the fact that each municipality sponsors multiple plans, the Commonwealth currently has more than 3,300 public sector plans, split roughly between 70% defined benefit and 30% defined contribution.

Ranked by number of pension plans, Pennsylvania is the pension capital of the mid-Atlantic and northeast. Neighboring states such as Ohio, New York, West Virginia, Maryland and New Jersey have fewer than 200 municipal pension plans in aggregate. In fact, the public sector pension plans of Pennsylvania make up over 25% of all public sector plans in the United States.

While there are a couple of large plans that function outside of the municipal pension law framework in Pennsylvania, this article focuses on the pension structure that covers more than 99% of the entities sponsoring pension plans in the state: Cities, Boroughs, Townships and municipal authorities.

ENTER ACT 205

Prior to the early 1980s, each municipality was responsible for the administration and funding of its own pension plan. As one might expect under such a lack of structure, there was a wild variety of successes and failures. Fortunately, Act 205, a state law enacted in 1984, established a structure to administer and properly fund these plans.

Act 205 was developed by a collaboration of state and local government officials and practicing actuaries in Pennsylvania. With this input from the actuarial community, best practices were written into the law that have allowed the pension system to withstand the inevitable pressures on DB plans.

The Act also established a retirement commission within the state government to act as a watchdog for the proper functioning of municipal plans. The commission had considerable power since, if a plan was deemed to be functioning properly, the state provided funding in the form of an annual stipend. This allotment of funds was a key component in the development of a well-functioning pension system.

In another forward-looking move, the allotment of state funding was not tied to the state's annual budget. Instead, taxes on certain insurance companies operating in the state are deposited into a trust that builds the annual fund for allotment to municipal plans.

Under Act 205, biennial actuarial reporting requires the authorization of an Enrolled Actuary. The EA must meet certain requirements, such as years of experience with Pennsylvania municipal pension plans. Plans are also subject to frequent audits by the state's Auditor General, usually every three to four years. Every two years, the PA Auditor General publishes the funding health of these plans. Each municipality receives a distress score based on the aggregate funding ratio of its pension plans equal to the ratio of actuarial value of assets over actuarial accrued liability. Funding health is classified by the Auditor General into four distress level categories:

- "not distressed" (a funded ratio of 90% or greater);
- "minimally distressed" (a funded ratio of 70% to 89%);
- "moderately distressed" (a funded ratio of 50% to 69%); and
- "severely distressed" (a funded ratio of less than 50%).

The vast majority of plans are generally well funded. As of Jan. 1, 2019, 63% of municipalities were designated as "not distressed" and another 32% were designated as "minimally distressed." That leaves fewer than 5% of Pennsylvania municipalities that are designated as either moderately or severely distressed.

There are various voluntary (and sometimes mandatory) recovery remedies for municipal plans whose funded ratios are less than 90%. These remedies are meant to help the plans get back to a solid financial position.

MUNICIPAL/PRIVATE SECTOR FUNDING REQUIREMENTS

As one might expect, there are many similarities yet many differences between the funding requirements of Pennsylvania municipal plans and plans sponsored by private sector entities. The four key differences are actuarial cost method, mortality assumption, interest rate assumption and asset smoothing flexibility.

Actuarial Cost Method

The Entry Age Normal (EAN) funding method is mandated under Act 205. For a salary-related plan under the EAN methodology, an individual's ratio of the present value of the projected benefit at entry age over the present value of future salaries equals the normal cost percentage. The normal cost percentage remains constant (before any gains/losses) and that percentage multiplied by the upcoming year's salary is the annual normal cost.

> "THE PUBLIC SECTOR PENSION PLANS OF PENNSYLVANIA MAKE UP OVER 25% OF ALL PUBLIC SECTOR PLANS IN THE UNITED STATES."

The EAN methodology is an immediate gains method. At each valuation date, at least one new amortization is created for any unanticipated changes to the accrued liability, including amendments, assumption changes, investment gains/losses and experience gains/losses. Similar to private sector plans, the annual cost would include the normal cost, the accumulated amortizations (albeit in this different format), an expense assumption, less any employee contributions, which is a common requirement for employees to share in the cost of the plan. However, under Act 205, should a plan's assets exceed the accrued liability, the amortizations are eliminated and the cost is reduced by 10% of the excess. Should the plan's assets exceed the present value of projected benefits, the annual cost is $0.

Mortality Assumption

Similar to recent private sector mortality studies, the SOA has published an updated mortality table for public sector plans (Pub-2010), including separate tables for safety (police), teachers and general employees (road crews and municipal administration).

Interest Rate Assumption

Actuarial assumptions are chosen by the actuary together with the municipality. Arguably, the most important assumption is the interest rate. For Pennsylvania municipal plans, the interest rate assumption should equal the expected long-term return on the plan's underlying investments. The assumption is commonly one rate, not a segment rate as in corporate plan funding. While the interest rate assumptions have decreased slowly over time, many still exceed the effective rates of the average long-term bond yields used for private sector plans. Most interest rate assumptions throughout the state fall in the range of 6.5% to 7.5%.

Asset Smoothing Flexibility

Act 205 does also permit two optional asset smoothing methods. The first spreads investment gains and losses over a 5-year period. The second is spelled out in the state law and assumes an annual investment return of 1% less than the plan's interest rate. Smoothed values are limited to 80% and 120% of the market value. **PC**

HUGHES AND FIDUCIARY DECISION-MAKING

The U.S. Supreme Court's decision in *Hughes v. Northwestern University* explains how a federal judge decides whether a legal challenge is one you must answer. **By Peter Gulia**

If you are a fiduciary or advise one, it might be smart to consider what your choices about investments and services would look like if a participant challenges your decisions in court.

The U.S. Supreme Court's decision in *Hughes v. Northwestern University* is not directly about how much care, skill, prudence, and diligence a retirement plan's fiduciary must use. Rather, it explains how a federal judge decides whether a challenge is one you must answer.

"A motion to dismiss a complaint is an argument about whether we're allowed to have an argument." That's what I tell my law students, recognizing that even the smartest of them often do not yet understand the practical consequences of federal courts' pleading standards.

Why am I telling you this? To understand how the *Northwestern University* precedent affects a fiduciary's decision-making, one must know a little about the procedural point the Supreme Court reviewed. Following are some important questions and answers.

HOW DOES A FEDERAL COURT CONSIDER WHETHER A COMPLAINT MUST BE ANSWERED?

A complaint that starts a lawsuit recites a set of alleged facts, and a short description about how those facts set

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"TO UNDERSTAND HOW THE *NORTHWESTERN UNIVERSITY* PRECEDENT AFFECTS A FIDUCIARY'S DECISION-MAKING, ONE MUST KNOW A LITTLE ABOUT THE PROCEDURAL POINT THE SUPREME COURT REVIEWED."

up the relief the complaint asks for. Before other litigation steps, a defendant might ask the judge to decide that, even if all allegations were proven, the plaintiff's complaint still would not get the relief requested. A judge decides whether the complaint's assertion of a claim is *plausible*. Under the federal courts' pleading standards, a complaint states a claim only if it alleges facts (not mere conclusions) from which there is a *plausible* (rather than merely speculative) assertion of a claim on which the court could grant relief. A judge does this evaluation pretending every fact the complaint alleges is true, and not considering any fact a defendant might introduce.

WHY IS THIS PROCEDURAL POINT SUCH A BIG ISSUE?

The expenses of litigation—especially if a case is fact-sensitive—often are overwhelming. Even if a defendant believes there is almost no chance a fact-finder would find the defendant breached a responsibility, putting an end to the expenses of litigation can make it rational to settle even a meritless case. On the plaintiffs' side, a case lacks much settlement value until it defeats the defendant's motion to dismiss. (An economics analysis of why both points are so would be too long for this article.) In the oral argument before the Supreme Court, the Justices recognized that deciding whether a complaint is *plausible* enough that a court requires the defendant to answer it can be tantamount to deciding which side ultimately will "win" the case, by getting or losing leverage in bargaining a settlement. For this economics problem, the Supreme Court did not set special pleading standards for fiduciary-breach complaints.

WHAT IS THE KEY POINT THE SUPREME COURT'S OPINION REINFORCES?

The fact that an individual-account retirement plan's investment alternatives for participant-directed investment include prudent alternatives does not excuse a fiduciary from a continuing duty to monitor all plan investment alternatives and remove imprudent alternatives.

To guide the lower federal courts, the opinion explains that a judge's analysis of whether a claim is plausible must be context-sensitive, and must consider a fiduciary's duties to monitor investments and services. (The *Northwestern University* opinion, which is only six pages, is online at https://www.supremecourt.gov/opinions/21pdf/19-1401_m6io.pdf.) In each analysis, the particular plan's facts matter.

WHAT DID THE SUPREME COURT *NOT* SAY?

The Supreme Court did not declare imprudent:

- using multiple service providers for the same function;
- allowing more than 400 investment alternatives;
- favoring participants' choices of service providers over concentrating purchasing power; or
- using indirect compensation from investment funds or their service providers to compensate recordkeepers and other plan-administration service providers, even if doing so was more expensive than paying fees directly.

Rather, the university's plans' fiduciaries may show that their decision-making thoughtfully considered each plan's surrounding facts and circumstances. For example, allowing choices of service providers and investment alternatives others might see as duplicative (or as not using a plan's purchasing power) might have prudently met participants' preferences for a plan that generates retirement savings primarily from participants' *voluntary* choices.

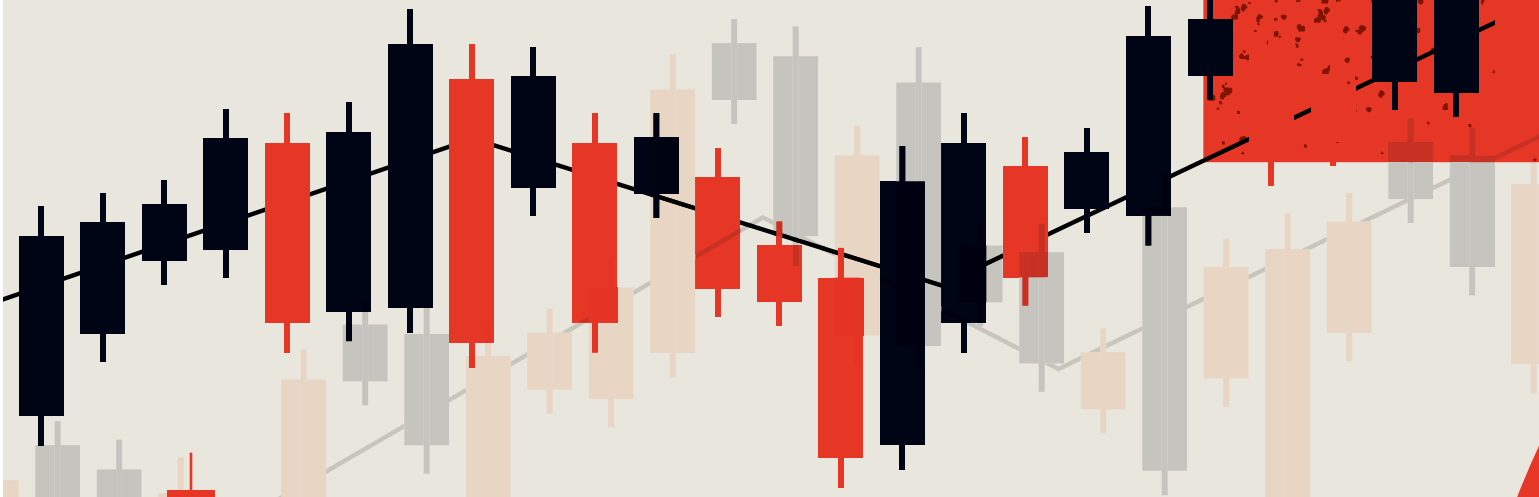
WHAT HAS HAPPENED SINCE THE DECISION?

In just the first three months after *Northwestern University* was announced on Jan. 24, 2022, several federal courts have decided against dismissing claims that a fiduciary might have breached its responsibility to a retirement plan. This trend had developed before the Supreme Court's decision: for excessive-fee cases filed after 2020 with motions to dismiss decided before April 5, 2022, more than 80% survived.

WHAT CAN WE LEARN FROM *HUGHES*?

As always, a fiduciary should carefully collect information, and thoughtfully consider everything about the retirement plan's and its participants' circumstances, needs, resources and opportunities. Furthermore, a fiduciary might think about what the plan could look like to a skeptical observer who sees only the public facts. While such an outlook should *not* be the basis for a fiduciary's choices, considering how something looks can help a fiduciary strengthen its decision-making, as well as its disclosures, Form 5500 reports and communications. **PC**

THE SDBA DILEMMA



SELF-DIRECTED BROKERAGE ACCOUNTS IN A 401(K) OR 403(B)— WHAT ARE THE CONCERNS?

BY R.L. "DICK" BILLINGS

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IF YOU ARE A TPA IN TODAY'S MARKETPLACE, YOU ARE BEING ASKED BY CLIENTS AND PROSPECTS (OR THEIR INVESTMENT ADVISOR) TO ADMINISTER A PLAN ALLOWING PARTICIPANTS TO INVEST PART OR ALL THEIR 401(K) OR ERISA 403(B) ASSETS IN FUNDS OR INDIVIDUAL SECURITIES OUTSIDE THE CORE MUTUAL FUND GROUP.

These are generically referred to as Self-Directed Brokerage Accounts (SDBAs). What are the concerns for plan sponsors and TPAs?

First of all, I see SDBAs falling into two distinct groups:

1) A "brokerage window" (BW)—offers the participant a much wider selection of mutual funds outside the core group. Such windows typically do not allow investment into individual securities, such as stocks, bonds, ETFs, etc.
2) A "brokerage account" (BA)—an option allowing the participant to buy any legal investment, including individual securities. I typically see two versions of BAs:

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a. the brokerage account is fully integrated into the plan's recordkeeping system. It may include restrictions such as limiting investments to those listed on certain stock exchanges, or

b. the account is *not* integrated into the recordkeeping system and usually has no investment limitations whatsoever. Major hurdles exist with this format, discussed below.

I believe that discussions should occur when a SDBA is being considered:

1) from the viewpoint of the client/plan sponsor/named fiduciary.[1] If these titles are held by multiple people, all of them must be part of the conversation;
2) from the viewpoint of the TPA (technically called the Contract Administrator); and
3) from the viewpoint of the participant who is interested in an SDBA.

For an SDBA to be successful and manageable, I believe that all three viewpoints must be incorporated into the decision-making process.

As a TPA with many years administering plans, I would say that you probably would not have too much of a problem *refusing* to administer plans containing a SDBA. You will lose some opportunities, but such a position may be safer and more profitable in the long run.

ADMINISTRATIVE CHOICES

Today I see TPAs using three types of daily recordkeeping platforms for plans allowing participant-directed investments:

1) Investment provider platforms offered by companies like John Hancock, Nationwide, Principal, Fidelity, etc.
2) "Open Architecture" platforms offered by such firms as Empower, Newport Group and PCS Retirement
3) Your own private-labeled open architecture platform, like that offered by FIS Business Systems, LLC (i.e., Relius)

Following are some questions to ask yourself as you consider administering plans with SDBAs.

How will asset values get physically entered your recordkeeping system?
If the BA is not integrated, this will most likely be a manual process, conducted quarterly.

How will you allocate fees to the BA?
How will part of a base-fee or per-participant-fee be paid from BA assets? This may create another quarterly manual process.

How are the related parties of the brokerage account getting paid?
You may figure this issue is not your problem, which may be true depending on the type of recordkeeping platform being used. If some SDBA fees (e.g., investment advisor charges) are paid by the participant personally or by their corporation, or the SDBA is basically only offered to highly compensated employees (intentionally or unintentionally), this will violate ERISA's benefits, rights and features requirement.[2]

If limitations exist within the SDBA versus the core group, who will be responsible for this?
When the BA is not fully integrated into the recordkeeping platform, one could argue that this should be a daily manual process.

How are participant account assets moved from the core group into the SDBA and vice versa?
If the BA is not fully integrated into the recordkeeping platform, another manual process may see plan assets being inadvertently deposited into participants' personal

A PARTICIPANT LOOKING TO INVEST VIA AN **SDBA** SHOULD CONSIDER THE INCOME TAX ISSUES OF PROFITABLE INVESTMENTS WITHIN ANY QUALIFIED RETIREMENT PLAN.

accounts, thus creating a prohibited transaction.[3]

THE NAMED FIDUCIARY'S PERSPECTIVE

Now let's consider the prospect of a SDBA from the named fiduciary's point of view.

Neither ERISA, nor the IRS or the DOL, have ever prohibited a plan sponsor from offering an SDBA to participants. When these accounts first became popular during the dot-com boom of the late 1990s, it seemed that anyone could make a lot more money using an SDBA instead of the core group. Remember, between 1995 and March 2000, the NASDAQ Composite rose 400%.[4] After reaching its peak in October 2002, the NASDAQ eventually lost 78% of its value, thus giving up all of its "bubble" gains.

While the current popularity of SDBAs is nowhere what it was during the dot-com bubble, they are still common. Some surveys have shown that more than 47% of plans allow some version of an SDBA.

In my experience, the only time the SDBA discussion has come up is because a participant (e.g., one of the shareholder-employees) or an investment advisor suggests it. It is likely that every company has at least one employee who thinks he or she can beat the market. Whether these beliefs end up being true or not, does the plan sponsor want the "tail wagging the dog"? That is, why would a plan sponsor add any employee benefit that only a small percentage of employees will utilize? A recent ERISA Advisory Council report says this is the dominant use of SDBAs.

Let's think about the year 2012. Leading up to that fateful year, there were movements within and outside the federal government reminding plan sponsors of their ERISA fiduciary responsibilities. ERISA became law in 1976, but "fiduciary responsibility" was not really promoted until 2012. In fact, many plan sponsors believed

that if they gave their participants the right to purchase virtually any legal investment, they would be exempt from any fiduciary risk.

Then came Question 39 among the FAQs listed in the DOL's Field Assistance Bulletin 2012-02.[5] Here is an abbreviated version of the answer to Question 39:

> "….in the case of a 401(k) or other individual account plan … a plan fiduciary's failure to designate investment alternatives, for example, to avoid investment disclosures under the regulation, raises questions under ERISA section 404(a)'s general statutory fiduciary duties of prudence and loyalty. Also, fiduciaries of such plans … that enable a participant ... to select investments beyond those designated by the plan are still bound by ERISA section 404(a)'s statutory duties of prudence and loyalty to participants and beneficiaries…"

It is important for every named fiduciary and plan sponsor to be aware of how things work if they are ever sanctioned by the IRS and, as a result, they take the IRS to Tax Court. If you or I were charged with a crime, we would be considered innocent until proven guilty. But if you sue the IRS in Tax Court, you are considered guilty until proven innocent. Penalties will be imposed up front, and you will then have to fight to get those penalties reduced or eliminated.

So when a plan fiduciary is making any decision about their 401(k) or 403(b) plan, this question should be asked: "Is this decision worth the risk of future scrutiny by the federal government?"

We now move our timeline to this year. On March 10, 2022, the DOL issued Compliance Assistance Release 2022-01.[6] This became such an issue that the DOL felt it necessary to issue very specific warnings to fiduciaries that add cryptocurrency to their investment lineup or SDBA. *(For more, see the Cryptocurrency column on page XX—Ed.)* The words within this Release were amplified for named fiduciaries considering the January 2022 U.S. Supreme Court decision in the *Hughes* case.[7] This is what the Court said:

> "[E]ven in a defined-contribution plan where participants choose their investments, plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options. The failure to remove imprudent investment options is a breach of duty."

Allowing many investment options via an SDBA will not eliminate, and may increase, a plan sponsor's fiduciary risk. One big exception would be "Solo-K" plans. These plans only cover HCEs, so discrimination and potential lawsuits are irrelevant.

INCOME TAXATION

What about the individual tax issue?

A participant looking to invest via an SDBA should consider the income tax issues of profitable investments within any qualified retirement plan. For example, let's assume that George, an SDBA participant, had the foresight to purchase 1,000 shares of Apple in 2002 for $14.33 per share. By 2019, that investment would have grown from $14,330 to $1,862,000! George now retires, rolls it into an IRA and then withdraws this money over 20 years.

These distributions alone will probably put him in the 24% federal income tax bracket. When added to other income, I would not be surprised to see George's federal tax bracket rise to 32% or more.

Then we add any state or local income tax. Let's say George ends up paying a 38% overall tax rate. Assuming 5% growth each year on the balance of his account, his annual distribution would be about $120,000; times annual taxes paid at 38%, or $45,600. Thus, on his distribution over 20 years, George pays $912,000 in taxes.

Now let's assume that George made the same Apple investment in a *personally* owned investment account. The holdings were completely sold upon his retirement. Federal capital gains taxes would amount to a level 20%. Say state and local taxes are again at 6%, making a total of 26%. George's subsequent tax bill on his $1.8 million stock sale would be around $485,000, almost 50% less than if the investment were done through the SDBA.

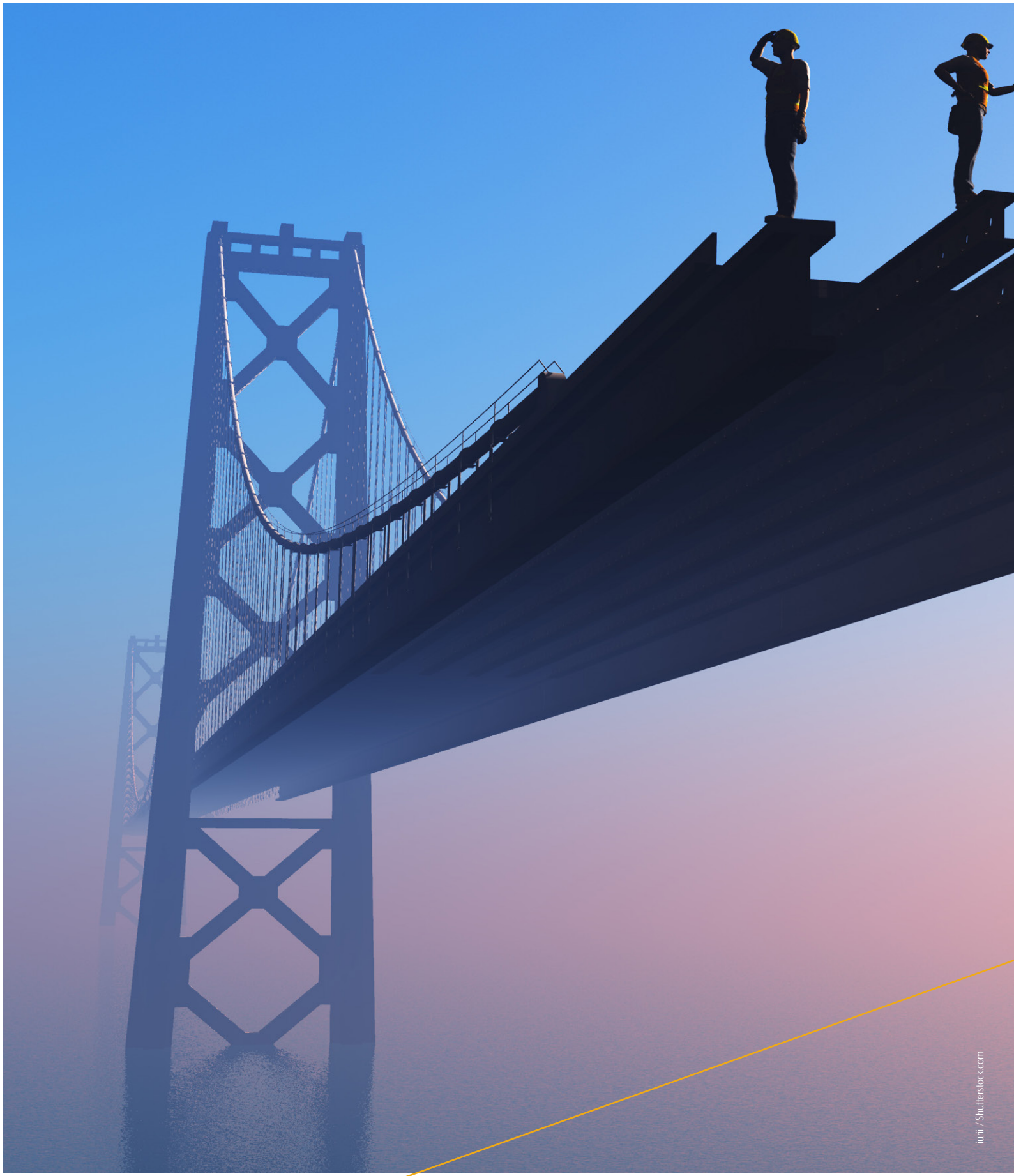
CONCLUSION

SDBAs, like auto-enrollment, loans or any other particular plan design option, are neither good nor bad in and of themselves. But we all know that ERISA-qualified retirement plans are heavily regulated. It is very important that any plan sponsor with non-HCE participants understands the full ramifications of adding an SDBA allowing the purchase of individual stocks and bonds. **PC**

Note: The views, thoughts, and opinions expressed in this article are those solely of the author, and not necessarily those of the author's employer.

Footnotes

1. A person designated in the plan document as having the "authority to control and manage the operation and administration of the plan." [ERISA §402(a)(1)]
2. 26 CFR §1.401(a)(4)-4.
3. Prohibited transactions include: (1) dealing with plan assets in the fiduciary's own interest or for his or her own account; and (2) acting on behalf of a party whose interests are averse to the plan's interests, or in any personal transaction involving the plan.
4. Jim Edwards, "One of the kings of the '90s dot-com bubble now faces 20 years in prison," *Business Insider*, Dec. 6, 2016.
5. Field Assistance Bulletins (FABs) are written by the DOL's Office of Regulations and Interpretations to provide guidance in response to questions that have arisen in field operations. FABs may also include transition enforcement relief that permits employers, plan officials, service providers and others time to respond to new laws or regulations.
6. A Compliance Assistance Release is intended a supporting role in identifying processes and programs in a business that require changes to maintain compliance with laws and industry regulations.
7. *Hughes v. Northwestern University*, 142 Supreme Court 737, 742 (2022).



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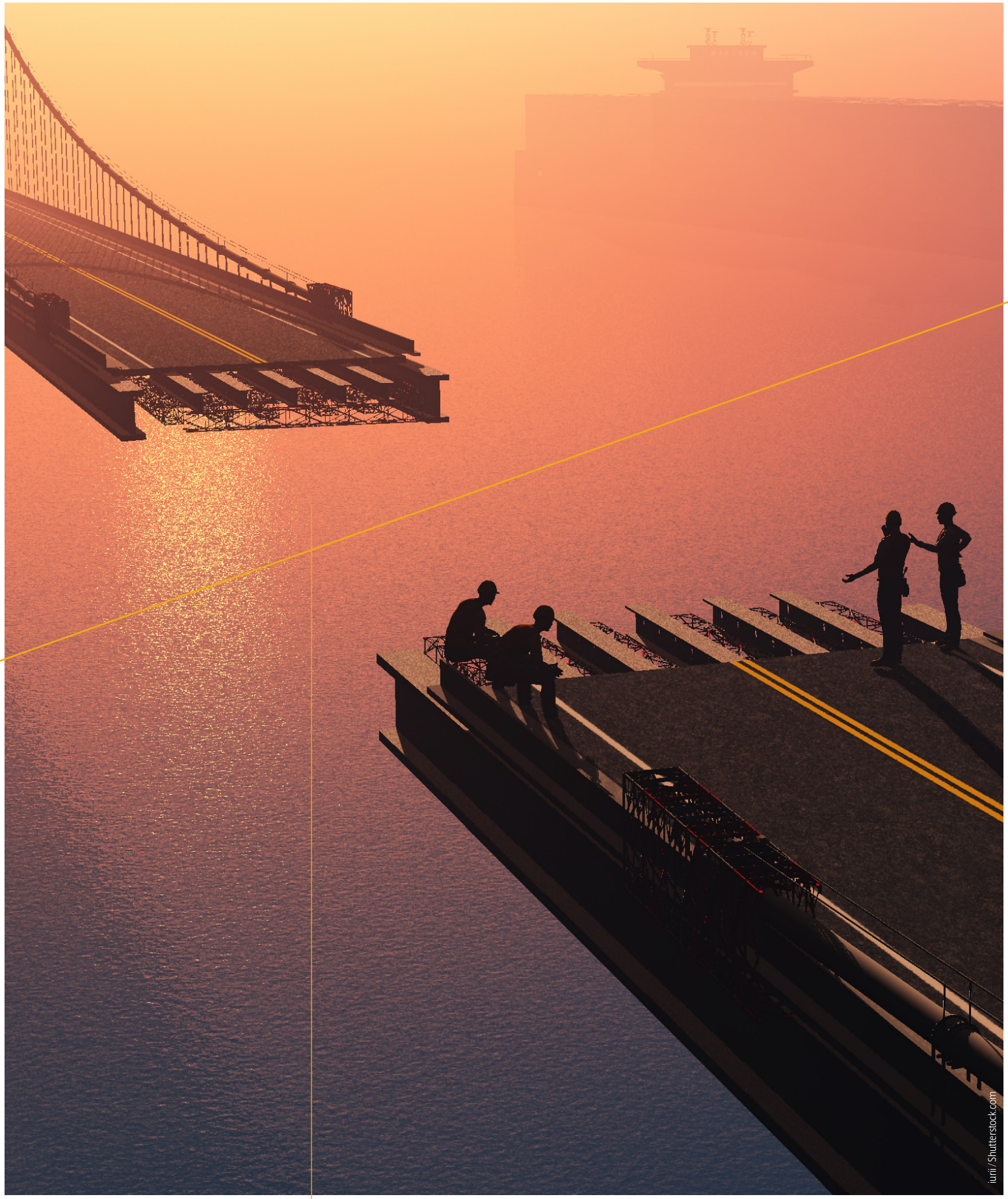
THE BRIDGE BUILDERS

A WORKING GROUP OF TPA BUSINESS OWNERS AND EXECS IS EXPLORING WAYS TO BRIDGE THE LONG-STANDING GAP IN UNDERSTANDING BETWEEN ADVISORS AND TPAS. **By John Ortman**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FOR YEARS, ONE OF THE MOST PERSISTENT BARRIERS TO THE SMOOTH AND EFFICIENT OPERATION OF MANY 401(K) PLANS HAS BEEN THE NATURE OF THE WORKING RELATIONSHIP BETWEEN THE PLAN'S ADVISOR AND ITS TPA.

When the advisor/TPA partnership works as it should, typically it's characterized by:

- a clear understanding of each other's role and expectations;
- a shared dedication to ensuring that plan administration runs smoothly and the plan is in full compliance; and
- the plan's design is tailored to the plan sponsor client's needs and goals.

To the degree that those attributes are diminished, optimal performance of the plan suffers, along with the advisor/TPA relationship and ultimately, client satisfaction. In far too many instances, this has been the unfortunate outcome of the TPA/advisor partnership. That's a problem. And since this often-negative dynamic has existed for decades, it's reasonable to assume that it's likely to be with us in the foreseeable future as well.

Or is it? Can it be fixed? And what can be done to help advisors and TPAs improve their partnership as service providers?

Early this year, a group of TPA business owners and executives came together to answer those questions. Here's their story.

GETTING OFF THE GROUND

It was ARA Chief Content Officer Nevin Adams who was inspired to try and bridge the communications gap between TPAs and advisors after sitting in on several ARA Women in Retirement Conference (WiRC) "Third Thursday" sessions in 2020 and 2021. On those calls he noticed that the issue of communication issues—frustration with one or the other "not staying in their lanes"—kept coming up. The issue was something that also popped up occasionally on the Retireholi(k)s' vlog, Adams notes, which, though conducted by the TPAs at Plan Design Consultants, often includes advisors. The seeds of the focus were actually planted in a live session with the Retireholi(k)s at the TPA Growth Summit a couple of years ago.

"I had good enough relationships with people on both sides of the discussion to think that we could actually bring some folks together and work on this," Adams continues. "It helped that I didn't really have an ax to grind, just wanted to take a concern that was being expressed by both TPAs and advisors, and see if we couldn't find common ground. I didn't know, at the outset, what we'd be able to do. I just wanted to bring together knowledgeable, passionate people who wanted to help solve the problem. And I think we ended up with that."

In addition to Adams, the group consists of:

- Shannon Edwards, President of TriStar Pension Consulting
- Amanda Iverson, COO & Partner, Pinnacle Plan Design
- Justin Bonestroo, SVP with CBIZ
- Mary Patch, a plan advisor with Independent Financial Advisors (IFP)[1]
- JD Carlson, owner of Plan Design Consultants (PDC)
- Chad Johansen, Partner and Director of Retirement Plan Sales at PDC

Edwards, Iverson, Bonestroo and Patch are well-known members and leaders of ASPPA. Bonestroo is the current President-Elect; Iverson is the current Vice President, Edwards is a member of ASPPA's Leadership Council, and Patch, a member of both ASPPA and NAPA, is the longtime Chair of the *Plan Consultant* Committee. Carlson and Johansen, both ASPPA members, are perhaps best known as two of the four members of the Retireholi(k)s.

'POLLING' PLACES

"One of the things that [the group] has been talking about is, how do we help the TPA and the advisor to better communicate and recognize where the lanes are?" Adams observes. "To quit fighting over who owns the relationship and come together in a way that will allow that relationship to really function for the betterment of everybody—not the least of which is the plan participants and plan sponsors we're all trying to work for."

Footnotes

[1] *Investment advice offered through IFP Advisors*, LLC, dba Independent Financial Advisors (IFP), a Registered Investment Advisor.

"WE ALL SEE OPPORTUNITIES FOR BETTER CLIENT SERVICE, OPPORTUNITIES FOR GROWTH, OPPORTUNITIES FOR MORE PRODUCTIVE PARTNERSHIPS. SO HOW DO WE FIND THOSE PARTNERS?" — AMANDA IVERSON, PINNACLE PLAN DESIGN

Bonestroo notes that the group's initial focus was just getting a better understanding of the mindset on both sides. So with Adams' help, the group conducted a pair of polls: one asking TPAs about their views on advisors (see "TPAs' Views on Advisors" sidebar) and the other asking advisors about their views on TPAs (see "Advisors' Views on TPAs" sidebar).

Iverson recalls the impact that the survey results had on Edwards, Bonestroo and herself as they prepared for a workshop session at the 2022 NAPA 401(k) Summit. "As we were going through the surveys and hearing from advisors and even other TPAs, it was clear that not every advisor/TPA experience has been amazing," she says. "Sometimes we had to swallow our pride and listen, and initially I we were like, 'Oh, *we* would never do that.' But we heard it happening over and over, so it was clear that there are opportunities for improvement and obstacles to overcome. We've spent a significant amount of time over the last year just digging into those service provider relationships, interactions and problem situations to determine, 'How did this happen?' 'What can we do to prevent these kinds of scenarios from happening?'"

The group soon found that a lot of the problem had to do with either not having the same expectations or having communication that wasn't clear. "When we started to dig into this, we were surprised at some of the things that we heard from the advisory side, as far as where their frustrations came from," Bonestroo recalls. "A lot of it came across as miscommunication or a misunderstanding of the roles on both sides. So we wanted to learn more about what's causing frustration and figure out how we can fix those things. Instead of just accepting the existing flaws in our interactions, we can all be deliberate to identify those flaws and their origins and then address them and create meaningful improvement."

COMMUNICATIONS AND EXPECTATIONS

One of the first steps in that journey is "to really open up the discussion about the areas of conflict and to get both sides to start speaking the same language and start understanding the landscape for the other party," says Bonestroo. "From the advisor's perspective, the idea is that if you're intentional in creating a partnership—if you recognize where your needs or your shortfalls are, and understand how a specific TPA could interact with you in those areas, and then purposefully create the collaboration—it will lead to better overall results."

Because of her experience as both a TPA and an advisor, Patch provides an advisor's voice in the group's discussions. "Mary has done a lot during her career," says Edwards. "She brings something unique to the table because she is so familiar with the TPA world, and is also so good when it comes to the fiduciary aspects of being a good plan advisor and really

TPAs' Views on Advisors

An email survey of ASPPA members asked TPAs to share their views on various aspects of their relationships with advisors.

Why do you work with advisors?
74%: Helps me win business
72%: Better for plan sponsor
66%: Helps with plan/client retention
29%: Assists with difficulties/difficult situations
19%: Makes my life easier

What do you not enjoy when working with advisors?
70%: Infringes on our expertise as a TPA
61%: Doesn't value what we do as a TPA
59%: Doesn't understand our services
54%: Overpromises our services to clients/prospects
48%: Unrealistic deadline expectation

Rank the four most important factors in working with an advisor (by calculated score):
81: Proactively communicates with me
79: Treats me as a partner
79: Helps me with new business
76: Assists with plan/client retentions
74: Dedicated to the retirement plan space
73: Assists with difficulties/difficult conversations

JUSTIN BONESTROO
CBIZ

NEVIN ADAMS
ARA

SHANNON EDWARDS
TRISTAR PENSION CONSULTING

taking care of her clients. She really expects a lot of value from her TPA, and she expects the job to be done right."

"I have a lot of friends in the industry who are advisors utilizing TPAs, and I feel like there are times they become frustrated with situations that happen," Patch says. "I believe some of it is just not understanding 100% exactly how the TPA functions. I also feel that sometimes an advisor has so much on their plate that they just don't have the time to engage at the level of really diving in and understanding what a TPA does and the differences between different TPAs' business models."

Of course, in all plans there are many things that must be done, Edwards adds: compliance work, the Form 5500, financial statements and audits for large plans, to name a few—all of which are the responsibility of the employer but carried out by the TPA, whether bundled or part of a standalone solution. "We need advisors to understand that by not choosing a TPA, you're still choosing a TPA—you're just choosing a *bundled* TPA."

"I have never come across a modern TPA that likes to be called an administrator," notes Johansen. "Understanding that we want to be an extension of our advisor partner teams is a crucial differentiator between a bundled TPA and a specialized TPA."

"Advisors like what they refer to as the 'easy button,' and sometimes it's just easier to work with a bundled solution and have one place to call for everything versus separating it out between a TPA and a recordkeeper, and then dealing with the nuances of where your client is supposed to call or who handles what on the plan," Patch adds.

There's another aspect of the bundled/unbundled issue, Patch points out: the many different types of advisors and TPAs. "There are specialists on the advisory side but also a whole lot of advisors who don't really specialize in this space," she notes. "So when the TPA is answering

Advisors' Views on TPAs

A poll in the NAPA Net Daily e-newsletter asked advisors to share their views on various aspects of their relationships with TPAs.

Why Work with a TPA?
Nearly all (98%) of the respondents work with one or more TPAs. Asked why they chose to do so, respondents noted the following (more than one response was permitted):

76%: Assists with technical difficulties

56%: Overall, better for plan sponsor

45%: Makes my life easier

34%: Assists with plan/client retention

29%: Helps me win business

24%: Not really my choice/decision

If Not, Why Not?
While the number of respondents was much lower, those who didn't work with TPAs cited these reasons:

72%: My clients don't want another party they have to talk to

59%: Adds a layer of complexity

31%: My plans don't need a TPA

28%: Too expensive

7%: Too technical, doesn't speak English to clients

Selection Process
As for whether they had a partner selection process in place:

47%: Yes, but it's not a formal process

30%: No

20%: Yes, a formal process

3%: Not yet

"I FEEL LIKE UNTIL WE FIND A GOOD WAY TO CREATE A CROSSOVER BETWEEN THE TWO ENTITIES, IT'S REALLY HARD FOR EACH OF THEM TO UNDERSTAND WHAT THE OTHER DOES." — MARY PATCH, IFP

a question, they could answer it from either end of that spectrum. A TPA may work with one advisor who is more experienced and wants to stay really involved. But they may support another advisor who doesn't ever get involved and wants the TPA to handle everything. So communication is a challenge on both sides of the house."

Johansen agrees. "There is a certain tendency on both sides. If you've had a bad experience with somebody who wears one of those labels, it's easy to just sort of generalize and say they're all like that," he says, noting that, "ultimately, the shared goal is about being able to build and develop a trusted relationship. But the reality is that a lot of advisors don't have a full appreciation for what a good TPA will be willing to do for them as a part of their normal service."

SHOPPING LIST

To address that gap, the group's next goal was to highlight both the areas that are critical in terms of keeping the plan in good, solid compliance, and also identifying the services to be provided, Adams explains. That way, an advisor could get a sense of what should be on their "shopping list" when it comes to looking for a TPA. "Do you want somebody who does this, or who knows about this, or who has experience with this—that kind of thing," Adams says, "because in a lot of cases, the advisors don't even know what to ask for. And often then they have to pick up the slack, taking on work that a good TPA would normally do as part of their service—if asked."

The result? All too often, opportunities are wasted. "We all see opportunities—opportunities for better client service, opportunities for growth, opportunities for more productive partnerships," says Iverson. "So how do we find those partners and then ensure we are able to be the kind of partners that will create a better client, plan, advisor and TPA experience?"

The group started with a list of top 10 areas of plan compliance "pain points"—areas where the best TPAs differentiate themselves—and that eventually provided the basis for a capabilities checklist that advisors can use to evaluate potential TPA partners. "One of the frustrations we've found is that ultimately, unless you have a process that identifies what the pain points are, and a process for looking at all of the ones that are important to you, it will be difficult to really put together a partnership that works," Bonestroo explains.

In between that initial draft and the checklist, the group collaborated on a series of monthly posts on NAPA Net and ASPPA Net intended to lay the groundwork for a shared understanding and appreciation of the respective roles: "Finding the Right TPA Partner," "Bundled Versus Unbundled: 5 Myths," "Resource 'Full?'" and "What's in a Name?" The last one makes the case that "the most used and least understood/appreciated acronym in the retirement plan industry is 'TPA.'"

This led back to the notion that advisors would benefit from knowing the service/support questions to ask their TPA partners—and that TPAs would benefit from advisors having a consistent and uniform list of potential services that would allow them to establish/validate their partnership value. And that, in turn, culminated in the checklist.

For example, for an advisor looking for a TPA partner, one of the questions to ask a TPA, Edwards notes, is: "Do you have a workflow client management system, where you have notes about how I want you to work with me, and are you able to do it that way?" That's the essence of the checklist the group has created—without getting overly complex or too deep "in the weeds."

The current draft version of this checklist is provided on page 37. It was shared with about a dozen advisor volunteers who provided insightful feedback and suggestions that have been incorporated in the updated draft. The next step in its development "is to actually have some advisors meet with a TPA and use it, put it into live practice and see how it flows for the advisor and for the TPA," Patch explains, adding that the group plans to tackle other deliverables in the future.

THE IMPORTANCE OF CULTURE

Another important point in choosing a partner is to understand what the culture is in that firm, Edwards notes. "It's about knowing how information gets from the person who sells the plan to the people who work on it and have the daily relationships. Because they can't read my mind;

TPA Assessment Checklist

How should a plan advisor go about evaluating a potential TPA partner? To help answer that question, this checklist was crafted with an eye toward what advisors should want to know. It also includes questions about a TPA's services, support and structure that a potential TPA partner should be prepared to answer in determining a good partnership fit.

Comments and suggestions can be directed to nevin.adams@usaretirement.org.

Experience/Background

- Are you a member of the American Society of Pension Professionals and Actuaries (ASPPA)?
- How many location(s) do you have? Where is/are they?
- What is your ownership structure?
- How many plans does your firm currently support?
- What is your typical plan size (assets and participants)?
- Which platform(s) do you most commonly work with?
- Which plan type(s) do you work with regularly (401(k), 403(b), 457, NQDC, Cash Balance)
- Is a member of your staff the advisor of record on any plans or otherwise receiving commission or advisory fee-based compensation on any plan(s)? (Y/N)
- What is your average client tenure with your firm?

Staffing/Support

- How many staff do you have? How many in client-facing/consultant versus back office/call center?
- Which credential(s) do you require your staff to have/maintain?
- Is there a single primary point of contact for the plan sponsor?
- How many plans are your client-facing consultants responsible for, on average?

Communication

- What is your policy in responding to inquiries, and how is that monitored/measured?
- What is your standard method of communicating important plan-specific issues with clients? (Automated emails, personalized emails, phone call, other).
- Do you typically include the advisor of the plan on all correspondence to a client? (Y/N, Upon request).

Services

- Is plan sponsor education (e.g., the meaning of terms in their plan document, legislative changes, plan design suggestions) part of your standard service? (Y/N)
- On what frequency? (Annually, upon request, upon role change)
- Do you offer 3(16) services?
- Do you take revenue-sharing into account when pricing your services for a client?
- Will you price your services on a revenue-neutral basis and direct-bill the client?
- Do you charge for drafting plan amendments? Is it included in your base charges, is there a document maintenance charge, or is it billed individually?
- Do you charge for plan restatements? Is it included in your base charges, is there a document maintenance charge, or is it billed individually?

Administration/Compliance

Do you: (responses: yes, routinely; yes, upon request; or no)

- Perform eligibility verification prior to each entry date?
- Provide/distribute required plan notices?
- Do compliance testing?
- Perform employer contribution calculations? If so, which one(s), and is it included in your base charges or is there an extra charge?
- Reconcile contribution deposits to participant contribution records?
- Take responsibility for plan tax filings (Form 5500, 8955, 5330, etc.)?
- Perform/verify distribution calculations?
- Perform QDRO analysis and approvals?
- Speak with participants regarding loans/distributions?
- Perform/verify participant loan calculations?
- Perform missed deferrals calculations (including missed earnings)?
- Take the lead on any required correction filings (late deposit calculations, VCP, EPCRS, etc.)
- Work directly with the plan's auditor to resolve questions/issues?

they don't know what I told the client and the advisor in that meeting, or what I promised, or how the advisor wants this plan to look," she says. "So it's important for an advisor to understand, after the plan is sold, what does it look like? Where does it go in the TPA firm, and how does the information flow down?"

"It's one thing to claim to be a partner, but the fact is you have your business owner, and you have your sales team. They understand the advisor relationship," Bonestroo points out. "But it doesn't mean anything if the people who actually have boots on the ground—working with the plan moving forward, working with the plan sponsor, working with the recordkeeper—don't have that same feeling."

For a TPA, "If your culture doesn't flow through from the top all the way to the bottom, and your consultants don't feel that way—if they feel that it's always 'us-versus-them' or 'here's a chance for me to look good because I can make somebody else look bad'—you're not going to have a good experience with that," says Bonestroo. "In the end, the only enemy is things being done wrong. We just want to make sure that we can get there together."

WHAT'S NEXT?

What does the future hold for the group? "It would be great to have this group continue to work on the objective of improved collaboration between retirement plan service providers," says Iverson. "Who knows where it'll take us? We may expand it with additional members. We could ask applicable parties additional questions, and then take on overcoming additional obstacles. We could seek feedback on what we're delivering to see how we can improve it."

Iverson also suggests adding the involvement of more NAPA members. "Mary has been the lone advisor in our group so far and she's done an excellent job—she's just been very transparent and honest in her feedback, and she hasn't worried about hurting any of our feelings, which is wonderful," she says. "It would be great to have a few additional advisors involved to help decipher the obstacles that we need to overcome."

Patch sees the need for more ongoing discussions and communications—perhaps in the form of discussion opportunities at ASPPA's Annual Conference and the NAPA 401(k) Summit. "I feel like until we find a good way to create a crossover between the two entities, it's really hard for each of them to understand what the other does," she says.

No matter what the future holds, look for lots more to come from this process. "I think all of us are passionate about the industry as a whole and making us all better together, rather than just focusing on the individual ARA sister organization than I'm a member of," says Edwards. "It's about bringing us all together so that we can serve the retirement plan community even better." **PC**

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THE IMPACT OF DOL'S PROPOSED AUDIT CHANGES

Here's how proposed changes in DOL audit requirements could affect auditors and plan sponsors.

By Zach Richards

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Daniel Tadevosyan / Shutterstock.com

On Sept. 14, 2021, the Employee Benefits Security Administration proposed amendments to DOL regulations relating to ERISA's annual reporting requirements. One of the proposed amendments would change the current method of counting covered participants for purposes of determining when a defined contribution plan may file as a small plan. If a plan is able to file as a small plan, the plan may be exempt from the Independent Qualified Public Accountants (IQPA) audit requirements generally applicable to large DC plans.

Under the proposal, DC plans, including 401(k) plans and 403(b) plans, would determine whether they must file as a large plan and whether they have to attach an IQPA audit report based on the number of participants *with account balances* as of the beginning of the plan year. Currently, the IQPA requirement includes the total number of *eligible participants* at the beginning of the plan year, even if the participant is not making contributions, receiving employer contributions, or maintaining an account in the plan.

The DOL estimates that there are currently 11,362 DC plans that are currently providing the IQPA report and audited financial statements that would no longer be required to provide. The EBSA has estimated that this change would create audit cost savings of $63.9 million annually. If adopted, the proposed changes generally would be effective for plan years beginning on or after Jan. 1, 2022.

At first glance, it seems that this proposed change would be a good thing for smaller plans by easing the burden of the administrative costs that employers bear when sponsoring a DC plan. For example, a plan with more than 100 eligible participants but only 45 participants would no longer be required to go through the annual audit process—or have to pay the fees associated with the audit each year. However, it is also important to consider some concerns regarding the diminished protections to plan participants if this change is implemented. The IQPA audit is an important part of the safeguards established by Congress in ERISA to protect plan participants.

Operational Errors

As noted in the comment letter from the Employee Benefit Plan Audit Quality Center Executive Committee of the American Institute of Certified Public Accountants (AICPA), an IQPA audit includes understanding the plan's internal control over financial reporting, which allows auditors to identify and communicate control weaknesses, compliance issues, and/or plan operational errors so they can be corrected.

Smaller plans may have a higher likelihood of errors and noncompliance because plan sponsors have limited resources to establish proper controls and monitor compliance with the plan document, ERISA, and DOL regulations. Some smaller plans have complex plan provisions and large account balances. While some small employers can effectively manage their plan and have no compliance issues, auditors often find multiple errors and noncompliance occurring in these plans, including the following items.

- **Participants are not enrolled in the plans on a timely basis.** The plan documents will dictate the service requirements that a participant must meet to be eligible to enroll in the plan. The plan documents will also determine the entry dates into the plan (e.g., immediate, first day of the calendar month, quarterly, semi-annually, annually). Occasionally, plans do not implement the service requirements or entry dates correctly.

- **Late remittances of employee withholdings go undetected and uncorrected.** One of the most common

This proposal could have the unintended consequence of discouraging plan sponsors from promoting plan participation to eligible employees to avoid an IQPA audit.

deficiencies identified during the audit process is untimely contributions to the plan. Department of Labor rules require that the employer deposit deferrals to the trust as soon as the employer can; however, in no event can the deposit be later than the 15th business day of the following month. Remember that the rules about the 15th business day isn't a safe harbor for depositing deferrals; rather, that these rules set the maximum deadline. However, there is a safe harbor for small plans under which the remittance of employee contributions is deemed timely if made within seven business days following the pay date.

- **Prohibited transactions occur and are not identified, reported or corrected.** ERISA prohibits certain transactions between an employee benefit plan and certain related parties, known as parties-in-interest. A fiduciary who permits a plan to engage in a prohibited transaction is liable for the penalties that apply to a breach of fiduciary duties. Additionally, parties-in-interest (including fiduciaries) who engage in a prohibited transaction are subject to a prohibited transaction penalty.

- **Eligible compensation definitions in plans are not applied correctly.** Most plan documents are straightforward in defining eligible compensation. However, plan documents can also exclude certain aspects of compensation, such as bonuses, commissions or overtime pay. The audit process can verify that eligible compensation is included, and ineligible compensation excluded, properly.

- **There is no process in place for evaluating and monitoring service providers, including but not limited to reviewing SOC 1 reports.** Plan sponsors rely heavily on service providers such as investment custodians, third-party administrators and payroll providers. It is imperative that plan sponsors properly monitor these service providers, since the ultimate responsibility is with the plan sponsor.

- **Inaccurate data is used in census, which affeccts discrimination testing.** The nondiscrimination rules prohibit discrimination in favor of highly compensated employees. All plans must comply with the nondiscrimination regulations, either by passing the detailed testing requirements applicable to that particular type of plan or by satisfying one or more of the safe harbor plan designs. If inaccurate census data is used for the discrimination testing, a plan could believe that it has passed the testing when actually it has failed it.

- **Plan sponsors misunderstand what expenses can and cannot be paid by the plan.** Plans will often incur various expenses related to the plan, such as outside accounting services, contract administrative services and legal services provided to the plan. However, the DOL has noted that plans should not pay for "settlor" legal expenses. These types of expenses could be for consulting services to assist with the decision of whether or not to adopt a plan, preparation of the initial plan and trust documents, and preparation of plan amendments that are not required for the plan to remain qualified.

Participation Rates

Additionally, plans with more than 100 eligible participants but fewer than 100 participants with account balances can be indicative of low employee participation in the plan. This proposal could have the unintended consequence of discouraging plan sponsors from promoting plan participation to eligible employees to avoid an IQPA audit. This runs counter to the DOL's goal of promoting retirement savings.

For example, let's consider a 401(k) plan that covers 250 eligible plan participants. However, the plan sponsor has not done a good job of educating participants about the benefits of investing in the 401(k) plan. So, let's assume that there are only 90 participants with account balances. Most people would agree that a 36% participation rate is not

good. But you can see where the plan sponsor may struggle to encourage more participation in the plan, knowing that increasing the number of participants with account balances may cause the plan to incur additional administrative costs. This proposal could have a negative unintended impact of discouraging plan participation while also questioning whether the plan sponsor is fulfilling its fiduciary duties.

Auto-Enrollment

One other item to consider is the increased use of automatic enrollment in DC plans, also known as opt-out plans. In particular industries, automatic enrollment can be a positive way for plan sponsors to increase plan participation, simplify selection of investments appropriate for long-term retirement savings, and get participants initially enrolled in the plan so they can begin to see the benefits of saving for retirement. If the proposed changes become effective, it is a very reasonable possibility that we could see a decrease in automatic enrollment as plan sponsors look to decrease the number of participants with account balances.

Long-Term, Part-Time Employees

All that being said, there were also many comment letters in favor of the proposed changes. The U.S. Chamber of Commerce provided a comment letter on the proposed amendments supporting the change, especially in light of the SECURE Act's long-term, part-time (LTPT) employee provision that would make more employees eligible, but who may not necessarily participate. The SECURE Act changes the longstanding rule that permitted 401(k) plans to exclude individuals who work less than 1,000 hours in the plan year. A long-term, part-time employee is defined as an employee who works at least 500 hours for 3 consecutive 12-month periods. In certain industries that have many part-time or seasonal workers, this could greatly increase the number of eligible participants. However, if most of these LTPT employees do not participate in the plan, the proposed amendment would allow the plan to forgo the audit.

As an example, let's look at a private golf club. The club may only have 40 full-time employees. However, a large number of part-time employees are hired during the busy summer months. These positions might be for the grounds maintenance crew, running the pro shop, or working in the onsite restaurant. Many of these part-time employees may be high school or college students who come back to work each summer and could meet the requirements of the PTPT employee definition. It's quite possible that the addition of these employees could put the plan into a position where an IQPA audit is required. The proposed amendment would help in this case, as most of these LTPT employees are not in a position where they would be interested in participating in the plan.


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Conclusion

It is quite clear that the proposed amendment will result in fewer IQPA audits being conducted. Additionally, it will prevent plans that have never been audited from being required to have an audit as a result of implementing the LTPT employee provision of the SECURE Act.

However, it seems interesting that the DOL is proposing this change given its prior assessment of the quality of employee benefit plan audits. In its most recent review, the EBSA noted that 39% of the audits contained major deficiencies with respect to one or more relevant requirements that would lead to a rejection of a Form 5500 filing, putting $653 billion and 22.5 million plan participants and beneficiaries at risk. If there are so many deficiencies with plan audits, is now the time to be reducing the number of IQPA audits? Is that in the best interest of plan participants?

Perhaps the best solution would be to identify cost-effective alternatives to a financial statement. As noted in its comment letter, the AICPA's Employee Benefit Plan Audit Quality Center recommended that the DOL evaluate whether small plan filers should have cost-effective periodic assessments by a CPA of the plan's compliance with the plan document, ERISA and DOL regulations. Limited compliance procedures could be less costly than a financial statement audit while providing plan participants with protections contemplated under ERISA. **PC**

Note: The views expressed by the author are not necessarily those of ASPPA or its members.

STUDENT LOAN SAVINGS UPDATE

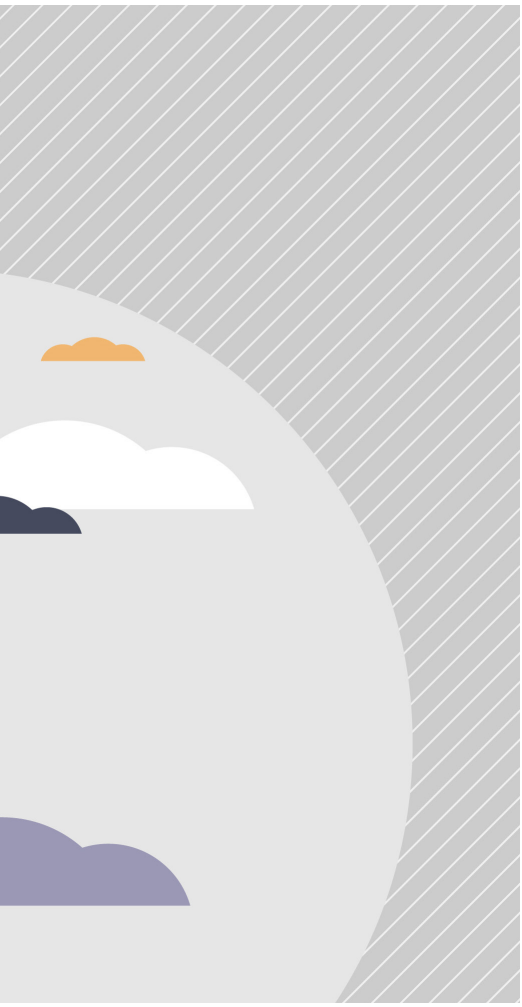
What's new in the world of student loan savings? **By Theresa Conti**

Let's talk first about student loan debt in general and how it is affecting retirement savings. More than 20% of American families have student loan debt; the average amount of student loan debt is over $38,000; and the total amount of outstanding student loan debt is estimated at more than $1.5 trillion. For families where the head of the household is under 35, about 45% have some form of student loan debt. And workers affected by student loan debt tend to have lower retirement plan balances than those without student loan debt.

There are really two groups that are most affected by student loan debt. The first group, young workers that just graduated from college and have started their first job, are probably the biggest group. Often they have the option of saving in a retirement plan with their employer, but maybe they can't afford to because of student loan debt they need to pay back. We all remember how much we paid for rent and other living expenses as young college graduates.

The concern for this group is that they don't get to take advantage of the "early savings" and accumulation of contributions to a retirement plan at a young age. Many times, student loan payments can last at least 10 years, which is a long time to miss out on retirement savings.

The second group affected by student loan debt is older workers. As parents, they may have Parent Plus loans that they took to pay for their children's college. Many of these loans are for a large amount and may carry a high interest rate. There are many instances with workers in their 50s and 60s who have Parent Plus loans with payment amounts of $2,000 or more per month. That payment is



affecting their ability to save, and in fact many of these older workers may not have any 401(k) or emergency savings. These loans may be eligible to be reduced based on their income, but will these loans ever be paid off? They may also be eligible for forgiveness after 20 or 25 years of payments, but that might be too late.

ENTER THE EMPLOYER

An increasing number of employers are looking for ways to help their employees by making employer matching contributions to a plan when the employee makes a student loan payment. Abbott Labs created this concept in a Private Letter Ruling in 2018. Abbott wanted employees who made a student loan repayment of at least 2% of compensation for the employer to make a 5% nonelective contribution to the plan on the student's behalf. This type of design specifically allows employees who cannot afford to both repay their student loan debt and make contributions to the retirement plan to avoid missing out on the "free money" being offered along with starting some retirement savings.

For example, let's say John graduated from college and is paying $6,000 per year ($500 per month) in student loans. If John makes $60,000 per year, then the loan payments would represent 10% of his salary. The company makes a match of 50% of 6% (with a maximum of 3%). Even if John doesn't make deferrals, he can still receive the 3% match in the plan, and it can be used in the ACP testing.

So why would an employer want to help employees with student loan debt? In the ongoing fight to attract and retain employees this could become a critical benefit to attract and retain the best talent along with reducing turnover. Based on statistics presented at this year's NAPA 401(k) Summit in April, 86% of young employees who were surveyed said they would commit to an employer for 5 years if their employer would offer some sort of repayment program or assistance.

The study also found that for employees under age 40, the four biggest financial challenges are:

1. Budgeting
2. Student loan debt
3. Emergency fund
4. Retirement

As you can see, retirement is coming in at the end of younger employee's thought processes. Can we really expect employees to begin to think about retirement savings when they have other debt?

LEGISLATIVE FIX IN THE WORKS

The SECURE 2.0 legislation was passed this Spring by the U.S. House of Representatives and is now under consideration in the Senate. The bill would expand the definition of employer matching contributions to include contributions made on behalf of an employee making student loan repayments. Employers would be allowed to match the employee's student loan payments with a matching contribution. For a plan subject to ACP testing, these contributions would qualify to be tested (and hopefully would help pass that test). It would also allow the employer to carve out these student employees for ADP testing purposes so that it would not adversely affect that test.

The way that student loan repayments would be eligible to be treated for employer match is if the matching contributions that are related to student loan repayments are treated in the same manner as salary reduction contributions. In addition, all employees would have to be eligible to receive the match relating to the payment of the student loans, just as they would be under the plan. In addition, they would be subject to the same vesting schedule.

Some of the things we need to think about as it relates to employers and the pending SECURE 2.0 provisions are that employers will probably be required to certify loan payments. Hopefully, we can rely on the employee to certify that to the employer. In addition, there will probably be a requirement to track the loan payments. Yet to be determined is how and what we will need to track. Could payroll companies withhold the loan repayments and make the payments so that the tracking can occur?

What would be considered a qualified student loan? It would need to be a loan that was incurred to solely pay for qualified higher education expenses. This could also include loans taken by the taxpayer, the taxpayer's spouse or any dependent of the taxpayer. So this could include the Parent Plus loans discussed above.

If this provision is enacted, it would not be effective until after Dec. 31, 2022 at the earliest. But it would be a great option for both those who need retirement savings and for employers that are having trouble hiring and retaining employees. **PC**

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SOLUTIONS FOR MISSING PARTICIPANTS

Here's a helpful refresher on the DOL's guidance and best practices for solving the missing participant dilemma. **By Mike McWherter**

In January 2021, the U.S. Dept. of Labor's Employee Benefits Security Administration updated its missing participant guidance. Designed to help plan fiduciaries meet their obligations to locate and distribute retirement benefits to lost, missing or nonresponsive participants, the guidance consists of three separate but coordinating components:

- Field Assistance Bulletin 2021-01
- Compliance Assistance Release 2021-01
- A document titled "Missing Participants—Best Practices for Pension Plans"

FIELD ASSISTANCE BULLETIN 2021-01

FAB 2021-01 is a temporary enforcement policy affecting defined contribution plans such as 401(k), profit sharing, and 403(b) plans. It enables these plans to use the Pension Benefit Guaranty Corporation's (PBGC) expanded Missing Participant Program for the transfer of lost/missing/nonresponsive participant account balances from a terminating plan. But as noted below, the PBGC's program is not a complete solution.

Prior DOL guidance (FAB 2014-01) listed the required search steps for missing participants. When participants can't be found or are otherwise nonresponsive, the guidance authorized a safe harbor transfer of their account balances to the DOL's preferred distribution option—a missing participant IRA established and maintained in accordance with 29 CFR §2550.404a-3. Its sister reg, §2550.404a-2, provides the same safe harbor for transfers of missing participant account balances under $5,000 in on-going plans. FAB 2014-01 also addressed the option of transferring the missing participant's account to a federally insured FDIC or NCUA interest-bearing bank account or transfer to a state unclaimed property fund.

But as "the Duke" used to say, "Hold on there, pilgrim!" There are significant caveats in using either a bank/credit union depository account or a state unclaimed property fund to move the missing participant's assets out of the plan. The DOL points out the costly negative tax consequences to the participant:

- Transfer to a bank account or state unclaimed property fund destroys the tax-qualified status of the participant's account
- Such a transfer makes the participant's account subject to income taxation, mandatory income tax withholding, and possible additional penalty for premature distributions
- Any interest that accrues after the transfer would also be subject to income tax.

All three of these consequences reduce the amount of money available for retirement, which is of course, antithetical to ERISA's purpose.

There is another significant caveat. In FAB 2014-1 (pp. 5–6) the DOL goes on to warn that:

> A prudent and loyal fiduciary would not voluntarily subject a missing participant's funds to such negative consequences in the absence of compelling offsetting considerations. In fact, in most cases, a fiduciary would violate ERISA section 404(a)'s obligations of prudence and loyalty by causing such negative consequences rather than making an individual retirement plan rollover distribution.

Fast forward to FAB 2021-01 and the DOL is adding the PBGC's Missing Participant Program as a permissible but not required option for transferring a missing participant account in a DC plan.

"THERE ARE SIGNIFICANT CAVEATS IN USING EITHER A BANK/CREDIT UNION DEPOSITORY ACCOUNT OR A STATE UNCLAIMED PROPERTY FUND TO MOVE THE MISSING PARTICIPANT'S ASSETS OUT OF THE PLAN."

One other important detail: FAB 2021-01 left the search requirements of FAB 2014-01 in place. The PBGC's Missing Participant Program does not include the required search component, so it's not a turnkey solution.

COMPLIANCE ASSISTANCE RELEASE (CAR) 2021-01

CAR 2021-01 provides guidance to its regional offices for the opening, investigative focus and investigation closing of DB plans that appear to have on-going issues related to plan administration, especially with terminated vested participants. By extension, CAR 2021-01 also allows plan sponsors and their service providers know what to expect in such investigations—a level of transparency that is good for all.

- **Opening an Investigation.** DOL may open an investigation in situations including but not limited to: (1) employer merger, acquisition or bankruptcy, (2) based on certain information in the plan's Form 5500, or (3) because plan participants contacted the DOL after having difficulty claiming their benefits.
- **Investigation & Errors Focus.** As expected, the DOL will ask for plan documents, census records, actuarial reports, participant/beneficiary communication procedures and missing participant procedures. It then looks for errors related to recordkeeping procedures (e.g., incomplete participant census data) that cause a risk of failure to allow the participant/beneficiary to enter pay status or claim their benefit. The DOL also looks for inadequate procedures that involve:
  - Identifying and locating missing participants and beneficiaries
  - Contacting terminated vested participants nearing normal retirement age to inform them of their right to enter pay status
  - Notifying participants that Required Minimum Distributions must begin and what must be done to avoid RMD penalties
  - Handling uncashed distribution checks
- **Closing Investigations.** Investigators should promptly convene the exit meeting, and plan fiduciaries should leave it with a clear understanding of the DOL's expectations. Fiduciaries should also understand the importance of responding to DOL recommendations in a timely manner.

MISSING PARTICIPANT BEST PRACTICES

While not formal guidance, and thus not carrying the force of law, best practices nonetheless tell us what the DOL is thinking and what they'd like to see with respect to plan administration and missing participants. Accordingly, incorporating the best practices where applicable to your plan helps keep corrective measures exit meetings from turning into exit meetings with a citation for violations of ERISA, or worse, fiduciary breach.

What do the best practices involve? The full list can be obtained on the DOL website, but the highlights are:

1. Maintain accurate census data.
2. Implement effective communication strategies using plain language, toll-free numbers and original plan sponsor/plan names so participants won't consider the communication to be junk mail.
3. Check related plan records when searching for missing participants; however, health plans probably won't tell you anything due to HIPAA and privacy concerns. The DOL's best practices include using social media. But use social media with caution, or not at all, as it could unintentionally lead to identity theft and fraud issues. Due to advances in technology, online and commercial locator services are more accurate than ever.
4. The National Registry of Unclaimed Retirement Benefits (NRURB) is an online pension registry that allows plan sponsors or their service providers to add names and search for plan participants free of charge. The site is easy to use and incorporates robust privacy and data-security measures to protect confidential data. In the interest of full disclosure: *The NRURB is powered by PenChecks. We are pleased to offer the listing and search for free, and proud the DOL has recognized the site as an innovative tool that can help reunite participants with their unclaimed retirement accounts.*

As the DOL aptly points out on its website, the first step in resolving fiduciary problems is knowing they exist, so visit the DOL's Missing Participants Best Practices webpage (https://bit.ly/38m9WkP) for a list of red flags that may signal problems with missing or nonresponsive participants. **PC**

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THE 3 PRINCIPLES OF DIGITAL PERSUASION

Use these tips to differentiate yourself in your email and social media prospecting. **By Erin King**

Is there a more frustrating feeling than crafting the perfect email to a prospect, explaining all the phenomenal ways you can help them with retirement planning, and asking them to hop on a quick call... only to have it be completely ignored?

Lee Iacocca, developer of the Ford Mustang, once said, "You can have brilliant ideas, but if you can't get them across, your ideas won't get you anywhere." Today, his quote adapted for the digital age might be, "You can have brilliant ideas, but if you can't get anyone to read your message, you won't get anywhere."

Today, we crave attention for ourselves, our ideas, and our products/services, but inbox exhaustion leaves us completely ignored from the first words of that digital notification. When you're reaching out to prospects to talk about their retirement plans, what type of response are you getting?

Well, if you're sending a cold email or DM, it can make you feel like a scientist searching for extraterrestrial life—you know there's a vast potential out there, but you're not seeing any signs of life. When it comes to classic business development advice on digital messaging, the cold email templates you're given look pretty much the same. It's some version of, "How are you, this is me, we do this, we are the bomb, here's who else thinks we're the bomb, will you meet with me?"

Running a social sales training agency for the last 15 years, I've trained thousands of leaders on business development strategies in the financial, health care and other spaces to help them attract attention. After analyzing thousands of message efficacy rates, I've determined there are two reasons why messages are ignored 98% of the time.

First, phrases like "thought we should connect" or "just wanted to reach out" are overused by so many professionals that oftentimes our brains don't even see those types of messages. Our minds have evolved to decide within 2.5 seconds (or about the length of a preview line on email or text) that the sender is friend or foe, server or seller, I care/don't care.

Think about how you go through your inbox or scroll through your newsfeed. In about 10 words you

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"CHALLENGE YOURSELF TO GO THROUGH YOUR NEXT MESSAGE AND DELETE THE WORD 'I' WHEREVER POSSIBLE. IT'S SURPRISING HOW EASY IT IS."

either delete, scroll by or pause and consider. For a prospect, the difference between stopping and not stopping begins with what the person is seeing in those first 2.5 seconds. Is the way you're showing up on the screen maximizing what I call "the power of the preview"?

The second reason why most messaging formulas fail to drive new client conversations is because they are a huge "show up and throw up" about your company's retirement services. They're all about *you*, not about the potential client at all! What is the least persuasive—and most used—word in the English language? The word "I." To stand out on the screen and differentiate yourself from sales spam, you must improve your digital persuasion skills.

When you reach out to someone you want to entice into exploring a retirement strategy conversation, try keeping three simple and effective, yet unconventional, principles in mind.

1. DELETE YOURSELF

Eradicate the word "I" from your digital outreach. This past week alone, I received 64 pitches via LinkedIn DM, and every one of them began with the word "I." "I saw your profile/I thought I'd reach out/I thought we should connect."

Instead of starting like everyone else, what if you examined your next message through the eyes of the recipients? They are rushing through their messages, and they get a message from someone they don't know. They think, "I don't know you, I am suspicious of you, are you worth my time?" Starting with "I" screams sales spam and is likely the reason you're not getting the traction you want.

So challenge yourself to go through your next message and delete the word "I" wherever possible. It's surprising how easy it is. Instead, start each communication with a proper noun that will resonate personally with your recipient. Use something specific you have in common: "Meredith Adkins thought we should connect!" "University of Maryland, eh?" "Snowboarding? Love Jackson Hole!" Starting with a proper noun of personal relevance to your recipient is a great way to get noticed.

2. ABOLISH THE ASK

When you reach out to someone you don't know via email or social media, there's an understanding that you have an agenda. Most people ask for "10 minutes of your time," a "brief discussion," or (the worst) "to pick your brain." If you want to stand out, abolish your ask and give something instead. Share an idea, article, introduction, observation, *anything* other than asking for something.

Refrain from asking for time, a meeting, lunch. By not asking for anything, you will differentiate yourself from all the others out there following messaging scripts. The persuasion principle of reciprocity will kick in if you lead with something personal, and then offer them something of value. Ideas are the currency of today, and offering an insight, introduction or shortcut without making any ask will elevate you beyond the rest of the pack instantly.

The natural reaction of anyone who receives this is to check out you, your company, and your solution. Then, they will try to find a way they can help you back, typically in the form of time or an introduction. They want to return the kindness you showed them. As Robert Cialdini's *Principles of Persuasion* notes, reciprocity has been deeply ingrained into human psychology dating back to tribal survival skills. It's a win-win. You get to be a good person and help others, then they get to feel like a good person by helping you in return.

3. CUT YOUR COPY

The easiest way to differentiate yourself digitally is to simply type less. A lot less. Like 80% less. From a visual perspective, opening a message that is two or three sentences instead of two or three paragraphs is already enticing someone to engage with you because brevity is so rare.

The number of paragraphs I receive from someone trying to sell me something averages three to five. It's a great scroll-worthy wall of words. If you can send two or three sentences instead, your potential client will likely be hooked from an optics standpoint before they even read a word, just because your short message is so refreshingly rare! By saying less, you are also activating the dopamine neurotransmitters that cause us to seek, desire and want more. Nothing is more persuasive than inciting curiosity using brevity. Don't ask for time and attention immediately… attract it over time.

My challenge to you: On your very next message, test these three principles of digital persuasion. You'll find that the message yields more responses, ignites more mutually respectful, rich dialogue, and fills up your calendar with more qualified meetings. **PC**

ETHICS AND STANDARDS AND LAWS—OH, MY!

Ethics inform professional standards, which support relevant laws. A wise professional attends to them all. **By Lauren Bloom**

When thinking about professionalism, it can be tricky to understand how ethics, standards and laws work together. The three are similar and intersect to some extent. All of them have to do with defining what good practice is, and all of them impose obligations on the employee benefits plan professional. However, ethics, standards and laws are not identical. This article explains their common traits, their differences and their importance to good professional practice.

WHAT ARE ETHICS?

A college professor would tell you that ethics, sometimes referred to as "moral philosophy," is the examination of what is morally right and wrong. Ethics can also refer to a system of moral values and principles. Traditionally, "ethics" has referred to academic study and "morals" to the things being studied; today we tend to use the two terms interchangeably.

At their broadest, ethics respond to the question, "How shall we live?" They seek to define fundamental principles like honesty, responsibility, loyalty, civility, tolerance and self-control. Professional ethics place those values in the business context. Honesty, integrity, loyalty, trustworthiness, prudence, concern for others, fairness and diligence all play a part in a well-defined professional ethic.

Ethics may be informed by the spiritual beliefs of the professional

practitioner; religious faiths uniformly instruct on the importance of moral values and behavior. However, a practitioner need not be religious to be ethical, and it is entirely possible to construct and live within a secular system of ethics. Ethics can also involve a certain element of subjectivity, especially when they seem ambiguous in a specific situation.

So, for example, an employee benefits plan professional, utterly exhausted from several long work days and facing yet another tight deadline, might have to decide between diligently finishing on time or prudently resting for a day to reduce the risk of error in the project. Business considerations might dictate the employee benefits plan professional's ultimate decision, but ethics would inform and could legitimately defend either choice.

However, it would be a mistake to assume that ethics are entirely subjective and, therefore, without objective authority. While reasonable people can and do disagree about the relative force of various ethical principles in a given situation, there exists in most societies a general consensus about what is morally right and wrong. So, for example, the "Golden Rule" of treating another as one would like to be treated is accepted pretty much worldwide, although how to satisfy that rule can become a question for debate. Ordinarily, ethics are not, in and of themselves, enforceable. Rather, they serve as a touchstone for a profession and its members, something to which professionals should aspire.

ETHICS AND PROFESSIONAL STANDARDS

Ethics are the foundation of professional standards, especially codes of professional conduct. They are normally developed by committees of experienced professionals who are familiar with the ethical challenges commonly faced by practitioners in their field; these committees are often assisted by professional facilitators and legal counsel. Professional standards serve several important purposes. They set benchmarks for generally accepted practice and offer valuable guidance to professionals on how to conduct themselves. Professional standards also inform how professions discipline their members in those rare but unfortunate situations where misconduct occurs.

> "HONESTY, INTEGRITY, LOYALTY, TRUSTWORTHINESS, PRUDENCE, CONCERN FOR OTHERS, FAIRNESS AND DILIGENCE ALL PLAY A PART IN A WELL-DEFINED PROFESSIONAL ETHIC."

Professional standards, like ethics, can be subject to interpretation. For this reason, many professions publish separate guidance on what the standards require. Some offer nonbinding practice notes. Others issue case reports and studies which may or may not serve as precedent. Presentations at professional meetings and articles in professional journals like this one offer good advice. However, they usually reflect only the opinions of the speaker or writer, and are informative but nonbinding.

Professionals are expected to use good judgment when interpreting professional standards. Legitimate differences of opinion on how to comply can exist, especially when new practices are emerging and professional literature has not yet caught up. However, it's wise to avoid tortured interpretations that defy common sense or depart significantly from what most professionals would agree the standards mean. Professional organizations normally require their members to adhere to their standards, so it is important for professionals to keep them at hand and refer to them when providing services to their clients.

ETHICS AND THE LAW

When it comes to the law, professionals must comply or suffer potentially significant consequences. We tend to think of laws as prohibiting bad behavior, but more often laws represent lawmakers' weighing of competing goods, taking into account the needs of their constituents. Laws proceed from the general—constitutions, for example—to the very specific, like regulations and published statements from regulatory bodies. Employee benefits plan professionals work in the highly regulated world of ERISA, where a massive body of regulations direct almost every aspect of plan design and operations.

Law takes precedence over professional standards to the extent they conflict. Lawmakers normally do not require professionals to adhere to the standards of their profession. Rather, the standards help professionals determine how to meet the requirements of law. Professional standards can take on the force of law in court, however. A professional who fails to practice as a reasonably prudent member of the profession commits malpractice and can be sued in civil court. In those lawsuits, professional standards can provide evidence of what reasonably prudent members of the profession consider to be acceptable practice. Thus, even though the standards themselves are not legally binding, a wise employee benefit plan professional pays appropriate heed to them, both out of a concern for professionalism and as a way to demonstrate exercise of due care.

Ethics inform professional standards, which support relevant laws. A wise professional attends to them all. **PC**

A LONG RUN, NOT A SPRINT

For the Naperville Running Company, a running goods store 28 miles west of Chicago, those dark times of the pandemic were not a finish line—they were part of a marathon. **By John Iekel**

Any employer will attest that the last few years have been especially daunting. But times that try men's souls also are opportunities—to rise above challenges, and to do so in an inspiring and lasting way. An employer in Chicagoland seized that opportunity and ran with it.

For the Naperville Running Company, a running goods store 28 miles west of Chicago, those dark times were not a finish line—they were part of a marathon. At a time when many employers closed, laid employees off, or trimmed benefits, owner Kris Hartner kept his business running and retained all of his employees—and *increased* their retirement benefits. The prize was not just for the end—it was delivered during the race, and to all participants.

HOW?

Part of the way Hartner and his team were able to succeed against the pandemic's powerful headwinds is that they devised a way to better support their customer base: they reinvented the way people shop for shoes. Before the pandemic, "Our business was 100% transacted in our brick-and-mortar stores—everything one-on-one with our customers in person. That all changed when our state mandated that all nonessential businesses close because of the pandemic," he says. Within three days of the state's announcement, his team:

1. Launched an ecommerce business.
2. Added curbside pickup.
3. Added home delivery.
4. Added virtual fitting.

With virtual fitting, customers can set up a Zoom appointment and store personnel would step them through the fitting process in a modified way and come up with a suggested shoe for them. Customers would either pick up the shoes they purchased curbside or have the company deliver or ship them. "This worked surprisingly well,"

"MOST PEOPLE ARE SURPRISED TO HEAR THAT WE DON'T DO ANY PAID ADVERTISING—NONE. I TAKE THAT MONEY AND INVEST IT IN OUR EMPLOYEES INSTEAD."

—Kris Hartner, *Naperville Running Company*

says Hartner, noting that "over the two weeks, we did over 90 virtual fittings and every person made a purchase. The community support was amazing."

DOLLARS AND CENTS

How did Hartner adjust the company's employee benefits? The company instituted an employer match and profit sharing in 2003; now even part-time employees are covered as well. Employees can have up to 8% of pay set aside in their retirement accounts; the company will match up to 4% of compensation. Profit sharing is at another 5% of pay, but that figure actually is even higher for the management team, whose members gain another 6.6%. And Hartner has eliminated the "last day provision"—the details of which are left to employers' discretion—so employees who decide to leave would receive even more money.

These actions did not come in a vacuum, however—the company already had a history of adjusting compensation and benefits to better meet employees' needs. "Five years ago I added a Long Term Incentive Program for my three key leaders," says Hartner. "Every year they get a bonus that rewards them with a portion of ownership in the business. It's a 10-year plan and at the end of the 10 years, the three of them will become my business partners."

He says that apart from the more recent retirement benefit changes, "Probably the most unusual change we made in the last two years was to set our starting wage above the livable wage. In our area, the livable wage is more than double the federal minimum wage. We always paid well, and well above retail averages, but this bumped things up even more."

"If we interview someone—even with no work experience whatsoever, as long we think they are a good fit for us—the minimum they would start at is $17 an hour," continues Hartner. "If they work 30+ hours, we add another $1 per hour. So we could have a college student with no work experience making $18 per hour right off the bat." Additionally, Hartner says, "We have many ways to grow pay from there—raises based on total hours worked, job duties, etc. We have employees making way more than people would expect from a retail job."

They also offer health insurance, significant holiday time, sick pay, tuition reimbursement and a kitchen stocked with groceries and food.

"Most people are surprised to hear that we don't do any paid advertising—none. I take that money and invest it in our employees instead," says Hartner. "The amazing level of service they provide is the best form of advertising we could do. As proof of this, the industry standard for payroll as a percentage of revenue is 12% to 18%, but we are at 25%.

"I wouldn't have it any other way," Hartner said of their compensation practices. And he said that their retirement plan "is just as important a component as high pay and great health insurance."

RESULTS

As you might expect, Hartner's approach has engendered employee loyalty. "Our turnover is traditionally very low—in the 10% to 15% range," he says, noting that in the retail sector, turnover averages just over 60%. "Seems like we're doing pretty well so far," he observes.

And employees are responding to the retirement plan, too. Hartner reports that there are employees who started working there when they were 18 or 19 years old who now have several hundred thousand dollars in their retirement plan but still are many years from retiring. "I love seeing that!" Hartner says of how well employees are saving.

THE BIG PICTURE

"Our biggest challenge is that retail hours are hard—nights and weekends. My goal is to make all other aspects of working for Naperville Running Company as good or better than any other employer," says Hartner. "My goal from our first day on May 27, 2000 was to build our business in a way that rewarded our employees just as well as any Fortune 500 company.

"As a business, from the outside, we like to think people see us as 100% committed to the customer. Within the business, I am 100% committed to our employees—I as the owner/founder of this business see my role as making sure our employees are taken care of in the best way I can. And by doing that, they will in turn take great care in handling all of our customers," says Hartner. **PC**

SOCIAL ENGINEERING: THE NO. 1 CAUSE OF CYBER BREACHES

Here are 6 helpful tips for combatting cyberattacks using social engineering techniques. **By Matt Rosenthal**

Social engineering is the art of manipulating people into divulging private information, such as login credentials or customer data, that can be useful in a cyberattack.

A social engineering attacker fabricates a pretext familiar to targets, and then preys on their cognitive bias to trick them into a false sense of security. Social engineering is not always an end, but often a means to an end.

If the information in question doesn't seem important, targets are less likely to defend it closely and may willingly reveal it to the attacker without becoming suspicious. However, every bit of information the attacker gains can be used as ammunition to strengthen the apparent legitimacy of their pretext. Social engineering requires a great deal of research and planning, and it may just be one angle of a complex attack against a particularly robust system.

EXAMPLES OF SOCIAL ENGINEERING TECHNIQUES

Social engineering encompasses a broad range of malicious activities. The types of information these criminals look for can vary, but the one common thread linking social engineering techniques is the human element. Cybercriminals analyze their target's behavior and likes and dislikes to determine which method(s) of attack will yield the best results.

Following are the top five types of social engineering attacks.

1. Phishing

Phishing attacks are the most common type of attacks leveraging social engineering techniques. An attacker uses email, social media, instant messaging or SMS to impersonate an authoritative source, such as a financial institution. The links in phishing emails are embedded with malicious code—in many cases, the hyperlink in the email does not point to the same location as the apparent hyperlink displayed to the user. Once clicked, the user is prompted to submit their information, which is then used against them to carry out the attack.

2. Pretexting

Pretexting is the practice of lying to gain access to personal data or other privileged information. An

"LEARNING HOW TO PREVENT SOCIAL ENGINEERING ATTACKS NEEDS TO BE A TOP PRIORITY FOR BUSINESSES."

attacker creates a fake identity—for example, posing as a third-party vendor—and uses it to manipulate the receipt of information. The success of a pretexting attack relies heavily on building a false sense of trust with the user, so choosing a suitable disguise is crucial. More advanced tactics involve tricking victims into doing something that circumvents the organization's security policies. For example, an attacker might say they're an external IT services operator to gain physical access into the building.

3. **Baiting**

Baiting is similar to a phishing scam in many ways. The difference is that baiting uses the promise of an item or good to entice the victim. These attacks are often found on peer-to-peer or social networking sites, offering free music or movie downloads. Once the malicious file downloads, the victim's computer is infected, allowing the criminal to take over the network.

4. **Quid Pro Quo**

A quid pro quo is a social engineering attack that exploits the human tendency to reciprocate good gestures. The hacker offers a service or benefit in exchange for information or access. The most common quid pro quo attack occurs when an attacker impersonates an IT staffer for a large organization. They might provide free technical support over a phone call and then ask the victim to temporarily disable their antivirus software to install the malicious application on their device.

5. **Tailgating**

Tailgating, also known as piggybacking, is when an attacker follows a victim into a restricted area. The attacker can walk in behind a person who is authorized to access the area, bypassing the security measures in place. They might impersonate a delivery driver and ask the employee to hold the door, striking up conversations and using this show of familiarity to get past the front desk.

WHY DO CYBERCRIMINALS USE SOCIAL ENGINEERING?

Social engineering techniques allow cybercriminals to hide their true identity and present themselves as reliable sources or individuals. It's typically easier to exploit your natural inclination to trust than it is to discover ways to hack your software. Social engineering is often used as the first stage of a larger cyberattack designed to infiltrate a system, install malware, or expose sensitive data.

Social engineering is growing in popularity; in 2020, it was the primary cause of breaches at 94%. As a result, learning how to prevent social engineering attacks needs to be a top priority for businesses.

WAYS TO PREVENT SOCIAL ENGINEERING ATTACKS

Security is all about knowing who and what to trust. According to a study by IBM, human error is a major contributing factor in 95% of all cyber breaches. Therefore, it is essential to eliminate opportunities for error as much as possible. You and your employees will have the best chance of avoiding social engineering attacks by following these six preventative strategies in 2022 and beyond.

1. **Educate Employees**

Implement security awareness training to educate employees on how to respond to common breach attempts—for example, what to do when confidential information is requested or if someone tries to tailgate an employee into the office.

2. **Establish Security Measures**

Outline how all employees should respond to social engineering attempts in your organization's information security policy or incident response plan (IRP). Ensuring that everyone follows best practices is the most effective way to defend against these attacks.

3. **Test Attack Resilience**

Perform controlled social engineering attacks to test employees across your organization. Send fake phishing emails and correct users that click malicious links, open attachments, or simply respond to the sender. These instances should be viewed as an opportunity to teach and inform rather than cybersecurity failures.

4. **Use Multi-Factor Authentication**

Require users to implement multi-factor authentication (MFA) rather than using a single sign-on password solution. MFA adds an extra layer of security to your systems, networks and data. It requires a user to present at least two forms of identification before gaining access to resources.

5. **Create a Third-Party Risk Management Framework**

Third-party vendors process large amounts of personally identifiable information (PII), making them key targets for social engineering hackers. Develop a third-party risk management framework and perform a cyber security assessment before onboarding new vendors or using existing ones.

6. **Detect Data Leaks**

Some cybercriminals may wait weeks or even months to carry out a social engineering attack. It is crucial that your organization continuously scans for data exposures and leaked credentials. Your organization needs to take a more proactive approach to cybersecurity and stay ahead of threats before they cause significant damage. PC

CRYPTOCURRENCY AND RETIREMENT PLANS

How will EBSA's controversial Compliance Assistance Release 2022-01 affect TPAs and recordkeepers?

By Allison Itami & David Levine

As advisors, TPAs, recordkeepers and other service providers dip their toes into providing cryptocurrency solutions to their plan sponsor clients, federal regulators and lawmakers are wading in as well. It has been an active first half of 2022 in the world of crypto offerings, with general interest in regulating cryptocurrencies and digital assets coming from President Biden and specific interest about cryptocurrencies in retirement plans from Congress and the Department of Labor's Employee Benefits Security Administration (EBSA).

EVOLVING LEGAL LANDSCAPE

Cryptocurrencies are digital currencies that rely upon decentralized "blockchains" (in simplified English, computer code) to verify and record transactions. There is a heated debate over whether cryptocurrencies are securities, commodities or something else altogether—making the regulation of cryptocurrency a contentious topic.

Securities, broker-dealers and registered investment advisers are subject to oversight by the Securities and Exchange Commission or, in some cases, state equivalents. Commodities are generally overseen by the Commodity Futures Trading Commission. Retirement plans are subject to the oversight of EBSA and the Internal Revenue Service. And some states also license money transmitters and cryptocurrency related activities, such as New York State with its BitLicense.

With so many interested parties, not a day seems to pass without new statements from the regulators. In the retirement space, the statement that is most top of mind is EBSA's controversial Compliance Assistance Release (CAR) 2022-01, "401(k) Plan Investments in Cryptocurrencies."

"NEVER BEFORE HAS A PARTICULAR INVESTMENT BEEN IDENTIFIED AS AN AUTOMATIC TRIGGER FOR AN EBSA INVESTIGATION, ESPECIALLY NOT ONE WITH PREJUDGED OUTCOMES."

THE IMPACT OF CAR 2022-01 ON SERVICE PROVIDERS

Self-directed brokerage windows have long been used to allow retirement plan participants to invest their retirement plans in investments that are not part of a plan's core investment lineup, which under ERISA is generally comprised of "designated investment alternatives." Importantly, while plan fiduciaries have a role in examining and monitoring the brokerage window offering, historically they have not been required to determine the prudence of each (or any specific) investment offering nor monitor the performance of each investment offering in the brokerage window. With this background, let's look at the impact of CAR 2022-01.

The Compliance Release lists a number of items that the DOL suggests may be relevant to a plan fiduciary's decision to include cryptocurrencies, including issues related to volatility, administration, valuation and the regulatory environment, and concludes with a statement that EBSA has "serious concerns" about the investment of plan assents in cryptocurrency. In fact, EBSA threatens to open an investigation of plans that offer cryptocurrencies:

> *[EBSA] expects to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies and related products, and to take appropriate action to protect the interests of plan participants and beneficiaries with respect to these investments. The plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described above.*

Undergoing an EBSA investigation can be incredibly disruptive for plan fiduciaries and staff. They can be very time consuming and expensive. Additionally, never before has a particular investment been identified as an automatic trigger for an EBSA investigation, especially not one with prejudged outcomes.

Importantly, the CAR can be read to be the first time an additional duty of prudence has been imposed on a single asset type within a brokerage window. Such an approach would be a significant break from prior practice and guidance, especially since the CAR is not a formal regulation issued by EBSA. This departure has resulted in pushback from many sources, including letters from Sen. Tommy Tuberville (R-AL) to EBSA questioning the move.

Tuberville also introduced legislation that would prohibit EBSA from restricting what a plan participant can invest in through a brokerage window. Other senators have gone in the opposite direction, expressing different views on accessing cryptocurrency through a retirement plan.

While CAR 2022-01 is aimed at plan fiduciaries rather than service providers generally, there are many items that service providers might look to. For example, some TPAs are affiliated with entities that provide investment advice to plan sponsors. These affiliates could be squarely within the CAR's threatening investigation scope if they were provide fiduciary investment advice about a crypto offering.

For other TPAs and recordkeepers, their involvement will likely be in trying to source or create products that address some or all of the concerns in the CAR. Typically, the valuation, custody and administration items mentioned in the CAR are items that recordkeepers and TPAs help plans address.

Importantly, help may be in the form of offering a brokerage window option or partnering to offering indirect exposure to crypto through investment vehicles—whether a target date or other fund. Additionally, some cryptocurrencies such as stablecoins are meant to make valuation and volatility less of an issue by pegging to a fiat currency or some other external reference. Like stable value funds and money market funds in the past, stablecoins are not guaranteed to not "break the dollar," and in fact have done so in 2022.

As service providers continue to try to find ways to distinguish themselves through new offerings, as recent press announcements highlight, supporting a platform with cryptocurrency access may be an option that some choose to adopt.

WALLETS AND OTHER INFRASTRUCTURE

The infrastructure required to support direct investment in cryptocurrency can take a while to build and test. Using a personal wallet to hold cryptocurrency directly may be a plan participant's preference, but it seems more likely that an institutional wallet will be in play for retirement plans. Teaming with a crypto native may be the most cost-effective entry, but would necessitate the transfer of funds and data among a recordkeeper, TPA and another third party. Like any other business entity, a recordkeepers or TPA will want to perform due diligence on any entity it uses for such services, looking at items surrounding cybersecurity, business continuity, insurance and more—and should expect similar diligence from other crypto partners. PC

'WIRCING' IT OUT—AT THE 401(K) SUMMIT

April's Women in Retirement Conference event at the NAPA 401(k) Summit featured a key Capitol Hill staffer. **By Kirsten Curry**

The 2022 NAPA 401(k) Summit in April kicked off with an exciting Women in Retirement Conference (WiRC) event where we learned more about how we can level up through advocacy for impactful economic and retirement security initiatives that affect women.

The WiRC event launched with an engaging working session featuring Kendra Isaacson, Pension Policy Director and Senior Tax counsel for Sen. Patty Murray (D-WA), Chair of the powerful Senate HELP Committee. Isaacson is a powerhouse advocate and a woman who knows how to level up in and for the retirement industry.

The event garnered a full room of accomplished and rising stars in the retirement industry! WiRC is recognized as a compelling forum that invites and encourages members of the diverse ARA sister organizations (ASEA, ASPPA, NAPA, NTSA and PSCA) to engage in thought-provoking discussion and decisionmaking about retirement policy. Attendees included women from ARA's Council for Women, Thrive mentoring committee members, Thrive mentors and mentees, the WiRC communications committee, WiRC Third Thursday representatives and the 2023 WiRC Conference Planning Committee, including this year's co-chairs Leah Sylvester and Kirsten Curry.

Why is Isaacson's work with the HELP Committee important to us? The committee has broad jurisdiction over health care, education, employment and retirement policies, and regularly makes decisions that impact women's economic and retirement security.

As a Washington State constituent, I was honored to introduce Isaacson and her work on behalf of Sen. Murray's office. Her expertise in and advocacy for the retirement industry started early, on when she earned her LL.M in Taxation with a certificate in Employee Benefits from the Georgetown University Law Center and went on to work for the DOL's Employee Benefits Security Administration (EBSA), where she worked in the Office of Policy and Research. She is a member of the HELP Committee's Oversight Team and advises Sen. Murray on all tax-related matters.

Isaacson advocates passionately for women and retirement savings. Currently she actively advances retirement and emergency savings initiatives, including the Women's Retirement Protection Act and a bipartisan package building on the Retirement Improvement and Savings Enhancement (RISE) and SECURE Acts.

Isaacson was candid with us about work on Capitol Hill and her life off the Hill. Speaking as one of the few women on the Hill who focuses on retirement policy, her advice to the WiRC audience was to speak up for women and the economic and retirement savings policies that are so important to advancing women financially. We have some of the greatest opportunities, as retirement industry professionals, to advocate actively for women.

The WiRC session included the ever-popular "Build a Bill" exercise facilitated by the ARA's Kelsey Mayo. During this highly interactive session, we gained insight into the decisionmaking process that leads to a new retirement policy bill in Congress and discussed which policies should be a priority and drive ARA's legislative work on the Hill. We collaborated on suggested policy related to emergency savings opportunities that can be linked to retirement plans. We dove into thoughtful conversation about requiring enhanced spousal consent for certain retirement plan

EPNAC.com (2)

Kelsey Mayo, ARA Director of Regulatory Affairs (L) and Kendra Isaacson, Pensions Policy Director/Senior Tax Counsel, Senate HELP Committee (R)

transactions. And we touched on lifetime income products and potential utilization in a 401(k) plan.

Mayo and Isaacson shared how key initiatives can be made stronger through our collaboration as we work to support and inspire women in and outside the retirement plan industry. The session concluded with an all-room conversation about what we think are the most important retirement savings issues facing women and how the retirement industry and the HELP Committee can address these issues in future legislation.

The event was made possible by many sponsors who have made it a top priority to support women advocating in and for the retirement industry. Don't want to miss the next Build a Bill session? We want you there! Join WiRC and our next Build a Bill event at the 2022 ASPPA National Conference, Oct. 23-26 at the Gaylord National Resort and Conference Center just outside Washington, DC.

Want to get involved in WiRC and experience our great events? We want you to be in the room and at the table! The 2023 Women in Retirement Conference will be held in January 2023. We will announce the location soon but anticipate a warm location for us all in the middle of winter. Consider becoming a Thrive mentee or mentor, or both! Whether engaging as a mentor or a mentee, Thrive provides a framework to connect with others within the retirement plan industry. You can sign up by filling out the application available online at https://womeninretirement.org/thrive-program/.

You can also participate in your ARA sister organization's GAC meeting or join a sister org government affairs committee. And if you are short on spare time but want to show your support for our advocacy initiatives, consider contributing to the PAC. No donation is too small; it's the number of members who participate that speaks volumes. **PC**

CRYPTIC CRYPTO

Cryptocurrency in a retirement plan? Should that be an investment option? **By Will Hansen**

You've probably seen the commercials and print ads touting the advantages of investing in cryptocurrency—including ads encouraging Americans to take their hard-earned retirement money and invest in cryptocurrency.

Wait, crypto as an investment option in retirement plans? Is that possible? Should it be an option? What is crypto? Personally, I believe that until there is a simple way to explain cryptocurrency, the average investor or plan participant should not be investing retirement dollars in this asset. But let's take a bit of deeper dive on why this has become such a hot topic.

On March 9, 2022, President Biden signed an Executive Order that, in a nutshell, directed federal agencies to review cryptocurrency and related products and determine what, if any, actions the federal government should take to protect markets and consumers. Following the release of the Executive Order, the Department of Labor released Compliance Assistance Release (CAR) 2022-01, "401(k) Plan Investments in Cryptocurrencies" (*For more, see the Cryptocurrency column on p. 60—Ed.)*

In CAR 2022-01, the DOL states that it was released in response to the recent flurry of advertisements from investment firms encouraging the use of cryptocurrencies as an investment option in a 401(k) plan. While it does not state specifically that cryptocurrencies should not be an allowable investment option in 401(k) plans, the document did "caution" plan fiduciaries considering cryptocurrency as an investment option in their plans. Furthermore, it states that fiduciaries of a 401(k) plan which offers a self-directed brokerage account window should also use caution when cryptocurrency is available via a brokerage window.

> "UNTIL THERE IS A SIMPLE WAY TO EXPLAIN CRYPTOCURRENCY, THE AVERAGE INVESTOR OR PLAN PARTICIPANT SHOULD NOT BE INVESTING RETIREMENT DOLLARS IN THIS ASSET."

Plan sponsors immediately voiced their concern that in singling out a specific asset class that should not be offered within a brokerage window, the DOL was going down a path that they had never gone down before—and while most likely not intentionally, potentially requiring plan sponsors to monitor individual investment offerings within a brokerage window.

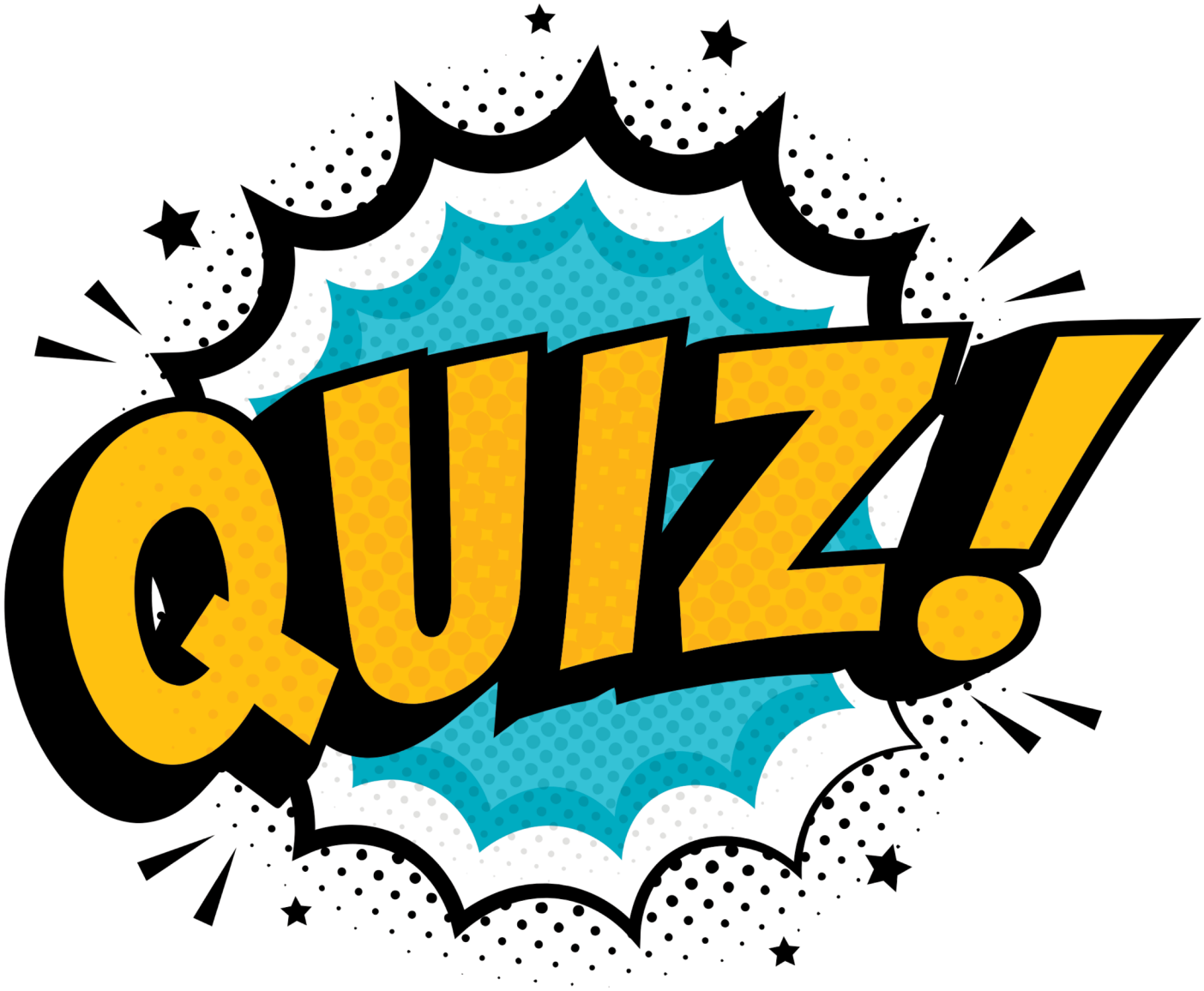
The drama didn't end with the issuance of CAR 2022-21. A few weeks later, Fidelity announced that it was offering one specific cryptocurrency as an investment option on its 401(k) platform. The offering enables plan sponsors to allow participants to invest; and other restrictions would apply to the asset class.

The Fidelity announcement sent shockwaves through the retirement industry. However, the common theme that I heard from plan sponsors, advisors and other retirement professionals is that while cryptocurrency might be around for the long term, it is not yet ready to be used as an investment option in 401(k) plans. That's not to say that down the road, when there is less volatility associated with the asset class, cryptocurrency could not be a standard investment class within a retirement plan. You never know, you might even receive your paycheck in the form of cryptocurrency at some point in the future.

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

What's next? Hopefully, additional guidance from the DOL stating clearly that there was no intent to force plan sponsors to monitor every single investment option within a brokerage window. And after that, retirement professionals continue to engage with plan sponsors and participants on what the right investment options are for a particular plan and its participants.

I don't expect many retirement plans to begin to offer cryptocurrency as an investment option within the plan. But as with other investment options that were once new and plan sponsors were skeptical of at first, things may change down the road. For now, I'll continue to remain perplexed about what exactly cryptocurrency is—until someone can explain it to me in less than 30 seconds. PC



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