AN OFFICIAL PUBLICATION OF ASPPA

PLAN CONSULTANT

FALL 2022

TACKLING THE TOUGH STUFF

Tips from Shannon Edwards and Justin Bonestroo on communicating with clients about complex administrative topics

A THAW IN THE CRYPTO WINTER?

PEPS: WHAT HAVE WE LEARNED?

KEEPING THE CYBER WOLVES AWAY

It's easy to see the *value* a TPA provides

John Hancock has declared October 17 National TPA Day

As a third-party administrator (TPA), you offer the insight, talent, and services plan sponsors need to transform 401(k) plans into successful retirement solutions.

We appreciate the value and expertise you share with all your business partners by:

- Designing plan solutions to improve outcomes for the plan and the participant
- Staying on top of legislative and regulatory changes
- Keeping plans in compliance with all relevant legislation
- Providing local market insight and referral opportunities to financial professionals
- Delivering exceptional service and boosting client retention

For over 25 years, TPAs and John Hancock have teamed up to make 401(k) plans work. And, as always, we're proud to recognize the accomplishments of America's TPAs.

Thank you for your partnership.

INSIDETHISISSUE

COVERSTORY

FEATURES

Anton Vierietin / Shutterstock.com

QR Code to Digital Version*

Use your phone to link directly to the Online Version!

*ios 13 and Android 9 users can scan using your phones built in camera utility.

Tithi Luadthong / Shutterstock.com


BARRY


BLACHMAN

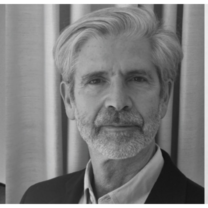

CONTI


KOUMANTAROS


MATRANGOLA


MCWHERTER


MURPHY


PARRY


VAN NEST


WOODMANSEE

Michael P. Barry is a senior consultant at October Three and President of O3 Plan Advisory Services LLC. His book, *Retirement Savings Policy—Past, Present, and Future*, was published in 2018 by DelG Press.

Gary D. Blachman (gary.blachman@icemiller.com), a partner in the Chicago office of Ice Miller LLP, focuses his practice on employee benefit plan compliance, executive compensation, corporate governance and risk oversight. He is a member of the *Plan Consultant* Committee.

Theresa Conti is the President of Sunwest Pensions in Tempe, AZ, a Founding Member firm of The Cerrado Group, a 501(c)(6) trade association dedicated to supporting the retirement plan consultant/TPA industry. She is a member of the *Plan Consultant* Committee.

Petros Koumantaros, QKA, CPFA, is a principal and shareholder in seven closely held financial service and retirement plan consulting, administration, and technology businesses. Collectively, these businesses work with 2,200 retirement plans, representing $9.2 billion in retirement plan assets, and support over 97,000 retirement plan participants.

Miriam "Missy" Matrangola, QKA, QPA, is a consultant at Atlantic Pension Services, Inc. where she works with new business development and consulting projects. Missy currently serves as Past President of ASPPA and as President-Elect of the ARA.

Mike McWherter, JD, is the Chief Compliance Officer for PenChecks, Inc. and PenChecks Trust Company of America. He has 32 years of combined legal, financial institution and ERISA service provider experience.

Suzanne E. Miscik is the Vice President of Retirement Plans and Fiduciary Services for National Professional Planning Group (NPPG) overseeing retirement plan and fiduciary sales, administration and consulting. She is a 30-year veteran of the pension industry with extensive pension and TPA management experience.

Michelle G. Murphy, ERPA, CPC, QPA, QKC is Senior Manager and practice leader of Blue Benefits Consulting, Inc., a TPA. In addition to management and oversight of locations in Indiana and Ohio, Mickie is responsible for business growth and sales.

Scott Parry is the senior vice president of state-facilitated retirement programs at Ascensus. He is responsible for managing all aspects of the firm's State-Facilitated Retirement Plan (SFRP) business.

Lisa Showalter, CPC, QPC, QPA, QKA, is a senior relationship manager with more than 30 years of qualified plan experience. She is skilled in all types of employer retirement plans. Lisa is a member of the *Plan Consultant* Committee.

Kevin Strauch, EA, MSEA, is a Consulting Actuary with Pinnacle Plan Design, LLC.

Deirdre Van Nest is an international keynoter and the founder of Crazy Good Talks, a branding company that helps financial professionals create the stories and speeches that grow their business and expand their influence.

Connie Woodmansee, CRSP, QKA, is an ESOP consultant and the manager of ESOP Services with FuturePlan by Ascensus. She has many years of experience in the retirement industry, with ESOPs and 401(k)s her primary focus.

Plan Consultant is Published by

ASPPA
American Society of Pension Professionals & Actuaries

EDITOR IN CHIEF
Brian H. Graff, Esq., APM

PLAN CONSULTANT COMMITTEE
Mary Patch, QKA, CPFA, Co-chair; David J. Witz, Co-chair; Lee Bachu; R.L. "Dick" Billings, CPC, ERPA; Gary D. Blachman; Jason D. Brown; Linda Chadbourne, QKA; Theresa Conti; Lorraine Dorsa; Shannon Edwards, ERPA; John A. Feldt, CPC, QPA; Tim Harkleroad; John R. Markley; Jim Racine; Lisa Showalter; Stephanie Terry, QPA; Eric Thorne, QKA, TGPC

EDITOR
John Ortman

SENIOR WRITERS
Ted Godbout, John Iekel

ART DIRECTOR
J.Ethan Duran

ADVERTISING SALES
Kim Kelemen
kkelemen@usaretirement.com

DIGITAL SALES
Tony DeScipio
tdescipio@usaretirement.org

TECHNICAL REVIEW BOARD
Michael Cohen-Greenberg ; Sheri Fitts; Drew Forgrave, MSPA; Grant Halvorsen, CPC, QPA, QKA; Jennifer Wiczynski, CPC, QPA, QKA; Robert Richter, APM

COVER
Anton Vierietin / Shutterstock.com

ASPPA OFFICERS
PRESIDENT
Natalie Wyatt, QKA, QPFC

PRESIDENT-ELECT
Justin Bonestroo, MSPA, EA, CPC, CPFA

VICE PRESIDENT
Amanda Iverson, APM

IMMEDIATE PAST PRESIDENT
Frank Porter, QPA, QKA

BOTH SIDES NOW

Plan sponsors worried about potential lawsuits over 'excessive' 401(k) investment fees are now facing a new concern: lawsuits involving low fees. **By John Ortman**

This summer saw a series of lawsuits against large 401(k) plans alleging that they breached their ERISA fiduciary duties by choosing to offer BlackRock's popular LifePath target date funds on their investment menu. (Note that BlackRock is not a target of the suits.) One factor driving the popularity of the LifePath suite—and TDFs in general—is that they offer participants a managed investment option based on a projected retirement date at a lower fee level.

The lawsuits allege that the plan sponsors (which include Black & Decker, Cisco Systems, Citigroup, Marsh & McLennan and Microsoft as of early September) breached their fiduciary duty by choosing to offer the LifePath TDFs because of the low fees BlackRock charges for them, despite their funds' underperformance.

In other words, if these suits are successful (which would include a cash settlement prior to trial), plan sponsors that now worry about lawsuits involving their high-fee menu options would have reason to worry about litigation over their low-fee menu options as well—facing litigation risk "from both sides now," to crib from a Judy Collins lyric from the '60s.

So what are the chances that the plaintiffs in these suits—all of whom are being represented by the same law firm—will prevail? Of course, only a fool would predict the outcome of a lawsuit that hasn't even reached the motion-to-dismiss stage. So at this point all bets are off.

Nonetheless, there are a couple of points worth noting. First, the suits all offer as evidence a comparison of the LifePath TDFs to the TDFs of four competitors that places the performance of the LifePath funds on the low end of that comparability scale.

> "ESSENTIALLY, THE DEFENDANTS HERE WERE SUED FOR, AT LEAST IN PART, PURSUING A LOW-FEE STRATEGY THAT THEY THOUGHT WOULD PROTECT THEM FROM LITIGATION."

However, there's a flaw in that ointment: The LifePath funds use a "to" glide path, while the four "comparator" funds (two of which are active and two of which are passive) all use "through" glide paths. Which means, of course that they are managed differently, and are expected to produce different market returns.

A "to retirement" TDF is more conservative. In a long bull market, it would underperform a "through retirement" TDF—which is what the LifePath TDFs did in the recent bull market. Different market conditions would reverse that situation. So to a significant degree, the suits are comparing apples to oranges. (October Three's Michael P. Barry takes a deeper dive into this dynamic on page 68.)

Second, regarding litigation involving underperformance in general, plan sponsors got some good news in June. In *Smith v. CommonSpirit Health*, the 6th U.S. Circuit Court of Appeals dismissed the plaintiffs' fund underperformance claims, requiring more factors than just underperformance relative to peers in order to prove imprudence.

So for the time being, plan sponsors are facing a "both sides now" situation. Essentially, the defendants here were sued, at least in part, for pursuing a low-fee strategy that they thought would protect them from litigation. And that's something new.

In an unrelated development, yours truly is experiencing his own "both sides now" situation: retirement. (Yes, I did retire from the American Retirement Association—make up your own joke.) However, I seem to be incapable of washing a 45-year career in publishing out of my hair just like that. So I'm going to continue writing for and editing *Plan Consultant* as a contractor, at least for a while.

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

Editor

LEVEL UP YOUR FALL!

The re-envisioned 2022 ASPPA Annual Conference is the retirement industry event to attend! Here's a sneak peak.

By Natalie Wyatt

Natalie Wyatt, QPA, QPFC, has more than 30 years of experience in the retirement plan industry. She serves as ASPPA's 2022 President

Summer has come to a close. The kids are back in school, summer vacations are now memories, and the July restatement rush has come and gone. [Insert deep sigh.]

With fall now upon us, there are wonderful things to come… this changing of the seasons that brings us pumpkin spice, a kaleidoscope of colors in the changing leaves—as well as an extended 5500 deadline. Well, perhaps not the stress that comes with the extended deadline, but once we make it past Oct. 15, we have this year's ASPPA Annual Conference, which takes place Oct. 23-26, 2022, to look forward to!

The 2022 ASPPA Annual will have a different look and feel than years before!

What makes it different? After last year's conference, the ASPPA Leadership Council created the ASPPA Annual Task Force to review the conference as a whole and make recommendations for changes in future ASPPA Annual Conferences. This task force included TPAs, recordkeepers and sponsors. It had very focused meetings to review the feedback they received, our changing industry and the evolution of the workforce—and brought to the ASPPA Leadership Counsel their recommendations for the future of ASPPA Annual. These recommendations included both short- and long-term changes that were incorporated in the work of the ASPPA Annual Planning Committee, including:

> "THE 2022 ASPPA ANNUAL CONFERENCE WILL HAVE A DIFFERENT LOOK AND FEEL THAN YEARS BEFORE!"

- Making the concurrent TPA Growth Summit's schedule align with the ASPPA Annual schedule so that attendees are able to attend all General Sessions at Annual.
- Modifying the flow of the exhibit hall to enhance the ability for interactions.
- Shortening the conference—now we have bonus sessions earlier on Sunday, but the conference will kick off at 4:30 p.m. rather than at noon on Sunday so that people can travel on that date to attend the conference.
- Making sure sessions are focused specifically on being more interactive with the audience and with each other.
- Offering a complimentary QKC Bootcamp to assist those pursuing the newest ASPPA credential.

Other recommendations included peer-to-peer case studies, deep dive sessions and time for peer-to-peer critical thinking/problem-solving roundtable exercises. The 2022 ASPPA Annual Planning Committee applied these recommended changes to their planning of the conference, identifying experienced speakers with backgrounds qualifying them to lead the workshop sessions, to make sure we have the best speaker possible for each session.

The conference sessions that have been planned are technical or practice-related—and sometimes both! In my opinion, this is by far one of the most labor-intensive volunteer committees that exist within ASPPA. I would like to say a big "THANK YOU" to this committee and the leadership provided by the ASPPA Annual Conference Co-Chairs, Maggie Younis and Amanda Iverson!

It's not too late for you to "Level Up" at ASPPA Annual 2022! Early registrations are the highest in years, and we want to see you there because the re-envisioned ASPPA Annual is the retirement industry conference to attend!

And if you are reading this in the printed copy you received at ASPPA Annual 2022, I am so glad to have you join us here!

On a personal note, this has been a wonderful and exciting year serving as ASPPA President. I would like to thank the ASPPA membership for the opportunity to serve in this role over the past year. I know that when I pass the gavel to Justin Bonestroo, he will serve our membership and the retirement industry well. Additionally, I would like to thank my husband, Ron, and my children, Ronan and Maura, for their support over the years of the various volunteer positions that I have held with ASPPA, including listening in without complaint on many a conference call. It has been an honor to serve this amazing organization and I look forward to what the future holds for ASPPA! PC

T. Rowe Price
INVEST WITH CONFIDENCE

T. Rowe Price Retirement Plan Services

THE T. ROWE PRICE DIFFERENCE

- We continually **invest in the growth of our retirement plan business** by visioning and building better plan sponsor and participant experiences.
- We use a **collaborative and consultative approach** with plan sponsors, financial professionals, and third-party administrators to drive better outcomes
- We are one of the **largest U.S. mutual fund companies**, measured by assets under management, offering access to a range of investment products with flexible pricing structures

Our promise to you: ongoing investment in innovative retirement plan solutions to drive better outcomes for plans and participants.

nearly 40 years Experience

- State-of-the-art recordkeeping
- Tenured client service teams with an average of 15 years in the industry
- Over 6,900 retirement plans and more than 2 million plan participants

Flexibility

- Access to a range of high-quality proprietary and nonproprietary investment products or a fully open architecture
- Competitive pricing based on adoption of industry best practices by engaging the consultative services of a third-party administrator (TPA)

Confidence

- Net Promoter Score® of 88—29 points above a benchmark of our peers[1]
- 97% overall client satisfaction[2]
- 90% of our clients agree that T. Rowe Price effectively collaborates with their TPA[3]

Discover the value we bring to retirement plans.

Contact us today to learn more.

[1]Chatham Partners 2021 Client Satisfaction Survey. The Chatham Partners' Net Promoter Score (NPS) measures clients' likelihood of recommending T. Rowe Price. Respondents are categorized as Promoters, Passives, or Detractors. The NPS is the percentage of Promoters minus the percentage of Detractors. Net Promoter, Net Promoter Score, and NPS are trademarks of Satmetrix Systems, Inc.

[2]Source: Chatham Partners 2021 Client Satisfaction Survey.

[3]2021 Chatham Client Satisfaction Study for Core Market plans over $5M in assets.

T. Rowe Price Retirement Plan Services

CCON0124158 8/22
202208-2384909

COMMON GROUND(S)

Two decades after the enactment of EGTRRA, the 'dynamic duo' of Rob Portman and Ben Cardin is still at it. **By Brian H. Graff**

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

Retirement savings has long been in the crosshairs of the nation's tax policy, but things got especially tough for retirement savings plan adoption in the late 1980s.

Sure, 401(k)s were just starting to take off, and we were already having to absorb significant tax code changes about every 18 months, but the Tax Reform Act of 1986 imposed a whole new level of change. It brought a brand-new $7,000 limit on pre-tax contributions, introduced multiple iterations of nondiscrimination testing, imposed a limit on compensation that could be considered in such tests, created a new definition for highly compensated employees, and more. There's little question that those changes (and others) did what they were designed to do—generate additional tax revenue in the here-and-now by limiting the deferral of taxes—but they also served to dampen the enthusiasm and support of business owners—particularly small business owners—for establishing and maintaining these critical programs—then, and for years to come.

But then a couple of congressmen named Portman (Rob) and Cardin (Ben) from different parties—and different parts of the country (Ohio and Maryland respectively) began working together on something that would eventually become the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), commonly referred to as "Portman-Cardin" after its two architects. The legislation would substantially raise the annual contribution limits on IRAs and 401(k)s, introduce Roth contributions as well as the Saver's Credit, provide for catch-up contributions, and increase the 415(c) and maximum compensation limits—all of which set about a true golden age of retirement plan innovation and growth.

> "IT SEEMS THAT EVEN IN THESE TROUBLED TIMES RETIREMENT SAVINGS ISSUES STILL CAN BRING CONGRESS TOGETHER—AS THEY DID FOR THE SECURE ACT IN 2019 AND THE CARES ACT THAT FOLLOWED."

Two decades later this "dynamic duo" is still at it. Key parts of the Enhancing American Retirement Now (EARN) Act have been drawn from their Retirement Security and Savings Act, including increases in the catch-up contribution limits, enhanced start-up credits for start-up plans, expansion of the current Saver's Credit, and increases in the required minimum distribution age.

We recently had the privilege of having both men—now U.S. senators—participate in the recent NAPA DC Fly-In Forum. Separately, each commended the collaborative spirit and commitment of their partnership to improving and expanding the private retirement system over their careers—despite acknowledged disagreement on some issues.

Indeed, at a time when the headlines and pundits proclaim dissent and division, with remarkably little fanfare outside of the trade press, retirement savings expansion and enhancement has progressed with an astounding level of bipartisan support. Whether it's the 414-5 House vote in support of SECURE 2.0, or the unanimous bipartisan support of the Senate Finance and Health Education Labor and Pensions (HELP) Committees for the "RISE and SHINE" and EARN acts, it seems that even in these troubled times retirement savings issues still can bring Congress together—as they did for the SECURE Act in 2019 and the CARES Act that followed.

Those margins of victory notwithstanding, the progress was hard to come by—and, as it was in 1986, could be stymied in the future. At the Fly-in Forum, Sen. Cardin cautioned that it was imperative that Congress act now, while there is momentum for action—noting that it is hard to predict what impact on the spirit of cooperation the mid-term congressional election might have—not to mention the uncertainties of action during the lame duck session that will follow the election.

For all the progress made—and the progress ahead that still seems possible—retirement plan professionals have to be concerned about the declining civility in our nation's capital—and indeed our nation. That's a particular concern as those—like Sen. Portman—who have had such a tremendous positive impact on our nation's private retirement system—head toward their own retirements. We can only hope that part of their legacy is a spirit of cooperation and civility embodied by individuals like Rob Portman and Ben Cardin.

And that retirement savings continues to be a common ground. PC

Rawpixel.com / Shutterstock.com

EXPANDING YOUR BUSINESS WITH AN EXTERNAL PARTNER

Tips on vetting and selecting the right business partner.

By Miriam "Missy" Matrangola & Michelle G. Murphy

Talking about a business partnership may conjure up images of pipe-smoking men in tweed suits making deals on black rotary phones. I love the old partner desks. If you've never seen one, they are usually heavy wooden desks with a kneehole on each side. One desk; two partners. They were not designed for multiple computer screens and laptops, but for easy communication between the two! The old traditional partnerships presumed that as a partner, one shared ownership of a company and worked in the same industry.

As a business that specializes in a niche industry, such as a TPA in the qualified retirement plan arena, there are opportunities to partner with other specialists outside your organization to expand business offerings without dedicating your own business resources, employee education and specialization. It's a very different type of partnership, but one that can be of great benefit to your practice.

One scenario where partnership with another firm may work well is when a DC-focused TPA is asked to provide a cash balance plan but doesn't have actuaries on staff. Other opportunities for partnership may be when a new client wants you to provide a service that would require you to be a 3(16) fiduciary, but your company is not prepared to do that; or a request for a nonqualified deferred comp plan offering that falls outside your expertise. In all three of these situations, an external partner could provide the ability to keep the client and still offer services that are not part of your regular offering.

How do you find an external compliance partner so you can stay competitive in your marketplace? And once you find a potential partner, how do you make sure they are the best fit for your company and will provide what your clients need?

"AS YOU LOOK AT A POTENTIAL EXTERNAL PARTNER, HOW DO YOU MAKE SURE THAT YOUR RELATIONSHIP WITH THAT COMPANY WILL NOT CREATE PROBLEMS OR LIABILITIES?"

To begin the process of finding an external partner, ask your associates in the industry for their recommendations. Financial advisors, investment wholesalers or other retirement consultants are a great resource pool. We have found cash balance providers through another ASPPA member, learned about 3(16) service providers from a wholesaler, and discovered a great resource for joint consulting for non-qualified plan opportunities from a financial advisor.

VETTING A PROSPECTIVE PARTNER

As you look at a potential external partner, how do you make sure that your relationship with that company will not create problems or liabilities?

First, it's important to vet the company. There are several factors that are important to consider, many of which are the same factors that you may use to sell your business to your clients:

- What is the length of time the company has been in business? While this is not determinative of experience, it does demonstrate that they must know how to keep clients happy.
- What is the professional education of the owners and leaders of the company? It is important to me that the owners and leaders of the company that I am dealing with have the appropriate professional education. For a company that will be doing 3(16) services, they should have owners and leaders with ASPPA designations (QPA, QKA, CPC). This gives you and your client the assurance that they are well-versed in retirement plans.
- Does the company have adequate E&O insurance? As we all know, mistakes will be made. It is important that there is insurance in the event of a mistake. And along the same lines, does the company use a contract that discusses what happens in the event of a mistake? You should make sure that you have a contractual agreement in place to cover your relationship with your external partner.
- Is the company CEFEX-certified? While this is not a necessity, it is an extra bonus. A company that has their CEFEX certification has been audited to make sure their processes and procedures are appropriate for the tasks they are performing. They have also been audited for their cybersecurity procedures. Which leads to a big question…
- Does the company have cybersecurity insurance coverage and cybersecurity procedures? This is especially important if they will be processing payroll, loans, and hardships distributions.

MAKING THE RIGHT CHOICE

Once a prospective partner is vetted, you will need to look at whether doing business together is the right solution.

- First, is this a good personality fit? Like any good relationship, you want to choose a partner who you like doing business with! It isn't a marriage, but you will want to work with someone you can tolerate, if not actually like working with.
- How will you work together? Is their business model going to match the way you want to serve your clients? Determine which of you will provide which part of the services. Will they be back-office or client facing? Many actuaries working in this kind of partnership deliver all reports to the TPA and the TPA packages combined reports and prepare 5500s for both 401(k) and pension plans. Do they offer turnaround times that are appropriate for your own timelines?
- How will you both get paid? The arrangement may be that an actuary is a subcontractor for the TPA or can contract directly with the client. The services may be different. Your service agreement may have to be spelled out differently based on what your arrangement is, to protect your own interests as well as those of your client.
- Will their fees fit within your current fee structure? If you are a low fee provider, joining forces with a high-cost 3(16) provider may not be a good solution at all.

Once you make a decision about which partner is a good match, make sure to update your service agreements and your communications to clients to reflect how services are provided, related fees and what the client may expect for turnaround time and deliverables.

While there is a good bit to consider on the front end to make a decision about who is a good fit, finding an outside partner will open opportunities for new sources of income and different types of relationships with prospective clients, and perhaps even allow for more consultative relationships with clients where in the past you may have turned away opportunities for business. Communication is still key to success, but you don't need to sit at the same desk bumping knees to do it well. PC

STATE RETIREMENT PROGRAMS: A QUALIFIED PLAN ADOPTION CATALYST

Research shows that state plans not only complement the retirement savings landscape, but are also driving growth in traditional DC plans. **By Scott Parry**

According to the Congressional Research Service, while 65% of American private sector workers have access to a defined contribution plan through their employer, only 51% who work for a company with less than 50 employees do.[1] This other 49% of small business employees translates to more than 35 million Americans heading into a future where they will probably rely on Social Security as the single source of their retirement savings. When citizens of states do not have enough financial resources to sustain themselves in their retirement years, who is forced to step into the void? State governments.

Approximately 10 years ago, after decades of employer-based retirement coverage shifting from pensions to DC plans, state legislatures began to do just that. The result has been the passage of broad retirement savings mandates for businesses with in-state employees, often supported by a state-run option. Whether you call them secure choice programs, auto-IRAs, or state-facilitated retirement programs (SFRPs) as we do at Ascensus, the message and premise are simple: States have a vested interest in their citizens' retirement security, employers have a stake in supporting it, and those employers can either offer a pre-existing DC option or facilitate the state program to do so.

TonelloPhotography/ Shutterstock.com

SFRPs are, by design, inherently simple—but in the competitive world of the retirement industry, these new programs were initially met with employer skepticism, resistance from advocacy organizations, lawsuits, and everything else in between. A predominant prediction was that SFRPs would negatively impact DC plan adoption, particularly within the small business community, or even worse, that employers offering a 401(k) would terminate the plan and choose to participate in the state program instead.

Ascensus is the leading administrator of SFRPs, partnering with Oregon, Illinois, and California to launch their programs, and as of July 31, 2022 serving 400,000 savers and over 100,000 registered employers in the space. At the same time, we are also one of the nation's leading providers of private retirement solutions, serving more than 156,800 plans and over 6.6 million participants. When we decided to lead the way in establishing the SFRP industry, we considered how success in this new space could affect our traditional retirement business, knowing that we would be uniquely impacted by the results, no matter the outcome.

Our research led us to believe—and the evidence is starting to show—that SFRPs not only complement the retirement savings landscape, but are also a driver of growth in traditional DC plans. Similar to efforts by Pew's Retirement Savings Project, Ascensus analyzed the U.S. Department of Labor's Form 5500 filings database.[2] We compared the number of new DC plan filings in Oregon, Illinois and California in the years prior to each introducing its SFRP, during its rollout, and after, versus the total number of filings nationally.

The results were quite clear. Oregon, the first state out of the gate, averaged 7.4% annual growth in new private DC plan registrations from 2010-2016. During the phased rollout of OregonSaves (2017-2019), the state averaged 12.7% growth—a 72% increase as awareness of and compliance with the Oregon retirement savings mandate spread. For 2020, new filings increased further to 13.5% growth, indicating that the Oregon SFRP program is having a sustained positive impact on traditional DC plan uptake alongside its own.

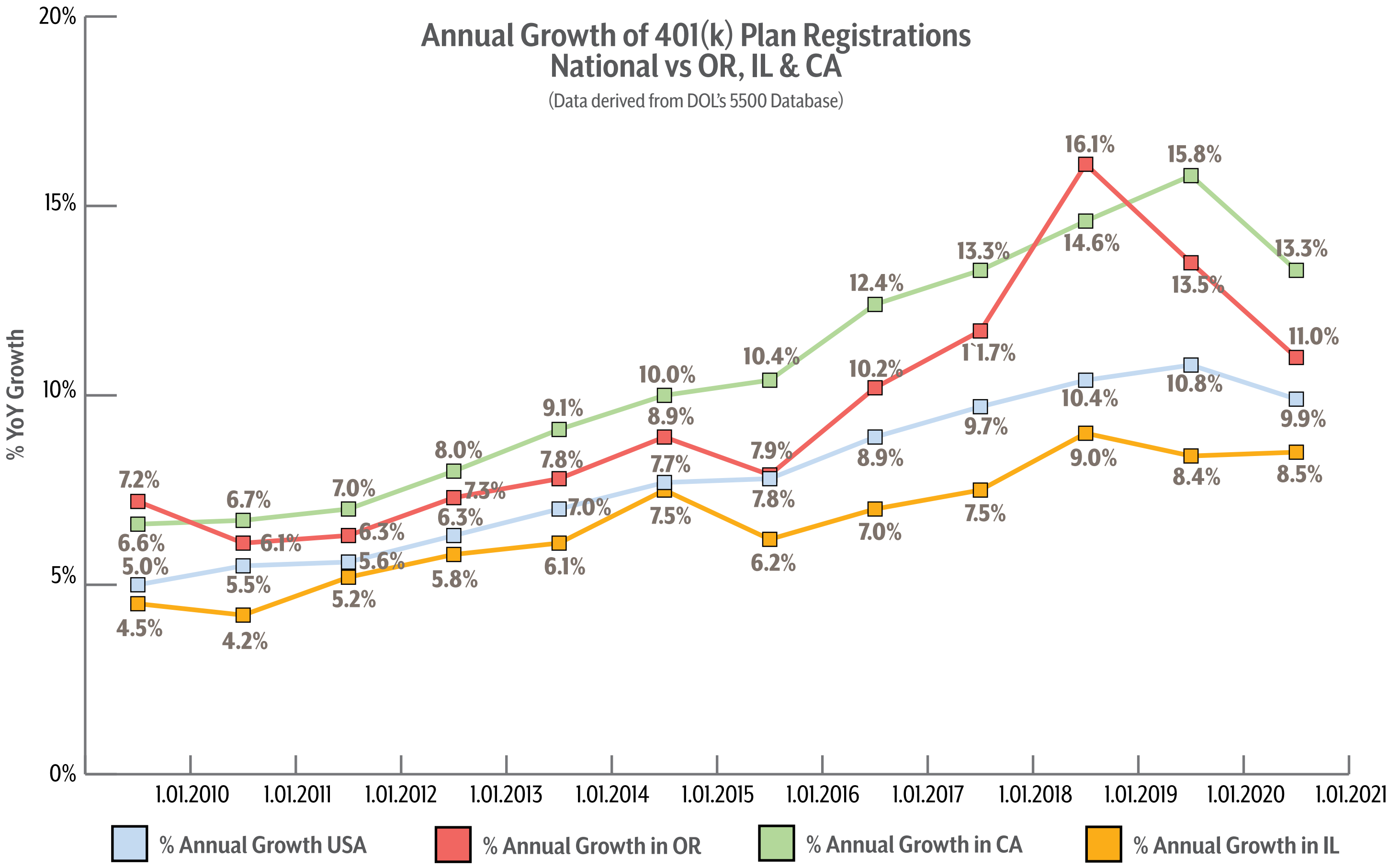
In Illinois the growth was slightly less pronounced, but the trendline much the same. Prior to Illinois Secure Choice's initial employer deadlines (2018-2019), the state averaged 5.8% annual growth in DC plan filings from 2010 to 2017. Amid those deadlines, filings increased by 42% annually, to 8.25% average annual growth, and ticked slightly upward again in 2020 to an 8.4% increase.

The complete impact in California is not yet known. The CalSavers registration deadline for its largest wave, which impacted employers from 5 to 50 employees, just passed on June 30, 2022. Because of a lag of many months in 5500 data due to filing deadlines, we can only partially examine the effect from earlier waves that applied to larger employers. California started with the largest average annual increase of 9.8% from 2010-2019, and filings still increased by 61% in 2020 to annual 15.8% growth. As California's partner in administering CalSavers, Ascensus observed unprecedented employer activity around the 2022 deadline, registering over 40,000 employers into CalSavers in June 2022 alone. We will assess complete Form 5500 data for 2021 and 2022 as it becomes available in October 2022 and 2023, respectively.

Pew's aforementioned research, last updated in July 2022, largely confirmed these results. Pew also researched the closing of DC plans in the SFRP states and found no evidence that closures accelerated in the time since these programs were introduced.[3]

It's worth noting all three states are in the process of expanding their retirement savings mandates: Oregon employers with four or fewer employees must register for OregonSaves by March 1, 2023, and Illinois Secure Choice is lowering its mandate threshold from 25 employees to 5 in two more waves by Nov. 1, 2023. California's legislature recently passed its own expansion, with the bill awaiting action by Gov. Gavin Newson as of mid-August. As such, Form 5500 filings for 2022 and 2023 will merit close study to continue evaluating the effects of SFRPs on traditional plan offerings by employers.

"SFRPS MIGHT WELL BE SUPPORTING 401(K) ADMINISTRATORS AND SALESPEOPLE CATERING TO THE SMALL BUSINESS END OF THE MARKET, FORCING ACCELERATION OF OPPORTUNITIES IN THEIR SALES PIPELINES."



Katie Selenski, Executive Director of CalSavers, is pleased at both the adoption of the program and the growth in private qualified plans. "We're mission driven to expand access across the state so that all Californians can get on a path to retirement security regardless of where they work," she said. "If part of that happens through the industry and accelerated new plan formations, that's great—401(k)s are great products. We're not here to compete with the market. We're here to provide a free path forward for employers that find insurmountable barriers to offering a plan on their own."

One undisputed fact about the introduction of SFRP programs is they have helped address barriers to offering retirement savings options commonly cited by small business owners—cost, administrative burden and fiduciary liability. With these issues addressed in SFRP design, small business owners have been awakened to multiple choices: using a state program that addresses common concerns, or revisiting traditional plans like 401(k)s. Critically, the state mandates gently force them to make decisions many have put off for years. As the data is beginning to show, SFRPs might well be supporting 401(k) administrators and salespeople catering to the small business end of the market, forcing acceleration of opportunities in their sales pipelines.

Where do we go from here? The years ahead will be illustrative as more state mandates are enacted and more SFRPs are brought to market. New companies are being started every day, and in SFRP states, every one with a smaller number of employees who might previously have missed out on workplace retirement savings will have to make decisions about offering some kind of plan. With the advent of SFRPs, the universe of options has broadened, and not at the expense of legacy products. **PC**

Footnotes

[1] Congressional Research Service, *Private-Sector Defined Contribution Pension Plans: An Introduction* June 2022, at https://crsreports.congress.gov/product/pdf/R/R47152.
[2] U.S. Department of Labor, *Form 5500 Dataset*, 2021, at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/public-disclosure/foia/form-5500-datasets.
[3] PEW, *State Auto-IRAs Continue to Complement Private Market for Retirement Plans* July 2022, at https://www.pewtrusts.org/en/research-and-analysis/articles/2022/07/25/state-auto-iras-continue-to-complement-private-market-for-retirement-plans

EPCRS: TEMPUS FUGIT!

The IRS Employee Plans Compliance Resolution System is a tool that is always a timely solution for those who need one. Here's a refresher and update on the program. **By John Iekel**

Complying with tax law and regulations is never easy; what is easy is making an error. The IRS Employee Plans Compliance Resolution System offers a way to fix mistakes that are if not inevitable, at least are not unusual. And that matters—some errors in plan administration and compliance pose the danger not only of fines but even plan qualification.

One key factor is how significant an error is, indicated Ilene H. Ferenczy, APA, Managing Partner at the Ferenczy Benefits Law Center, in a session of the 2021 ASPPA Winter Symposium. A variety of factors are in play in the determination of how an error's significance, Ferenczy said—it's a judgment call. But she suggested that a rule of thumb is that an error is significant "whenever it's not insignificant."

So when is an error insignificant? That determination depends on an analysis of facts and circumstances and weighing factors, Ferenczy said. These include:

- whether other failures occurred in the affected years;
- the percentage of plan assets and contributions involved;
- the number of years involved;
- the number of participants affected relative to total plan participants and those who could have been affected;
- whether a correction was made within a reasonable time of discovery; and
- the reason for the failure.

EPCRS BASICS

The general principles underlying EPCRS place special emphasis on plan sponsors and other administrators of eligible plans. The IRS spells that out in Revenue Procedure (Rev. Proc.) 2021-30, saying that they should:

- be encouraged to establish administrative practices and procedures that ensure that their plans are operated properly in accordance with the applicable requirements of the Internal Revenue Code;
- satisfy the applicable plan document requirements of the Code;
- make voluntary and timely correction of any plan failures; and
- be able to rely on the availability of EPCRS in taking corrective actions to maintain the tax-favored status of their plans.

The guiding principles also state that:

- voluntary compliance is promoted by establishing limited fees for voluntary corrections approved by the IRS, thereby reducing employers' uncertainty regarding their potential tax liability and participants' potential tax liability;
- fees and sanctions should be graduated in a series of steps so that there is always an incentive to correct promptly;
- sanctions for plan failures identified on audit should be reasonable in light of the nature, extent and severity of the violation; and
- administration of EPCRS should be consistent and uniform.

mentalmind / Shutterstock.com

"THE IRS ANNOUNCED ON JUNE 3 THAT IT IS PILOTING A PRE-EXAMINATION RETIREMENT PLAN COMPLIANCE PROGRAM; THE PILOT BEGAN THAT MONTH."

There are three ways to correct mistakes through EPCRS:

1. **The Self-Correction Program (SCP)**, through which a plan sponsor or administrator that has established practices and procedures designed to promote and enable compliance can correct errors without contacting the IRS or paying a fee.
2. **The Voluntary Correction Program (VCP)**, through which plan failures can be corrected at any time before an audit in order to receive IRS approval for the corrections. The IRS issues a compliance statement detailing mistakes identified in the submission and the correction methods it has approved. The mistakes are to be corrected within 150 days after the compliance statement is issued.
3. **The Audit Closing Agreement Program (Audit CAP)**, through which a plan failure can be corrected while the plan is being audited; a sanction also must be paid. Under Audit CAP, the plan sponsor:
   - enters into a closing agreement with the IRS.
   - makes correction before entering into the closing agreement; and
   - pays a sanction negotiated with the IRS and determined based on facts and circumstances.

PERIODIC TINKERING

The IRS periodically updates and refreshes the information on its website concerning EPCRS to account for the issuance of new guidance and regulations, and as well as the approach and/or passage of relevant deadlines. It also sometimes updates procedures in a way that affects EPCRS.

The most recent such update came in Rev. Proc. 2021-30, in which the IRS made what it called "significant changes and revisions," including the following.

- **Overpayments Correction Options.** Rev. Proc. 2021-30 expanded correction principles to allow plan sponsors to fix operational failures when plan participants or beneficiaries receive payments from defined benefit plans that exceed what is permitted by the terms of the plan, effective July 16, 2021.
- **Expansion of Self Correction for Significant Operational Failures:** Rev. Proc. 2021-30 extended the correction period of significant operational failures from two to three years, effective July 16, 2021.
- **Expansion of Self Correction for Retroactive Plan Amendments:** Rev. Proc. 2021-30 makes it easier to use retroactive plan amendments to correct operational failures by removing the requirement that all participants in the plan benefit by the retroactive amendment, effective July 16, 2021.
- **Anonymous VCP Submissions:** Effective Jan. 1, 2022, Rev. Proc. 2021-30 eliminated anonymous submissions under VCP.
- **Anonymous Pre-Submission Conferences:** Effective Jan. 1, 2022, the IRS began to permit plan sponsors or their representatives to make an anonymous written request for a pre-submission conference to discuss a potential VCP submission at no cost to the plan sponsor. Following the pre-submission conference, if the plan sponsor submits a VCP request, it can no longer be anonymous.
- **Extension of Automatic Enrollment Failures:** Rev. Proc. 2021-30 extended the sunset of the safe harbor correction method to correct missed elective deferrals for eligible employees subject to an automatic contribution feature in 401(k) or 403(b) plans.
- **Increased Threshold for De Minimis Correction Amounts:** Rev. Proc. 2021-30 increased from $100 to $250 the threshold for certain de minimis amounts for which a plan sponsor is not required to implement correction.

NEW PRE-EXAM COMPLIANCE PROGRAM

The IRS announced on June 3 that it is piloting a pre-examination retirement plan compliance program; the pilot began that month.

This program will notify a plan sponsor by letter that their retirement plan was selected for an upcoming examination. The letter will give a plan sponsor a 90-day window to review its plan document and operations to determine if they meet current tax law requirements. If a letter recipient does not respond within that period, the IRS will contact the recipient to schedule an exam.

If a plan sponsor discovers in their review that mistakes were made in the plan's documents or operations, it may be possible for the plan sponsor to self-correct those mistakes through EPCRS.

The IRS says that it will review documentation and determine if it agrees with a plan sponsor's conclusions and whether any mistakes were self-corrected appropriately. It will then issue a closing letter or conduct either a limited or full scope examination.

At the end of this pilot, the IRS says that it will evaluate its effectiveness and determine if the program should continue to be part of its overall compliance strategy. PC

VectorMine / Shutterstock.com

ESOPS IN DAILY ADMINISTRATION

While daily valuation in an ESOP adds hurdles, an ESOP recordkeeper with experience in both the daily and balance forward environment can help navigate the process.

By Connie Woodmansee

An employee stock ownership plan (ESOP) is a type of qualified defined contribution plan that gives workers ownership interest in the company. By definition, an ESOP must be designed to invest “primarily in qualifying employer securities” (see Code Section 4975(e)(8)) and generally speaking, there are no liquid investments (such as cash or mutual funds) held by the plan.

Since the ESOP does not have cash to process benefit payments, the plan sponsor has the responsibility to ensure that liquid funds are available to repurchase the shares from departing participants once eligible for a distribution. Accordingly, ESOP distributions are typically processed one time a year—and only after the employer has contributed enough funds to process the distributions. Furthermore, most ESOPs are sponsored by privately held or closely held companies where the company’s shares are not traded on an open market, but rather valued annually by an independent third-party valuation firm.

These two features—distributions paid once a year and the company stock valued only once a year—allow ESOPs to be accounted for on a “balance forward” basis, with the plan’s activity and market value changes being reported on an annual basis. Accounting for ESOP activity on a balance forward basis allows the participant accounts to be reported on an accrual accounting basis. Contributions and distributions can be included that are physically remitted to the trust after year end (for example, including a contribution for the 2022 plan year that was remitted to the trust in March of 2023 on the 2022 participant statements).

With information at our fingertips, we can view our 401(k) balances on the vendor’s website where the market values are “daily valued” (i.e., updated each business day) and the activity in our account is updated routinely. Technology has allowed our 401(k) plans (and other retirement plans invested in mutual funds) to be updated on a nearly real-time basis, and participant statements are generated on a quarterly basis. Accordingly, the daily valued participant accounts are reported on the cash accounting basis, meaning we can include only the activity that has occurred as of the reporting date—regardless of whether the transaction is for the current plan year or the prior plan year.

A growing number of ESOP companies would like to provide participants with statements that reflect the balances of all their retirement accounts, which leads to more frequent statements (i.e., quarterly) including a mixture of balance forward and daily valued account balances.

It is not uncommon for companies to sponsor an ESOP combined with a 401(k) plan, or “KSOP”—adding a layer of complexity to the administration. Whether you have a combined KSOP or standalone ESOP, updating the balance forward section of the plan is imperative. It is reasonable to ensure that participant activity is updated more frequently so the account balances reflected on

"PLAN SPONSORS MAY WANT THE CASH/MORE LIQUID ACCOUNTS (I.E., THE 401(K), PROFIT SHARING ACCOUNTS, ESOP OTHER INVESTMENTS) TO BE VALUED ON A DAILY BASIS, BUT THAT CAN BE PROBLEMATIC BECAUSE DAILY ACCOUNTING IS DONE ON A CASH (NOT ACCRUAL) BASIS."

the website are not overstated. Even a balance forward only plan accessible online should be updated so account information is not overstated.

Activity not required more frequently can remain static (such as contributions, earnings, and recycling of shares), but activity that impacts the balance during the year (e.g., distributions) need to be updated to reflect the change. Plans that offer participant-directed investments for some retirements accounts may need to require restrictions on transfers into and out of closely held stocks.

Plan documents do not always provide a specific step-by-step roadmap on how to recycle shares, allowing the plan sponsor the opportunity to develop administrative procedures that will work for their company. Plan sponsors may want the cash/more liquid accounts (i.e., the 401(k), profit sharing accounts, ESOP other investments) to be valued on a daily basis, but that can be problematic because daily accounting is done on a cash (not accrual) basis. Accordingly, each participant's account will reflect some sources on the cash basis and others (primarily the ESOP) on the accrual basis. If the *cash* used to repurchase shares is daily valued, then the corresponding shares that were repurchased/recycled also must be adjusted on the same day to prevent an overstatement in the account. The conversion/transfer of the cash to stock should be reflected in participant accounts at the time of the cash transactions. Many recordkeepers would agree that it works best to keep the cash portion of the ESOP as balance forward like the stock portion.

ESOPs frequently provide mutual funds as investment alternatives for:

1. diversification requirements under Code Section 401(a)(28)(B); or
2. segregation (also known as reshuffling, which is the liquidation of stock from the accounts of separated participants to be repurchased by active participants).

The conversion of stock to mutual funds can be handled under a KSOP or a plan-sponsored 401(k) plan. The provisions of the plans should include guidance on the conversion process. Once converted to mutual funds, these ESOP accounts are generally participant-directed in the same manner as the participant's deferrals even though these accounts can still carry the restrictions of the ESOP (timing and manner of distributions, eligibility for loans, etc.)

Plan sponsors must provide statements quarterly for participant-directed individual account plans which could include diversification and segregation accounts mentioned above. Statements for other individual account balances are required *annually*. The Department of Labor's guidance for participant statements is that they should be provided no later than 45 days after the end of the quarter. Most 401(k) statements are available about two weeks following the end of the quarter. This can be challenging since ESOP (balance forward) balances are usually not updated with the new stock price until four to six months following the end of the plan year (for closely held stock). For many plans, the June quarter end would be the earliest quarterly statement with updated ESOP accounts. Many ESOP companies provide annual "ESOP only" statements to let participants see the value of their account with the updated stock value. The website would generally be updated around this same time. The timing of this information can create confusion for participants.

For publicly traded shares held by an ESOP, there can be some different hurdles. The plans operate basically the same as with just mutual funds, with the exception that the trading time is often T + 2 for settlement—so a slight delay.

Communication with participants is important. Depending on the level of investment trading, the custodian might discuss unitization versus share accounting. Unitized accounting provides cash flow for transactions with few or no delays. There is complexity in helping participants understand that the number of units do not represent the actual shares held in their individual account. Additionally, the value shown for the unitized fund will not be equivalent to the price found under the stock symbol, and dividends allocated to participant account will not correlate to what is published.

While daily valuation in an ESOP adds hurdles, engaging an ESOP recordkeeper with experience in both the daily and balance forward environment can help navigate the process. Providing more frequent valuations and statements can serve as an encouragement to employee owners and beneficial for the company culture.

Education is necessary to ensure these participants understand the provisions of the plan. So, whether a plan sponsor has two separate plans or one plan with two or more components, and whether the plan is balance forward or a combination of balance forward and daily valued—communication is key. PC

Your modern, easy way to manage retirement plans

Nationwide®
is on your side

At Nationwide, we are committed to making the retirement process simple for everyone. And now our interactive tools are even better. Our new, modernized platform makes it easier for TPAs, financial professionals, plan sponsors and participants to manage retirement plans. Upgraded capabilities help you grow your business and deliver a better partner experience.

Simple, meaningful online tools

These latest updates let you see what your plan sponsor or participant sees with a multi-view experience. Participants can now initiate loan and distribution requests online, and TPAs can review, approve or reject those requests. See examples of our improved tools and functionality below.

Administrative ease

- Future-dated payroll contributions
- Auto-escalation

Administrative portal

- Multi-view experience
- Audit support
- Enhanced plan-level reporting

Improved online distribution & loans process

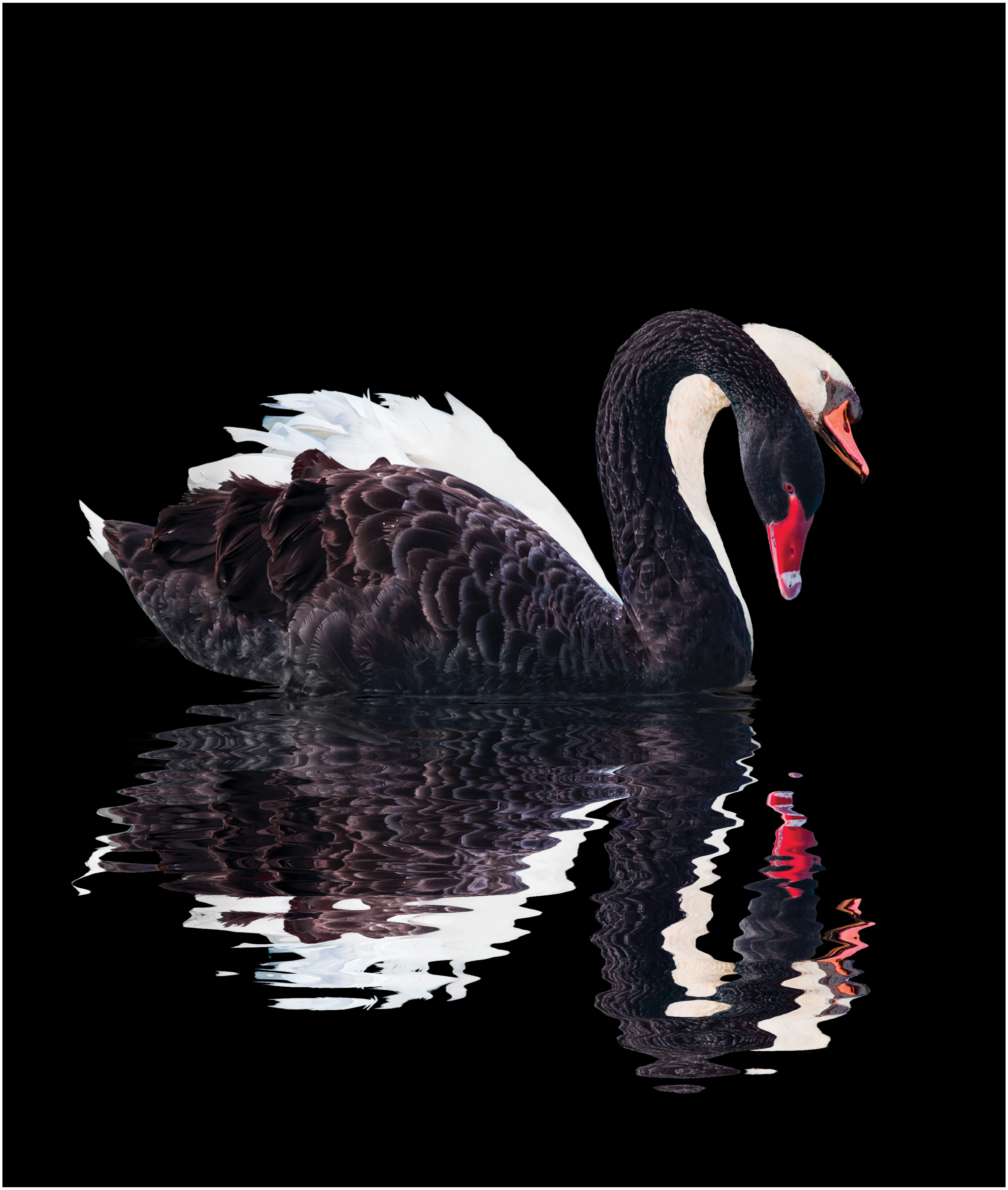
- Straight-through loan and distribution request processing
- Integrated participant-to-administrator online experience

ASPPA ANNUAL | TPA GROWTH SUMMIT

Stop by our booth at ASPPA Annual 2022 or contact your Nationwide representative to learn more.

Scan this QR code for additional information about Nationwide Retirement Solutions

PNM-19654AO (9/22)



muratart / Shutterstock.com

EASING THE DB PLAN TERMINATION PROCESS

Here's how to ensure that your swan song as a plan consultant goes smoothly. By Kevin Strauch

Plan terminations for defined benefit plan can be tricky animals. All the work that went into the plan design, the years of annual administration and consulting along the way— all that comes to an end when it's time to terminate the plan. This is our swan song as plan consultants—our last opportunity to show the plan sponsor the expertise and service we bring to the table.

PARTIAL TERMINATIONS

Before diving into the weeds of final plan terminations, it's worth mentioning another kind of plan termination: a "partial termination." A partial termination can often be forgotten, as it's not as common as a final plan termination.

A partial termination as described in Code Section 411(d)(3) can occur when the turnover rate of participating employees is 20% or more. This is subject to facts and circumstances. It could be the case in which a plan has a turnover rate of 25% but does not have a partial termination if the turnover rate is routine and the employees are typically replaced.

Some amendments that reduce future accruals for employees could also be considered a partial termination. The result of a partial termination is that "affected employees" must be fully vested in their benefit, to the extent funded. Therefore, it's important to make the plan sponsor aware of these scenarios and have the appropriate discussions to determine if a partial termination occurred.

VALUATION DATE AND METHODOLOGY

When it comes time to terminate the plan, complete the final calculations, and pay out the plan assets, there is quite a bit of consulting needed in addition to extra procedures.

First of all, minimum funding requirements exist up to and including the plan year of the date of plan termination. The minimum funding deadline is 8.5 months after the date of termination. The new deadline must be communicated with the plan sponsor.

Rev. Proc. 2017-56 provides for some automatic approval for changes in funding methods, which should be considered along with other assumptions. If the funding method or actuarial assumptions change, the Schedule SB must have an attachment stating the change.

- If the defined benefit plan had been operating with an end-of-year valuation date and the plan termination date is before the normal last day of that plan year (say December 30 for a calendar year plan), then the valuation date can be any date from the beginning of the plan year through the date of termination. Valuing assets and liabilities on any given day during the final plan year can be very helpful in determining the lowest possible minimum required contribution. Asset performance to date in 2022 likely means that January 1 might be a good valuation date for calendar year plans.
- It's possible that a defined benefit plan has automatic approval to change the valuation date from beginning of the year to end of the year in the year of termination. Certain conditions must be met as outlined in Rev. Proc. 2017-56: (1) the plan must be eligible to designate any day during the plan year as its valuation date pursuant to 430(g)(2)(B); (2) the assets of the plan (without receivable contributions) as of the plan termination date are sufficient to satisfy benefit liabilities; and (3) if applicable, a notice of intention to terminate was filed with the Pension Benefit Guaranty Corporation (PBGC).
- The asset valuation method may be changed to a method that determines the value of plan assets as the fair market value of assets. The conditions to allow for this are the same as the above point, except that the plan does not need to be eligible to designate any day during the plan year as its valuation date. Changing from an average value of assets to non-average value of assets can potentially allow for a lower minimum required contribution.
- Actuarial assumptions must be reviewed and be appropriate. The assumptions used in the past might not be appropriate for a terminating plan. For example, it might be appropriate to value all lives in the plan with a 100% withdrawal rate and assuming all take a lump sum of their benefit due, as opposed to assuming a 35-year-old will wait until their normal retirement age of 65 to take their lump sum benefit.

UNDERFUNDED/OVERFUNDED PLANS

When it comes to plan terminations, how do we properly consult with the ever-changing market? Consulting as

"THIS IS OUR SWAN SONG AS PLAN CONSULTANTS—OUR LAST OPPORTUNITY TO SHOW THE PLAN SPONSOR THE EXPERTISE AND SERVICE WE BRING TO THE TABLE."

it relates to the plan termination process looks much different in 2022 than it did in 2021. In 2021, the market had significant increases. Many plans were overfunded, and consulting likely revolved around excess assets. As of the writing of this article in July, the market in 2022 has had a significant decrease to approximately the value as of Jan. 1, 2021. Consulting now likely involves discussions of underfunded plans.

As per usual, the plan document is the best place to start! The plan document's provisions will determine how to operate the plan if the plan is overfunded or underfunded. With an overfunded plan, often the document will say to either revert the excess assets to the employer or allocate the excess assets to participants. However, the document can be amended to change the provisions regarding excess assets, except that a plan which has language to allocate to participants can't change to revert to the employer unless this provision has been in place for at least 5 years prior to plan termination. If assets revert to the employer, there will be a hefty excise tax, so this method is usually avoided at all costs.

Excess assets can also be transferred to a Qualified Replacement Plan, perhaps a defined contribution plan. If the excess asset language in the plan document says to allocate to participants, it will often provide some guidance as to how this is done. The document can read "allocate to participants in a nondiscriminatory manner" or "increase benefits pro-rata." These descriptions can be vague, so it's best to have the plan sponsor confirm their interpretation of the document. The increase in benefits does trigger the requirement for non-discrimination testing, which the plan sponsor should be made aware of.

For underfunded plans, the document might have language to pay out benefits "to the extent funded." Personally, I don't like to recommend that a plan pay out 80% of the lump sums due to all participants if a plan is 80% funded, and this would not be allowed by the PBGC for covered plans.

If the plan is underfunded when distributions are expected to occur, what are some viable options? A majority owner (50% or more) can elect to forgo their benefit to the extent needed. If that scenario doesn't exist, the plan sponsor might be required to fund the plan to pay out benefits in full. Waiving a benefit does not reduce the minimum required contribution. If a plan is going through the PBGC plan termination process and was overfunded at the start of the process but is now underfunded, it might be worthwhile to ask the PBGC for an extension of time to complete distributions. This would give additional time for the plan sponsor to fund the plan or for the assets to increase. If a majority owner can sign an election to forgo benefits, the actuary should amend the PBGC Form EA-S. The plan sponsor could also consider rescinding the plan termination until funding improves.

Consulting can be difficult when we don't know what the market will do or where the assets will be upon distribution. If we could predict the future, we would have a different job.

If assets are in cash during the plan termination process, the roadmap to plan termination is clearer, but we must be careful of our language in recommendations, especially when it comes to assets, as many of us do not want fiduciary responsibility. Nevertheless, communication with the plan sponsor is crucial to inform them about how the plan termination process will go and how the process changes if the plan's funded status changes. There will be different results for a plan that is underfunded compared to overfunded, or for a plan that was expected to have 5% of excess assets, compared with 10%. Clear communication and setting expectations are very important to plan sponsors.

ADDITIONAL POINTS TO CONSIDER

There are some miscellaneous items related to plan terminations that are worth remembering as well:

- The benefits due to missing participants in a PBGC-covered plan can't be automatically rolled out of the plan into an IRA. The plan must use the PBGC missing participant program.
- It's possible for a plan that is not covered by the PBGC to use the missing participant program upon plan termination.
- Participant benefits due in a defined benefit plan can't be reduced for fees.
- A plan should continue with its regular distribution practices through the plan termination process. If the plan hasn't forced participants out in the past, it should not do so one month before termination.

As plan consultants, our swan song must include frequent and clear communication with the plan sponsor. Informing the plan sponsor of the plan termination requirements, timelines, options available to them, and the change of plan operations, and setting expectations helps facilitate a smooth plan termination process. PC

STATE TAXATION OF RETIREMENT DISTRIBUTIONS

In which we learn to think of state taxation of retirement distributions as a tax salad. **By Mike McWherter**

Phone call from PC Editor John Ortman to me:

John: Hi, Mike! I was wondering if you'd like to write an article for the next issue of *Plan Consultant* on taxation of retirement distributions?

Me: Sure John, I'd be happy to! The federal taxation is pretty straightforward. No problem.

John: Great! By the way, the article needs to be on *state* taxation of distributions.

Me: Um, did I already say yes? I'd like to buy a vowel, please… Did I mention I'm moving to an ice floe in the Arctic Circle?

All kidding aside, this is a great topic. One of the things that makes it a great topic can also make it somewhat complex. It's not quite 51 variations on a theme (50 states and Washington DC), but it's close. And it's a moving target as well: 46 states' legislatures were in session this year and approximately 14 of them were still in session as of mid-July. Nearly all of them made changes to their tax code.

Which calls for these disclaimers: *As soon as something is published about state taxation of retirement distributions—like this article—it immediately begins to acquire a degree of obsolescence which increases over time. I'm writing this in Summer 2022, so some of the information here will have changed by the October publication date. Also, this article is not intended to and should not be construed as providing legal, investment, tax or any other professional advice.*

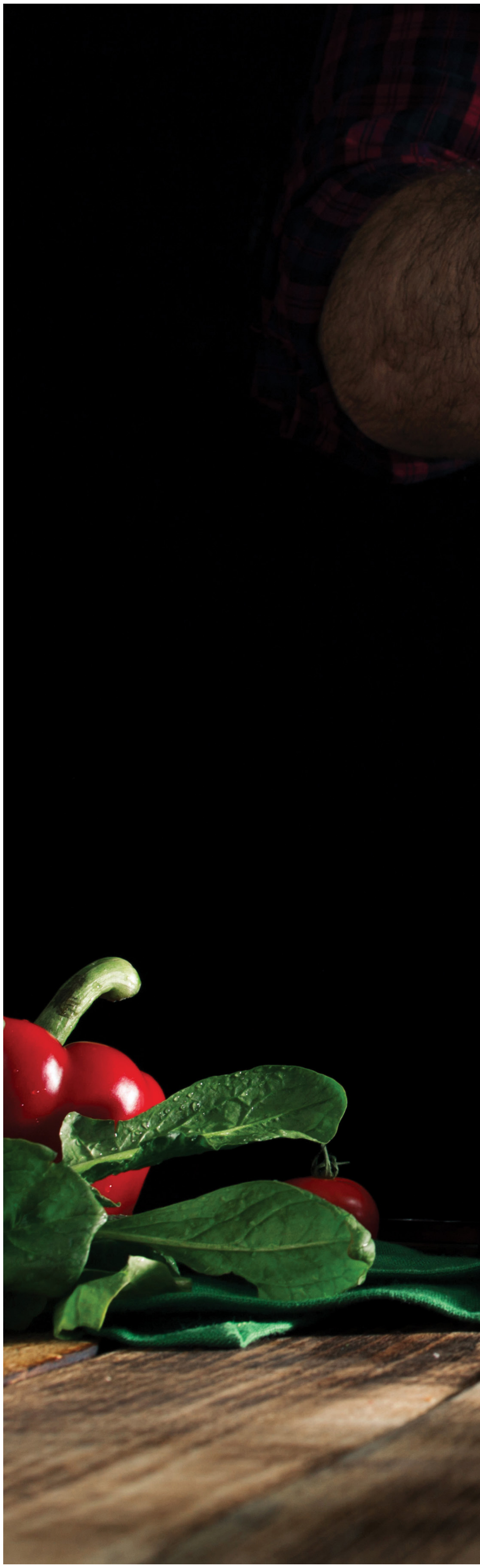
Let's start with the easier stuff.

A QUICK WORD ON FEDERAL TAXATION OF RETIREMENT DISTRIBUTIONS

Whether from a DB or DC plan, the Internal Revenue Code will treat these distributions as taxable income. Generally, IRA distributions will be subject to income tax unless it's a Roth IRA and the owner has met the age-59½ and 5-year rules for Roths.

STATES THAT DO NOT HAVE AN INCOME TAX

If your participants reside in Alaska, Florida, Nevada, South Dakota, Tennessee, Texas, Washington or Wyoming—*congratulations*! Those states have no income tax of any kind. There, retirement distributions from a DB plan, a DC plan or an IRA are not taxed at the state level. (An Honorable Mention goes to New Hampshire, which taxes only dividend and capital gain income.)


KucherAV / Shutterstock.com

> "THE STATE TAXATION OF RETIREMENT BENEFITS BECOMES WHAT CAN MOST CHARITABLY BE DESCRIBED AS A TAX SALAD. THERE IS GREAT VARIETY AND HENCE NUANCE TO WHAT'S THERE."

From here the state taxation of retirement benefits becomes what can most charitably be described as a tax salad. There is great variety and hence nuance to what's there.

STATES THAT DO NOT TAX DB PLAN, DC PLAN OR IRA DISTRIBUTIONS

Three other states—Illinois, Mississippi and Pennsylvania—do not levy a tax on DB, DC or IRA distributions.

STATES THAT DO NOT TAX DB PLAN DISTRIBUTIONS

There are two more states that do not tax DB pension plan distributions: Alabama and Hawaii. However, both states do tax distributions from DC plans and IRAs.

And here's an interesting twist in Hawaii: While it will tax DC plan and IRA distributions, it will not allow the service provider to withhold, remit and report those taxes as nearly all other jurisdictions either allow or require. The participant must do so via his or her state tax return. Apparently there is a price to be paid for living in paradise.

MOST STATES TAX RETIREMENT DISTRIBUTIONS

Forty-two states assess personal income taxes. This is to be expected, as income taxes comprise a significant portion of state government revenue. As of 2020, income tax accounted for more than 35% of all state tax collections, according to the Tax Foundation.

Of those 42 states, approximately 10 have a flat tax rate. The rest of those states plus the District of Columbia tax retirement distributions based on the individual's or joint filer's tax bracket. (See the discussion of Alabama and Hawaii above for taxes on distributions from DC plans and IRAs but not DB plans.)

Adding to the frivolity, the number of brackets, rates and margins varies from jurisdiction to jurisdiction. Keeping things relatively simple, several states use a three-bracket system. Once again, Hawaii keeps it interesting by having 12 brackets. And as you would expect, the ranges of the top and bottom bracket rates are not consistent from state to state. Some states' brackets top out at less than $10,000, while New York in 2021 added a bracket for incomes over $25 million.

WHAT ABOUT SOCIAL SECURITY BENEFITS?

Obviously not a distribution from a DB plan, DC plan or IRA, Social Security benefits are a component of most people's retirement income. Twelve states tax either some or all of a person's Social Security benefits—Colorado, Connecticut, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, Rhode Island, Utah, Vermont and West Virginia.

Along with the states listed above, Uncle Sam will also tax your Social Security income. Like the states, it's a bit of a moving target from year to year. And it varies based on income and marital status. Here are the current numbers:

- Individuals with income of $25,000 to $34,000: Up to 50% of your Social Security benefit is subject to federal income tax.
- Individuals with income over $34,000: Up to 85% of your Social Security benefit is subject to federal income tax.
- Married filing jointly with income of $32,000 to $44,000: Up to 50% of your Social Security benefit is subject to federal income tax.
- Married filing jointly with income over $44,000: Up to 85% of your Social Security benefit is subject to federal income tax.

WHAT ABOUT MILITARY RETIRED PAY?

Three states—California, Vermont and Virginia—plus Washington D.C. tax military retired pay. Another Honorable Mention goes to Virginia, which does not tax the military retired pay of Congressional Medal of Honor recipients.

Speaking of Virginia and Congressional Medal of Honor recipients, if you've never visited Arlington National Cemetery and the Tomb of the Unknown Soldier, you should. I promise: You will be glad you did. PC

AN END TO THE CRYPTO WINTER?

ARE WE WITNESSING THE FIRST SIGNS OF A MAJOR THAW IN THE 'CRYPTO WINTER'?

BY
GARY BLACHMAN

Gorloff-KV / Shutterstock.com

4K HEAVEN / Shutterstock.com

CRYPTOCURRENCY AND OTHER DIGITAL ASSETS ARE AMONG THE MOST CONTROVERSIAL INVESTMENT PRODUCTS TO EMERGE IN RECENT YEARS. WITH THE POTENTIAL FOR "OUTSIZED PROFITS," IT IS NO WONDER THAT RETIREMENT PLAN PARTICIPANTS WANT THE ABILITY TO INVEST IN CRYPTOCURRENCY AS PART OF THEIR PERSONAL RETIREMENT STRATEGY.

However, the Department of Labor's recent guidance, Compliance Assistance Release No. 2022-01, makes the investment of retirement plan assets in cryptocurrency more complicated. The guidance warns 401(k) fiduciaries to "exercise extreme care" before allowing plan participants to invest plan assets in cryptocurrencies due to perceived "significant risks and challenges to participants' retirement accounts, including significant risks of fraud, theft, and loss." Furthermore, to protect the interests of 401(k) plan participants and beneficiaries, the DOL announced that it intends to investigate 401(k) plans that offer cryptocurrency as an investment option to protect plan participants from these risks.

For years, crypto industry insiders have speculated about what tech advances would unleash the institutional money that was seemingly content to sit on the sidelines. The DOL's "cautionary" guidance on the use of cryptocurrency in 401(k) plans appears for the moment to indicate that the "crypto winter" persists.

However, several weeks after the DOL released its informal guidance, Fidelity Investment Inc. announced that it will begin allowing 401(k) participants to invest up to 20% of their savings into bitcoin by year-end. Fidelity's decision to plunge into the choppy waters and invest in blockchain and cryptocurrency clearly reflects the bullish excitement and potential for many investors who are eager to participate in this emerging opportunity. These and other recent developments in the financial services industry may actually be a sign that

the crypto winter is experiencing the first signs of a major thaw.

EXPANDED FIDUCIARY DUTIES?

The DOL's crypto guidance is the first time the DOL has provided guidance on whether cryptocurrencies are appropriate plan investments. The DOL raises the question of whether 401(k) plan fiduciaries can satisfy their fiduciary duties if participants are allowed to invest their account balances in cryptocurrencies. ERISA requires a plan fiduciary to discharge his or her duties solely in the interest of the plan's participants and beneficiaries. The plan fiduciaries responsible for the operation of the plan must exercise "prudence" when selecting the investment options offered to plan participants. This "prudent expert standard of care" requires plan fiduciaries to consult with appropriate experts when making investment decisions if the fiduciary lacks the necessary expertise. Plan fiduciaries also owe an ongoing duty of care, which requires them to continuously monitor a plan's investments and remove imprudent investments. Plan fiduciaries must diversify plan investments to protect the plan from the risk of large losses, unless it is clearly prudent not to do so under the circumstances.

The DOL noted that a fiduciary's duty under ERISA is the "highest known to the law." A fiduciary who breaches those duties is personally liable for any losses to the plan resulting from that breach. As such, a fiduciary's consideration of whether to include an option for participants to invest in crypto is subject to these responsibilities. The DOL cited the recent U.S. Supreme Court opinion in *Hughes v. Northwestern University*, 142 S. Ct. 737, 742 (2022), when it noted, "even 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 investments is a breach of fiduciary duty.

Historically, the DOL has communicated that the prudence of an investment option depends on the facts and circumstances and, except in a few very specific circumstances (e.g., artwork, antiques, gems and certain other collectibles), ERISA does not actually prohibit any particular types of investments. As such, this makes the level of caution expressed by the DOL relative to cryptocurrency even more noteworthy.

CRYPTO GUIDANCE

The DOL's announcement applies to cryptocurrencies and other virtual digital assets, which include "tokens," "coins," "crypto assets" and any derivatives. At the outset, the DOL's crypto guidance warns fiduciaries to "exercise extreme care before they consider" adding a cryptocurrency

option to a 401(k) plan's investment menu. It is important to note that the DOL reference to "extreme care" when considering a cryptocurrency investment option appears to be a higher standard than the current ERISA requirement of exercising "prudence" when selecting a potential investment. The DOL does not elaborate on whether extreme care differs from prudence, and this has caused significant concern among a growing number of crypto fans.

The DOL's guidance identifies the following concerns that fiduciaries should consider relative to cryptocurrency in 401(k) plans.

Speculative and Volatile Investments

The DOL states that the Securities and Exchange Commission has cautioned that investment in cryptocurrency "is highly speculative" and subject to "extreme price volatility." Additionally, the DOL cautioned that the extreme volatility can have a devastating impact on participants with large investments in cryptocurrency. According to the DOL, there are several factors that could contribute to the volatility, such as the valuation process, fictitious trading practices, and widely published reports of theft and fraud, among other factors.

The Challenge for Plan Participants to Make Informed Investment Decisions

The DOL noted that cryptocurrencies are often presented to investors as innovative investments that provide "unique potential for outsized profits," resulting in participants having high return expectations with little appreciation for the unique risks and volatility associated with cryptocurrencies. The DOL comments that, "it can be extraordinarily difficult, even for expert investors, to evaluate these assets and separate the facts from the hype." The DOL is concerned that plan fiduciaries who are charged with the duties of prudence and loyalty, and include cryptocurrency as a plan investment, are essentially telling plan's participants that "investment experts have approved the cryptocurrency option as a prudent option for plan participants" and that "This can easily lead plan participants astray and cause losses."

Custodial and Recordkeeping Concerns

Unlike traditional plan assets that are held in trust or custodial accounts, the DOL notes that cryptocurrencies generally exist as lines of computer code in a digital wallet. The DOL states that because cryptocurrencies are not held in a similar manner as

TK6photo / Shutterstock.com

AS INVESTOR INTEREST IN CRYPTOCURRENCIES CONTINUES TO GROW, RETIREMENT PLAN FIDUCIARIES MUST UNDERSTAND THE FIDUCIARY DUTIES AND RESPONSIBILITIES OWED TO PLAN PARTICIPANTS AND BENEFICIARIES.

traditional plan assets in trust or custodial accounts, they are vulnerable to hackers and theft.

Valuation Concerns

The DOL expressed concerns about the reliability and accuracy of cryptocurrency valuations. Currently, there is no agreement as to how cryptocurrency should be valued, and different intermediaries may use inconsistent valuation methodologies as compared to traditional investment products.

Evolving Regulatory Environment

Since the law around cryptocurrency is still evolving, some market participants may be "operating outside of existing regulatory frameworks or not complying with them," the DOL points out, noting that fiduciaries "will have to include" an analysis of how regulatory requirements may apply to "issuance, investments, trading, or other activities and how those regulatory requirements might affect investments by participants in 401(k) plans." Fiduciaries would have to take care not to accidentally participate in illegal transactions. Furthermore, the use of cryptocurrency in illegal commerce could impact 401(k) plan participants—for example, if law enforcement agencies shut down a platform or restrict the use of a particular cryptocurrency.

Because of these and related concerns, the DOL crypto guidance warns that the Department expects to conduct an investigative program on plans that offer participants cryptocurrency products. Furthermore, the DOL provides a clear and definite warning to plan fiduciaries: "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."

SELF-DIRECTED BROKERAGE WINDOWS

While the focus of the crypto guidance is on 401(k) plans, the DOL's warnings also extend to plans and plan fiduciaries responsible for allowing cryptocurrency investments through self-directed brokerage windows. This is extremely concerning because historically, plan fiduciaries did not have an obligation to monitor the underlying investment s in a brokerage window. The DOL's potential expansion of fiduciary duties to encompass the investment options in brokerage windows also raises practical concerns. For example, brokerage windows maintain thousands of investment options and it would be unrealistic to require plan fiduciaries to monitor and screen for cryptocurrency investments outside of the core fund options. Further guidance from DOL is needed on this issue.

FIDELITY'S CRYPTO PROGRAM

Shortly after the DOL issued its crypto guidance, Fidelity announced that it expected to implement a bitcoin investment option that allows participants to invest up to 20% of their accounts in cryptocurrencies. Fidelity's decision is beyond the scope of the DOL's guidance because the DOL's regulatory authority only reaches fiduciaries that exercise direct control over retirement plans, not service providers like Fidelity that market products to them. Essentially, this pushes the decision whether to offer cryptocurrency to the plan sponsors and administrators who serve as plan fiduciaries.

Fidelity isn't the first company to give 401(k) participants access to cryptocurrency assets. Another industry provider, ForUsAll Inc., has linked workers with cryptocurrency exchanges through brokerage windows for several years. Fidelity takes a different approach with its Digital Asset Accounts product, which doesn't rely on outside exchanges or brokerage windows. Instead, Fidelity will hold onto the digital assets itself so that their value will reflect institutional grade securities.

THE FIRST LAWSUIT

On June 2, ForUsAll Inc. filed the first lawsuit to invalidate the DOL's crypto guidance on the grounds that it was issued in violation of the Administrative Procedure Act. This is the same statute that was used by the 5th U.S. Circuit Court of Appeals to invalidate the DOL's fiduciary rule.

The complaint also asks the court to enjoin the DOL from taking any enforcement action. The lawsuit highlights inconsistencies between previous positions of the DOL, and specifically regarding self-directed brokerage accounts. ForUsAll asserts

THE DOL CRYPTO GUIDANCE WARNS THAT THE DEPARTMENT EXPECTS TO CONDUCT AN INVESTIGATIVE PROGRAM ON PLANS THAT OFFER PARTICIPANTS CRYPTOCURRENCY PRODUCTS.

that investments in cryptocurrency could be an appropriate plan investment to allow participants to diversify their accounts. Prior to the DOL's recent guidance, ForUsAll had partnered with Coinbase Global Inc., the largest U.S. digital currency exchange platform, to offer an in-plan brokerage window that allows employee investors to transfer up to 5% of their account balance directly into more than 50 different cryptocurrencies.

The complaint mentions that the company met with the Labor Department as it designed the program to set guardrails that protect participants from market volatility. For example, the company includes institutional-grade crypto-investments only, a 5% cap on investments, a quiz to ensure investors know enough about trading and proactive monitoring, and alerts for participants and sponsors.

INDUSTRY GROUPS NOT HAPPY WITH THE DOL

Fidelity is not alone in pushing back on the DOL's crypto guidance. Other financial industry groups representing retirement plan sponsors and the U.S. Chamber of Commerce also want the DOL's guidance revoked because it effectively bans cryptocurrencies without the DOL undertaking a formal rulemaking process. According to an April 12 letter from 11 industry groups to DOL Acting Assistant Secretary, Ali Khawar, "We are not aware of any legal basis on which the Department can proceed down this path, and this would set a concerning precedent for future announcements by any Administration about what investments are permissible." These groups stressed that they weren't expressing an opinion on whether it's appropriate to use cryptocurrency in retirement accounts. According to the DOL, the notice-and-comment rulemaking can easily take a year or two, and as the letter itself notes, investment products tied to crypto are proliferating rapidly. Khawar responded that, "The idea that we should defer any measure of clarity for another couple of years doesn't seem like a very good one, for investors or anyone else." Several groups signing the letter include the American Council of Life Insurers, the Insured Retirement Institute, the Investment Company Institute, the Securities Industry and Financial Markets Association and the U.S. Chamber of Commerce.

WHERE DO PLAN FIDUCIARIES GO FROM HERE?

While the DOL did not ban retirement plans from investing in cryptocurrencies, forcing plans to exercise "extreme care" suggests a new standard for making investment decisions regarding digital currency. And if the DOL brings self-directed brokerage windows under audit scrutiny, this will herald a colossal change in how plan sponsors have historically treated those types of investment vehicles and greatly increase the potential for litigation.

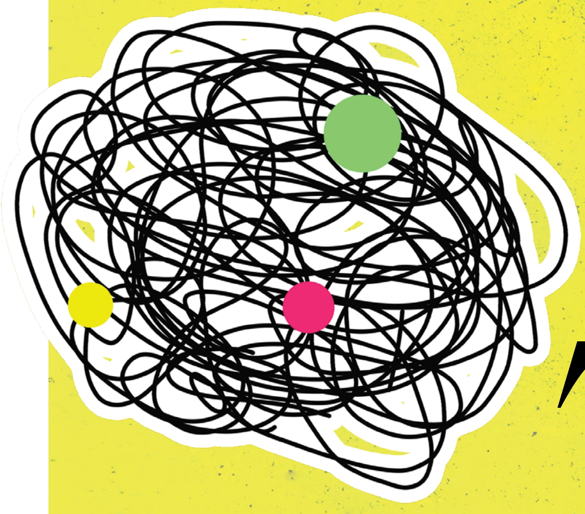
Plan sponsors are already concerned about litigation risk when selecting funds for their 401(k) plans. While participants may benefit from crypto or other digital asset exposure, the sponsor alone faces the legal risk arising from a charge of imprudence in selecting the "wrong" digital asset for their plan. It appears that the DOL's crypto guidance has thrown a blanket on this investment class at a time when it was gaining traction among investors seeking a pathway to offset high inflation and greater diversification.

The DOL's guidance targets not only cryptocurrencies but also other products whose value is tied to cryptocurrencies. It is unclear whether those other products would include funds that have any level of exposure to cryptocurrency or only exposure above some minimum threshold. The DOL's guidance also focuses specifically on 401(k) plan investments in cryptocurrencies and related products. Additional clarity is needed as to whether the guidance also applies to other investments such as IRAs or defined benefit plan investment funds.

At this time, cryptocurrencies do not comprise a significant amount of qualified plan investments. As investor interest in cryptocurrencies continues to grow, retirement plan fiduciaries must understand the fiduciary duties and responsibilities owed to plan participants and beneficiaries. Until there is additional guidance, plan fiduciaries should review their core fund lineups to determine whether any funds have exposure to cryptocurrencies and weigh the risks given the current regulatory environment. Of course, plan fiduciaries should continue to monitor market developments, additional regulatory guidance, and any pending litigation to determine whether cryptocurrencies are appropriate investments for retirement plans. PC

Volodymyr_Shtun / Shutterstock.com

Tackling the Tough Stuff



How do you communicate with clients about complex administrative topics? Here are some valuable tips in four key areas.

By Shannon Edwards & Justin Bonestroo


E = mc²
R = c/2
A
b
0
x = x²+√8³ / √1-(x/2)
c
b
c
√1+(a+b)

Have you ever had to explain to your child in grade school what compounding interest is and why they should begin saving early?

I had to once because my son was furious that his father and I were "taxing" his allowance and making him save a portion of his money for college. Believe me, that was not an easy conversation because he was already dead set against it, and it was hard for him to wrap his young mind around why he should be saving for something so far off in the future.

In retirement plan administration, we would argue that there are several topics that we must explain to our clients which are difficult for them to understand—and that at times they are dead set against doing. In this article, ASPPA President-Elect Justin Bonestroo and I discuss four of the most difficult topics to explain to a client so that they understand them, accept them, and administer them properly: eligibility, compensation, earned income and RMDs.

— Shannon Edwards

01. Eligibility

One of the statements we hear repeatedly from our clients is, "Our plan only covers full-time employees" or "He can't be eligible for the plan because he is not full-time." Therefore, the first topic we are going to tackle is—you guessed it—eligibility.

When we first meet with a client to take over their plan or to design a new plan, one of the very first topics we cover is eligibility. It is confusing because there are so many choices to

There are several topics which we must explain to our clients that are difficult for them to understand—and that at times they are dead set against doing.

— Shannon Edwards, TriStar

make. In addition to that, other employee benefits that they are more familiar with administering may allow them to distinguish between part-time and full-time or allow them to require more hours of service than the 401(k) plan. In addition to their unfamiliarity with the rules, they may be adamantly opposed to allowing employees they consider to be part-timers to participate in the plan.

On top of the full-time vs. part-time issue (which will become even more confusing once we have to address long-term, part-time employees in 2024), if the plan is using a year-of-service requirement for eligibility, it is likely that they have a year-of-service requirement for vesting as well. To add to the confusion, they may also have a year-of-service requirement for receiving an allocation of employer contributions.

The use of 1,000 hours to define a year of service and using that definition in three different parts of the plan that operate separately and independently of each other can lead to further confusion. For example, I had an hour-long call with a client last week. This client has been a client of ours for more than 20 years; the topic of eligibility is not new to them. However, when we coupled that with the fact that 1,000 hours is required for a year of service for vesting as well as eligibility and contribution allocations, it led to further confusion.

The situation arose because they had a participant quit in early January of this year. They were not happy with her and did not want her to be 40% vested in her profit sharing account. They refused to believe that she could have three years of service for vesting when she hadn't been employed for three full years.

As we talked through the situation, they continuously misused and confused the requirements for vesting and the requirements for eligibility and how both operate in the plan. They didn't confuse the year-of-service requirement for the allocation because they were very irritated that this employee had clearly waited to leave until January so that she would receive a profit sharing allocation for the year.

Luckily, this plan is a profit sharing-only plan with no 401(k) feature. Therefore, since we determine and confirm eligibility for them at the time we run the profit sharing allocation for the plan year, there is no one left out that should have been included. However, if they don't agree with our calculations, there is another lengthy conversation about eligibility.

The confusion over how to calculate eligibility and plan entry is further complicated in a 401(k) plan. This is caused by the fact that generally speaking, employers must track and monitor eligibility continuously and ensure that newly eligible participants are enrolled and offered the opportunity to defer. If errors are made, it can be costly for the employer to correct. That is why we take so much time and care to explain eligibility in depth to all our clients.

We use examples to illustrate how the requirements work and what the terms mean. For instance, if they use a one-year-of-service requirement for eligibility, we explain to them that it is 12 months and 1,000 hours of service during those 12 months. We go over how the calculation period shifts to the plan year in the second calculation period. We point out that the 12-month requirement starts on the original date of hire and is not required to be a continuous 12 months.

If they use less than a year of service, we explain in detail once again that a three-month waiting period is three months from the original date of hire, and there may or may not be an hours-worked requirement based on how the plan is written. We discuss temp-to-perm employees and how the service hours they work—even as a temp—count toward the service requirements in the plan. Finally, we address the dreaded rehires, both in determining initial eligibility and eligibility after their return to employment.

It is important to us that our clients understand exactly what their plan document says and requires. We use examples and illustrations to make it more easily understood. And most importantly, we work hard to build a trusting relationship with our clients so that they feel comfortable asking questions before errors occur. We would prefer that they reach out to us for help proactively rather than having to correct an error later.

— Shannon Edwards

> Consulting, education and instruction are not one-time-only events; these conversations are repeated over and over. Some sponsors may pick it up and get it right, but many forget—again and again.
>
> *— Justin Bonestroo, CBIZ*

02.
Compensation

We've all heard it—in fact, you've probably said it yourself: "Compensation is cited by IRS and DOL as one of the most common errors found under audit or submitted for correction." Yet, after years of hearing this statement, compensation remains at or near the top of that list. Proper definition of plan compensation is hard enough to understand for many professionals; how can a plan sponsor who doesn't spend their days immersed in qualified plan administration have any chance of getting it right?

Well, like anything else, success starts with awareness. A plan sponsor that fails to understand not only that their plan document defines what the plan should use as compensation, but also that using any other definition causes a real problem, is more likely to use the wrong compensation and less likely to ask questions when making changes.

For example, a business owner may decide that they want to cut costs, and might view their 401(k) plan as a good place to start. As an example, recently I worked with a new plan sponsor client who sponsored a 401(k) plan with a company match. At some point, they decided that they no longer wanted to include bonuses in their match calculation. In their case, it would have been possible to amend the plan to accommodate this change, but, unaware of the consequences, they decided to make changes in the payroll system to exclude bonuses without reflecting the change in the plan document. Unfortunately, they had excluded bonuses for several years before it was caught. When we took the plan over and found the error, the sponsor replied: "How come nobody told me about this before?"

It is not reasonable to expect that every plan sponsor is going to understand the differences between 415 compensation, testing compensation and plan compensation and all the many nuances related to what is included and what is excluded. However, it is reasonable to say that it is the job of any good TPA to impress upon their plan sponsor clients the complexity and importance of the topic.

Sponsoring a plan requires some level of education. That's not just an opinion, it's required by ERISA—they are in fact acting as a fiduciary, which requires the "care, skill, prudence, and diligence" that someone "familiar with such matters would use." In a plan administration world full of unknowns, a TPA is often best equipped to provide that education, or at least point out the need for it. In the end, it is up to them to ensure that they are administering their plan correctly and asking questions when necessary. Not all TPA business models include this education, but it is an opportunity to improve compliance.

There are a few key opportunities when this conversation can occur. First, when a plan is initially designed or an existing plan is taken over, a TPA should be in close contact with their new plan sponsor client. During the implementation of a new plan, several decisions must be made regarding the plan's provisions, including the definition of plan compensation. Similarly, in a takeover situation, it may be good practice to review the existing plan document with the plan sponsor to determine whether there are any changes that

Anton Vierietin / Shutterstock.com

can or should be made to best meet their current goals and to confirm they are following the terms already in place. This is a perfect time not only to provide them with options, but also to explain the importance of administering the plan to reflect the options they selected.

Once a plan is up and running, those provisions are actually put into use—often immediately—by the plan sponsor and the proverbial rubber meets the road as they set up payroll and begin withholding employee deferrals and possibly depositing employer matching contributions to the plan each payroll period.

In most cases, these deposits are not checked by the TPA until after the plan year has concluded. This leaves open the possibility of several deposits being made based on incorrect compensation before the mistake is caught. Making the plan sponsor aware that compensation is defined in a specific way or even spot-checking their input during the payroll setup process before they get started improves the chance of setting up payroll correctly for deposit purposes throughout the year. And once the year is over and census data is collected by the TPA to perform annual administration tasks, it is still a good practice to check their work.

After a plan year ends, it is time for the TPA to get to work wrapping up administration and reporting requirements. Usually, this includes gathering census information if it hasn't already been collected throughout the year. This is another opportunity to revisit the plan compensation topic.

Aside from making deferrals and matching contributions, compensation will also be used to determine highly compensated employees, key employees, 415 limits, profit sharing contributions, deduction limits and more. And it's possible that the definition used for some of these tasks differs from what was used for deferrals. Again, how can a plan sponsor be expected to realize these nuances? Therefore it is important to have specific instructions as part of the census collection process. It may not be reasonable to pick up the phone and walk every plan through the census collection process, but it is important to ensure that what is collected is sufficient to determine plan compensation, 415 compensation, and any other definition that may apply—and this may require additional instruction. Simply accepting one line item provided by your client leaves open the possibility for error and prevents the opportunity to confirm that the plan was operated correctly.

Consulting, education and instruction are not one-time-only events; these conversations are repeated over and over. Some sponsors may pick it up and get it right, but many forget—again and again. And even if they do remember, it's possible that someone else may become involved. Multiple payroll clerks, new HR staff, or new payroll providers may enter the equation, each of whom could unknowingly make a change that creates havoc. Depending on the size of the sponsor, there could be several people with the ability to modify payroll systems and enter payroll codes.

Forms of compensation available from the plan sponsor can also change as new benefits such as specific bonuses, stock options or awards, and other fringe benefits are created, each with its own payroll codes. Best practices would include a process that incorporates the plan, or that limits those who make these changes to individuals who consider the impact it may have on plan operation—in addition to a continuous education and confirmation process.

— Justin Bonestroo

> The RMD rules that apply upon the death of a participant have always been complicated, and are even more so after SECURE.
>
> *— Shannon Edwards, TriStar*

03. Earned Income

While we're on the topic of plan compensation, earned income can be another confusing topic. In cases where business owners receive their income in a source other than W-2 wages, plans are required to determine earned income based on adjustments made to net profits. S-corps need to know that K-1 isn't included.

While this may seem like a more straightforward area, there are still several mistakes that can easily be made (and easily avoided).

Entities reporting earned income from Schedule C or Schedule K-1 must convert net profit to earned income to determine plan compensation. In many cases, income is provided in draft form and won't be finalized until after contributions have been determined. Any changes to the income or expenses reported on the draft can cause earned income to change as well. Additionally, owner and staff contributions are an expense that factors into net profit. For partnerships, the staff contribution cost is reported on Form 1065 and the individual partner's contributions are reported on Schedule K-1. Sole proprietors report staff contributions on Schedule C, but report their portion of retirement contributions on Form 1040.

When calculating earned income based on draft filings, it is common to receive only a copy of the Schedule K-1 or Schedule C and not a copy of Form 1065 or Form 1040. For this reason, it is important to confirm, particularly for Form 1065 filers, whether the staff contribution cost (actual or estimated) has been taken into account in preparing the drafts. Without confirming, it can be easy to double-count staff contributions in performing earned income calculations, resulting in plan compensation that is lower than it should be.

In the end, the goal isn't necessarily to have your clients become experts in plan compensation, but rather to help them get set up properly in the beginning and make them aware that definitions are precise so they know to ask questions before making a change—and to be thorough in providing them with education, so that you can be sure you're equipped with the right information to keep them on track.

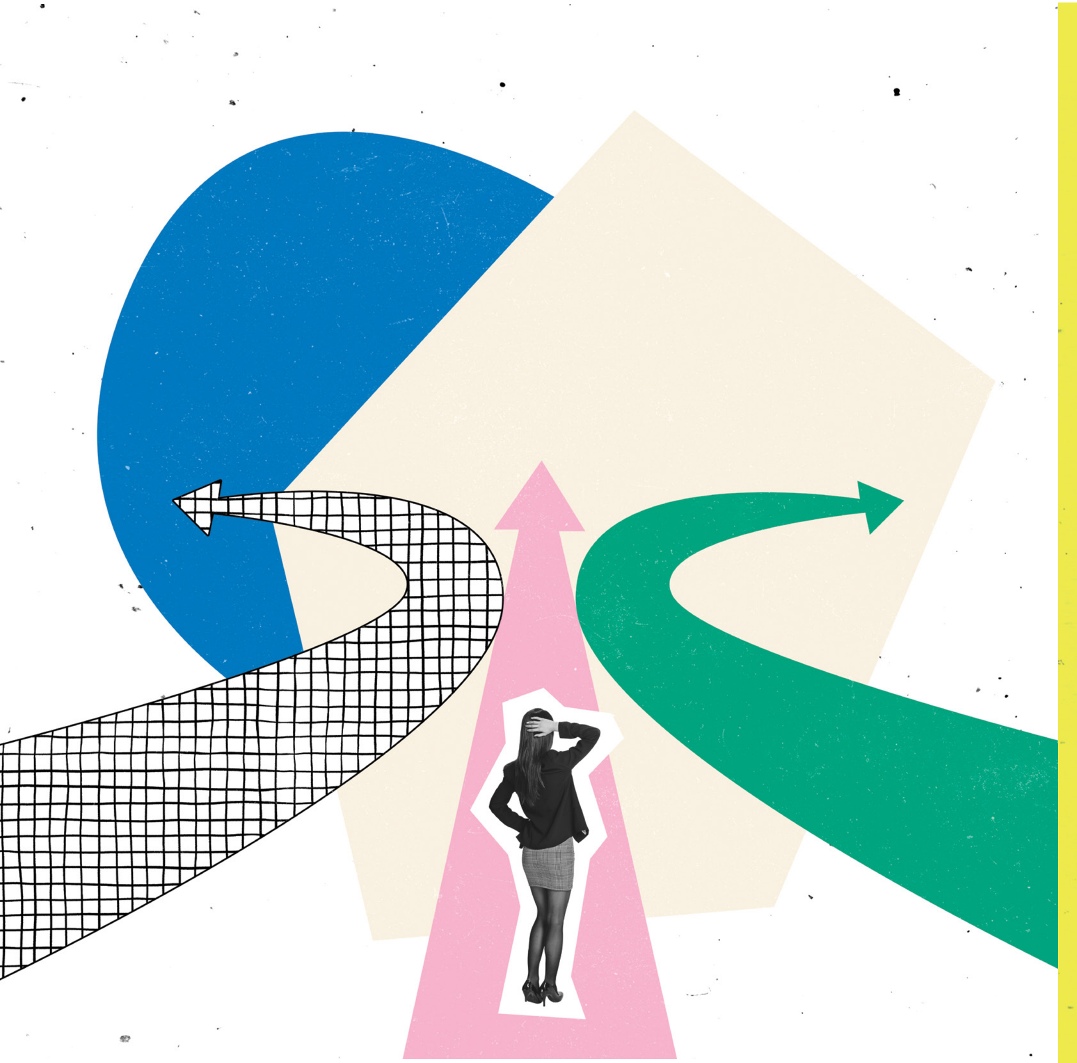
— Justin Bonestroo

04. RMDs

Now that we have offered the plan to the right people and used the correct definition of compensation to allocate the contributions, one of the more complex issues becomes who must take money out of the plan. This topic is very complex and can be confusing. Moreover, Required Minimum Distributions (RMDs) were made more confusing by the SECURE Act.

Prior to SECURE, terminated non-owner participants and more than 5% owners—whether still employed or not—had to take RMDs at the age of 70½. The rules for RMDs prior to the death of a participant were, and still are, straightforward. You determine the required beginning date based on the age of the participant, determine the distribution calendar year, and calculate the required distribution. SECURE simply increased the age for determining the required beginning date from 70½ to 72 for participants born after June 30, 1949.

The RMD rules that apply upon the death of a participant have always been complicated, and are even more



so after SECURE. The rules differ depending upon whether a participant dies before or after the participant's required beginning date (even if distributions may have begun before that date). Prior to SECURE, the beneficiary of a participant who died prior to his or her required beginning date could (subject to the terms of the plan) elect to receive distributions under the five-year rule or the life expectancy rule.

To use the life expectancy rule, the election had to be made by either the end of the year following the year of the participant's death, or if the beneficiary is the surviving spouse, by the time the participant would have reached age 70½ (which is now age 72). SECURE still permits these methods to be used for eligible designated beneficiaries (EDBs), which are defined below. However, under SECURE, if a DC plan participant plan dies after 2019 and the participant's designated beneficiaries are not EDBs, then the entire death benefit must be distributed no later than the end of the 10th calendar year following the calendar year of the participant's death (the 10-year rule).

SECURE did not change the requirement that the five-year rule applies to participants who have no designated beneficiary. If a participant dies after his or her required beginning date, then distributions must be made at least as rapidly as they were being made prior to the participant's death. However, at least as interpreted by the Treasury in proposed regulations, SECURE now also requires that if the participant's beneficiaries are non-EDBs, then the 10-year rule also applies.

A designated beneficiary must be an individual (i.e., not an estate or charity). In some cases the beneficiaries of a trust established by a participant may be considered designated beneficiaries (these are referred to as see-through trusts).

As noted above, SECURE added a new type of beneficiary: an eligible designated beneficiary (EDB). An EDB is a designated beneficiary who is one of the following:

- The participant's surviving spouse (including a former spouse named as an alternate payee under a qualified domestic relations order)
- A child of the participant who has not reached the age of majority (i.e., age 21)
- A disabled or chronically ill individual as defined in the Code and the proposed Treasury regulations
- An individual who is not more than 10 years younger than the participant

To further complicate matters, the determination of beneficiaries is made as of September 30 following the year of the participant's death. Therefore, some designated beneficiaries may be disregarded for purposes of the RMD rules if they are no longer beneficiaries as of the beneficiary determination date.

The rules for the calculation of the RMD amount changed based on who the designated beneficiary is on the beneficiary determination date, what type of beneficiary they are, when the participant died and whether RMDs had already begun.

These rules are so complex that we encourage our clients to contact us as soon as they are made aware of the death of a participant. We track all participants who reach their RMD age, and begin working with the client and the participant to ensure that the RMDs are calculated properly and taken on a timely basis. And we communicate continuously with our clients regarding rule changes such as SECURE and emphasize the importance of letting us know when participants who are not 5% owners terminate employment and would be required to take an RMD. PC

— Shannon Edwards (with thanks to Robert Richter for technical review)

PEPs: Lessons

Thapana_Studio / Shutterstock.com

Learned

In the last year and half, PEPs have emerged as a viable option for an employer to continue offering a 401(k) plan but dramatically reduce its fiduciary responsibility for that plan. What have we learned so far? By Suzanne E. Miscik & Lisa Showalter

The retirement plan landscape is changing and growing. The expansion of state mandated retirement savings programs and Pooled Employer Plans (PEPs), along with the heightened need for employers to provide meaningful benefits to recruit talent, is forcing employers to evaluate options when searching for the best solution to meet their corporate goals and objectives for growth and benefits.

For employers to make good fiduciary choices in today's environment, they must be educated about their level of fiduciary responsibilities when offering a retirement benefit. Knowing how each type of retirement plan affects its level of fiduciary responsibility allows an employer to have control over how to mitigate that responsibility and reduce the associated risk.

PEPs are a relatively new way to provide a retirement saving vehicle that can effectively mitigate fiduciary responsibility. A PEP aims to lower costs by creating economies of scale, by allowing unrelated businesses to band together under one retirement plan which is overseen by a professional plan sponsor called a Pooled Plan Provider (PPP).

The Setting Every Community Up for Retirement Enhancement (SECURE) Act is the legislation that created the PEP as a new type of multiple employer plan. This legislation was effective for Jan. 1, 2021. In the last year and half, PEPs are emerging as a viable option for employers to continue offering a 401(k) plan but dramatically reduce an employer's fiduciary responsibility for that plan. Depending on the PEP, an employer can still find the same flexibility with plan features and design as they would when sponsoring their own individual 401(k) plan.

It is suggested that more than half of current 401(k) participants will be covered by a PEP by 2030. Why? Utilization of a PEP provides many advantages for the adopting employer and their participants and beneficiaries. Advantages to the employer include ease of implementation and reduced day-to-day administrative work and plan costs. And participants and beneficiaries gain access to high-quality financial tools and resources for reduced fees.

Reduction of Fiduciary Liability

The PPP is responsible for registration, set-up, contracting

Thapana_Studio / Shutterstock.com

Thapana_Studio / Shutterstock.com

and ongoing monitoring of all service providers (i.e., recordkeeper, investment manager, auditor, compliance, etc.) to the PEP. By becoming an adopting employer in the PEP, the employer is no longer the plan sponsor or named plan fiduciary. The employer's fiduciary responsibilities as an adopting employer are generally reduced to the following duties (but not limited to this list):

1. Analyzing the different retirement options and choosing the best solution for their employees
2. Selecting a prudent advisor
3. Educating their employees/ participants and beneficiaries
4. Submitting contributions timely
5. Maintaining regular review of the plan

(Note, however, that each PEP may require an adopting employer to perform fiduciary duties beyond those listed above.)

In addition, the PPP will have hired a 3(38) investment manager to select and monitor the investment options inside the PEP. All adopting employers will utilize the same fund lineup. Either the PPP will provide the trustee, named fiduciary, compliance and 3(16) services, or the PPP will hire individual vendors to supply those services.

Ease of Implementation

The implementation process is less cumbersome for the employer than that of a single-employer plan because the PPP is responsible for the selection and contracting of all service providers. The employer is not researching and interviewing multiple providers. As the designated named fiduciary and plan administrator, the PPP will consult with the adopting employer to establish what plan provisions will apply to their employees and will provide all the plan documentation required. The PPP will coordinate with the various service providers to execute employee education and enrollment, including delivery of any required employee disclosures and notice. The PPP also assumes responsibility for the oversight of all administrative duties, including the functions of the adopting employer.

If an employer sponsors an existing 401(k) plan and chooses to join a PEP, the employer's existing plan is terminated. Regulations require the employer to take certain actions to properly terminate this 401(k) plan, including filing a final Form 5500 and 8955. This step can often be overlooked by the employer, since it requires the employer to actively work with their prior service providers for at least a year after the assets have moved into the PEP. Employers are often confused about this step since the activities of moving into a PEP may feel the same as if they are simply transferring their plan to a new set of service providers. Providing the employer with a clear guideline of actions required is critical for an employer to understand its role in joining a PEP.

Regulations also prohibit the assets of the 401(k) plan from being distributed to participants when a subsequent 401(k) plan is offered by the same employer. A PEP is considered a subsequent 401(k) plan. Therefore, assets of the prior plan are transferred into the PEP. This provides continuity for participants and beneficiaries.

Reduced Administrative Costs

Any time 401(k) plan costs or fees are being analyzed, the key is to know the services being delivered for all the various components that apply. PEPs deliver the highest level of fiduciary mitigation for the employer. Oftentimes, an employer's existing 401(k) plan does not include the same depth of administrative and fiduciary oversight services as the PEP that is being considered. This can create confusion when comparing costs or determining where there are cost savings experienced when moving into a PEP, since there are many soft-dollar costs that need to be taken into consideration. These include the human capital cost to administer the audit annually, distribution of notices and enrollment materials, etc.

Employers adopting a PEP are typically relieved of involvement in reviewing and approving distribution and loan transactions and monitoring eligibility and enrollment of employees. When the employer's payroll processor can connect seamlessly with the PEP, the employer can be relieved of the tasks of monitoring and implementing participant 401(k) salary reduction changes. Historically, all of these activities have been the responsibility of the employer's Human Resource staff. That staff can be freed up to focus on other important responsibilities.

More than ever before, working with a plan consultant that is experienced in workplace retirement plans to evaluate the costs and benefits of adopting a PEP, a single-employer plan or a state mandated plan will result in more reliable comparisons of the costs and a clearer understanding of the employer's retained fiduciary duties.

Economies of Scale

By pooling the assets of multiple plans into a PEP, adopting employers gain access to more competitively priced investment vehicles than could have been accessed as separate single-employer plan. As assets grow in the PEP, both organically and by adding the assets of additional adopting employers, the buying power of a PEP increases much faster than in separate plans. This leads to adopting employers being able to lower the cost of administration, recordkeeping, investment management and annual auditing—both initially upon adoption of the PEP and as the PEP continues to grow.

Flexibility of Plan Design

Generally, adopting employers can choose from the plan features offered by the PEP to design a program that meets their unique goals and objectives. Employers can select the best eligibility requirements that fit their workforce. They can continue to have discretion over how employer contributions are credited to participants year by year and what vesting schedule is applied. Employers may also be permitted to control whether loans or other types of in-service distributions are offered.

However, employers should understand that some PEPs may be more restrictive than others depending on recordkeeping or administrative constraints. Some features such as definition of compensation used for benefit purposes or the flexibility in offering loans, distributions and in-service distributions may be limited. It is important for an adopting employer to understand whether the terms of the PEP are customizable, if needed.

Lessons Learned in 2022

The Employer's Role

PEPs have only been part of the spectrum of workplace retirement plan offerings since the beginning of 2021. Most PEPs became effective in 2022. As we near the end of 2022, at least 120 different PEPs have registered with the Department of Labor.

Thapana_Studio / Shutterstock.com

As assets grow in the PEP, both organically and by adding the assets of additional adopting employers, the buying power of a PEP increases much faster than in separate plans.

While PEPs can greatly reduce an employer's time and administrative burden in the day-to-day management of its retirement plan, each PEP may require different levels of employer involvement. Employers may need to remain involved in validating a participant work status when a distribution or loan is being processed. Employers which do not use payroll vendors that can connect seamlessly to the PEP's recordkeeping platform may still have the task of remitting participant contributions and loan repayments on a timely basis, as well as capturing and implementing participant contribution rate changes into their payroll system. And employers may be required to deliver participant annual notices or enrollment kits. While many employers wish to reduce their administrative activities to simply managing payroll deductions and remittance, this may not be realistic based on the abilities of the recordkeeper or the services offered under the PEP.

Designing the PEP's overall service model takes a close collaboration among the PPP, the recordkeeper, the TPA and the 3(16) service providers. Each one brings unique skills to the PEP, but there are also service areas that can overlap. For the PEP to successfully deliver services to the employer, it is critical that all parties eliminate any duplication of duties and clearly define the roles and responsibilities of each service provider to the PEP.

Not all PEPs are built the same way. Recordkeeper systems and processes need to recognize that the plan sponsor of the PEP is the PPP and not the adopting employer. Adding a separate role for the PPP is similar to, but not the same as, recognizing a separate 3(16) plan administrator. The PPP is the party required to sign initial contracts to engage the recordkeeper, the 3(38) fiduciary, and the 401(k) plan auditor. The PPP is the party responsible for signing legal plan documents, including trust agreements and the plan documents. The employer is signing only as an adopting employer or participating employer of the PEP. As discussed above, this structure is what removes or reduces the fiduciary duties of the employer.

Confusing a 'Group of Plans' with a PEP

A "Group of Plans" is not the same as a PEP. The marketplace has many retirement plan service offerings that are built to have the same feel to the employer as a PEP, but are not true PEPs. A Group of Plans may offer a single pricing package, a single investment manager or 3(38) fiduciary and other standard package of service providers similar to a PEP, but the key difference is that the adopting employer remains the plan sponsor responsible for signing all service contracts and legal plan documents, selecting and monitoring investments and plan fees, and reviewing and approving certain distribution and loan activities. Careful review of this type of group retirement plan offering with a PEP is needed to determine which options fits the employer's needs.

Conclusion

It is not clear whether the number of PEPs available to employers will continue to grow or if only a certain percentage of PEPs in the marketplace today will be able to maintain the economies of scale required to stay competitively priced and sufficiently flexible to attract and retain adopting employers.

Regardless of how successful one individual PEP may be, PEPs are here to stay as a choice in offering workplace retirement plans. PEP service providers will continue to develop more streamlined processes and workflows as technology evolves beyond that used today to service single-employer plans.

The maturation of PEPs will no doubt serve to enhance the entire landscape of employer-sponsored retirement plans, regardless of whether a single-employer plan, a Group of Plans or a PEP is utilized. And employers will continue to find dedicated service providers and partners that are focused on helping employees achieve a financially secure retirement. PC

Tithi Luadthong / Shutterstock.com

KEEPING THE WOLVES AWAY

Here are some helpful tips on cybersecurity to share with your staff. **By Theresa Conti**

Cybersecurity is a *big* issue for all of us, not only in our business lives but also in our personal lives. It is truly one of those topics that keeps me up at night! It is such a big issue that in April 2021, the DOL published cybersecurity guidance for plan sponsors, plan fiduciaries, recordkeepers and plan participants. The guidance addressed three topic areas: tips for hiring a service provider, cybersecurity best practices, and online security tips.

This article looks at some of the biggest things that we should emphasize to our staff to ensure that we protect the precious and sensitive data that we have. The first and biggest risk we face is really the internet itself. Since we are continually connected with *many* devices, that creates a lot of places where data can be accessed. In addition, we are all continually accessing the internet and have constant connections, creating many areas for criminals to target.

Criminals are using hacking techniques to get login credentials. Then they use other information that is accessible on social media to help authenticate themselves when it comes to certain transactions (such as loans or distributions). People give up information readily on these types of social media platforms.

Especially in today's post-COVID world, criminals have become much sneakier and fraud is more prevalent.

"WHEN IT COMES TO PLAN SPONSORS, FIDUCIARIES, RECORDKEEPERS, PARTICIPANTS, FINANCIAL ADVISORS AND TPAS, WE NEED TO WORK TOGETHER AND HELP EACH OTHER."

If many of your staff now work remotely a significant amount of the time, make sure your they have the proper security in place at their homes. All routers allow the user to create a secure password for access; all staff should be required to have that in place. In addition, there was a significant increase in threats during the pandemic and criminals found new schemes. They use such things as malware, phishing messages/emails, and fake website links.

Phishing is used to trick the email recipient into revealing information that can then be used to access accounts or commit other types of fraud. The victim gets an email that appears to be from someone they know (e.g., a financial institution or trusted party). The email will have a malicious link that directs the victim to a fake site which then requests login or other personal information. The criminals then use this to access real accounts and access the victim's information. According to the federal government, this is still the No. 1 form of internet fraud, even though it is the most recognizable.

Email account compromise can take several forms. Criminals gain access to an email account and use existing or new email threads to request funds or change real transactions. There have been cases of an employee of a company receiving an email from a company executive to send money somewhere. The employee carries out the instructions without verifying the sender, and the money is sent to an account that the criminal controls. According to the FBI, this is still the No. 1 email scheme… because what employee isn't going to take direction from an executive?

There are many other things that criminals can find out from emails if they are able to hack into them. These include all kinds of personal information, such as travel plans, photos, passwords, paystubs, tax forms, signatures, and all kinds of account information. That is why it is so important to send this type of information using a secure portal or other method allowing secure upload.

We also continue to see clients' email accounts being compromised. As service providers, we need to be careful about taking instruction from a client by email—it might sound like a client, but if it seems fishy there is no harm in questioning it. In fact, we sometimes get clients questioning us about items we are sending to make sure they are "real."

One thing that has become apparent is that if you are checking on an email, don't reply to that email. You probably want to call instead, because often the scammers are monitoring the email and have full control of it and may respond as the client.

In fact, many recordkeepers and trust companies significantly reduced using wire or ACH transfers in the past few years to try to derail criminals from accessing retirement plan funds. Most recordkeepers now make a participant "jump through hoops" to get distribution or loan funds sent via wire or ACH, and now mostly use checks.

Since that change was made, however, it now seems that most fraud is focused on checks. Check fraud can occur in many forms, but mostly it's a distribution request that has a different address, or the criminal is taking the checks out of the participant's mailbox and washing them to gain access to the retirement plan accounts. With check fraud, unfortunately, it is difficult to recover the assets—only about 2% are recovered.

So, what can we do to help prevent these types of cybersecurity issues? We can use password managers, antivirus protection and two-factor authentication, along with secure upload/portals to share data and other confidential information. Password managers are fairly easy to implement and use as part of your business model, and there are many out there to choose from. Work with your cloud-based provider or IT staff to use the one that is most appropriate for your team.

Most importantly, as service providers we should have cybersecurity insurance. Make sure to thoroughly review what is included in the policy, including what things are covered. In addition, make sure that you are also aware of things you need to do as the insured. For example, I know that our policy requires employee cybersecurity training as part of the coverage. You often hear about companies that have had breaches and the criminals sit out there for years before they use the information for other purposes or sell it on the dark web.

And if you have a breach or some sort of fraud, make sure you report it immediately—not only to your cybersecurity insurer but also to local police and/or the FBI. Your report may help stop the criminal from doing it to someone else.

Lastly, everyone needs to be aware of the dangers and work as partners. When it comes to plan sponsors, fiduciaries, recordkeepers, participants, financial advisors and TPAs, we need to work together and help each other. If something happens to me, knowing about the details could prevent the same thing from happening to you! PC

nitsawan katerattanakul / Shutterstock.com

BUILDING YOUR TECH ECOSYSTEM

Here are 5 tips for creating a technology ecosystem that can turbocharge your TPA business. **By Petros Koumantaros**

During my teenage years in the late 1990s, I worked summers at my parents' TPA firm. In those days we received duplicate financial statements for client accounts—thousands of them. The crates of mail arrived monthly like clockwork.

One of my jobs was to open the mail, remove the financial statements, highlight key information, and file the statements for plan administrators and trust accountants. The statements were later reconciled during each plan's annual administration. Twenty-five years later, my teenage job became irrelevant, disrupted by technology.

Over the years, retirement plan professionals embraced technology and reengineered legacy business processes. However, today it is not enough only to have good technology. Rather, elite firms have the right mix of technologies working together—a technology ecosystem operating throughout the functional areas of the organization.

Most retirement plan consulting firms operate through four functional areas. First, every business must find a customer (marketing). Second, every business must sell something to a customer (sales). Retirement plan consulting firms typically sell recurring services. The general and administrative functions of running the business tie everything together. The chart below summarizes these functional areas.

Larger firms may have more functional areas and subfunctions, while smaller firms may have fewer. Good technology ecosystems streamline each functional area's operations and share relevant data among disparate systems used within other functional areas.

Put simply, good technology ecosystems facilitate growth and operational excellence. Poor technology choices are costly and hinder growth. So, what is right? How do retirement plan professionals make prudent technology decisions?

BEST PRACTICE #1: USE IT OR YOU CAN'T DO IT

How many CRM deployments failed because salespeople would not update their leads or opportunities? How many client onboarding systems failed because implementation specialists or clients found them too complicated? How many workflow management systems failed because plan administrators refused to migrate from spreadsheets?

Management relies upon data from these systems to make informed business decisions. Accordingly, end user adoption of the systems is paramount for success. One method to facilitate end user adoption is to make technology use a necessary condition of the work. As an example, if only the CRM generates service proposals, then a sales professional must use the CRM as a condition of the job. If the service proposal relies upon data from the CRM's opportunity record, then the sales professional must complete the opportunity record to generate the service proposal.

Bottom line: Use the system or you cannot do your work. There are no alternatives.

BEST PRACTICE #2: A TAIL DOES NOT WAG THE DOG

A business determines its technology roadmap—not the other way around. The technology ecosystem should flex and scale with the business. As an example, a TPA practice with five A-to-Z plan administrators has vastly dissimilar needs than a multi-location functionalized TPA with dozens of employees.

Business leaders should ask themselves: How big do we want the company to get? What percentage of our workforce will work remotely in the future? What role should

1 MARKETING

- Email Marketing
- Exhibits and Events
- Podcasts or Video
- Social Media
- Website

2 SALES

- Pipeline Management
- Proposals and RFP Responses
- Startup Plan Design

3 SERVICE

- Call Center / Participant Services
- Client Onboarding & Takeovers
- Government Reporting
- Plan Administration and Compliance
- Plan Consulting
- Plan Documentation
- Plan Operations and Platform Management
- Plan Terminations

4 GENERAL & ADMINISTRATIVE

- Accounting and Billing
- Analytics and Business Intelligence
- Governance and Legal
- Information Technology
- Payroll
- Recruiting and Staffing
- Training and Development

technology have in each functional area, through each stage of business growth? What technologies can flex as we scale? What technologies may we need to replace?

Business objectives should guide all technology decisions.

BEST PRACTICE #3: DON'T USE DOG SH*T FOR FROSTING

External-facing apps are an extension of the firm to its clients. Accordingly, external-facing apps can have greater monetary impact than internal use technology. Tragically, too many business leaders focus solely on function, dismissing the presentation and user experience. Steve Jobs once famously remarked, "You've baked a really lovely cake, but then you've used dog sh*t for frosting." I would not buy that cake. Who would?

Make no mistake, how you package and present an app matters just as much as how the app functions. Ask yourself, does the app represent your brand effectively? Is using the app a pleasurable user experience from start to finish? How can we enhance the user experience?

Smaller firms often shy away from app development because of perceived costs. However, you do not necessarily need software engineers on payroll to build external-facing apps. App developers are widely available on a contract basis. Alternatively, you can license good client-facing tech and package your brand around it.

Need a client data collection app? What about an app that integrates with your invoicing system so clients can pay their bills online? Do you waste time managing external appointments? Consider Microsoft Bookings, an Office 365 app, which enables people to schedule meetings that synchronize with Outlook Calendars.

Regardless of whether you make it or buy it, never forget about how you package it.

BEST PRACTICE #4: ENTER DATA ONCE AND ONLY ONCE

Another job from my teenage years was to key transactions from financial statements into spreadsheets. We referred to this job as "spreading the assets." It was part of the trust reconciliation process. Today, plan administrators can download financial data from recordkeeping platforms and financial institutions.

Eliminating duplicate data entry improves quality and saves time. However, duplicate data entry still occurs. For example, does your CRM push data to downstream apps, or must other people re-enter identical data in disparate systems (e.g., accounting/billing, administration, workflow management, etc.)?

Ideally, people should enter data once and only once. Apps dependent on the data should draw from the record of origin. When a person modifies data, the modified record should propagate seamlessly to the systems dependent upon it. A robust technology ecosystem manages the exchange of dependent data among disparate systems.

BEST PRACTICE #5: BUILD THE HOUSE ONE BRICK AT A TIME

Developing a good technology ecosystem is a process of continuous improvement, working in tandem with ongoing business operations. The table below lists foundational questions to answer as a starting point. These questions evolve as a business refines its technology ecosystem.

You build a technology ecosystem just as you would a house: one brick at a time. Finally, just like a house, you can always improve a technology ecosystem. PC

Foundational questions	Evolving questions
Who are our firm's clients?	Who do we want as our firm's clients?
What tools and capabilities do we provide to our clients?	What tools and capabilities should we provide to our clients?
How good are we at supporting our consultants and plan administrators?	How can we better support our consultants and plan administrators?
What support do we offer to our consultants and plan administrators?	What support should we offer to our consultants and plan administrators?
What are our data analytics gaps?	What stories do the data analytics tell us about our business?
What do we want to know about our business?	How do we apply what we have learned?

ASPPA

American Society of
Pension Professionals
& Actuaries

Are You on Track with CE Credits?

2021–2022 CE Cycle Ends Dec. 31

A NEW LINE OF ATTACK ON PLAN FIDUCIARIES

In a new twist in 401(k) fee litigation, a law firm has filed a series of lawsuits targeting the use of BlackRock TDFs, alleging that the plans improperly pursued a low-fee strategy. **By Michael P. Barry**

Recently, participants and former participants in some of the largest 401(k) plans in the country have sued plan fiduciaries claiming that the use of one of the largest target date funds, the BlackRock LifePath Funds, was imprudent, because those funds "underperformed" alleged "comparators."

These sorts of fiduciary imprudence/TDF underperformance claims have emerged as a second major line of attack (after the attack on fund and recordkeeping fees that began in the early 2000s) by plaintiffs' lawyers on 401(k) plan fiduciaries.

These lawsuits, in which plaintiffs are all represented by the same law firm, include claims against the plans of Black & Decker, Cisco Systems, Citigroup, Marsh & McLennan and Microsoft. The complaints are very similar (and in large parts identical) and generally focus on the imprudence of investing in the BlackRock TDF. In this article, we are going to focus on the complaint against Marsh & McLennan, filed Aug. 4, 2022.

MARSH & MCLENNAN COMPLAINT

Marsh & McLennan maintains a 401(k) plan for its employees. As of Dec. 31, 2020, the plan had around 32,200 participants and $5.92 billion in assets. As in the other cases, Marsh & McLennan's plan includes in its fund menu, as the default investment TDF, the BlackRock LifePath Index Funds. As of Dec. 31, 2020, about 17% of plan assets were invested in the BlackRock TDFs.

In their complaint against Marsh & McLennan and the plan's fiduciaries, the plaintiffs begin with some sweeping allegations:

> "The BlackRock TDFs are significantly worse performing than many of the mutual fund alternatives offered by TDF providers and, throughout the Class Period, could not have supported an expectation by prudent fiduciaries that their retention in the Plan was justifiable.
>
> "A simple weighing of the merits and features of all other available TDFs at the beginning of the Class Period would have raised significant concerns for prudent fiduciaries and indicated that the BlackRock TDFs were not a suitable and prudent option for the Plan. In addition, any objective evaluation of the BlackRock TDFs would have resulted in the selection of a more consistent, better performing, and more appropriate TDF suite. *Instead, as is currently in vogue, Defendants appear to have chased the low fees charged by the BlackRock TDFs without any consideration of their ability to generate return.* Had Defendants carried out their responsibilities in a single-minded manner with an eye focused solely on the interests of the participants, they would have come to this conclusion and acted upon it." *(Emphasis added.)*

As a factual basis for these claims, the plaintiffs only cite the general underperformance of the BlackRock funds versus the market's other large providers.

In this regard, the complaint begins by identifying what plaintiffs believe is the correct set of comparators. The following table in the complaint lists the market share for BlackRock and the plaintiffs' "comparator" funds.

MARKET SHARE OF BLACKROCK AND TDF COMPARATORS

Fund	Market Share
Vanguard Target Retirement	**36.4%**
T. Rowe Price Retirement	**10.7%**
BlackRock LifePath Index	**8.8%**
American Funds Target Date Retirement	7.6%
Fidelity Freedom	**6.8%**
Fidelity Freedom Index	**4.6%**

John Hanson Pye / Shutterstock.com

The complaint then provides 15 pages of tables comparing the performance of the BlackRock TDF (and different age target allocations within each suite of funds) with these comparator funds for various periods (e.g., 3- and 5-year returns). This data shows that (generally and with exceptions) the BlackRock TDF did underperform these comparators.

TO VS. THROUGH

As we have discussed, comparing target date fund performance is particularly difficult and problematic because of the multitude of variables that may affect it. Differing glidepaths. Differing asset allocation strategies. And differing asset classes. Choices with respect to which, while rational and prudent by themselves, may result in "underperformance" vs. an alleged "comparator" (with a different glidepath, asset allocation strategy, and different asset classes).

This problem is particularly acute with respect to BlackRock's TDF, because it uses a "to" glidepath, while all the comparator funds use a "through" glidepath.

Plaintiffs provide the following description of this distinction:

> "TDF glidepaths are managed either 'to' or 'through' retirement. A 'to retirement' glidepath generally assumes participants will withdraw their funds once they reach the presumed retirement age, or soon thereafter. The asset allocation of a 'to retirement' TDF remains static once the retirement date is reached. A 'through retirement' glidepath expects participants will remain invested after reaching retirement and gradually draw down on their funds. Accordingly, the terminal allocation of a 'through' TDF is not reached until a predetermined number of years after the target date."

While none of these complaints goes so far as to claim that "to" glidepaths are inherently imprudent, plaintiffs lean into criticism of them:

> "TDFs designed to take investors to retirement typically de-risk faster than their 'through' peers, and while this may offer greater potential protection against downside risk, it leaves investors exposed to the potentially destructive, lasting consequences of running out of money in retirement. As retirees trend toward keeping

"THE SUSTAINED BULL MARKET IN U.S. EQUITIES HAS MADE ONE SORT OF FUND/ASSET ALLOCATION STRATEGY LOOK "GOOD" AND MADE OTHERS LOOK "BAD." DIFFERENT MARKET CONDITIONS MAY REVERSE THAT OUTCOME."

> savings in their retirement plans post-retirement, 'through' glidepaths have been more widely utilized. Indeed, of the 28 TDF suites launched in the past decade which remain active, nearly 80% adopt a 'through' approach."

One might expect, since a "to" glidepath is generally understood to be more conservative, in a long-run bull market it would underperform a "through" glidepath. And that fact, rather than imprudence, might better explain the alleged underperformance against an entirely "through" comparator group.

Plaintiffs try to anticipate and counter this obvious criticism of their logic by arguing (contra the above criticism of "through" glidepaths generally) that the BlackRock glidepath is in many cases—if you take "equities" as standing for risky and "bonds" as standing for "conservative"—riskier than the glidepaths of the comparator funds. While still underperforming those other funds. One would want to see more specifics on this before believing this claim.

CAN THESE CASES SURVIVE A MOTION TO DISMISS?

Obviously, anything can happen. In *Pizarro v. The Home Depot*, a U.S. District Court for the Northern District of Georgia denied a motion to dismiss on pretty similar facts.

However, it could be argued that investment in a fund with $290 billion in assets ought to be assumed to be prudent—unless you can prove that all those other investors are also imprudent. Which sort of calls into question your concept of prudence.

Also, courts—even those favoring plaintiffs—do not seem to be prepared to allow an imprudence-based-on-underperformance claim to proceed simply on the basis of a retrospective demonstration of "comparative" underperformance. They usually require a showing of some other "red flags."

In this regard, in *Smith v. CommonSpirit Health*, et al. (June 2022), the Sixth Circuit, in upholding the dismissal of plaintiffs' underperformance claim, stated:

> "Nor does a showing of imprudence come down to simply pointing to a fund with better performance ... [T]hese claims require evidence that an investment was imprudent from the moment the administrator selected it, that the investment became imprudent over time, or that the investment was otherwise clearly unsuitable for the goals of the fund based on ongoing performance."

Finally, *CommonSpirit* is also instructive on the issue of comparisons, emphasizing that it is inappropriate to compare funds with "distinct objectives." One would think that a "to" TDF has a pretty obviously distinct objective from a "through" TDF.

NO SAFE PLACE

To repeat what we have now said several times with respect to these lawsuits: This is an evolving area of the law. This litigation is not going away anytime soon. Different courts are reaching different results.

In this context, the situation of a plan's sponsor and its fiduciaries is difficult. They will want to consult with counsel and consider whether there are any actions they can take that will reduce risk.

The sustained bull market in U.S. equities has made one sort of fund/asset allocation strategy look "good" and made others look "bad." Different market conditions may reverse that outcome.

In other words, these are markets, the future is uncertain, and—where sponsor fiduciaries can be sued for (often marginal) fund underperformance—there is no safe place.

Note the language the complaint uses as justification for these lawsuits: "Instead, as is currently in vogue, Defendants appear to have chased the low fees charged by the BlackRock TDFs without any consideration of their ability to generate return." In these cases the defendants are being sued for pursuing a low-fee strategy—a strategy that some have thought would protect them against fiduciary litigation. PC


QKA®
QUALIFIED 401(k)
ADMINISTRATOR
Bring **state-of-the-art training** to your team.
ASPPA
asppaqka.org

TELL YOUR WHY STORY

Here's how to craft and use the story that will grow your business. **By Deirdre Van Nest**

As a TPA, you might have asked yourself these questions:

- How do I compete against larger firms that don't charge as much as I do?
- How can I stand out from the crowd and not be viewed as a commodity?
- How do I quickly build relationships with advisors *and* plan sponsors across all communication platforms?

Gone are the days when people wanted to work with a faceless business. Today, people demand authenticity and an emotional connection. They want to work with people they relate to and trust to have their best interests at heart.

This is great news! Here's why: Many of your competitors are about transactions. But you are about relationships—authenticity and emotional connection are where you thrive.

But creating that trust quickly can be challenging. That's where your personal brand "WHY Story" comes in. When people first experience you, *nothing* can convey how much you truly care about your clients like your WHY Story will.

When you know how to how to package and share your WHY Story, you'll be able to increase trust, connection and likeability in three minutes or less. I know that's an outrageous claim, but I've been teaching financial professionals storytelling and public speaking skills for over a decade, and I've never come across a communication tool this powerful. In fact, when told right and leveraged correctly, your WHY Story literally becomes an extension of your business development team. It's one of your most powerful business assets.

Here's what I mean: On Jan. 11, 2017, I shared my WHY Story for the first time in a keynote speech to a group of advisors. The results blew my mind.

As I shared, I could *feel* the energy in the room shifting. When my story was over, an advisor raised his hand and said, "I will believe anything you say right now!" That's what you want too, right?

As you can imagine, it changed everything. I started sharing my story everywhere I went. By the end of 2018, our sales had increased more than 60% due to this one tweak. Not only that, but I was having *fun*. For the first time in my life, I was bringing the full *me* to my work.

This experience left me with a powerful "aha!" moment: When you *stop proving* yourself and *start being* yourself… magic happens!

The bottom line: Advisors and financial services organizations regularly hire me *because* of my story. And when you share your WHY Story, they'll hire you too. On the flip side, if you're not sharing it in a compelling and

Cafe Racer / Shutterstock.com


WHY..

"WHEN TOLD RIGHT AND LEVERAGED CORRECTLY, YOUR **WHY** STORY LITERALLY BECOMES AN EXTENSION OF YOUR BUSINESS DEVELOPMENT TEAM. IT'S ONE OF YOUR MOST POWERFUL BUSINESS ASSETS."

meaningful way (without oversharing), you're limiting your influence.

WHAT IS A PERSONAL BRAND WHY STORY?

To truly be an asset to your business, your WHY Story must:

- convey *why* you do what you do;
- convey *why* you care about helping your ideal clients; and
- show your humanity and make you relatable.

It's a story unique to you, your life and your business. Because it humanizes you and makes you relatable, it enables you to increase trust, connection and likeability in three minutes or less.

WHAT YOUR PERSONAL BRAND WHY STORY IS *NOT*

It's equally important for you to understand what a WHY Story is *not*. People often mistake a WHY Story for a *bio* story. They're not the same. Your WHY Story is *not* a story to:

- make you look smart;
- show how great you are; or
- trace your whole professional journey.

This means that you don't share a laundry list of your credentials, accolades and experiences, or get into all the details of your life. A bio story that focuses on your credentials is a story you want to have in your toolkit, but it will *never* yield the same powerful trust-building results that your WHY Story will. So many professionals confuse being *credentialed* with being *trustworthy*; they're not the same.

WHY IS SHARING YOUR PERSONAL BRAND WHY STORY SO POWERFUL?

As the adage says, "People don't care how much you know until they know how much you care." It's true. When you get personal and are relatable in a way that's appropriate for business, people respond.

Now, if you're a Boomer or a Gen Xer like me, this may be hard to wrap your head around. After all, we were taught that your professional life and personal life should never intersect. Thankfully, that way of thinking is outdated, because this is exactly how to become the TPA of choice, no matter *who* or *what* you're up against.

Research shows 74% of Americans are more likely to trust someone who has an established personal brand, and 66% of consumers are willing to switch from a known brand to an unknown, purpose-driven brand *(Source: "Trends in Personal Branding," Brand Builders Group, June 2021)*. Why are those statistics important to you? Because you can start to establish your personal brand and convey your purpose through your WHY Story. So please, start sharing your story!

BUT WHERE DO I SHARE IT?

Your WHY Story should be the cornerstone of all your marketing and recruiting activities. Here's a list of places to share your story:

- One-on-one meetings
- Educational presentations
- On video
- On your website
- Books, articles, blogs
- Across all social media platforms
- With your internal team (your WHY Story is a powerful way to attract and retain top talent)

I know this can be overwhelming, so I'm happy to help. If you want to receive a free copy of our "Put your Story to Work" Playbook, email us at connect@crazygoodtalks.com and enter "TPA Guide" in the subject line. This is the same guide we create for our private clients, teaching them *exactly* how and where to share their story.

Remember, what you *offer* may be viewed by some as a commodity, but *you* are not a commodity. Your WHY story is your differentiator more than anything else you offer.

Don't want to compete on price? Share your WHY Story. Don't want to be seen as a commodity? Want people to trust you, like you, and feel connected to you in three minutes or less? Share your WHY Story! When you do, you'll build your business faster and make a bigger impact on the lives of others—and that, my friend, is Crazy Good! PC

ASPPA RETIREMENT PLAN SERVICE PROVIDER

ASSESSMENTS PERFORMED BY CEFEX, CENTRE FOR FIDUCIARY EXCELLENCE, A DIVISION OF BROADRIDGE FI360 SOLUTIONS

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

ADMIN SUPPORT GROUP
Barreal de Heredia, Costa Rica

ALLIANT EMPLOYEE BENEFITS
New York, NY
alliant.com

ALTIGRO PENSION SEVICES, INC.
Fairfield, NJ
altigro.com

APS PENSION
Melville, NY
apspension.com

ASC TRUST
Hagatna, Guam
asctrust.com

ASPIRE FINANCIAL SERVICES, LLC
Tampa, FL
aspireonline.com

ASSOCIATED BENEFIT PLANNERS, LTD.
King of Prussia, PA
abp-ltd.com

ASSOCIATED PENSION CONSULTANTS, INC.
Plainview, NY
associatedpension.com

ATLANTIC PENSION SERVICES, INC.
Kennett Square, PA
atlanticpensionservices.com

BEACON BENEFITS, INC.
Danvers, MA
beacon-benefits.com

BEASLEY & COMPANY
Tulsa, OK
bco.cc

BENEFIT PLANS PLUS, LLC
St. Louis, MO
bpp401k.com

BENEFIT PLANS, INC.
Omaha, NE
bpiomaha.com

BENEFITS ADMINISTRATORS, LLC
Lexington, KY
benadms.com

BLUE RIDGE ESOP ASSOCIATES
Charlottesville, VA
blueridgeesop.com

BLUESTAR RETIREMENT SERVICES, INC.
Ponte Vedra Beach, FL
bluestarretirement.com

CECILCO 401(K) MANAGED SOLUTIONS
Dallas, TX
cecilco.com

CREATIVE PLAN DESIGNS LTD.
East Meadow, NY
cpdltd.com

CREATIVE RETIREMENT SYSTEMS, INC.
Cincinnati, OH
crs401k.com

DELAWARE VALLEY RETIREMENT, INC.
Ridley Park, PA
dvretirement.com

DEMARS PENSION
CONSULTING SERVICES, INC.
Overland Park, KS
demarspension.com

DWC – THE 401k EXPERTS
St. Paul, MN
dwc401k.com

FIDUCIARY CONSULTING GROUP, INC.
Murfreesboro, TN
ifiduciary.com

FUTUREBENEFITS OF AMERICA
Arlington, TN
futurebenefitsofamerica.com

GREAT LAKES PENSION ASSOCIATES, INC.
Farmington Hills, MI
greatlakespension.com

INTAC ACTUARIAL SERVICES, INC.
Ridgewood, NJ
intacinc.com

JULY BUSINESS SERVICES, INC.
Waco, TX
julyservices.com

LATITUDE SERVICE COMPANY, INC
Plymouth, IN
latituderetire.com

MCCLOUD & ASSOCIATES
Liberty, MO
mccloudandassociatesinc.com

NATIONAL BENEFIT SERVICES, LLC
West Jordan, UT
nbsbenefits.com

NORTH AMERICAN KTRADE ALLIANCE, LLC.
Plymouth, IN
ktradeonline.com

ONEAMERICA
Indianapolis, IN
oneamerica.com

PCS RETIREMENT, LLC
Philadelphia, PA
pcscapital.com

PENSION FINANCIAL SERVICES, INC.
Duluth, GA
pfs401k.com

PENSION PLANNING CONSULTANTS, INC.
Albuquerque, NM
pensionplanningusa.com

PENSION SOLUTIONS, INC.
Oklahoma City, OK
pension-solutions.net

PENTEGRA RETIREMENT SERVICES
Columbus, OH
pentegra.com

PINNACLE PLAN DESIGN, LLC
Tucson, AZ
pinnacle-plan.com

PREFERRED PENSION PLANNING CORP
Bridgewater, NJ
preferredpension.com

PRIME PENSIONS, INC.
Florham Park, NJ
primepensionsinc.com

QRPS, INC.
Raleigh, NC
qrps.com

REA & ASSOCIATES
New Philadelphia, OH
reacpa.com

RETIREMENT, LLC
Oklahoma City, OK | Sioux Falls, SD
retirementllc.com

RETIREMENT PLAN CONCEPTS & SERVICES, INC.
Fort Wayne, IN
rpcsi.com

ROGERS WEALTH GROUP, INC.
Fort Worth, TX
rogersco.com

RPG CONSULTANTS
Valley Stream, NY
rpgconsultants.com

SAVANT CAPITAL MANAGEMENT
Rockford, IL
savantcapital.com

SECURIAN FINANCIAL
St. Paul, MN
securian.com

SENTINEL BENEFITS & FINANCIAL GROUP
Wakefield, MA
sentinelgroup.com

SI GROUP CERTIFIED PENSION CONSULTANTS
Honolulu, HI
sigrouphawaii.com

SLAVIC401K.COM
Boca Raton, FL
slavic.net

SOUTH STATE RETIREMENT PLAN SERVICES
Charleston, SC
southstate401k.com

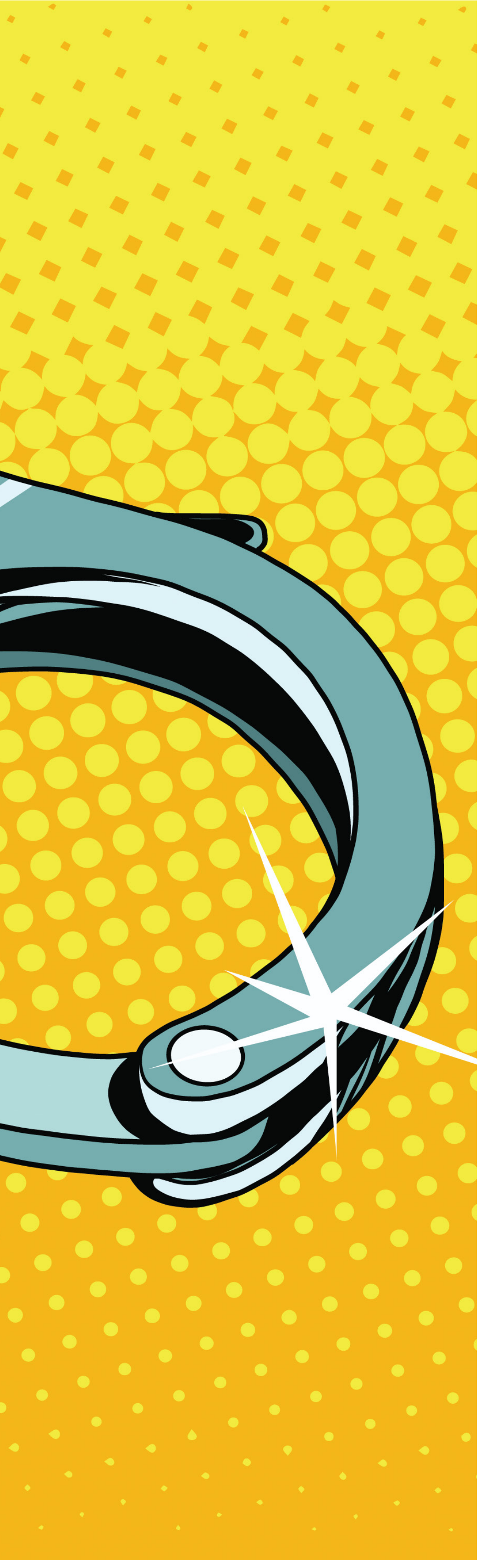
TPS GROUP
North Haven, CT
tpsgroup.com

TRINITY PENSION GROUP, LLC
High Point, NC
trinity401k.com

**as of Aug 31, 2022*

ASPPA

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



PROFESSIONALISM AND CRIMINAL CONVICTIONS

How does the ARA's Code of Professional Conduct apply when a benefit plan professional is convicted of a crime? **By Lauren Bloom**

In an ideal world, everyone would obey society's criminal statutes. Unfortunately, human beings make mistakes and sometimes break the law. A criminal conviction can damage anyone's life. But when the convict is an employee benefit plan professional, such a conviction can have serious and lasting implications for the person's professional career. This article explains how the American Retirement Association's Code of Professional Conduct ("the ARA Code") applies when an employee benefit plan professional is convicted of a crime.

The ARA Code requires ARA members to perform professional services with "honesty, integrity, skill and care." Whenever providing advice, recommendations and other services for a Principal (defined by the ARA Code as "any present or prospective client of a Member or the employer of a Member where the Member provides retirement plan services for their employer's plan"), the member must also observe any applicable professional standards. A quick review of the ARA Code might suggest that its requirements apply only to the member's professional life, *i.e.*, when the member is actively engaged in providing professional services. Under this reading, the member's conduct outside of work would never fall under the ARA Code, right?

Wrong.

The ARA Code goes on to state that a "Member who pleads guilty to or is found guilty of any misdemeanor related to financial matters or any felony shall be presumed to have contravened" the Code. This brief

> "MISDEMEANORS INVOLVING FINANCE GO TO THE HEART OF AN EMPLOYEE BENEFIT PLAN PROFESSIONAL'S FINANCIAL INTEGRITY. BENEFIT PLANS AND THEIR PARTICIPANTS DEPEND ON THAT INTEGRITY, AND THEIR TRUST NEEDS TO BE PROTECTED."

statement contains a number of important points. First, the courts distinguish between criminals who plead guilty and those who are convicted of a crime, but the ARA Code does not, at least not at first. A member's guilty plea may be relevant later, but it's the fact of the crime that matters initially, regardless of whether the member admitted wrongdoing or forced a prosecutor to prove guilt in court.

Second, the ARA Code distinguishes between misdemeanors and felonies. What's the difference? Misdemeanors are less serious crimes than felonies; under federal and most states' laws, a misdemeanor is a crime that carries a potential jail term of less than one year. Felonies are crimes that society recognizes as more serious, including murder, rape, arson, burglary and kidnapping. Federal law defines a felony as a crime that carries a potential death penalty or jail term of one year or more, but states differ in their treatment of felonies. Some states adopt the "one year or more jail term" definition or refer to where the convict will be incarcerated (i.e., in a county jail versus a high-security state prison) but others are more flexible in tailoring the punishments to fit the crimes.

Third, the ARA Code distinguishes between misdemeanors that are "related to financial matters" and those that are not. An employee benefit plan professional who embezzled funds from a charity where she volunteered (perhaps intending to borrow and quickly repay the money) or who engaged in minor insurance or tax fraud would come under this provision of the ARA Code. If that same professional was convicted of disorderly conduct, simple assault or first-time drunk driving, her conviction might not trigger the ARA Code. Why the distinction? Misdemeanors involving finance go to the heart of an employee benefit plan professional's financial integrity. Benefit plans and their participants depend on that integrity, and their trust needs to be protected.

Fourth, the ARA Code makes no such distinction when it comes to a member's felony conviction. Felonies can involve financial matters, but they often do not. Thus, an ARA member who was convicted of a non-financial felony like murder, rape or kidnapping would be in potential violation of the ARA Code even if the crime was unrelated to the member's professional practice. One member's felony can damage the reputation of the entire profession, so the profession reserves the right to take action when a felony occurs.

The ARA Code does not categorically state that a convicted member is always in violation of its requirements. Rather, the conviction sets up a *presumption* that the member contravened the ARA Code. That presumption brings the member under the ARA's counseling and discipline procedures, but it does not guarantee that the member will be disciplined. Rather, it means that the convicted member will need to be prepared to rebut the presumption of violation, or to offer mitigating circumstances for the counseling and disciplinary body to consider.

At this stage, it might make a difference whether the member voluntarily showed remorse for the crime and entered a guilty plea. Depending on the circumstances, particularly with regard to a financial misdemeanor, the member might argue that the amount of money involved was relatively small, that the crime was a mistake or misunderstanding that the member tried to rectify, or that the crime, while financial, had nothing to do with the member's professional practice. In the case of a felony, the member might again offer any mitigating circumstances or argue that his crime was unrelated to his work. In either case, the member would be unwise to stonewall the disciplinary inquiry, because non-responsiveness leaves the disciplinary body to proceed only with the publicly available fact of conviction and without any moderating information that might justify counseling or a lesser penalty than expulsion from membership.

Thankfully, employee benefit plan professionals are rarely convicted of crimes. Knowing the ARA Code's provisions can help that rare convicted member understand how to keep the conviction from unfairly destroying his or her professional reputation and career. PC

EXPAND YOUR REACH...

- ***Plan Consultant* (in print)**
  A quarterly magazine designed to help retirement plan professionals improve their skills and enhance their knowledge.

- **asppa-net.org (on the web)**
  ASPPA members have exclusive access to invaluable resources and regular news that helps them build and maintain their practice. Reach ASPPA members where they utilize tools and resources provided by ASPPA to improve their business.

- ***ASPPA Connect* (e-newsletter)**
  Reach ASPPA members on the go. All ASPPA members receive a free subscription to *ASPPA Connect*, an e-newsletter published three times a week featuring news and commentary. Both traditional banner ads and sponsored content opportunities are available.

- **ASPPA Product Profile (dedicated eblast)**
  A sponsored product profile allows you to reach the ASPPA network with your product or service message. You choose the date (subject to availability) and ARA will send the message on your behalf.

Reach more than 7,000 retirement plan professionals, including business owners, actuaries, TPAs, record keepers, consultants and more. ASPPA members come from all corners of the country, but are all united by their commitment to the private pension system.

TO ADVERTISE, CONTACT:

KIM KELEMEN
703.516.9300 | ext 305
kkelemen@usaretirement.org

ASPPA

Fit Ztudio / Shutterstock.com

FORGING PARTNERSHIPS

TPAs can grow their business by developing relationships with these four partners. **By Jill Dennis**

When we first started in this business, TPAs didn't really do marketing. In the "old days," TPAs would sit back and wait for the phone to ring. In today's world, however, we do much more marketing—and a big part of that is the relationships that we develop to help grow our businesses. Here's a look at some key partnerships.

WHOLESALERS

Our first major relationship is with the platform wholesalers. These are the men and women who are working continually to bring business in for their employers. Having a relationship with the wholesalers in your area continues to be extremely important. They are constantly out meeting with

financial advisors to bring in business and be top of mind.

Those relationships are so important to TPAs in so many ways. When an advisor has a new opportunity, the wholesaler who is familiar with your service model can often recommend the advisor to you. In addition, this becomes increasingly important with an existing plan that may have a TPA that they are unhappy with. The wholesaler wants to save that business for his employer; by being able to recommend your services, it's good for all sides of the equation.

About a year ago we were contacted by a wholesaler for a recordkeeper who was known to be primarily bundled. He described a situation in which they had sold a plan with an advisor who worked with another local TPA. This TPA was apparently unprepared to work with a recordkeeper that had limited experience in working with outside TPAs, and things quickly went downhill—so much so that the wholesaler was looking for a new TPA solution to save the relationship, and he wanted to bring us in.

We ended up getting hired. The wholesaler was able to save the sale, and we developed a new recordkeeping relationship and a new advisor relationship. In fact, this arrangement became so successful that this wholesaler is quickly becoming one of our top referral sources.

ADVISORS

Having good relationships with advisors is also important. When they have an opportunity, they will call you to discuss and possibly even ask your advice about which platform might work best for the client. We continuously maintain our relationships with advisors in many ways. We send out regular communications with updates on all things retirement plan related; we have meetings and webinars to provide them value added information; and we are once again doing in-person meetings, whether those are happy hours for networking or having speakers provide value-added information for the advisors.

> "CPAS CAN BE A GREAT SOURCE OF NEW BUSINESS—THEY WILL RECOGNIZE THE NEED FOR A PLAN; IF A CLIENT ALREADY HAS A PLAN, THEY MAY RECOGNIZE THAT THE CLIENT IS NOT TAKING FULL ADVANTAGE OF IT."

Again, having advisors know your service model is very helpful when they encounter a plan opportunity.

Another recent success story involves an advisor who had an opportunity with a plan (in fact, until about 12 months before, that plan was our client). The current advisor had moved that plan to a bundled platform and then managed to mess it up. The client talked to this new advisor, who brought up our name. The client responded that we had been their TPA and had always done a good job, so they had no concerns about coming back to us. So for that advisor, it gave him the opportunity to easily take over that plan. For us, it gave us an opportunity to get that client back. And for the client, we had experience with their plan and had worked through all their issues in the past, so it was easy for us to take back (although doing the corrections was not that easy)!

CPAs

Another relationship that TPAs should have is with CPAs. CPAs can be a great source of new business—they will recognize the need for a plan; if a client already has a plan, they may recognize that the client is not taking full advantage of it. For example, recently we had a plan where we noticed the client had made late deposits to the plan. The client was actually quite upset with us about it and tried to accuse us of "working for the IRS" instead of for them.

The CPA (who was copied on the communication) jumped right in and stood up for us, reminding the client that our bringing it to their attention and recommending correcting the late deposits will actually keep them out of trouble… and that this is our job. A great example of a client's CPA helping us to bring them back in line!

PAYROLL PROVIDERS

The final relationship that we have started to use more is with payroll providers. With all the recordkeepers having many options for integration anymore with the different payroll companies, this seems like a natural extension of our business model. If you haven't done so already, you should find out who the regional managers for the payroll companies serving your area are.

We have done roundtables with some local wholesalers, some financial advisors and the entire team of the payroll provider. This allows those payroll salespeople to really understand the relationship between the TPA, advisor and platform and is a natural progression of business. We all know that several of the payroll providers who also have 401(k) platforms really tie the client in. In fact, talking with the payroll salespeople about how they should talk to the client about the 401(k) as part of the sales process really helps everyone. It really allows them to be the "hero" by having a solution for the 401(k) and not having that piece as an afterthought.

We all know that payroll is still one of the biggest issues for our clients. If we can solve that problem for them, it's better for everyone. Having the partnership also solves other things for us as TPAs. For example, it gives us someone to refer our clients to if they are having payroll issues. It also allows us to potentially have access to the payroll providers' websites so we can download census data at year end and get the correct information that we need more easily. Some might say this is not our job, but we say that it potentially saves us time, as we can get the correct information the first time! PC

OUT OF THE PANDEMIC: THIRD THURSDAY BEGINNINGS

These virtual get-togethers and the success they have achieved are proof of the importance of community.

By Barbara Giesing, Rian Steinbiss & Kelly Hummel

Every move made in the great pension puzzle could earn someone thousands by the time they retire. Financial professionals know the significance of even a single investment election. We appreciate the importance of combing through coverage tests to ensure compliance, knowing the potentially dire consequences of skipping a step. There is a unique pressure, both rewarding and intimidating, that comes with our profession.

In a world driven by technology, it is easy for us to focus on the numbers, isolate ourselves from the outside world, and miss out on experiences even from others knowledgeable within the industry. In part due to the complexity of the field, it can seem better to insulate ourselves rather than pursue advancement that can appear burdensome and even act as an impediment in getting the job done.

Is this pang of isolation new? Surprisingly no, and the American Retirement Association (ARA) endeavors to change this reality. Founded in 1966 as the American Society of Pension Actuaries, the organization grew rapidly and quickly opened its doors to welcome a greater range of financial professionals. ARA grew to include five “sister” organizations, each geared toward specific causes and platforms: The American Society of Pension Professionals & Actuaries (ASPPA), the American Society of Enrolled Actuaries (ASEA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), and the Plan Sponsor Council of Americas (PSCA). These groups established their own conferences and events as separate communities.

However, an organization loses effect if the members never meet! The ARA’s mission in vitalizing its community consists of advocacy, education, events and conferences, targeted to each sister organization. To advance the role of women in the field and in response to the needs of a growing and diverse membership, the ARA created two key events: ASPPA Women Business Leadership Forum and NAPA Connect. In 2018, these two events merged and became the Women in Retirement Conference, uniting women business leaders and managers from TPA and financial advisory firms.

The goal of the conference was simple: address the challenges and opportunities faced by professional women in the retirement industry. The 2018 conference achieved great success. Many attendees—business owners, managers, advisors and TPAs—networked, learned and attained support from a community of peers previously unknown, facing similar industry challenges.

Luba V Nel / Shutterstock.com

"THE ARA'S MISSION IN VITALIZING ITS COMMUNITY CONSISTS OF ADVOCACY, EDUCATION, EVENTS AND CONFERENCES, TARGETED TO EACH SISTER ORGANIZATION."

After initial success, then came COVID-19, and planning for the 2021 conference was paused.

Not wanting to lose momentum, committee leaders and ARA staff began holding Zoom meetings to boost morale, continue learning, promote growth and stay connected even with the distance. These sessions were the origin of the Women in Retirement's virtual Third Thursday events. Conference committee member Virginia Krieger Sutton recounted exactly how the idea came to be: "[The Zoom meeting] morphed into the Third Thursday series with the growing realization that we were going to be in a virtual world for a while, and that we could really build on many of the core values of WiR through the webinar format," she recalls. "It was terrific 'lemonade'!"

Third Thursdays provided a perfect solution to the hyper-digital world generated by COVID. It also allowed a broader reach in the number of professionals in the industry, as many would not have been able to attend regardless of the pandemic. With the convenience of the virtual events, Third Thursdays became stand-alone events, opening new doors for professional women looking for relevant content in the financial world. From engaging workshops presented by featured speakers, to intimate roundtables with fireside Q&As, it became clear that these events were welcomed, establishing a need for longer-term planning.

In response to the Third Thursday successes, a group of volunteers banded together with enthusiasm and a plethora of work ahead! These virtual affairs required event development, sponsorship, marketing, script writing and show flow generation, as well as pre-show host interviews and technical support. While the volunteer members grow, the WiR Third Thursdays Committee has one consistent goal: to bring thoughtful and relevant content to the professionals in our ever-changing industry and growing community.

When asked to comment on her first term on the committee, member Barbara Giesing had this to say: "As a new member of PSCA, I was delighted to find and participate in the WiRC Third Thursday meetings! I've found the information to be pertinent, well presented, and the meetings provide great opportunities to network with colleagues with whom I wouldn't otherwise have the chance to interact… In the divisive culture of the day, it's great to have a forum promoting positive and productive ideas."

The in-person Women in Retirement Conference returned in January 2022, but, separately, Third Thursdays continued to thrive. The Third Thursday committee arranges a variety of different topics and welcomes members of all five ARA sister organizations to attend. One retirement industry organization sponsors each month and is afforded a private audience with women leaders in the retirement plan industry from all the ARA sister organizations. Already in 2022, we have tackled how to market your brand successfully with Sherri Fitts, how to save stress-free with Suze Orman by using new products like SecureSave, and how to discuss mental health in the workspace with Melissa Doman. We've analyzed new legislation with Kelsey Mayo, and celebrated women's history month with State Street Global Advisors. These events are designed to be inclusive, educational, and fun!

Third Thursdays evolved as an incredible response from a group of determined women who saw the wonderful potential born out of the collaboration that began from the Women In Retirement Conference. With the simplicity of Zoom, the community-centric nature, the member-complimentary status, and the convenience and budget friendly travel requirements, these virtual get-togethers and the success they have achieved are proof of the importance of community. The expansion brings about larger audiences, intriguing new topics and an abundance of new opportunities.

In the coming months, we will have a new round of fantastic speakers and sponsors to lead discussions surrounding diversity, stress management, and a few fun surprises for the year-end holidays.

As the world of retirement planning and consulting evolves, we will grow and learn with it, and encourage you to join us on the journey. Our virtual events are complimentary to members of all five sister organizations. We're excited about sharing in the wealth of knowledge provided by this virtual community! PC

NEW & RECENTLY CREDENTIALED MEMBERS!

WELCOME

CPC
Samuel Axtell
Andrew Fiederlein
Brandon Ramunto
Randall Schug

QPA
Andrew Fiederlein
Chad Fuller
Yu Jiang
Kevin Kim

QKC
Kristen Adkins
Maxwell Anderson
Samuel Axtell
Mary Bartlett
Theresa Basciano
Brent Bielski
William Coughlan
Andrew Fiederlein
Alexis Haley
Yu Jiang
Kevin Kim
Jessica Krumlauf
Jennifer Lee-Michell
Mariah Melanko
Julie O'Brien
Stacy Thompson
Laura Van Steeter
Joshua Winter
Reid Yamamoto
Janey Yim
Scott Zrinski

QKA
Maxwell Anderson
Kattia Angulo Escalante
Natalia Araya
Damaris Araya Hidalgo
Julie Austin
Kendra Balcerak
Blake Bandani
Ursula Boney
Lillianna Burrow
Jose Cambronero Salazar
Esteban Carballo
Jody Caudill
Susan Chadwick
Arunkumar Chellapandi
Diann Combs
Francina Conejo
Ryan Cowen
Joseph D'Alconzo
Jonathan Daniel
Cathleen Daniel
Robyn Daughtrey
Jim Deasy
Nathan Deege
Brenna Dotson
Corbin Dyche
Aaron Epstein
Jacqueline Falco
Anna Farnsworth
Andrew Fiederlein
Donal Ford
Jackson Forrestall
Lisa Fox
Michaele Frye
Jennifer Gatterdam
Annie Giannini
Emily Gottschalk
Crissy Gullstrand
Elaine Hamilton
Cammie Hembree
Victoria Henige
Luis Hernandez Arguedas
Steven Herrmann
Jonathan Hirz
Linda A. Hodgson
Joel Howell
Jessica Jackson
Lexi Johndrow
David Kay
Jordan Kilts
David Kloc
Cory Kocher
Meggan Major
Randall Marcellus
Katherine Marin Caceres
Steve Martin
Andrew Merydith
Stacy Mora Mena
Marilyn Mullen
Cesar Olivares
Ikenna Onukwufor
Kristel Pais Arrieta
Thao Palmer
Amit Patel
Litong Pei
Rigoberto Perez
Andrew Plummer
LeeAnn Pollard
Kim Pope
Lauren Puig
Ivan Quiros Jimenez
Remington Rable
Lisa Richardson
Suzanne Romero
Maurcio Sanchez
Margaret Sands
Stephen Schultz
Nicole Schultz
Sabrina Scott
Meredith Sdao
Jared Shapiro
Christina Sharp
Julie Sjuts
Bryan Smethers
Steven Spancake
Emilie Stern
Bryan Sullivan
Jake Taylor
Travis Ter Haar
Tiffany Terwillegar
Amy Thomas
Kenty Truong
Deida Valladares
Angelica Vargas
Aleisha Velez
Thomas Velto
Jessica Wallace
Robert Walsh
Julie Webb
Lauren Wilhelm

A RETIREMENT BILL IN 2022?

We are one step closer to a retirement bill being signed into law later this year (hopefully)! **By Will Hansen**

Four congressional committees with jurisdiction completed their work on retirement legislation over the past 18 months. Two of them, the House Ways & Means and the House Education & Labor Committees, packaged their legislation together and sent it to the floor of the House of Representatives. The legislation passed with broad (414-5) support from both parties and just a handful of nay votes.

More recently, the Senate HELP Committee and Senate Finance Committee completed their work and have passed retirement bills out from their respective committee. The activity in the Senate was seen as the last hurdle prior to the leaders of the four committees coming together and negotiating a final retirement bill.

All in all, there are nearly 90 provisions between the various retirement bills. The total cost of the provisions contained in the bill was roughly $40 billion; they are paid for largely by requiring or encouraging Roth contributions for catch-up and employer contributions. A significant number of the provisions in the House bill and Senate Committee bill are identical, but some differences are noticeable.

Key provisions that will need to be worked out in the coming months include:

- **Automatic Enrollment:** The House bill mandates that automatic enrollment be included in the plan design of all new plans created after the bill is signed into law. The Senate bill creates a new safe-harbor design to encourage automatic enrollment.
- **New Plan Start-Up Credit:** The House bill provides for a 100% tax credit for a small employer's administrative costs in operating a new plan for the first several years plus a tax credit for employer contributions. The Senate bill only provides for a 75% tax credit.
- **Savers' Credit:** I hear often that the Savers' Credit is underutilized because either: (a) the individual doesn't know about the tax credit; or (b) the individual doesn't qualify because they don't have any tax liability. The House bill seeks to increase the number of individuals eligible as well as promote the credit. The Senate bill also seeks to increase the number of individuals eligible but also turns the credit into a refundable tax credit as long as the excess is deposited into a retirement account.
- **Required Minimum Distributions:** As people live longer, there has been a push to extend the RMD age. The SECURE Act pushed the RMD from 70½ to 72. The House bill would stagger the increase in RMD over several years from 73 to 75 (with 75 not coming until 2033). The Senate bill would skip the staggering and simply increase the RMD age to 75—but not until 2032.

In addition to those differences, the Senate committee bills tackle policies that are not focused on in the House bill. Here are two of the policies included in the Senate bills but not the House legislation:

- **Starter K:** As the name implies, this is an introductory 401(k) plan for small businesses. Eligible employees must be auto-enrolled at 3%, and the maximum contribution mirrors the IRA limits at $6,000 per year. The employer is not required to perform costly non-discrimination testing and cannot provide any employer contributions.
- **Emergency Savings:** The Senate Finance bill provides for an additional hardship distribution for emergency use. An individual may withdraw up to $1,000 per year (only one withdrawal per year) to cover emergency expenses. Prior to the individual tapping this distribution again, the previously withdrawn amount must be repaid. The Senate HELP bill provides for a sidecar account in which the individual may make multiple withdrawals over the course of the year for emergency use. The sidecar account cannot accumulate more than $2,500.

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

> "THE ACTIVITY IN THE SENATE WAS SEEN AS THE LAST HURDLE PRIOR TO THE LEADERS OF THE FOUR COMMITTEES COMING TOGETHER AND NEGOTIATING A FINAL RETIREMENT BILL."

With several differences in how to approach a certain policy change as well as the new policy areas only covered in the Senate bills, it will be an interesting few months of negotiation between the four committees with jurisdiction. The goal is to piece together a bipartisan retirement bill to be included in a larger piece of legislation that, with the past as a guide, would be passed at the end of this Congress in December 2022. Fingers crossed! PC

Voya can help you realize greater value by getting your workplace benefits and savings in sync.

- May improve financial outcomes*
- Help boost employee engagement
- Save time with a simplified experience

*Investments are not guaranteed and are subject to investment risk including the possible loss of principal. The investment return and principal value of the security will fluctuate so that when redeemed, may be worth more or less than the original investment.

Not FDIC/NCUA/NCUSIF Insured I Not a Deposit of a Bank/Credit Union I May Lose Value I Not Bank/ Credit Union Guaranteed I Not Insured by Any Federal Government Agency

This information is provided by Voya© for your education only. Neither Voya© nor its representatives offer tax or legal advice. Please consult your tax or legal advisor before making a tax-related investment/ insurance decision.

VOYA® FINANCIAL