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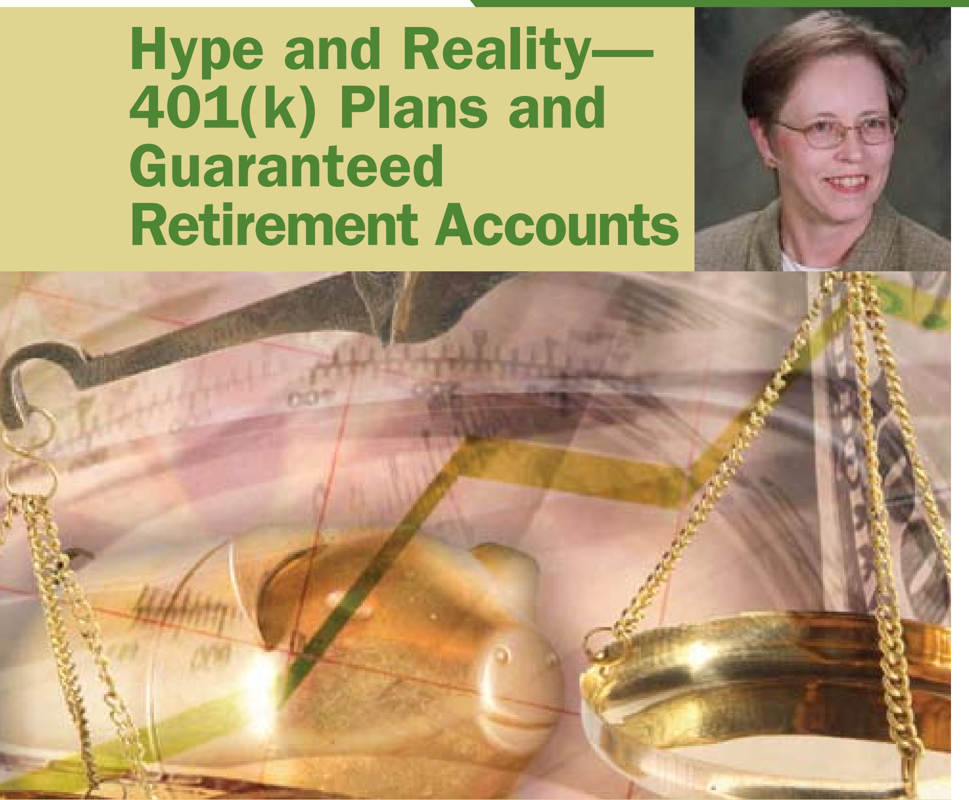
THE ASPPA Journal

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

WASHINGTON UPDATE

Hype and Reality—401(k) Plans and Guaranteed Retirement Accounts



by Judy A. Miller, MSPA

Recently, the Republican Savings Solutions Group (including Minority Leader Boehner, ranking members of the committees of jurisdiction Camp and Kline, and others) sent a letter to Secretary Solis of the Department of Labor and Secretary Geithner of the Department of the Treasury. The letter expressed "strong opposition to any proposal to eliminate or federalize private-sector defined contribution pension plans, such as 401(k)s, or impose burdensome new requirements upon the businesses, large and small, who choose to offer these plans to their employees."

ASPPA applauds the sentiment and appreciates the strong statement of support of the private pension system. However, ASPPA members have asked if this letter is a strong, timely response to an

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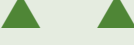

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FROM THE EDITOR

The "Graying" of Our Industry

by Chris L. Stroud, MSPA

In some ways, we are experiencing a "graying" of our industry. Many third party administration (TPA) firms were created just before or just after the passage of ERISA, which—as any good pension professional knows—took place in 1974. Some of these original entrepreneurs have sold their firms, others have passed them on to family members and many continue to run their firms today. Thus, many of today's TPA firm owners are Baby Boomers (born 1946 – 1964) or Radio Babies (born 1930 – 1945). We are slowly starting to see Generation Xers (born 1960 – 1980) running TPA firms, which is a welcomed progression.

Many TPA firms and retirement services institutions grew steadily in the 1980s and 1990s as 401(k) plans became increasingly popular and as daily valuation and participant investment direction revolutionized the industry. More Boomers entered the industry, and in walked Gen Xers to help lighten the workload. In the last decade, especially with the economic downturn and increased mergers and acquisitions, most retirement services firms have not seen the same type of employee growth as in past decades. As a result, there are still not too many Millennials (born 1981 – 2000) in our industry.

In the US workforce, it is estimated that Gen Xers and Millennials now make up 50% or more of the workforce. Our industry has a way to go to match that statistic. We need to bring in more Gen Xers and Millennials and let them help lead the way to success in this rapidly changing technology-driven industry in which we work. ASPPA also continues to look for ways to better serve these younger groups.

One of the major challenges facing many TPA firms today is planning for succession—both "planned" succession, as well as determining the course of events if an "unplanned" exit were to occur. We all like to believe that we are immortal, and it is not uncommon for a single owner or partners of a closely-held firm to avoid addressing the difficult issue of succession. Spouses are taken care of, key man insurance is purchased—but neither speaks to the issue of who takes over at the helm. Would it be someone from within—or would an outsider step in and take over? Has middle and upper management been groomed for such a possible event? Has the company also planned adequately to replace rank and file employees and managers who are approaching retirement age? Is there a plan to capture and transfer the knowledge that may soon be walking out the door? Are there sufficient talented Gen Xers and Millennials in the company to bring a fresh perspective and keep the operations running smoothly for years to come?

As the younger generations make an impact on our industry, companies will have many opportunities to grow and prosper—but firms will also face some challenges. It isn't easy to have three or four generations working together in one office. It won't go smoothly without a plan to embrace change and proactively develop methods to promote communication and collaboration across the generations. As we bring more Gen Xers and Millennials into our industry, we need to look for ways to take advantage of their technology skills while helping them develop technical expertise and consulting skills. Millennials, known as the "digital natives," learned technology as they learned to walk and talk—which makes them think differently. They approach problems with technology first, whereas Boomers approach problems with problem solving skills learned years ago, and simply use technology as a tool.

There are many things that a firm can do to bridge generation gaps and harness the power of the younger generations. (See "Bridging the Generation Gaps in the Retirement Services Workplace," *Journal of Pension Benefits*, Volume 17, Number 2, Winter 2010.) In the meantime, stay tuned. The fresh perspective of these younger folks will change the face of how TPA firms are run and how technology is used!

CONTINUED FROM PAGE 1

immediate, real threat to the system—or just politics as usual. The answer is that the threat may not be immediate, but it is real (and the letter also was good politics). One thing is certain—we are living in interesting times, and we can't afford to get caught napping.

Middle Class Task Force

Earlier this year, Vice President Biden spoke about the first "Annual Report of the White House Task Force on the Middle Class." Included in the report are recommendations for improving retirement coverage for middle class families. The Vice President summarized the recommendations, including the administration's proposal for automatic IRAs and an expanded, refundable Saver's Credit (both proposals that ASPPA supports), as well as "guaranteed accounts."

This terminology is reminiscent of the October 2008 House Education and Labor Committee hearing on the impact of the financial crisis on retirement savings. One of the panelists, Professor Teresa Ghilarducci, spoke about her recommendation that the existing system and its income tax exclusion for employer-provided benefits be replaced with a $600 tax credit for contributions to government-run retirement accounts that would provide a guaranteed rate of return (3% above inflation). This proposal was referred to as "Guaranteed Retirement Accounts," and it received a lot of coverage in the ensuing down-market, 401(k)-bashing frenzy.

There has been little or no public discussion of the proposal on Capitol Hill since that hearing, and the administration's budget proposals have not included these accounts. (In fact, the most recent proposed budget included a doubling of the limit on the tax credit designed to encourage small employers to set up qualified retirement plans and SIMPLE plans, along with auto-IRA and refundable Saver's Credit proposals.) However, the report from the middle class task force indicates that the concept is still under active consideration within the administration. Under the heading "Another Option: Safe Investment Choices," the report suggests that workers should have safe, inflation-protected investment options. Later on in this section, the creation of Guaranteed Retirement Accounts (GRAs) is noted as one approach to providing this alternative. The report goes on to assure readers that "GRAs would not replace Social Security" and recommends further study.

Guaranteed Retirement Accounts

The recommendation for "further study" of Guaranteed Retirement Accounts is not a clear endorsement, but it does indicate the concept has appeal to at least some members of the task force. A centerpiece of the proposal is the notion that the current tax incentives for employer-sponsored defined contribution plans—especially 401(k) plans—only benefit the rich [see "401(k) Plans Under Fire – Blaming the Drought on the Well," *The ASPPA Journal*, Spring 2009]. The proposed "solution" is to convert the current exclusion to a uniform refundable credit.

So, although the threat to the tax incentives underpinning the current 401(k) system is not imminent, it is real. The ASPPA Government Affairs staff and volunteers are explaining

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to Congress how the current system really works to provide retirement security for millions of American workers—in real time, with real employers and employees—and we will continue to work to get this message out. The support of the membership through grassroots involvement and support of the ASPPA Political Action Committee (PAC) is critical to our success.

Surprise Twist

One amusing twist to this year's saga is the unfortunate (for EBSA and Treasury) coincidence of the Middle Class Task Force Report and the RFI on Lifetime Income Options issued jointly by the DOL and Treasury. No one who has been involved in retirement policy or practice read the RFI as anything but an honest attempt to gain good information about how to help retirees in a defined contribution world convert retirement savings into a secure retirement income, but others saw the RFI as a threat. Believing the RFI was a front for converting 401(k) accounts into government-issued debt, hundreds of workers responded to the RFI suggesting in no uncertain terms that the government keep their hands off of 401(k) plans. [The response by the ASPPA Government Affairs Committee (GAC) to the RFI is available on the ASPPA Web site at **www.asppa.org/comments**.]

Always Something

There are some who think control of the House may shift to Republicans this fall, in which case GRAs will likely not be a threat in the next Congress. Political winds can shift quickly, so we won't know until after November 2 how the House (or Senate) will look in 2011. One thing we do know is that it's always something. A key component of the Republican Savings Solutions Group's Savings Recovery Act (HR 2021) is to permanently increase IRA and SIMPLE elective deferral limits to the 401(k) elective deferral limit. (RSAs anyone?)

ASPPA GAC and PAC

ASPPA GAC and staff will continue to convey the real value of the employer-sponsored system to policymakers on the Hill and in the administration. We actively support proposals such as auto-IRAs and an improved Saver's Credit that will strengthen the system. But we are continually educating Congress about the threats that some well-intentioned proposals would pose to the system in the long-term. ASPPA PAC also plays a key role in this effort by allowing us to support members of Congress who share the goal of a secure retirement for American workers through the private employer-sponsored retirement system.

This year has been challenging, and we have a long way to go, but ASPPA will continue to work to strengthen and protect the employer-sponsored retirement system.

*Judy A. Miller, EA, MSPA, FSA, Chief of Actuarial Issues, joined the ASPPA staff in December 2007. Prior to joining the ASPPA staff, Judy served as senior benefits advisor on the staff of the US Senate Committee on Finance from 2003 to November 2007. Before joining the congressional committee staff, Judy provided consulting and actuarial services to employer-sponsored retirement programs for nearly 30 years. A native of Greensburg, PA, she enjoyed living in Helena, MT from 1975 until she moved to Washington, DC in 2003. Immediately before leaving Montana, she was a shareholder in Anderson ZurMuehlen & Co., providing consulting services through its affiliate, Employee Benefit Resources, LLP (EBR). Prior to joining EBR, she was vice president of Hendrickson, Miller & Associates, Inc. for 15 years. Judy is a fellow of the Society of Actuaries, an MSPA with ASPPA and an Enrolled Actuary. (**jmiller@asppa.org**)*

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Schedule C—A New Era in Annual Reporting

by Bradford P. Campbell and David J. Witz

The annual ritual of filing the Form 5500 is a familiar one for the hundreds of thousands of plan administrators charged with this responsibility. However, 2009 is a year of sweeping change for the Form 5500, and everyone involved, from plan administrators to plan service providers, is confronting new issues.

Perhaps the most substantive change to the Form 5500's content, and the change most responsible for the steady increase in discussions between plan administrators and plan service providers in recent months, is the expanded reporting of direct and indirect service provider compensation on the new Schedule C. The concept of indirect compensation on the new Schedule C is very different than in the past, and though the Department of Labor (DOL) published the new requirements more than two years ago, real questions and concerns about their interpretation linger. While the DOL provided additional clarity by issuing two sets of Frequently Asked Questions (FAQs) on the Schedule C addressing 65 specific questions in all, plan administrators and service providers will still be facing a difficult adjustment and some uncertainty in this first year of the new reporting rules.

The DOL expanded Schedule C disclosure as the first of a series of three "fee disclosure" regulations intended to improve transparency and to provide plan fiduciaries and plan participants better information on which to base their decisions regarding the selection of service providers and the services they render. The Schedule C's more detailed disclosure of indirect payments received by service providers in connection with plan business was intended to achieve several DOL objectives:

- **More Information for Plan Fiduciaries**—By requiring the plan administrator to annually report on specific fee arrangements (and to identify service providers that refuse to provide necessary information), the new Schedule C addresses the DOL's longstanding concern that some fiduciaries have difficulty getting the information needed to understand and assess plan service provider fees.[1]

- **More Public Information about Fee Arrangements and Plan Costs**—Though the exception for "eligible indirect compensation" prevents all fees from being publicly disclosed, the new Schedule C provides the DOL, plan fiduciaries, researchers and policymakers with more public data about the types of fee arrangements and their costs.
- **More Enforcement Tools for DOL Investigators**—Though the DOL has indicated that it will be understanding of the near-term transition problems plans and service providers are experiencing, the expanded Schedule C provides the DOL with new long-term enforcement tools. The additional data will allow the DOL to expand its fee-related enforcement capabilities and audit targeting.

Compliance Complexity

Despite the DOL's interpretive guidance, the new rules are complex, causing confusion and uncertainty. Plan administrators, who are charged with the responsibility of accurately completing the Schedule C, will have to review the disclosures they receive from service providers and decide if they appear sufficient. Service providers will have to review not only their compensation arrangements with the plan, but also their other business dealings to ensure that they are capturing all reportable compensation from third parties.

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1 See discussion of fiduciary's need for disclosure in the preamble to the proposed 408(b)(2) regulation, Federal Register, December 13, 2007 (Volume 72, Number 239) at 70988 "Fundamental to a fiduciary's ability to discharge these obligations (*i.e.,* "to act prudently and solely in the interest of the plan's participants for the exclusive purpose of providing benefits and defraying reasonable expenses") is the availability of information sufficient to enable the fiduciary to make informed decisions about the services, the costs and the service providers."

Given the significant variation in the form and content of compensation arrangements for financial services and the potential for different interpretations of the new rules, service providers and plan administrators are well-advised to start working together in advance of the filing deadlines and to seek legal counsel as necessary to ensure compliance.

For example, the number of codes identifying specific services received by the plan more than doubled, from 23 to 55, but the instructions do not define the new terms. Indirect compensation includes "money and any other thing of value... received from sources other than directly from the plan or plan sponsor...if the person's eligibility for a payment or the amount of the payment is based, in whole or in part, on services rendered to the plan..."[2] Only certain kinds of indirect compensation must be reported in detail—certain gifts and gratuities are not reported, and there are special rules for bundled service arrangements and certain fully-insured welfare contracts.[3]

Most significantly, "eligible indirect compensation" (certain fees charged to investment funds and reflected in net return) is subject to reduced reporting if previously disclosed to plan fiduciaries.[4] This prior disclosure may be through existing documents (the prospectus, Form ADV, etc.) but must be flagged for the plan administrator as serving both the original purpose and also the Form 5500 disclosure purpose.[5] Further, in order to meet the eligible indirect compensation requirements, the disclosure must allow "a reasonable plan administrator [to] readily determine from the documents:

- The existence of the indirect compensation;
- The services provided for the indirect compensation or the purpose for the payment of the indirect compensation;
- The amount (or estimate) of the compensation or a description of the formula used to calculate or determine the compensation; and
- The identity of the party or parties paying and receiving the compensation."[6]

While these requirements reflect the existing diversity of arrangements used by service providers and plans, the practical effect is that the same services provided at the same cost but through different payment structures can yield different degrees of reportable compensation on the Schedule C. Service providers can custom design collaborative bundled relationships[7] so that a single service provider can provide a range of services, and the structure chosen can either increase or decrease the amount of disclosure required under the Schedule C. Critics of this flexibility point out that it undermines the DOL's goal of increasing disclosure to plan fiduciaries. However, the DOL has indicated that it will address this issue through a separate regulation requiring disclosures to plan fiduciaries when entering into a service provider relationship as a requirement of the statutory prohibited transaction exemption for reasonable services under ERISA Section 408(b)(2).

While the 65 FAQs issued by the DOL help clarify the application of the rules to various compensation arrangements, service providers and plan administrators will have unanswered questions as they begin to actually complete the Form. Beginning early to collect and evaluate information is important, because as legitimate disputes regarding the disclosure requirements emerge, both parties need time to work together to resolve their concerns.

Limited Relief for 2009 Transition Year

While the DOL signals that its enforcement efforts for the 2009 filing season will take into account the difficulties inherent in the transition to the new Form 5500 and electronic filing, a prudent plan administrator or service provider must recognize the limited nature of this relief.

Overall, the DOL has increased funding for enforcement activities, and the Employee Benefits Security Administration (EBSA) is undertaking a review

2 See "2009 Instructions for Form 5500," pg 22.
3 Ibid, pg 23.
4 "...[i]ndirect compensation that is fees or expense reimbursement payments charged to investment funds and reflected in the value of the investment or return on investment of the participating plan or its participants[,] finders' fees[,] 'soft dollar' revenue, float revenue, and/or brokerage commissions or other transaction-based fees for transactions or services involving the plan that were not paid directly by the plan or plan sponsor (whether or not they are capitalized as investment costs)." Ibid, pg 24. See also DOL's "FAQs about the 2009 Form 5500 Schedule C," #8.
5 DOL's "FAQs about the 2009 Form 5500 Schedule C.," #29.
6 Ibid.
7 Ibid, #13.

While reduced civil penalties often can be negotiated with EBSA, even honest mistakes can still be quite expensive.

for "strategic planning" purposes of whether Form 5500 compliance can be linked to benefit plan management as a "long-term performance indicator..." suggesting that compliance in this area will be under increased scrutiny in the future.[8] Form 5500 compliance is already an active part of EBSA's enforcement program, and the penalties for violations can be severe. ERISA and the Code provide for civil penalties of up to $1,100 a day for deficient or delinquent Form 5500 filings, and there are criminal penalties or fines of up to $100,000 and imprisonment for up to ten years for certain willful or knowing violations.[9] While reduced civil penalties often can be negotiated with EBSA, even honest mistakes can be quite expensive.

With that in mind, let's examine two very specific DOL statements regarding enforcement in 2009.

Reporting Service Providers to the DOL for Failure to Disclose

Line 4 of Part II of the Schedule C directs a plan administrator to report to the DOL "each service provider who failed or refused to provide the information necessary to complete this Schedule."[10] Because the statute does not give the DOL the authority to require reporting directly from service providers, inclusion of this line on the Schedule C is an indirect means to compel service provider compliance.

Reporting a service provider for noncompliance is something a plan administrator needs to consider carefully. First, the Schedule C instructions require the plan administrator to contact the service provider, request the information and inform them that they will be reported if they do not comply.[11] Procedures should be established to document this process. Second, though the DOL has not specifically said how it will respond when a provider is reported, it is likely that the DOL will follow up with the plan and/or provider reported. The DOL may inquire about the initial selection process for the service provider and whether information needed to assess the reasonableness of fees and potential conflicts of interest was collected prior to the time of appointment.[12] There is also a possibility that a DOL review might result in an overall plan audit that is not limited to a Schedule C reporting concern.[13]

In response to concerns expressed by plans and service providers that it may be difficult to fully comply with the new rules in the first year, the DOL provided some limited transitional relief. The DOL explains in Schedule C FAQ #40 that it recognizes some service providers "may have to modify their recordkeeping and information management systems" to gather the data to report, and that it "may be difficult...to make those adjustments sufficiently in advance."[14] The plan administrator does not need to report the service provider for failing to provide the correct disclosures if the service provider provides the plan administrator with a written statement that "(i) the service provider made a good faith effort to make any necessary recordkeeping and information system changes in a timely fashion, and (ii) despite such efforts, was unable to complete those changes for the 2009 plan year."[15]

The DOL further limited this relief in its Supplemental Schedule C FAQ #10, clarifying that the service provider has to disclose all such information it is able to collect, and that "the Department also expects plan administrators...will communicate with the service provider regarding the statement and the steps the service provider is taking to be able to provide the necessary information in connection with future Schedule Cs..."[16] It is also important to note that the service provider may also provide an estimate or formula rather than the actual dollar amount, making it easier to comply.

Thus the written statement is not a panacea for service providers, but rather a limited form of temporary relief. All compensation data required by the Schedule C that can be gathered must be disclosed, and only the portion of data that could not be gathered timely due to changing recordkeeping and information systems—despite "good faith efforts"—is excused.

Though each service provider would have to be judged based on its unique facts and circumstances, it is likely that many service providers will not qualify for this exception and, certainly, any direct fees and expenses would be known.

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8 See "FY 2011 Congressional Budget Justification, Employee Benefits Security Administration," pgs. 9, 20, 26.

9 See ERISA Sections 501 and 502, and IRC Sections 6652 and 6692.

10 Schedule C (Form 5500) 2009, Part II, line 4, pg. 6.

11 2009 Instructions for Form 5500, pg. 25.

12 See preamble to the proposed 408(b)(2) regulation, Federal Register, December 17, 2007 at 70989, "The Department believes that in order to satisfy their ERISA obligations, plan fiduciaries need information concerning all compensation to be received by the service provider and any conflicts of interest that may adversely affect the service provider's performance under the contract or arrangement."

13 "Therefore, even if an investigation initially focuses on a specific issue, every plan investigated does get an overall review. This approach enables us to identify emerging areas of noncompliance..." EBSA response to Government Accountability Office report on EBSA enforcement programs, December 19, 2006.

14 "FAQs about the 2009 Form 5500 Schedule C," #40.

15 Ibid.

16 "Supplemental FAQs about the 2009 Form 5500 Schedule C," #10.

Fiduciary service providers may also find it difficult to use this form of relief, as fiduciaries are subject to prohibited transaction rules preventing self-dealing.[17] While a fiduciary service provider may be receiving indirect compensation legitimately under certain contractual arrangements approved by the plan fiduciary that specifically address the nature and permissible amount of such compensation (for example, agreements regarding "float" retention), an inability to report such compensation to the plan administrator is likely to be questioned by the DOL and should be by the plan administrator regardless of cost to modify the recordkeeping or information systems.

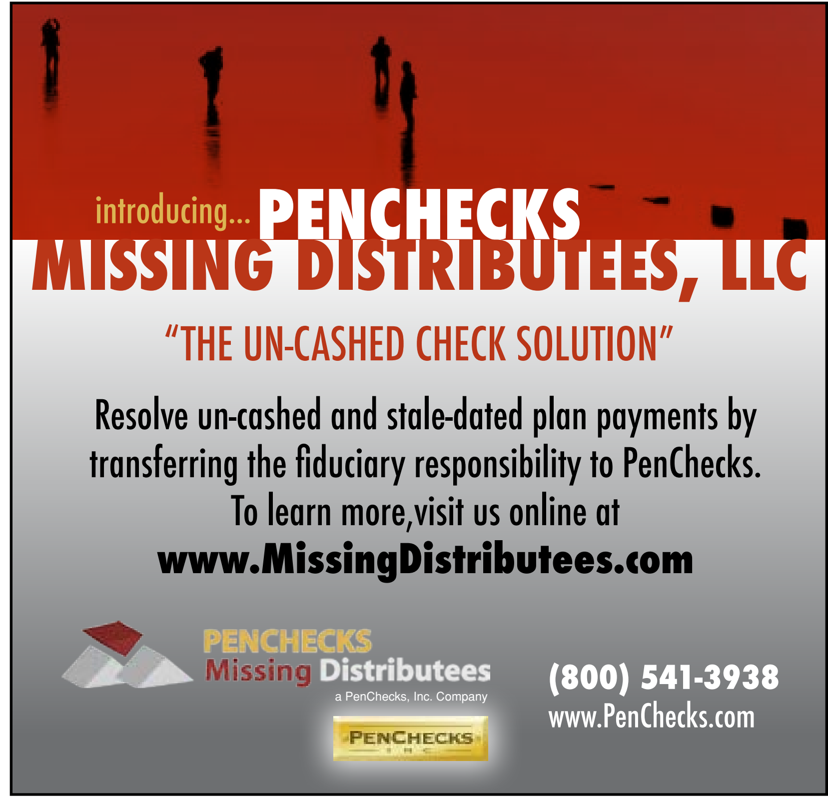
Service Provider Code Issues

The significant expansion of the number of codes is complicated by the fact that many service providers could be described by more than one code and the instructions do not define the code terms. The Schedule C requires the plan administrator to select from the list "all codes that describe the services provided and the compensation received" and to "enter as many codes as apply."[18] While some private groups have suggested definitions, such as that found in PlanTools' April 2010 Technical Release, preparers are left to their own resources to accurately assign the appropriate Code to the service rendered.[19]

The DOL provided limited relief for this concern in Supplemental FAQ #15, stating that "a reasonable good faith effort to properly classify services and fees is required," but the DOL will not reject a filing "solely because [DOL] might have used a different service or fee code."[20]

2010 and Beyond

Though everyone likely agrees that the transition period will cause some disruption and additional cost, the lessons learned from this first all-electronic Form 5500 filing cycle will help refine the process going forward. The DOL will likely consider a variety of suggestions for improvement, from logistical issues regarding the mechanics of filing to substantive concerns regarding the reporting of compensation in a variety of circumstances. It is clear that the Schedule C will become the impetus for a number of long-term changes to the service provider/plan relationship.



First, the new Schedule C is, in effect, making plans with more than 100 participants engage in an annual review of their service provider arrangements and cost. Plan fiduciaries have always had a duty to monitor their service providers and reassess their provider relationships periodically, but the Schedule C is likely to result in annual assessments of service provider fee reasonableness.[21] This monitoring may present new opportunities for many service providers.

Second, relationships and payment arrangements will be more public, though what impact this will have is less clear. The data available will offer only a partial picture of the arrangements of the plan universe as a whole, or even the arrangements of individual plans, due to the different reporting requirements for eligible indirect compensation and inconsistent code usage from plan to plan.

Finally, the DOL has created significant new enforcement tools for its investigations. The fee data will be used to identify certain plans and service providers for audit or investigation, and compliance with the new Schedule C requirements forms the basis for additional enforcement activity.

Service providers and plan administrators are understandably focused on getting through the 2009 filing cycle, but the new Schedule C is going to result in long-term changes. The DOL will be increasingly focused on filing compliance under the new Form 5500 in 2010 and beyond, and the challenges listed here are just a few of the issues plans and service providers

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17 See ERISA Section 406(b).
18 2009 Form 5500 Instructions at 24.
19 **www.fraplantools.com**.
20 Supplemental FAQs, #15.
21 See preamble to the proposed 408(b)(2) regulation, Federal Register, December 17, 2007 at 70993, "Section 404(a) of ERISA requires that the responsible plan fiduciary engage in an objective process designed to elicit information necessary to assess not only the reasonableness of the compensation or fees to be paid for services, but also the qualification of the service provider and the quality of the service that will be provided."

will need to address to reduce the likelihood of being an audit target. Service providers, especially those who do not work with ERISA plans on a regular basis, need to be aware that the Schedule C disclosure requirements impose year-round data collection obligations. The combined effect of the Schedule C requirements and the forthcoming Section 408(b)(2) regulation governing service provider disclosures will significantly affect the operating environment for plans and service providers alike, with new challenges—and new traps for the unwary.

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The Fly in the Ointment: Plan Loans and QDROs

by Michael P. Coyne and Jane E. Kleinsmith

John Doe is a participant in his company's profit sharing plan. He has an account balance of $40,000, which includes a participant loan with an $18,000 outstanding principal balance. Recently, the plan administrator received a proposed qualified domestic relations order (QDRO) providing that 60% of Mr. Doe's account is to be segregated for the benefit of ex-Mrs. Doe as part of a divorce settlement and paid to her as soon as permitted by the terms of the plan. Like many QDROs, the order is silent as to how the specific assets are to be segregated and whether the loan should be included or excluded in calculating the account balance.

Consider all of the problems facing the plan administrator. First, 60% of Mr. Doe's account is $24,000, and that amount exceeds the amount of liquid investments in his account. Additionally, if the plan administrator is to provide the alternate payee with 60% of each investment, it would seem that $10,800 of the plan loan should be allocated to her. But there are more problems. The order calls for a distribution as soon as permitted under the terms of the plan, and the terms of the plan permit a distribution at any time to the alternate payee. How does the plan administrator comply with this part of the order? Even if all of the liquid investments are allocated to the alternate payee, a complete distribution is not possible. Should part of the loan be distributed? Is that even possible? Should the trustee be asked to borrow funds to make the distribution?

If the distribution to the alternate payee does not take place immediately, it would be possible to divide the participant loan between the participant and the alternate payee. In the John Doe example, as payments were made on the loan, 60% would be allocated to the alternate payee's account and 40% would be allocated to the participant's account. However, this approach may create significant administrative problems. We have been advised that some plan administration software is not designed to split loan payments between separate accounts.

Additionally, if the loan is split, then the plan needs to be worried about whether the loan is adequately secured. Following division of the accounts, the participant's account balance is only $16,000. The outstanding loan balance exceeds

that amount. Does the alternate payee's account continue to act as collateral for the loan? If so, has a prohibited transaction occurred? Should the plan require additional collateral from the participant?

Default presents some unusual questions as well. If the participant defaults, the defaulted loan is to be treated as a taxable distribution. Does this scenario mean that the alternate payee receives a taxable distribution of 60% of the loan? This type of problem will likely lead to a return to domestic relations court, and one would expect the plan to be dragged into litigation by either or both of the parties.

Is it possible to distribute the loan to the alternate payee? While it is legally possible to assign the note to the alternate payee, that approach is not likely a very attractive option for the alternate payee. Unless the note is placed in an IRA, the alternate payee will have taxable income. (Finding an IRA custodian to hold a partial interest in a note may be a challenge.) From the plan's perspective, a transfer of the entire note would be a good resolution, as it would no longer be the plan's responsibility.

In our example, the alternate payee would not be entitled to the entire note, but rather 60% of it. Can the plan assign only an interest in the note? It is possible, but the plan would remain responsible for collecting payments on the note and distributing payments to the alternate payee. Again, this situation is very unattractive to the alternate payee, unless the assignment is transferred to an IRA.

Plan sponsors can avoid many of the obstacles associated with loans and domestic relations orders by carefully drafting loan procedures to ensure coverage of the most common issues.

Given the complications associated with participant loans, one would expect divorce attorneys to aggressively negotiate a resolution to protect their clients. Unfortunately, many members of the domestic relations bar do not have sufficient experience with pension law to appreciate the problems associated with plan loans. Tax attorney Stephen H. Leventhal wrote, "The real issue for divorce attorneys is making certain that the language they include in a divorce decree and a QDRO protects their client. For all practical purposes, [pension law] means very little to the attorney who is attempting to negotiate a favorable division of a retirement asset for his client."[1]

The rather significant item of court decisions dealing with participant loans and QDROs provides ample evidence of the difficulty of resolving these issues in domestic relations courts. In one case, where the participant loan was not adequately addressed in a QDRO, the court required an alternate payee to repay one-half of the participant loan.[2] In another case, a domestic relations court's failure to explicitly address responsibility for payment of a participant loan in connection with a divorce action was deemed to be a reversible error.[3]

Obviously, the nature of a participant loan as a plan asset presents unique issues when retirement assets are being divided in connection with a divorce or dissolution. Fortunately, plan sponsors who anticipate these problems can resolve most, if not all of them, with carefully crafted loan procedures and standards for reviewing QDROs. The prohibited transaction exemption and regulations that permit participant loans grant plan sponsors fairly wide latitude in developing the rules and conditions under which participant loans will be granted. The only restrictions on such rules and conditions are that they not discriminate in favor of highly compensated employees, officers or shareholders and that they apply to all participants and beneficiaries on a reasonably equivalent basis.[4]

Similarly, plan sponsors are required to adopt reasonable procedures to review QDROs.[5] Procedures need not be limited to simply determining the qualified status of the order. The statute specifically authorizes procedures "to administer distributions under such qualified orders." Additionally, a plan administrator has the right to insist upon clarity and precision in the qualified domestic relations order and can reject any order that is vague.[6] Consequently, it is clearly permissible to include in the procedures requirements that the qualified domestic relations order include provisions addressing any unusual situations or potential problems, such as participant loans.

The plan sponsor's objective should be to have procedures that are sufficiently clear and precise so that a participant or alternate payee will have no need or desire to draw the plan into litigation. Plan sponsors should start by considering loan procedures that will avoid many of the problems described earlier in this article. Here are some examples:

- **Prohibit participant loans to any participant who is a party in a divorce action without the consent of the domestic relations court.** It is not unusual for a court to order a freeze on any distributions or participant loans.[7] Rather than wait for the court to issue an order, simply make this practice a part of the plan's standard loan procedure.
- **Require the participant to acknowledge, as part of the loan application, that he or she is not presently a party to a divorce action.** While it is possible that a participant will falsify the loan application, this acknowledgement will protect the plan from any claim of breach of fiduciary duty. Keep in mind, however, that if the plan administrator has independent knowledge that a divorce is pending, this information is sufficient to allow the administrator to deny the loan, even if the participant answers a question to the contrary.
- **Require the spouse's consent to all participant loans, regardless of whether such consent is required by law.** Spousal consent is only required if the participant's account is subject to the joint and survivor annuity rules of Section 401(a)(11).[8] However, a loan program may nevertheless make spousal consent a requirement for all loans.
- **Provide that any request for a distribution results in acceleration of the loan repayment date.** It would not be permissible to delay a requested distribution due to an outstanding loan. Accelerating the loan payment will eliminate distribution problems.

In addition to these changes to the loan program, a plan's qualified domestic relations procedures should include specific provisions addressing participant loan issues:

- **Require that every QDRO provide specific directions regarding the disposition of any participant loan.** Arkansas benefits attorney, Craig Westbrook, includes the following provision in his procedures for reviewing qualified domestic relations orders: "The plan permits loans to participants. If there is an outstanding participant loan, the order should

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1 Benefit Practice Portfolios, Drafting the Division of Retirement Plan Assets into a Divorce Decree—Qualified Domestic Relations Orders—(October 2004), by Steven H. Leventhal, J.D., LL.M., Taxation; CCH Benefits Practice Portfolios.
2 Ouziel v. Ouziel, 285 A.D.2d 536, 728 N.Y.S.2d 75, N.Y.A.D. 2 Dept., 2001. July 16, 2001.
3 Shepard v. Shepard, 2001 WL 57181 (Ohio App. 9 Dist.).
4 §2550.408b-1.
5 ERISA Sec. 206(d)(3)(G)(ii).
6 Patricia J. Matassarin v. F. F. Mike Lynch, et al., 23 EBC 1663, U.S. Court of Appeals, Fifth Circuit, (Apr. 27, 1999).
7 See, for example, Casey v. Casey, 2004 WL 3130246, Conn. Super., 2004.
8 IRC Sec. 417(a)(4).

address the participant loan so that the plan administrator can determine whether the division of the participant's account includes or does not include the participant loan."

- **Provide that the plan will not make a distribution to an alternate payee to the extent that loan repayments are needed to fund that distribution.** This provision might be included in either the loan program or the procedures for reviewing qualified domestic relations orders. Preferably it is included in the QDRO procedures, as it puts the domestic relations attorney on notice of the types of problems that arise with respect to plan loans.
- **Provide that participant loans cannot be divided; they must be allocated to the participant.** Florida benefits attorney, Carol Myers, notes that prohibiting the division of a plan loan will eliminate many of the most difficult legal and administrative issues associated with plan loans.[9] It may be necessary to amend the plan's loan provisions to allow the plan to request additional collateral if the division of the account pursuant to a QDRO leaves the plan with less than adequate security.

Plan sponsors can avoid many of the obstacles associated with loans and domestic relations orders by carefully drafting loan procedures to ensure coverage of the most common issues. Additionally, a standardized process by which QDROs are reviewed and approved should be implemented. In the absence of proper safeguards, a plan sponsor risks being drawn into domestic relations litigation, which will likely result in increased costs associated with reviewing QDROs. Awareness of potential plan loan issues and standardized procedures for dealing with loans will likely result in the effective, thorough and litigation-free administration of qualified domestic relations orders.

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9 The authors wish to acknowledge the insights and advice provided by Ms. Myers for this article.

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Code Section 436: Dealing with Amendments and Restricted Benefits

by Norman Levinrad, FSPA, CPC

This article will deal with two aspects of Code Section 436—how to deal with amendments and how to deal with restricted benefits when distributions have to be processed.

Any time a plan is amended to increase benefits, the plan administrator must make sure that the amendment conforms to the rules of Code Section 436(c), or else the amendment does not take effect. This article will help explain how these rules function.

Amendments

Basic Rule 1

An amendment that does not increase the Funding Target (FT) has no effect on an Adjusted Funding Target Attainment Percentage (AFTAP) for the year and can always be adopted. Remember, benefit accruals are restricted once the AFTAP falls below 80% and are frozen once the AFTAP falls below 60%.

If an amendment does not increase the FT (*e.g.,* if the amendment is a fresh start benefit increasing future accruals only), the amendment is *always* permitted to take effect, regardless of the plan's funding level as expressed by its AFTAP when the amendment is adopted.

However, the regulations do address whether an amendment adopted after the valuation date must be recognized for funding purposes for a plan year, even if it has no impact on the FT. For funding purposes under Section 430, if an amendment for a year is adopted after the valuation date, even if the amendment has no impact on the FT and only impacts the Target Normal Cost (TNC) for the year, it must be taken into account for funding for that year if the amendment would not be allowed if it were included in the FT.

Example 1

A plan's 2010 AFTAP has been certified as 85%. The valuation date is January 1, 2010. An amendment is adopted in November of 2010 to increase future benefits via a fresh start amendment effective January 1, 2010 [and a 412(d)(2) election is made to use the amendment for the 2010 funding calculation]. The amendment can be adopted without regard to the impact of the benefit increase because the FT for 2010 is not affected. However, we need to determine what the AFTAP *would be* as of January 1, 2010 if the TNC were included as part of the FT:

- If the AFTAP is more than 80%, then the 2010 valuation does *not* need to reflect the amendment (the impact of it would first be seen in the 2011 valuation);
- If the AFTAP is less than 80%, then the 2010 valuation *must* reflect the amendment. Even though the amendment increasing the TNC was not adopted by the valuation date, the 2010 valuation must reflect the effect of the amendment in the TNC.

Basic Rule 2

An amendment increasing benefits *cannot* take effect in a plan year if:

- The AFTAP before the amendment is less than 80%; or
- The AFTAP before the amendment is more than 80% but would be less than 80% after the amendment.

However, there is an exception to this rule if the employer makes a sufficient 436(c) contribution so that the above limits do not apply. (Note: the employer can post security rather than make a 436 contribution, but

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since this situation will rarely apply to small plans, this article will not discuss this option.) A 436 contribution is a *current year contribution* needed to permit an amendment to the plan. It is important to realize that a 436 contribution is not permitted to be counted for 430 purposes. (Section 430 sets forth the minimum funding requirements and Section 436 sets forth benefit restrictions for underfunded plans—while these two Code Sections share some common definitions and terms of art, they must be read and applied separately.)

The amount of 436(c) contribution required to permit an amendment depends on the plan's AFTAP before the amendment:

- *If the AFTAP before the amendment is less than 80%,* the 436 contribution required is the increase in the FT attributable to the amendment. So if the AFTAP before the amendment is less than 80%, the AFTAP after the amendment does not need to be more than 80% if the increase in FT attributable to the amendment is funded via a 436 contribution.
- *If the AFTAP before the amendment is more than 80%*, the 436 contribution required is the amount necessary to bring the AFTAP to 80% after the amendment.

One way to avoid having to deal with 436 contributions to permit an amendment is to have the client make an additional prior year contribution that increases the AFTAP for the current year.

A 436 contribution must be made and designated as such at the time the contribution is used to avoid the amendment restriction, and cannot be subsequently recharacterized.

If the AFTAP for a year has already been certified, *and the client makes a 436 contribution to allow the amendment*, then there are different requirements for recertifying the AFTAP:

- If the AFTAP was more than 80%, and the AFTAP after the amendment would have been less than 80%, and a 436 contribution was made to increase the AFTAP after the amendment to 80%, then an AFTAP for the year that takes into account the amendment and the 436 contribution *must* be recertified. The recertified AFTAP must reference the amendment and the 436 contribution.
- If the AFTAP was less than 80%, and the 436 contribution was such that the FT associated with the increase is funded, then an AFTAP for the year that takes into account the amendment and the 436 contribution *may* be (but does not have to be) recertified at the request of the plan administrator. There is no requirement in the regulations that the actuary certify anything as to the cost of the amendment; however, the general principles of ASOP 41 will presumably apply for this communication.
- If the AFTAP was more than 80%, and the actuary determines that the AFTAP after an amendment would still be more than 80%, then an AFTAP for the year that takes into account the amendment and the 436 contribution *may* be (but does not have to be) recertified at the request of the plan administrator. Again, there is no requirement in the regulations that the actuary certify anything as to the cost of the amendment; however, the general principles of ASOP 41 will presumably apply for this communication.

The easiest way to think about these rules is that there is one AFTAP for a plan year, and the impact of the amendment increasing benefits must be funded via a 436 contribution, and the AFTAP must be recertified, such that the AFTAP does not change.

The amount of the 436 contribution is discounted to the first day of the plan year at the effective rate for the year. If the effective rate is not known at the time the 436 contribution is being made (because the valuation for the year has not yet been run), then the third segment rate for the year must be used. If there is excess funding because of this rate, then the excess can be re-designated as a 430 contribution.

The concept of a 436 contribution as a current year contribution that cannot do double duty as a 430 contribution for a year will be very confusing to clients. One way to avoid having to deal with 436 contributions to permit an amendment is to have the client make an *additional prior year contribution* that increases the AFTAP for the current year. The timing of such an amendment can be delayed to within the 2 1/2 months following the end of the plan year to allow prior year contributions to be used to support the amendment.

Example 2

A plan's 2009 AFTAP was 91%. The presumed AFTAP as of January 1, 2010 is 91%. In February of 2010 the client wants to amend the plan to increase benefits effective January 1, 2010, by increasing the FT as of January 1, 2010. The 2010 AFTAP has not yet been certified, but all the data is ready to do so, so the preliminary AFTAP as of January 1, 2010 after the amendment is 75%. The actuary determines that an additional contribution of $100,000 would increase the AFTAP to 80%. So the client can:

- Make an additional *prior year* 2009 contribution of $100,000, adopt the amendment, and the actuary certifies the 2010 AFTAP at 80%; or
- If the 2009 funding has been finalized and the client is unwilling to fund an additional 2009 amount, make a 2010 Section 436(c) contribution of $100,000, adopt the amendment, and the actuary certifies the 2010 AFTAP at 80%. (However, in this case the $100,000 cannot

also be used as a Section 430 contribution for 2010, which is not a problem if the client is looking for a maximum contribution for 2010, but is a problem if the client only wants to make a $100,000 contribution for 2010.)

Example 3

A plan's 2009 AFTAP was 91%. In November of 2009, the client wants to increase benefits effective January 1, 2009. The actuary determines that the assets are $100,000 short of what they need to get the AFTAP to 80% (after the amendment). If the client adopts this amendment in November of 2009, there is no way to make an additional prior year contribution for 2008. So the client can:

- Adopt the amendment in November of 2009 and fund the $100,000 as a 436 contribution for 2009, which means it cannot also count as a 430 contribution for 2009 (which in most cases will be an unfavorable result); or
- Wait until after December 31, 2009, fund the $100,000 as a *2009 prior year contribution,* adopt the amendment before March 15, 2010 effective January 1, 2009 as a 412(d)(2) amendment for 2009 and the actuary can certify the 2010 AFTAP at more than 80%. This approach will likely be the strategy of choice because it allows the amendment with no need for a 436 current year contribution. There will be problems when the client wants to adopt the amendment but does not have the cash to fund the contribution by March 15, 2010. In that situation, the client simply will not be able to amend if the $100,000 cannot be funded by March 15, 2010.

Note that:

- If a plan has language that automatically restores accruals that were restricted, and an AFTAP is adopted that restores benefit accruals retroactively, the restoration is *not treated as an amendment* if the period of accruals is fewer than 12 months, and the actuary certifies that the AFTAP after the restoration would be more than 60%.
- If there is no automatic restoration language, an amendment reactivating accruals is treated like any other amendment.
- An amendment to increase mandatory vesting is not considered an amendment for this purpose.
- While the Regulations are silent on this issue, the position of the IRS appears to be that automatic Section 415 COLAs in a document are amendments.

Under PPA, amendments increasing benefits are very tricky to manage. Every amendment is now a consulting project, as the plan's funded status, the need to possibly make 436 contributions and the timing of the amendment vis-à-vis prior year contributions all affect when the amendment will be effective and how the amendment will apply.

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What Happens When Benefits are Restricted?

How do you prepare participant distribution elections when there are restrictions in place?

For this article, we will *not* discuss the restricted distribution rules under Treasury Regulations Section 1.401(a)(4)-5, which generally prohibit lump sum distributions to certain highly compensated employees, when plan assets are less than 110% of plan liabilities. Rather, we will discuss the general restrictions imposed by PPA when a plan is less than 80% funded.

A participant terminates and you are asked to prepare his or her distribution election forms. How the distribution proceeds depends on the AFTAP for the plan year. If the:

- AFTAP is more than 80%: the distribution can proceed as normal; the participant is entitled to a lump sum or one of the annuity options under the plan.
- AFTAP is between 60% and 80%: the participant is restricted to a lump sum based on half of his or her accrued benefit or the value of the PBGC guaranteed benefit, if lower.
- AFTAP is less than 60%: no lump sums are available.

However, how these restrictions are handled and how the choices are communicated to participants is very complicated because participants are entitled to all of their options under the terms of the plan. Let's review some examples:

Example 1

A plan's AFTAP is less than 60%. Suzie Q, age 55, terminates employment with an accrued benefit of $500 per month for life commencing at age 65. The immediate annuity equivalent of this benefit is $300 per month at age

55. Assume the full lump sum equivalent of this life annuity is $100,000. While the plan provides a lump sum option, no lump sums can be paid because the AFTAP is less than 60% and no benefit can be paid which exceeds the life annuity amount.

Assume that the plan offers the following annuity options: Life, Life and 10 Year Certain, Joint and 50% Survivor, Joint and 100% Survivor, and 5 Year Installment.

Suzie's choices are:

- To defer payment of her benefit until such time as there are no restrictions; or
- To go into pay status with respect to an immediate annuity in any of the annuity options under the plan, as long as the payment amount does not exceed the life annuity amount. In this case, all the annuity options can be offered, *except the 5 year installment payment*, because that amount would exceed the life annuity amount.

It is relatively easy to communicate this information to Suzie, as it is only a slight variation of the normal communication for a plan that offers no lump sum benefits.

Example 2

A plan's AFTAP is between 60% and 80%. Suzie Q terminates at age 55 with an accrued benefit of $500 per month for life commencing at age 65. The immediate annuity equivalent of this benefit is $300 per month commencing at age 55. While the plan provides a lump sum option, the amount of the lump sum is restricted based on half of her accrued benefit. Assume for the example that the present value of 1/2 of her $500 accrued benefit is $50,000, and assume it is less than the value of the PBGC maximum.

Again, assume the plan offers the following annuity options: Life, Life and 10 Year Certain, Joint and 50% Survivor, Joint and 100% Survivor, and 5 Year Installment.

Suzie's choices are:

- To defer payment of her full benefit until such time as there are no restrictions;
- To go into pay status with respect to an immediate annuity of $300 a month commencing at age 55, with respect to her full accrued benefit in any of the annuity option under the plan, except for the installment option where the amount exceeds her life annuity amount; or
- To choose to receive half of her unrestricted accrued benefit as a lump sum (value of $50,000) or in any of the annuity forms under the plan; and
    - — Defer the balance of the remaining half of her restricted accrued benefit until such time as there are no restrictions; or
    - — Go into pay status with respect to the remaining half of her restricted accrued benefit as an immediate annuity of $150 per month commencing at 55, in any of the annuity options under the plan as long as the amount does not exceed the life annuity amount (so the 5 year installment cannot be offered with respect to the restricted piece of her benefit).

It goes without saying that communicating these options is extremely complicated and will likely be extremely confusing to participants. The Service acknowledges this situation in the preamble to the regulations and suggests three ways to handle this issue (but this list is not necessarily an exclusive list):

- Send the participant the normal distribution election form without regard to any restrictions, but if he or she elects a prohibited payment, then go back to him or her and explain that the election he or she made is prohibited, and provide a new form with the available options. This option is really impractical because in most cases the participant will elect a lump sum option and will be really grumpy if you go back to him or her and say "Oh yeah, remember that $100,000 lump sum option you elected—well, we were really kidding, you actually are not allowed to receive it."
- Send the participant the normal election form with a back-up form in case the participant elects a prohibited amount. This option is also a really impractical option because again the participant will likely elect an option he or she cannot receive and will be very confused by the back-up form.
- Send the participant two sets of forms, one for the unrestricted portion and one for the restricted potion of the accrued benefit. This option is the most practical of their alternatives. However, this option will still be very confusing to participants.

There is a fourth alternative, not suggested by the Service, which is to use a two-step process as follows:

- Step 1 is to provide the participants with a simplified form that outlines their basic options; and
- Step 2 is to provide a detailed form based on the option they select from the Step 1 process.

If the plan administrator uses this alternative, in the case of Suzie in our Example 2 previously, the Step 1 form could look something like the following sample:

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To: Suzie Q. Rocker

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Under the Pension Protection Act of 2006 (PPA), when a Plan's Adjusted Funding Target Attainment Percentage (AFTAP) is between 60% and 80%, a participant cannot receive a full lump sum. Because the Plan's AFTAP is less than 80%, you cannot receive the full lump sum equivalent of $100,000 at this time. You are only entitled to receive a partial lump sum of $50,000 at this time.

The following election must be completed so that the appropriate distribution forms, if applicable, can be prepared for your completion. If you have any questions or would like more detailed information regarding your benefit choices, please contact the individual listed on the cover page.

You have essentially four choices regarding your benefit distribution. Place your initials next to the choice you wish to make:

Choice	Initials	Description of the Choice	If You Make This Choice
1		I elect to take no distribution now and defer receipt of my benefit until the restrictions are lifted.	Complete the attached ELECTION TO DEFER BENEFITS confirming your choice to defer benefits.
2		I elect to take my full vested accrued benefit of $300 per month now in the form of an annuity under one of the equivalent annuity options in the plan document.	You will receive detailed distribution forms to complete explaining your equivalent annuity options.
3		I elect to take 1/2 of my vested accrued benefit now as a partial lump sum of $50,000 or in the form of an annuity under one of the equivalent annuity options in the plan, and I elect to take the remaining 1/2 of my vested accrued benefit of $150 per month in the form of an annuity under one of the equivalent annuity options in the plan document.	You will receive detailed distribution forms to complete explaining your partial lump sum and equivalent annuity options for the remainder of your benefit.
4		I elect to take 1/2 of my vested accrued benefit now as a partial lump sum of $50,000 or in the form of an annuity under one of the equivalent annuity options in the plan document, and I elect to defer receipt of the balance of 1/2 of my vested accrued benefit until the restrictions are lifted.	You will receive detailed distribution forms to complete explaining your partial lump sum and the equivalent annuity options of the partial lump sum.

After Suzie completes this form, a specific Step 2 form is sent to Suzie based on which of the four options she elected. While this alternative is not described by the Service, this author believes that it meets all the requirements of law and is the most practical way to approach a restricted benefit option. However, I suggest you get the advice of your own ERISA counsel to decide how best to approach dealing with these bifurcated situations.

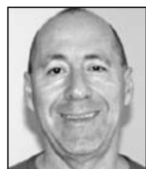
Caution: For all of the preceding discussion, both on amendments and on dealing with restricted payments, it is critical that everyone involved fully understands all the rules for determining a plan's AFTAP. These rules include the rules for determining presumed AFTAPs as of the first day of the fourth month of the plan year. While determining AFTAPs is the subject of a separate detailed article, a brief example will illustrate how easy it is to make a mistake and create a disqualifying event for a client's plan:

Example 3

In a calendar year plan, the 2009 AFTAP was 79%. As of January 1, 2010, it is determined that the plan's presumed AFTAP is 79%, and the plan administrator advises a participant who terminates in February that he or she *cannot* receive full lump sum payment because the plan's AFTAP is less than 80%. However, the 436 regulations require that you determine a presumed AFTAP as of January 1, 2010 based on the January 1, 2010 plan assets, and using that presumed AFTAP you determine if there are any deemed burns of credit balances to avoid restrictions. Had this calculation been performed, the AFTAP as of January 1, 2010 would have been determined to be 80% after the deemed burn of the credit balances. Because the plan administrator restricted benefits where no restrictions actually applied, this action is a disqualifying event.

Summary

As we all know well, PPA has made pension life much more complicated, and dealing with routine amendments and routine participant terminations is now no longer routine! Hopefully this article has helped clarify a few of the issues.



*Norman Levinrad, FSPA, CPC, EA, MAAA, is president and chief actuary of Summit Benefit & Actuarial Services, Inc. He is currently on the Board of Directors of ASPPA and is on the ACOPA Leadership Council. Norm is a regular speaker at actuarial conferences on plan design and other actuarial issues, and he has published many articles on various pension topics. Most importantly, he is a lifelong true-blue Chelsea fan. (**norman@summitbenefit.com**)*

Fees: What You Get for the Money

by Robert L. Long, APM

Okay, I'll admit it—my wife and I are home improvement television geeks (HGTV and DIY). Even though we're close to completing an entire redo of our 25-year old home, we still enjoy new home improvement ideas and trends, and we still get excited about visits to The Home Depot and Lowes. An interesting and popular HGTV show these days is called "What You Get for the Money." The premise of the show is to explore what kind of home buying power exists in different areas of the country (*e.g.,* What kind of home will $500,000 get you in San Francisco compared to Des Moines, Iowa?). Wouldn't it be great if someone would create a similar type show to analyze what you get for what you pay in 401(k) administrative and investment fees?

In looking forward to the highly anticipated fee disclosure regulations to be released by the DOL, I've been trying to keep up on the volumes of articles being written on 401(k) fees. Many talk about fees as a bad thing. I found it quite interesting that very few, if any, focus on what a 401(k) participant or plan sponsor is receiving in return for the fees he or she is paying. The focus seems to always be on the level of the fee itself—not what you are getting. How do you compare a $500,000 home in San Francisco with a similar priced home in Des Moines without having the opportunity to view and evaluate the home itself, as well as the town and the local environment? It also may seem outrageous that I have chosen to shell out $200 for a new bathroom faucet just to wash my hands instead of the cheaper $50 model. But what did I get for the money? Actually, I got a solid, high quality fixture that will service my bathroom for 20+ years. Too simplistic? Maybe…but maybe not.

A more realistic example:

- Participant A's 401(k) plan boasts an average expense of 30 basis points (bps). For that, the participant has a decent array of mutual funds, but is totally on his own to decide how to invest.
- Participant B's 401(k) plan has an average expense of 60 bps. For that, the participant also has a decent array of mutual fund options, but also has several online educational options and fund analyzers to assist in fund selection and monitoring.

- For an additional fee (let's say an extra 40 bps for a total of 100 bps or 1%), Participant B also has access to an individual advisor to annually help assess her progress and make appropriate adjustments.

On the surface (if you follow the conventional wisdom of today's pundits), Participant A is clearly better off because of lower expenses: 30 bps represents a huge savings over 100 bps. Maybe…but maybe not.

For argument sake, let's say Participant A is able to conjure up a 7% return on his own, for a net gain of 6.7%—not bad considering today's environment. Participant B, as a result of accessing the educational and analysis tools (there are a lot of good ones available), is able to generate an 8% return for a net gain of 7.4%. Hmmm…pretty good. Then Participant B, recognizing the value in getting quality guidance, engages the advisor, who is able to bump her return to 9% for a net gain of 8.0%. [Remember, over the life of the plan, the additional net return (8.0 – 6.7 = 1.35) compounds.] Who is better off?

Clearly, the expense/return assumptions above are arguable. However, the point is that there are many variables involved in accurately assessing

what represents a reasonable expense level. The value received in return for the expenses paid will ultimately determine how successful participants are in adding to their nest eggs. The best way to assess value and how it will impact the ability to accumulate assets is to evaluate the entire package—all of the expenses along with all of the services.

The same argument can be used for a plan sponsor. One might boast of average overall expenses of 50 bps. But what is the plan sponsor getting in return? Another sponsor may average 125 bps. Perhaps the sponsor paying the higher fee is receiving quality consulting and advisory services that make the plan much more effective and valuable for the participants. On the flip side, maybe the sponsor paying 125 bps isn't being serviced effectively and clearly is paying too much.

As we anticipate the dawn of fee disclosure guidance (it may be in our hands as you read this article), it is even more critical that plan sponsor and participants alike carefully review the entire package of services along with their associated fees. Reviewing a single piece of the puzzle in and of itself will have little value.

Here are a few additional variables (both for participants and sponsors) that must be taken into consideration when assessing value and determining what you are getting for the money. Learn to ask: "*What am I paying* for these services and *how much will they help* in the ability to accumulate assets for retirement?"

- **Educational tools:** These tools are extremely important in the world of participant direction. To what extent will they be utilized? How easy are they to use and how effective are they?
- **Analytical tools:** These tools measure risk and return and monitor performance and can help tremendously in keeping participants on track with their goals.
- **Access to advisors:** Practical, well disciplined and well educated advisors can bring great value to the table. Fees will go up, but often can be well justified.
- **Access to actively managed investment profiles or models:** The advisor will charge more for these options, but professional management may be very worthwhile for many participants.
- **Access to brokerage and managed accounts:** Clearly additional costs are involved with this option, but for many participants these accounts can be of great value, particularly managed accounts being managed by professional managers.
- **Open architecture:** Often open architecture will lead to more flexibility and increased fund options while reducing costs, but may not be appropriate based on the sponsors' needs.
- **Various consulting services:** Additional services, such as document and plan design services, distribution consulting and services for those nearing retirement, etc. can add value.

One more thought as we enter the brave new world of fee disclosure: if you are providing quality services and contributing value to plan sponsors and participants, then you shouldn't be concerned about fee disclosure. Everybody needs to get paid somewhere along the line—there are no free lunches, as the saying goes. Don't be shy in justifying the fees you are charging to help your clients understand and appreciate your value proposition, but take the time to communicate that value clearly.

In summary, we all likely agree that fee disclosure that results in an "apples to apples" comparison is a good thing. However, fees are only one piece of a very large puzzle. The entire value proposition must be carefully reviewed. So for sponsors and participants, the real question is *"What do you get for the money?"*

Don't be shy in justifying the fees you are charging to help your clients understand and appreciate your value proposition, but take the time to communicate that value clearly.

*Robert L. Long, CLU, ChFC, APM, is product manager for Actuarial Systems Corporation and is heavily involved in the daily valuation and trading aspects of the pension industry. A 30-year industry veteran, Bob managed a variety of pension administration operations within the insurance industry before becoming involved with systems development. He currently serves on ASPPA's Board of Directors and previously Co-chaired ASPPA's Education and Examination Committee. Bob was also involved with the rollout of the new IRS Enrolled Retirement Plan Agent designation (via AIRE) and served on AIRE's Board of Managers. (**blong@asc-net.com**)*

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The Great Recession: Fiduciary Lessons Learned from the Financial Crisis

by David C. Kaleda

The second half of 2008 and 2009 were trying times for many plan fiduciaries. As a result of the worst financial recession since the Great Depression and a near collapse of the money markets and credit markets, many plan fiduciaries with responsibility for managing plan assets faced obstacles such as illiquidity and substantial investment losses. This article highlights some of the challenges fiduciaries faced during the financial crisis and uses those challenges to illustrate what fiduciary practices can minimize investment losses and mitigate fiduciary risks associated with managing plan assets.

This article provides a summary of fiduciary responsibilities with respect to investment of ERISA assets, explanations of some of the investment challenges faced by fiduciaries related to securities lending, auction rate securities, stable value funds and target-date funds, and an overview of actions a fiduciary can take to avoid or minimize fiduciary liability exposure.

Overview of Fiduciary Duties of Investment Fiduciaries

Fiduciaries with responsibilities related to the investment of ERISA plan assets include fiduciaries at the plan sponsor (*e.g.,* plan administrator, investment committee, pension committee, etc.; referred to herein as "Employer Fiduciaries") and the fiduciaries engaged by the Employer Fiduciaries to manage the plan's assets (*e.g.,* investment managers, investment advisors, etc.; referred to herein as "Third Party Fiduciaries"). The terms "Employer Fiduciaries" and "Third Party Fiduciaries" are collectively referred to in this article as "Investment Fiduciaries." Investment Fiduciaries must perform their responsibilities in accordance with the general fiduciary provisions of ERISA.

Pursuant to the duty of prudence, Investment Fiduciaries must perform their duties with respect to the investment of plan assets with the care, skill and prudence that would be applied by a prudent investor, acting in a like capacity and knowledgeable about the investment of retirement plan assets.[1] In its regulations, the Department of Labor (DOL) requires the Investment Fiduciary to give "appropriate consideration" to the facts and circumstances relevant to the investment of plan assets.[2] In addition to the above duty of prudence, Investment Fiduciaries must:

- Act for the exclusive purpose of providing benefits to participants and beneficiaries;
- Act pursuant to the documents that govern the plan; and
- Take steps to diversify plan assets in order to minimize large losses.[3]

Furthermore, Investment Fiduciaries must make sure that they do not cause an ERISA plan or account to engage in non-exempt party in interest prohibited transactions or non-exempt self-dealing prohibited transactions.[4]

In order to meet their fiduciary obligations, Investment Fiduciaries should select plan investments in a methodical manner considering how

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1 ERISA § 404(a)(1)(B).
2 *See* DOL Reg. § 2550.404a-1(b).
3 ERISA § 404(a)(1).
4 ERISA § 406(a) & (b).

each investment will fit into the plan's investment portfolio. Furthermore, if an Investment Fiduciary wishes to take advantage of the fiduciary protection afforded to defined contribution plans that offer participant self-directed investments, Investment Fiduciaries need to make sure that the plan also complies with Section 404(c) of ERISA. After the initial investment selections are made, Investment Fiduciaries must periodically monitor plan investments and dispose of investments that are no longer appropriate under ERISA.[5] Importantly, however, ERISA does not require that every fiduciary decision be correct, but rather it requires procedural prudence whereby the fiduciary demonstrates that it followed a deliberative process in taking action as a fiduciary.[6]

Issues Arising During the Financial Crisis

As the financial crisis unfolded, Investment Fiduciaries began to consider what action was necessary under ERISA in order to reduce investment losses, protect plan assets and minimize exposure to fiduciary liability. The following are examples of issues arising out of the financial crisis that Investment Fiduciaries encountered. This list is by no means all-inclusive. However, the following issues commonly arose in ERISA practice, gained a lot of media or political attention and were the subject of litigation or regulatory review. They also are useful in demonstrating what Investment Fiduciaries can learn from the financial crisis in order to be better ERISA fiduciaries and minimize risk.[7]

Securities Lending

Investment managers and custodians often engage in a practice called securities lending in order to make additional income from the assets they manage. Securities lending is a transaction between the investment fund and a borrower (the "Borrower"), usually a bank or other financial institution, whereby the fund "lends" securities to the Borrower. The Borrower will often pay a fee to the fund for use of the securities. In addition, the Borrower is required to give the fund collateral, which is typically cash or cash-like securities (*e.g.,* US Treasuries), with a market value of 100 percent or more of the fair market value of the securities loaned. Such assets are held for investment in a sub-account, often called a "collateral pool." The Borrower typically has a right to return the securities to the fund, at which time the collateral (or equivalent assets) must be returned. A financial intermediary, such as an investment manager or custodian (or both), enables the transaction between the fund and the Borrower. Furthermore, such manager or custodian may invest the assets held in the collateral pool until the collateral must be returned.[8]

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5 *See* Hunt v. Magnell, 758 F. Supp. 1292 (D. Minn. 1991).
6 *See* Donovan v. Cunningham, 716 F. 2d 1455, 1467 (5th Cir. 1983).
7 Note that this article does not address some of the unique fiduciary issues that arise in the investment of employer securities.
8 This description is of a common and basic securities lending transaction, which can be much more complex in structure. *See* Mark C. Faulkner, *An Introduction to Securities Lending*, (3d Ed. 2006).

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Unfortunately, just as target-date funds were becoming more popular and their validity had been confirmed by the DOL through its QDIA regulations, the equity and fixed income markets performed extremely poorly, which impacted the performance of target-date funds.

During the financial crisis, securities lending became the focus of high profile ERISA law suits.[9] In those suits, the plaintiffs, who were Employer Fiduciaries that made the decision to invest in collective trusts that included securities lending, sued the custodian of the funds and affiliated investment managers (the "Defendants"). The claims underlying those suits stated that the Defendants imprudently invested the assets they received from the Borrowers as collateral for the lending transaction, which resulted in the funds incurring significant losses and preventing the plans from redeeming their interests in the funds without receiving a portion of fund assets, some of which were virtually worthless, in kind.

Even Investment Fiduciaries not involved in the litigation were impacted by the securities lending issues. Investment Fiduciaries that attempted to redeem a plan's interest in one of the aforementioned funds or another fund or separate account in which securities lending occurred, were prevented from redeeming such interests or such redemption could not occur without receipt of some assets in kind. Furthermore, even in the absence of a redemption, such funds or accounts incurred significant losses through the investment of assets underlying the securities lending transaction.

Auction Rate Securities

Auction rate securities (ARS) were a type of bond issued by a governmental or corporate entity. ARS typically had maturities ranging from five to 30 years. The interest paid by ARS issuers was based upon rates that were regularly set and reset through a Dutch auction process held at periodic intervals.[10] Through the Dutch auction, participants submitted offers to purchase, also called bids, a specified number of ARS and the minimum interest rate they were willing to accept from the issuer. Once offers to purchase all of the ARS were received, the highest interest rate submitted was the rate that applied to every ARS sold in the auction. In the event not enough offers to purchase were submitted so that not all of the ARS were sold, an auction failure occurred. Current owners could not sell the ARS and default, often unfavorable, interest provisions applied. Prior to the financial crisis, if an auction failure was expected to occur because bids were inadequate to sell all of the ARS, dealers would step in and purchase the outstanding ARS, thus assuring current ARS holders that the ARS in which they invested were liquid and could be sold at the next auction.

As a result of the financial crisis, the Dutch auction process failed. Unlike prior to the crisis, investors (including the dealers) were not willing to assume the risk that the issuers of the underlying debt would continue to be in a position to make the interest payments at the rate determined by the last auction. Thus, all of the ARS in multiple auctions were not purchased. This lack of confidence was largely brought on by the significant increase of defaults in the sub-prime mortgage market. Furthermore, investors began to realize that the insurers, who in some cases were supporting the payment of the interest through insurance wrappers, were no longer in a position to guarantee the debt payments. After numerous auction failures occurred, the Securities and Exchange Commission (SEC) brought enforcement actions against several dealers that ended in settlement agreements. The SEC alleged that the dealers misled investors into believing that ARS were as liquid as cash and never fully informed them of the risk of auction failures, even when clear evidence was available to the dealers that the auction failures were imminent.[11]

Due to the collapse of the auction system, ARS held by investors, including ERISA plans and funds or accounts that held ERISA plan assets, became illiquid. Valuation of these assets became very difficult. Furthermore, in many cases, ARS issuers were now required to pay to investors very high interest rates, thus presenting a high default risk, or very low interest rates, which were much lower than the rate that would have been paid had the auctions not failed (or the rate on a comparable bond that is not an ARS). Investment Fiduciaries who managed ERISA plan accounts that held ARS found themselves in a position where they could not sell the ARS or accurately value them.

Stable Value Fund Performance and Liquidity Issues

The financial crisis showed Investment Fiduciaries that investing in stable value funds and similar investments had different implications than they originally thought. Many Investment Fiduciaries viewed these funds as comparable to money market mutual funds or other cash-like investments that would maintain their one dollar par value per

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9 FedEx Corp. v. Northern Trust Co., No. 08-2827 (W.D. Tenn. December 1, 2008); BP North America Inc. Sav. Plan Inv. Oversight Comm. v. The Northern Trust Company, No 08-6029 (N.D. Ill. October 21, 2008).

10 California Debt and Investment Advisory Commission, *Issue Brief: Auction Rate Securities* (August 2004); *See also FINRA Investor Alert: Auction Rate Securities: What Happens When Auctions Fail*, available at www.finra.org/Investors/ProtectYourself/InvestorAlerts/Bonds/P038207.

11 *See, e.g.,* SEC v. Citigroup Global Mkts, Inc. (S.D. NY, Oct. 13, 2008); SEC v. UBS Secs. LLC (S.D. NY, Oct. 31, 2008).

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share while allowing for immediate liquidity. As such, principal would be protected against loss. However, the financial crisis demonstrated that stable value products were much more sophisticated investments and were not liquid like money market funds or other cash-like investments.

Unlike money market funds, stable value funds, in order to generate higher returns than money market funds, do not simply invest in cash-like instruments such as commercial paper, short-term government securities, repurchase agreements, certificates of deposit, bankers' acceptances and similar securities. Rather, in order to generate higher returns than money market funds, stable value funds invest in a broader array of securities including corporate bonds, municipal bonds, derivatives, asset backed securities, mortgage backed securities, guaranteed investment contracts and other securities. These securities are not as liquid and are more subject to market volatility and investment losses. Furthermore, stable value products often include insurance "wrappers," which are designed to help maintain, but not guarantee, a par value of one dollar per share or unit in the investment fund.

As a result of the virtual paralysis of the credit and money markets and the collapse of certain insurers and the downgrading of others with respect to their credit quality, several issues related to stable value funds arose. For example, stable value managers needed to invoke provisions under investment management agreements that allow up to 12 months to liquidate a plan's position in the fund, require a significant market value adjustment or require "in kind" transfers to plans. Furthermore, the collapse of certain insurance companies and the downgrading of others threatened the ability to maintain the one dollar par value of units in stable value funds. Although such par value is not guaranteed, many Investment Fiduciaries and participants had come to expect that the value of the shares would not go below one dollar per share or unit.

Target-Date and Life Cycle Fund Investment Performance

In October of 2007, about one year before the financial crisis, the DOL implemented final regulations establishing the qualified default investment alternative (QDIA) so that if the regulatory requirements were met, the plan fiduciaries would not be held liable for the default investment of participants' accounts in the QDIA pursuant to Section 404(c)(5) of ERISA. One of the approved QDIAs included funds designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures based on the participant's age, target retirement date or life expectancy, which include life cycle funds and target-date funds.[12]

With the issuance of the final regulations, the DOL affirmed the validity of target-date and life cycle funds as default investments, which had already been gaining popularity in 2007 and prior years.[13] Unfortunately, just as target-date funds were becoming more popular and their validity had been confirmed by the DOL through its QDIA regulations, the equity and fixed income markets performed extremely poorly, which impacted the performance of target-date funds. Target-date funds came under scrutiny. The financial crisis brought several issues into focus, including:

- Not all target-date funds are the same;
- A target-date fund may have significant holdings in stocks even if a participant is at or over the fund's stated target age; and
- Significant investment losses, at least in the short term, can be incurred through investments in the target-date funds.

Fiduciary Lessons Learned

All of the issues that arose during the financial crisis and are described above (as well as many others encountered during the crisis) serve as an excellent

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12 *See* DOL Reg. § 2550.404c-5(e)(4).

13 Dallas Salisbury, President and CEO, Employee Benefit Research Institute, Written Statement for the United States Senate Special Committee on Aging, *"Boomer Bust?" Securing Retirement in a Volatile Economy*, Feb. 25, 2009.

framework for a discussion of how the investment fiduciary provisions summarized previously can be met. Summarized below are several lessons Investment Fiduciaries can learn from the crisis, including:

- Delegating investment authority and hiring experts;
- Engaging in procedural prudence and allocating fiduciary responsibilities;
- Reviewing written materials describing investments;
- Reviewing investment-related contracts;
- Considering divestiture of assets;
- Considering whether legal action is necessary; and
- Purchasing fiduciary liability insurance.

Delegating Investment Authority and Hiring Experts

Investment Fiduciaries must carefully review proposed ERISA plan or account investments prior to the purchase of such investments and must review such investment decisions regularly, particularly in abnormal economic times such as the financial crisis. Such review is necessary to demonstrate compliance with ERISA's fiduciary duty provisions.

While Third Party Fiduciaries are trained as investment managers and are often well-equipped to perform such evaluations, many Employer Fiduciaries are not. As such, the Employer Fiduciaries should consider that Section 402(c)(3) of ERISA permits a plan's "named fiduciary" to delegate the responsibility to invest plan assets to a qualified investment manager if the named fiduciary prudently selects the investment manager and monitors his or her results. Under ERISA, to the extent the plan fiduciaries prudently select an investment manager, prudently establish investment guidelines for the manager and prudently monitor the performance of the manager, the plan fiduciaries are generally not liable for any investment losses.

Even if the plan fiduciary responsible for making investment decisions does not delegate this responsibility to an investment manager, which is not possible in every case, the plan fiduciary can hire an expert, such as an investment advisor, to help it select the investments appropriate for the plan. In fact, if the fiduciary does not have the expertise to make investment-related decisions, it may have a duty under ERISA to hire an expert. At a minimum, Employer Fiduciaries, such as the plan's investment committee, should include persons who have some level of sophistication in investing.

Engaging in Procedural Prudence and Allocating Fiduciary Responsibilities

As discussed previously under the overview of fiduciary responsibilities, the focus of ERISA is not on whether an Investment Fiduciary makes the right investment decisions, but rather whether the Investment Fiduciary gave "appropriate consideration" to the facts and circumstances in determining whether the decision to purchase or retain an investment was prudent and was otherwise in accordance with the general fiduciary provisions. In effect, the Investment Fiduciary must demonstrate procedural prudence.

Furthermore, ERISA provides that fiduciary responsibilities can be allocated among multiple fiduciaries so that fiduciaries are only held liable under ERISA with respect to the responsibilities specifically delegated to them.[14] As such, through implementing procedures designed to ensure that the general fiduciary requirements are met and by allocating fiduciary responsibilities among different fiduciaries, exposure to fiduciary liability can be minimized.

The importance of being able to demonstrate procedural prudence and the effective allocation of fiduciary responsibility among fiduciaries became very apparent during the financial crisis. As plan investments decreased in value or became illiquid, fiduciaries scrambled to review their initial investment decisions to determine if there was any fiduciary liability exposure and to determine if action was necessary in light of current economic conditions. In many cases, Investment Fiduciaries did not entirely understand the nature of the plan investments or plan investment strategies used, such as liquidation restrictions on stable value products and the use of securities lending. Moreover, they had no written record establishing the basis for making certain investment decisions, so they had no evidence showing that the initial investment decisions met ERISA's requirements. Finally, there were many questions about who was the fiduciary making the investment decisions and there was very little understanding that, by allocating fiduciary responsibilities appropriately, some plan fiduciaries can be insulated from liability exposure faced by other fiduciaries.

Reviewing Written Materials Describing the Investments

Investment Fiduciaries need to read and understand the materials related to the plan's investments (*e.g.,* prospectuses, offering memoranda, collective trust agreements, etc.). The use of securities lending in a fund and the restrictions on liquidating a stable value fund are disclosed in such materials.

Continued on page 34

14 ERISA § 405(c)(1).

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Waters Honored with Morningstar-ASPPA 401(k) Advisor Leadership Award

Financial Advisor Recognized for Leadership in Retirement Plan Industry

by Melinda Semadeni

Sean M. Waters, co-founder of Cook Street Consulting, Inc. (CSC) in Greenwood Village, CO, received the 2010 Morningstar-ASPPA 401(k) Advisor Leadership Award during The ASPPA 401(k) SUMMIT in Orlando, FL, on March 15.

The award was introduced in 2008 to honor a specific accomplishment or contribution by an advisor or group within the 401(k) industry. Sponsored by Morningstar, Inc., a leading provider of independent investment research, and ASPPA, the leader in retirement plan education and advocacy, the award reflects the multi-faceted efforts of advisors to serve their clients—both plan sponsors and participants, innovate within the retirement plan industry and maintain high ethical standards.

Mary Beth Glotzbach, Morningstar vice president of investor communications, and Brian H. Graff, Esq., APM, ASPPA Executive Director/CEO, presented the award to Waters and offered certificates to two finalists—Steven Dimitriou of Mayflower Advisors, LLC, and Kendall Storch of Longfellow Benefits. The three honorees were selected from among 100 nominations sent in by their peers and colleagues throughout the retirement plan industry.

From left to right: Brian H. Graff, Esq., APM, of ASPPA, award recipient Sean M. Waters and Mary Beth Glotzbach of Morningstar, Inc.

2010 Morningstar-ASPPA 401(k) Advisor Leadership Award Recipient Sean M. Waters of Cook Street Consulting, Inc.

"Sean Waters has all the qualities a leading advisor should possess—outstanding client service, ethical practice, industry expertise, innovation and a primary focus on the needs of his plan sponsors and participants," said Graff. "As a result, he has enhanced the ability of working Americans to achieve a secure retirement."

Prior to the award presentation, fellow advisor Todd Lacey of The (k)larity Group moderated a special session with Waters, Dimitriou and Storch. They offered SUMMIT attendees a robust discussion on fiduciary duty, fee disclosure, ways to improve plan participation and advisory management. Acknowledging the backlash against 401(k) plans during the economic downturn, Waters made the case for the private retirement system: "I think the 401(k) is a great structure. Studies have shown that if people invest regularly and rebalance their portfolios, they won't experience the loss that many did over the last decade." Waters added that "participants may have felt awful during the downturn, but the data shows the average participant did fine, and it was because of the features found in an employer-sponsored 401(k) plan."

As co-founder at CSC, Waters oversees fiduciary analysis, asset allocation modeling and business development. He and his ten-person team oversee approximately $5.25 billion in retirement plan assets. Prior to his work at CSC, Waters worked as an institutional portfolio manager for Scudder Kemper Investments in San Francisco where he managed more

than $250 million, in addition to co-managing another $1.5 billion. Waters began his career at Crédit Lyonnais in New York as a proprietary bond trader. He received his BA from the University of Colorado at Boulder and holds the Chartered Financial Analyst (CFA) designation. He is a member of the CFA Institute, the Denver Society of Security Analysts and the Investment Management Council, a national organization of select investment consultants and advisors with specialized fiduciary training. In addition to his business activities, Waters also serves on the Boards of Invest in Kids, a non-profit organization, and the Ricks Center for Gifted Children.

Previous recipients of the Morningstar-ASPPA 401(k) Advisor Leadership Award include Fred Reish, APM, of Reish & Reicher, and William Chetney of National Retirement Partners. The tenth anniversary of The ASPPA 401(k) SUMMIT will be held March 6-8, 2011 at Caesar's Palace in Las Vegas, NV.

From left to right: Brian H. Graff, Esq., APM, of ASPPA, finalist Steven Dimitriou, finalist Kendall Storch and Mary Beth Glotzbach of Morningstar, Inc.

Melinda Semadeni joined the ASPPA staff as Director of Media Relations in January of 2010. She has a background in journalism and public relations and recently produced a podcast series on savvy investing available on iTunes. Melinda enjoys working with ASPPA members to raise awareness of the organization. (**msemadeni@asppa.org**)

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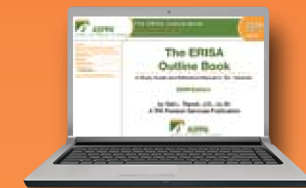

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Continued from page 28

Investment Fiduciaries should review investment management and investment advisory contracts carefully to determine whether the documents adequately set forth the rights and responsibilities of the respective parties.

However, many Investment Fiduciaries were surprised by the existence of these provisions during the crisis. In practice, based upon their review of these materials, Investment Fiduciaries should ask questions of managers and factor the answers into the investment decisions. Failure to do otherwise raises serious questions regarding whether the Investment Fiduciaries acted prudently including their "appropriate consideration" of the underlying facts and circumstances.

Reviewing Investment Management and Investment Advisory Contracts

Investment Fiduciaries should review investment management and investment advisory contracts carefully to determine whether the documents adequately set forth the rights and responsibilities of the respective parties. For example, Investment Fiduciaries should verify that:

- The manager or advisor specifically agrees to its appointment as a fiduciary to the plan (if such fiduciary relationship is intended);
- The agreement includes appropriate protective language, such as indemnification or cross-indemnification language, and excessive exculpatory language on behalf of the other party to the agreement is limited;
- The agreement adequately sets forth the parties' representations and warranties; and
- The manager or advisor agrees to perform its duties pursuant to ERISA including compliance with applicable prohibited transaction class exemptions.

Investment Fiduciaries have a duty to assure that ERISA assets are adequately protected, which can in part be accomplished by assuring investment-related agreements are well-drafted. The provisions of these agreements became much more important during the financial crisis.

Considering Divestiture of Assets

If investment performance drops significantly and the likelihood of recovery is unlikely or the retention of certain ERISA plan assets cannot otherwise be justified under ERISA's general

fiduciary provisions, Investment Fiduciaries need to consider the possibility of divesting ERISA assets. However, in so doing, the Investment Fiduciary must take care to prevent an ERISA violation, including causing prohibited transactions, in attempting to resolve the problem.

During the financial crisis, many Investment Fiduciaries, for a variety of reasons, were willing to purchase troubled assets (*e.g.,* ARS) from ERISA plans and accounts, or transfer those assets from one ERISA account to another. However, in the absence of an exemption, this would cause the Investment Fiduciaries to engage in prohibited transactions under ERISA section 406. In order to avoid prohibited transactions, Investment Fiduciaries sought individual prohibited transaction exemptions in many cases, particularly in transactions involving ARS.[15] In the alternative, fiduciaries considered taking advantage of the DOL's Voluntary Fiduciary Correction Program (VFCP), which addresses correcting the sale of certain plan assets to a party in interest.[16]

Investment Fiduciaries should also try to work with investment managers to achieve a divestiture where it otherwise does not appear possible. For example, in the case of stable value funds, managers were willing to establish a blended fixed income fund that consisted of both the stable value fund and a money market fund through which an orderly and more rapid liquidation of the stable fund assets could occur. Fund managers involved in securities lending set up programs whereby a plan could liquidate its position in the fund over time in order to avoid in kind distributions. In other words, if an Investment Fiduciary believes that ERISA requires action should be taken, it should try to work with the other party to reach the desired goal.

Reviewing Participant Communications

Investment Fiduciaries should continually review their written plan communications to assure that the nature of the plans' investments are clearly communicated to plan participants and that they are delivered in a manner that complies with DOL requirements. The importance of clear communication materials became evident as target-date funds incurred significant losses and as stable value funds faced performance and liquidity problems.

One of the key requirements for QDIA protection is that the plan administrator communicates multiple aspects of the QDIA, including investment risks, in the form of a written notice. Such notice must be delivered at the time of initial eligibility (or immediately before) and on an annual basis. During the financial crisis, questions arose whether QDIA notices adequately disclose investment risk and whether those notices were being "delivered" in a manner permitted under the regulations (*e.g.,* electronically).

In the context of stable value funds, as insurers went into receivership or received downgraded credit ratings, serious questions were raised whether the one dollar par value in a stable value fund could be maintained and whether communication materials were clear that such value was not guaranteed. By clearly drafting and properly delivering communication materials, Investment Fiduciaries can help protect themselves against successful benefit claims and ERISA suits by allowing the fiduciary to take advantage of certain investment safe harbors (*e.g.,* QDIAs) and by presenting materials that do not arguably mislead participants.

▲ ▲ ▲

15 *See, e.g.,* DOL IPTE 2010-5 & DOL IPTE 2009-06.

16 71 FR 20262, 20278.

GAC Corner

ASPPA Government Affairs Committee Comment Letters and Testimony since February 2010

April 23, 2010

ASPPA submitted comments to the Department of Labor and the Internal Revenue Service requesting a blanket extension for filing the 2009 Form 5500 series reports so that plan sponsors would not have to file IRS Form 5558 to obtain an extension. The basis for this request is the expectation of the challenges plan sponsors and administrators will face in filing reports for the first time under the new EFAST2 filing system.
www.asppa.org/document-vault/pdfs/GAC/2010/final5500.aspx

March 18, 2010

ASPPA and NTSAA filed comments with the Department of Labor regarding the "limited involvement" safe harbor exemption from Title I of ERISA for certain 403(b) arrangements offered by 501(c)(3) organizations. Relief was requested for arrangements which may now be subject to Title I as a result of the guidance provided by FAB 2010-01.
www.asppa.org/document-vault/pdfs/GAC/2010/403b3182010.aspx

March 4, 2010

ASPPA filed comments with the Internal Revenue Service providing recommendations on how the procedures for determination letters, plan remedial amendments and other matters covered by Revenue Procedure 2007-44 could be improved. The letter was filed in anticipation of the issuance of an updated revenue procedure in this area.
www.asppa.org/document-vault/pdfs/GAC/2010/2007-44.aspx

February 12, 2010

ASPPA filed comments with the Department of Labor requesting that a self correction component for the late deposit of employee contributions be added to the Voluntary Fiduciary Correction Program.
www.asppa.org/document-vault/pdfs/GAC/2010/vol2010.aspx

February 3, 2010

ASPPA and NTSAA filed comments with the Department of Labor requesting clarification of the application of the exemption from ERISA coverage for certain 403(b) arrangements using an "open architecture" investment platform.
www.asppa.org/document-vault/pdfs/GAC/2010/final403b.aspx

For all GAC filed comments, visit **www.asppa.org/comments**.

For all GAC testimony, visit **www.asppa.org/testimony**.

The financial crisis refocused Investment Fiduciaries' attention on the need for adequate indemnification provisions and the need for fiduciary liability insurance coverage, at least in some circumstances.

Considering Whether Legal Action is Necessary

In extreme circumstances, Investment Fiduciaries may have to take legal action in order to protect plan assets and the interests of plan participants. As examples of such circumstances, investment committees of plans sponsored by two Fortune 500 companies sued a custodian and investment manager for breach of ERISA's fiduciary duties in challenging securities lending practices. These suits are still pending, so the substantive merits of the cases are yet to be determined by a court. However, these cases demonstrate that, when things go awry with respect to plan investments, Investment Fiduciaries should take the time to review plan assets and determine whether compensation should be sought on behalf of the plan or other action is necessary in order for Investment Fiduciaries to meet their ERISA obligations.

Protecting Investment Fiduciaries through Insurance or Otherwise

As the financial crisis unfolded and ERISA plans began experiencing significant losses, Investment Fiduciaries became much more aware of the total dollar exposure to which they might be personally liable in the event an ERISA fiduciary breach occurred. The crisis prompted many Investment Fiduciaries to consider to what extent, if at all, they were protected from such liability. ERISA allows an employer to purchase fiduciary liability insurance on behalf of its employees who act as Investment Fiduciaries.[17] However, many fiduciaries did not understand that an ERISA bond designed to comply with Section 412 of ERISA does not, in general, provide fiduciary liability protection. Rather, such bonds are designed to protect ERISA plans and accounts by requiring payment of losses to the plan or account when such losses are incurred by handling plan assets in a manner comparable to civil or criminal fraud. For that reason, most fiduciaries that breach ERISA's fiduciary responsibility provisions in making investment decisions are not covered by such a bond.

Furthermore, the governing plan documents did not offer adequate indemnification of employee Investment Fiduciaries by the sponsoring employer or fiduciary liability coverage was inadequate or nonexistent *(e.g.,* the policy did not cover the indemnifying fiduciary). The financial crisis refocused Investment Fiduciaries' attention on the need for adequate indemnification provisions and the need for fiduciary liability insurance coverage, at least in some circumstances.[18]

Conclusion

The last several years have been trying times for Investment Fiduciaries. By looking at the issues that arose with regard to securities lending, ARS, target-date funds and stable value funds, we can better see what steps Investment Fiduciaries should take to meet their fiduciary obligations. Importantly, Investment Fiduciaries should be reminded that although the global economic crisis that began in 2007 and still exists today was unprecedented, the responsibilities and challenges of being an ERISA fiduciary are not. In other words, the crisis simply highlighted that fiduciary risk associated with managing plan assets is very real and that certain steps can and, in some cases, must be taken by Investment Fiduciaries to protect plan assets from loss and to protect Investment Fiduciaries against liability under ERISA. Many of the prophylactic and remedial actions highlighted and recommended in this article are not new, but their relevance and importance were brought into focus by the financial crisis and should be carefully considered by all Investment Fiduciaries.

*David C. Kaleda is a partner in Alston & Bird, LLP's Employee Benefits and Executive Compensation Group in Washington, DC. He advises plan sponsors, service providers and investment fiduciaries on a variety of tax code and ERISA issues. Prior to joining Alston & Bird, David worked for several years at a large mutual fund company and benefit plan recordkeeper as an employee benefits attorney and compliance consultant. (**david.kaleda@alston.com**)*

17 ERISA § 410(b).

18 Note that the enforceability of indemnification clauses has been called into question when the plan sponsor offers an indemnification to a Third Party Fiduciary, but the indemnification provision, if enforced on behalf of the Third Party Fiduciary, would have a negative effect on the plan. In two cases involving ESOPs, the courts concluded that such indemnification provisions were invalid under ERISA § 410(a) because the enforcement of the clause would have a negative effect on the employer plan sponsor, drive down the stock price and thus reduce the value of the employer stock held in the ESOP. *See* Fernandez v. K-M Industries Holding Co., Inc., 646 F. Supp. 2d (N.D. Cal. 2009); Johnson v. Couturier, 572 F.3d 1067 (9th Cir.2009). Thus, indemnification provisions should be reviewed carefully and other alternatives, such as the purchase of insurance, should be considered as needed.

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Ethics and Professionalism in the Retirement Plan Services Arena

by Richard A. Hochman, APM

This article addresses several different professional ethics issues that one may confront while working within the qualified employee plans arena. Not all situations that are encountered in one's daily practices have clear-cut correct answers. Instead, work is frequently performed in confusing grey areas.

For retirement industry professionals, meeting the requirements of an hour or two of continuing professional education does not begin to address the larger issues involved with conducting their business affairs in an ethical and professional manner. One key issue to be noted is that there are no industry-wide standards because so many different types of professionals practice in the retirement services area.

Striving for a Higher Standard

In the course of adopting and operating its company's plan, an employer may work with an attorney, accountant, actuary, recordkeeper or contract service provider, investment advisor, institutional trustee or some combination of the above. Each of these advisors/service providers may belong to a different professional group and each such group has its own practice standards. Some groups may be subject to specific licensing requirements and testing, while others are not. To some degree there may be an overlap in the services being provided by the various professionals, which may, in turn, result in conflicts in the advice that the employer receives. Additionally, some of these professionals may serve as referral sources for the others. This situation could lead to confusion as to who the party is that is actually being serviced (*i.e.,* "the client"). Is the advice that is provided to the employer or the decisions that are being made influenced by a concern about the continuation of referrals? Does the service provider serve multiple roles, such that there are internal conflicts in properly servicing the employer? If the service provider serves as recordkeeper, there is one set of duties and responsibilities, but as trustee, there is a different role and likely fiduciary duties that did not previously exist. For example, the

One key issue to be noted is that there are no industry-wide standards because so many different types of professionals practice in the retirement services area.

Department of Labor recently issued guidance in Field Assistance Bulletin 2008-1, stating that those serving in the capacity of Trustee are responsible for making sure that the employer is making proper and timely contributions to the plan. Clearly, a recordkeeper has no such duty.

To better understand the roles that practitioners fulfill, it might help to examine how the various professionals interplay with the employers who sponsor retirement plans. A small employer wishes to start a qualified retirement plan on behalf of the owner(s) and the employees. How might the employer begin the process? The employer could approach any of the industry professionals listed previously. Depending upon who is approached, questions may receive entirely different answers, and the employer may end up with different plans and arrangements. The first issue is that there is not necessarily one right answer for the employer's fact set. Additionally, the employer may not know exactly what they want or they might not understand the alternatives available. Then the employer will have to confront the issue of what the company may be able to afford or what may work best for the owner(s) and the employees. As we begin to work with the employer, we must convey the important message that adopting a qualified plan is not a one or two-year commitment, but a commitment for a much longer term which, in turn, may mean a significant investment on the employer's part,

though not necessarily a long-term relationship with any one practitioner/vendor. The employer may not understand what they really want. Just because one of their business associate's firm has a particular kind of plan, that plan design might not be right for this employer's situation. In other words, just because the 401(k) has become the most popular type of plan does not mean it is the best for every employer.

Before the rules changed early last decade, it often made more sense for small employers to have a basic profit sharing plan than a 401(k) because they could get a larger allocation depending on what their employees deferred. Yet many of these employers were nonetheless sold 401(k) plans, which may have had higher costs and smaller benefits. In trying to obtain a plan, one problem that the employer may confront is that the "plan-in-a-box" approach may be all that certain vendors are looking to sell or capable of selling. Does this approach potentially create a best practices issue? Some might clearly argue yes! Or is this merely a situation where the employer is getting what they are seeking out and/or paying for? As with everything else in the real world, there is no such thing as a free lunch. An employer that looks only at cost will receive a different standard of service than an employer that is willing to pay for what they need. Obviously, cost and pricing become issues in the delivery of services and impact service quality. This article does not address the issue of fee disclosure under ERISA Section 408(b)(2), which is a current hot topic in the regulatory environment and has its own steamer trunk full of ethics issues.

If the employer approaches a provider looking to buy a particular plan type, might it be inappropriate to sell that plan to the employer? Quite possibly the answer is yes! How many service providers, large or small, would let the employer leave without giving them what they asked for? As an illustration, years ago when setting up a new company, we had the need for new computers. Thinking I knew what the possible alternatives were, I approached several computer vendors requesting a quote for computers with a specific type of chip. One vendor had the "nerve" to say to me, "Before I provide a quote, let's discuss what your company does and for what tasks the computers will be used." They wanted to be sure that the computer and the chip that I requested were the right ones for my needs. The vendor's approach resulted in a recommendation for a different computer from a different company and very different technology. When I approached the other vendors about which computer and chip type would better meet my needs, they said that, in fact, the alternative computer would be better. When I asked why they didn't tell me that to begin with, I was told, "You came in with a specific request. Why would we advise you to buy something else?" In other words, I was much better served by the vendor who took the time to inquire and listen and made a recommendation based on all of the facts, not just what I thought I wanted. Would it have been an ethical violation to sell the computer that I asked for to me? Clearly not; but a higher standard of professionalism served me better. As an ASPPA member, should I not be looking to always engage in a higher standard of practice, understanding that not all employers are going to want to pay for it?

For the Trustee, the ultimate duty is to the participants and beneficiaries, even for those serving in a self-trusteed role.

In our industry, how often, when working with takeover cases, do we encounter an employer in a plan (or a combination of plans) that does not meet the employer's needs or goals? How many times has an employer been sold a plan that lacks the necessary flexibility or operates in a way that is counter to the stated objectives that the employer has identified? (We must accept, however, that the employer may have told the prior provider something very different from what you were told.) The employer then approaches your firm for help to remedy the problem. In a depressed economic environment similar to the one in which we now find ourselves, there aren't many new plans being sold and much of the available new business may be in the mode of takeovers from another benefits provider. Might there be ethical considerations that come into play before you agree to the engagement, especially if you are going to give advice that is contrary to that offered by another industry practitioner?

ASPPA's Code of Professional Conduct

ASPPA maintains a Code of Professional Conduct that is to be followed by its members. Under the heading "Professional Integrity," the Code provides,

> "An ASPPA member shall perform professional services with honesty, integrity, skill and care. A member has an obligation to observe standards of professional conduct in the course of providing advice, recommendations and other services performed for a principal."

Under the heading "Disclosure," the Code provides,

> "If a member is invited to advise a principal for whom the member knows, or has reasonable grounds to believe, that another benefits professional is already acting in a professional capacity with respect to the same matter or has recently so acted, it would normally be prudent to consult the other benefits professional both to prepare adequately for the assignment and to make an informed judgment whether there are circumstances as to potential violations of this Code which might affect the acceptance of the assignment. The prospective new or additional benefits professional should request the principal's consent to such consultation."

Finally, under the heading "Courtesy and Cooperation," the Code provides,

> "An ASPPA member shall perform professional services with courtesy and shall cooperate with others in the principal's interest. Differences of opinion among benefits professionals may arise. Discussion of such differences, whether directly between benefits professionals or in observations made to the client by one benefits professional on the work of another, should be conducted objectively and with courtesy. A member in the course of an engagement or employment may encounter a situation such that the best interest of the principal would be served by the member setting out a differing opinion to one expressed by another benefits professional, together with an explanation of the factors which lend support to the differing opinion. Nothing in this Code should be construed as preventing the member from expressing such differing opinion to the principal."

Real Life Situation

Many years ago, an employer that had been sold a combination of plans approached the firm I was working with for help. They told us that they could not afford the necessary contributions and wanted out of their approved plans. Specifically, they had recently been sold a combination of money purchase, target benefit and defined benefit plans—all covering the same employees. In analyzing their situation, perhaps the most interesting or significant comment that the employer made was that they were in the investment business and did not have consistent cash flow and needed flexibility for their plan contributions from year to year. They assured us that the prior provider was specifically advised of that fact.

How could the employer be in this position to begin with? The employer approached a well-known benefits counsel about adopting a qualified plan arrangement. That attorney sold them three different documents at a significant cost for each one. Was there an ethical breach in light of what was delivered to the employer? While a combination of defined contribution and defined benefit plans would not be that unusual, could there be a need for both a money purchase and a target benefit plan covering the same employees? With all three plans being subject to minimum funding requirements, clearly there was little flexibility for the employer when it came to the amount of their contribution. Looking at the adopted plans, one might wonder if the employer said they wanted to maximize their deduction or wanted flexibility as to their contribution amount.

We spent the next year working to unwind the plans and asking the IRS to allow us to

terminate them because the employer did not understand the commitments that were made. Clearly, there was some discussion with the client about why they were in the position in which they found themselves. Either the employer did not properly explain things to the prior professional or the retirement services professional did not clearly explain things to the employer when all the documents were executed. We did not talk to the other provider as we wound down the plans and had the employer's tax returns adjusted to reflect that they were no longer claiming the plan deductions. We did not initiate any disciplinary proceedings against the prior provider. One question is whether or not we were required to contact ASPPA or the State Bar Association. We did not believe so and did not. Interestingly, the defined benefit plan was covered by the PBGC. I told the same story during a subsequent lecture that was attended by a PBGC manager. The PBGC came up to me during the break and let me know that their office was aware of some of the problem practitioners in the industry.

Conflicts of Interest

Whenever a practitioner works with or is considering working with a client, one issue that can arise is that of "conflicts of interest." The issue addresses the basics of whether or not the professional can represent a specific client. The rules for this area are sometimes very complex and seemingly internally conflicting. The underlying question is whether or not representing a client will negatively impact the professional's ability to represent another existing client. Does the client hold an interest that is counter to an interest of another client? Does the professional have a personal interest that is counter to the client's? These considerations frequently bring up the question as to who the client will be. Is the ultimate client the employer/plan sponsor, the plan administrator or the administrative committee, the Trustee(s), the participants and beneficiaries or a combination of the above? Not knowing who the ultimate client is can and will lead to major problems. When representing the employer/plan sponsor, the professional's duty is to that person or firm and not the participants. For the Trustee, the ultimate duty is to the participants and beneficiaries, even for those serving in a self-trusteed role. When a problem arises, a decision may need to be made about retaining an attorney. It is important to remember that only attorneys can have privileged conversations. Non-attorney advisors must be careful not to put themselves in a position where they may end up being a witness against their clients or their clients' interests because they lack the privilege not to testify.

You might also encounter a situation where a client asks that you do something that is not illegal per se, but may be viewed as

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When faced with difficult situations, it is common to solicit legal advice or consult with respected industry experts to gather opinions on how best—and ethically—to handle difficult situations.

ethically questionable. Will practitioners always be able to see the line and know whether or not they can step across it? Per the old cliché, will we know it when we see it? When what is now the EPCRS program was first introduced as the Administrative Policy Regarding Self Correction, we were told that the program was not available for "egregious" violations. When we asked what those violations were, we were told that they hadn't happened yet, but the IRS would know one when they saw one. We were later told that an employer went to jail for such a violation.

Plan Document Issues

In spending a lot of time around and with plan documents, an issue that one hears raised is the proper use of pre-approved plans. While some practitioners attack their allowability, this article will not address that issue. One of the required provisions in all prototype adoption agreements is a statement "that the failure to properly fill out the adoption agreement may result in the disqualification of the plan." During earlier submission cycles, the IRS discovered that not all prototype sponsors were as concerned with compliance issues as they were with gathering and managing plan assets. To that end, the prototype sponsors were not assuring that the employers were completing the adoption agreements, nor were they making sure that employers were adopting and following amendments made between restatements. Thus, the adoption agreement must contain a statement that the sponsor will inform the adopting employer of any amendments to the plan or of the discontinuance or abandonment of the plan. Perhaps more importantly, adopting employers did not always know who the prototype sponsor was or how to contact them. Accordingly, the IRS added a requirement that each adoption agreement must include the name, address and telephone number of the sponsor or the sponsor's authorized representative so that adopting employers will know who to contact to ask questions about the qualified status of the underlying document.

With that basic guidance spelled out, an issue to consider is whether all prototype sponsors are or should be held to a single standard of conduct/professionalism when it comes to the maintenance and operation of their prototype documents. One must first determine who can be a prototype sponsor. Revenue Procedure 2005-16 spells out the definition as "any person that has an established place of business in the United States where it is accessible during every business day may sponsor a plan as a word-for-word identical adopter or minor modifier adopter of a plan of an M&P mass submitter, regardless of the number of employers that are expected to adopt the plan." Those not working with a mass-submitter may sponsor a prototype so long as they represent to the IRS that they have at least 30 employer-clients, each of which is reasonably expected to timely adopt the sponsor's basic plan document. Those who typically sponsor prototype documents include law firms, accounting firms, actuarial firms, third party administration and recordkeeping firms, financial institutions of all sorts including banks, trust companies, brokerage houses, investment advisory firms, insurance companies, mutual funds and credit unions. With such a diverse group of sponsors, can one standard be applied? An argument can be made that since the ability to sponsor a prototype document is controlled by one agency, namely the IRS, that one standard of conduct could be imposed upon all sponsors. In reality, however, despite the best efforts of the IRS, it is clear that different standards of behavior apply. Law firms not only have to be concerned about the IRS and the Internal Revenue Code, but also have to operate under the rules established by the various State Bar Associations and the American Bar Association. Likewise, accounting firms must operate under the rules of the American Institute of Certified Public Accountants. Enrolled Actuaries must operate under the rules of the Joint Board for the Enrollment of Actuaries and, in addition, the Code of Conduct of any actuarial association to which they may belong. Similarly, an individual who holds an ASPPA credential will have to satisfy ASPPA's Code of Professional Conduct even if they don't hold any other credential. The reason for some of the required language listed previously is that some vendors of prototypes felt that their responsibility for amendments stopped at the preparation and mailing. In their belief, they were not responsible to see to it that the employers received the amendment, timely executed it as necessary and modified the operation of their plan accordingly. Other sponsors understood that their responsibilities included those additional pieces to assure proper operation of the employer's plan with the latest guidance.

Because of this divergence in operations, there are some practitioners who question the use of prototype plans as complying with best practice standards. As a result, the IRS will occasionally impose a different set of rules on adopters of prototype plans, illustrated by the additional limitations imposed on prototypes using cross-tested allocations.

Regardless of the business entity they represent, all sponsors of prototypes and other document types should establish procedures to assure that

adopting employers are kept up to date with regard to their plan documents. The recent amendment and restatement of all pre-approved defined contribution plans for the EGTRRA law change gave plan sponsors the opportunity to evaluate their own procedures. For example:

- Did they have a current list of all adopting employers?
- Were they able to contact all of those employers and meet or communicate with them about their plan terms and provisions?
- Did they have a methodology to assure that all employer-clients responded?
- Were procedures in place for employers who did not respond or who did not meet return deadlines?
- Were other document amendments necessary to reflect interim amendments that had not previously been made?
- Did the sponsor or the client have copies of up to date documents?
- Did the old documents reflect operation of the plan? Will the new documents?
- How was the issue of submission for determination letters handled?
- If employers fell through "the cracks," could they determine how and why?

Client Records

Practice before the IRS is governed by Circular 230. Circular 230 provides in part that, at a client's request, a practitioner must promptly return records that the client needs to comply with their federal tax obligations. The practitioner may retain copies of the returned records. However, the Circular states that—*A return, claim for refund, schedule, affidavit, appraisal or other document prepared by the practitioner or the practitioner's firm, employee or agent is not considered a client record if the practitioner is "withholding" the document pending the client's payment of fees required by "its contractual obligation" to the practitioner*. That said, can a practitioner just refuse to return documents on the grounds that their bills have not been paid? There are some who argue that, under a reasonable interpretation of ASPPA's Code of Professional Conduct, the client's data belongs to the client and not the practitioner, and that the data must be returned even if full payment has not been received. While the practitioner may own its work product utilizing the data and the charts, tables and graphs that it produces as a result, they cannot withhold the raw data. What liability might there be if a practitioner refuses to return data and the annual Form 5500 is late and the employer incurs a penalty?

Control of Work Product

An ASPPA member shall not perform professional services when the member has reason to believe that he or she may be used to mislead or to violate or evade the law. The material prepared by a member could be used by another party to influence the actions of a third party. The member should recognize the risks of misquotation, misinterpretation or other misuse of such material and should take reasonable steps to ensure that the material is clear and presented fairly and that the sources of the material are clearly identified. The member's opinion could be misused to promote products that result in abusive tax avoidance transactions (ATATs).

Conclusion

In performing our day-to-day duties, it is important to be aware of the types of ethical issues that can sometimes present themselves. When faced with difficult situations, it is common to solicit legal advice or consult with respected industry experts to gather opinions on how best—and ethically—to handle difficult situations.

*Richard A. Hochman, APM, is an attorney with extensive background in the tax and employee benefits field. In his role as president and COO at McKay Hochman, Rich supervises a team of attorneys and consultants in the design, drafting and support of prototype and custom documents for financial institutions, brokerage firms, insurance companies, pension consultants and plan sponsors. As a member of the firm's training faculty, he regularly participates as an instructor in continuing education programs sponsored by the firm, including in-house programs and at a variety of pension industry forums such as Enrolled Actuaries (EA), as well as forums sponsored by ASPPA and NIPA. Rich provides written commentary and testimony in Washington, DC on regulatory issues on matters relating to qualified retirement plans on behalf of clients. During his benefits career, Rich has been responsible for designing and implementing prototype and individually designed plans. He has also published tax analysis for use by attorneys, accountants and consultants on a broad range of topics. Rich currently serves on the Board of Directors for ASPPA. (**rhochman@mhco.com**)*

FROM THE PRESIDENT

The ASPPA Leadership Proposition

by Sheldon H. Smith, APM

Recently, a well-respected colleague and nationally recognized employee benefits attorney asked me why I agreed to be the President of ASPPA. The tone of his question was a bit pejorative, and what he was really asking is why did I agree to be the President of an organization like ASPPA? The tone of the question made it clear to me that this non-ASPPA member did not truly understand the benefits world around him. Of course, I had long ago answered the question about my reasons for wanting to lead this exceptional organization, and I had always thought of ASPPA in a positive light. Unfortunately, there are some in our industry who, for many different reasons, fail to understand the true value of being an ASPPA member and participating in ASPPA leadership.

ASPPA has become a 7,000+ member professional society whose membership includes individuals who work in the retirement plan arena in virtually every involved discipline. From actuaries to investment advisors, attorneys to administrators, auditors to consultants, and more, ASPPA strives to make certain the system intended to provide a dignified retirement for American workers is maintained, enhanced and modified as needed in order to meet that objective. ASPPA's volunteer leadership includes its officers who comprise its Executive Committee, its Board of Directors, its volunteer co-chairs, the vice chairs of various committees, the leadership councils of ACOPA and NTSAA, and the chairs of all the subcommittees that operate within the framework of the ASPPA community.

The question that was posed to me by my colleague is actually one that might fairly be addressed to the more than 100 ASPPA leaders, and might best be asked, "What is it that causes you to want to be a volunteer leader in the organization?"

There are undoubtedly a number of answers to this question, and some of them might be:

- Being an ASPPA leader provides me with the opportunity to meet and work with other leaders in the retirement plan industry and government throughout the country.
- Being an ASPPA leader assists me in learning new skills and gaining new confidence, which allows me to perform my day job much better.
- Being an ASPPA leader provides me with the psychic value in knowing that I am assisting in making the organization and the retirement plan industry better and in having a positive impact on the lives of plan participants.
- Being an ASPPA leader provides me with an opportunity to learn about all of the disciplines that comprise the retirement plan industry and assists me in appreciating the complexity of it all.
- Being an ASPPA leader gives me the sense of knowing that what I do through ASPPA can be important in the lives of average Americans because ASPPA, more than any of the other professional societies involved in the retirement plan industry, advocates well on behalf of their retirement plans.
- Being an ASPPA leader gives me a voice in those components of the organization that most interest me whether they be education, government affairs or others.
- Being an ASPPA leader gives me a sense of pleasure and satisfaction in knowing that I am doing something truly important while not being paid for it.

These are just a few of the reasons that ASPPA volunteer leaders might give to indicate why it is important to them to participate in a meaningful way. Those involved in ASPPA leadership are

recognized with esteem in the retirement plan community. People who understand the retirement plan environment are most thankful that ASPPA leaders are willing to devote their time and attention to educating the retirement plan community and to promoting and maintaining the employer-sponsored retirement plan system.

My colleague who could not understand why I opted to take on the critical role of the presidency of ASPPA obviously does not understand ASPPA's role and its influence. As I have moved up through the ranks of ASPPA leadership, it has become more and more obvious to me that the work of ASPPA is monumentally significant in helping to frame the culture of our society, and those who might suggest otherwise simply do not understand nor appreciate ASPPA's significant role and its impact. All ASPPA members should consider whether or not it makes sense for them personally to participate in the leadership of ASPPA. Becoming involved at that level could be one of the most rewarding things you ever do. It certainly is for me, and I relish the fact that I am able to serve you, our community and the millions of Americans who rely on what we do.

*Sheldon H. Smith is a partner in Holme, Roberts & Owen LLP's Compensation and Benefits Group. Since 1980, Sheldon had been a member of either the adjunct or visiting faculties of the University of Denver College of Law. Sheldon has been a member of the Western Pension & Benefits Conference since 1986 and has served as its president and as president of the Denver Chapter. He is currently President of ASPPA and is a member of its Executive Committee and Board of Directors. Sheldon is also the president of the Colorado Regional Cabinet of Washington University in St. Louis. Sheldon is a fellow of The American College of Employee Benefits Counsel and has been selected to "Chambers USA—America's Leading Lawyers," "The Best Lawyers in America," "Who's Who in American Law," "Who's Who in American Education" and named as a Colorado Super Lawyer. Sheldon is admitted to practice before the Colorado Supreme Court, the United States District Court for the District of Colorado, the United States Tax Court, the Tenth Circuit US Court of Appeals and the Seventh Circuit US Court of Appeals. (**sheldon.smith@hro.com**)*

Notice of ASPPA's Annual Business Meeting

The ASPPA Annual Business Meeting will be held during the 2010 ASPPA Annual Conference at the Gaylord National Hotel & Convention Center in National Harbor, MD, on Sunday, October 17, at 3:15 p.m.

The Annual Business Meeting will include an address by ASPPA's 2009-2010 President, Sheldon H. Smith, APM, and a look toward the future by ASPPA's incoming President, Thomas J. Finnegan, MSPA, CPC, QPA.

All ASPPA members are strongly encouraged to attend this important meeting.

ASPPA's Working Relationship with Premier Retirement Think Tank

by Geralyn M. Miller

As you may recall from a previous article, I have been attending the Employee Benefit Research Institute's (EBRI's) meetings and policy forums as ASPPA's trustee on the EBRI board of directors. These meetings have been and continue to be a source of valuable information for all of us in ASPPA. I want to share some thoughts with you today that I came away with from attending the most recent board meeting regarding the value of our participation and sponsorship of EBRI.

Before I begin, let me offer a qualifier to my article. When I sat down to write this article, I had difficulty in thinking of how to construct what I wanted to say. I knew what I wanted to say, for the most part, but I didn't know how to say it because I was afraid that I would sound either like a boring and preachy academic or an overzealous EBRI/ASPPA cheerleader. So, with that being said, I'll plunge into this article and hope for your forgiveness if either appears to be the case.

This most recent EBRI meeting was particularly dynamic given the current spotlight on retirement savings in America. In his President's Report, Dallas Salisbury spoke of the tumultuous climate in Washington, DC and even depicted this climate with a picture of the US Capitol Building centered against the backdrop of a severe lightning storm. Those engaged in the practice of retirement planning will be significantly impacted by the public policy that results from the stormy environment of political wrangling. ASPPA members may be particularly vulnerable to any unintended consequences that may emanate from policy that is enacted from insufficient levels of factual knowledge. For this reason, I listened extremely closely to the reports provided to board members at this meeting. I both participated in the meeting and, simultaneously, assessed the work of EBRI to make certain that what was presented was based on sound evidence. I was not disappointed.

As I'm fond of telling students who often think there isn't anything they can possibly learn that they don't already know, we all have opinions but not all of those opinions are rooted in fact. Nowhere is it more critical that solid and accurate factual knowledge reach its audience than in the case of those policymakers who hold our fate in their collective hands. Yet, misinformation in the political and decision making arenas abounds and is often the foundation upon which public policy is built. We're all familiar with the moral of the story of the three little pigs; when you build a house, it had better have a sturdy foundation.

While we might assume that legislation and executive rules are constructed on factual knowledge, the simple truth is that the information used is often derived from flawed studies. As a researcher, I am all too aware of the danger that results from this type of error. On the surface, the information might appear to be logical, but someone trained in what to look for in the methodological construction of research studies often uncovers defects. Back in the 1990s, one research methodologist assigned his statistics class the task of reviewing articles that had appeared in a scientific journal to assess the suitability of the particular statistical techniques used in the studies. Surprisingly, the students found a high degree of incorrect application of statistical techniques. The validity of the results of those studies was, therefore, quite questionable even though the conclusions from those studies had been taken as fact for years. To put it bluntly, when you put garbage in—you get garbage out.

So why am I going on and on about this? Well, it occurred to me during the board meeting that the information that EBRI was providing was of a much higher caliber and credibility than a good deal of other information being used in DC. While EBRI is not associated with any particular academic institution, they strive to provide information that is derived from hard empirical data. Jack Vanderhei, Director of Research for EBRI, holds a Ph.D. in Economics from the Wharton School at the University of Pennsylvania and taught at Temple University until he retired and joined EBRI on a full-time basis. He has been collecting information on defined contribution plans since the mid-1990s. As a result, EBRI houses the most comprehensive set of 401(k)-related data provided by EBRI's member organizations in existence.

Furthermore, as of next year, the data collected will give Vanderhei and his team of researchers the ability to provide factual information on the retirement savings of individuals as they rollover from one plan to another. The dataset houses 24 million participants and covers 54,000 plans that collectively hold $1.09 billion in assets. This type of information is

incredibly rich and useful. To my knowledge, there is no other repository of this nature anywhere in the public domain that has nearly the breadth and/or depth of this particular dataset. It holds the answers to the future of retirement planning.

The dataset was made possible by the willingness of many of its members to share their data in a way that protects the anonymity of the participants in the various plans. Vanderhei worked for years to develop a set of protocols that would provide members the confidence they needed to have this type of cooperative arrangement with each other, given that they are competitors in the retirement savings arena. As of today, the database is protected by an extremely secure standardized encryption algorithm that is quite impressive given the vast amount of data. Recognizing the value of coming together to analyze their collective data, participation in and sponsorship of these companies in EBRI demonstrates the level of commitment on both the part of the members and the staff of EBRI toward providing the type of factual information that is needed for policymakers to minimize the unintended consequences that often accompany change in public policy measures.

As a general rule, the research that is produced by academics housed in traditional research oriented universities is given the highest level of credibility by our policymakers. That is, generally, a good rule to follow because that type of research must achieve a stamp of approval from other academics in a peer review process before it can get published in a reputable scholarly journal. But that peer review process is precisely what sets some academic research apart from other research. Not all research produced by academics is peer reviewed and, as the example of the instructor of methodology noted previously points out, even some of the work that makes its way into scholarly journals is flawed. It is crucial, therefore, that the methods used to collect, house and analyze data be of the highest caliber possible. It must be the result of rigorous application of scientific methods.

As someone who has taught research methods and published peer-reviewed journal articles, I was struck during this past EBRI meeting by just how much care is taken at EBRI to ensure adherence to this type of data collection and methodology. They really know their stuff, and our affiliation with them can only enhance our efforts at creating sustainable retirement savings plans and recordkeeping services of the future. Although they are already a well respected entity by key policymakers, we need to take every opportunity available to make sure that policymakers know that we hold EBRI in the highest of regard and that they should be relied upon as a primary source of factual information on the 401(k) universe.

Geralyn M. Miller, Ph.D., is an associate professor in the school of business at Indiana University-Purdue University Fort Wayne and the director of research for the Institute for Pension Plan Management. She teaches courses in business ethics, management and financial public policy and is a member of ASPPA. **(millergm@ipfw.edu)**

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ASPPA CPC Modules: Great Education + CPE = Happy Employers and Employees!

by Susan H. Perry, CPC, QPA, QKA

In my TPA office, we have five ASPPA and NIPA credentialed staff members. We also have three staff members currently pursuing ASPPA credentials. That's a lot of Continuing Professional Education (CPE) to pay for! As a result, we are always looking for new ways to provide CPE to the staff that will actually teach them something valuable without breaking the bank. ASPPA's new CPC modules really fit the bill—at $100 per staff member, earning three CPE credits for passing is certainly a bargain!

The CPC modules were initially designed as a learning tool for those professionals pursuing the Certified Pension Consultant (CPC) credential, ASPPA's highest credential in the ERISA Consulting track. The modules quickly caught on as educational tools, however, by serving the needs of anyone searching for advanced education on the various subjects covered.

There are currently seven CPC modules available:

- Distributions & Loans
- Related Groups & Business Transactions
- Fiduciary Topics
- Investments
- ESOPs
- Nonqualified Plans
- Governmental & Tax-Exempt Plans

ASPPA's Education and Examination (E&E) Committee is currently working on a Cash Balance module, and if you have a specific training need, please send ideas for future CPC module development to **education@asppa.org**. The modules are valuable education to employees at all levels—even those who might never become pension consultants.

The premise behind the revised CPC program is to educate a consultant on material that he or she might be asked by a client. The one proctored CPC essay exam tests information that comes up quite often in a consulting situation—material that a candidate should know off the top of his or her head. On the other hand, the online modules are intended to delve into areas that a consultant may be asked about, but would likely need to research. Therefore, the questions that accompany the module text are open-book format.

As a long-time CPC, I often run my thoughts on a difficult consulting issue past my partners, other CPCs, an ERISA attorney or accountant. My partners and I believe that educating our staff on how to research their own answers to problems and run their thoughts past their colleagues is very valuable in that it increases job satisfaction and makes them even more valuable to our firm and clients. Even the staff members who long ago completed their credential pursuit benefit from new educational opportunities, particularly when subtle law changes occur.

Our staff tackled the CPC Distributions & Loans module first, experimenting with this new tool. My partners and I decided that we would have all of our technical staff, whether they needed CPE or not, participate. The opportunity to expose newer, less experienced staff to the types of questions asked on the CPC module was too good to pass up. For purposes of our training sessions, we required the staff members to exhaust all resources and fully discuss all possible answers before they could move on to discussing the next question.

We provided our staff with one hour each day to work on the module. One of my partners led the discussions. Each staff member had his or her copy of the question and accompanying text material, and we met as a study group each morning to discuss one or more questions, as time permitted. They worked together researching from the text material provided, *The ERISA Outline Book* and the Internet to arrive at their own answers. (**Important:** ASPPA encourages students to collaborate with colleagues to gain insight and enhance their problem solving and research skills as long as they do not violate published examination policies. All online examinations must be submitted by the candidate and reflect his or her own knowledge. All candidates must follow ASPPA's published Examination Standards of Conduct at **www.asppa.org/candidate-corner#ASPPAconduct**.)

When they first started the process, staff members came unprepared to the morning sessions. As they moved through the process, they started researching the day's questions in advance. Everyone wanted to come into the session with a well thought out answer. Once they could each present a reasonable response and obtain constructive feedback on it, they started to believe in themselves. They engaged in some insightful conversations about the research they had done and the information they had located.

One of the most entertaining moments of their time spent on the CPC module occurred when they tackled the hardship question. Our distribution processor turned out to be the only

staff member to get the question correct from the start. She had approximately 18 months of experience at that point. The senior technical staff averages 20 years of experience. You should have heard the senior staff arguing with the distribution processor. However, she stood her ground. She was right and she knew it. When it became evident that the distribution processor was, in fact, correct, her confidence level soared. She has since begun pursuing the QKA credential.

Another benefit that came from the modular education occurred when the senior staff had to explain concepts to the junior staff members. Since everyone had to reach an answer they could substantiate, the junior staff members were not allowed to sit with confused expressions on their faces and simply agree to whatever answer the senior staff came up with. As a result, our senior staff was forced to explain some pretty complex topics in reasonably understandable terms to our junior staff. My partner, who was with them during each session, indicated that the senior staff members were communicating much like we'd want them to communicate with clients. The senior staff developed some new skills, learning to better explain things like net unrealized appreciation calculations—what they are, how they work and when they are used. We saw their ability to explain issues to clients improve as a result.

The last major benefit we derived from the CPC module process was that our staff members actually started reviewing our loan and distribution process in light of what they had learned. They started to question whether a particular form would work in a specific unusual situation. They wanted to know if we should add language to our beneficiary designation forms explaining why naming different beneficiaries could cause different tax issues. Many of the ideas had merit and, in general, they started thinking more critically about processes and procedures, which can never be a bad thing.

When I asked our staff members what they thought of the CPC module experience, they indicated that they enjoyed it more than sitting through meetings that required no interaction. Several of them thought that they learned more from completing the module than they had from the last full-day seminar that they attended.

Whether our staff members pursue ASPPA credentials to the CPC level or not, having them complete the modules has turned out to be well worth the investment of time and money. My partners and I will continue to encourage our staff to take all of the CPC modules.

***Editor's Note**:* While the CPC modular education is packaged for individual sale, ASPPA offers webcourses and webcast education products that can be shown in a classroom setting to train multiple employees simultaneously. Please contact **training@asppa.org** for more information.

Susan H. Perry, CPC, QPA, QKA, ERPA, is president of E.A. Edberg Associates, Inc., a third party retirement plan administration firm located in Phoenix, AZ. She is responsible for all aspects of the day to day running of the firm and has extensive experience in the design, implementation and administration of all types of defined benefit and defined contribution plans. Sue is Co-chair of ASPPA's Education and Examination Committee, Co-chair of ASPPA's CPE Policy Subcommittee, and serves on the ASPPA Management Team. She is also a member of NIPA and serves on the AIRE Board of Managers. (sueperry@edbergassociates.com)

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The CPC modules are available for $100 (including study material) during each calendar quarter. The next CPC proctored examination is offered November 11, 2010. For additional information, please go to **www.asppa.org/CPC**.

A Guide to ASPPA Jargon

In today's fast-paced world, we commonly shorten frequently used names and phrases into easy-to-remember abbreviations or acronyms – USA, USB, SSN, PIN, ID, DOB, EOY, LOL – and the list goes on. New ASPPA members who are exposed to an ASPPA conference or other ASPPA event for the first time might have a difficult time understanding the ASPPA jargon that others have adopted as part of their "ASPPA language."

The following list is a brief guide to ASPPA jargon, primarily consisting of abbreviations that pertain to ASPPA conferences, credentials, publications and affiliations. We hope this list will familiarize ASPPA members with commonly used ASPPA jargon.

ABCs – ASPPA Benefits Councils; regional councils formed to offer local education within communities and to increase awareness of ASPPA.

ACOPA – ASPPA College of Pension Actuaries; an ASPPA committee providing the primary source of professional organizational support for pension actuaries. All credentialed actuarial members of ASPPA are members of ACOPA.

AIRE – American Institute of Retirement Education; an entity formed by ASPPA and the National Institute of Pension Administrators (NIPA) to jointly administer the Enrolled Retirement Plan Agent (ERPA) program.

AMT – ASPPA Management Team; a body that consists of the staff and volunteer co-chairs of all the major ASPPA committees. The purpose of the AMT is to coordinate projects and promote communication across committees.

APAPA – ASPPA Plan Administrators Policy Alliance; an affiliate ASPPA organization exclusively for TPA firms. The purpose of APAPA is to provide an organizational structure through which member firms can share common concerns and become more politically active in preserving the private pension system.

APM – Associated Professional Member; an ASPPA credential awarded to CPAs, attorneys or other professionals who meet the specified criteria.

ASAPs – *ASPPA asaps* are ASPPA's technical alert publications (offered by e-mail or fax) to disseminate late-breaking news.

BCOS – Benefits Conference of the South; a conference held annually in Atlanta, jointly sponsored by ASPPA and the IRS.

BOD – ASPPA's Board of Directors; the strategic body of ASPPA leadership.

CIKR – Council of Independent 401(k) Recordkeepers; an affiliate ASPPA organization consisting of 401(k) plan service providers that are primarily in the business of providing retirement plan services as compared to financial services companies who primarily are in the business of selling investments.

CPC – Certified Pension Consultant; an ASPPA credential for consultants who deal with all administrative and compliance aspects of qualified plans.

E&E – ASPPA's Education and Examination Committee; responsible for courses, exams, webcourses and publications related to ASPPA's certification and credentialing programs.

EC – ASPPA's Executive Committee; consists of all Officers of ASPPA, Executive Director/Chief Executive Officer and Immediate Past President. The EC operates on behalf of the Board when the Board is not in session.

EOB – *The ERISA Outline Book;* authored by Sal Tripodi and distributed by ASPPA.

F&B – ASPPA's Finance and Budget Committee; responsible for managing the budget and monitoring income and expenses.

FSPA – Fellow, Society of Pension Actuaries; ASPPA's highest credential in the actuarial track.

GAC – ASPPA's Government Affairs Committee; communicates with top officials and government agencies regarding legislation and pension policies.

LABC – Los Angeles Benefits Conference; a conference held annually in Los Angeles, jointly sponsored by ASPPA, NIPA and the IRS.

LRPC – ASPPA's Long Range Planning Committee; tasked with reviewing ASPPA's strategic plan and recommending changes to the ASPPA Board of Directors.

MABC – Mid-Atlantic Benefits Conference; a conference held annually, jointly sponsored by ASPPA and the IRS.

MC – ASPPA's Management Council; consists of the ASPPA President, President-Elect and the Executive Director/Chief Executive Officer. The MC manages the day-to-day operations of ASPPA and staff.

MSPA – Member, Society of Pension Actuaries; an ASPPA credential for enrolled actuaries.

NAIRPA – National Association of Independent Retirement Plan Advisors; an affiliate ASPPA organization of independent retirement plan advisory firms.

NTSAA – National Tax Sheltered Accounts Association; the nation's only independent, non-profit association dedicated to the 403(b) and 457 marketplace. NTSAA combined operations with ASPPA in 2010 to jointly support the 403(b) and 457 plan industry.

PAC – ASPPA's Political Action Committee; provides financial support to candidates for federal elective office who demonstrate support of the private pension system.

PERF – ASPPA's Pension Education and Research Foundation; provides endowments for educational institutions to be used in granting scholarships or similar activities.

QKA – Qualified 401(k) Administrator; an ASPPA credential for administrators and recordkeepers who work primarily in the 401(k) industry.

QPA – Qualified Plan Administrator; an ASPPA credential for administrators and recordkeepers who work in the qualified plan arena.

QPFC – Qualified Plan Financial Consultant; the ASPPA credential designed for financial consultants working in the retirement services industry.

RPF – Retirement Plan Fundamentals; an ASPPA certificate program that serves as the basis for most ASPPA credentials.

TAJ – *The ASPPA Journal*; a quarterly publication for ASPPA members.

TGPC – Tax-Exempt & Governmental Plan Consultant; ASPPA's newest credential designed for administrators and financial consultants who work in the 403(b) or 457 plan markets.

WBC – Western Benefits Conference; an annual conference held in the western US jointly by ASPPA and the Western Pension & Benefits Conference.

Thank you to all of our ASPPA members who support the ASPPA PAC. For more than 10 years, the ASPPA PAC has been key to ASPPA's success at impacting legislation affecting retirement plans. ASPPA PAC really does "open the door." Below is a list of ASPPA members who have contributed (or pledged to contribute) to the ASPPA PAC in 2010. We greatly appreciate your support! If you'd like to contribute to the PAC, please contribute online at www.asppa.org/pac or contact Kara Getz at kgetz@asppa.org or 703.516.9300.

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For review course dates and location or to register, visit www.asppa.org/ea-review-courses.

E-mail any questions regarding EA courses to education@asppa.org.

Profile on CUNA Mutual Group

by Sarah Simoneaux, CPC

CUNA Mutual Group, located in Madison, WI, is known for its high quality retirement plan services that it provides to credit unions and their members. Last summer, CUNA acquired CPI Qualified Plan Consultants, a retirement plan recordkeeper located in Great Bend, KS. The acquisition has not only made CUNA/CPI one of the largest retirement services providers in the Midwest, it has also made the company one of the top firms taking advantage of ASPPA's education and credentialing programs.

Although CUNA Mutual Group has been providing services to small retirement plans for more than 50 years, it was 15 years ago that management realized business growth had made their retirement services employees "siloed." One group was proficient at 5500 forms, but needed to learn more about understanding plan document provisions. Another group could determine eligibility, but did not understand how eligibility impacted compliance testing. Tom Eckert, VP, Retirement Plan Products points out, "We needed an education program that trained our associates on all aspects of retirement plans and allowed them to earn credentials to be recognized for their training efforts. We selected ASPPA based on ASPPA's broad-based education and credentialing expertise. We now have approximately 100 ASPPA credentialed members at CUNA."

With so many credentialed members, CUNA managers encourage employees to take advantage of ASPPA continuing professional education offerings. Webcasts, *The ASPPA Journal* quizzes and the new ASPPA webcourses provide continuing professional education for CUNA credentialed ASPPA members who do not travel to conferences. CUNA uses the unlimited online version of *The ERISA Outline Book* to give their staff access to up-to-date information for the high level of service they provide to their clients. Sharon Severson, CPC, QPA, CUNA's Director of Retirement Plan Products, says, "CUNA Mutual is dedicated to its retirement plan staff's education and views ASPPA's education program as the leader of credibility and excellence in the qualified plan industry."

Sharon notes that ASPPA education is only one piece of the retirement plan puzzle. As a leader at CUNA, she recognizes the value of credentials to a career and to the firm. She is a leading example of the power of ASPPA credentials—she holds ASPPA's highest non-actuarial credential, the Certified Pension Consultant (CPC). She is also an Enrolled Retirement Plan Agent (ERPA), which allows her to also be a Qualified Pension Administrator (QPA) with ASPPA. Sharon says: "The ASPPA CPC credential has provided me with a credible sustainable career—not just another job." Sharon has also served on ASPPA's Education and Examination Committee.

Prior to CUNA's acquisition of CPI, CPI was the largest employee-owned, third party administrator in the United States. CPI was incorporated in 1972 and has more than 400 employees. CPI has been a supporter of ASPPA's education programs and credentials since ASPPA's inception. CPI's CEO, Bob Dema, and COO, Dana Miller, are both Certified Pension Consultants (CPC) with ASPPA. Bob and Dana have served in ASPPA leadership positions, and Dana has been a key member of ASPPA's Education and Examination Committee. Dana and Bob make ASPPA credentials part of CPI employees' job requirements, and CPI now has more than 40 credentialed ASPPA members. Dana notes that the management's continued commitment to ASPPA education and credentials is an essential element to CUNA's success and growth in the retirement services arena.

CUNA's growth in a competitive marketplace and difficult economy is proof that investment in education works. As a result of their focus on ASPPA credentials and service excellence, CUNA has been recognized as a top provider in surveys completed by 401kExchange and Boston Research Group since the surveys began in 2001.

Sarah Simoneaux, CPC, is president of Simoneaux Consulting Services, Inc., located in Mandeville, LA, a firm offering consulting services to for-profit companies providing retirement services and to non-profit organizations. Sarah also provides consulting through Simoneaux & Stroud Consulting Services, specializing in business planning, business consulting, professional development, industry research and customized skill building workshops. She has worked in the employee benefits industry since 1981. Sarah was formerly vice president of Actuarial Systems Corporation (ASC). Prior to her position at ASC, she was a partner in JWT Associates, a qualified plan consulting firm in Los Angeles, CA. Sarah has volunteered her services in various capacities to assist ASPPA, and she served as the 2005-2006 ASPPA President. She currently serves as an ASPPA Education Programs Advocate, and she authored a book used for ASPPA's Qualified Plan Financial Consultant (QPFC) credentialing program. Sarah earned her Certified Pension Consultant (CPC) credential from ASPPA in 1988. (sarah.simoneaux@scs-consultants.com)

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ASPPA and the College for Financial Planning (CFFP) have joined forces to offer qualified retirement plan education to financial advisors. Beginning in September, the College will offer live instructor-led online classes for the advanced courses that lead to ASPPA's Qualified Plan Financial Consultant (QPFC) credential.

Additionally, CRPS® designees will automatically receive credit for the first two ASPPA QPFC required exams—Retirement Plan Fundamentals 1 and 2. For candidates who do not have the CRPS® credential and have not already completed ASPPA's Retirement Plan Fundamentals (RPF) certificate program, ASPPA offers on-demand courses to supplement course material for the RPF exams.

These valuable courses help prepare students to sit for all QPFC exams. Upon successful completion of all required exams, students may apply for the QPFC credential with ASPPA.

For more information on ASPPA's courses, visit www.asppa.org/courses.
Additional information on the QPFC credential can be found at www.asppa.org/qpfc.

ASPPA BENEFITS COUNCILS

The ABC of Detroit: Succession Planning...from Day One

by Marlene M. DeBrosse, OKA

ASPPA has played a huge part in my career, from the time I first discovered the pension world almost 20 years ago to now, as I serve in a leadership role for the ABC of Detroit.

My first job out of college was in an accounts payable position at a company where the first-line managers did not trust computers. Ugh! I was keeping track of data on paper, in columns, and my reports looked just like spreadsheets—only I had to rely on a 10-key to add the columns. I had numerous computer-related classes in college, and it was very frustrating to NOT be able to use a computer in my daily work! It was very evident that there was no future in this job, and after about 18 months, I began looking elsewhere. A friend talked about implementing a pension plan where she worked. Her pension advisor was looking to hire someone with no experience. They were willing to train someone from the ground up. I was bound and determined to convince them that I was their "man." They took a chance on me, and I have been forever grateful!

My mentor, Carol [now a vice president and part owner], relied on ASPPA materials to help teach her team the many details of qualified plans. There were many lunchtime classes and discussions on topics like top heavy, taxation of distributions, family aggregation and permitted disparity.

This first job prepared me for a different position with a local CPA firm, administering qualified plans for clients of the firm. ASPPA also played a role in this job, including a study group after work to pass ASPPA exams. It was a great job, until Sarbanes Oxley came on the scene.

A new opportunity developed, working on one 401(k) plan. To this day, I love my job as a plan sponsor! My experience has proven valuable to the HR team, and management encourages me to maintain my ASPPA credential.

I used to attend local meetings and seminars sponsored by other professional organizations, but they were few and far between. I don't remember going to an ASPPA event locally five years ago, and deep down I felt that there was a need for a local ASPPA presence. In 2006, I received a phone call from my first mentor, who had met with managers from the CPA firm. They were considering starting up a local ASPPA Benefits Council and asked me to join them! I am still honored and excited to work with Carol, Susan and Marylis, and to help coordinate and plan meetings for the members of the ABC of Detroit!

ASPPA plays a part in training and developing your workforce, and the ABC of Detroit is proud to provide area benefit professionals with opportunities for "knowledge and networking" close to home. Brian H. Graff, Esq., APM, kicked off our first meeting in September 2006, and we have held 17 meetings since. We are thankful to be able to bring nationally recognized speakers to our ABC.

The membership of the ABC of Detroit includes local TPA and law firms, CPA firms, investment and consulting firms, and independent advisors. We are a diverse group of pension professionals who are eager to hear about recent law changes from industry leaders like Craig P. Hoffman, APM, George J. Taylor, MSPA, and Derrin Watson, APM, and new regulations from Janice M. Wegesin, CPC, QPA. Several local business professionals have offered their time to present various topics, and local firms have been very generous in supporting our efforts by sponsoring meetings. In return, they are recognized on the ABC's Web site.

I really believe that ASPPA and the ABCs play a role in your company's succession plan. Like I mentioned, you see the same people at the various meetings and seminars. We need some new blood! 34% of the workforce is over 50 years old. When a third of the workforce retires, who will replace your valued experienced employees?

Last year, a few of us met with faculty and students at a local business college to introduce ASPPA and to discuss the varied positions and careers available in the pension industry. Whatever the degree, be it general business, human resources, finance, computer science, management, law or accounting, all would be background for a career in the pension industry. One faculty member had never heard of ASPPA before our meeting. As part of a grassroots effort to raise awareness and interest in the pension industry, members of the ABC of Detroit will continue to meet with local colleges and students to promote pension jobs and to invite students to our meetings. We encourage our members to "take a chance" and hire an intern. The workforce in the Detroit area is abundant and varied from college students, grads, and people between jobs or those looking for a career change.

With good succession planning, employees are ready for new leadership roles as the need arises, and when someone leaves, a current employee is ready to step up to the plate. A successfully developed process will increase retention of superior employees, who in turn recognize that time and career opportunities are being invested in them, and may eliminate their need to seek opportunities elsewhere. It all starts somewhere, with someone at the lowest rung on the ladder.

It's more than an exit plan for savvy business owners. Business owners—take care of your company's future, starting with entry-level employees!

Marlene M. DeBrosse, OKA, is the manager of qualified and non-qualified plans for PulteGroup, Inc., in Bloomfield Hills, MI. Marlene currently serves as treasurer of the ABC of Detroit. (marlene.debrosse@pulte.com)

The ABC of North Florida

by Gary A. Burns

The ASPPA Benefits Council (ABC) of North Florida is a small group. Despite our size, our membership includes representatives from a broad range of professionals, including accountants, TPAs, attorneys, investment advisors, consultants, actuaries and benefit analysts.

If you reside in the North Florida area, we hope you will consider joining us. When we get together, we frequently find ourselves involved in interesting conversations that reflect a wide variety of topics and viewpoints, and new members are always warmly welcomed.

We generally meet quarterly in Jacksonville, FL, to enjoy a meal and a presentation on a timely topic. Over the past year we have enjoyed presentations from well known speakers, including S. Derrin Watson, APM, SunGard, on the proper approach to correcting the most common plan mistakes; Robert M. Kaplan, CPC, QPA, ING, who provided an update on the 2009 ASPPA Annual Conference; Tim Hollinger, Principal Financial Group, with a presentation aimed at providing an understanding of the evolution and regulation of not for profit retirement plans; and Brian H. Graff, Esq., APM, ASPPA, with an eagerly anticipated Washington Update. ASPPA members qualify for two hours of continuing professional education credit for attending our luncheon events.

For more information about the ABC of North Florida, including membership registration and upcoming events, please contact Gary Burns, SunGard Relius, at 904.399.5888, ext. 5939 or send an e-mail to **gary.burns@sungard.com**.

Gary A. Burns is a pension consultant for SunGard Relius, located in Jacksonville, FL. Gary has more than 20 years of experience in the retirement plan services industry and is the current president of the ABC of North Florida. (gary.burns@sungard.com)

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Calendar of Events

ASPPA

Date*	Description	CPE Credits**
Jul 1 – Sep 30	CPC modules 3rd quarter testing period	
Jul 12	Northeast Area Benefits Conference • Boston, MA	8
Jul 13	Northeast Area Benefits Conference • New York, NY	8
Jul 18 – 20	Western Benefits Conference • Los Angeles, CA	17
Aug 13 – 14	ACOPA Actuarial Symposium • Las Vegas, NV	15
Sep 15	Registration deadline for 3rd quarter CPC modules testing period	
Sep 20 – 21	DOL Speaks: The 2010 Employee Benefits Conference • National Harbor, MD	15
Sep 27	Early registration deadline for fall examinations	
Sep 30	3rd quarter CPC module submission deadline	
Oct 1 – Dec 30	CPC modules 4th quarter testing period	
Oct 17 – 20	ASPPA Annual Conference • National Harbor, MD	24
Oct 29	Final registration deadline for fall examinations	
Nov 1 – Dec 16	Fall 2010 examination window (TGPC-2, PFC-1, PFC-2, DC-1, DC-2, DC-3 and DB)	
Nov 4	Postponement deadline for CPC examination	
Nov 11	CPC examination	
Nov 15 – 16	The ASPPA Cincinnati Pension Conference • Covington, KY	16.5
Dec 1	Postponement deadline for fall TGPC-2, PFC-1, PFC-2, DC-1, DC-2, DC-3 and DB examinations	
Dec 15	RPF-1, RPF-2 and TGPC-1 examination deadline for 2010 online submission (midnight, EST)	
Dec 15	Registration deadline for 4th quarter CPC modules testing period	
Dec 30	4th quarter CPC module submission deadline	

* 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 CPE credit information for conferences is subject to change.

Jul 7 – Aug 31
ERPA–SEE Summer 2010 Examination Window

Aug 13
ERPA–SEE Examination Postponement Deadline

ABC Meetings

August 17
ABC of Greater Cincinnati
Current Issues Facing the IRS
Mikio Thomas

August 18
ABC of Atlanta
Administrative Issues Associated with Rehires
Robert M. Richter, APM

September 15
ABC of Atlanta
Investment Advice and ERISA Section 408(b)(2)
Tess J. Ferrera

September 28
ABC of Greater Cincinnati
Topic TBD
Robert M. Kaplan, CPC, QPA

October TBD
ABC of Greater Cincinnati
Annual Presidents Dinner Party

November TBD
ABC of Greater Cincinnati
Annual Welcome Reception for CPC

November 17
ABC of Atlanta
Representing Clients in DOL and IRS Audits
Panel

December 12
ABC of Atlanta
Legislative and Regulatory Update
Ilene H. Ferenczy, CPC

December 14
ABC of Greater Cincinnati
Topic TBD
Richard A. Hochman, APM

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**

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

Level = Difficult

Answers will be posted at www.asppa.org/taj.

MCHUMOR.com by T. McCracken

Worker & Retired Bees

Word Scramble

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

COME C MEN □ □ □ _ _ _ □ _

ZANY ALE _ □ □ □ _ _ □

SHARP HID □ □ _ _ _ _ □ □

THY RIFT □ _ _ □ □ _ _

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

Mystery Answer:

"Good _ _ _ _ _ _ **"** _ _ _ _ _ _ _ _ _ _ _ _.

Answers will be posted at www.asppa.org/taj.

What the parents expected of their teenage son while they were away on vacation.

Your life just got easier.

Put our software solutions to work for you.

It's time I benefited from my pension software. . .
That's why I switched to DATAIR.
Best software
Best support
Best price
401(k), Pension and
Cafeteria Plan
Software for TPAs and consultants
DATAIR offers the best software and customer support to help you grow your TPA practice. Choose modules for Valuations, Administration, Proposals, Plan Documents and Government Reporting. Our time-tested systems help you provide consulting and administrative services for your clients' 401(k), Profit Sharing, 403(b), Defined Benefit, Cash Balance, and Cafeteria Plans.
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