

# THE ASPPA Journal

ASPPA's Quarterly Journal for Actuaries, Consultants, Administrators and Other Retirement Plan Professionals



## FEATURE ISSUE

### Stephen L. Dobrow, CPC, QPA, QKA, QPFC, Elected 2008-2009 ASPPA President



by Troy L. Cornett

In July, ASPPA's Board of Directors elected Stephen L. Dobrow, CPC, QPA, QKA, QPFC, as ASPPA's President for the 2008–2009 term. His term begins at the close of the 2008 ASPPA Annual Conference. Stephen is president of Primark Benefits, a pension consulting firm in Burlingame, CA.

Like many ASPPA members, Stephen found himself in the pension industry quite by accident. A San Francisco native, Stephen entered the retirement field in 1976 when he became a computer programmer at a TPA firm owned by family friend, Arthur Hirschhorn (who later became Stephen's stepfather). The task at hand was to convert a computer system used for pension administration from a large mainframe to a minicomputer, which

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# FWIW

by Chris L. Stroud, MSPA

**F**WIW, we have achieved a new “low” in communication standards—text slang. I must admit, however, that sending or receiving text messages is quick, efficient and to the point. AAMOF, Barack Obama chose to text the announcement of his running mate Joe Biden. BTW, did you happen to notice that the word “text” is now also a verb? Gr8!

We live in a world of acronyms (e.g., ATM, B2B, COB, DBA, FYI, TBA, TGIF), and our industry is a master of the acronym game (e.g., ADP, EPCRS, SPD, ASAP). So it shouldn't be surprising that the texting world hosts a long list (forever growing) of useful acronyms. Many of them substitute for common phrases and can be quite entertaining. Memorize these timesavers—you never know when they might come in handy!

**AAMOF**—As a matter of fact

**BTDT**—Been there done that

**BTW**—By the way

**EOD**—End of discussion

**FWIW**—For what it's worth

**GAL**—Get a life

**GJ**—Great job  
**GMTA**—Great minds think alike

**G2G**—Got to go or good to go

**HAND**—Have a nice day

**HTH**—Hope this (or that) helps

**IANAL**—I am not a lawyer

**IDK**—I don't know

**IMHO**—In my humble (or honest) opinion

**LOL**—Laughing out loud

**NBD**—No big deal

**OAP**—Old age person or old age pensioner

**OMG**—Oh my gosh!

**ROFL**—Rolling on floor laughing

**TINSTAAFL**—There is no such thing as a free lunch

**TMI**—Too much information

**TYVM**—Thank you very much

**YMMV**—Your mileage may vary (I especially like this one, which has the deeper meaning of “you may have a different experience.”)

BTW, it's not just acronyms we have 2 lrn. There's a whole new language of chat slang that people are just making up as they go along. Just leave out letters, especially vowels, or just spell phonetically (e.g., bcoz: because). This type of slang was originally created to shorten words because users paid per character or had

## FROM THE EDITOR



limited text message length. Now, with these limitations all but gone, this slang remains a way of life and continues to evolve in ways that don't always shorten and sometimes just mutate words into something that vaguely resembles the original words. Chk these out:

**CUL8R**—see you later

**dis**—this

**dunno**—don't know

**duz**—does

**fav**—favorite

**go2**—go to

**gr8**—great

**hlp**—help

**kewl**—cool

**laf**—laugh

**n**—in or and

**ne1**—anyone

**noob**—newbie or newcomer

**ppl**—people

**sez**—says

**sum1**—someone

**thx**—thanks

**UR**—your, you are

**w/**—with

**wut**—what

**wuz**—was

**y**—why

**yup**—yes

**1dr**—wonder

**1drfl**—wonderful

**2day**—today

**2moro**—tomorrow

**4get**—forget

IMHO, as instant messaging, chat and texting are now commonplace, the related lingo is impacting our daily dialog. The lingo has also infiltrated commercials, newspapers, cartoons and even the way we talk to each other. One can't help but wonder what interoffice and client communication will look like in the not so distant future.

“OMG! The new SPD just arrived. I 1dr wuts changed.”

“I just had a gr8 EPCRS xperienc. IANAL and YMMV, but it wuz NBD 4 me.”

“Your 401(k) st8mt is enclsd. ROFL.”

If U R an OAP or a noob who feels way behind the curve, there's hope! U can find a whole host of Web sites to hlp u get familiar w/ the new lingo. 2 of my favs are [www.lingo2word.com](http://www.lingo2word.com) and [www.transl8it.com](http://www.transl8it.com). Both of these sites allow you to enter slang lingo and it will transl8 it to regular English for u – a gr8 way to make sure you understand what those Gen Xers or Gen Yers are really saying to you or about you! And the latter even lets u nter plain English and it will transl8 it to slang 4 u so you can be hip and learn to speak or text in slang. Kewl!

EOD. G2G. HTH. HAND! 📧

## SPECIAL FEATURE

was a leading-edge technology in those days. The company, Professional Retirement Services (PRS), was the predecessor company to Primark Benefits.

In the late 1970s, Stephen became a consultant to the Pacific Maritime Association and the International Longshore and Warehouse Union, where he computerized the pension records of 12,000 ILWU members. During this time and into the 1980s, Stephen continued to assist PRS in the programming of its valuation system, working nights and weekends after his “real” job.

In the 1980s and 1990s, Stephen pursued a Silicon Valley career. He held a number of software engineering, marketing, sales and finance positions for a variety of start-up companies. For example, he led the team that developed and marketed the world’s first multi-user accounting package for microcomputers.


In 1990, while employed as acting CFO of a software firm, Stephen was approached by Mr. Hirschhorn to purchase and become the owner of Professional Retirement Services, along with two of his sisters who worked there. Stephen’s thinking at the time was that since he knew how pension valuation systems worked, and since he had a background in accounting and taxation and had some management experience, how difficult could it really be to run a pension consulting firm?

As you can imagine, this assessment was rather naive and several years of in-depth education was needed.

Thus began Stephen’s association with ASPPA and other pension organizations. Several ASPPA members were very generous in providing education to our industry. Cheryl Morgan, CPC, QKA, Chris Burwell-Woo, CPC, QPA, and Gwen O’Connell, CPC, QPA, were the local instructors of C-1 and C-2 classes. Paul Carlson, QPA, led a local study group using materials written by Sal Tripodi, APM. Without the support of all of these great instructors and others, Stephen could not have come up to speed in such a short time, and he thanks them immensely. With the desire to “repay” ASPPA for the great education, Stephen became an ASPPA volunteer in 1994 and has served on ASPPA committees ever since.

Many members may remember that Stephen worked in the ASPPA Conferences Committee for many years and oversaw the dramatic expansion undertaken in this area. He also served at various times as chair of committees such as Membership, ASPPA PAC and Finance and Budget, and he has held positions such as Treasurer, member of the Board of Directors as well as a member of the ASPPA Executive Committee.

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Stephen holds a degree in Management from Golden Gate University in San Francisco. He formerly served as a chapter officer for NIPA and is active in the Western Pension & Benefits Conference. 

The other members of ASPPA's 2008-2009 Executive Committee are:

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*Troy L. Cornett is the Office Manager for ASPPA and is the liaison to the ASPPA Executive Committee, Board of Directors and ASPPA Management Team. He also manages ASPPA's Data Services department and is the Production Manager and Associate Editor of The ASPPA Journal. Troy has been an ASPPA employee since July 2000. In his time away from the ASPPA office, Troy enjoys seeing the latest movie releases, driving his VW Beetle and sipping lattes with his friends at Starbucks. ([tcornett@asppa.org](mailto:tcornett@asppa.org))*

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The American Society of Pension Professionals & Actuaries (ASPPA), a national organization made up of more than 6,000 retirement plan professionals, is dedicated to the preservation and enhancement of the private retirement plan system in the United States. ASPPA is the only organization comprised exclusively of pension professionals that actively advocates for legislative and regulatory changes to expand and improve the private pension system. In addition, ASPPA offers an extensive credentialing program with a reputation for high quality training that is thorough and specialized. ASPPA credentials are bestowed on administrators, consultants, actuaries and other professionals associated with the retirement plan industry.

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## WASHINGTON UPDATE

## ASPPA Joint Report Highlights Need for Accurate Revenue Estimating for Retirement Savings Proposals

by Teresa T. Bloom, APM

On June 3, 2008, ASPPA, along with ten other organizations, issued a research report (“Report”) highlighting the need for more accurate federal budget revenue estimates for proposed legislative changes affecting retirement savings.

**T**he Report, *Revenue Estimates and Retirement Policy: The Need to Consider Present-Value Estimates of Changes in Tax Policy*, concludes that Congress needs to institute a more realistic scoring system when calculating proposed retirement savings legislative changes and their effects on the federal budget.

The Report is the result of a collaborative effort among 11 various organizations (listed at the end of the article) associated with retirement issues, investments and government plans. These organizations strongly support the concept that Congress should explore and institute a more accurate method of calculating legislative revenue estimates for legislative proposals that relate to retirement savings. Over a year and a half period, the organizations worked closely with the two authors of the report, Judy Xanthopoulos, Ph.D., and Mary M. Schmitt, Esq., to develop this comprehensive and concise educational research report. Judy and Mary are both former staff with the Joint Committee on Taxation (the office responsible for producing revenue estimates to members of Congress), and consequently, have many years of experience on this topic.



### Overview

The Report explains that for purposes of the federal budget, Congress currently provides revenue estimates for tax legislative proposals on a cash-flow basis using a ten-year budget window. This method works well for tax proposals that provide a current deduction with no subsequent

offsetting revenue increase, such as a mortgage interest deduction. However, the use of a cash-flow basis with a ten-year window does not accurately measure the long-term revenue effects of retirement savings proposals—which provide a current-year deduction or exclusion for contributions to a retirement plan and subsequent income inclusion when people start withdrawing amounts for retirement. In effect, these rules result in a significant distortion of the economic costs of retirement savings tax deferrals, ignoring the fact that this money is eventually paid back into the system, and thus inhibiting the enactment of legislative proposals designed to increase retirement benefits for millions of American workers.

The Report concludes that preparing revenue estimates on a present-value approach would allow for a more accurate measurement of the revenue effects. Under a present-value analysis, the revenue estimate for any year would consider the tax exclusion for the contributions, any inside buildup, and the subsequent income exclusion that occurs when the retirement savings is withdrawn. This present-value method would contemplate the income tax collection on retirement savings would ultimately be paid back into the federal budget, which extends way beyond the current ten-year budget window. Accordingly, present-value estimates would more accurately reflect the long-term revenue costs of certain retirement savings proposals.<sup>1</sup>

The calculation of federal credit programs, which involve direct federal loans or federal guarantees of private loans, is a precedent for using present-value estimates for federal budget scorekeeping purposes. After approximately 20 years of debate about the appropriate way to account for cost of federal credit programs, Congress enacted a change in budgetary accounting that utilizes a present-value calculation so that the costs of these credit programs can be compared to the costs of other federal programs. We are hopeful that Congress will not take 20 years to enact a similar change for retirement savings proposals.

## Background

Every piece of legislation reported out of a Congressional committee must provide a revenue score of its potential impact on government revenues and outlays (revenue scoring). Three federal offices prepare these estimates on a regular basis. The Joint Committee on Taxation (JCT) scores a bill's estimated change to federal revenue and distribution of tax burdens, while the Congressional Budget Office (CBO) scores a bill's spending projections and cost estimates. Treasury's

Office of Tax Analysis (OTA) provides revenue estimates for the White House and also works with Congress through JCT and CBO. These estimates are very important to policy discussions regarding the impact of proposed tax changes, making it crucial that policymakers receive the most accurate and complete assessment of a tax bill's likely effects.

JCT provides official revenue estimates for all House and Senate legislation relating to income, estate and gift, excise and payroll taxes (including tax legislation affecting retirement policy). Pursuant to several legislative changes made during the 1970s and 1980s, revenue scoring on all legislation, with the one exception for credit reform proposals, is now confined to a cash-balance basis with a ten-year revenue window.<sup>2</sup>

JCT estimates can often make or break congressional support for legislation. These estimates are especially important when Congress considers tax legislation, especially if the tax-writing committees are required to adhere to congressionally-mandated budget targets.

## Problems with the Ten-year Revenue Window

Confining revenue scoring calculations of retirement savings proposals to a ten-year revenue window ignores the long-term economic effects. This revenue period gives an inaccurate and misleading picture of a bill's budgetary impact, making it impossible for policymakers to adequately consider the full economic effect of certain retirement savings tax incentives that provide for capital accumulation. In particular, the ten-year revenue scoring window fails to take into account the long-term impact of people retiring and paying taxes on their retirement accounts, which results in long-term revenue losses being much lower than what is actually scored. This impact is a crucial element of retirement policy that must be addressed if workers are to continue to have available tax incentives that allow them to adequately save for their retirement.

The current revenue scoring system makes the revenue impact of a particular piece of legislation a much more important consideration in the legislative process, often discouraging the enactment of revenue-losing measures that members of Congress would find overly expensive. Therefore, many revenue-losing measures (such as a retirement savings proposal) must often be paired with revenue-raising measures. In addition, members of Congress must generally have multiple proposals "scored" for revenue effects in order to find a vehicle that will be acceptable to the relevant congressional committees.

*The current revenue scoring system makes the revenue impact of a particular piece of legislation a much more important consideration in the legislative process, often discouraging the enactment of revenue-losing measures that members of Congress would find overly expensive.*

*A present-value approach to preparing revenue estimates for retirement savings proposals will allow for a comparison of the overall revenue costs.*

In addition to skewed results, the ten-year horizon creates other problems. By assuming all temporary tax provisions expire as scheduled, and by assuming that obvious problems—such as the alternative minimum tax—will not be addressed, the US budget creates huge incentives for budget gimmicks. For example, a proposal to delay the effective date of a tax provision until year 11 would have significant long-term costs, but cost virtually nothing in the ten-year budget window. Likewise, causing certain tax provisions to expire within a certain time period also skews their long-term budgetary impact.

### Present-value Analysis Compared to Cash-flow Analysis

A present-value approach to preparing revenue estimates for retirement savings proposals will allow for a comparison of the overall revenue costs. In particular, a present-value analysis of an increased tax deferral for retirement savings will incorporate the current-year tax deduction or exclusion, the present value of the earnings attributable to the present-year contribution and the present-value of the subsequent income inclusion when people begin to withdraw from their accounts upon retirement. On the other hand, a cash-flow analysis will show significant revenue losses from many retirement savings proposals providing for an increased tax deferral, as the ten-year revenue window will fail to capture the long-term offsets to the revenue losses when people retire and pay back taxes back into the federal budget.

The best way to understand the difference between the two methodologies is to view it in an example. Table 1 in the Report shows the difference in revenue effects of cash-flow estimates and present-value estimates. Under the example, an individual makes a \$1,000 contribution to a deductible retirement plan each year for ten years and then withdraws the account balance ratably during the subsequent ten years. As apparent from the example, the net revenue impact on the federal budget is significantly lower using a present-value analysis versus a cash-flow analysis.

Year	Contribution	Cumulative Account Balance	Cash-flow Revenue Effect	Present-value Revenue Effect
1	\$ 1,000	\$ 1,000	<\$ 250>	<\$ 174>
2	\$ 1,000	\$ 2,080	<\$ 270>	<\$ 167>
3	\$ 1,000	\$ 3,246	<\$ 292>	<\$ 161>
4	\$ 1,000	\$ 4,506	<\$ 315>	<\$ 155>
5	\$ 1,000	\$ 5,867	<\$ 340>	<\$ 149>
6	\$ 1,000	\$ 7,336	<\$ 367>	<\$ 143>
7	\$ 1,000	\$ 8,923	<\$ 397>	<\$ 138>
8	\$ 1,000	\$ 10,637	<\$ 428>	<\$ 132>
9	\$ 1,000	\$ 12,488	<\$ 463>	<\$ 127>
10	\$ 1,000	\$ 14,487	<\$ 500>	<\$ 122>
<b>Total Years 1-10</b>			<b>&lt;\$3,622&gt;</b>	<b>&lt;\$1,469&gt;</b>

Source: Revenue Estimates and Retirement Policy Research Paper, April 2008

### Precedent for Present-value Scoring—Credit Reform and the President’s Budget

Congress has previously addressed the difference between the two methodologies in calculating the costs for federal credit programs, which involves direct federal loans or federal guarantees of private loans. Under prior law, a direct loan was accounted for in the budget as a cash outlay the year the loan was disbursed. However, a loan guarantee where the federal government promised to repay a loan made by a private lender had no impact on the federal budget until a default on the loan occurred and the federal government made cash payments associated with the defaulted loan. The difference in treatment created a significant bias in favor of loan guarantees rather than direct loans, which showed no revenue impact, even though the long-term cost of a direct loan could be much lower.



This experience demonstrates that a pure cash-flow analysis can provide a significant distortion of the overall costs to the federal government. Once Congress made the decision to use a present-value analysis of all the costs attributable to the time credit is extended, policymakers were able to accurately compare the costs of a credit program to other competing credit programs, including loan guarantee programs. We ask that Congress analyze retirement savings proposals in the same way.

The President's budget provides further verification that present-value estimates are more accurate when presenting a list of tax expenditure estimates.<sup>3</sup> Under the Congressional Budget Act, JCT is separately required to produce an annual list of tax expenditure estimates.

In particular, the President's annual budget submission provides a cash-value basis of tax expenditures, but *also* provides present-value estimates for certain tax expenditures to show the "true economic cost" of these tax provisions. Interestingly, JCT does not prepare any comparable analysis of their tax expenditures on a present-value basis.

### Next Steps

This comprehensive educational research was designed to shed light on the significant threat that any future retirement savings proposals—designed to favor increased retirement savings—would face from the current revenue scoring methodology. The next step is to educate the key members of the House and Senate tax-writing committees (the House Ways and Means Committee and the Senate Finance Committee, respectively). The sponsors of the Report are currently working to schedule both House and Senate Hill briefings later this fall. We will also be requesting individual meetings with key tax-writing committee staff, as well as staff from the JCT.

The sponsors are hopeful that our education efforts will increase the understanding of key policymakers on the resulting economic distortions that occur when scoring retirement savings proposals when the long-term effects on the federal budget are not taken into account. As a consequence, we are optimistic that Congress will ultimately take steps to correct these inaccuracies in revenue estimating procedures, similarly to what they did for federal credit programs. ↗



Judy Xanthopoulos, Ph.D., and Mary M. Schmitt, Esq., prepared the Report. To read and download a printable copy of the publication, visit the ASPPA Web site at [www.asppa.org/resources/wash-update.htm](http://www.asppa.org/resources/wash-update.htm).



*Teresa T. Bloom, Esq., APM, Chief of Government Affairs, joined ASPPA in September 2004. Prior to working at ASPPA, Teresa was a pension law specialist in the Office of Policy and Research and the Office of Regulations and Interpretations at the DOL's Employee Benefits Security Administration, where she worked on a variety of policy and technical issues relating to Title I of ERISA. Teresa currently serves as a Government Affairs Committee Co-chair. ([tbloom@asppa.org](mailto:tbloom@asppa.org))*

### Sponsors

The following organizations associated with retirement issues, investments and government plans joined together to sponsor the research project:

- The Actuarial Foundation
- American Society of Pension Professionals & Actuaries
- Profit Sharing/401k Council of America
- US Chamber of Commerce
- The ESOP Foundation
- Committee on Investment of Employee Benefit Assets
- National Conference on Public Employee Retirement Systems
- National Association of State Retirement Administrators
- American Benefits Council
- ERISA Industry Committee
- National Association of Manufacturers



- 1 The Report notes that when considering potential changes to revenue estimating for retirement plans, those changes should be neutral in relation to defined benefit and defined contribution revenue estimates.
- 2 The Congressional Budget and Impoundment Control Act of 1974, the Economic Recovery Tax Act of 1981 and the Balance Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings).
- 3 We note that a tax expenditure estimate is not the same as a revenue estimate as it does not account for the behavioral effect that might occur if a provision was repealed, whereas a revenue estimate does take into account the behavioral effects.

# Know This Notice—PPA Participant Disclosures

by Brian K. Furgala, CPC, QPA

An underlying theme to the Pension Protection Act of 2006 (PPA) is enhancing disclosure requirements to participants. Under PPA, these new or revised disclosures cover the broad range of discussing the health of the plan, participant rights under the plan and the addition of new features to the plan.

**A**lthough the intent is to educate the participant, the numerous requirements regarding the form and timing of the disclosures may lead to administrative confusion. In an attempt to avoid this confusion, this article describes the contents, deadlines and other factors involved in PPA disclosure requirements to participants.

## Automatic Enrollment Arrangements

Automatic enrollment arrangements received favorable treatment in PPA either through confirming state law preemption or through creating new arrangements. The alphabet soup of automatic enrollment arrangements (*i.e.*, ACAs, EACAs, QACAs) each require substantially the same information in the notice to participants, but there are a few subtle differences.

## Automatic Contribution Arrangements (ACAs)

Under automatic contribution arrangements (ACAs), the notice to participants must contain:

- An explanation of the circumstances under which elective contributions will be made for the participant;
- The percentage of such contributions which will be made on the participant's behalf;
- The participant's right to elect to not have such contributions made or to elect to have such contributions made at a different percentage or amount; and
- How contributions made under the arrangement will be invested in the absence of any investment election by the participant.



The notice must be provided to participants affected by the automatic enrollment within a reasonable period before the first elective contribution and within a reasonable period before each subsequent plan year. For example, if a plan administrator limits the ACA to newly enrolled participants, only those participants would be required to receive the notice. Generally, a reasonable period of time is considered at least 30 days, but not more than 90 days, before the employee first becomes eligible and before each subsequent plan year.

Although not required to preempt state law, the plan administrator will most likely want to implement a qualified default investment alternative (QDIA) to obtain fiduciary relief. Therefore, the notice requirements discussed later in the QDIA section may be integrated into the ACA notice. Failure to provide the ACA notice subjects the plan administrator to a civil penalty of up to \$1,100 per day for each failure [payable to the Department of Labor (DOL)].

### Eligible Automatic Contribution Arrangements (EACAs)

Building on the ACA notice, the notice for eligible automatic contribution arrangements (EACAs) must contain the same information as the ACA notice along with describing the participant's right to make a permissible withdrawal and the procedures to elect such a withdrawal. Furthermore, an EACA is required to use a QDIA and the QDIA notice requirements discussed later may be integrated into the EACA notice.

The proposed IRS regulations require the notice to be provided to every employee eligible under the cash or deferred arrangement, not just the participants affected by the automatic enrollment. Consequently, the notice must be provided to all participants regardless of whether the participant made an affirmative election. Similar to the ACA requirements, the notice must be given within a reasonable period before the first elective contribution and within a reasonable period before each subsequent plan year. The 30- to 90-day time period described above in the ACA section is most likely considered a reasonable period. Due to an EACA meeting the requirements of an ACA, failure to provide the EACA notice subjects the plan administrator to

a civil penalty of up to \$1,100 per day for each failure (payable to the DOL).

### Qualified Automatic Contribution Arrangements (QACAs)

Once again building on the ACA notice, the notice for qualified automatic contribution arrangements (QACAs) must contain the same information as the ACA notice along with the general requirements of a traditional 401(k) safe harbor notice. In contrast to an EACA, a QACA is not required to allow participants to make a permissible withdrawal. However, the plan administrator may decide to implement this feature into the QACA. If so, the EACA notice may be integrated with the traditional 401(k) safe harbor requirements to form the QACA notice. Similar to the ACA and EACA time periods, the notice must be given within a reasonable period before the first elective contribution and within a reasonable period before each subsequent plan year. The 30- to 90-day time period described above in the ACA section is most likely considered a reasonable period. Failure to provide the notice results in the plan administrator being unable to rely on the relief provided by complying with the QACA requirements.

*Automatic enrollment arrangements received favorable treatment in PPA either through confirming state law preemption or through creating new arrangements.*



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*In contrast to an EACA, a QACA is not required to allow participants to make a permissible withdrawal.*

The IRS has provided a model notice for plans electing QACA or EACA arrangements at: [www.irs.gov/pub/irs-tege/sample\\_notice.pdf](http://www.irs.gov/pub/irs-tege/sample_notice.pdf).

### Qualified Default Investment Alternatives (QDIAs)

Although normally discussed with the automatic enrollment arrangements, the qualified default investment alternative (QDIA) regulations may apply to any qualified plan allowing participant-directed investment elections. To obtain the fiduciary relief under the QDIA regulations, the notice must contain the following:

- Description of the circumstances upon which investment in the QDIA is made for the participant;
- Explanation of the participant's right to direct the investment of assets;
- Description of the QDIA, including description of investment objectives, risk and return characteristics and fees and expenses related to the QDIA;
- Description of the participant's right to transfer assets invested in the QDIA to other investment alternatives under the plan, including any restrictions, fees or expenses related to such transfer; and
- Explanation of how participants can obtain investment information concerning other investment alternatives under the plan.

Generally, notice must be furnished at least 30 days in advance of the date of first investment in QDIA or 30 days in advance of the plan eligibility date. For example, a plan with one year eligibility and semi-annual entry dates may provide the notice prior to December 1 for all participants entering the plan on the upcoming January 1. In addition, notice needs to be furnished 30 days in advance of each subsequent plan year.

An alternative is available for an immediate eligibility plan. This alternative is most relevant for a QDIA within an automatic enrollment arrangement. Obviously, it would be a challenge to provide a newly hired employee 30 days advance notice when the intent is to have the employee become immediately eligible and contributions to begin on the next payroll. Therefore, the notice may be provided on the plan eligibility date (date of hire) provided the participant has an opportunity to make permissible withdrawals as required for an EACA. For example, an employee hired on November 15 and who immediately becomes a participant may receive the notice on this date. In addition, this employee would be receiving another copy of the notice around

December 1 to fulfill the "each subsequent plan year" requirement. Fiduciary relief would be provided under the QDIA regulations as long as the participants may withdraw their contributions before 90 days.

The notice may be distributed by means traditionally approved by the IRS and DOL, including electronic media. Failure to provide the notice results in the plan administrator being unable to obtain the fiduciary relief under the QDIA regulations.

### Plans Holding Publicly Traded Employer Stock

PPA also included a new code section providing diversification rights regarding publicly traded employer stock held by defined contribution plans. Although the initial notices were due in 2007, there may be a continuing obligation to provide notice to participants holding publicly traded employer stock. If a plan continues to restrict the diversification of stock until participants have reached three years of service, participants must be provided notice at least 30 days before the first date on which the participants are eligible to exercise their rights.

For example, an employee is hired on May 1, 2008 as a full-time employee. On July 1, 2009, the employee becomes a participant and all profit sharing contributions are automatically invested in employer stock. If the plan uses the hours of service method, the participant would be able to diversify his or her profit sharing account starting January 1, 2011, and notice would need to be provided prior to December 1, 2010. If the plan uses the elapsed time method, the participant would be able to diversify his or her profit sharing account on May 1, 2011, and notice would need to be provided prior to April 1, 2011.

The IRS has provided a model notice in Notice 2006-107 which may be viewed at: [www.irs.gov/irb/2006-51\\_IRB/ar09.html](http://www.irs.gov/irb/2006-51_IRB/ar09.html). Failure to provide the notice subjects the plan administrator to a penalty of up to \$110 per day for each failure (payable to the participant).

### Defined Benefit Funding Notice

The good news ... PPA repealed the plan funding notice requirement under ERISA §4011 and removed the Summary Annual Report (SAR) requirement under ERISA §104(b)(3) for plan years beginning after December 31, 2007. The bad news ... PPA replaced the SAR requirement with a new funding notice for single employer defined benefit plans for plan years beginning after December 31, 2007. Although changes were also



made for multiemployer plans, this article focuses solely on requirements for single employer plans. The notice is required to provide the following:

- Certain identifying plan information;
- A statement regarding the plan's funding target attainment percentage for the current plan year and the two preceding plan years (actual percentage unless in excess of 100%);
- A statement of the total assets and liabilities of the plan for the current plan year and the two preceding plan years;
- A statement of the number of plan participants;
- A description of the funding policy and the asset allocation of investments under the plan;
- Explanation of any amendment, schedule increase or decrease, or event that has a material effect on the plan's liabilities or assets for the applicable year;
- A summary of the rules governing the termination of single employer plans;
- A general description of plan benefits guaranteed by the PBGC;
- A statement that a participant may obtain an electronic copy of the annual report; and
- A statement that the plan is required to provide information under ERISA §4010.

The notice must be provided no later than 120 days after the end of the plan year relating to such notice. However, for small plans (generally 100 or fewer participants), the plan administrator is provided additional time. The notice for small plans may be provided by the filing deadline for the Form 5500. Failure to provide the notice subjects the plan administrator to a penalty of up to \$110 per day for each failure (payable to the participant).

### Benefit Limits Imposed on Underfunded Plans

PPA added a new code section that placed funding-based limitations on certain benefits in single employer defined benefit plans. If the adjusted funding target attainment percentage falls below a certain amount for a given plan year, the plan may be required to limit unpredictable contingent benefits, limit increasing benefit liabilities, prohibit accelerated benefit payments and/or freeze accruals. If these restrictions are placed on the plan, written notice must be provided to all plan participants.


For example, written notice must be provided within 30 days of the plan being subject to the restrictions pertaining to limiting unpredictable contingent benefits and prohibiting accelerated

benefit payments. In addition, written notice must be provided within 30 days after the valuation date for a plan year in which accruals are frozen.

The notice must disclose how the participants are affected by the particular restrictions. To illustrate, if the plan prohibits accelerated benefit payments, the notice must define a prohibited payment and describe any options available to the participant.

Failure to provide the notice subjects the plan administrator to a civil penalty of up to \$1,100 per day for each failure (payable to the DOL).

### Conclusion

The PPA participant disclosure rules are not that simple. Be on the lookout for the IRS and DOL to continue providing guidance regarding the PPA participant disclosures. In addition, ASPPA will continue to monitor the released guidance and provide insight whenever possible. 



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*PPA added a new code section that placed funding-based limitations on certain benefits in single employer defined benefit plans.*

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# A Primer in SAS 70 Reports

by Steven L. Schmidt

The American Institute of Certified Public Accountants' Statement on Auditing Standards (SAS) No. 70 is an internationally recognized auditing standard for service organizations. A SAS 70 audit report demonstrates that a service provider has been subjected to a thorough audit of its internal control activities, including controls over information technology and related processes.

Service providers and third party administrators have found that obtaining a SAS 70 report is an effective way to establish credibility with potential customers. Specifically, a "clean" (no reported internal control deficiencies) SAS 70 report communicates that the service organization has effective internal controls in place. A SAS 70 report acts as a selling tool for the organization as it can differentiate a service provider from its competitors. The SAS 70 audit process can also be utilized by management as a way to identify opportunities for improvement in operational areas.

The major difference between the two types, as noted in the table below, is the Type I SAS 70 audit report does not include a test of operating effectiveness of the internal controls in place at the service organization. Whereas, a Type II SAS 70 audit report includes tests of operating effectiveness of the internal controls in place at the service organization and identifies any known weaknesses that may exist.

The Type I SAS 70 audit report is a good starting point for service organizations reporting for the first time. This audit gives them the opportunity to identify and remediate any internal control weaknesses prior to reporting on their effectiveness. The drawback to the Type I audit report is that many external auditors may still need to test controls in place at the service organization in order for them to gain assurance that the controls are operating as designed.

An added benefit of a Type II SAS 70 audit report is that if the report is "clean," an auditor of a company utilizing the service provider's services can use the SAS 70 report to reduce the amount of testing it must perform. In most instances the customer's auditor will not be required to visit and perform tests at the service provider's place of business. Without a current Type II SAS 70 report, a service organization may have to respond to multiple audit requests from its customers and their respective auditors. Multiple visits from customer auditors can be inconvenient and expensive, as they place a strain on the service organization's personnel. SAS 70 reports have become increasingly important and necessary as public company clients of service providers become subject to the requirements of the Sarbanes-Oxley Act of 2002. Also in today's environment, companies continue to outsource the processing of internal information to service organizations. Therefore, greater reliance is being placed on service organizations and as a result there has been an increase in the number of SAS 70 reports being required by companies to verify the accuracy, completeness and security of this processed information.

A Type I SAS 70 is generally at a point in time (e.g., October 31, 20xx), and a Type II SAS 70 covers a specified period of time (e.g., November 1, 20xx to October 31, 20xx). The Type II SAS 70 reporting period typically covers at least a six-month period of time and provides some flexibility since the period can be

**There are essentially two types of SAS 70 reports; Type I and Type II:**

Report Contents	Type I Report	Type II Report
1. Independent service auditor report	Included	Included
2. Service organization's description of controls	Included	Included
3. Information provided by the independent service auditor; includes a description of the service auditor's test of operating effectiveness and the results of the test	Optional	Included
4. Other information provided by the service organization	Optional	Optional


established at any time throughout the service provider's fiscal year. In situations when a reporting period does not coincide with the fiscal year end of a service provider, a Gap Letter can be issued. A Gap Letter is very common and states that to the best of your knowledge, there have not been any significant changes in the internal controls described in the SAS 70 report since it was issued for the period ending October 31, 20xx, nor are there any material weaknesses in such internal controls and procedures that require any corrective action. The service auditor conducts a full and complete audit each year and reports on the results even if the description of controls remain the same for the service organization.

The service organization's description of controls should be developed utilizing the following five interrelated components of internal controls as outlined in COSO (Committee of Sponsoring Organizations of the Treadway Commission):

- Control environment;
- Risk assessment;
- Control activities;
- Information and communication; and
- Monitoring.

Also, there are additional external control considerations that are embodied as part of a SAS 70

report. In certain situations, the application of specific controls at a respective client organization is necessary to achieve certain control objectives in a service organization's SAS 70 report. These are identified as user controls. Typically, client auditors should consider whether these user controls have been placed in operation at client organizations and test them accordingly.

It is not uncommon and, in fact, usually a good practice, for a service provider to initially obtain a Type I SAS 70 report to identify and remediate any internal control deficiencies prior to having the internal controls tested as required in a Type II SAS 70 engagement. 



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# Asset-Based Fees Under Attack— What Once Was May No Longer Be!

by David J. Witz

The trend can no longer be ignored—asset-based compensation and/or asset-based commissions are under attack. What has been an accepted industry practice for decades has become a point of contention and debate today with legal ramifications that cannot be ignored.

In fact, many industry practitioners believe we are at the end of the “Asset-Based Model” (ABM) era, where the adviser charges a percentage of plan assets for an explicit or implied bundle of services, and the beginning of the “Professional Business Model” (PBM), closely associated with a “fee for service” model similar to an accounting firm or law practice, which is emerging as the industry standard. Ironically, the PBM is familiar to many seasoned professionals who ran their practice in the early years of ERISA much like a law or accounting practice (*i.e.*, charging hourly rates, project fees and retainer fees rather than collecting transactional or annuitized commissions).

In addition to the method of compensation, another distinction between the ABM and PBM is the method of business acquisition. Although a strong sales and marketing department is important to both structures, the PBM will rely more heavily upon the intellect of its human capital to justify its pay rates. Historically, the ABM relies more heavily upon the skills of its sales and marketing department(s) and a friendly environment with product providers willing to structure investments with built in commissions that hide the effects of excessive fees by keeping the topic out of sight and out of mind. This description is not an indictment of asset-based fees overall, but it is a recognition that some unsophisticated plan sponsors have been duped into agreements that do pay excessive and unjustified compensation to advisers where fees were barely identifiable to anyone but a knowledgeable industry practitioner. Similarly, those familiar with pricing takeover engagements are familiar with plan takeovers by advisers at a lower price that remains excessive. In other words, a move from excessive to less excessive



remains excessive. However, the PBM approach will significantly reduce the likelihood of these events happening in the future.

Compensation and margins will also come under pressure after the finalization of the proposed 408(b)(2) regulations. With the passage of the new regulations, downward pressure on compensation is expected for advisers as the requirement to provide full disclosure of both direct and indirect fees, as well as any potential conflicts of interest, takes effect. Unfortunately, this trend in full-disclosure not only affects the future levels of compensation but may subject past fee structures and practices to legal scrutiny. If the new regulations provide a plan sponsor with the information necessary to assess fee reasonableness, that plan sponsor has an obligation to consider what steps, if any, should be taken to recoup any excess paid in the past. If the plan sponsor ignores this duty, the participants and their plaintiff attorney will not. It should come as no surprise that ERISA legal counsel may suggest legal action against an adviser to recoup past excessive fees, especially where the adviser failed to acknowledge his or her fiduciary status and disclose both direct and indirect fees in the past.



Keep in mind, the new regulatory requirements under section 408(b)(2) impose new consequences for disclosure violations, but the regulation did not create a new requirement to disclose—a subtle point overlooked by most observers. In fact, the DOL makes clear, in the preamble to the proposed regulations, that a plan sponsor's requirement to obtain fee information, both direct and indirect, and the adviser fiduciary's requirement to disclose, including conflicts of interest, has always existed. However, the application of a new prohibited transaction consequence does apply for any transaction between any non-fiduciary and the plan where the non-fiduciary service provider fails to disclose, in writing, their fees, both direct and indirect, as well as any potential conflicts of interest prior to entering into a service engagement. Clearly, the new regulations, once finalized, create a boon for the PBM structure that promotes and leverages its value proposition. On the other hand, the new regulations create a precarious situation for the ABM that previously failed to acknowledge or denied fiduciary status and/or charged excessive fees, especially those who were dually registered.

Furthermore, the dually registered ABM structure will experience more downward pressure

on compensation and margins if the Securities and Exchange Commission (SEC) finally addresses the discrepancies between the purpose and use of 12b-1 fees. The potential impact of SEC action should not be underestimated. In 2006 alone, the industry dispersed more than \$12 billion in annual 12b-1 fees. Some of the 12b-1 fees were returned to retirement plans and either used to pay plan expenses or reallocated to participants' balances. In either case, the rebating of 12b-1 fees, Sub-Transfer Agent Fees or Shareholder Services Fees can legitimately be deemed "preferential dividends" according to the definition in Section 562 of the Internal Revenue Code. In fact, unless the SEC and the IRS take the necessary steps to correct this violation, advisers are best advised to avoid using a mutual fund that participates in an activity that clearly violates both the securities law and the Internal Revenue Code. An ABM should avoid influencing, suggesting or recommending investment structures that cause the plan sponsor and service provider to violate the Internal Revenue Code and the Investment Company Act of 1940. It is especially important that the ABM avoid participating in this activity when preferential dividends create conditions for fraudulent performance reporting to be distributed

*If the new regulations provide a plan sponsor with the information necessary to assess fee reasonableness, that plan sponsor has an obligation to consider what steps, if any, should be taken to recoup any excess paid in the past.*

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*Keep in mind, the new regulatory requirements under section 408(b)(2) impose new consequences for disclosure violations, but the regulation did not create a new requirement to disclose—a subtle point overlooked by most observers.*

to participants which, in turn, would cause the plan to lose its section 404(c) defense.

If the regulatory activity of the DOL and SEC are not enough to cause one to reconsider the structure and future of an ABM, then the increasing risk of litigation and a persistent legislature that is threatening additional changes should. For the ABM adviser who contemplated an easy sale of his or her investment advisory practice for high multiples in the future amidst this multi-tier attack on compensation and margins, the ABM may find a future sale of its practice as easy as flipping houses in California during the current sub-prime meltdown. Clearly, the traditional strategy of building an asset-based business using investment advisory agreements with no cap on compensation or industry products which hide indirect compensation is a business model whose days are numbered. As the emerging trend continues, the value of a retirement practice will be largely determined by the same principles used to value a legal or accounting practice with the true value of the firm being directly tied to the knowledge of the firm's principals, associates and staff and the efficiencies of the firm's process to deliver higher margins without sacrificing client service. That is not to say that assets under management for a PBM will not impact its value. On the contrary, assets under management will affect firm valuations but only to the extent that the PBM can build a client base that pays the PBM its maximum retainer fee. Of course, the PBM, like the ABM, will have to justify the increase in revenue based upon legitimate reasons versus using the excuse that larger plan assets increase the adviser's liability. While increasing assets may increase adviser liability, it rarely increases time in the engagement. Also, the increased liability associated with increased plan assets is an insurable risk for a fixed and determinable cost. The PBM or ABM may be required to provide the plan sponsor with a copy of the declaration page of its fiduciary liability policy to prove the insurance exists and to prove the cost of the increase attributable to the clients plan assets and the cost for that additional liability. Otherwise, the PBM must provide other convincing reasons why a higher fee can be justified. Once the compensation cap is met, every additional dollar under management, after the maximum fee retainer has been achieved, will fail to yield additional margin to the PBM. This model is unfamiliar territory for the successful ABM whose annual pay raise is directly tied to participant and employer contributions, market returns and new business acquisitions.


Unlike the traditional ABM that enjoys increasing revenue and margin commensurate with increasing assets, a PBM's cap on fees for investment advisory services will require a PBM to increase its client base to keep pace with the ABM's revenue growth ... a virtual impossibility. Of course, as PBMs garner market share, an ABM will experience increased margin pressures to abandon its pricing structure to compete with the PBM. Assuming the human capital of each firm is equal, the ABM could evolve into a PBM due to market pricing pressures over time. Thus, the ABM will work longer and harder hours for less pay. On the other hand, the ABM who stubbornly refuses to adopt change will go the way of the dinosaur because plan sponsors, when faced with the same quality of staff and identical deliverables, must prudently choose the service provider that charges the least. Of course, it is expected that staff competency and firm deliverables will prove to be a new venue for competitive bantering as the plan sponsor considers their option to secure necessary services for the operation of the plan at a reasonable price. This bantering should prove to be little more than market noise if the ABM does not secure the appropriate ERISA geeks to address high level consulting engagements that most ABMs are unable to provide. However, assuming equal competency in staff, both ABMs and PBMs will experience increasing competitive pressures to achieve higher levels of competency and efficiency while simultaneously adjusting fees downward.

Of particular intrigue, in the comparison of the ABM to the PBM approach, are the different objectives behind the ABM approach. Thus far, the focus has been on the ABM with visions of selling a practice to reap great wealth upon the sale of the practice in addition to potential excessive annual fees, but that is not the mantra of all ABMs. Some embrace the ABM approach with the intent to build a practice that pays sufficient income to provide the desired standard of living, which includes "X amount" of free time, where free time is valued at a premium. There are many individuals who embrace that ABM approach and work the equivalent of a semi-retired or part-time job. However, as the transition to PBM takes root, this adviser may be forced to work harder for the same amount of revenue received in the past. It is this practitioner, in particular, who faces the biggest dilemma in the future. Whereas, the ABM who reluctantly adjusts its business model to adapt to the PBM approach will strive to replace lost income, the ABM who places a premium on time may be more likely to exit the business. This exit could occur by selling the practice or aligning the practice with another ABM or PBM that is

dedicated to staying in the game for the long term. This joint venture, of sorts, assures the ABM of some revenue without suffering the additional costs and time impositions and frees the exiting ABM to focus attention on managing money for individuals where margins are higher. Of course, one must keep in mind the risk of a prohibited transaction claim where an adviser, functioning in a fiduciary role, uses that position to cause the plan to pay additional fees. This risk alone is sufficient to encourage a complete departure of the business to focus exclusively on wealth management to avoid a prohibited transaction.

### Conclusion

The business model of the traditional asset gatherer (*i.e.*, the ABM structure) is dissolving. The future belongs to the entity (*i.e.*, the PBM) with a depth of intellectual capital that can be engaged to consult on most any level of complexity. This same entity will charge hourly rates, project fees and retainer fees for work as demanded by the market. The firm's principals, associates and staff will be well paid for their knowledge, problem solving abilities and their efficiencies. The future of the firm will be dependent upon the visionary leadership of the principals to implement a reliable business continuation plan. Future leadership will be hand picked and mentored to develop and secure the appropriate talent to continue the business without an impact on service or quality. Leadership will also explore strategic merger and acquisition opportunities where additional talent provides the PBM to maintain its competitive advantage. This PBM will not be a one-man shop that leaves the client vulnerable to the knowledge limitations of that individual as well as the emotional, physical and financial health of the sole

proprietor. Do not misinterpret this comment. There are competent sole proprietors operating their practices as PBMs. They have much to offer for a price that is lower than the cost of that same skill set within a PBM with higher overhead. The individual PBM certainly has a part to play in this market, but it will be a hurdle for plans of size to justify the retention of a PBM structured as a sole proprietor. As far as the ABM is concerned, now may be the best time to reap the rewards of large multiples. In addition, for all the previous reasons mentioned, the ABM should aggressively seek to enhance its intellectual capital as it adjusts its business model to compete in the future. Of course, this analysis could be nothing more than one person's pontification. Only time will tell. 



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*27 years of industry experience. David is also an AIF®. ([witzdj@earthlink.net](mailto:witzdj@earthlink.net))*

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# The Final 403(b) Regulations—An Extreme Makeover

by L. Joann Albrecht, CPC, QPA

Section 403(b) arrangements, once arcane tax deferred saving accounts for employees of public schools and 501(c)(3) tax-exempt organizations, have been in the spotlight since the final 403(b) regulations were issued on July 26, 2007.

**W**hen the regulations are implemented, 403(b) plans will look more like their 401(k) and governmental 457(b) plan cousins (refer to the accompanying chart on page 21). This article discusses several of the major provisions of these regulations and widespread misconceptions associated with them.

## Effective Dates

The final regulations are generally applicable for taxable years beginning after December 31, 2008. One common misconception is that all collectively bargained, church and government plans will have a longer period of time to implement the final regulations. Delayed effective dates for implementing the final regulations apply only in limited circumstances that require:

- Amendment of collective bargaining agreements;
- Legislative action for government plans; or
- Ratification by a convention of churches for church plans.

Otherwise, these 403(b) plans will have a January 1, 2009 applicability date except for specific transition rules for contract exchanges and transfers and separate life insurance contracts that apply to all 403(b) plans.

## Written Plan

Prior to the final regulations, 403(b) arrangements, excluding plans covered under Title I of ERISA, were not required under the Code to have a written plan or plan document. After December 31, 2008, all 403(b) funding contracts, except annuity or custodial accounts issued for church plans [defined under IRC 414(e)], will have to be



maintained pursuant to a written defined contribution plan. Church plans funded with retirement income accounts (RIAs) must also be maintained under a written defined contribution plan.

Written plans must contain all the material terms and conditions for eligibility, benefits, applicable limitations, time and form of distribution options, any optional provisions offered under the plan such as loans and hardships and plan to plan transfers. All plan provisions must comply in form and operation with Section 403(b). For this purpose, all contracts purchased for an employee will be treated as a single contract. If any contract fails to meet the requirements of 403(b), all contracts purchased for that employee would not qualify for tax deferral.

The written plan may be a single plan document or consist of a number of documents. The plan may incorporate by reference other documents such as the annuity contracts, custodial agreements and loan policies, which then become part of the plan. If there is a discrepancy between the plan and a document incorporated by reference, the plan will govern. For example, if the funding contract permits loans and the plan does not, the contract cannot make loans despite the loan provision in the contract.

### 403(b), 401(k) and Governmental 457(b) Plan Comparison

Item	403(b)	401(k)	Governmental 457(b)	All
Sponsorship limited to certain types of employers*	✓	✓	✓	
Universal availability requirement for making salary deferrals	✓			
Special definition for includible compensation	✓			
Limited investment options	✓			
Separate life insurance contracts no longer permitted after 9/24/07	✓			
Post severance employer non elective contributions permitted	✓			
Eligible employees must be common law employees	✓			
Information Sharing Agreement requirement with vendors outside the plan	✓			
No aggregation with employer's non 403(b) defined contribution plans for 415 annual additions**	✓			
Operational/contract defects generally affect participant but not entire plan	✓			
Subject to 402(g) deferral and coordination limits	✓	✓		
Subject to 415 annual additions	✓	✓		
In service distribution of elective deferrals at age 59 1/2	✓	✓		
Roth deferral account available	✓	✓		
Employee after tax contributions permitted	✓	✓		
Non discrimination testing for employer contributions (non government plans)	✓	✓		
Application of 10% early distribution tax***	✓	✓		
Application of controlled group rules (non government plans)	✓	✓		
ADP test for elective salary deferrals****		✓		
May be combined with defined benefit plan		✓		
Coordination of deferrals with 457 plans only			✓	
Employer contribution subject to FICA			✓	
Vested employer contributions reduce deferral limits			✓	
Limited timing restriction for making salary deferral election			✓	
Participation of independent contractors permitted			✓	
In service distributions for permissive service credit purchases in a governmental defined benefit plan	✓		✓	
Special catch-ups for under deferrals in prior years	✓		✓	
Auto rollover for mandatory distributions of small account balances				✓
Automatic enrollment permitted				✓
Deferral contributions subject to FICA taxes*****				✓
Deemed IRAs permitted				✓
Withdrawals for financial hardship/unforeseeable emergencies				✓
Participant loans				✓
IRC 417 limit on compensation				✓
Age 50 catch-up permitted				✓
Direct rollovers for non spousal beneficiaries to inherited IRAs				✓
Direct rollovers to Roth IRAs				✓
In service distributions from rollover accounts				✓
Plan termination				✓
Savers Credit available				✓
Post severance elective deferral contributions				✓
Subject to USERRA				✓
Inclusion of deferential pay in definition of compensation				✓
Written plan or plan document required				✓
402(f) notices required for distributions eligible for rollover				✓
1099R tax reporting for distributions				✓

\* Governmental employers may not adopt new 401(k) plans but may continue to maintain existing plans.

\*\* Defined contribution plans of the employer sponsoring the 403(b) plan are not aggregated for 415 purposes. However, if a 403(b) participant is in control of more than 50% of an outside business that maintains a defined contribution plan, both the participant's 403(b) plan and the outside plan are aggregated for 415 purposes.

\*\*\* Applies only to rollovers from qualified plan and IRAs to the 457 plan.

\*\*\*\* Governmental 401(k) plans are not subject to nondiscrimination testing.

\*\*\*\*\* Applies only if employment is covered under Social Security. Medicare taxes would still apply.

*Implementing the final 403(b) regulations does not automatically impose new fiduciary duties on employers where none existed previously.*

The plan may delegate certain tax compliance and administrative functions to product vendors or other third parties but not to employees unless they are significantly involved in the administration of the plan. Service agreements between the employer (or plan sponsor) and those responsible for administration and tax compliance, as a best practice, should include the exchange of information so that each party can perform their assigned duties under the plan. Service provider agreements should not be confused with information sharing agreements (ISA) between employers and investment product providers.

To help defray the cost of adopting a written plan, the IRS issued Rev. Proc. 2007-71 containing model plan language developed specifically for public schools to use in adopting a written plan or amending a current plan. The model language adopted as is or in substantially similar terms will give school districts the same form reliance as a private letter ruling. The model language may be modified by public schools and 501(c)(3) organizations but the plan will not have form reliance without a private letter ruling.

Currently there is no IRS pre-approved prototype program for 403(b) plans but a

pre-approved prototype program is expected sometime next summer. The IRS is developing LRMs for a 403(b) pre-approved prototype program that will incorporate some of the public comments it has received for the model plan language published in Rev. Proc. 2007-71.

### **Fiduciary Obligations and the Final Regulations**

403(b) plans are either ERISA or non-ERISA plans. Implementing the final 403(b) regulations does not automatically impose new fiduciary duties on employers where none existed previously. For example, 403(b) plans for public schools are government plans and therefore are never subject to Title I of ERISA, including its fiduciary requirements—regardless of employer actions, discretionary or otherwise. Likewise, non-church and non-governmental 403(b) plans are not subject to Title 1 of ERISA, but only if the plan is limited to elective salary deferrals and employer involvement with the plan is limited to actions described in the ERISA safe harbor regulation [29 C.F.R. 2510.3-2(f)]. Ultimately, fiduciary obligations and liabilities for non-ERISA plans are determined by the state in which the plan is

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maintained according to any state enabling statutes, state attorney general opinions, relevant case law or state trust law [if 403(b) contracts are held in a trust]. It is imperative that plan sponsors consult with their own legal counsel to determine what fiduciary responsibilities they may have for their non-ERISA 403(b) plans.

In Field Assistance Bulletin (FAB) 2007-2, the Department of Labor confirms that implementation of the final regulations will not necessarily cause a non-ERISA plan to become an ERISA plan. ERISA coverage continues to be a facts and circumstances determination. According to the FAB, 403(b) plan sponsors can keep their plans within the DOL safe harbor if they:

- Adopt a written 403(b) plan;
- Compile information about vendor products and terms for employees to review and analyze;
- Limit mutual fund or annuity contractors who may approach employees to a number that gives employees a reasonable selection of products;
- Limit contract transfers and exchanges to vendors that are part of the plan;
- Provide information to vendors about employees, such as name, address, compensation or doctor's certification of employee's health condition;
- Review the plan for conflicting provisions and compliance with Section 403(b); and
- Take steps to keep the plan tax compliant (including correcting plan failures under EPCRS); or
- Terminate the plan.

To avoid ERISA coverage, according to the FAB, the plan may assign discretionary decisions such as loan eligibility, hardship determinations, plan transfer decisions and QDRO determinations to someone other than the employer. The plan should accurately describe the employer's limited role and the delegation of discretionary determinations to third parties. The FAB cautions employers to carefully review the FAB to determine if their actions in implementing the final 403(b) regulations stay within the DOL safe harbor regulation.

### Funding 403(b) Plans

Funding products (contracts) for 403(b) plans are limited to annuity contracts issued by state licensed insurance companies and custodial accounts funded exclusively with mutual fund shares held by a bank trustee or an IRS-approved non bank custodian for the exclusive benefit of plan participant and beneficiaries. RIAs for church plans are treated as annuity contracts, even if funded with mutual

fund shares, and may be commingled with other church assets for investment purposes if 403(b) contributions and earnings are accounted for separately from other church assets.

### Contract Requirements

Funding contracts (both annuity and custodial account contracts) must comply with section 403(b) and the regulations and are required to contain language that:

- Requires contracts to be nonforfeitable (except for the payment of future premiums);
- Limits elective deferrals to the 402(g) and catch-up limits;
- Provides for rollovers to other eligible retirement plans;
- Requires annuity contracts to be nontransferable;
- Limits annuity contracts that provide life insurance protection and disability benefits to the incidental benefit limitations; and
- Satisfies the minimum distribution requirements of IRC 401(a)(9).

Contracts must also separately account for non-vested amounts and amounts in excess of the 415 annual additions limit. These amounts are treated as if they were made to a 403(c) contract (*i.e.*, a nonqualified contract). Contracts that do not meet these requirements are not valid 403(b) contracts even if purchased pursuant to a written plan.

### Say Goodbye to 90-24 Transfers

Nothing in the final regulations has caused more anxiety than the impending demise on January 1, 2009 of the popular 90-24 transfer. Participants and beneficiaries used 90-24 transfers to move money from one 403(b) contract to another, including to contracts that were not part of the employer's plan. Employers were usually unaware of these transfers and the overall tax compliance was severely compromised.



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*Plan termination for many 403(b) sponsors becomes a “catch-22.” The majority of 403(b) plans are funded with individual contracts that do not permit distributions from these contracts without participant consent.*

The final regulations address this situation by revamping 90-24 transfers into nontaxable transactions that are either contract exchanges or plan to plan transfers. Contract exchanges are exchanges between contracts within the same plan. Plan to plan transfers may be transfers to another 403(b) plan in which participants are employees or former employees of the employer sponsoring the receiving plan, or transfers from the 403(b) plan to a governmental defined benefit plan for the purchase of permissive service credits or to repay the value of cashed-out defined benefit service credits. Except for the purchase of permissive service credits in a governmental defined benefit plan, plan to plan transfers are not permitted to or from qualified, governmental 457(b) or any non 403(b) plan.

Plan to plan transfers and contract exchanges require that:

- Both plans agree to the transfer/exchange;
- The receiving plan, except for the transfers to a governmental defined benefit plan, must impose distribution restrictions that are no less stringent than those of the transferring plan; and
- Amounts are not reduced because of the transfer/exchange.

Under the final regulations, 90-24 transfers made before September 25, 2007 are grandfathered: they remain subject to the old rules under Rev. Proc. 90-24 and do not require Information Sharing Agreements (ISAs). Transfers made after September 24, 2007 to a contract vendor outside the plan are subject to the final regulations. Post September 24, 2007 exchanges will not be part of the employer’s plan beginning as of January 1, 2009 unless the employer and the product vendor have an ISA to provide each other with information necessary for that contract and any other contract to which contributions have been made to satisfy section 403(b). Shared information includes participant employment status and information about other contracts and the employer’s qualified plans, including compliance with any applicable hardship withdrawal rules, the \$50,000 cap on participant loans and any other tax requirements. The ISA permits the outside contract to be treated as part of the employer’s written plan, thus excluding future contributions from gross income and allowing distributions to be eligible for rollover.

### Orphan Contracts

“Orphan contract” is a term coined by the 403(b) community. It refers to a contract issued before January 1, 2009 that has not received contributions from the plan in a year after the contract was issued because:

- The vendor is no longer eligible to receive contributions (was deselected); or
- The contract was issued in an exchange after September 24, 2007 (which met the requirements of Rev. Rul. 90-24).

Orphan contracts may still be treated as part of the employer’s plan if the employer makes a good faith attempt to include these contracts as part of its plan. A good faith attempt requires an employer to collect information about vendors and then provide these vendors with the contact information about the person responsible for administering the plan. As long as the employer makes a good faith attempt and memorializes that attempt, transitional relief applies even if the good faith attempt is not successful.

Alternatively, the contract vendor may make a good faith attempt to contact the employer to exchange participant information before making a distribution from the contract. Neither the employer nor the vendor is required to make these good faith efforts for contracts that ceased receiving contributions before January 1, 2005.

The transitional relief provided in Rev. Proc. 2007-71 applies to contracts issued between 2005 and 2008 inclusively. If neither the contract vendor nor the employer makes a good faith attempt, the contract ceases to be a 403(b) contract on January 1, 2009 and future contributions will be included in gross income. Contracts without an ISA may be treated as part of the employer’s plan if they are exchanged by July 1, 2009 for a contract under the employer’s plan or to a contract that has an ISA with the employer.

Contracts issued to former employees and beneficiaries prior to January 1, 2009 are still subject to the rules and regulations governing 403(b) plans even if the employer no longer exists, the vendor has been deselected or the vendor issued the contract after September 24, 2007. It is up to the vendor to make a reasonable attempt to determine if a participant or beneficiary has any outstanding loans from the employer’s qualified plans and the highest outstanding loan balance for these loans for the past 12 months before making a loan. If a participant is not a current employee as of January 1, 2009, the vendor may rely on the participant’s representation about his or her status as a former employee.

### Plan Termination—Easier Said Than Done

The final regulations permit employers to do what they couldn’t do in the past—terminate their 403(b) plans. Plan termination is possible only if:



- The employer or related employer do not make contributions to any successor 403(b) contracts beginning on the date of termination and for 12 months after all distributions are made from the plan; and
- All 403(b) plan assets are distributed to all participants. Any distributions from partially terminated plans are not eligible for rollover to another retirement plan.

Plan termination for many 403(b) sponsors becomes a “catch-22.” The majority of 403(b) plans are funded with individual contracts that do not permit distributions from these contracts without participant consent. High termination fees and charges deter many participants from terminating their individual contracts. Although the final regulations permit plan sponsors to terminate their plans, it will still be difficult in practice to terminate 403(b) plans as quickly and easily as 401(k) plans.

Plan termination may be a more viable option if the plan is funded exclusively with annuity contracts. Annuity contracts, but not custodial accounts, may permit contract issuers to distribute fully paid individual insurance annuity contracts

which may be subsequently rolled into an IRA. Distributions from paid up contracts are taxed when distributed. Administration and tax reporting of distributions from paid up contracts is handled by the contract issuer. The IRS has indicated that fully paid contracts will follow the same rules that apply to annuities distributed from qualified plans.

### Plan Sponsor “To Do” List

The implementation date for the final 403(b) regulations plan is imminent—January 1, 2009. Here is a list of projects that 403(b) plan sponsors will need to complete before next year.

#### Implement course of action to maintain, consolidate, freeze or terminate current plans.

Plan sponsors should, if they haven’t already, engage experienced 403(b) advisors who recognize that 403(b) plans are not just glorified 401(k) plans for tax-exempts and public schools. These plans have been evolving since 1958 to reflect the diverse needs of this niche market.



#### Address the written plan requirement.

Plan sponsors will need to select plan provisions, decide if they want to use any or all of the

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*Although the new regulations bring some compliance hurdles, they provide an opportunity to make 403(b) plans more effective in helping participants save for retirement.*

IRS model language or adopt a prototype or individually designed plan. Existing plan documents will need to be amended to reflect the final regulations.

#### Select vendors that will provide investment products to the plan.

Plan sponsors will need to reach out to contract vendors who cannot accept future contributions to find out if they will agree to an ISA.

#### Take advantage of the transitional relief under Rev. Proc. 2007-71 for orphan plans.

There is no reason not to do this—all it requires is a good faith effort. Taking advantage of this relief protects employees from potential tax consequences for future contributions and distributions from orphan contracts.

#### Weigh the pros and cons of ERISA coverage.

Private sector 403(b) sponsors whose plans are not currently covered under ERISA should evaluate if any of their actions could trigger ERISA coverage, keeping in mind that ERISA coverage is not necessarily a bad thing. ERISA protections can limit fiduciary liability, whereas state law may not provide these kinds of protections for fiduciary missteps. Smaller employers may find the costs associated with the ERISA reporting and disclosure requirements prohibitive and will want to maintain their plan's non ERISA status.

#### Implement an effective employee communication plan.


Meaningful employee communications are more crucial than ever. A well conceived and executed communication program can mitigate employee backlash to changes that employees consider negative, such as changes in investment providers, a plan freeze or termination or the adoption of a new 403(b) plan.

Communications that are designed to inform or educate participants about the plan can do double duty as a tool to encourage them to increase their deferrals and to spur employees who are not participating in the plan to start making deferrals.

#### The Post Regulatory World

While some employers consider plan termination, others are attempting to reduce (or deselect) the number of investment product providers. Deselection for non-ERISA plans may be difficult because some states, such as Ohio, Texas and California, make restricting the number of product providers difficult. Before deselecting vendors, employers should consider that one size

may not fit all. Employees who are investment do-it-yourselfers may find low cost products fit the bill. Those needing more individualized attention may need higher cost products that provide these services, while others may need a mix of fixed and variable investment products.

Two things are certain—403(b) funding contracts of the future will look more like 401(k) group annuity and custodial accounts and 403(b)s will continue to evolve. Although the new regulations bring some compliance hurdles, they provide an opportunity to make 403(b) plans more effective in helping participants save for retirement. Now is the ideal time for plan sponsors to take a comprehensive look at their 403(b) plans. 

**Editor's Note:** The ASPPA Education and Examination Committee is currently developing the requirements for an ASPPA 403(b) certification program and a 403(b) credential. More information on these anticipated new programs can be found on page 28.

*L. Joann Albrecht, CPC, QPA, is a consulting manager for public sector retirement plans at Nationwide Financial in Columbus, OH, with more than 24 years of experience in private and public sector retirement plans. She is the immediate past Chair of the ASPPA Tax-Exempt and Government Plans Subcommittee and serves as a Subject Matter Expert (SME) for the ASPPA Education and Examination Committee. Joann is a current contributing author to Aspen Publisher's 457 Answer Book, and she writes a monthly online federal legislative and regulatory report for Nationwide that is distributed to public sector plan sponsors and industry consultants. ([albrechj@nationwide.com](mailto:albrechj@nationwide.com))*

#### Resources:

403(b) Final Regulations  
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FAB 2007-2  
[www.dol.gov/PrinterFriendly/PrinterVersion.aspx?url=http://www.dol.gov/ebsa/regs/fab2007-2.html](http://www.dol.gov/PrinterFriendly/PrinterVersion.aspx?url=http://www.dol.gov/ebsa/regs/fab2007-2.html)

Rev. Proc. 2007-71  
[www.irs.gov/pub/irs-irbs/irb07-51.pdf](http://www.irs.gov/pub/irs-irbs/irb07-51.pdf)



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# 403(b) Education ... and a New ASPPA Credential!

These 403(b) times, they are a changin'! After years of seemingly permanent stability, we're poised for some dramatic changes, as outlined in the 403(b) article by Joann Albrecht on page 20 of this issue. These changes, in turn, require changes in educational offerings to support the market changes.

**W**hile ASPPA considered the changing educational needs of its members, ASPPA was approached by the National Tax Sheltered Accounts Association (NTSAA). The NTSAA is a nationally recognized and respected organization whose mission, according to Executive Director Ronald W. Wilson, CAE, is to be the leading resource for education, advocacy and unbiased information for individuals and organizations serving the 403(b) and 457(b) marketplace. To that end, they sponsor two different designations for this market:

- Certified Retirement Specialist (CRS), and
- Master Certified Retirement Specialist (MCRS).

The NTSAA was faced with a significant amount of effort and cost in revising their existing educational programs. At the same time, ASPPA was considering how to address the growing educational needs of ASPPA members in this market. As a result, an agreement was reached between the NTSAA and ASPPA for ASPPA to assume responsibility for the educational credentialing program on behalf of the NTSAA. This agreement was recently approved by the Board of Directors of both organizations and calls for:

- The creation of a new Tax Exempt Plan Consultant (TEPC) credential, and
- The creation of a new certificate program, as a subset of the credential: the Tax Exempt Plan Administration (TEPA) certificate, focusing on the administrative aspects of 403(b) and 457 plans.

The primary intent is to offer education for those who specialize in the 403(b)/457 marketplace resulting in a recognized ASPPA credential. By offering a certificate program, ASPPA also intends to offer education for those desiring to enhance their 403(b)/457 administrative knowledge and skills.

The TEPC credential will require successful completion of the existing Retirement Plan Fundamentals (RPF) 1 and 2 courses, followed by an administrative-focused course with an online exam, similar in structure to the RPF courses. Those who satisfy these three exams will earn the TEPA certificate. The fourth and final exam will be a proctored exam focused on the sales and marketing aspects of tax exempt plans. Existing credentialed ASPPA members will thus only need to take the third online exam to earn the TEPA certificate, and the fourth proctored exam to earn the TEPC credential.

Existing NTSAA designated members in good standing will be grandfathered upon joining ASPPA as follows:

- Those with the MCRS designation will be awarded with the TEPC credential; and
- Those with the CRS designation will be given credit for both RPF courses and the administrative focused online exam, but will need to take and pass the proctored sales/marketing exam to earn the TEPC credential.

TEPC credentialed members are subject to the same continuing education requirements as all other ASPPA credentialed members and are subject to the ASPPA Code of Professional Conduct.

Although the ASPPA Board of Directors has approved the creation of these new educational programs, all new credentials must be approved by ASPPA membership. Thus, you can expect the opportunity to review and vote on approval of the TEPC credential before the end of 2008. We expect delivery of these new programs to begin in late 2009. The curriculum and syllabus are currently being developed and will be included with the membership vote announcement. 📌

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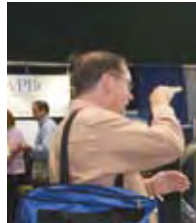
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2008 Western Benefits Conference program Co-chair Alan R. Ross, of Western Pension & Benefits Conference, introduced the Tuesday luncheon speaker, Jim Whittaker.



Internationally famous mountaineer, adventurer and environmentalist, Jim Whittaker, delighted the Tuesday luncheon audience with his recounts of being the first American to climb Mount Everest in 1963 and leading the first American climb of K2, the world's second highest mountain.



ASPPA President Sal L. Tripodi, APM, welcomed the more than 700 attendees of the 2008 Western Benefits Conference to Seattle with hospitality and humor.



ASPPA Senior Vice President/Treasurer Sheldon H. Smith, APM, joined President Sal L. Tripodi, APM, and President-Elect Stephen L. Dobrow, CPC, QPA, QKA, QPFC, for some fish tossing in the Western Benefits Conference exhibit hall.



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US Department of Labor Assistant Secretary Bradford Campbell addressed the Monday luncheon audience of Western Benefits Conference attendees.



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Teresa T. Bloom, APM, ASPPA Chief of Government Affairs, and ASPPA member Jim Nolan helped ASPPA PAC celebrate its tenth anniversary by breaking its goal for new contributions.



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# A Research Perspective on the Future of Retirement

by GERALYN M. MILLER, Ph.D.

Economic and social conditions in the United States have changed dramatically over the recent past. The booming economy of the late 1990s has reversed into what is now viewed by some as recessionary in its nature. On top of this economic downturn, the population continues a steady growth to its current level of 304,372,387 people, up more than 20% from that of 1990. People are living longer, too. In 2007, 18.3% of the population was age 85 and older while in 1990, that age group was only 12.4% of the population. In essence, we have more people, with a greater number of them living longer and all having to stretch their money much farther than they had ever anticipated.

In addition to the above statistics, the first member of the Baby Boomer generation became eligible to collect social security in this past year. This generation was aptly named for the spike in birth rates spanning the two decades following the conclusion of World War II. As a result of the increase in births during those years, we now are witnessing the beginning of what will be a retirement wave composed of greater numbers of people than ever before in the history of the country. The Boomers number an estimated 76 million people.

Given the above, it is easy to understand why careful financial planning is necessary today and into the foreseeable future, particularly with regard to retirement savings. Failure to plan adequately is never good, but when it means a difference in the quality of your life at a later stage, it is essential. So what is the current condition of retirement savings in the US? Let's consider a few things.

## Social Security

First, the conventional wisdom tells us that our system of social security may be in serious jeopardy. It has become evident from studies that social security income will not be enough to sustain our retirees. While this system, developed nearly three-quarters of a century ago, has been the focus of intensive public and congressional interest, meaningful reform of the system has yet to occur,



leaving the country in a position of not knowing what to expect from what was previously the main source of retirement income. At the very least, many in the US fear for the future vitality of this fundamental source of retirement income.

## Retirement Savings

The pattern of our retirement savings plans in this country has been changing over the last two decades. Researchers have demonstrated that the total number of defined benefit (DB) plans has decreased significantly. Although a small segment of the industry is witnessing a slight increase in these types of plans, overall, the total number of DB plans has declined. The Bureau of Labor Statistics, for instance, reported that in 1985 80% of the employees participating in retirement plans were enrolled in defined benefit plans, but



by 2000 that percentage had dropped to 36%. Far more common, today, are defined contribution plans, which require a more active involvement on the part of people in planning and saving for their retirement needs. This shift requires a fundamentally different way of looking at retirement savings planning on the part of both consumers and pension professionals. Researchers Leora Friedberg and Anthony Webb, in a National Bureau of Economic Research working paper, present evidence to suggest that this changing dynamic in the pension plan patterning is responsible for increasing the numbers of workers over the age of 60.

Most of the studies into retirement savings that exist have focused on asset accumulation. From these studies, and there are a good number of them, it appears that while Baby Boomers as a group have accumulated a good deal of wealth, that wealth is unevenly distributed across the group. In fact, the Boomers in the lower quartile of savers have accumulated less over their lifetimes than did their predecessors. So, it appears that there is a good deal of variation with regard to the levels of assets at the disposal of the retiring Boomers.

### Lifestyle

The Boomer generation is one that is accustomed to having access to a greater number and variety of goods and services than the generations prior to it. Coincidental to the spike in birth rates was a shift from what had been predominantly a rural society to largely an urban one. The large urban centers that sprang up have been home to concentrated service provision such as healthcare facilities, public transportation, financial and legal services, to name but a few. Baby Boomers, for the most part, have lived lifestyles that were never dreamed of by previous generations. They are folks who are used to a relatively high standard of living, as a whole. Baby Boomers are not likely to be retirees who will be satisfied with a standard of living below that which they have become accustomed over the course of their working lives.

Baby Boomers have been extremely active folks throughout their lives. They are used to being on the go. How retirement will impact their psychological and social states remains to be seen. When Dick and Jane Boomer have spent little time together because of their working responsibilities, how do they adapt to constant companionship with each other? These are considerations that most folks fail to look at in any meaningful way until they actually retire. Yet, they are ones that, most likely, involve resolution

through expenditures of some sort and should have been taken into consideration in their savings planning. For instance, if Dick wants to play golf and Jane wants to join a jazzercise class, they can do so only if they have enough income to go beyond the basic necessities of food, clothing, shelter and healthcare.

### Decumulation of Assets

Now, let's look at retirement from another angle. What are the optimal strategies available to Baby Boomers and future generations of retirees with regard to decumulation of the assets they possess through their lifetime of savings? Decumulation of assets has not been as popular a line of inquiry for researchers over the years as has accumulation of assets. In fact, it is only in recent years that this term has begun to generate any interest in the media, as well. A brief example will illustrate this recent focus on decumulation. Using Lexis-Nexis Academic Universe search engines on the key words, "Pension and Decumulation," there were 90 references in US and world newspapers between May 14, 2006 and May 14, 2008. The same key words search produced only 31 references between May 14, 2004 and May 14, 2006, and only 18 references in the two preceding years.

Arriving at models for optimal decumulation strategies is a daunting task. There is much to learn on many levels in order to begin to understand how to go about doing this type of planning. As anyone in the retirement savings arena is well aware of, there is a plethora of unknown factors that impact on the levels of accumulated retirement assets. Could anyone have predicted with any accuracy 20 or so years ago the all time rapid escalation in gasoline prices that we are experiencing today? Life expectancy has been on the rise for quite some time, but will it continue indefinitely? We really have no way of knowing when trends like these will reverse themselves, if ever, or what new trends will appear. Furthermore, as researchers from the Employee Benefits Research Institute found in 2005, even when people have a realistic expectation of their own life expectancies, they tend to underestimate the amount of money they will need to live comfortably on a yearly basis. Many, therefore, are faced with the very real possibility of outliving their assets.

### Research is Underway


Thomas Edison, one of America's greatest thinkers and inventors, once said, "A lot of people miss opportunity

*Baby Boomers are not likely to be retirees who will be satisfied with a standard of living below that which they have become accustomed over the course of their working lives.*



because it comes dressed in overalls and looks like work.” Given the uncertainties the world has to offer with regard to finding optimal strategies for decumulation to prevent outliving those assets, there is a good deal of work to be done. It is fortunate that there are many people who are willing to work hard in the retirement savings arena. Research efforts are taking place right now that will, hopefully, result in answers to these and other tough questions facing retirement planning practitioners. Financial behavior researchers have been working to better understand the attitudes that workers hold with regard to how they save for retirement. Design teams have been working with economists to better identify products that would be useful for the purposes of decumulating retirement assets. These are just a couple of examples of the vast amount of work taking place at the present time in an attempt to enhance pension planning.

### Conclusion




Keeping abreast of the progress made by these researchers will be both interesting and, potentially, rewarding for pension professionals and the retirees of this country alike. The challenges breed opportunities, as Edison noted; we are living and working in exciting times for our industry. 

**Editor's Note:** Geri Miller was also integrally involved in the production of the newly released ASPPA Retirement Plan Fundamentals (RPF) webcourses. See ad on page 45.



*Geralyn (Geri) M. Miller, Ph.D., received her M.A. in Governmental Relations from DePaul University and her Ph.D. in Public Policy Analysis from the University of Illinois, Chicago, IL. She has worked in the public affairs arena and taught at DePaul and Dominican Universities. She currently is an Associate Professor at Indiana University–Purdue University Fort Wayne (IPFW), where she is the Director of the Institute for Pension Plan Management. (millergm@ipfw.edu)*

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## Love is in the AIRE

by Sal L. Tripodi, APM

On September 26, 2007, the IRS published modifications to its Circular 230, which governs practice before the IRS. Prior to the publication of these modifications, there were only four categories of practitioners who could practice before the IRS: accountants, attorneys, enrolled actuaries and enrolled agents. Revised Circular 230 creates a fifth category of practitioner: the enrolled retirement plan agent (ERPA). To become an ERPA, a candidate will be required to pass one exam (consisting of two parts).

The IRS decided to contract out the responsibility for administering the ERPA exam. On August 6, 2008, the IRS announced its selection of the American Institute of Retirement Education, LLC (AIRE) as the contracted ERPA exam administrator. What you might not know is that AIRE is a joint venture between ASPPA and the National Institute of Pension Administrators (NIPA). It is exciting to be partnering with NIPA in this endeavor, and ASPPA members should take pride in the fact that AIRE was selected. This contract is a recognition by the IRS of the expertise that ASPPA and NIPA bring to the table for this important new IRS practice category.

Here's what the IRS says about the selection of AIRE.

“After careful consideration of the proposals, the IRS determined that the AIRE proposal met all evaluation factors and presented the best value to the Government. AIRE's Board of Managers consists of some of the most prestigious members in the retirement plan community throughout the United States. The AIRE Board of Managers have unmatched depth and breadth of knowledge and expertise to establish the degree of proficiency required of an ERPA candidate to demonstrate competency in retirement plan matters. They will serve as advocates for the ERPA examination program and provide assistance and guidance for ERPA candidates. ASPPA and NIPA have been offering exams leading to credentials for retirement plan professionals for more than 65 years combined. ASPPA and NIPA annually

administer and update 11 and 6 rigorous examinations, respectively, for retirement plan professionals. From examination development to credentialing, continuing and professional education, association management and advocacy efforts, AIRE is unparalleled in the industry.”

Wow! (But you probably knew all those things already.) Dare we say, “to err is human, to AIRE is *divine*?”

So, are you going to be an “AIRE-head” and seek the ERPA credential from the IRS? To answer that question, you need to know what an ERPA is entitled to do.

An ERPA's practice is limited to representation with respect to: (1) Employee Plans Determination Letter Program, (2) Employee Plans Compliance Resolution System (EPCRS) and (3) Employee Plans Master and Prototype (M&P) and Volume Submitter program (collectively known as “Pre-Approved Plans”). ERPAs also are generally permitted to represent taxpayers with respect to IRS forms under the 5300 and 5500 series which are filed by retirement plans and plan sponsors, but not with respect to actuarial forms or schedules.

The creation of the ERPA will enable TPA firms and consulting firms that do not have any attorneys, accountants, enrolled actuaries or enrolled agents on staff to be able to represent clients before the IRS in these matters by having one or more staff members become ERPAs. The ERPA credential also is an important recognition of how important the retirement plan professional is to sound administration of the private retirement system.

There are continuing education requirements prescribed by the IRS, generally requiring 72 hours of CE during a three-year enrollment cycle. (ERPAs must renew their credential with the IRS every three years.) For more information about ERPA and the enrollment and CE requirements, visit the ERPA exam Web site: [www.erpalexam.org](http://www.erpalexam.org). As an ASPPA member, you know that ASPPA provides numerous continuing education opportunities that will assist ERPAs in fulfilling their CE requirements with the IRS.

### When Can You Get Started?

Registration for the ERPA exam opens on October 23, 2008—the day after the 2008 ASPPA Annual Conference ends. The first exam window begins on January 6, 2009 and ends February 7, 2009. The Web site cited in the prior paragraph contains more detailed information about the exam and registration process.

### Interaction with ASPPA Credentials


Unfortunately, none of the ASPPA credentials automatically earn you an ERPA. This fact is not a negative reflection on ASPPA's credentials. The IRS simply did not want to choose among the various retirement-related credentials out there to create a "grandfathering" program. Thus, all retirement plan professionals who wish to become ERPAs must do so by taking the prescribed exam, regardless of their educational background or credentials.

In response to the creation of the ERPA, ASPPA has also made some modifications to its credentialing program. The learning objectives for an ERPA align most closely with ASPPA's QPA credential. Accordingly, individuals who

earn the ERPA credential may apply to ASPPA for the QPA credential. At the same time, ASPPA is in the process of restructuring its CPC program. Our hope is that more QPAs will be encouraged to seek this highest administrative credential available from ASPPA. Earlier this year, Brian H. Graff, Esq., APM, Bob Long, APM (Co-chair of ASPPA's Education and Examination Committee), and I presented a free webcast to explain these changes. To learn more, or for an opportunity to listen to that webcast, go to [www.asppa.org/ERPA](http://www.asppa.org/ERPA).

These are exciting times for ASPPA and for the retirement industry. And it's been fun serving as your President during these exciting times.

As the Hollies might have sung today if they were re-recording one of their hits:

*"All I need is the AIRE that I breathe . . . and an ERPA!"* 

*Sal L. Tripodi, APM, JD, LLM, is the principal of TRI Pension Services, a nationally-based consulting firm in Highlands Ranch, CO. He is the author of The ERISA Outline Book. Sal is also the President of ASPPA. TRI Pension Services provides numerous in-house seminars for financial institutions, administration firms and other pension service providers throughout the country, and also publishes a quarterly newsletter (ERISA Views). For more information about TRI Pension Services, visit [www.cyBERISA.com](http://www.cyBERISA.com). ([cyBERISA@aol.com](mailto:cyBERISA@aol.com))*



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# The ASPPA Recordkeeper Certification

## A Great Thing for Plan Sponsors and for the Industry

by Ronald E. Hagan

Businesses that provide recordkeeping services to retirement plans, primarily referred to as Third Party Administrators (TPAs), have a major impact on the ability of retirement plan officials to meet their fiduciary duty. Yet TPAs are not regulated by the government. To promote self-regulation in our industry and to help plan sponsors and other fiduciaries assess the competency of recordkeeping firms, ASPPA launched the ASPPA Recordkeeper Certification program in 2007.

### How the ASPPA Recordkeeper Certification Program Can Help Alleviate Plan Sponsor Risk

Until the past couple of years, plan sponsors have not given much attention to ERISA's rules governing how to select recordkeepers, investment firms, custodians and trustees. The climate has changed, however, with the dramatic impact of lawsuits against all sizes of ERISA plans and with the increased pressure for full fee disclosure. Many plan officials fail to realize that the burden of exposing any potential problems with vendors is theirs, not their service providers. Consequently, when trouble comes in the form of a Department of Labor sanction or participant lawsuit, the plan sponsor's executives are left alone to make their own defense.

ERISA requires that plan officials select and monitor service providers using a *prudent process*. Learning which providers can be trusted is a key ingredient in an efficient selection and monitoring process. Plan sponsors are realizing that the ASPPA Recordkeeper Certification program makes the job of proving prudence easier as they compare and select their retirement plan's recordkeeper.

### The ASPPA Recordkeeper Certification—Many Positive Implications for the Industry

ASPPA's decision to sponsor a certification program for recordkeepers has many positive implications for the retirement plan market. The program was designed with two primary objectives in mind – to promote self-regulation within the recordkeeping industry and to offer a means for plan sponsors and other fiduciaries to make informed decisions on recordkeeper selection.

Key components of the ASPPA Recordkeeper Certification program include: (1) a defined quality management system useful in selecting recordkeepers; (2) clarity of the scope of recordkeepers' business models; (3) independent certification of competency and capability; and (4) an integrated approach that meshes with current investment advisory and investment manager certifications.

### Why a SAS 70 Audit Alone Isn't Enough

In its effort to align the recordkeeping industry's practices with the needs of retirement plan sponsors, ASPPA considered using the *Statement on Auditing Standards Number 70* (SAS 70), a program managed by the American Institute of Certified Public Accountants (AICPA). (See article on page 14 of this issue.) In a SAS 70 audit, a certified public accountant conducts an audit of a service organization and produces a report. The SAS 70 audit relies on the service organization to describe the processes that it wants to be audited.

When ASPPA conferred with government regulatory agencies about their view of how a certification program for recordkeepers should be designed, ASPPA learned that the SAS 70 approach had a major flaw. Regulatory agencies want recordkeepers to be audited against a *defined standard* that contains *uniform practices*. In this way, retirement plan sponsors would be able to compare recordkeepers on an "apples to apples" basis.

A SAS 70 audit, on the other hand, allows the organization being audited to describe its own controls, which become the subject of an auditor's test. SAS 70 audits *do not* follow a required format nor utilize a specific technical standard. Rather, service organizations are permitted to disclose their control objectives and activities in a variety of fashions and using a variety of technical standards. Furthermore, the ASPPA certification program focuses on the processes that are essential in helping retirement plan officials satisfy their fiduciary duty. A SAS 70 audit, however, provides no opinion of a service organization's fiduciary support competency.

In summary, the SAS 70 program's lack of a uniform benchmark, combined with its failure to define specific fiduciary support practices, quickly disqualified it for the government and ASPPA's purposes. Consequently, ASPPA chose an approach to certification that was designed specifically for the retirement plan sponsor market. Compared to a SAS 70 audit, an ASPPA certification has a great deal more relevancy to plan sponsors in fulfilling their fiduciary

duty and offers more robust insight into the recordkeeper’s entire operation. However, if a recordkeeper firm has a favorable SAS 70 audit report, it could expedite the ASPPA certification process.

The chart below is a summary comparison of key features between the ASPPA and SAS 70 programs:

ASPPA Certification vs. SAS 70	ASPPA Recordkeeper Certification	SAS 70 Audit
Qualifies TPAs for industry self-regulated status	Yes	No
Certification standard designed to support fiduciaries	Yes	No
Unites TPAs with investment firms’ requirements	Yes	No
Audit applies uniformly to all TPA business models	Yes	No
Tests corporate governance controls and practices	Yes	No
Tests compliance with SEC and FINRA rules regarding market timing and late day trading	Yes	No
Inspects disclosures and conflicts of interest	Yes	No
Independent committee decides pass/fail	Yes	No
Annual audit required to maintain certification	Yes	No
Audit methodology uses international standard	Yes	No
Audits conducted by accredited fiduciary specialists	Yes	No

### Best Practices for the Recordkeeping Industry

Faced with the opportunity to build a certification program from scratch, ASPPA set up a task force to solicit input from the Securities and Exchange Commission, the Department of Labor, plan sponsors, recordkeeping industry executives, CEFEX, Roland|Criss and other industry advisors. The ASPPA task force defined a standard that is built on 17 critical practices, which have formed the basis of the ASPPA Recordkeeper Certification program. (Refer to prior articles in the Fall 2007 and Winter 2008 issues of *The ASPPA Journal* for more details or go to [www.asppa.org/arc/overview.htm](http://www.asppa.org/arc/overview.htm).)

#### Act Now!

Many recordkeeping firm owners have realized that the ASPPA Recordkeeper Certification program currently provides a unique way to distinguish their firm in the marketplace. Certified firms are now educating plan sponsors on the importance of the ASPPA Recordkeeper Certification and familiarizing them with the 17 best practices. Questions about whether or not a firm is certified are beginning to appear on plan sponsors’ Requests for Proposals (RFPs) as they look for recordkeepers. If those aren’t reasons enough to jump on the bandwagon and get certified, there is one more important reason. ASPPA’s goal is that the ASPPA Recordkeeper Certification program will offer a viable industry self-regulation solution in order to fend off any efforts by SEC or DOL to regulate our industry. Your participation in the program will help ASPPA—and our industry—achieve that goal. 🏆



*Ronald E. Hagan is president and CEO of Roland|Criss. He has a lengthy career in developing retirement plan governance systems and advising fiduciary committees on governance practices. Prior to joining the Roland|Criss team, Ron was a senior vice president with the First National Bank of Commerce and a fiduciary on its Asset Liability Management Committee. Subsequently, Ron was a principal with Booz, Allen & Hamilton. He serves as an advisor on the ASPPA task force that maintains the industry practices for the recordkeeper certification program. He is also Chairman of the Board of the Investment Fiduciary Leadership Council. ([ronhagan@rolandcriss.com](mailto:ronhagan@rolandcriss.com))*

# CPC Program Changes for 2009

by Kimberly A. Radaker, CPC, QPA, QKA, and Kim L. Szatkowski, CPC, QPA, QKA

As previously announced, all professionals who meet the requirements for the new IRS Enrolled Retirement Plan Agent (ERPA) designation will be given the opportunity to join ASPPA with the Qualified Plan Administrator (QPA) credential. Because of this new development [and based on feedback from ASPPA members regarding the current Certified Pension Consultant (CPC) program], it is imperative to revitalize the CPC program and applicability of the CPC credential so that it is recognized as the “pinnacle” in retirement plan consulting expertise by the entire industry.

The revamping of the CPC program began with a job analysis to determine exactly what knowledge is required—and we’ve determined the credential needs to be tested in different and more relevant ways. Rather than having two proctored essay exams (C-3 and C-4), starting in 2009 the CPC credential will be obtained by passing specific core and elective online modules, along with a single comprehensive CPC essay examination.

Since this announcement was made, candidates and designees have understandably raised questions about how the program will work, what the modules will cover and what transition requirements there will be for candidates who have passed one of the current exams but not both. An informational webcast for members was held on January 30, 2008, and this article will address questions where answers were unknown at that time.

## CPC Module Description, Topics and Requirements

Each module will have a text component, an optional Web component and an online exam.

The questions will be designed to reflect real situations that arise as practitioners consult with clients in practice. Candidates may need to do some research before answering the questions.

It is expected that candidates will use resources and reference materials beyond the information in the text. In this way, the online modules will test not only a candidate’s mastery of the material in general, but also the candidate’s ability to research complex issues and provide the proper advice to clients.

There will be six core online modules required:

- DOL Topics\*;
- Defined Benefit Topics\*;
- Investments;
- Distributions & Loans;
- Fiduciary Topics; and
- Related Groups & Business Transactions.

\* A candidate with a QPA achieved through the conventional ASPPA program will receive credit for the DOL Topics and Defined Benefit Topics modules since this knowledge was previously tested, and will therefore only have to complete four core modules and two of the three elective modules.

There will be three **elective** online modules. Credit for two of the three modules will be required:

- ESOPs;
- Governmental & Tax-Exempt Plans; and
- Nonqualified Plans.

## CPC Examination

One comprehensive, proctored five-hour examination will be required for the CPC credential—in addition to successful completion of the online modules.

The exam will consist of eight multi-part essay questions covering the following topics:

- 401(k) Plans;
- Business Entities & Related Groups;
- Correction Programs & Ethics;
- Coverage & Nondiscrimination;
- Defined Benefit Plans;
- Distributions & Loans;
- Fiduciary Responsibilities including ERISA §404(c); and
- Plan Design.



This exam will remain challenging, but efforts will be made to test the knowledge that the majority of CPCs need to know in practice on a frequent basis and to avoid testing truly obscure information.

This revised CPC examination will be offered for the first time in the fall of 2009, and thereafter during both the spring and fall testing windows.

### Transition Rules

The C-3 examination was offered for the final time in the spring 2008 testing window, and the C-4 examination will be offered for the final time in the fall 2008 testing window. Intensive Review Sessions for C-4 will be held at the ASPPA Annual Conference in October.

### Transition Plan for Candidates who have Passed C-3

A candidate with a QPA achieved through the current ASPPA program who has passed C-3 only (not C-4) will receive credit for the DOL Topics, Defined Benefit Topics, Investments, Distributions & Loans and Fiduciary Topics modules. These candidates will need to complete the Related Groups & Business Transactions module, two of the three elective modules and the proctored CPC examination.

### Transition Plan for Candidates who have Passed C-4

A candidate with a QPA achieved through the current ASPPA program who has passed C-4 only (not C-3) will receive credit for the DOL Topics, Defined Benefit Topics, Related Groups & Business Transactions and the two elective modules. These candidates will need to complete the Investments, Distributions & Loans and Fiduciary Topics modules and the proctored CPC examination.

### 2009 Program Syllabus

Additional information can be found at the ASPPA Web site at [www.asppa.org/CPC](http://www.asppa.org/CPC) or send your questions to [education@asppa.org](mailto:education@asppa.org).



*Kimberly A. Radaker, CPC, QPA, QKA, is a retirement plan consultant with experience in virtually all areas of retirement plan design and administration. She is the Technical Education Consultant responsible for ASPPA's CPC program and also serves as a resource for several companies when complex issues arise. ([kim@radakerconsulting.com](mailto:kim@radakerconsulting.com))*



*Kim L. Szatkowski, CPC, QPA, QKA, ASPPA's Chief of Pension Education, has more than 25 years of technical education experience in the retirement plan industry. Prior to joining the ASPPA staff in 2007, Kim was the national sales and marketing director for Actuarial Systems Corporation (ASC). Kim has owned a consulting firm specializing in third party administration and employee training, and has held a variety of management positions. In addition to teaching retirement education courses, she participated in the development of ASPPA's Qualified 401(k) Administrator (QKA) credential. She has also served as an Associate Editor for The ASPPA Journal and is a founding member and past president of the ASPPA Benefits Council (ABC) of Central Florida. ([kszatkowski@asppa.org](mailto:kszatkowski@asppa.org))*

## ASPPA Recordkeeper Certification

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# ASPPA PERF: Good People PERForming Good Work

by Thomas L. Hopkins

I was in Minnesota recently and one expression I heard repeated over and over again was, “They’re good people.” The context was recounting familiar acquaintances as in, “Do you know John Smith of St. Cloud?” The reply almost invariably (said in the familiar Midwestern inflection) was, “Oh yah, they’re good people.” Next, the person would regale the group with a story about how John Smith had walked two miles in a blinding snowstorm to bring them their mail or some other selfless act.

Initially, these stories would raise an eyebrow of disbelief until another person recounted a similar act of kindness or confirmed the original story. The fact is, I didn’t hear of anyone referred to in any other manner. I was recently thinking about how to introduce the philanthropic arm of ASPPA, the ASPPA Pension Education and Research Foundation (PERF), and that refrain kept ringing in my head, “Oh yah, they’re good people.”

For those who are unaware, ASPPA PERF was created in 1976 by a group of visionary ASPPA leaders as a vehicle for giving back to the industry by providing scholarships for students in the actuarial or math fields and funding research projects to enhance the private retirement industry.

Thanks to the generous contributions from those in the industry, ASPPA PERF provides a permanent source of funds to address long-term industry concerns at the national level. Today, ASPPA PERF helps:

- Provide endowments to educational institutions for the granting of scholarships to qualified students majoring in Actuarial Science or related mathematics fields who are seeking assistance with tuition and expenses;
- Sponsor the development of educational materials and texts as well as research by making grants of funds for approved projects; and
- Sponsor the Martin Rosenberg Academic Achievement Award and the ASPPA Presidential Scholarship.

The Foundation continually looks ahead to identify future issues in the industry and provide responses to changing priorities. It is guided by a prestigious Board of Directors, which includes leaders representing various areas of the industry that provide a broad perspective on the widespread needs of the pension and actuarial professionals.

Under the leadership of the Board, great strides have been made in establishing PERF as an important vehicle to address industry concerns. Some of the selfless acts performed by the Foundation are described in more detail below to give you a flavor of the good work performed by this organization.

In December 2004, the Foundation signed an agreement with the University of Michigan to provide annual funding to support the Michigan Pension Education and Training Program (MPET) in the Department of Mathematics to provide funding to foster excellence in pension education and to promote scholarly research in the pension field. In practice, the MPET agreement provides the mechanism for ASPPA to utilize the Technical Education Consultants (TECs) for the creation and implementation of its credentialing programs. The agreement, now in its fourth year, has provided more than \$1 million dollars for this necessary and worthwhile endeavor.

During the past few years, the Foundation has provided funding for research reports, such as *Savings under Tax Reform: What is the Cost to Retirement Savings?* This report was issued in response to the tax reform commission created by President Bush to explore alternatives to the current tax system. The conclusion of the report was that any type of consumption tax would increase total savings, but such savings would not provide uniform savings across all income classes. The existence of qualified retirement plans offers the opportunity of savings to all eligible workers. This report was issued with a press release and generated terrific media exposure for ASPPA and, more importantly, the private retirement industry. This report is just one example of the Foundation providing the necessary counter arguments to proposed changes related to the private retirement industry.

Another recent report, *Revenue Estimates and Retirement Policy: The need to consider present-value estimates of changes in tax policy,*



concluded that the current federal budget scorekeeping rules—under which revenue effects are reflected on a cash-flow basis using a ten-year budget window—overstate the true costs of retirement savings proposals. These rules result in a distortion of the economic costs of tax deferrals, which are eventually paid, and inhibit the enactment of legislative proposals designed to increase retirement benefits for American workers.


Most recently, the Foundation provided a \$50,000 grant to the newly created Institute for Pension Plan Management at Indiana University-Purdue University Fort Wayne (IPFW) to use the ASPPA credentialing courses as the foundation for cutting edge curriculum provided by the Institute. This project, the first of its kind in North America, will provide education, specialized training and research for the retirement industry as a whole. In addition to reaching those currently in the industry, this program expands ASPPA's offerings to provide a clear academic path for individuals wishing to pursue a career in the retirement field.

Perhaps now you can understand why that phrase, "Yah, they're good people" was a constant refrain when thinking about PERF. PERF really is "good people" and provides a much needed

funding mechanism for enhancing ASPPA's voice in the private retirement industry.

The Foundation's mission continues to attract both the financial support and leadership of prominent members of the actuarial community. However, the coffers of the organization have begun to run low and support from members of the private retirement industry is needed to replenish its funds.

To this end, ASPPA's Executive Committee has approved a matching program whereby ASPPA will match any contribution made to the Foundation between now and December 31, 2008, up to \$500. All of the overhead costs of the Foundation are absorbed by ASPPA and your contribution is used directly for the support of the organizational goals.

Contributions to the Foundation are tax deductible, and there are three easy ways to contribute. Send money directly to ASPPA PERF at 4245 N. Fairfax Dr. Suite 750, Arlington, VA 22203. Make a contribution through the expense reimbursement report. Include a contribution with your dues notice by simply marking the box and including an amount with your dues renewal. 



*Thomas L. Hopkins, CPA, joined the ASPPA staff as Chief Financial Officer in 2004 after spending 20 years in various private and public accounting positions. He currently oversees ASPPA's Accounting, Information Technology, Human Resources and Data Services departments. Immediately prior to joining ASPPA, Tom worked for Meso Scale Diagnostics (MSD), a joint venture with IGEN International (NASDAQ: IGEN), where he was Chief Financial Officer overseeing the Accounting and Human Resources functions. Previous to this position, he spent ten years as controller and vice president of finance for a division of Perkin Elmer (NYSE: PKI). Tom has a Baccalaureate degree in Economics from the University of Maryland Baltimore County and an Masters Business Administration from the George Washington University. ([thopkins@asppa.org](mailto:thopkins@asppa.org))*

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# ASPPA PAC: A Foundation for Pension Protection and Personal Success

by Yannis P. Koumantaros, QKA

The ASPPA Political Action Committee (ASPPA PAC) has grown from its beginning ten years ago into a significant force to be reckoned with in Washington, DC. But as may not be completely obvious without explanation, ASPPA PAC has at the same time contributed substantially to my own success, and to the success of ASPPA members around the country.

**O**n the occasion of ASPPA PAC's tenth anniversary, it is entirely appropriate to pause to celebrate our PAC and to encourage more generous support for this crucial tool for our institutional—and personal—growth and well-being.

Our business is utterly dependent on federal law—ERISA and the tax code. Qualified retirement plans are what we are all about, and we cannot help our clients provide for their own and their employees' secure retirements without solid, fair laws that achieve the right balance between participant protection and effective incentives for employers to incur the costs and responsibilities of providing a qualified retirement plan.

We know better than most that both ERISA and the pension tax rules are complex. This complexity is necessary to balance incentives with protections. As there are countless differences in employer situations, the rules that govern employer-provided retirement plans must be flexible (complex) enough to accommodate these many industry, demographic, financial and philosophical variations.

The world of qualified pension plans is also technical. It is an area of abiding fascination to us, but to many others—in Congress as well as in our private lives—talk of pension law causes eyes to glaze over. Actuarial science is a necessary part of the security we strive to achieve for ourselves, our clients and their workers—but it is not the stuff of scintillating cocktail party conversation! Therefore, we have a formidable hurdle to cross when we seek to focus lawmakers' attention on the intricacies of pension law and the necessity for correct and timely legislation

to put and keep pension law protections and incentives in the balance required to assure the most secure possible retirement for most American workers. And that's where ASPPA PAC comes in.

ASPPA PAC allows us to help the lawmakers whose help we need. It lets us enjoy the advantages of a “two-way street” (*i.e.*, a mutually beneficial relationship) by giving us a tool with which we can offer assistance to those whose help we so urgently need. Our efforts in this regard further our important work of building strong, credible, trusted relationships with lawmakers. It helps us, through these crucial relationships, create the favorable impression that results in our government affairs personnel being able to focus lawmaker attention on key, but technical, pension law issues.

And a wonderful side effect of this relationship-based access is that it helps each of us involved in the process be better informed, more sensitive advisors to our clients. The often early, and always significant “inside story” that naturally comes across the desks of ASPPA PAC volunteers and supporters helps us build our businesses and helps us help our business clients provide better pension plans for themselves and their workers.

Examples of this byproduct abound. We knew what new opportunities would emerge from the developing Pension Protection Act (PPA) in 2005 and 2006. We participated in the development of the automatic 401(k) plan rules and in the cash balance conversion rules. This year, we are watching as Congress corrects the unintended (or simply wrong) PPA glitches. We are now participating in the development of automatic IRA programs, and in new law that will increase pension planning opportunities



**ASPPA PAC**<sup>™</sup>  
OPENS THE DOOR

for women and others who enter, leave and then reenter the workforce. We are participating in the important emerging new rules that will allow for payment of pension benefits during phased retirement. We helped Congress fashion new plans, such as the DB(k) plan that was authorized in PPA, or hybrid defined benefit/defined contribution plans such as cash balance plans.


The result of all these efforts are of direct benefit to our clients. We were well-positioned to advise our clients of these emerging opportunities, which helped them decide on their pension planning choices. Thus, participating in ASPPA PAC and in ASPPA government affairs activities directly benefited us volunteers and our clients even more quickly than ASPPA's work helped our membership as a whole.

There are many opportunities open to ASPPA members to support ASPPA PAC and/or to participate in its growth and operation. Contributions are, of course, at the heart of the PAC's effectiveness. We need as many contributions, no matter how small they might be, from as many ASPPA members as possible. And we need contributions to be as generous as possible from those members who can and will support the PAC to a more significant extent. You can contribute (non-corporate) funds to ASPPA PAC online—simply visit [www.asppa.org/government/gov\\_pac.htm](http://www.asppa.org/government/gov_pac.htm). Or you can respond to the July 9 e-mail sent to all ASPPA members by ASPPA's President, Sal L. Tripodi, APM, and Executive Director/CEO, Brian H. Graff, Esq., APM. The e-mail contains contribution information as well.

There are tangible benefits to participating in ASPPA PAC. There will be a fun "birthday celebration," complete with political theming, at the ASPPA Annual Conference in Washington, DC in October. There will be a special reception for PAC contributors, recognition, prizes to be won and awards to be presented in connection with the celebration. There will also be a special election analysis webcast that will be offered on a complimentary basis to those who contribute \$250 or more to ASPPA PAC this year.

To create "the buzz" and encourage the growth in participation by ASPPA members in their ASPPA PAC, many committed volunteers are required. The tasks these volunteers can perform are many and varied, and can take as little as an hour or so of commitment, or as much as the committee chair's job entails. Please do consider joining our volunteer effort (which mostly focuses on spreading the word of the benefits of ASPPA PAC to ASPPA members). If you are interested,

contact ASPPA PAC Co-chair Teresa Bloom ([tbloom@asppa.org](mailto:tbloom@asppa.org)). Teresa will help you identify the job you'd most like to do, and determine the amount of time it will take. She will then sign you up for the tasks for which you want to volunteer.

Thank you for your consideration of a donation to ASPPA PAC or an increase in your current contribution level. And thank you for considering joining our team of committed volunteers. You'll find it fun and profitable for yourself, as well as a great way to give back to your industry and to ASPPA. 



*Yannis P. Koumantaros, QKA, is chief pension consultant and CFO of Spectrum Pension Consultants, Inc. He is responsible for internal and external pension consulting, financial operations and development of new business nationwide. Yannis is affiliated with ASPPA, ASPPA PAC, NIPA, SPARK, NAACI and the Charles Schwab Trust Company Advisory Board. His retirement plan marketplace knowledge has contributed to such media sources as SmartMoney magazine and FundAdvice.com. Prior to joining Spectrum, Yannis graduated from the University of Washington with a bachelor's degree in Business Administration, Finance/Marketing concentration. ([yannis@spectrumpension.com](mailto:yannis@spectrumpension.com))*

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# GAC Meetings with Regulatory Agencies

by Robert M. Richter, APM

On June 23, 2008, ASPPA Government Affairs Committee (GAC) leadership met with representatives of the Treasury, Internal Revenue Service (IRS), Department of Labor (DOL) and Pension Benefit Guaranty Corporation (PBGC). These meetings are arranged by GAC on an annual basis to discuss a variety of current regulatory issues.

While these meetings were taking place, representatives of GAC's Form 5500 Schedule C Task Force held a separate meeting with DOL representatives. Some of the issues raised in this meeting were subsequently addressed in FAQs that the DOL posted on its Web site.

The following is a summary of the key issues that were addressed with the regulatory agencies. In many cases these issues have been, or will be, the subject of GAC comment letters.

## IRS/Treasury Meeting

### Interim Plan Amendments

In 2005, the IRS set forth rules regarding the timing of plan amendments. These rules were initially found in Rev. Proc. 2005-66 and are currently found in Rev. Proc. 2007-44. The rules generally require that an amendment, to reflect a change in the law (and anything integrally related to a change in the law), must be adopted no later than the due date of the employer's tax return for the fiscal year in which the change becomes effective. An employer must generally adopt a discretionary amendment by the last day of the plan year in which the change is effective.

The IRS is currently examining whether changes should be made to the interim amendment rules. The rules were implemented because the Treasury and IRS believe that more timely amendments help foster compliance with the qualification requirements. However, both practitioners and IRS agents are finding that the rules are difficult to apply and therefore increase non-compliance due to failure to adopt an amendment timely. The confusion results because there are non-uniform deadlines due to the rule itself (*i.e.*, it varies based on an employer's fiscal year) and the fact that there are numerous exceptions [*e.g.*, IRC §411(d)(6) anti-cutback rules]. In addition, in many cases it is not clear whether an optional provision in a new law is subject to the interim amendment rule or the discretionary amendment rule.

The IRS asked for input on potential changes to the interim amendment rules. In general, ASPPA proposed that amendments only be required every two years (in order to coincide with the six-year remedial amendment period cycle for pre-approved plans) and that the only amendments needed would be those listed by the IRS. Also, where legally possible, the IRS should provide relief from the anti-cutback rules of IRC §411(d)(6). GAC's Plan Documents Subcommittee believes this proposal would (1) be acceptable to the Treasury and IRS because amendments would still be required more frequently than once every five or six years; (2) provide uniform deadlines to adopt the amendments; and (3) provide certainty as to which amendments would be needed (*e.g.*, whether a particular change is a discretionary change or integral to a required change). It should be noted that this was an initial proposal and many details must be fleshed out. The process of developing and implementing changes to the current rules will be lengthy and we will provide additional details as this project develops.

### Voluntary Delinquent Filing of Form 5500-EZ

The IRS does not have a formal process regarding the waiver of penalties for failure to file Form 5500-EZ. The IRS has, however, been very lenient in waiving penalties upon request. Nevertheless, practitioners are put in a difficult situation in advising plan sponsors who have delinquent Forms 5500-EZ that the ultimate sanctions are not predictable since one cannot guarantee that penalties will be waived. Some plan sponsors would prefer to pay a reasonable fee upfront if that would guarantee the resolution of the matter. Alex M. Brucker, APM, submitted a letter asking the IRS to implement a late filer program similar to the delinquent filer voluntary correction program (DFVC) and ASPPA supports this request. The IRS acknowledges and understands the concern. Unfortunately, the IRS will not be able to implement such a program in the immediate future because of logistical concerns (*e.g.*, coordination with the DOL and the EFAST 2 system).

### Prefunding a Match with Excess DB Assets

Under the Internal Revenue Code (IRC), an excise tax is imposed on an employer reversion of excess assets from a terminating defined benefit plan. The excise tax is reduced where the employer transfers a portion of the excess amounts to a qualified replacement plan [as defined in IRC §4980(d)(2)]. The IRS has, in various Private Letter Rulings, permitted some qualified replacement plans to use the transferred excess amounts to provide matching contributions to plan participants. The rulings, however, were issued prior to the release of the final IRC §401(m) regulations. Under these regulations, employers are prohibited from pre-funding matching contributions. Thus, it appears that the ability to use transferred excess assets to provide a matching contribution would now be prohibited.

The IRS and Treasury believe the regulations prohibit the use of the transferred assets to provide matching contributions under a replacement plan. They are sympathetic to the issue particularly since it is possible this issue was not considered when drafting the regulations. Nevertheless, if the Treasury and IRS decide to continue to permit this use of excess assets, then the project will take a considerable amount of time if they determine that it would require a modification to the IRC §401(m) regulations.

### IRC §414(s) Compensation

Many practitioners are dealing with issues relating to the impact of the post-severance compensation provisions of the final IRC §415 regulations. One area of concern relates to the impact of these provisions on a plan's definition of compensation for other purposes (*i.e.*, the regulations define IRC §415 compensation and provide specific rules regarding the treatment of post-severance compensation). IRC §415 compensation serves as the basis of compensation that is used to determine whether a plan's definition of compensation for allocation or benefit purposes is discriminatory under IRC §414(s). The current IRC §414(s) regulations provide for certain "safe harbor" adjustments that may be made to IRC §414(s) compensation. It is not clear what adjustments, if any, may be made with respect to post-severance compensation without creating the potential of a discriminatory definition of compensation.

For example, IRC §415 compensation must include regular pay that is paid within the later of the end of the limitation year or 2 1/2 months after a participant has terminated employment. For administrative ease, some plans may only want to include for allocation or benefit purposes

regular pay that is paid to the former employee as part of the last paycheck. It is not clear whether the plan's definition of compensation is potentially discriminatory and must therefore be annually tested in accordance with the IRC §414(s) regulations.

The process of modifying the IRC §414(s) regulations to address this [and other issues, such as the impact of the recently enacted HEART Act of 2008 on IRC §414(s) compensation] is lengthy. GAC hopes the IRS will be able to address these issues on a more expedited basis through less formal guidance, such as by issuing a Revenue Ruling.

### Issues Relating to the Benefit Restrictions of IRC §436

#### *Valuation of cash balance accounts*

ASPPA supports a position where the denominator of the Adjusted Funding Target Percentage (AFTAP) for a cash balance plan (for purposes of benefit restrictions) is the lesser of the Funding Target or the balance of the hypothetical account balances. At the public hearing on the proposed regulations, government representatives had difficulty with the concept of ignoring subsidies inherent in high and low interest rates. However, the IRS now says they have no policy objections to this proposal, but do not believe there is legislative authority to support the position (*i.e.*, there may not be any authority to have a funding target percentage for purposes of IRC §436 that differs from the funding target percentage under IRC §430). Since the IRS believes there is no legislative support for the position, GAC is pursuing this through legislation.

#### *Terminating a plan with a bad AFTAP*

The IRS has raised concerns as to whether a terminating plan that is subject to the benefit restrictions of IRC §436 can make distributions to participants. The basis for this position appears to be that even though the funding rules of IRC §412 no longer apply to the plan, the benefit restrictions of IRC §436 remain intact. This issue is critical and GAC is working to get it resolved as soon as possible.

## GAC Corner

### ASPPA Government Affairs Committee Comment Letters and Testimony since June 2008

#### August 4

ASPPA testified before an IRS public hearing on proposed minimum required contribution regulations, addressing issues raised in the July 21, 2008 comment letter.

[www.asppa.org/pdf\\_files/govpdfiles/ASPPA\\_MRC\\_Hearing\\_Outline\\_08.04.08.pdf](http://www.asppa.org/pdf_files/govpdfiles/ASPPA_MRC_Hearing_Outline_08.04.08.pdf)

#### July 21

ASPPA, in cooperation with COPA, submitted comments to Treasury and the IRS on their proposed regulations regarding minimum required contributions.

[www.asppa.org/pdf\\_files/govpdfiles/ASPPA\\_MRC\\_Comments072108final.pdf](http://www.asppa.org/pdf_files/govpdfiles/ASPPA_MRC_Comments072108final.pdf)

#### June 23

ASPPA GAC leadership met with the IRS, the US Department of Treasury, the US Department of Labor and the Pension Benefit Guaranty Corporation to discuss a variety of ongoing regulatory issues as part of the GAC annual agency meetings.

For all GAC filed comments, visit

[www.asppa.org/government/gov\\_comment.htm](http://www.asppa.org/government/gov_comment.htm)

*The IRS has steadfastly held that there is no authority to write end-of-year valuation rules for 2008, however, until technical corrections have passed.*

#### *Plans with end-of-year valuations*

The benefit restrictions of IRC §436 present a problem for plans that use end-of-year valuations. The valuation of these plans would occur after the date the deemed AFTAP rules would apply to the plan. This could result in benefit restrictions being applied based on the deemed AFTAP even though the AFTAP based on the actual value of the assets may be sufficient to permit distributions. The PPA technical corrections bill would provide the IRS with the authority to fix this problem. However, that bill has not been enacted and the IRS indicated that it cannot provide a rule similar to the rule for the 2007 AFTAP (that is, to use results for the immediately preceding year) without technical corrections. The IRS would be willing to preserve the 2007 end-of-year calculation rule for plans that switch to beginning-of-year valuations for 2008 as a temporary solution to this problem. The IRS has steadfastly held that there is no authority to write end-of-year valuation rules for 2008, however, until technical corrections have passed.

#### **Summary of Weekend/Holiday Deadlines**

March 15, 2008 (the deadline for calendar year plans to make corrective distributions without being subject to an excise tax) was on a Saturday. There was confusion among practitioners as well as within the IRS on whether the application of the “weekend/holiday” rule applies to distributions of excess contributions and excess aggregate contributions. The “weekend/holiday” rule generally provides that if a tax return is due on a weekend or holiday, then the return is due on the first business day following such date. The confusion arose because the IRS provided, in a newsletter, that corrective distributions could not be delayed to the following Monday (March 17). However, some practitioners contacted the IRS service center and were told that the “weekend/holiday” rule did apply. The IRS requested that ASPPA provide a list of potential plan related deadlines where this issue may arise in the future. ASPPA provided a list of these deadlines to the IRS. We hope this list will facilitate and expedite the issuance of guidance regarding which deadlines are subject to the “weekend/holiday” rule.

#### **IRC §403(b) Regulations**

The deadline to comply with the IRC §403(b) regulations, including the written plan requirement, is generally the first day of the 2009 plan year. There currently is no pre-approved plan program for 403(b) plans. The IRS hopes, however, to implement a prototype 403(b)

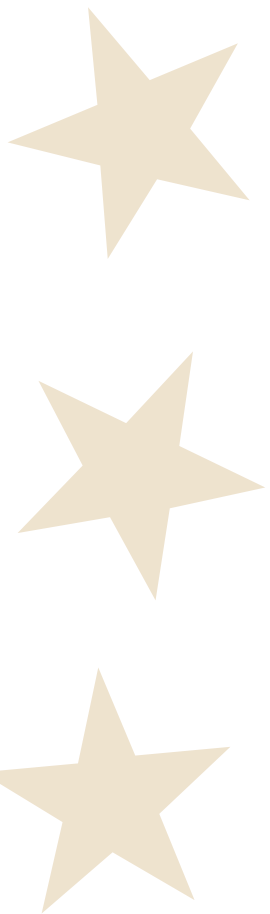
program late in 2009 whereby submissions would be made late in 2009 with approved plans being available around 2011. In order to meet this timeframe, guidance on the program needs to be issued later this year. The concern of practitioners is that any guidance on the program, particularly the issuance of Listing of Required Modifications (LRMs) that the IRS agents use to review plans, may be construed as guidance on the plan document requirements. Issuing such guidance late this year might create concerns because documents are currently being drafted to comply with the January 1, 2009 deadline. The IRS understands the concern but must move forward with the establishment of the prototype program. It is expected that plans being drafted to comply with the January 1, 2009 deadline would be subject to a good-faith standard.

#### **Permissive Disaggregation/Otherwise Excludible Rule**

Some IRS auditors have been raising issues relating to the application of the permissive disaggregation and otherwise excludible rules found in IRC §§ 401(k) and 401(m). Under these rules, in applying the ADP/ACP tests, a plan is permitted to either (1) apply separate testing for those participants who have not completed one year of service and are at least age 21, or (2) disregard non-highly compensated participants who have not completed one year of service and are at least age 21. The issues that have been raised are whether the plan document must provide for the use of the rules and what hypothetical entry date may be used when applying the rules [*i.e.*, the entry dates that otherwise apply under the plan or the maximum entry dates permitted under IRC §410(a)].

A spirited discussion took place on these issues. These issues have been raised at numerous ASPPA conferences yet the IRS has not provided any formal guidance. At least one IRS key district issued a letter to its agents stating that it would apply a non-enforcement type policy. Raising these issues on audit is viewed as unfair and highlights the need for the IRS to provide guidance that can be relied upon by both practitioners and IRS auditors.

ASPPA’s position is that permissive disaggregation is based on the rules set forth in the IRC §410(b) regulations (the coverage rules). Plans are not required to include the coverage rules in the terms of the plan. If a plan applies the disaggregation rules for otherwise excludible employees in operation for coverage purposes, then the plan is required to apply the rule to the ADP/ACP tests. Thus, it would appear that the rule does not need to be stated in the terms of the plan.





Regarding the hypothetical entry date, ASPPA emphasized that public policy supports the position that the maximum entry dates can be used regardless of the entry dates stated in the plan for other purposes. The purpose of the law is to encourage plan sponsors to provide for more lenient eligibility conditions so that employees may begin saving for retirement. If the maximum entry dates are not permitted, then it would be construed as penalizing employers for including more liberal eligibility conditions, which is contrary to the public policy behind the provisions.

The IRS stated that it intends to provide guidance on these issues in the near future.

#### Follow-up on Prior Comment Letters

GAC has submitted numerous comment letters to the Treasury and IRS during the past year. GAC used the meeting to follow up on many of these comment letters.

#### Correction of document drafting errors

Practitioners or plan sponsors may make inadvertent drafting errors when preparing or restating a plan document. Many practitioners refer to these as scrivener's errors, although the IRS does not like to use that term because it is a term of art under the law. (There is significant case law on scrivener's errors and it is not clear that such case law can be applied to qualified retirement plans.) The IRS permits certain corrective amendments, but the process must be handled through the Voluntary Compliance Program (VCP) of EPCRS. GAC submitted numerous comment letters and has met with the IRS to discuss the expansion of EPCRS to permit self-correction of certain drafting errors.

The IRS is unwilling to expand EPCRS to permit self-correction of drafting errors. The major concerns of the IRS are proving there was a drafting error as well as concern on whether a corrective amendment would be a cut-back of benefits. While the operation and communication to participants is evidence of intent, other factors must also be taken into account. Accordingly, GAC suggested that the Service publish an article setting forth some of the factors the IRS has taken into account when deciding whether to permit a corrective amendment under VCP. The goal is to inform practitioners that corrective amendments are allowed in certain circumstances. This will hopefully result in more VCP submissions which may, in the long term, help the IRS identify areas where self-correction may be appropriate. The IRS intends on publishing such an article, although due to limited resources, there is no estimated date of publication.

#### Partial plan terminations

ASPPA had submitted a comment letter on Revenue Ruling 2007-43 regarding partial plan terminations. The Revenue Ruling creates a rebuttable presumption that a partial termination occurs when an employer initiates a termination of employment that results in a more than 20% reduction in the employer's workforce. It is not clear whether firing an employee for cause is an employer initiated action. For example, if an employer with three employees fires one employee for cause, there is more than a 20% reduction in the workforce. The issue is whether this creates a rebuttable presumption of a partial termination (which would require the plan to fully vest the terminated employee). The IRS does not believe any follow-up guidance to the Revenue Ruling is needed because there is no evidence that IRS agents have been applying such a strict interpretation of the Revenue Ruling.

#### Other Projects

Other ongoing projects where guidance is expected soon include: (1) finalization of the automatic contribution arrangement regulations, (2) guidance on permissible mid-plan year amendments to ADP/ACP test safe harbor plans, and (3) updated IRC §402(f) notices.

#### DOL Meeting

##### 401(k) Fee Disclosure

GAC was able to reiterate some of the comments that ASPPA and the Council of Independent 401(k) Recordkeepers (CIKR) made in both written and oral testimony on the proposed ERISA §408(b)(2) regulations. As expected, the DOL was not able to address the content of the regulatory project and the discussion centered on the timeframe for issuing such guidance. President Bush's administration will be leaving office soon, so there is a push to have politically sensitive projects finalized before year-end. This includes all regulatory agencies, and it is not certain whether the DOL regulatory projects would be on this fast-track. The DOL is, however, focusing all resources on the regulatory projects such as finalization of both the ERISA §408(b)(2) regulations and the ERISA 404(a) regulations on participant fee disclosure (the proposed regulations were released on July 23, 2008 with a 45-day comment period).

##### Participant Contribution Safe Harbor Comment Letter

ASPPA had submitted a comment letter thanking the DOL for issuing a safe harbor for the deposit of employee contributions and requesting that it be expanded to large employers (those with more

*GAC was able to reiterate some of the comments that ASPPA and the Council of Independent 401(k) Recordkeepers (CIKR) made in both written and oral testimony on the proposed ERISA §408(b)(2) regulations.*



*The Participant Disclosure Task Force will continue to work on recommendations regarding participant communication and GAC expects the implementation of the recommendations to require both legislative and regulatory action.*

than 100 participants). The DOL response was that no one submitted evidence that large employers need the safe harbor. Rather, anecdotal evidence the DOL had received indicates that most large employers routinely deposit deferrals within a period less than seven days.

#### **Benefit Statement Guidance**

GAC emphasized the need to have further guidance on participant benefit statements. The DOL believes that based on a realistic assessment of their resources, regulations on benefit statements would not happen this year. However, the DOL stated that it may be possible to issue guidance on a relatively few select topics relating to participant statements. GAC requested that the DOL issue guidance indicating that benefit statements do not need to show each asset held by a pooled investment fund.

#### **Voluntary Delinquent Filing of 5500-EZ**

GAC informed the DOL about the comment letter sent to the IRS regarding delinquent filing of Form 5500-EZ (see item in the IRS/Treasury meeting). While it is not a DOL issue (because the filing is made for IRS purposes only), the DOL reiterated the same concerns as the IRS regarding the logistics of implementing such a program.

#### **Ability to Use Online Calculator for Self-correction**

The DOL does not officially permit plan sponsors to use the online calculator when calculating interest on the self-correction of the late deposit of employee contributions. Some DOL auditors, however, have accepted the use of the online calculator. GAC explained that the DOL should encourage self-correction and that permitting the use of the online calculator makes sense from both a practical and policy perspective. The burden and costs of using the Voluntary Fiduciary Correction Program (VFC Program) is excessive, especially in light of the fact that in most cases the amount involved (*i.e.*, the interest on the late deposits) is minimal. Therefore, many smaller plan sponsors elect to self-correct the violations. If the online calculator cannot be used, then the cost of calculating actual earnings approaches the cost of using the VFC Program. From a policy perspective, no one wins with this approach. Typically the amount of lost earnings to participants is minimal—and in fact may be greater by using the calculator rather than by using actual earnings.

#### **Update on Participant Disclosure Task Force**

GAC had formed a Participant Disclosure Task Force to examine whether there are better ways to communicate important plan information to participants. Currently, the volume of disclosure is

excessive and, in some cases, creates a disincentive for employees to participate in a plan. The DOL supports this endeavor and believes that electronic delivery is the likely solution to providing more meaningful and concise information to participants. The Participant Disclosure Task Force will continue to work on recommendations regarding participant communication and GAC expects the implementation of the recommendations to require both legislative and regulatory action.

#### **Recent Enforcement Activity on Anti-kickback Provisions**

Some DOL auditors have been raising concerns about the application of ERISA's anti-kickback provisions where service providers receive benefits and/or gifts from investment providers. The DOL believed that definitive guidance was not practical and that auditors would be reasonable in their application of the rules. However, on August 15, 2008, the DOL released guidance on this issue.

#### **PBGC Meeting**

##### **Due Date of Variable Rate PBGC Premium**

The final PBGC regulations provide that the due date for paying PBGC premiums is four months after the end of the plan year. This requirement presents a problem for plans that have investments without a readily ascertainable market value. This requirement may also be a problem for small employers because of increased costs. Most providers address year-end calculations near the end of the employer's tax-filing deadline. Requiring that calculations also be made within four months of the plan year end would increase plan costs.

GAC will attempt to gather data to send to the PBGC regarding the scope of this problem. Many small plans may be exempt from PBGC coverage (professional service corporations with fewer than 25 employees). If GAC is unable to persuade the PBGC to provide relief, then the PBGC can provide penalty relief on a case-by-case basis. This alternative may be viable, particularly if only a small number of plans will be affected.

##### **Need for Small Plan Exemption from ERISA §4062(e) Reporting**

Currently, plans are subject to a \$1,100/day penalty for failure to file a reportable event covered by ERISA §4062(e)/4063(a). Under the existing rules, although ERISA §4062(e) events (*i.e.*, cessation of operations at a facility resulting in a greater than 20% of active participants being separated from employment) are unlikely to be of interest to the PBGC in the case of a small plan, there's no relief from the reporting requirements for small plans.

For example, suppose a plan has eight active employees and the employer's work is done in two different locations. One location, with two employees, is closed and the two employees lose their jobs. This is an ERISA §4062(e) event and failure to notify PBGC within 60 days exposes the plan to a penalty of up to \$1,100 per day.

The concern is that many small plans may not be aware of this requirement and it is unlikely the PBGC would want to pursue the failure to file in this situation. GAC suggested that the PBGC provide a technical update stating that, pending further guidance, the PBGC will not pursue penalties where certain small-plan criteria are met. The PBGC seemed somewhat receptive to this idea, although GAC needs to follow up with suggestions on what the small-plan criteria should be.

#### Technical Update 2007-3 and Application to 2008 vs. 2009 Lump Sums

The PBGC clarified in Technical Update 2007-3 that, when a plan's termination date is in the 2007 plan year but distributions are not made until the 2008 plan year, the PPA lump sum assumptions cannot be used, even where the plan had been amended, on or before the termination date, to include the PPA assumptions. The PBGC reasoning is that a plan must use the law in effect as of the stated termination date, not the date of distribution.

The PBGC has not addressed the situation where a stated termination date is in 2008 yet distributions are made in 2009 (*i.e.*, whether to use the 20% or the 40% blend). The PBGC was interested in the IRS/Treasury position and the two agencies are working together to provide what will hopefully be consistent positions. The issue centers on whether the change in blended rates from 2008 to 2009 is a change in the law or whether the change is merely an operational plan provision.

#### How to Lock in Annuity Prices for a Terminating Plan


Sponsors who are terminating plans in a standard termination by purchasing irrevocable commitments (rather than through payment of lump sums) often want to lock in what they believe are favorable annuity prices at the time they are planning a standard termination. Waiting until the permitted distribution period exposes the plan (and ultimately the sponsor) to the risk of prices spiking just when they need to close out the plan. PBGC has made it clear that there are potential problems with purchasing irrevocable commitments before the permitted distribution period, but has not developed guidance on what

is permissible. The PBGC was interested in whether annuity providers are willing to lock in annuity rates prior to the distribution. Thus, GAC will follow-up with the PBGC to provide data that may help the PBGC issue guidance on this issue.

#### Missing DC Participant Program

PPA mandates that the PBGC develop a program for accepting account balances of lost participants in terminating DC plans. The PBGC is working on this regulatory project. However, the PBGC is interested in receiving input from GAC regarding the size of account balances where a rollover to an IRA is typically not being made (*e.g.*, if the account balance is less than a certain amount, some plans forfeit the balance rather than incurring a transfer expense that would extinguish the account).

#### Conclusion

The annual meetings with the government agencies play a vital role in achieving the goals of ASPPA. While GAC does not expect answers to be provided at these meetings, it is clear that these meetings and the comment letters have an impact on the subsequent issuance of guidance. If you have issues you would like GAC to address or would like to be a volunteer, please contact us. 

**Editor's Note:** Refer to ASPPA *asap* No. 08-30, "Latest Developments on EOY Valuation AFTAPs," for additional information published subsequent to the writing of this article.



*Robert M. Richter, Esq., APM, is a vice president at SunGard Relius in Jacksonville, FL. Robert manages the consulting department, which is responsible for drafting plan documents and supporting SunGard Relius customers. Robert is the Secretary of ASPPA and is Co-chair of ASPPA's Government Affairs Committee. (robert.richter@sungard.com)*



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**American Institute  
of Retirement Education**  
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# ABC of Cleveland—A Winning Season!

by William A. Duncan

In 2007, the Cleveland Cavaliers made it to the NBA finals, the Cleveland Indians made it to the American League Championship Series seventh game and the Browns were in the play-offs until the last day of the season. The ASPPA Benefits Council (ABC) of Cleveland also had a winning season—full of educational and networking opportunities for members and guests.

The past year has presented numerous opportunities to attend working luncheons and gain continuing education credit through presentations from local and national experts.

For the luncheon series, on November 6, 2007, Richard Naegle of Wickens, Herzer & Panza gave a presentation entitled “Spousal Rights and the Retirement Equity Act.” On December 12, 2007, Richard (Rich) A. Hochman, APM, gave a presentation which, given some interesting facility challenges, may well be the first ERISA presentation backed by a full gospel holiday choir! On February 12, 2008, Corrine Tyler of Baker & Hostetler gave a presentation regarding Internal Revenue Code Section 409A, and on April 17, 2008, Brian H. Graff, Esq., APM, journeyed to Cleveland to give his annual Washington Update. In June of 2008, Jeff Zimon of Benesch, Friedlander, Coplan and Aronoff received great reviews for his presentation entitled “ERISA Litigation Update.”

In addition to the luncheons hosted by the ABC, an all-day summer workshop with various local and national speakers including Adam C. Pozek, QKA, QPFC, of Sentinel Benefits as the featured speaker was hosted by the ABC in August 2007. The seminar nearly reached capacity for the facility and received its highest ranking in years. Much of the success of the seminar can be attributed to the efforts of the planning committee and its chair,

Cathy Wolford, MSPA, CPC, of Libman, Kadavy & Co. The committee is currently working hard on the 2008 all-day workshop which will feature Rich Hochman as the keynote speaker. Rich’s presentation earlier in the year was so well received that numerous individuals requested that he be brought back to Cleveland for additional speaking engagements!

The chapter continues to flourish under the leadership of chapter president, Kim Funderburg, CPC, QPA, QKA, of Charles Schwab. Of course, she couldn’t do it without the support of the very active and engaged board members, which include Brenda Lowenthal, QKA, treasurer; McKim Wertz, immediate past president; Christine Danko; Florence Zabarsky, QKA; Julia Chernyak; Kevin Krantz, APM; Rhonda Gorman, QKA; and Bill Duncan.

Experience tells us that Cleveland sports may not continue the successes that took place in 2007; however, the ABC of Cleveland’s success will surely continue! New members and guests and those interested in serving on committees are always welcome.

For more information about the ABC of Cleveland, including membership registration and upcoming events, contact Brenda Loewenthal, QKA, at Brewster & Brewster, Inc. at 440.951.8889 ext. 115 or [brendal@brewsterandbrewster.com](mailto:brendal@brewsterandbrewster.com).



William A. Duncan is the secretary and ASPPA liaison for the ABC of Cleveland. Bill is a shareholder with the Cleveland law firm of Kadish, Hinkel & Weibel Co., LPA. He focuses his practice on ERISA, retirement and estate planning matters. ([wduncan@khwlaw.com](mailto:wduncan@khwlaw.com))

# ABC of New England—Moving Forward

by Lawrence D. Silver, QKA

Having the flexibility to adapt our educational programs to meet the evolving needs of the local pension community enables the ASPPA Benefits Council (ABC) of New England to provide top-notch education on relevant pension legislation.

In addition to providing first-class education on core general topics relevant to the recently passed legislation, this year we have started to provide niche seminars targeting specific portions of the pension community. In August we focused on the accounting/CPA field with a seminar entitled “Employee Benefit Plans—A Unique Audit Challenge.” Following that, our September seminar was focused on defined benefit plans and how they affect the actuarial community. Capitalizing on the experts in various niches available to us, we are able to provide these exceptional seminars as an inexpensive and fun learning experience while providing continuing education credits. The ABC is looking to present between eight and ten seminars each year and is reviewing locations other than the Boston area. Look for future meetings to be held in the Western MA/CT regions. Do you have a suggestion for a future topic and/or meeting location? If so, please contact us.

## Looking for More Involvement?

I am very excited about the growth of our ABC over the past few years as we continue to expand the ASPPA presence on a local level by providing educational programming for the community. While our ABC has come a long way in a short time, we are continuously looking for volunteers to spend an hour or two a month ensuring continual success. Volunteers comprise the backbone of our ABC through their hard work and their dedication. If you would like more information on volunteering or are interested in volunteering your time, please contact me at [lawrence.silver@thehartford.com](mailto:lawrence.silver@thehartford.com).

## 2009 and Beyond

It is with both joy and sadness that I write my last article as president of the ABC of New England. I started this role following in the footsteps of

### Below are the seminars offered by the ABC of New England in 2008:

Date	Speaker	Topic
Feb 28	David Guadagnoli, Esq.	Plan Terminations: Case Studies and Real World Examples
Mar 25	Adam C. Pozek, QKA, QPFC	The Alphabet Soup of Automatic Enrollment
Apr 29	Ilene H. Ferenczy, Esq., CPC	Retirement Plan Industry Update
May 15	Janice M. Wegesin, CPC, QPA	5500 Update and Plan Audits
Aug 12	Jerry Anderson	Employee Benefit Plans: A Unique Audit Challenge
Sep 25	Hal S. Tepfer, MSPA, and Ed Ryan	Defined Benefit Plans Workshop
Oct 1	TBD	TBD
Nov 1	TBD	ASPPA Annual Conference Review

\*Check our Web site at [www.abcne.org](http://www.abcne.org) in December for our 2009 schedule.

Ellen S. Houston, QPA, QKA, the ABC's first president, and through careful planning we developed both short and long-term goals to accomplish in my two-year term in this role. I am pleased to share with you that we have already met many of the short-term goals relating to initial memberships, programs and sponsorships. In addition, we are well down the path of fulfilling our long-term goals and solidifying our position in the pension community. Moreover, the ABC's president-elect, Adam Pozek, comes to our organization with an abundance of experience as a current member of the ASPPA Board of Directors and former president of the ABC of Atlanta.

I would like to say a sincere thank you to the individuals that comprise the board of our ABC for their hard work and dedication to ensuring the success of the organization. Leading you all in this endeavor has been an enjoyable and worthwhile journey. 🏹



Lawrence D. Silver, QKA, is an assistant director of ERISA compliance for The Hartford's Retirement Plans Group in Boston, MA. He has more than 11 years experience in the retirement industry and his group specializes in the non-discrimination testing and government filings for defined contribution plans. Larry is currently president and liaison of the ABC of New England and serves as the Co-chair of the ABC Task Force and the Vice Chair of the ABC Liaisons. ([lawrence.silver@thehartford.com](mailto:lawrence.silver@thehartford.com))

# Poker Actuarial

by David M. Lipkin, MSPA

“I’m all in.” This phrase is the cry we hear in the poker room, where tensions and emotions run high. Many people have recently become interested in the intriguing game known as “Texas Hold ‘Em.” Many enjoy playing the game live or on the Web, and others enjoy watching it live or on the many television forums available. In fact, actuaries have a unique set of skills that should allow them to better analyze poker. As you will see, however, pure mathematical analysis is not enough to guarantee a winning session—but it (probably!) won’t hurt.

This article is not designed for background. For that, I suggest you watch poker on TV or buy a book on the subject. Suffice it to say that each player (usually 10–11 at a table) is dealt two cards “face down,” which he or she combines with five “community” cards that the dealer presents, to make the best (five card) hand possible. A single deck is used for the game.

To keep poker jargon from intimidating you, let me identify the special names that have been given to these community cards:

- *The flop*—the first three cards are revealed (face up) at the same time;
- *The turn*—the fourth community card; and
- *The river*—refers to the final community card. [Hence the expression, “I got rivered” (*i.e.*, due to the some extraordinarily bad luck, I was beaten because of an unfortunate final card).]



## Actuarial Analysis

We actuaries are trained in the financial aspects of risk management, so poker is really right up our alley. The main equation that we need to answer relates to “pot odds” and requires a review of some basic questions:

**Q1:** Given my own cards, plus what I can already see on the board (let’s say that there has already been a flop), how many cards remain unseen that would make me a likely winner of this pot?

**A1:** Let’s say you have the ace and ten of hearts. The flop reveals two more hearts, so you

only need one more heart to make a flush. If you get another heart, you would have the highest possible flush hand—with an ace high. Of course, you could still be beaten by a better higher hand (*e.g.*, a full house), but we’ll worry about that later.

So, there are now nine hearts left (13 total hearts, less our two, less the two in the flop) out of 47 cards we have not yet seen (52 total cards, less our two hearts, less the three cards from the flop on the board.) Each single card has a 1/47 chance of arriving on the next card, which equates to a 2.13% chance. This probability is a really important number to know.

Nine “out” cards times 2.13% equals an approximate 19% chance of hitting your flush on the turn.

- Q2: How much will it cost me to see the next card?
- A2: This answer depends upon how much your opponents make you pay for that privilege. Let's say that there is already \$100 in the pot, and someone bets \$10 after the flop. If you decide to "call" this bet and put in another \$10, you are getting a rate of return of:  
 $\$110/\$10 = 11$  to 1  
 to hit your flush. (The \$110 includes his bet; do not count your own bet here.)
- Q3: Is this a good deal for me?
- A3: Yes! You are getting 11 to 1 odds on roughly a 5 to 1 chance (19%), so the "pot odds" are in your favor. You should call (or raise) here.  
 This example is just a flavor of the mathematical thinking required to win at poker. Note the analogy to pension funding here, as we can have both "accrued" and "projected" pot odds. While the above example was easy and dealt with the money already visible, the more proper ("projected pot odds") analysis involves taking it a step farther and asking the following question.
- Q4: What are my chances of hitting my flush on the fourth or fifth cards, how much will I need to pay to see those cards, and how much will I win if I eventually "take down" the pot?
- A4: You need to find a good poker book (try Sklansky) to assist with this higher-level analysis. Further, you also need to factor in another contingency.
- Q5: If I do hit my flush, might I still lose? What are the chances of a loss happening?
- A5: Suffice it to say that a pair (or three of a kind) showing on the board diminishes the value of your potential flush.

### So, it is that Simple?

No. There are two non-mathematical factors that also will influence your poker success:

1. Poker Strategy; and
2. Luck.

### Elements of Poker Strategy

Another essential skill involves "reading" your opponents. Just because they bet a lot does not automatically mean that they have strong hands. (They might be "bluffing" you.) Have you played with them before? What are their patterns? Do they appear to have that type of personality? Beware of the opposite tactic also, where a player may "check" (i.e., bet \$0) with a very strong hand.

Determining how much to bet is another factor. The mathematical answer flows from the previous section. You want to bet enough so that your opponent will receive unfavorable pot odds if they call you. This logic goes back to the basic poker/math truism: "Every time you bet or call with favorable pot odds, and every time your opponent does

so with unfavorable odds, this combination creates a positive event for you."

The extreme example of this concept is someone betting all their money at once ("all in"). This bet will cause most players to fold.

One non-mathematical technique to use is reading "tells" of opponents—watching for tell-tale signals. Maria (a player in my local game) involuntarily twitches when she is nervous. (Do not tell her this, please!) Other "tells" involve, perhaps, letting out a big sigh, making a big bet or call very quickly, gulping, how one handles his or her chips, etc. There are books on just this subject of tells, and libraries of books on the larger issue of "poker strategy."

### Luck

Luck is luck. You might do everything right and still lose. Losing is not always your fault. The idea is that, over a long period of time, luck should even out. Pocket aces will not hold up every time, so don't be too surprised.

Note, however, that if you do have a strong hand but choose to play it "cleverly" (betting little or nothing in an attempt to lure the other players and their money into the pot), then you are letting them see extra cards cheaply. If you get beat, it will be more a result of your own poor strategy rather than bad luck on your part.

Finally, a word about "bad beats." In poker lingo, a "beat" is when someone unexpectedly loses with a strong hand—perhaps the other player got lucky on the river. A "bad beat" is when it happens to you. Lesson learned: Do not whine to others about your bad beat stories. Yes, it was unfortunate. Yes, it happens to everyone. (Here is the most important part.) No, we do not want to hear about your bad beat stories. We all have our own problems.

### Conclusion

To summarize, poker is a fast-moving, dynamic game that can cause you to ride an emotional roller coaster. Actuaries are uniquely qualified (potentially) to do well. Do not bet more than you can afford to lose. Good luck and happy playing! 🎰

*(Note: The author assumes neither emotional nor financial liability for the advice provided in this article.)*



*David M. Lipkin, MSPA, is the president of Metro Benefits, Inc., in Pittsburgh, PA, which he founded in 1986. David speaks on a variety of topics, including the professional responsibilities of the actuary. He has published numerous articles. He has been selected by the Department of Labor to serve as an independent fiduciary for several orphan/abandoned plans. David currently serves as Co-chair of ASPPA's Government Affairs Committee. He previously served as Chair of GAC's Defined Benefit Subcommittee. David currently serves on the ASPPA Board of Directors and is an Ex-Officio member of the Executive Committee. David is a Member, Society of Pension Actuaries (MSPA), a Fellow of the Society of Actuaries (FSA) and an Enrolled Actuary (EA). (david@metrobenefits.com)*

## Welcome New Members and Recent Designees

### ▲ MSPA

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Virgilio Rodriguez, MSPA  
Danny L. Struble, MSPA

### ▲ CPC

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Andrew J. Zollman, CPC, QPA

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# ASPPA Calendar of Events

Date	Description	CE Credits
<b>2008</b>		
Oct 19 – 22	ASPPA Annual Conference • Washington, DC	20
Oct 31	Final registration deadline for fall examinations	
Nov 3 – Dec 12	Fall 2008 examination window (DB, DC-1, DC-2, DC-3, PFC-1 and PFC-2)	
Nov 6	Postponement deadline for C-4 and A-4 examinations	
Nov 13	C-4 examination	
Nov 13 – 14	ASPPA Cincinnati Pension Conference • Cincinnati, OH	15
Nov 14	A-4 examination	
Dec 1	Postponement deadline for fall DB, DC-1, DC-2, DC-3, PFC-1 and PFC-2 examinations	
Dec 15	RPF-1 & RPF-2 examination deadline for 2008 online submission (midnight, EST)	
<b>2009</b>		
Jan 15 – 16	Benefits Conference of the South • Atlanta, GA	15
Jan 29 – 30	Los Angeles Benefits Conference • Los Angeles, CA	15
Mar 22 – 24	The ASPPA 401(k) SUMMIT • San Diego, CA	15
Apr 17	Early registration deadline for spring examinations	
Apr 20 – 21	Great Lakes Benefits Conference • Chicago, IL	15
Apr 29 – 30	Mid-Atlantic Benefits Conference • Washington, DC	11
Apr 30 – May 1	DOL Speaks: The 2009 Employee Benefits Conference • Washington, DC	11

\*\* Please note that when a deadline date falls on a weekend, the official date shall be the first business day following the weekend.

\*\* Please note that listed CE credit information for conferences is subject to change.

## ABC Meetings Calendar

### 2008

#### October 1

**ABC of New England**  
Topic: TBD  
Speaker: TBD

#### October 3

**ABC of Delaware**  
IRS Audit Program (DOL Invited)  
Catherine Jones, George Brim,  
Kathleen Schaffer, Art Bachman  
and Bob Bildersee

#### October 11

**ABC of Greater Cincinnati**  
President's Party

#### October 21

**ABC of Atlanta**  
DB Plan Funding Issues/Plan  
Design for Professional Groups  
Kevin J. Donovan, MSPA

#### November TBD

**ABC of Dallas/Ft. Worth**  
Plan Design  
S. Derrin Watson, APM

#### November 1

**ABC of New England**  
ASPPA Annual Conference Review

#### November 11

**ABC of Detroit**  
Washington Legislative Update  
Brian H. Graff, Esq., APM

#### November 12

**ABC of Atlanta**  
Pension Protection Act Update  
Adam Cohen and Rob Neis

#### November 12

**ABC of Greater Cincinnati**  
Reception for "The ASPPA  
Cincinnati Pension Conference"

#### November 13 & 14

**ABC of Greater Cincinnati**  
The ASPPA Cincinnati Pension  
Conference & Certification Workshop

#### November 13

**ABC of Northern Indiana**  
Annual Board Meeting  
ABC of Northern Indiana Board

#### December 13

**ABC of Atlanta**  
Holiday Party

#### December 16

**ABC of Greater Cincinnati**  
Topic: TBD  
Richard A. Hochman, APM

### 2009

#### January 13

**ABC of Greater Cincinnati**  
Topic: TBD  
Suzanne L. Wynn, APM

#### January 27

**ABC of Greater Cincinnati**  
Topic: TBD  
Sal L. Tripodi, APM

#### February 24

**ABC of Greater Cincinnati**  
Topic: TBD  
Charles D. Lockwood

#### March 24

**ABC of Greater Cincinnati**  
Topic: TBD  
Craig P. Hoffman, APM

For a current listing of ABC meetings, visit [www.asppa.org/membership/member\\_local.htm](http://www.asppa.org/membership/member_local.htm).

# Fun-da-Mentals

## Sudoku Fun

Every digit from 1 to 9 must appear:

- In each of the columns,
- in each of the rows,
- and in each of the nine mini-boxes

9		1	7					
		3					5	1
			3		1	7	8	2
			6	3		2		9
	1	8	5			4		
								3
					3	1	6	
		4		6				
5		7				3		

Level = Difficult

Answers will be posted on ASPPA's Web site in the Members Only section. Log in. Click on *The ASPPA Journal*. Scroll down to "Answers to Fun-da-Mentals."



## Word Scramble

Unscramble these four puzzles—one letter to each space—to reveal four pension-related words.

GET AWAY

— □ □ □ — □

SLING MAP

□ — — — — □ □ □

ERR HIDE

□ □ — □ □ — —

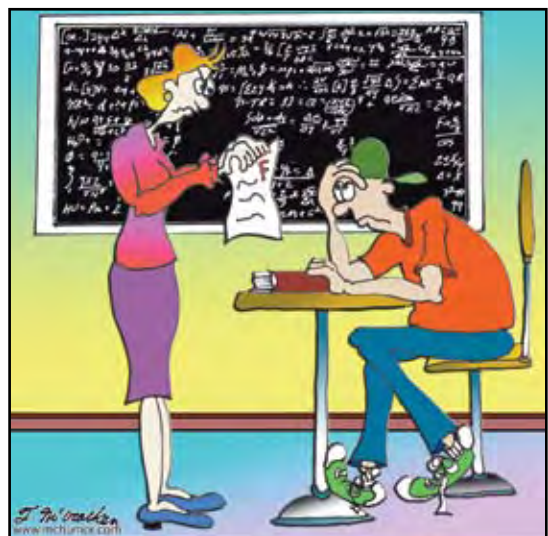
ROT REP

□ — □ □ — □

**BONUS:** Arrange the boxed letters to form the Mystery Answer as suggested by the cartoon.

Mystery Answer: He was using the " \_\_\_\_\_ " method.

Answers will be posted on ASPPA's Web site in the Members Only section. Log in. Click on *The ASPPA Journal*. Scroll down to "Answers to Fun-da-Mentals."



What the student claimed when the teacher accused him of cheating on the test.



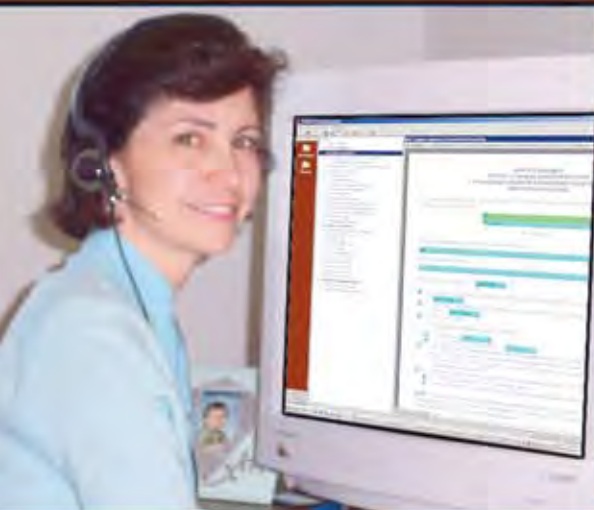
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