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

WASHINGTON UPDATE

401(k) Plan Fees Under Siege

by Brian H. Graff, Esq., APM

The issue of 401(k) fees has gotten a lot of attention recently and, in general, not favorable attention. Several class action lawsuits have been brought against Fortune 100 companies and their service providers, alleging that 401(k) plan fees ultimately borne by participants have been improper, excessive and undisclosed. One case alleges that ERISA was violated due to revenue sharing received by an insurance company service provider from mutual funds that were included in their list of plan investment options without refunding such payments to the plan or participants and without proper disclosure. This case also alleges that the insurance company service provider was acting as a fiduciary in this regard and violated ERISA's prudence requirements. Another

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FROM THE EDITOR

E-mail E-tiquette

by Chris L. Stroud, MSPA

E-mail definitely speeds up communication and creates wonderful efficiencies; however, there are boundaries that, once crossed, can swing the use of this wonderful tool over to the inefficient or ineffective status. In today's world of overflowing e-mail inboxes and information overload, we often find ourselves multi-tasking while reading or writing e-mails. When we do not give an e-mail our full attention, we are setting ourselves up for an e-blooper or a breach in "e-mail e-tiquette." Many folks have their own pet peeves when it comes to e-mail etiquette, and I am taking this opportunity to pass on a few of mine in a list of e-mail DOs and DON'Ts below.

DOs

- Use a subject line to help the reader identify the topic. It also helps when cleaning out old e-mails.
- Use a standard "signature" that includes contact information (phone, address, etc.) so it will be easy to contact you by means other than e-mail. Once set up, most e-mail services can then automatically include this information on every e-mail you send.
- Use the "Out of Office" tool to let people know how long you will be away and when you will return so they know that their e-mails may go unnoticed for a while.
- Proofread e-mails, checking for both grammar and tone. Remember, your choice of words is a reflection of your professionalism as well as that of your company.
- Number questions if you are asking several things in one e-mail to make it easier for the recipient to respond in a clear manner.
- Use standard file extensions on attachments so the reader (and the reader's computer, firewall, etc.) can easily identify them. (*i.e.,* ".doc" for Microsoft Word, ".xls" for Microsoft Excel, etc.)
- Send a separate "alert" message before sending large attachments by e-mail. Most e-mail systems limit the size of attachments and may not inform you or the recipient of rejection.
- Remove old or unnecessary attachments before replying. If you plan to edit and return a new version, track your changes and rename the edited file so it won't accidentally be confused with the prior version. E-mails with unneeded attachments waste space.
- Use e-mail to make people smile. Send at least one "Thank you" or "Great job" e-mail every day. You will feel better after doing it—and you will make someone else's day!

DON'Ts

- Sending inappropriate jokes or graphics to anyone's business e-mail is a no-no. Many companies have strict Internet and sexual harassment policies and simply opening such e-mail can violate these policies.
- Avoid "reply to all" when your response needs only to be directed to one person. Help the rest of the group avoid e-mail "clutter."
- Avoid comments that you would not say directly to the recipient in person. It is easy to be "bold" using e-mail, but inappropriate nonetheless.
- Don't perpetuate negative e-mail. Either ignore it or pick up the phone and resolve the issue in a mutually respectful way. Tone is subjective in an e-mail, and e-misunderstandings can occur and breed hostility.
- Don't criticize someone in an e-mail to another person. E-mails can be forwarded or attached to a string of e-mails that others may inadvertently read, including the person the negative comment was about.
- Don't chastise someone by e-mail, especially if others are copied on the same e-mail. Such forms of "public reprimand" are inappropriate.

In today's fast-paced world, it is often the little things that can become big-time annoyances. Keeping these rules of thumb (or rather forefinger, for a mouse-click) in mind while at work will help promote e-harmony and will make you, and others, more e-fficient.

If you have other DOs and DON'Ts that you would like to share, please send them to us at **theasppajournal@asppa.org**.

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WASHINGTON UPDATE

case involves a complaint against a plan sponsor and a mutual fund company service provider alleging that "hidden fees" stemming from intra-company revenue sharing between the mutual fund company's subsidiaries were undisclosed and therefore violated ERISA.

Print and television media have become aware of these cases and, subsequently, have increased their focus on 401(k) fees. Congress has also gotten into the act. The new Chairman of the House Education and Labor Committee, George Miller (D-CA), recently asked the US Government Accountability Office (GAO) to examine how 401(k) plan fees are charged. The GAO Report, issued last November, concluded that most 401(k) plan participants do not know how much they are paying in fees and recommended that Congress enact legislation requiring more detailed fee disclosures. Chairman Miller then called for extensive hearings on 401(k) plan fees. In fact, the first hearing occurred on March 6.

In an interview with *Pensions and Investments*, Chairman Miller indicated that he hoped that greater fee transparency, delivered in a useful manner pursuant to regulations, would put a damper on excessive fees, and that he will not decide whether legislation is necessary until after the hearings.

Although concerns about "401(k)" plan fees are most often mentioned, congressional committee staff are similarly concerned about 403(b) and 457 plan fees. These plan types are likely to be examined as well. Once the House Education and Labor Committee has hearings, it is almost certain that several other House and Senate committees with an interest in retirement plan matters will also have hearings on these issues.[1]

Recently, no one has focused more attention on this issue than the Department of Labor (DOL).[2] The DOL currently has three regulatory projects on fee and expense transparency. They have already proposed extensive changes to the 2008 Form 5500, particularly Schedule C, requiring explicit reporting of fees, including, in many cases, requiring disclosure of revenue sharing payments received by service providers from third parties, even if not directly paid from the plan.[3]

The DOL is also developing proposed regulations under ERISA §408(b)(2) that will likely make adequate disclosure (at the point of sale) of the provider's compensation, direct and indirect (including payments received by third parties), a condition of a "reasonable contract or arrangement" and "reasonable compensation" for purposes of the prohibited transaction exemption.[4]

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Finally, the DOL is developing a proposed change to the ERISA §404(c) regulations to clarify what fee information must be provided to participants to enable them to easily compare fees among a plan's investment options. Participant advocates have been arguing that the current reliance on prospectuses is not effective for the average plan participant.

Regarding the 2008 Form 5500 Schedule C, the DOL's proposal would specifically require plan administrators to:

- Identify all service providers receiving $5,000 in total compensation (whether "direct" from the plan or plan sponsor or "indirect" from any other source) in connection with (1) services provided to the plan; or (2) the person's position with the plan.
- Indicate for each service provider whether the service provider received any indirect compensation from a third party.
- Provide an additional layer of information (including identity of each payor, amount of compensation received and nature of compensation) if the identified service provider is a plan fiduciary or other "enumerated service provider" and receives more than $1,000 in indirect fees. The list of "enumerated service providers" includes contract administrator, securities broker, insurance broker, custodian, consultant, investment advisor or manager, recordkeeper, trustee or appraiser.
- Identify each fiduciary or service provider that failed or refused to provide the information necessary to make the disclosures required above, which could potentially lead to criminal and/or civil penalties.

The proposed instructions to the 2008 Form 5500 broadly define "indirect compensation" to include finder's fees, placement fees, commission on investments, transaction-based commissions, sub-transfer agency fees, 12b-1 fees, soft-dollar payments and float income. The proposal allows service providers to estimate indirect compensation, provided an explanation of the payment calculations is included. Significantly, the proposal only requires "bundled arrangements" to disclose the aggregate amount paid for the services. The allocation of costs among affiliates or third party subcontractors need not be disclosed unless it is a payment to an "enumerated service provider," which is required to be reported separately as discussed above.

Plans maintained by small businesses that are not required to file Form 5500 will not be required to include these new fee disclosures in the simplified Form 5500, Form 5500-EZ.[5] Regardless, concerns have been raised by plan sponsors (and service providers) that the costs associated with compiling this disclosure information will outweigh any benefits. Further, concerns have been raised that the mandatory disclosure of indirect revenue sharing payments from third parties will confuse plan sponsors who may inaccurately perceive that such payments are coming from plan assets.

This potential payment confusion is of particular concern given that the proposed Form 5500 disclosure requirements are inconsistent among retirement plan service providers. The proposal specifically exempts "bundled" service providers (service providers who provide plan services through affiliated companies) from

Print and television media have become aware of these cases and, subsequently, have increased their focus on 401(k) fees.

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Complete and consistent fee disclosures to plan fiduciaries enhance competition in the retirement plan marketplace.

being required to disclose the allocation of fees received among affiliates (*i.e.,* intra-company revenue sharing). In contrast, "unbundled" service providers would be required to disclose the fees for such services separately, even if not paid directly by the plan.

These inconsistent disclosure requirements, which are dependent on how plan services are delivered, could lead to a distorted analysis by plan sponsors as they assess 401(k) plan fees. The inconsistency does not allow for an "apples to apples" comparison between providers. For instance, it will be difficult for fiduciaries to determine the true costs for plan services provided through a "bundled" arrangement, often presented as "no cost." If the DOL continues to impose these inconsistent requirements on point-of-sale disclosures as part of its proposed regulations under ERISA §408(b)(2), the effect of these distortions will be even worse. Ironically, the lack of 401(k) plan fee disclosure among affiliated companies was the chief basis of one of the lawsuits discussed above.

If the DOL is going to require the disclosure of indirect payments to plan service providers, ASPPA believes that such disclosures should be required regardless of whether the payment is received by an independent third party or an affiliated company. Complete and consistent fee disclosures to plan fiduciaries enhance competition in the retirement plan marketplace. Inconsistent disclosure requirements will not achieve this desired result and could actually do more harm than good.

The congressional hearings are likely to paint an ugly picture from the start. They will focus on the "horror stories" showing examples of how plan sponsors and participants were taken advantage of. This focus will fuel the negative media attention on this issue.

To restore confidence in the system, ASPPA supports complete and equitable disclosure transparency by all types of plan service providers. As an industry, if we fail to support full disclosure, we risk the very real danger of Congress and/or the regulators taking the next step, namely the regulation of fees themselves.

*Brian H. Graff, Esq., APM, is the Executive Director/CEO of ASPPA. Before joining ASPPA, he was pension and benefits counsel to the US Congress Joint Committee on Taxation. Brian is a nationally recognized leader in retirement policy, frequently speaking at pension conferences throughout the country. He has served as a delegate to the White House/Congressional Summit on Retirement Savings, and he serves on the employee benefits committee of the US Chamber of Commerce and the board of the Small Business Council of America. (**bgraff@asppa.org**)*

1 Such committees could include the House Financial Services and Ways and Means committees and the Senate Banking, Finance, and Health, Education, Labor and Pension committees.

2 To a lesser extent, the Securities and Exchange Commission (SEC) has also been examining these issues. In 2005, they issued a report based on an industry-wide investigation of mutual fund practices that raised concerns about disclosure of potential conflicts of interest with respect to investments in 401(k) plans. One of the SEC commissioners has also publicly stated that he would like to more closely examine how 401(k) plan fees charged by mutual fund companies are assessed and disclosed. ASPPA understands that senior staff at the SEC has already been coordinating with senior staff at the DOL. Such coordination will likely continue.

3 ASPPA's Government Affairs Committee filed extensive technical comments on the proposed 2008 Form 5500, which can be found at **www.asppa.org/government/comment09-19-06.htm**.

4 ERISA §408(b)(2) provides for a statutory prohibited transaction exemption allowing plan assets to be paid to a plan service provider under a plan service arrangement that is necessary and appropriate; reasonable, including terminable on a reasonably short notice; and no more than "reasonable compensation" is paid for such services.

5 This exception generally applies to plans with fewer than 100 participants.

Eliminating Optional Forms of Benefits:
An Analysis of Treasury Regulations Published Under IRC §411(d)(6)

by Barry Kozak, MSPA, and Peter K. Swisher, CPC, QPA

In 1984, Congress amended the Internal Revenue Code (IRC) to add a provision prohibiting amendments to qualified plans that have the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy or eliminating an optional form of benefit.

Under its REA authority, Treasury published final regulations under §1.411(d)-4 on September 6, 2000, which allow certain amendments in defined contribution plans. Then, in 2001, the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) directed Treasury to publish regulations that allow an exception for a plan amendment to a defined benefit plan that "reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in more than a *de minimis* manner." Under its EGTRRA mandate, the "Round 1" final Treasury regulations under §1.411(d)-3 were published August 12, 2005, and the "Round 2" final regulations were published on August 9, 2006.

The first part of this article discusses the rules for plan amendments that can eliminate optional forms of benefits from defined benefit (DB) plans, and the second part presents a few case studies for eliminating optional forms of benefits from defined contribution (DC) plans.

Part 1—Defined Benefit Plans

Rounds 1 and 2 of the final regulations basically do three things:

1. They describe DB plan amendments that can eliminate certain optional forms of benefits under one of four methods:
   a. The eliminated optional forms are *redundant* to those retained;
   b. The eliminated optional forms are not any of the *core* annuity options required to be retained;
   c. The eliminated *redundant* or *non-core* optional forms are burdensome and *de minimis*; or
   d. The eliminated optional forms have not been *utilized*.
2. They define what benefits are actually protected under IRC §411(d)(6); and
3. They preclude plan amendments from adding restrictions on rights to receive accrued benefits (even if such amendment otherwise complies with vesting rules) reflecting the Supreme Court's holding in *Central Laborers' Pension Fund v. Heinz*.

Elimination of Optional Forms of Benefits

Forms That Are Redundant

There is a three-pronged analysis needed for a proper plan amendment for forms that are redundant:

1. It only eliminates optional forms of benefits that are redundant with the retained options;
2. It eliminates optional forms of benefits that have annuity commencement dates at least as long as the QJSA notice period after the amendment adoption date (which is 180 days)[1]; and

Either an optional form fits into one of the defined families or it forms its own family.

3. If the retained forms of benefit do not commence on the same annuity commencement date, or if their present values are less than that of the form that was eliminated, then the amendment must meet the burdensome and *de minimis* tests.

Optional forms of benefit are considered to be redundant if there is a retained optional form of benefit available to the participant that is in the same "family" of optional forms of benefits and if the participant's rights with respect to the retained optional form of benefit are not subject to materially greater restrictions (such as eligibility, ability to designate a beneficiary, the right to receive in-kind distributions, etc.).

Either an optional form fits into one of the defined families or it forms its own family. The determination of whether two optional forms of benefit are within the same family is made without regard to actuarial factors or annuity starting dates. (For example, if a plan has a single-sum distribution option for some participants that is calculated using a 5% interest rate and a specific mortality table and another single-sum distribution option for other participants is calculated using the 417(e)(3)(A) interest rate and mortality tables, then both forms are part of the same family, and one can be eliminated by amendment if the other is retained.)

Additionally, the determination of whether two optional forms of benefit are within the same family is made without regard to pop-up provisions (*i.e.,* where payments may increase upon the death of the beneficiary or another event that causes the beneficiary not to be entitled to a survivor annuity), cash refund features (*i.e.,* where a payment is provided on the death of the last annuitant) or term-certain provisions in a joint and contingent annuity. Finally, the determination of whether two optional forms of benefit are within the same family is made without regard to social security leveling features, refund of employee contributions features or retroactive annuity starting dates features; however, to the extent the eliminated form includes or excludes such a feature, the retained form must generally include or exclude the feature.

The defined families are:

- Joint and contingent options with continuation percentages of 50% to 100%;
- Joint and contingent options with continuation percentages of less than 50%;
- Term certain and life annuity options with a term of ten years or less;
- Term certain and life annuity options with a term longer than ten years;
- Level installment payment options over a period of ten years or less;
- Level installment payment options over a period of more than ten years; and
- Any other optional form of benefit creates its own family.

A new rule added under the Round 2 final regulations provides that if a plan allows a participant to bifurcate his or her benefits and make separate elections for each part, then the redundancy rules apply to each part separately. For example, if there are two parts to a participant's accrued benefit, then only the portion of the accrued benefit within one family can be tested for redundancy, without any regard to the form of benefit available for the other portion. The logic in this example extends to a bifurcated accrued benefit where one portion is payable in a single sum but the other portion is not. The term "annuity commencement date" is defined in the Final Regulations to take into account any retroactive annuity starting dates.

Forms That Are Non-Core

There is a three-prong analysis for a proper plan amendment for forms that are non-core:

1. After the amendment becomes effective, each "core option" is available to each participant for benefits accrued both before and after the amendment;
2. It eliminates optional forms of benefits that have annuity commencement dates at least four years after the amendment adoption date; and
3. If the retained forms of benefit do not commence on the same annuity commencement date, or if their present values are less than the form that was eliminated, then the eliminated form must meet the burdensome and *de minimis* tests.

Rules regarding Social Security leveling, refund of employee contributions and retroactive annuity starting dates for non-core optional forms of benefits are similar to those described above for redundant optional forms of benefits. In addition, if "the most valuable option for a participant with a short life expectancy" is eliminated, then, after the plan amendment, an optional form of benefit that is identical must be available to the participant (other than differences in actuarial factors or annuity starting dates). Single-sum distribution

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optional forms may be eliminated only if they represent less than 25% of a participant's accrued benefit, and if an amendment eliminates non-core optional forms of benefit, then the plan must wait at least three years after the annuity commencement date for which the form of benefit is no longer available before making changes to any remaining core option (except for changes that offer a participant a benefit of inherently equal or greater value). If the plan retains both a 50% joint and contingent annuity and a 100% joint and contingent annuity optional form of benefit, then a plan amendment may eliminate a 75% joint and contingency annuity optional form of benefit.[2]
The defined core optional forms are:

- Life annuity;
- 75% joint and contingent (J&C) annuity;
- Ten year term certain and life annuity; and
- The most valuable option (MVO) for a participant with a short life expectancy:
  - For any annuity starting date, the MVO is the optional form of benefit that is reasonably expected to result in payments that have the largest actuarial present value in the case of a participant who dies shortly after his or her Annuity Start Date (ASD), taking into account both payments before and after his or her death. (A plan is permitted to assume that the spouse is the same age as the participant to determine the MVO, and is permitted to assume that the MVO at age 70½ remains the MVO for all later ages and the MVO at age 55 remains the MVO for all earlier ages.)
  - There is a general safe harbor hierarchy of MVO (subject to certain requirements): a single-sum option, which is at least as valuable as any form of benefit being eliminated; a joint and contingent annuity with a contingent percentage of at least 75% if the plan does not offer a single-sum distribution before the plan amendment; a term certain and life annuity with a term certain period of at least 15 years if the plan does not offer a single-sum distribution or 75% J&C annuity before the plan amendment.

Burdensome and De Minimis *Requirements*

The burdensome and *de minimis* tests for eliminating redundant optional forms of benefit and for eliminating non-core optional forms of benefit are satisfied if:

- The retained optional form of benefit commences on the same annuity commencement date as the form being eliminated; and

- The actuarial present value of the eliminated optional form of benefit is not less than the actuarial present value of the retained form of benefit.

Otherwise, there are specific requirements.

The burdensome test (when needed) is a facts and circumstances test. The regulations provide some of the factors that will be used:

1. If early retirement benefits are being eliminated:
   - — Whether the various annuity starting dates (ASD) in the aggregate are burdensome or complex (*i.e.,* the number of categories, the difficulty in summarizing the various terms and conditions for the participants, and if all of the different ASDs are a result of plan mergers, transfers or consolidations); and
   - — Whether the effect of the plan amendment is to eliminate some of the complexity and to ease the burdensomeness.
2. If retirement-type subsidies and actuarial factors are being eliminated:
   - — Whether the actuarial factors used are, in the aggregate, burdensome or complex (*i.e.,* the number of different retirement-type subsidies or actuarial factors, the difficulty in summarizing the various terms and conditions for the participants, if the plan is eliminating generalized forms, if the plan is replacing a complicated form with a simple form and if all of the different factors and subsidies are a result of plan mergers, transfers or consolidations); and
   - — Whether the effect of the plan amendment is to eliminate some of the complexity and to ease the burdensomeness.

Certain presumptions are allowed: If there are multiple annuity starting dates, then the elimination of any of the ASDs will be presumed to ease the complexity and burdensomeness (but a substitution of new ASDs for eliminated ASDs will not); and if the actuarial factors are, in the aggregate, burdensome within a generalized optional form, then replacing some factors will be presumed to ease the complexities and burdensomeness (but a substitution of one set of factors for another will not, unless the change is merely to replace older factors with more accurate factors, such as those reflecting more recent mortality experience or more recent market rates of interest).

An important provision added to the Round 1 final regulations allows plans to "update" old assumptions that reflect more recent mortality experience or market rates of interest without violating the §411(d)(6) rules. Additionally, the definition of "generalized optional form" was added, which considers all forms of benefit that are identical in all aspects except the actuarial factors used to calculate the amounts of distributions as part of the same generalized optional form. Finally, if any plan amendment in the prior three years added optional forms of benefits that created the complexities or burdensomeness, then the current amendment will not be deemed to eliminate complexities or ease the burdensomeness.

The *de minimis* test, when needed, is a numerical test. The retained optional form must have substantially the same annuity commencement date as the eliminated form ("substantially the same" means that they are within six months of each other.), and either the amount is *de minimis* or there is a delayed effective date. *De minimis* means that on the date the amendment is adopted, the difference between the actuarial present value of the eliminated optional form and the retained form is not more than the greater of: 2% of the present value of the retirement-type subsidy under the eliminated form or 1% of the participant's §415(c)(3) compensation for the prior plan year, or the participant's high §415(b) three-year average, if greater.

The "delayed effective date" for the *de minimis* test means that the optional forms of benefit are not eliminated until the end of the expected transition period. It begins when the amendment is adopted and ends when it is reasonable to expect that the form being eliminated would be subsumed by another optional form of benefit after taking into account expected future benefit accruals. The transition period must be made using reasonable and conservative actuarial assumptions. (It is likely to result in the longest period of time until the eliminated optional form would be subsumed.) If a plan is amended during the expected transition period that reduces future benefit accruals, then the transition period must be extended. The transition period is only for active participants; the amendment eliminating an optional form of benefit ceases to apply to any participant who terminates employment during the transition period.

Forms That Are Not Utilized

The Round 2 final regulations provide a third method for allowing plan amendments to eliminate optional forms of benefits if they are not utilized. Unlike the first two methods (the redundant and non-core methods), the utilization method will not require compliance with the burdensome and *de minimis* tests.

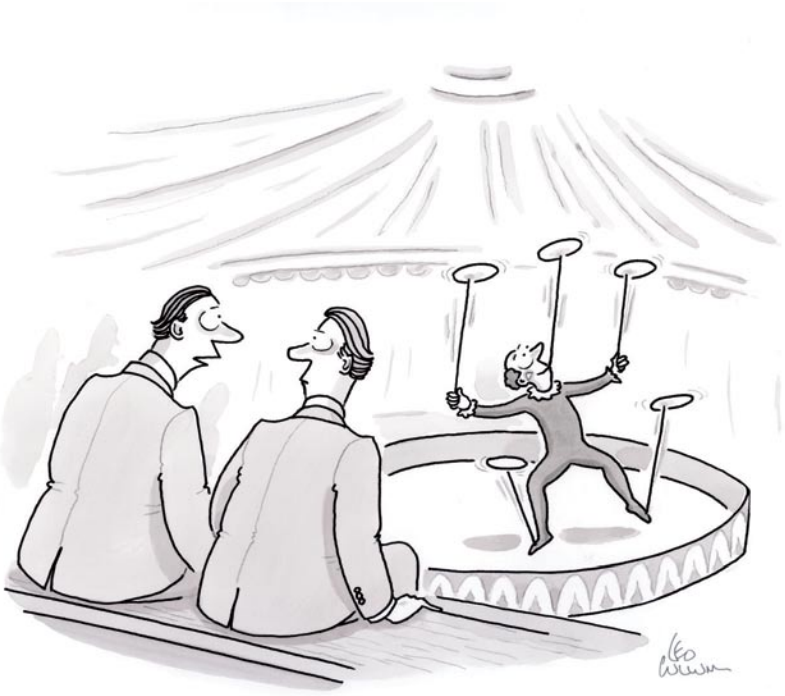
There is a four-pronged analysis for a proper plan amendment for forms that are not utilized:

1. No optional form of benefit being eliminated is a core option;
2. The amendment eliminates optional forms of benefits that have annuity commencement dates at least as long as the QJSA notice period after the amendment adoption date (*i.e.,* 180 days);
3. The generalized optional form has been available to at least the "applicable number of participants" during the look-back period; and
4. No participant has elected any optional form that is part of the generalized optional form with an annuity commencement date that is within the look-back period.

The look-back period is the pre-adoption period (*i.e.,* the time between the first day of the plan year and the date that the amendment is adopted) and the two plan years immediately preceding the pre-adoption period (at least one of which is a 12-month period). The look-back period may be extended for up to three more preceding plan years in order to meet the "applicable number of participants" requirements. Participants are only those who were offered the generalized optional form with an annuity commencement date within the look-back period, excluding:

- Those who did not elect any form of distribution during the look-back period;
- Those who elected a single-sum distribution for at least 25% of his accrued benefit;
- Those who elected any optional form of benefit that was only available during a limited period of time; or
- Those who elected an optional form of benefit with an annuity commencement date more than ten years earlier than the participant's normal retirement age.

The "applicable number of participants" was reduced to 50 in the Round 2 final regulations. However, if a large plan wants to count any participant who elected a single-sum distribution that was at least 25% of his or her accrued benefit as still not utilizing that generalized optional form, then the applicable number of participants becomes 1,000.



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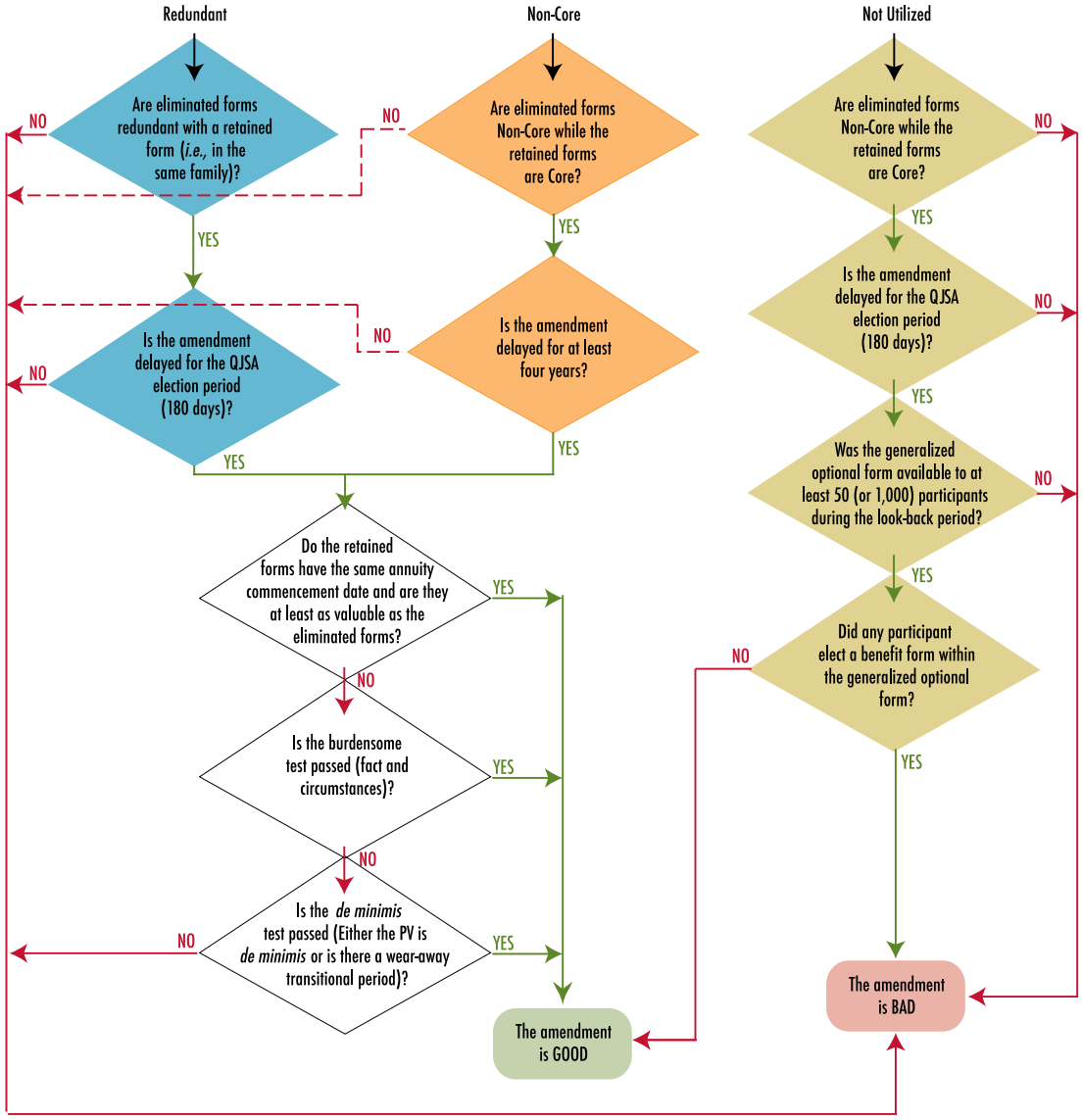

A "generalized optional form" includes all forms of benefit that are identical in all aspects except that the actuarial factors used to calculate the amounts of distributions shall be considered part of the same generalized optional form.

Benefits that Cannot be Eliminated by a Plan Amendment

Accrued benefits protected under IRC §411(d)(6) include the participant's entire accrued benefit as of the applicable amendment date, without regard to whether the benefits were accrued prior to severance from employment or whether a plan amendment was adopted after the participant terminated employment. A plan amendment may not decrease protected accrued benefits in either a direct or indirect manner. Two amendments adopted on the same date will be looked at in the aggregate, and the result of the multiple amendments cannot decrease a protected accrued benefit. A series of plan amendments adopted within a three-year period will be looked at in the aggregate, and the result of multiple amendments cannot decrease a protected accrued benefit.

No amendment to a DB plan can eliminate or reduce an IRC §411(d)(6) protected benefit, which includes: the protected portions of an early retirement benefit, a retirement-type subsidy or an optional form of benefit before the plan was amended.

The IRC §411(d)(6) protected benefits are defined as:

- An early retirement benefit, which is the right to receive a benefit after severance from employment and before normal retirement age;

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- An optional form of benefit, which is a distribution alternative that is available under the plan with respect to an accrued benefit or a retirement-type benefit;
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- A retirement-type subsidy, which is the excess (if any) of the actuarial present values of a retirement-type benefit over the accrued benefit that would commence at normal retirement date. (Note: The present values considered are at the date that the retirement-type benefit commences.); or
- A subsidized early retirement benefit, or early retirement subsidy (*i.e.,* the right to receive a retirement-type benefit at a particular date after severance from employment and before normal retirement age where the actuarial present value of the accrued benefits at that earlier annuity commencement date is greater than the value payable at normal retirement age).

The final regulations go on to describe benefits that are not protected by IRC §411(d)(6):

- A participant's accrued benefit is protected if the participant satisfies the pre-amendment conditions for the benefit, even if the condition on which eligibility depends is an unpredictable contingent event (such as a plant shutdown);
- A plan amendment that replaces one optional form of benefit with another that is of inherently equal or greater value is allowed (This new exception is provided in the 2005 final regulations, and an example is provided that shows a good plan amendment that substitutes a 91% adjustment factor for particular ages for a 90% adjustment factor for those same ages and a second example shows a good amendment that eliminates a life annuity option for married participants where it retains a subsidized qualified joint and survivor annuity.);
- A plan cannot be amended to recharacterize a retirement-type benefit as an ancillary benefit; and
- Future, unaccrued benefits as of the date of the amendment are not protected [but the elimination might require an ERISA §204(h) notice].

Other benefits specifically not protected by IRC §411(d)(6) are ancillary benefits, such as:

- A Social Security supplement other than a QSUPP;
- A disability benefit that does not exceed the maximum qualified disability benefit;

- A life insurance benefit;
- A medical benefit [as defined in §401(h)];
- A death benefit that is not part of an optional form of benefit; or
- A plant shutdown benefit that neither continues past normal retirement age nor affects the payment of an accrued benefit.

The regulations provide definitions and examples. (Please note that the only examples that are relevant are those retained in the cumulative final regulations. All examples in either set of proposed regulations should be wholly ignored.) One important new provision is that the GATT rates under IRC §417(e) will be deemed "reasonable." Another provision indicates that the term annuity commencement date is basically the ASD, even if the ASD is based on the retroactive ASD rules.

Coordination with Vesting Rules

Reflecting the decision in the 2004 United States Supreme Court holding in *Central Laborers' Pension Fund v. Heinz* (as indicated in IRS Revenue Procedure 2005-23), an amendment cannot place a greater restriction or condition on a participant's rights to his or her accrued benefits, even if the new condition otherwise complies with the vesting rules under IRC §411(a). According to the Round 2 final regulations, however, the amendment can change the plan's vesting computation period if it complies with Department of Labor vesting computation periods regulations.

Part 2—Defined Contribution Plans

DB plans are not alone in needing a method for eliminating benefits prospectively. The §411(d)(6) regulations were designed with DB plans in mind, yet they are the primary source of guidance for reducing access to benefits, rights and features (BRFs) in DC plans as well. But of equal importance when reducing or limiting a BRF are the §401(a)(4) nondiscrimination rules. Here some key points to consider when changing or eliminating features in DC plans:

Myth: "You have to do the same thing for everyone"

This myth is a common misconception. Features, such as the ability to direct investments or take plan loans, are not protected benefits and may, therefore, be taken away. The provision of such features, nonetheless, is subject to the nondiscrimination rules.

BRF Nondiscrimination is Commonly Overlooked

TPAs are accustomed to completing Form 5500s and performing ADP tests every year. BRF nondiscrimination testing, however, is rarely part of the annual compliance "package," unless the administrator simply notices that it must be done.

A thorough understanding of the requirements and the restrictions is necessary in order to undertake such an amendment in a DB or DC plan.

BRF Discrimination is Common in Open Option Plans

When owners or HCEs typically self-direct while employees are all in a pool or other "group" arrangement, the arrangement is suspect. With respect to BRFs, often such arrangements will fail the "current and effective availability" rules of IRC §401(a)(4).

Keep the End in Mind

Are you eliminating a brokerage option because you think it serves participants poorly? Then let that thinking drive your planning. Are you grandfathering such an option so certain key employees can keep it but all future employees can't get it? Again, let that thinking drive your planning.

Here are examples of situations where DC plans wish to limit or eliminate BRFs:

- A medical practice currently permits an "open option" feature and wishes to phase this feature out for new hires.
- A large 401(k) sponsor wishes to eliminate access to a self-directed brokerage option, yet may wish to "grandfather" access to this benefit for current employees.
- A small 401(k)/profit sharing plan sponsor permits owners to self-direct but all employees are in a pooled account—an arrangement the owners wish to continue.
- A 401(k) plan of a publicly traded company wishes to impose restrictions on the purchase of company stock within the 401(k).

We will take each of the examples given above and analyze them.

Case #1: Medical Practice with Open Option Feature

This arrangement is extremely common in physician practices, and virtually nowhere else. In this example, the doctors all have accounts with their favorite brokers, and the participants are in a group annuity or other "group" program. The doctors are determined to continue self-directing their own accounts. Here are the questions you should ask:

- How was the open option feature communicated? Was it communicated?
  - Is it in the SPD or SMMs?
  - Is it in the enrollment kits?
  - Is there a separate document by which access to this feature was communicated?
  - Are new owners/doctors told about the ability to self-direct, while new employees are not?
  - Is the open option feature mentioned in education and enrollment meetings?
- Who is using the feature currently? If only doctors/owners/HCEs are using it, the effective availability of the feature is suspect unless the feature was clearly communicated to non-HCEs.
- Does the sponsor want to "grandfather" those currently using the open option feature? If so, we will discuss below how the testing works prospectively when dealing with an eliminated feature.

The steps to consider when changing or eliminating features in these DC plans depend on whether or not the current arrangement is discriminatory.

The current arrangement fails 401(a)(4)

Assume that only the doctors self-direct, that all of the employees are in a group annuity product, that the office manager tells all new non-doctor hires that this is their only option and that the arrangement is therefore not *effectively* available even if it is *currently* available per the plan document.

- To the author's knowledge, there is no formal correction available in the regulations for an effective availability failure. Presumably, the correction is to go ahead and make the feature available to a nondiscriminatory group. Assume, then, that this feature is publicized to all current employees as part of the solution—not what the doctors want to do, but a necessary step. This approach could mean special notices, special meetings, election forms, SMMs or a combination of these and other methods.
- Once all employees who want access to the open option feature have been given that opportunity, you are ready to take it away prospectively in a way that preserves the doctors' ability to continue using it.

Taking away the open option feature

The client's objectives in our example are to preserve self-direction for the current doctors, minimize the number of current employees who move to self-direction when the option is properly communicated and eliminate the option for all future hires. Here are the steps:

1. **Announce the elimination of the feature**. In the announcement provide information on how current employees who have not elected it can take advantage of the open option feature before it is eliminated.
2. **Establish the testing group**. The population of current employees becomes the testing group for BRF availability. All employees

benefiting under the open option feature as of the date it is frozen will be the only employees included in the test from that point forward. "Benefiting" in this case is the same as "benefiting" under a 401(k) feature—a participant who is able to elect the feature benefits even if he or she does not in fact elect it. For example, assume there are five doctors and 25 staff. All five doctors self-direct, none of the staff self-directs and none of the staff chooses to self-direct even when the option is properly publicized. 25 of 25 are considered to benefit even though none has elected to participate.

3. **Freeze it**. As of the target date, the open option feature is frozen. No new hires—including doctors—will be permitted to use this feature. The "grandfathered" employees (the five doctors) can continue to use the feature so long as it passes BRF nondiscrimination. Since the testing group is the frozen census of current employees, there is no practical reason to believe a testing failure could ever occur since five of five doctors and 25 of 25 staff are all benefiting.

Alternatively, the doctors could simply do away with the open option feature altogether, for themselves as well as all future employees. Few medical practices choose this path, thus requiring the multi-step procedures to set things right before eliminating the feature for new hires.

Case #2: Eliminating Self-Directed Brokerage

A large 401(k) plan sponsor wishes to eliminate access to a self-directed brokerage option (SDB), yet may wish to "grandfather" access to this benefit for current employees.

Using the thought process from Case #1, previously, here are the steps:

1. **Test for nondiscrimination**. Is the SDB currently and effectively available to a nondiscriminatory group? In this case, the SDB is noted as an option on the enrollment materials, appears in the SPD, is mentioned prominently on the vendor Web site and is mentioned as an option in the enrollment process. All employees may choose it. The SDB is therefore currently and effectively available to a nondiscriminatory group.
2. **Eliminate it outright**. If the sponsor is willing to do so, eliminating access to the SDB is certainly the cleanest solution. As the chief ERISA counsel of a large national vendor remarked when faced with this scenario, "If the SDB is being eliminated for fiduciary reasons, the last thing you want is a mixed message. 'Okay for this current group, not okay for everyone else.' Prudent is prudent." Fiduciary issues aside, we will continue looking at the BRF and cutback issues.
3. **"Grandfather" the existing employees**. Since the SDB is currently and effectively available to all employees, all eligible employees as of the effective date of the amendment freezing the SDB are considered to be benefiting for testing purposes. The option therefore continues to pass testing even if the demographics shift dramatically.
4. **Freeze it**. The "freezing" goes into effect and no one not already in the SDB is permitted to use it from that point forward.

Case #3: Discriminatory Open Option

A small 401(k)/profit sharing plan sponsor permits only owners to self-direct, but all employees are in a pooled account, an arrangement the owners wish to continue.

This scenario is identical to Case #1 with one exception; it has been specifically communicated to employees that they may not self-direct (instead of simply failing to properly inform them of the feature). In this case, the arrangement is clearly discriminatory, but the solution is the same as in Case #1.

Case #4: Restrictions on Company Stock

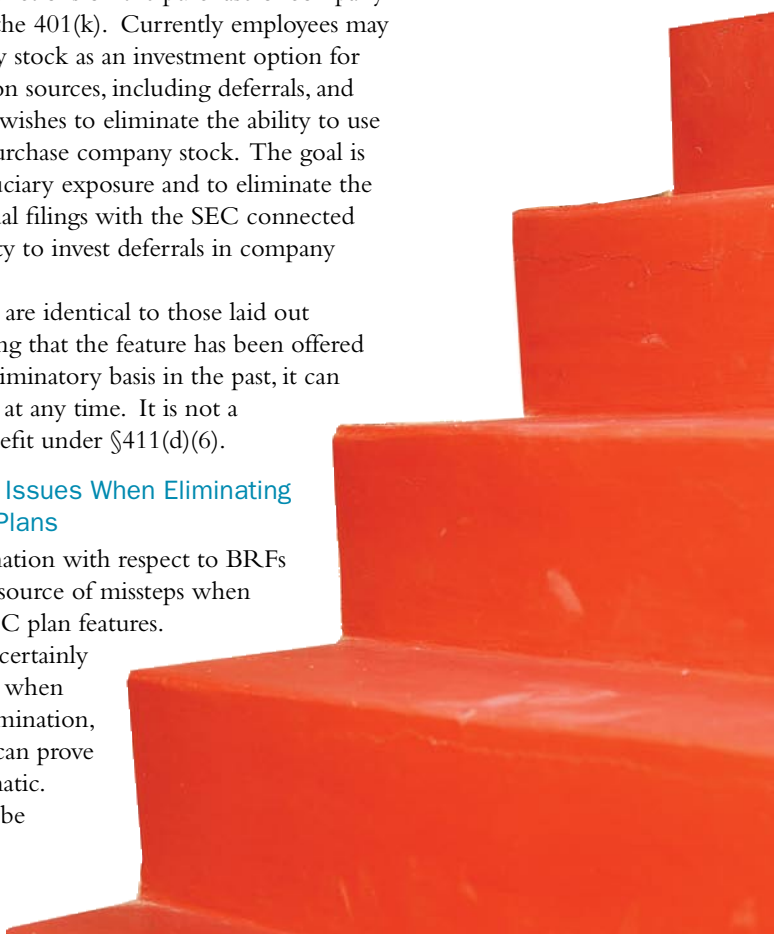
A 401(k) plan of a publicly traded company wishes to impose restrictions on the purchase of company stock within the 401(k). Currently employees may elect company stock as an investment option for all contribution sources, including deferrals, and the company wishes to eliminate the ability to use deferrals to purchase company stock. The goal is to reduce fiduciary exposure and to eliminate the need for annual filings with the SEC connected with the ability to invest deferrals in company stock.

The steps are identical to those laid out above: assuming that the feature has been offered on a nondiscriminatory basis in the past, it can be eliminated at any time. It is not a protected benefit under §411(d)(6).

Summary of Issues When Eliminating BRFs in DC Plans

Nondiscrimination with respect to BRFs is a common source of missteps when eliminating DC plan features. Features may certainly be eliminated when there is discrimination, but doing so can prove to be problematic. While it may be

Nondiscrimination with respect to BRFs is a common source of missteps when eliminating DC plan features.



unlikely that a participant would press a claim against a fiduciary for failing to make an option effectively available, care should still be taken to eliminate the feature correctly. Once it is clear that a feature has been currently and effectively available to a nondiscriminatory group, the way is clear for eliminating the feature without concerns over future repercussions from nondiscrimination. Clearing up a discriminatory situation is often as simple as properly communicating a feature.

Note that notice requirements, such as the ERISA §204(h) notice, do not apply to these eliminations. If a fiduciary uses his discretion to eliminate a loan feature, a hardship feature, an investment option, a self-directed brokerage option or any other non-protected benefit, any requirement to notify participants arises from other concerns, such as 404(c).

Finally, note that partial eliminations of features call for continued BRF nondiscrimination testing, but that the demographics are frozen as of the date of elimination of the feature, greatly simplifying the task.

Conclusion

There are acceptable scenarios that allow for the reduction or elimination of certain benefits or subsidies by plan amendment. A thorough understanding of the requirements and the restrictions is necessary in order to undertake such an amendment in a DB or DC plan.

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1 §1102 of the Pension Protection Act of 2006 amends IRC §417(a)(6)(A) and ERISA §205(c)(7)(A) by substituting "180 days" for "90 days," effective for distributions made after December 31, 2006.

2 Please note that this provision was added by the Round 2 final regulations, which was published before the Pension Protection Act of 2006, §1004(a) added IRC §417(g), introducing the new term "qualified optional survivor annuity," which requires a plan to offer a 75% joint and survivor annuity if the plan's QJSA is less than 75% or a 50% joint and survivor annuity if the QJSA is greater than or equal to 75%.

Debit Card Usage in Flexible Spending Accounts and Health Reimbursement Arrangements

by Kimberly A. Flett, QKA

As the cost of health care continues to rise, employers are looking for more opportunities to provide affordable and yet attractive health care options and share the cost with their employees. Recent Internal Revenue Service (IRS) guidance has made the use of debit cards within health flexible spending accounts under a Section 125 plan and health reimbursement arrangements under Internal Revenue Code (Code) §105 a convenient way to enhance an employer's health benefit package.

Before 2003, flexible spending account (FSA) and health reimbursement arrangement (HRA) participants relied on a paper-processing and time-consuming method of submitting receipts to their employer for qualifying out-of-pocket medical expenses. Such expenses include co-payments, payments towards a plan deductible, dental, vision and other qualifying costs that are reimbursable through such plans under Code §213(d). This process changed when IRS Revenue Ruling 2003-44 allowed the use of various cards with such programs. These cards include credit, debit and stored-value cards. Although great in concept, the ruling imposed limitations that inhibited the practical use of such cards. For example, qualified medical expenses could not be immediately deducted since lengthy steps were required to substantiate that claims qualified as legitimate medical expenses. With the issuance of Notice 2006-69, the IRS provided clearer guidance and paved the way for more effective usage of credit, debit and stored-value cards within medical plans.

IRS Notice 2006-69

The Notice sets forth details surrounding the usage of debit, credit and stored-value cards (prepaid employer-sponsored cards) under a health flexible spending account or a health reimbursement arrangement. There are three methods employers may use to substantiate claimed medical expenses.

Co-payment Substantiation Method

This method allows for automatic authentication if co-payments under the health plan are matched in specific multiples. The specific transaction will be automatically approved, provided the transaction at a health care provider does not equal more than five times the amount of the health care co-payment.

Any deviation from the preauthorized co-payment amount will need to be submitted for review and substantiation. An efficient system will be able to handle various levels of co-payment. For example, a prescription co-payment may be $5 and the office visit $10. The merchant, at the point of sale, provides information to the employer (or third-party administrator) electronically that the claim is for a valid medical expense and no further substantiation is required.

The cost of using an administrator varies based on the size of the employer and the complexity of the system, but should benefit both the employer and its employees in the end.

This process is best illustrated by the following examples.

Example 1: An employee is enrolled in Company A's FSA. Company A reimburses claims using debit cards. The plan has a $15 co-payment for office visits and a $10 co-payment for prescriptions. The employee visits two doctors and receives three prescriptions in a one-day period. The employer's debit card automated system matches the doctor visits for a total of $30 in co-payments. Because the amount of the transactions are an exact multiple not in excess of five times the amount of $15 multiples, the system approves the transactions and no further substantiation is required. Additionally, the system will approve the three prescriptions for a total of $30 since this amount is not in excess of five times the amount of co-payment and no further validation is required. Automatic reimbursements of recurring expenses can occur for an employee who refills a prescription drug on a regular basis for the same amount without substantiation or review.

Example 2: Assume in the next case that the employee uses the debit card to purchase the three prescriptions plus two over-the-counter medicines (cold tablets, antacids) so that the total bill comes to $42. The over-the-counter allowance is part of the employer's FSA program. Since the amount of the transaction is not an exact multiple of the prescription co-payment, the purchase must be verified with a receipt or proof of purchase before payment will be made.

Inventory Information Approval System

An inventory information approval system uses stock keeping units (SKUs) to approve or reject transactions by merchants. These include health care providers and non-health care providers that are chosen by the employer to be included in the payment system. Non-health care providers generally provide over-the-counter drugs and other items that qualify as medical expenses. The system requires a method for reviewing items purchased and compares these items to qualifying medical expenses as listed in Code §213(d), which includes over-the-counter medications. The system will be pre-authorized to ensure total transactions do not exceed the plan's FSA election limits or HRA employer-provided amounts. These recordkeeping requirements are effective for plan years beginning after December 31, 2006.

Example: An employee is a participant in Company B's FSA. At a participating merchant, the employee purchases several items that qualify as medical expenses under Code §213(d). The employee also purchases several items that are non-qualifying medical expenses. At the time of purchase, the card system established by the employer compares the SKUs from all of the items purchased against those that qualify as medical expenses. Those expenses that are non-qualifying will not be paid for with the debit card.

Direct Third-Party Substantiation

Under this method, a third party, such as a doctor's office or pharmacist, provides an explanation of benefits (EOB) to the employer. The employer will approve the expense without need for further review.

Example: An employee is a participant in Company C's FSA. Company C has already established substantiation with health care merchants that an EOB will be provided to the employer for services rendered. Because this provides independent third-party verification, any co-payment amount is authorized and no additional receipts or information would be required. In such cases, a card would not be used. Rather, the employer provides payment directly to the provider.

Non-qualifying Expenses

A health plan using debit, credit or stored-value cards must have a method of correction for improper payments (*i.e.,* payments for non-qualifying medical expenses). Initially the employee should be required to return the erroneous amounts. The employer may also consider adjusting balances on the card to offset the transaction. Failure to obtain adequate repayments can result in a liability to the employer on the part of the employee.

Prohibition Against Self-Certification

A precondition of payment or reimbursement is corroboration of all medical expenses. This requires verification from an independent third party to ensure the claim is valid. A participant may not merely describe the treatment or purchase in order to receive reimbursement. Any amounts that cannot be verified are included in the employee's gross income.

Debit Cards in Dependent Care Assistance Programs

IRS Notice 2006-69 also describes usage of debit, credit and stored-value cards in Dependent Care Assistance Programs (DCAPs) as part of a Section 125 plan. For DCAPs, there is an important difference in using them as compared to cards in the other plans. Under health FSAs, payments

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made to participants must reimburse qualified transactions up to the amount of the initial annual election, regardless of the amount contributed to the FSA. HRAs function similarly in that the reimbursement amount is generally the amount of the annual employer contribution. DCAPs, however, cannot provide reimbursements in excess of the amount that has been contributed to the DCAP. Furthermore, the expense must be incurred prior to being reimbursed or paid to the provider. These limitations cause a dilemma when the employee needs to pay the provider in advance. This situation is not unique when using debit, credit or stored-value cards in DCAPs. One of the most common complaints about DCAPs is the fact that early in the plan year, employees may need to be able to fund two times the initial dependent care expenses (to pay the provider in advance and to fund the DCAP in order to permit future reimbursements). The IRS guidance makes it clear that these rules continue to apply even when a plan is using a debit, credit or stored-value card.

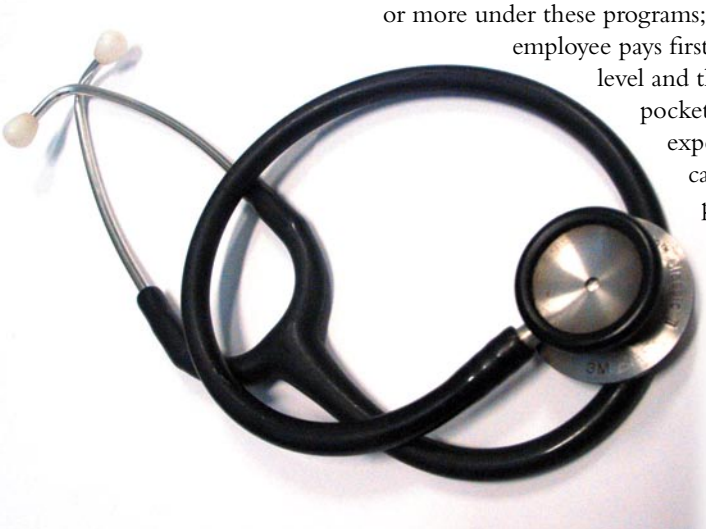
As more and more employers, merchants and service providers become automated, the use of an electronic card system such as a debit or credit card will aid employers, encourage employee participation and provide an overall beneficial medical plan program.

Health Savings Accounts

Legislation paved the way for health savings accounts (HSAs), providing more opportunities to use the automated debit/credit card feature as part of a medical program. Most providers of HSAs, such as banks or trust companies, incorporate these cards into their programs. Although HSAs are not specifically mentioned in Revenue Ruling 2006-69, an HSA participant is responsible for ensuring that all claims are for qualified medical expenses.

Application of the Ruling

Since HRAs are funded with employer contributions, employees are generally accepting of this benefit and willing to participate. It is more difficult for employers to solicit participation in an FSA. Employees may not always readily see the tax savings benefits and, therefore, do not fully understand the value of participating in an FSA. The employee can gain a pre-tax benefit of 30% or more under these programs; however, since the employee pays first at the payroll level and then again out-of-pocket at the time the expense is incurred, it can appear as though payment is rendered twice for the same transaction. Using a card system can help gain more employee participation. Additionally, such programs can reduce paper recordkeeping for human resource or other departments within a company.



The participant using the card should keep all receipts in the event of an inquiry on a specific transaction. An effective system must require that an employee certify that all purchases will be for covered and allowable expenses within the program.

The use of debit, credit and stored-value cards can be an expensive process if an employer were to implement a program on its own. Pre-authorization, verification and approval processes can become involved and time consuming if not carefully administered. A qualified third-party administrator can be obtained to effectively implement and handle these types of systems. Many TPAs are providing systems complete with Internet services so participants and sponsors can quickly review their accounts. The cost of using an administrator varies based on the size of the employer and the complexity of the system, but should benefit both the employer and its employees in the end.

Conclusion

As more and more employers, merchants and service providers become automated, the use of an electronic card system such as a debit or credit card will aid employers, encourage employee participation and provide an overall beneficial medical plan program.

*Kimberly A. Flett, QKA, is a manager in Retirement Plan Services at SS&G Financial Services, Inc., in Fairlawn, OH. She is responsible for supervising a team of third party administrators in the design and processing of qualified plans, which includes 401(k), profit sharing, compliance testing, loan and distribution administration, document preparation, consulting and preparation of Form 5500. Kimberly also is in charge of the medical plan design administration and consulting for cafeteria plans, health reimbursement arrangements and health savings accounts, and she is responsible for numerous outside technical writing projects for the department. In addition to having over ten years of experience in retirement services, Kimberly is also a CPA and has 17 years in public accounting with a background as an auditor in an international firm and in tax administration for a local CPA practice. Kimberly is a member of ASPPA, Ohio Society of Certified Public Accountants and the American Institute of Certified Public Accountants. She serves as the Vice Chair of The ASPPA Journal Committee and on ASPPA's Education and Examination Committee. (**kflett@ssandg.com**)*

Are We Engaged?

The Pros of Having Engagement Letters (There are No Cons)

by Ilene H. Ferenczy, CPC

One of the most important elements of an engagement letter is that it can limit your liability by clearly spelling out what you are (and are not) doing for the client. An engagement letter should also outline the client's duties, timelines and any other relevant information that will help create reasonable expectations for both parties.

When I was in my last position as a vice president of a third party administrator (TPA) firm before I went to law school, the company I worked for was purchased by a lawyer. One of the first things that the new owner did was require that we institute engagement letters for our clients. The president of the company and I looked at each other with amazement when the new owner told us about this change. We had many longstanding clients who had relationships with the firm for many years. We had never felt a need for engagement letters. More than 20 years later, here I sit, telling any TPA who will listen why they need to use engagement letters or agreements to outline the terms of their relationships with their clients. And, I get the same questions from them that I asked all those years ago.

- Do we really need engagement letters?
- Wouldn't our clients be offended when asked to sign to the terms of a relationship that had been in existence for years?
- Doesn't this engagement letter requirement appear as if we were calling their integrity into question?

The answers to the above questions are:

• *Yes.* You need engagement letters because they are important for your business, both in terms of protecting you and helping you do business effectively.

• *No.* Your clients will not be offended. They are accustomed to signing engagement letters with their own clients for their services, with their lawyers, with their accountants and with many of their other service providers.

One of the most important features of an engagement letter is that it can outline what you do *and what you* do not *do.*

• *No.* They will not feel as if you are questioning their integrity. In fact, they will see you as the professional that you are. It is all part and parcel of doing work with professionals. Business is, after all, business.

What Do You Mean When You Say Engagement Letters Can Protect Me?

The Scope of Your Services

There are functions that you do not fulfill for your clients that are elements of plan administration. Do you handle the funds? Do you make discretionary decisions for your clients (*e.g.,* determining whether a hardship has occurred or whether a participant is sufficiently credit-worthy to borrow money from the plan)? Do you file Forms 5500 for the client, or do you provide the forms for them to file? Do you prepare Forms 1099R for terminated participants and defaulted loans?

One of the most important features of an engagement letter is that it can outline what you *do* and what you *do not* do. The letter offers the dual value of defining the scope of the services for which you are taking responsibility

and can advise the client of tasks that need to be performed by someone other than you—perhaps by them, their accountant or attorney or another service provider.

If one or more of these tasks goes undone and liability results, the limitations of your engagement letter may be an excellent defense to a charge of malpractice or breach of contract.

Are You a Fiduciary?

To succeed in a lawsuit against you for a breach of fiduciary duties, your client first needs to demonstrate to a court that you are a fiduciary. If the court finds you are not a fiduciary, you cannot be held liable for a breach of fiduciary duties, thereby forestalling an entire line of lawsuits under ERISA.

Fiduciaries exist under ERISA in two ways: they are named in the plan document as such, or they perform the functions necessary to become a fiduciary—generally, exercising discretion in the plan's finances or operations.

The functional definition is the sticking point. Your client might try to show that you crossed the line by exercising discretion with regard to the plan. You will need to show that the line of demarkation is clear. One of the tools that you can use for this purpose is to show that your engagement letter provides in clear fashion that you are not a fiduciary and that you will not engage in any tasks on behalf of the client that would cause you to become a fiduciary. This engagement letter provision may not be all the evidence you need to convince the court, but it will be at least a good start. And when you remember the cost of litigation (easily into six figures), getting out of a lawsuit earlier rather than later can mean thousands and thousands of dollars in savings.

The Takeover Conundrum

Suppose you take over a case from another TPA in March 2007, effective for the plan year ending December 31, 2007. The prior TPA remains responsible for all administration for 2006 (including the Form 5500, which is due at the end of July, after your representation began).

Suppose further that the prior TPA fails to prepare and file the Form 5500 for 2006. In fact, the prior TPA does no work for 2006, and you do not discover this until late 2007 when you begin gearing up for your end-of-year work. When you discuss this with the client, the client insists that you were hired in March, so you were responsible for anything due after that.

If you had an engagement letter in place, it could specify the period for which you were providing services, and it would outline in clear form that your job did not entail finishing up 2006, limiting liability for you and providing clarity to your client as to the duties for which you were responsible.

Here is another common takeover problem. Suppose that the IRS sends this client an audit notice in 2007 to examine the plan for the year ending in 2005. When the IRS reviews the 2005 work, it finds errors in the nondiscrimination testing and threatens to disqualify the plan. The client looks to you and asks, "Why did you let this happen?"

If you had an engagement letter in place, it could outline the period for which you are providing services and the extent to which you are taking responsibility for the accuracy of prior years' information. Furthermore, it may remind you to charge for any extra time you agree to spend reviewing work performed by your predecessor.

How Can an Engagement Letter Make the Business of Being a TPA Easier?

Fees, Glorious Fees

You calculate that the client can contribute amounts to its cross-tested profit sharing plan that are the same as the prior year. The client asks you to determine what the contribution would be for the employees if you increase the allocation for the principals. You do another calculation. The client says that this scenario is too expensive. *What contribution can the principals receive if the contribution for the rank and file is limited to a lower, acceptable level?* You do a third allocation.

When you bill the client for these extra calculations, the client protests: You never said you were charging extra for these calculations!

Your engagement letter may outline what is included in your fees and what warrants extra charges. It may also outline your collection procedures, any interest that you charge on late payments, when your services are considered to be terminated due to nonpayment and the fact that any charges you incur in collecting delinquent payments are added to the client's bill.

This information has the dual benefit of advising clients up front about what your fees are likely to be, as well as being good evidence in any collection proceeding as to what the client agreed to.

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Expectant Clients, Expectant Service Providers

Both you and your clients have expectations about what each of you will do to facilitate the administration of the plan. You expect to get clean, complete and accurate data from your client on a timely basis. Your client expects you to perform certain services within a certain timeframe accurately and completely.

An engagement letter may help both you and your client establish reasonable expectations. You cannot accurately do your work if you get the data within the week before the final deadline for nondiscrimination testing or Form 5500 filing. Furthermore, you need your client to take charge of getting that data to you in a complete form. Every time you have to follow up to supplement piecemeal data, your job is harder to do. How can you advise your client of what you need to be successful in providing services?

Similarly, your client may expect you to complete your work within a relatively short period of time after you receive the data, not appreciating how much effort it takes to perform the tasks involved in your services. The client might not understand that the items you request are not superfluous. In fact, if you did not explain at the time your engagement began what the client was expected to do at year-end, the client may be surprised at your data request.

The engagement letter can clarify that you need data no later than some set period of time (30 days, 45 days) before tax forms are due. It can further outline that you will perform your tasks within a set period of time after receiving complete data. In other words, the letter can establish expectations for your clients so that they are neither surprised by what they need to do nor by what to expect from you. When your client's expectations are met, your client is happier—and so are you!

Anything Else?

Many other things can be encompassed within an engagement letter. For out-of-state clients, you can outline the law that will be used to interpret your engagement agreement is the law of your state. You can require that arbitration be used to resolve disputes. You can limit your liability to a given level. In fact, you can include just about anything in your engagement letter that you find helps you or provides clarity to your client.

What are the Disadvantages of an Engagement Letter?

Assuming that you have been thorough in your letter by including all important issues and that you are going to do what you promise to do, and assuming that you really want to hold your clients to their responsibilities under your relationship, there are no disadvantages to having an engagement letter.

What about that argument that clients will be offended? Again, your clients are accustomed to doing business with professionals and they should not be offended by having the terms of a business relationship reduced to writing. But, ask yourself: If the client refuses to sign to what you expect them to do, what are the chances that the client was going to do it in the first place? My father always told me, "If someone won't sign to it, he's not going to do it." My father was a smart guy.

In some states, ethical requirements force attorneys to use engagement letters, at least for jobs that are expected to cost the client in excess of some threshold dollar amount, such as $1,000. The reason why these letters are ethically required is that they ensure that both the lawyer and the client understand the parameters of the services to be provided. Why wouldn't any service provider prefer to have this kind of clarity?

*Ilene H. Ferenczy, Esq., CPC, APA, is an attorney with The Law Offices of Ilene H. Ferenczy, LLC, in Atlanta, GA, where she consults on all types of employee benefit plans. She is a Co-chair on ASPPA's Government Affairs Committee and serves on ASPPA's Board of Directors. She is a nationally known speaker on benefits issues and is the author of ASPPA's Defined Contribution Plans series and of more than 40 articles for various publications. (**iferenczy@ihflaw.com**)*

The ESOP Movement—Perspectives from The ESOP Association Leadership

by Malcolm R. Hartman

Since their establishment in 1974, Employee Stock Ownership Plans (ESOPs) have grown in popularity. There has been recent research that appears to confirm the thesis that employees *do* benefit from ESOPs. Basically, an ESOP is no more than a defined contribution plan. The ESOP invests most of its assets in the stock of the sponsoring corporation.

The ESOP community is a dynamic environment. The convergence of the various financial, business, legal and political issues adds to the challenge of the individuals and institutions involved with ESOPs. Yet, it appears that the future is bright for ESOPs. Many observers believe that the ESOP employee ownership movement is the wave of the future for American businesses. As a member of The ESOP Association board of directors, Mike Hartman solicited the insights and perspectives from other members of the board. Mike asked Steven Voigt, CEO, of The King Arthur Flour Company, Inc., and chair of the ESOP board of directors, about the future and the challenges facing ESOPs. Steven graciously responded on behalf of The ESOP Association board of directors. The following article was reprinted with permission from the Willamette Management Associates *Insights*[1], Winter 2007 issue.

Insights: What do you see as the future for ESOPs and for the employee ownership movement?

Voigt: I envision a 21st century where the majority of American employees own stock in the companies where they work.

Just as we have seen the growth of all-natural and organic products in our nation's supermarkets, I believe we will see the development and use of more sustainable governance solutions in American corporations. Expanded employee ownership—through ESOPs—will play a major role in this development.

To compare developments in the world that King Arthur Flour operates in, we see Americans selecting healthier foods. This trend is not because our government or because large corporations led the way. Rather this trend is due to values-driven, mid-sized companies in the food industry that laid out the information about food choices. And, consumers made their choices with this information in mind.

I expect a similar scenario in the world of employee ownership. This scenario is not just in the future, but it is developing right now. I see a scenario of values-driven, mid-sized companies, which are the core of the ESOP corporate community, leading the way with effective models of board governance, increased employee participation and more equitable wealth creation.

Insights: In your opinion, what are the primary issues facing the ESOP community today?

Voigt: The ESOP Association and its board recognize that there are threats to the growth of, and even to the very existence of, ESOPs. These threats come from some quarters of government, academia and media. However, we believe that these threats will be overcome, just as the ESOP community overcame similar threats in the 1970s, the 1980s and the 1990s.

I compare this situation to the success of the small organic producers. Against their formidable competitors, these producers are winning space on the shelves of the major supermarkets. By winning that space, not only did the small producers win, but so did the grocers and the public.

When the ESOP community wins, everyone in America wins, not just ESOP advocates.

To cite one threat, The ESOP Association's board is very aware, and disappointed, that the current Administration (while professing a policy to

promote an ownership society for America) has not been more responsive to the employee ownership movement. The current Administration has not, in any manner, made employee ownership in any form—and not just in the ESOP form—a part of that vision of an ownership society.

It is my belief that employee ownership is as powerful in building a fair and just society as home ownership or mutual fund ownership. This belief is shared not only by the board of The ESOP Association but by anyone who has ever worked for, or with, ESOP-owned companies.

Also, the Presidential Panel on Federal Tax Reform seems to have left no room for ESOPs in the tax structure it has recommended to the Administration. The Panel's recommendations are now being reviewed by Congress in hearings and by the Treasury Department.

Insights: What are some of the challenges currently facing ESOP trustees (either internal or independent/institutional trustees)?

Voigt: The question arises: How does the current environment affect the trustees of ESOPs? With the well publicized scandals in the past eight or so years, the scrutiny of the duties and responsibilities of ESOP trustees and fiduciaries has intensified. And so the focus of ESOP trustees and fiduciaries on their responsibilities also has intensified.

I have observed that as the ESOP model becomes older, and is used more, coupled with developments with non-ESOP models of governance, then quite naturally the level of scrutiny of ESOP trustees and fiduciaries has increased. And it will continue to increase.

The response to this higher level of scrutiny of trustee and fiduciary decisions impacting ESOPs should be education, discussion, debate and cooperation that explore policies, mechanisms, legalities and best practices. In this way, the ESOP trustee is learning not just to meet basic legal requirements. The ESOP trustee is also learning to master the opportunities to maximize the role of ESOP-owned companies as models for American businesses.

I am pleased that The ESOP Association, in cooperation with its New England chapter leadership, is in 2007 sponsoring a program for members of the board of directors of ESOP companies and trustees. The New England chapter will be marketing this program nationally.

This program, pioneered by the New England chapter, is an example of the type of education, discussion, debate and cooperation noted above. And, it will bring together the top leaders of ESOP companies in an open and candid review of the crucial role that directors and trustees in an ESOP company must play in developing high performance companies.

Insights: In your experience, do you find that ESOP employer stock valuations are generally accurate? Are improvements needed in this area?

Voigt: There is a question whether the valuation of privately held ESOP company stock can be improved, and if so, how? I believe that the discounted cash flow analysis, commonly used in the ESOP stock valuation process, should incorporate the sponsor company repurchase obligation as projected. In comparison to ten years ago, I am pleased to see that more and more employer stock valuations incorporate the sponsor company repurchase obligation as projected.

As a continuation of the emphasis on education of internal trustees and fiduciaries noted above, internal trustees are having greater appreciation as to who is legally charged with setting the value of ESOP sponsor company stock. As a result, internal trustees will be more involved with valuation issues. And, valuation professionals will have to accept this higher level of trustee involvement.

In conjunction with the trend that internal trustees will be more involved with valuation issues, I am extremely pleased that The ESOP Association's board has recently created an Interdisciplinary Advisory Committee on Fiduciary Issues. This committee complements and builds on the resources currently available to educate ESOP trustees and fiduciaries.

The new national meeting, the new advisory committee and the growing awareness of ESOP company trustee and fiduciary issues will all help raise the bar as to what are the best practices in our ESOP community. And, these best practices will relate to governance, management and day-to-day practices.

In looking over recent developments and in thinking of the future, I am optimistic that ESOPs have a great future in our nation. This optimism is because of the commitment, passion and just plain horsepower of the people in the ESOP community.

Insights: Steve, thank you for your time—and for your thoughtful observations.

Malcolm R. Hartman is a principal in the Atlanta, GA, office of Willamette Management Associates. As a leading financial advisor, Mike specializes in ESOP engagements relating to feasibility studies, post transaction cash flow analysis and transaction financing. ***(mrhartman@willamette.com)***

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1 *Insights,* a journal of applied microeconomics, is published on a quarterly basis with periodic special interest issues and distributed to the friends and clients of Willamette Management Associates and Willamette Capital. For further information, please visit **www.willamette.com**.

FROM THE PRESIDENT

Your Dollars at Work

by Chris L. Stroud, MSPA

Did you ever wonder how much money it takes to keep ASPPA going at today's rapid pace? How do the dollars that ASPPA brings in translate to benefits for you—the member? I am hoping that the pie charts and explanation below will help shed some light on these issues for you.

ASPPA's core purpose is to educate all retirement plan professionals and preserve and enhance the employer-based retirement system. When you study ASPPA's 2006 revenues and expenses, with much of our focus on Education (courses, publications, exams, conferences and webcasts) and Government Affairs, it is easy to see that we remain true to our core purpose. One of ASPPA's strengths is that our most significant revenue streams are distributed over several major areas—education courses, exams and publications; conferences and webcasts; and membership dues. Unlike many other professional organizations that rely primarily on dues for revenue, ASPPA is able to provide additional benefits with revenue generated from our programs and services.

It takes a lot of money to produce quality education, conference and webcast programs. That is why you see quite a bit of the money collected for these programs going right back out as expenses to put on these programs. ASPPA leadership, however, is constantly looking for ways to add value to our programs as well as for ways to cut costs without sacrificing quality. For example, we are taking strides to reduce unnecessary paper, especially in the conferences area, and taking greater advantage of electronic distribution of materials. We have changed *The ASPPA Journal* from bimonthly to quarterly to reduce printing and mailing costs, and the related CE quizzes are now only available electronically. We will also be looking at delivering future editions of the *ASPPA Yearbook* electronically, which will give you added advantages such as search capabilities and bookmarking, as well as allowing you to print it, if desired. As we automate services and reduce costs, we free up dollars to spend on other valuable member benefits.

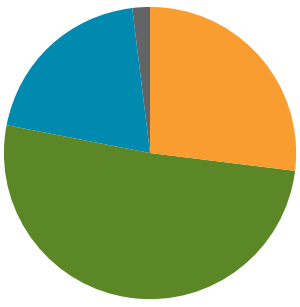
A significant portion of our revenue is spent on Government Affairs efforts. Our entire membership benefits from ASPPA's active role in legislative and regulatory efforts, as well as our lobbying efforts.

There are several new member benefits reflected under various expense categories that are definitely value-added services for our members—our new ASPPA Discussion Forums, the new *ASPPA enews* publication and the coming-soon Professional Services Directory. ASPPA has expanded its infrastructure and technology to support these new offerings. ASPPA also continues its marketing efforts to "brand" ASPPA and expand our circles of influence, as well as promoting the benefits of ASPPA membership and the value of ASPPA credentials.

You will note that our largest expense is related to "staff, benefits and office expenses." In the past few years, ASPPA leadership has made a significant commitment to add staff "chiefs" to bring individuals with high-level management skills to ASPPA to oversee the major areas. In addition, a portion of the Education expenses represents the fees paid to our Technical Education Consultants (TECs) and fees to support our relationship with the University of Michigan, which help ASPPA maintain high standards in our educational programs. People are always an organization's most precious asset, and ASPPA is well positioned for future growth because of our significant investment in many talented individuals—and, of course, the strength and passion of our volunteers.

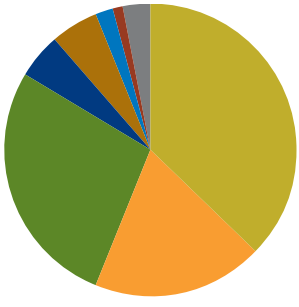
Chris L. Stroud, MSPA, MAAA, EA, is president of Stroud Consulting Services, Inc., in Marco Island, FL. Chris has 28 years of experience in retirement planning, software and management consulting, and sales and marketing. Prior to setting up her own consulting firm six years ago, she was employed by FDP for 22 years, a pension and insurance software firm that was purchased by SunGard. Chris now offers a variety of consulting services to several firms, including continued support to SunGard for all SunGard Relius products. Chris is the President of ASPPA and the Editor of The ASPPA Journal. *(**chris.stroud@relius.net**)*

2006 Revenue (in thousands)



Educational courses, publications & exams	2,569
Conferences & webcasts	4,874
Membership dues	1,888
Other	144
Total	9,475

2006 Expenses (in thousands)



Staff, benefits & office	3,360
Educational courses, publications & exams	1,689
Conferences & webcasts	2,680
Government affairs	409
Marketing	462
Exec group (Board, Exec Comm & Interprof.)	178
Printed Yearbook	64
Other	242
Total	9,084

Nominations to the ASPPA Board of Directors—The Ultimate Volunteer Job

by Sarah E. Simoneaux, CPC

Both of my children have grown up with a mother who, fortunately or unfortunately, loves to volunteer. Scouts, church, school and community cleanups have been, or still are, a part of my volunteer life. As I move from activity to activity, the kids ask, "What about ASPPA? Are you still doing *that*? Mom, come on, it's not a *paying* job!" As I wax philosophically about the joys of volunteering for ASPPA, their eyes glaze over in that unique way of teenagers pretending to listen as their parents are talking.

I give up the lecture, but continue my philosophical musings in silence. Why have I stuck with ASPPA for so long? Certainly, it is much more related to my career than post-Katrina cleaning up. And it has all the positives of a good volunteer experience: working with great people, getting more out of it than you put into it and feeling as if you are making a difference. Ultimately, though, I keep coming back to my time on the ASPPA Board of Directors. The Board's strategic focus, fun and productive meetings, and its focus on what is best for ASPPA members and the retirement profession are key reasons I am still doing this non-paying job.

However, I am reaching the end of my ASPPA Board of Directors service. Despite my personal sadness at leaving, this departure is a good thing for ASPPA. Open slots on the Board allow ASPPA to bring in new leaders with new visions. Because the Board is working on strategic issues facing ASPPA and the industry over the next five to ten years, input from new Board members is essential to ensure that ASPPA fulfills its mission. The Board's Governance Task Force has been working for several years to better define characteristics of Board members and how they are selected. That process is still ongoing and more details may be available at a later date, but as Chair of the Nominating Committee, I urge you to read on about the characteristics the Nominating Committee seeks for Board members and how you can nominate potential new ASPPA leaders for the Board right now.

Board Member Characteristics

The Nominating Committee looks at a variety of characteristics of the individual when determining who would be a good ASPPA Board member. They also take into account the current makeup of the Board and the number of open slots. The characteristics include:

- Leadership qualities
- Ability to meet ASPPA's core values of strategic thinking, responsiveness, courage and dedication
- Willingness to serve in a leadership capacity
- Activities within ASPPA, including demonstrating leadership in more than one area
- Ability to represent the organization as a whole
- Credentialed voting member of ASPPA

When you submit your nomination, take these characteristics into account. Feel free to comment on the candidate's strengths in each of these areas. Read on for specifics on how to nominate someone.

The Nomination and Selection Process

The Nominating Committee begins looking at candidates in the spring and continues its work into the summer. Prior to the ASPPA Annual Conference, the Nominating Committee submits a slate of prospective Board members to the Board. This slate is then presented to the ASPPA membership for a vote at the Annual Business Meeting that takes place during the ASPPA Annual Conference.

Now is the time to submit qualified candidates to ASPPA for the Nominating Committee's review. A candidate must be a credentialed member of ASPPA (FSPA, MSPA, CPC, QPA, QKA, QPFC or APM) and must be nominated by at least two credentialed ASPPA members—and remember that you can even nominate yourself! The nomination form can be found online at **www.asppa.org/forms/boardnomform.htm**. The submissions deadline is August 22, 2007.

The Nominating Committee keeps nomination forms on file from previous years for candidates that

did not become Board members. The committee, however, would like updated information on any candidate who is still interested in serving on the Board, or, alternatively, any candidates who no longer wishes to be considered. You can e-mail that information to the Board liaison, Troy Cornett, at **tcornett@asppa.org**.

The committee is looking forward to receiving Board nominations of ASPPA credentialed members who have vision and leadership skills and a willingness to serve. Serving on the ASPPA Board of Directors is the ultimate "no-paycheck" job!

*Sarah E. Simoneaux, CPC, is a pension consultant specializing in qualified plan compliance software. She is vice president of Actuarial Systems Corporation, a qualified plan system and software provider. Before joining ASC, Sarah owned a pension consulting firm in California. Sarah is ASPPA's Immediate Past President and has served on ASPPA's Board of Directors for over a decade. She has also held the positions of President, President-Elect, Vice President and Treasurer with ASPPA, and she has chaired the ASPPA Conferences, Membership and Marketing committees. She has lectured at ASPPA's Annual Conference, regional conferences, as well as at the AICPA Annual Employee Benefits meetings. (**ssimoneaux@asc-net.com**)*

Announcing Incoming ASPPA President-Elect

The ASPPA Board of Directors is pleased to announce the selection of Stephen L. Dobrow, CPC, QPA, QKA, QPFC, as the incoming 2007-2008 ASPPA President-Elect.

Congratulations Stephen!

Stephen's term as President-Elect will begin in October, at the end of the 2007 ASPPA Annual Conference, as Sal L. Tripodi begins his term as President.

Nominations Open for ASPPA's Board of Directors

Submit by: August 22, 2007

If you know a forward-thinking ASPPA credentialed member (FSPA, MSPA, CPC, QPA, QKA, QPFC or APM) with admirable leadership skills, please nominate them today.

Visit **www.asppa.org/forms/boardnomform.htm** to submit your nominee's name to the ASPPA Nominating Committee.

Questions? Contact Troy Cornett, the Board of Directors Liaison, at **tcornett@asppa.org**.

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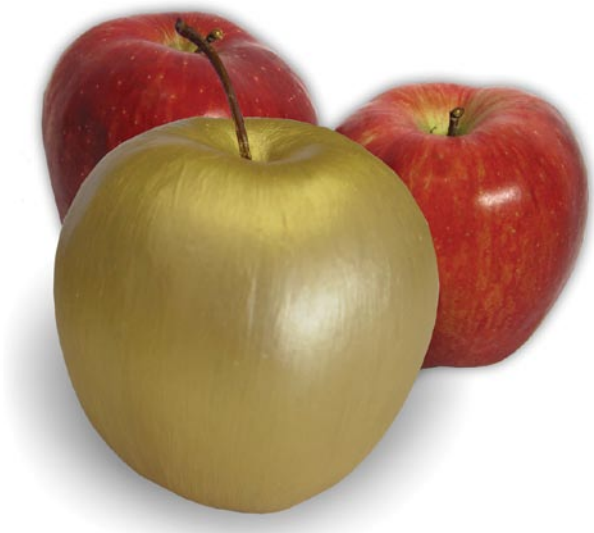


ASPPA's Advanced Actuarial Conference: Focusing on the Pension Actuary

by William G. Karbon, MSPA, CPC, QPA

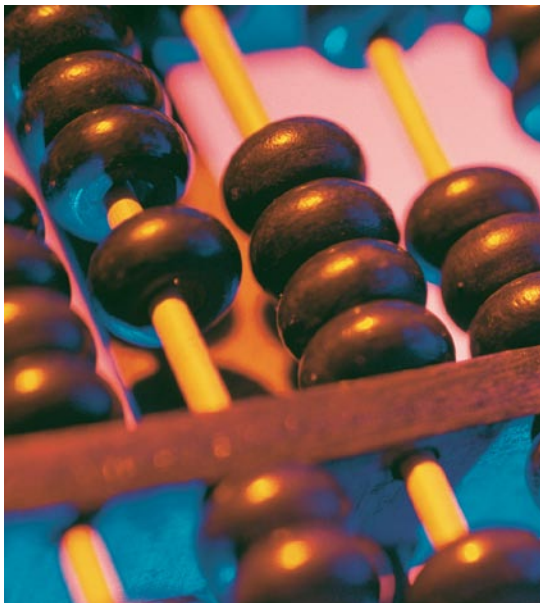
The Pension Protection Act of 2006 (PPA) created many challenges for the pension actuary. How can the actuary stay current and deal with the ever-changing nature of the pension industry? ASPPA created the Advanced Actuarial Conference (AAC) to focus on the unique needs of the pension actuary and assist the actuary in addressing these many challenges.

ASPPA recognized the need to create a conference designed to meet the needs of practicing pension actuaries and other professionals holding significant pension actuarial positions. To satisfy this need, ASPPA held the first AAC in 2006. As a result of the favorable response to last year's conference, ASPPA will again host the AAC on June 5 and 6 in Boston, MA.

The 2006 attendees clearly indicated that much of the conference's success was due to the smaller, more interactive nature of the workshop sessions. The conference format encouraged interactive discussions of session topics, allowing practitioners to share experiences and discuss issues that are in need of regulatory guidance.

To meet the needs of the entire pension actuarial community, the AAC planning committee successfully encouraged members from the other actuarial organizations to participate. In addition to offering many ASPPA speakers, a significant number of speakers and attendees were also active members of the Society of Actuaries, the American Academy of Actuaries and the Conference of Consulting Actuaries. The outreach to other actuarial organizations broadened the array of session topics and expanded the pool of talented speakers.

This year's conference will offer the same successful interactive format, as well as the same integration of members from other actuarial organizations. General sessions will address critical issues for today's pension actuaries, including a presentation providing insights on PPA's actuarial provisions, a Q&A session with the IRS and an actuarial policy update. The remainder of the conference will be devoted to interactive workshops conducted by leaders of the pension actuarial profession.



The AAC provides an opportunity to address issues unique to the pension actuary in an environment encouraging an open exchange of ideas and information.

Many of the interactive workshops will address specific PPA issues, including:

- "Hands-on" sessions detailing the calculations required by the new funding and lump sum requirements;
- Explanations of the yield curve and the RP 2000 mortality table, and the impact of these items on new funding requirements and lump sum benefit rules;
- Opportunities created for cash balance plan design;
- An analysis of the changes to investment allocation decisions and methodologies resulting from the new funding rules; and
- A discussion of the myriad of new notice and disclosure requirements.

Conference topics will also include legal issues that are of interest to the pension actuary. For example, one workshop session will be devoted to recent actuarial litigation while another workshop will address legal concepts faced by the actuary. Additional workshops will focus on new industry trends and plan design issues, including non-traditional defined benefit plan designs such as variable annuity plans, floor offset plans and other hybrid plan designs.

This year's conference will close with an Ask the Experts session. Attendees will have a chance to ask questions to a panel of experts on any pension actuarial topic and hear the opinions and insights of various industry leaders.

The AAC provides an opportunity to address issues unique to the pension actuary in an environment encouraging an open exchange of ideas and information. In light of the considerable changes occurring in the pension actuarial world today, this conference offers the perfect venue for you to network with your peers and gain additional knowledge on critical issues. We hope to see you there!

William G. Karbon, MSPA, CPC, QPA, is a vice president and senior retirement plan consultant with CBIZ Benefits & Insurance Services, Inc., located in Plymouth Meeting, PA. He is an Enrolled Actuary and serves as Co-chair of The ASPPA Journal Committee. He has also served on ASPPA's Education and Examination and Professional Conduct committees. Bill has been a featured speaker for professional organizations and authors the Pension Roundup *on* ***freeerisa.com****. He has also technically reviewed books on 401(k) plans and has been an instructor for advanced consulting classes sponsored by ASPPA. (****wkarbon@cbiz.com****)*

GOVERNMENT AFFAIRS

ASPPA GAC's Still At It: February Hill and Treasury Meetings

by Ilene H. Ferenczy, CPC

You might think that, with the Pension Protection Act of 2006 (PPA) on the books, ASPPA's Government Affairs Committee (GAC) would be resting on its laurels, or at least turning its full attention away from Congress and to the administrative branch of government. Not so!

While GAC has recently placed a lot of its volunteer resources into obtaining or analyzing guidance that the Treasury, IRS, DOL and PBGC are issuing, GAC is still mindful of the role that the legislature plays in shoring up the employer-sponsored retirement plan system.

In February, GAC had its first of three 2007 face-to-face meetings in Washington, DC. Besides planning our endeavors for the next 12 months, we also took this occasion to meet with several Congressional staffers, as well as representatives of the US Treasury.

The congressional meetings were particularly important on this occasion, notwithstanding the fact that the legislature certainly did its part last year when PPA was pushed through at the 11th hour! With the change from republican to democratic majority in the House and the Senate, it was important for GAC to get to know the new players, as well as to reacquaint ourselves with staff of the members of Congress who have gone from being back benchers to being in control of the various committees. We met with members of the

- House Committee on Ways & Means [in particular, Mildeen Worrell, an aide to new chair Charles Rangel (D-NY)];
- House Committee on Education and Labor;
- Senate Committee on Finance [including former ASPPA member and actuary Judy Miller, who is an aide to chair, Senator Baucus (D-MT)];
- Senate Committee on Health Education, Labor and Pensions, republican and democratic staff; and

- Staff from the offices of Senators Conrad (D-ND), Kerry (D-MA) and Smith (R-OR).

While some of the meeting time was spent getting reacquainted, GAC took the opportunity to discuss some new and some continuing ideas for future legislation. Included in our grab-bag of position papers on various issues were discussions of the proposed Smith-Conrad-Kerry bill, which is intended to expand the practical benefit of retirement plans to women and small business. GAC discussed the considerations for payroll-deduction IRA programs (which requires it to be sponsored by certain employers who do not maintain qualified plans), the administrative savings that would result from permitting 401(k) account earnings to be part of a hardship distribution, and our recommendation to permit an individual defined benefit plan to be aggregated with other plans for passing the limitations of Code Section 401(a)(26).

GAC will be spending a good part of 2007 working with Congress and the Administration to ease the reporting and disclosure burdens that have been caused by PPA's various provisions and other legislation. For the February meetings, we focused our attention on discussing with the congressional staff the DOL's 45-day statement requirement for trustee-directed investment plans

is unworkable. While the participant statement requirements outlined by the DOL in Field Assistance Bulletin (FAB) 2006-03 are problematic for many reasons, we selected this particular issue for these meetings because the need to comply with these rules is so imminent. In fact, it is almost assured that, as practitioners attempt to comply with the DOL's rules for these plans, the information given to participants will be more confusing and less informative than what most plans provided to participants prior to PPA's passage. Even though the DOL's guidance may offer some level of certainty as to what is needed, we are all loathe to give participants "statements" that will confuse them, anger them and produce resentment toward the plan sponsors in the name of legal compliance. GAC is working with the DOL to discuss and resolve these issues, but Congress remains a viable avenue of respite as well.

An area of significant frustration for actuaries is the potential for great volatility in the limitation of benefits paid in a lump sum from a defined benefit plan. This volatility is based on the fact that the interest rate to be used under Code §415 potentially fluctuates with the market. GAC lobbied before PPA to remove the variable interest factor that creates this volatility and was unsuccessful. Nonetheless, particularly with a different makeup to the congressional majority, GAC continues to point out how problematic this kind of unpredictability is to the viability of defined benefit plans, which are sorely needed in this country if we are to have any level of significant retirement security.

The need for proper fee disclosure weighs on everyone's minds as the DOL considers what guidance it will issue. Similarly, private lawsuits on this issue are beginning to become more common. We discussed these concerns, as well as the difficulties plan sponsors have trying to access the information they need to properly assess fees, in an attempt to get the congressional staff thinking about how legislation can impact disclosure in a positive fashion.

GAC also continues to think ahead to potential legislation that may be in the "thought" stages or not on the congressional radar at all. In that category, we spoke with congressional staff about ideas that arose out of the Conversation on Coverage, particularly with regard to the GAP (Guaranteed Account Plan) proposal. GAP is a proposed hybrid plan that contains elements of a cash balance plan and a cross-tested 401(k) plan. It provides an annual allocation with a guaranteed interest credit (like a cash balance plan), can have a 401(k) feature, can use cross-testing for nondiscrimination and provides a "safe harbor" under which an employer can pass nondiscrimination testing automatically by making a set annual contribution for the non-highly compensated employees.

The second GAC proposal for legislation that may be only a passing thought for senator or representatives at the moment relates to ERISA lawsuits. Due to the opinions of certain federal court judges, participants in some circuits who have suffered from breaches by fiduciaries have no standing to sue for their rights under ERISA because all participants in the plan were not victims of the damage. GAC proposed to staffers that Congress consider legislation to repair this situation so that all participants who are the victims

GAC Corner

ASPPA Government Affairs Committee

Comment Letters Recently Filed

January-March 2007

March 16
Comments to the IRS on the model notice on the new diversification requirement for publicly traded employer securities
www.asppa.org/pdf_files/govpdffiles/0316_Employer_stock_diversify.pdf

March 12
Comments to the IRS on its Employee Plans Compliance Resolution System
www.asppa.org/pdf_files/govpdffiles/0312_EPCRS.pdf

March 5
Comments for the record to the House Committee on Education and Labor on 401(k) plan fee disclosure
www.asppa.org/pdf_files/govpdffiles/2007_03_House_E&L_401(k)_fees_for_the_record.pdf

February 21
Comments to the DOL on its RFI on Investment Advice
www.asppa.org/pdf_files/govpdffiles/0221RFIInvestmentadvice.pdf

February 15
ASPPA, SBCA the US Chamber and NFIB submitted a letter to DOL regarding its 45-day Requirement to Provide Benefit Statements
www.asppa.org/pdf_files/govpdffiles/Trustee_Directed_Bnft_Stmts_DOL21507w-NFIB.pdf

January 24
Testimony submitted to the Senate Committee on Finance on SIMPLE Cafeteria Plans
www.asppa.org/pdf_files/govpdffiles/2007_01_Senate_Finance_SIMPLE_Cafe_Plans_FIN.pdf

For all GAC filed comments, go to **www.asppa.org/government/gov_comment.htm**.

of fiduciary wrongs have proper recourse.

In addition to our congressional meetings, GAC representatives spent some time with Treasury officials, hoping to give input on the areas requiring guidance, and to encourage Treasury and the IRS to ease some of the administrative burdens caused by PPA and other laws.

GAC continues to encourage Treasury to consider eliminating the paperwork burdens caused by interim amendments, encouraging the use of the five-year or six-year restatements to bring plans up to date. Treasury reiterated its concern that plans must clearly outline participant rights, or else enforcement is difficult, both from a tax standpoint and an assurance of participant benefits viewpoint. GAC will continue to advocate that the government ease plan sponsors' documentation burdens.

GAC also discussed with Treasury the difficulties of complying with the new guidance on diversification of employer securities for companies whose stock is traded either on an over-the-counter bulletin board (which the IRS has privately ruled does not constitute "publicly traded") or on an exchange, but their trading is so thin as to make daily trades practically impossible. While the Treasury officials admitted that they did not consider the burdens and impact of thinly traded securities when issuing their guidance, they had no recommendations for practitioners who are unable to comply with the rules as currently stated.

On the whole, the meetings were productive. GAC continues to connect with the various governmental representatives, and to give input on behalf of ASPPA members. Furthermore, we know that our comments are considered by both Congress and Treasury. We will strive to ensure that our concerns be given due consideration as guidance or legislation is formulated.

Ilene H. Ferenczy, Esq., CPC, APA, is an attorney with The Law Offices of Ilene H. Ferenczy, LLC, in Atlanta, GA, where she consults on all types of employee benefit plans. She is a Co-chair on ASPPA's Government Affairs Committee and serves on ASPPA's Board of Directors. She is a nationally known speaker on benefits issues and is the author of ASPPA's Defined Contribution Plans series and of more than 40 articles for various publications. (iferenczy@ihflaw.com)

ABC of Greater Cincinnati—Building for the Future

by John P. Stebbins, QKA

The ASPPA Benefits Council (ABC) of Greater Cincinnati continues its four-year tradition of emphasizing a strong programming schedule and focusing on increasing membership.

Last year our programming committee obtained annual speaking commitments from preeminent speakers who are recognized within the retirement plan industry. This approach and the diligent efforts of our programming chair, Gina Moore, have made it easier for our chapter to pre-populate our current year programming and establish a robust 2007 Programming Calendar:

January 23
Scott Campbell, DOL/EBSA

February 27
Frank J. Bitzer, Fifth Third Bank Council

March 27
Craig P. Hoffman, APM, SunGard Relius, LLC

April 24
Membership Appreciation Celebration

May 2
IRS

June 14 – 15
Cincinnati Employee Benefit Conference

September (TBD)
ASPPA National Speaker

November 13
ABC Testing Workshop

December 11
ABC Annual Business Meeting
Guest Speaker: Richard A. Hochman, APM, McKay Hochman Co., Inc.

Last year the ABC of Greater Cincinnati reached an all-time high of 193 members. Our goals of reaching 100% membership renewal and increasing chapter membership by 10% are ahead of schedule, thanks to the efforts of our membership chair, Patricia Perry, and treasurer, James Seibert. As we rapidly approach our ABC's Membership Appreciation Celebration, our promotional efforts to reach out to the community continue to attract new members.

We have focused our efforts to increase the head-count from each corporate renewal and have personally invited new organizations to join our ABC. Having a pre-populated programming calendar has been a great help to advertise the chapter's benefits during our membership drive. As of February 20, we have 165 membership renewals, which is 78% of the way toward reaching our 2007 goal of 213 ABC members. It is also a 70% increase over renewals received last year at this time.

Our chapter's 2007 project is to create the ABC of Greater Cincinnati Web site. We are working with Donna Lee of Benefit-Insights, Inc., who has assisted several ASPPA chapters in designing their own Web sites. We are building Greater Cincinnati's Web site to enhance our chapter and improve our ability to communicate with professionals. Look for the ASPPA Benefits Council of Greater Cincinnati's Web site soon.

John P. Stebbins, QKA, is the 2007 president of the ABC of Greater Cincinnati and senior consultant for Fidelity Investments in Covington, KY. (john.stebbins@fmr.com)

ABC of Cleveland—Looking Back on 2006 and Forward to 2007!

by *Kimberly E. Funderburg, CPC, QPA, QKA*

All professionals, especially those at small companies, understand how hard it is to keep up with changing rules and regulations. To assist retirement plan professionals, each year the ASPPA Benefits Council (ABC) of Cleveland hosts five luncheons where speakers are featured who discuss legislative updates, IRS and DOL initiatives, etc. The luncheons are a great way to stay up to date while earning continuing education credits and networking with fellow retirement plan professionals.

The ABC of Cleveland worked hard in 2006 to bring high quality credentialed speakers to our luncheon series. We also made great strides with our sponsorship committee, chaired by Chris M. Danko, QPA, QKA, and had two luncheons with corporate sponsorship, which was a first for us! In 2006 we hosted the following speakers and sponsors:

- In February, Stephen W. Forbes, vice president of the Denver Division of SunGard, braved the Cleveland weather and joined us to discuss retirement plan corrections and review the new 415 regulations.
- In April, Brian H. Graff, Esq., APM, ASPPA Executive Director/CEO, provided his annual Washington Legislative Update, again drawing a record number of attendees.
- In June, we welcomed Daniel S. Gardner from the IRS. Daniel provided insight on IRS audit and examination activity as well as other IRS initiatives and was very well received by those who attended.
- In November, we featured nationally renowned speaker Ted Benna, often considered "The Father of 401(k)." Ted provided a history of the 401(k) industry and addressed certain aspects of the Pension Protection Act of 2006. This luncheon was sponsored by Prudential Retirement & Van Kampen.
- In December, Paul Baumann, Deputy Regional Director, EBSA Cincinnati Regional Office of the DOL, joined us to discuss DOL audit and enforcement activity and provide an update on upcoming initiatives. Great West Retirement Services was our sponsor for this luncheon.

With the amazing 2006 lineup of speakers, we knew 2007 was going to be a challenge, but we are pleased to report that we are off to a great start! Michael H. Olah, director of ERISA services of Charles Schwab, joined us in February and spoke about "Uncommon Solutions to Common Plan Problems." His perspective and real life examples provided the attendees with practical solutions to the often confusing and difficult issues which arise each and every day.

The featured speaker for the April 17 luncheon was Brian Graff, who again provided a Washington Update. Brian's insight regarding what is happening in Washington is riveting and very entertaining. In past years, Brian's presentations have drawn our largest crowds. The luncheon was sponsored by The Hartford.

While the final line up of speakers and luncheon dates is not finalized, there are plans underway for June, October and December luncheons.

For more information about the ABC of Cleveland, including membership registration and upcoming events, contact Brenda C. Loewenthal, QKA, at Brewster & Brewster, Inc., 440.951.8889 Ext. 115 or **brendal@brewsterandbrewster.com**.

Kimberly E. Funderburg, CPC, QPA, QKA, is the manager of the Internal Control Department for Schwab Corporate and Retirement Services, in Richfield, OH. She has nine years of experience in retirement plan administration and is the current president of the ABC of Cleveland. (kimberly.funderburg@schwab.com)

Welcome New Members and Recent Designees

MSPA

Garnik M. Akopyan, MSPA
Michael E. Clark, MSPA
Thomas C. Holman, MSPA
James Voelker, MSPA

CPC

Carol L. Carlson, CPC, QPA, QKA
Leigh Carlyle, CPC, QPA
Patricia Clark, CPC, QPA, QKA
Lisa P. Clontz, CPC, QPA, QKA
Andrew J. Cooper, CPC, QPA, QKA
Ryan A. Gray, CPC, QPA, QKA
Leslie B. Hart, CPC, QPA, QKA
Stephanie M. Hepler, CPC, QPA, QKA
Kyla Marie Keck, CPC, QPA, QKA
Glenn P. Klinger, CPC, QPA, QKA
Manuel Marques, CPC, QPA, QKA
Michael R. Nelsen, CPC, QPA, QKA
Koralee K. Putnam-Roup, CPC, QPA
Katherine D. Stephenson, CPC, QPA, QKA
Peter K. Swisher, CPC, QPA
Gordon K. Tewell, CPC, QPA, QKA
Ann M. Weaver, CPC, QPA, QKA
Nicholas J. Zapf, CPC, QPA

QPA

David Blanchett, QPA, QKA
John S. Buttrick, QPA, QKA
Deborah L. Calhoun, QPA, QKA
Jana J. Chambers, QPA, QKA
Scott F. Colby, QPA, QKA
Elaine M. Cone, QPA, QKA
Gerianne DeRosa, QPA, QKA
Ralph D'Souza, QPA, QKA
Shirley A. Fox, QPA, QKA
Penny P. Gravley, QPA, QKA
Reginald Hector, QPA, QKA
Sharon A. Hinds, QPA, QKA
Kari N. Jakobe, QPA, QKA
Glorianna S. Lee, QPA, QKA
Steven P. Lyons, QPA, QKA
Tonia R. McBride, QPA, QKA
Annette B. McMahon, QPA, QKA
Brandy R. Moore, QPA, QKA
Matt M. Moriarty, QPA
David Mulkern, QPA, QKA
Keith M. Nazak, QPA, QKA
Suzanne D. Newton-Wiegand, QPA, QKA
Kean Nguyen, QPA, QKA
Brian Patterson, QPA, QKA
Steve S. Riordan, QPA, QKA
Scott Salisbury, CPC, QPA, QKA, QPFC
Kathleen A. Smith, QPA, QKA
Douglas M. Spickard, QPA, QKA
Carla J. Stucky, QPA, QKA
Victoria L. Waun, QPA, QKA
Amy E. Weihl, QPA, QKA
Jeanette L. Williams, QPA
Tammy A. Williams, QPA, QKA
Heather K. Yeager, QPA, QKA
Holly Anne Youzwak, QPA, QKA

QKA

Joanne Abitabilo, QKA
Kelly Aldrich, QKA
Kelly Alexander, QKA
Stacey L. Anderson, QKA
Janice E. Antal, QKA
Tyree Artis, Sr., QKA
Mary A. Bailey, QKA
Charles Edward Balch, QKA
Deborah K. Baze, QKA
Kimberly A. Beal, CPC, QPA, QKA
Barry A. Bilger, QKA
Nicole Biron, QKA
Terrilee Blakely, QKA
Elizabeth Carol Brinkley, QKA
Kimberly H. Buehler, QKA
Tabitha Bush, QKA
Jill Butt, QKA
Valeri R. Dedich, QKA
Kirk A. Disch, QKA
Kathy Jo Disney, QKA
Iris R. Dodson, QKA
Shannon M. Dolan, QKA
Marsha L. Donalson, QKA
Ralph D'Souza, QPA, QKA
Daniel Echevarria, QKA
Kristin A. Ertel, QKA
Ryan Estomin, QKA
Dominic C. Etienne, QKA
Cara M. Farley, QKA
Joshua W. Fetzer, QKA
Jason F. Fink, QKA
Ron Fishman, QKA
Lisa E. Flowers, QKA
Diana Garcia, QKA
Thomas J. Gogoj, Sr., QKA
Kari A. Hall, QKA
Janice B. Hardcastle, QKA
Ronald A. Hayunga, QKA
Stefanie L. Hensler, QKA
Tenille M. Himmel, QKA
Mary R. Horn, QKA
Shawn M. Howard, QKA
Urmez K. Hozdar, QKA
Patricia J. Huebner, QKA
Lisa L. Huinker, QKA
Penny J. Jentis, QKA
Carol S. Kalas, QKA
Keith P. Keidl, QKA
Terrie L. Kilgore, QKA
Regina O. Kingsborough, QKA
Kira L. Krapcho, QKA
Jeanne E. Krauss, QKA
Ann B. Large, QPA, QKA
Nadeen O. M. Lawrence, QKA
Connie Lee, QKA
Glorianna S. Lee, QPA, QKA
Miyeon Lee, QKA
Jeanette M. Liszewski, QKA
Sherri A. Mahaffey, QKA
Cynthia J. Maiorano-Putti, QKA
Christopher J. Martin, QKA
Joshua Martin, QKA
Kathleen McAuley, QKA
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Jared T. Torgan, QKA
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Linda S. Weatherly, QKA
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Scott Salisbury, CPC, QPA, QKA, QPFC

APM

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Brian Gawthrop, APM
Stephen T. Hester, APM
Melvia D. Weinberg, APM
John T. Wyatt, III, APM

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Debra L. Vilkanskas
Ronda F. Washington
Laura L. Whitlock
Bill Wostoupal

ASPPA Calendar of Events

Date	Description	CE Credits
May 3 - 4	Great Lakes Benefits Conference • Chicago, IL	15
* May 13	Final registration deadline for spring examinations	
May 14 - Jun 29	Spring 2007 examination window (DB, DC-1, DC-2, DC-3, PFC-1 and PFC-2)	
May 22	C-3 examination	
May 24 - 25	DOL Speaks: The 2007 Employee Benefits Conference • Washington, DC	15
Jun 5 - 6	Advanced Actuarial Conference • Boston, MA	15
Jun 7	Northeast Area Benefits Conference • Boston, MA	8
Jun 8	Northeast Area Benefits Conference • New York, NY	8
July 22 - 25	Western Benefits Conference • San Francisco, CA	20
Sep 14	Early registration deadline for fall examinations	
Sep 20 - 21	Benefits Conference of the South • Atlanta, GA	15
Oct 19	Final registration deadline for fall examinations	
Oct 21 - 24	ASPPA Annual Conference • Washington, DC	20
Nov 1 – Dec 14	Fall 2007 examination window (DB, DC-1, DC-2, DC-3, PFC-1 and PFC-2)	
Nov 15	C-4 examination	
Dec 31	RPF-1 & RPF-2 examination deadline for 2007 online submission (midnight, EST)	

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

ABC Meetings Calendar

May TBD
ABC of Central Florida
401(k) Fees
Matthew Hutcheson

May 8
ABC of Northern Indiana
Legislative and Regulatory Update
Robert J. Toth, Jr. and
David J. Kolhoff, APM

May 22
ABC of Greater Cincinnati
IRS Presentation – "How to Prepare for IRS Audit"
Steve A. Detillian

May 24
ABC of Atlanta
Corrections Program Workshop
Ilene H. Ferenczy, CPC, and
John D. Hartness, APM

May 31
ABC of Detroit
Post-Traumatic 1st Quarter Benefit Statements and What to do Here-after; Other PPA06 Practical Tips
Cheryl L. Morgan, CPC, QKA

June 8
ABC of Western PA
Current DB Issues/Emphasis on Funding and Notice Requirements
Michael L. Pisula

June 14 & 15
ABC of Greater Cincinnati
Cincinnati Employee Benefits Conference
TBD

June 21
ABC of Atlanta
Prohibited Transactions Workshop
Alex M. Brucker, APM

July TBD
ABC of Central Florida
ESOPs
Steve Sheppard

August 28
ABC of Greater Cincinnati
ERISA Update
S. Derrin Watson, APM

September 11
ABC of Western PA
Fiduciary Rules and Responsibilities
Eugene F. Maloney

September 13
ABC Dallas/Ft. Worth
Washington Update
Brian H. Graff, Esq., APM

September 20
ABC of Detroit
Full-day ERISA Seminar
Sal L. Tripodi, APM

September 21
ABCs of Central and South Florida
Washington Update
Brian H. Graff, Esq., APM

September 25
ABC of Northern Indiana
Washington Update
Brian H. Graff, Esq., APM

September 26
ABC of Greater Cincinnati
Washington Update
Brian H. Graff, Esq., APM

November TBD
ABC of Detroit
403(b) Final Regs
Lawrence B. Raymond, CPC

November 1
ABC of Atlanta
Automatic Enrollment Workshop
Adam C. Pozek, QKA, QPFC

November 13
ABC of Greater Cincinnati
ABC Testing Workshop
ABC Education Chair

December 11
ABC of Greater Cincinnati
Legal Update
Richard A. Hochman, APM

For a current listing of ABC meetings, visit **www.asppa.org/membership/member_local.htm**.

Fun-da-Mentals

Sudoku Fun

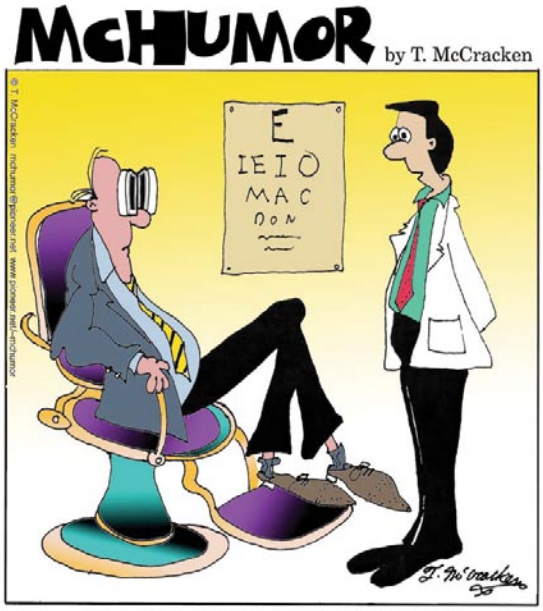
Every digit from 1 to 9 must appear:

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

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

Level = Moderate

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



". . . and I'd suggest you spend less time surfing the web."

Word Scramble

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

THE SIGH ☐☐ — — ☐ — ☐

TERSE TIN — — — ☐☐ — ☐ —

LACK BOOK ☐☐☐ — — — — ☐

CAVE IT IN — — ☐ — ☐ — ☐☐

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

Mystery Answer:

It was a " _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ **."**

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

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