WHO'S AFRAID OF THE GENERAL TEST?

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- Update on latest IRS pronouncements
- Data requirements
- Practical applications
- Case studies

MR. ADRIEN R. LABOMBARDE: Let's start with the session title, "Who's Afraid of the General Test?" Anyone willing to admit? Most employers are afraid. Many industry organizations have been putting together comments to the Treasury and the IRS. Certain professions, and even some actuaries, seem to make their living off of safe harbors as opposed to the general nondiscrimination test, although I've seen the general test described in some literature as an actuary's dream. It's not quite what I grew up dreaming of when I went to be an actuary, but I've seen it described as an actuary's dream. A fair number of actuaries are still afraid of the general test. There are enough scattered around just about everywhere, except in the federal government. I don't think the Treasury and the IRS seem at all afraid of it. I'm speaking here, in part, because I'm not afraid of it. I will start my part of this by admitting that you're talking to a lover of the general test. A government person is here who helped design the general test, and a person is here who has run enough of them and who thinks that the general test is nothing to be afraid of.

First let me start with a couple of disclaimers. The opinions expressed, of course, are my own, although I do work for Milliman & Robertson, a firm that has used my own services in the general test to some great extent. These views are not necessarily those of Milliman & Robertson and certainly are not necessarily the views of any of the sponsoring organizations of this spring meeting of the Society. The intention of this session is purely educational; it's to improve your skills, it's to improve your knowledge of the general test. The comments that we'll be stating regard the ease of the general test. You should not necessarily be afraid of it. The comments are not intended to establish any kind of basis for pricing of the general test or any of these other services, nor are they to determine the marketing of any of the products or services.

First, obviously, there's absolutely too much to cover in the kind of detail that we would like. I've actually given a general-test session that went eight hours, without covering safe harbors, 410(b) coverage rules, 414(s) compensation rules, integration rules and all of the rest. I'm used to speaking at Enrolled Actuaries meetings and other sessions where I can say, "Well, I'm just going to put aside the 410(b) coverage rules, because there's another session that deals with those, so either go to that session or listen to the tape." We don't have that luxury here. Because of that, we're going to cram a little on 410(b) coverage in this, because it is like the chicken and the egg. You need to understand 410(b) and understand it well to really catch what's going on in the general test. To the extent possible, we'll also touch on

certain other areas, such as 414(s), and possibly a dash of 401(l) that may be important.

Our principal areas of focus will be the central calculation techniques; that is, how to actually do the general test and what's it all about. There are new directions in the regulatory development. A lot has happened in the past year, and even within the past day, as you'll find out. There are some practical considerations; for example, with respect to what kind of data you need, when you are going to time your operation of the general test and the like, and maybe, if we get a chance, a war story or two.

If you're a general test user and you've already been using the general test, maybe we can still give you a hint or two, a new twist or two. Certainly you'll be hearing some new information, because we have some new information. If you're unsure, if you are afraid of the general test, I hope that you'll feel a little bit more comfortable when you leave and maybe be encouraged to take another look and give it another try. If you're anti-general-test, I hope to at least have this be an invitation to dialogue. I'm certainly open to hearing your views.

I'd like to take a moment right now to allow Harlan Weller the chance to make any introductory comments, maybe summarize the current status of the regulation progress, and lay the groundwork for exactly how all of this fits together before I get into some actual, specific general test techniques.

MR. HARLAN M. WELLER: The views you're going to hear are my own. I work for the Department of Treasury, but the comments have not been cleared by the Department of Treasury. They do not reflect the official views of the department or the Internal Revenue Service. Nonetheless, I think that my comments are fairly indicative of what the staff has been thinking as the general test was developed over the last couple of years.

The general test is part of the 401(a)(4) regulations, which were initially issued in the May 1990 proposed form and were finalized in September 1991. They were part of a package of five interrelated regulations. The five regulations that were released at once were 401(a)(4), 410(b), 414(s), 401(l) and 401(a)(17). We released five regulations at once, and they turned out to be 609 pages that deal with all these topics. It is considered to be an intrarelated series of regulations, and the key in the relationship is between 401(a)(4) and 410(b) regulations.

The basic concept that was incorporated in the general test is that the best way to measure discrimination is to look at the various accrual rates that are being provided to employees under a plan and, by using those accrual rates, see whether, at each level of accrual that the plan is providing, you have a representative mix of nonhighly and highly compensated employees. If at every single level you have a representative mix, then everything is sort of evenly mixed up. I guess you could almost use a cake-batter kind of analogy. The good part of the cake would not go to one group of people and the bad part of the cake would not go to the other group of people. That is the central concept that showed up in the 401(a)(4) regulations, both in the construct of restructuring plans into various subgroups, each of which may share a common formula, and in terms of safe-harbor designs or in the general test itself.

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The general test had to deal with a particular complexity which, if you start looking at the various accrual rates -- assuming for the moment that you have one group of people getting a 1% accrual, and another group of people getting 1.2% or 1.4% -- if you look at that distribution, you could have a potential situation in which there are more nonhighs than you'd expect at the higher accrual rate and more highs than you would expect at the lower accrual rate. If you had that odd situation, and you just did a pure 410(b) test at each of the accrual rates, you'd find that you'd fail at these lower accrual rates. In my example, at the 1.0 accrual rate, you'd have an excess number of highs and yet somehow, if those highs had better benefits, then you would be passing, and that obviously doesn't make any kind of sense. So the general test goes beyond the step of slicing the plans into various accrual rates by using an accumulation technique. It's sort of a downward accumulation. Take all people who have an accrual rate of 1.4% and above -- and test whether that's a 410(b) group. Take everyone who has an accrual rate of 1.2% and above and test whether that's a 410(b) group. Test everyone who has an accrual rate of 1.0% and above and test if that's a 410(b) group. If you can do that at every single level, then you have a nondiscriminatory plan, and that's the guts of the general test. We think that it's a reasonable test.

At the same time that we had run into some situations after the 1991 regulations came out, we heard from some employers that the general test was too tough. They pointed out situations in which you can have a small number of highly compensated employees who have unusually high accrual rates, which often may not have been as a result of plan design. It may be sort of an odd combination of facts and plan design, resulting in what we think of as outliers, people with high accrual rates. If a highly compensated employee turns out to have the highest accrual rate, then you are going to fail the general test. For example, if you have accrual rates of 1.4%, 1.2% and 1.0%, and one person sitting out there has 2.0%, you've now flunked the general test. There are situations where employers were really concerned that was going to happen to them for completely innocent reasons.

One case got a very sympathetic hearing on Capitol Hill, in which a substantial employer with 50,000 employees had a plan and its plan design tended to favor people at young hire ages. One of the things that we discovered when we were doing 401(a)(4) is that plan designs can favor people at older hire ages or younger hire ages or be indifferent. In this case, the plan design favored people at younger hire ages. In particular, it was in the context of the amount of early-retirement subsidy they were getting. It turned out that the very youngest hire age, by a matter of several years, was a highly compensated employee. The mere fact that this one person was hired at age 15, whereas the next youngest hire was 20, was enough to cause the general test to fail in this enormous organization. Then, if you can imagine, you can add on to sort of make the case sound worse, and that works very well with the congressional representatives, if you add on the situation. Maybe this person just became a highly compensated employee last year.

Let's make believe that to be the situation. Here we have an employer who may have had a plan that was passing the general test for the last 10 or 15 years. Then, just because this one individual has gotten a raise suddenly, the general test is blown. That obviously doesn't make much sense. In response to these kinds of potential horror stories, we set out to make some changes in the general test. Last summer

we had announced a series of notices, 92-31, 92-32 and 92-37, which proposed some changes in the Section 401(a)(4) regulations. We asked for feedback on those notices and in fact, we did get many good comments. The results of that feedback were proposed amendments to the Section 401(a)(4) regulations that were issued in January 1993.

Among the changes that we made in the January proposal was create a safety valve just to deal with these kinds of oddball situations. You can come to the commissioner and say, "Look, I'm failing the general test, but it's really not my fault. This is just sort of happening that way." You can still be deemed to have passed the general test if the Commissioner agrees with your interpretation. In fact, you haven't done something untoward, and it's just the way it's worked out. That's one of the significant changes that was in the January package.

Along with some of the technical comments that we received in the September package, we received many comments that said, in general, that this was all too complex. "It's too long. It's too burdensome to deal with." In response to that, we went through the final regulations and tried to simplify them wherever we could. The January proposal actually reduced the initial 401(a)(4) regulations by more than 100 pages. In September 1991, there were 600 pages. This go-around made the 401(a)(4) regulations come in at under 200 pages. We've done our best to try to simplify and shorten it.

As I said, there is a whole package of regulations, and this time we had to do them separately. We wanted to get the core 401(a)(4) regulations out and get people to comment on them. Then we will follow up with the rest of the package: 410(b), 401(l) and 414(s) regulations. As of about two hours ago, they have actually been filed with the *Federal Register*. They are now publicly proposed changes for 401(l), 414(s) and 410(b), and later I'll talk about what some of those changes are.

Now I'm going to turn it back to Adrien and let him give you some of his remarks on the general test.

MR. LABOMBARDE: I'll try and keep this briefer than I ordinarily would, because I look forward to hearing whatever summary Harlan can give.

I have some simple reasons for being afraid of the general test. I've heard it's too complex, it's too unstable. You might pass one year and fail the next. Employers don't like the instability of that as contrasted with the safe harbor. Some say it's too data intensive. Very many think that it's too expensive, particularly if a plan is small. I've heard many people say that it's fine for large employers, but what about small employers? I've run general tests for plans under ten lives, and it does not necessarily need to be inefficient to do so. Some people actually think that it's theoretically unsound. I don't personally agree with that opinion, but if anybody believes that it is and that it's not really the proper approach, I'd invite you to make your comments known. One common one that I get is that employers shoot for the safe harbor, because they say that's the only way they can get a determination letter right now. For the time being, that may be a good excuse or a good reason to be afraid of the general test, because, in fact, you can get a determination letter for certain vanilla

safe-harbor plans right now. You cannot yet get one for the general test. That excuse will only last for a small period of time.

Last, but not least, without going into pricing or anything, I think some actuaries may be afraid of the general test because of what I might call dubious market potential. That is, it's not the kind of thing that you're going to go out and make money on. Even if you get clients to not be afraid of the general test, you're still coming to them with a compliance item as opposed to a solution, unless you can use it to help your employer solve a problem; that is, provide the solution to a problem where the employer wants a particular plan design that would not work with the safe harbors.

Let's begin by returning for just a moment to the safe harbors, because I think if you understand where the safe harbors are coming from, it's a little bit easier to start getting into the general test. What is the hallmark of the safe harbors? It's uniformity. If you treat everybody the same, then you have a safe harbor. The hallmark of the whole thing is uniformity.

At one of my earlier sessions almost three years ago now, someone did take my invitation to stand up with an alternative view. He said, "Why is the government bothering us with all these complex rules? Why can't I just offer my employees a benefit that gives them, say, a 3% allocation rate and be done with it? Why do I have to go through all this hassle?" The answer is – of course, you can. That's the safe harbor; if you provide that 3% on a 414(s) compensation. Don't tell me it's going to be on base pay plus bonus, or something like that. Don't tell me you want to provide the 3%, but, hey that being provided to are just partners of the firm. The point here is, it really is the employer's choice to provide a unique set of benefits designed for unique purposes that's driving you away from the safe harbor, that's driving you into the complex rules. I don't say that so much to say that it's the employer's fault, but just to emphasize that there's a choice here. When you go to the safe harbor, you're essentially asking yourself – what do I need to do to get into 401(a) heaven? What do I need to do to be saved? What do I need to do to satisfy the government, the Department of Treasury and the IRS?

The general test is essentially going to come out with the same answer in the end. You may have a different plan design, you may have a different life-style, shall we say, but you do what you want. You have the plan design that you want, fashioned after your own desires. Afterward you're coming back and saying, "Did I do anything that's going to bump me into hell?" In the end, the answer still comes back to a measure of uniformity. Would the nonhighly compensated employees (NHCEs), who were treated at least the same or better than highly compensated employees (HCEs), satisfy 410(b)? The difference here is with the safe harbor; you're generally going to have everybody in the same group of uniformity. You may be splitting it into different groups with employees, with restructuring, but generally you're going to have one aggregate group.

With the general test, because of the uniqueness of the plan design, you met people all over the place. You're going to cut them into slices under the general test. The measure of uniformity becomes the accrual rates that you've got. Uniformity is a looser idea of, are the NHCEs treated at least as well or better than the HCEs who we're looking at?

The essential question in all of this still comes back to 410(b). When we segregate groups, what we'll be calling rate groups for the general test, does each rate group satisfy the coverage rules of 410(b)? We don't have a 410(b) class here. A 410(b) class is probably beyond the scope of this. I will allow Harlan time a little bit further on in this session to say some comments about what's new in the 410(b) regulations or in the amendment to the 410(b) regulations that came out. Let me at least say that if you're unaware of 410(b), that really is one of the starting points for learning the general test. You have to go back and either read the regulations or read some good description of how to run it. But to remind you of where we're at, if you've been in 410(b) you essentially have two tests that we may touch on from time to time. The ratio percentage test says there's a 70% threshold there, and the ratio of NHCEs who are covered has to be at least 70% of the ratio of the HCEs who are covered by the plan or, as we'll see, by the rate group. It simply passes on to the smaller unit that we're looking at.

You can get a smaller percentage than the 70% if you pass the average-benefit percentage test. Some extra tests have to be satisfied that say the average benefits provided to the NHCEs are at least 70% of the average benefits provided by the HCEs. If you satisfy that, then you get yourself some lower thresholds in the regular 410(b) test, and similarly, when you're doing the general test, you get a lower threshold than the 70%.

It kind of becomes incumbent upon me, at this point, to take a little side note on 410(b). I'll try to be brief, because this could get into almost a whole session, I'll give a couple of examples.

Let's look at an employer that has an 80% concentration rate. The concentration rate is based on nonexcludable employees who are NHCEs. If 100 employees are nonexcludable, and 80 of those employees are nonhighly compensated and 20 of them are highly compensated, I have a concentration rate of 80%.

Now, I'm going to go and try and apply the ratio percentage; that's the 70% test. Let's say that I have a plan that covers all ten HCEs. How many NHCEs do I need to cover? To satisfy it, I have to cover 28. I need 28 to satisfy the ratio percentage test. When you have an 80% concentration rate, you will find that number is always constant as a ratio of HCEs. That is, with an 80% concentration rate, this ratio percentage test will be satisfied if the ratio of NHCEs to HCEs is 2.8. If I cover one HCE in this group, I need three NHCEs, so that the three is greater than the 2.8. If I cover two HCEs, I take 2 x 2.8 to get 5.6 -- I need six NHCEs.

The thing is, you can do this at any concentration rate. If you take any concentration, you can determine these thresholds, and these thresholds are then constant for any given concentration rate. For the 80% concentration rate, the numbers for the general test turn out to be 2.8 NHCE per HCE to pass the ratio percentage test, or 1.2 if you're doing the average-benefit percentage (ABP) test. That is, for every HCE, I need at least 1.2 NHCEs to satisfy this. You'll never actually see me calculating 70% or the ratio percentages like the government has done.

I use that as a bit of shorthand, and I use it to help in the communication with the employers. Let me show you how to actually calculate this. It's a very easy

algebraic thing that any of you ought to actually be able to derive on your own. Let me point out that, although I find it a useful communication device, all of your programs should still be calculating these ratio percentages, because when you go back to the government for reporting purposes, it's not looking at NHCEs per HCEs; it is going to want to know if you are 67.2% or 75.3%. It is going to be looking vis-à-vis the 70% ratio percentage.

What is the general test? How can I reexpress this now? For each highly compensated employee, the coverage requirement has to be satisfied by the group of employees who are treated at least as favorable as that HCE. Let's say Harlan is an HCE here. With respect to Harlan, I establish a rate group. I look at what benefits I'm providing to him or what contributions I'm providing to him. I look among my group and find everyone who is treated at least as favorably or more favorably than him. Whether they're HCEs or NHCEs, I count and compare them with this 2.8 factor that I'm looking at. I'm going to assume we're talking about an 80% concentration-rate company. I would compare that ratio against 2.8. I satisfy the 2.8 ratio; I satisfy the ratio percentage test for that rate group. I go to the next rate group, I go out to the next HCE, and I do the same thing. I do the same thing for each of the HCEs. If I satisfy that for all the HCEs, I'm fine.

If I satisfy it for some of the rate groups, but some of the rate groups are less than 2.8 and some are greater than 1.2, then I have to go back and ask, have I satisfied the average-benefit percentage test? I do the average-benefit percentage test. If I satisfy that, then I get the lower threshold. But again, it's going to each rate group and doing that kind of a test on it; in this case, with the average-benefit percentage test looking at the 1.2.

Let's break this into a couple of distinct steps. First, each rate group has to satisfy coverage. If any of the rate group fails, the general test fails. If any of the rate group satisfies the average-benefit percentage test, you might as well just use the ABP-related threshold, the 1.2 that I'm talking about, because if you satisfy the average-benefit percentage test, at that point it's irrelevant whether some of the rate group satisfies the ratio percentage and some don't. As long as one has to use the ABP test, you might as well just run the ABP test and use a lower threshold for all of the groups.

There is one rate group per HCE in the example I gave. With 20 HCEs in a group of 100, there are 20 rate groups. Now, there may be duplicates with HCEs that have equal rates. If some HCEs have exactly the same rates, then technically, although I've got two or more different rate groups, they're all going to come up with the same numbers. When I count the heads of how many people were treated better than, or at least as favorable as those HCEs, the counts are going to turn out the same. As an aside, that's part of the emphasis of what's called grouping of rates, or what I call rate banding. There's a grouping thing that allows you to bring some of the rates together into a single rate. I prefer to talk of it as banding to keep the idea distinct, and we'll maybe touch on that a little bit later. But the idea there is to bring the rates into distinct groups so you'll have less rate groups. If I'm talking about a plan that includes 100,000 lives, and I have maybe 20,000 rate groups, if I can band the rates together, maybe I can bring it to only five rate groups instead of 20,000.

Essentially there are still really 20,000 rate groups there, but they're simply all equivalent, and you really only need to look at five calculations there.

Each employee can be in more than one rate group. There's no problem with that. This isn't the same as employee group restructuring, where each employee goes into a distinct group. Each employee here will be in any rate group with respect to any HCE who is treated as favorably or less favorably than that particular employee.

How do you know if you're included in a rate group? I'm going to define this in terms of a defined-benefit (DB) plan, because then I think the defined-contribution (DC) plan is essentially just a special case where the rates happen to be equal. In my programming, I use exactly the same algorithm for both, with simply a simple twist that equates the two rates.

For a defined-benefit plan, I'm going to define a particular rate group now. Let me go back to Harlan and say he's my HCE. I'm going to look throughout the group here for anybody who satisfies both of the following conditions. Both conditions, not one or the other, have to be satisfied. Their normal rate must be greater than Harlan's normal accrual rate, and their most valuable rate must be greater than Harlan's most valuable accrual rate. If both of those conditions are satisfied, then you're in Harlan's rate group.

If the DC plan is aggregated with the DB plan for coverage and nondiscrimination purposes, and you still have both of the rates, if it's simply a DC plan, you really are only looking at the allocation rate. But you can almost run the same algorithms through by simply pretending as though there are two rates, but the two rates are equal. Your allocation rate is greater than Harlan's allocation rate and your allocation rate is greater than Harlan's allocation rate. It's simply repeating the same thing, but to the computer, it simply runs through with the same algorithm.

Table 1 includes some vectors from a Lotus spreadsheet that I calculated. I included these in here because I thought you could picture it a little bit better. This is intended for communication purposes only and is not to suggest how you ought to do it. Anyone who knows his or her way around Lotus ought to be able to look at this and quite easily figure out that I'm showing you the simplest. You can dress it up, change it, or use other database programs. This is not an advertisement for Lotus. Even if you're using Lotus, there are certain other techniques that can do it faster and more efficiently than I'm going to be suggesting here. I'm only going to be suggesting this for purposes of communicating to you what it is that we're actually doing on the general test.

You see an input matrix. This matrix was drawn from a spreadsheet where I actually did the rate calculations. I had all the input data on the employees: their dates of birth, their salaries, their accrued benefits. I performed the calculations to determine the most valuable. I perform all the normalization techniques that are necessary. I impute disparity. I do any kind of rate-banding that I want to do. I come down with the four columns that you see. The first column is only for information purposes, so that I know who's there and which employee it is. It's the second, third and fourth columns that become central to the general test itself. Are you HCE or not? What is

your normal-benefit (NB) accrual rate? What is your most valuable benefit (MVB) accrual rate?

TABLE 1
Spreadsheet Approach Based on Datacounts
Relying on a Portion of Data From a Sample Defined-Benefit Case

Input			
ID	HCE	NB	MVB
18	1	0.0172	0.0190
34	1	0.0163	0.0181
39	1	0.0161	0.0178
1	1	0.0154	0.0170
71	1	0.0164	0.0164
64	1	0.0152	0.0160
68	1	0.0153	0.0157
CRIT0			
HCE=0	NB> =0.017200		MVB> =0.019000
CRIT1			
HCE=1	NB> =0.017200		MVB> =0.019000
Datacount Results and Ratios			
N_{NHCE}	N_{HCE}		Ratio
55	1		55.0000
67	2		33.5000
70	3		23.3333
77	4		19.2500
72	2		36.0000
79	6		13.1667
79	6		13.1667

@DCOUNT(INPUT,HCE#AND#NB#AND#MVB,CRIT0)=55
@DCOUNT(INPUT,HCE#AND#NB#AND#MVB,CRIT1)=1

You'll notice HCEs are all 1s there. That's because this is drawn from a 2,200-life case. I'm only showing you the top piece of it. You'll see that I've actually, for convenience purposes, ranked my data according to the high to low on the most valuable benefit rate. Technically this ranking is irrelevant. When you see what I'm doing on the counts, you'll see that you could basically leave this data ranked however you want it to be ranked. It's easier for you, once you're finished, if you have a failure within the group. It's easier to analyze it and understand what needs to be done to correct it if you do this kind of ranking.

Note one observation that becomes interesting. I've ranked it first by HCE. If this were purely ranked by the most valuable benefit rate, I'd know right off the bat that this fails, because there are 1s right near the top of the ranking here. It's ranked first by HCE, then high to low on most valuable. But note something. Look at employee

No. 1 down there. You'll see that employee No. 1 is not in the same rate group as employee No. 71, who is right below, even though employee No. 1 is treated better than employee No. 71 on the most valuable benefit rate. The most valuable rate of 1.7% exceeds employee No. 71's most valuable benefit rate of 1.64%. But the normal rate doesn't click. For employee No. 1, the normal rate is 1.54%, which is less than 1.64%, so employee 1 would not be in the same rate group as employee No. 71. You need to have both conditions satisfied to be in the rate group. Both the normal rate and the most valuable rate must exceed the rate that I'm using as the criteria for the rate group.

Let's go to the criteria fields, CRIT0 and CRIT1. You'll see that in each one of these, and these are using Lotus criteria database calculations, I simply have a three-part criteria. First, for CRIT0, I simply want to be sure of an NHCE, so I want to see whether the field is a 0 or 1. I'm saying it's got to be a 0. Then I'm asking if the normal accrual rate is greater than 1.72%. I'm establishing the criteria for my first rate group, for the top employee, employee No. 18, the one at the top of the list. I want to know if the normal accrual rate is greater than 1.72% and if the most valuable accrual rate is greater than 1.9%. I'm going to be running a data count based on those three criteria. I run a second data count, that's CRIT1, asking the same question. How many HCEs satisfy those conditions? You'll then see the D counts right below that. In Lotus, it's @ D count parentheses and the formula that you see there is a simple, triple criteria. You'll see a single criteria in the Lotus manuals. This simply adds all three. You have to satisfy all three to do the count. This really just goes through the data and counts the heads. How many NHCEs satisfy the condition? 55. How many HCEs satisfy the condition? One. That means for the rate group associated with employee No. 18, 56 employees are in the rate group: 55 are NHCEs, and one is an HCE.

If you were to use the percentage-of-percentage method, you would take the 55 and divide it by the total number of NHCEs who are nonexcludable in the entire group and take the 1 and divide it by the total number of HCEs in the group. Take the division of those two, and find out if it exceeds 70%. Here I've already gone through the calculation beforehand to say the threshold is 2.8. I take 55 divided by 1, which equals 55. Ask, is that greater than 2.8? Yes, fine. I go to the next rate group.

Here I would be simply using a macro typically to simply loop back, to rate group the next rate group. The next rate group on the list is the rate group associated with employee No. 34. When I do the D counts with the new criteria for employee No. 34, I find 67 NHCEs, and two HCEs. Sixty-seven divided by 2 is 33.5, which exceeds 2.8. I'm fine. I go to the next step. I loop down, I replace the criteria, I go to employee 39. There are 70 NHCEs, 3 HCEs, the ratio is 23.3, and that exceeds 2.8. Fine, I go to the next one. You see, it's simply looping down and counting the heads to see if I satisfy the test. If any one of those ratios is less than 2.8, then it tells me I've got to do the average-benefit percentage test. If any one of those ratios is less than 1.2, then it tells me that I'm failing the general test, and I've got to look for some other alternate approach.

The X-axis on Chart 1 is the normal accrual rates running from low to high. This Y-axis shows the most valuable accrual rates running from low to high. Someone up here has a high, normal accrual rate and a high most valuable rate. The closed circles

are my NHCEs. This is the highest ranked NHCE up here, it's the one with the highest normal accrual rate and the one with the highest, most valuable accrual rate. Everybody in that shaded region has a normal accrual rate that is higher than the HCEs normal accrual rate and a most valuable accrual rate that is higher than the HCEs most valuable accrual rate. If I count everybody who is in that shaded region, I exceed the 2.8 to 1 ratio and I've satisfied the test. I then simply come down the line. I go to HCE No. 2. That looks like I satisfied it with room to spare, because in the shaded region is everybody who satisfies the criteria of having a normal accrual rate higher and a most valuable accrual rate higher. Count the heads and apply 410(b). You go through all the different rate groups like that, and if you satisfy it for all of the rate groups, then you've satisfied the test. I did this partly to give you a visual image of exactly how it goes. There is a different kind of calculation that you may have heard of that is implicit in what's going on here. I tend to simply let my spreadsheet just do the data counts and not care exactly where they come up.

CHART 1

Most Valuable Accrual Rates
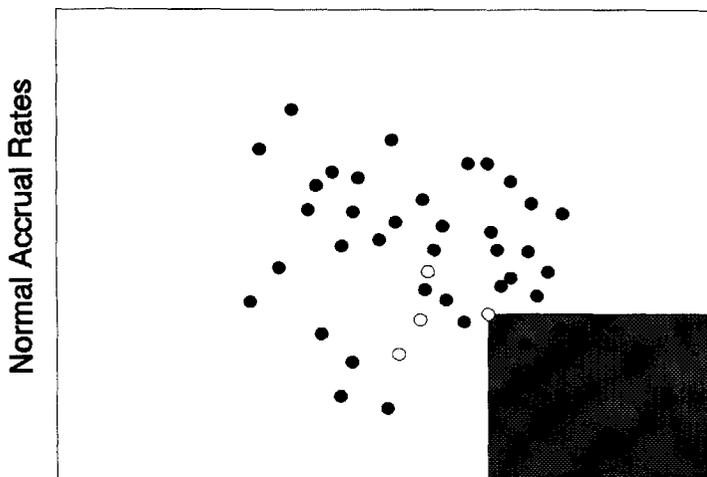
I can say everyone who is within, for instance, plus or minus 5% of a midpoint range, can be called equal to the midpoint range. Instead of being scattered all over the chart, they'd start pulling things into distinct units, into distinct cells. If you take those distinct cells and count how many HCEs are in each distinct cell and how many NHCEs are in each distinct cell, you get what is frequently called matrix restructuring. You're putting everybody into particular cells in a matrix. It comes out the same as what I'm talking about with the data counts, because when you're finished with that, you still have to effectively put your shaded region up there and count everybody in the matrix who is above and to the right on this. Matrix restructuring is as complex as it sounds. It is no more complex than what I've done with these nifty graphics.

MS. JEANETTE R. COOPER: When these regulations were designed, why were the matrix approaches used as opposed to letting you do a normal test separately and then a most valuable test separately?

MR. WELLER: There was a concern, at the time, of a situation in which the highly compensated employees had high, normal accrual and high, most valuable accrual rates, and a group of nonhighly compensated employees had high, normal accrual rates, and a different group of nonhighly compensated employees had higher, most valuable accrual rates. There was enough room in the 410(b) calculations that you could do that without sort of having overlap in the nonhighly compensated group. Therefore, the highs would be getting the best of both worlds, relative to the non-highs, and we felt that was inappropriate. It may be a hard design to develop, but it was potentially there, and that's why we use the simultaneous testing of normal and most valuable control for that.

There are three amendments that we proposed in 414(s), 401(l) and 410(b). I'm going to start with 414(s). In determining accrual rates, you need to use a 414(s) definition in your denominator. Your plan formula can be based on any kind of compensation definition you want. Again, it's part of this whole process of the general test to develop your benefits however you want, but test them on a uniform testing basis. The uniform testing basis is Section 414(s) compensation. There are other elements to the uniform testing basis, but one of the key ones is Section 414(s) compensation. We have made a few changes in the definition of Section 414(s) compensation, and they're all, I would say, liberalizations to allow for some common situations that were potentially knocking you out of being a Section 414(s) definition.

The first one was previewed last year in the notices, and it's the ability to use compensation, not necessarily from the employer, but from a related employer. It's the situation where there is a transfer of an employee to maybe a joint venture where you have acquired an organization. It may make sense for you in many situations to recognize compensation from an employer other than the current employer. A person may temporarily not be working, not be drawing compensation, but you still want to provide benefits on the basis of some sort of underlying compensation. In the notices that we issued last year, we said that we were going to permit you to recognize compensation with another employer, provided three standards are met. First, treat all similarly situated employees the same. Second, have a reasonable business purpose for recognizing this compensation. That usually means that there is a reasonable connection between the two employers. It also has some limitations on your ability to continue to credit compensation after a person has terminated employment. The third is a no-significant-discrimination criteria. When all is said and done, we're going to take another look at this crediting of compensation and see whether you are effectively significantly discriminating. We recognize that many of these transfer situations tend to be highly compensated employees, so the use of the adjective *significant* in front of the word *discrimination* is intended to give a little bit of room for reality. It is going to be biased toward the highs, but we don't want it overly biased toward the highs. These changes shouldn't come as surprises to people who read the notices last year, but we have now implemented those three pieces.

A second change in the 414(s) definition is a question that people raised: what happens if I define my compensation in such a way that it is sort of automatically

biased against highly compensated? I specifically exclude a particular management bonus, which is only provided to highly compensated employees. Can I still have a safe-harbor definition of Section 414(s) compensation? Again, a little background. The Section 414(s) regulations have safe harbors and a testing basis. I guess we like this idea where you have your choice. You either do things on a design basis, or you do it on a more ad hoc basis and demonstrate that it's nondiscriminatory. In this case, people wanted to know how different they could make the compensation definition among the highly compensated and still be in a safe harbor. We said that essentially, if you're doing an exclusion for just highly compensated, and it doesn't even have to be a consistent exclusion, any kind of exclusion that affects just highly compensated will be permitted within the context of a safe-harbor 414(s) compensation.

We also picked up some clarifications on rate of pay. I don't think that it represents a significant change from the prior regulations, but some employers use a greater rate of pay than actual pay, or take rate of pay and add actual bonuses and things like that, and that is now going to be permitted under Section 414(s). Whenever you do something like that, you're going to be out of the safe harbor, and you're going to have to prove that's a nondiscriminatory definition. But it fits into our definition of a reasonable compensation definition.

A minor amendment was made to the 401(a)(4) proposed regulations that were issued in January 1993 to deal with the issue of double proration. As you know, there is a Department of Labor regulation that says if you have a situation where you are prorating service in your service counting rules for prorated compensation, you have to essentially annualize either the compensation or the service credit. We have now clarified that you can annualize in Section 414(s) compensation, if needed, to avoid problems with that rule.

One more change I want to mention in Section 414(s) compensation is that some employers had an exclusion that was not the entire amount of bonuses. They might say, "we're only going to pick up 50% of the bonuses, and we're going to exclude 50%, or we're going to pick up only commissions up to the first $20,000, and we're not going to pick up any additional commissions." We have now said that will be a reasonable kind of definition. If you're going to do an exclusion, you can do an exclusion of all or a portion of some of what we call additional or irregular compensations. Again, whenever you do something like that, it has to be on a consistent basis, and it still has to satisfy the nondiscriminatory test, an actual comparison of your definition of a safe-harbor definition, but it's going to be a reasonable jumping-off point. Those are the main changes in Section 414(s).

I'm going to talk a little bit about Section 410(b) changes. The average-benefit percentage test, which is this determination Rich mentioned on the average of the accrual rates, has to be 70% of the average accrual rates for the highly compensated, if you want to have the lower thresholds in 410(b). The determination of accrual rates for purposes of the average-benefit percentage test has been modified basically to parallel the changes in the 401(a)(4) regulation. As you may have sloughed through, the final 401(a)(4) regulations had a detailed, step-by-step description of how to determine accrual rates. We used to call it the cookbook. In the January proposal, we took out the cookbook, we went instead to a general description of what you're

trying to cook, and we let the actuaries come up with their own recipes. We've followed the same procedure here in the determination of accrual rates for the average-benefit percentage test. In fact, we've done a lot of citing back to the 401(a)(4) regulation and have just said to go do what you do in 401(a)(4) context, and it will all work out here.

Another change has to do with the average-benefit percentage test in the context of an employer who wants to separately test the employees who are less than 21 and 1. There is an option in the code that says if an employer is allowing people who could have been excluded into it's plan, the code provides an opportunity to separately test those people, the otherwise excludables, as they're known. If the otherwise excludables are a 410(b) group relative to other otherwise excludables, then you can use the higher exclusion for the rest of your group. Let me see if I can explain that a little better.

Let's say that you have a plan that allows people into the plan at age 18. The basic rule said that you would have to compare the people who benefit under your plan to everyone who is 18 and over within the control group. That may be burdensome if you have other divisions where you don't keep track of the people who are 18, etc. There is an option in the code to separate the people who are between 18-21, and if in your plan the people between 18-21 are a 410(b) group, then you can test the people 21 and over in your plan relative to people who are 21 and over corporate-wide. It's been, I think, a fairly convenient kind of option. In the final regulations, however, that separation didn't extend to the average-benefit percentage test. When you actually had to crunch numbers to see whether the average benefit accrual rate for the nonhighs was at least 70% of the average accrual rate for the highs, you didn't get a chance to do this desegregation. We have made a change so that if you do this separate testing for the under-21 and 1s, you will be able to have that apply for the average-benefit percentage test.

Those are probably the most important changes. We have made some easings in the context of multiemployer plans. There's been a special relief provided to those employers with multiemployer plans; in particular, multiemployer plans that have had a problem with covering noncollectively bargained employees, the nonunion people within the multiemployer plan.

The third set of regulations that came out were the 401(l) regulations. The 401(l) regulations are relevant solely in the context of a safe harbor. It's not something that really should even be brought up in the general-test discussion, but I'm on a roll, so I'll keep going. In the 401(l) regulations we've implemented the primary insurance amount (PIA) safe harbor that we promised last year. Essentially, this safe harbor requires that the offset be limited to what the 401(l) offset would provide. Many people are unhappy with that continued limitation, but we feel that's a necessary step to reflect the statutory change of Section 401(l). If you put a cap on your PIA offset so that the offset is the lesser of a 401(l) offset or the percentage of the PIA that you otherwise used, you could then have a safe harbor, and you don't have to go through the rest of the general test.

One question that had come up on the 401(l) regulation had to do with people who are offering lump sums and whether they needed to reduce the permitted disparity

because of subsidy in the lump sums. In the final regulations we said if your subsidy in your lump sum is because of compliance with the 417(e) interest rate requirements, that would not require you to reduce your permitted disparity. The question arose, did we mean strict compliance with the 417(e), including a bifurcation between people above and below $25,000? The answer is, no, we don't require you to do a bifurcation above and below $25,000 to get the benefit of this exception.

We made a couple of changes in the overall permitted-disparity rules. They're basically technical, I don't want to get into it at this session, but I urge you to take a look at them. Some employers were running into problems when they had multiple formulas in their plans or even when they had a new formula that sort of overwrote the old benefit. We have sort of loosened the rules. If you have a new formula that applies to all years of service, and that new formula develops your benefit so that your old benefit is not irrelevant, because your new formula is greater than your 411(d)(6) protected benefit, then you can determine cumulative permitted disparity on the basis of the new formula, rather than go through the steps that we had in Section 5 of the 401(l) regulations. As I say, it's not a common situation, but if you do have that situation, I think you'll find some useful relief.

MR. LABOMBARDE: I'm going to try and touch primarily on things where there have been some changes. If you knew the general test before, there are some changes, such as what Harlan just shared with us, which may be relevant. Under the previous final regulations, actually this is still the case under the new structure, you have to test actives differently from formers. Now the distinction here is, although there was a safe harbor of sorts, many plans would have had to have the general test done on former employees. It would have been more difficult to get data and do some of the calculations. The new structure of the rules would open that up so there would be a facts-and-circumstances type of viewpoint of looking at former employees.

Under the technical rules, I just want to draw your attention to something that is actually very, very intrinsic to much of what we've said already. We've been saying that when you do the general test itself, you apply 410(b), but this is one of these little, circular, chicken-versus-egg things. You're applying it to the plan that has passed through 410(b). I have seen situations where Plan A is a safe-harbor plan. They kick and crawl and strain to try and get Plan B into a safe-harbor plan, but neither one of them would pass coverage on their own. They say, fine. When we come to coverage we can permissively aggregate. When we permissively aggregate these two plans, they pass. Maybe one of them is a salary plan and one of them is an hourly plan. They permissively aggregate the two of them, and lo and behold, they pass coverage. Fine. When they come to 401(a)(4), we're going to be looking at those plans as still being permissively aggregated. Now, suddenly, the fact that you had two safe-harbor plans doesn't mean a thing, because unless they're uniform with respect to each other, they no longer appear uniform to the 401(a)(4) tester. One of them may be a salaried DB plan. The hourly plan may be a DC plan. If you want to segregate them with employee group restructuring, you're going to be right back where you began, because the segregated groups have to satisfy 410(b). If you aggregated them to pass 410(b) in the first place, you got involved in that vicious circle. Frequently, aggregation of plans for purposes of getting 410(b) will drive you into the general test. Even though you were kicking and crawling and trying to get a

safe harbor, it didn't really do you any good, unless it helped you to pass the general test a little bit easier, but you're still going to be doing the general test.

I have a word about uniform, qualified, joint-and-survivor plans. I've done so far, I've been talking about dual rate calculations. There was a rule in the 1991 regulations that permitted you, under certain circumstances, if you satisfied certain conditions, to do the general test based only on the most valuable basis. I'll simply say this and then skip along. I would like to hope that if you understand what I've been saying about data counts, you'll understand that counting the number of employees who exceed the most valuable rate to a Lotus program, or to any other program that you're doing, is no more difficult than counting the employees who satisfy two criteria: most valuable rate and normal rate. Calculation of the normal rate is usually something that you're probably doing on the way to calculating the most valuable rate. In other words, although this was given the uniform, qualified, joint-and-survivor option for simplicity purposes, generally it is no more simple. You will generally find it is no more simple to do the single-rate test than it is to do the dual-rate test. The dual-rate test is not really more complicated, which only brought it down to the question of, were there situations where you would have passed the single-rate test and you would have failed the double-rate test? In that regard, I would point you to an example, and I can't even recall the particular example cite, but it is under the section that talks about the single-rate option that says, under certain circumstances, you might be abusing the antiabuse rule of the regulations 1.401(a)(4)-(1)(b)(2). Essentially, the gist of that is that if you have a situation -- it's not black and white, it's not cut and dry -- where you would fail the dual-rate general test, but you could pass the single-rate general test, you're not really in the clear anyway. The IRS or Treasury is going to take a close look at that and see what's going on and why that's the case. Essentially, they really simplified it for us here by taking away an option. Some people don't like that option being taken away. I think that we can live with what we've got here, because the calculations are not really all that much more difficult.

Regarding the rate types and the rate methods, Harlan's kind of covered where the new regulations have been going. They've gotten rid of the strict cookbook and have left it to us reasonable actuaries to come up with a reasonable recipe. I'm sure we can all come up with that. I would point to two particular things that I've seen some movement in, where actuaries have said they will do a slightly different thing, and that is in the normalization procedures. You might not necessarily be using the same ones that had been used in the previous regulations, although the previous regulations were, I think, rather generous because of the way in which they did not incorporate mortality during the deferral period. I've been working with many cash-balance plans. In cash-balance plans, you have to project forward to normal retirement. The previous regulations told us what rate we have to do. Now we're simply under the regime of, do what's reasonable.

As Harlan pointed out, when you go to the numerator of the rates, you're simply looking at the plan. If you have a discriminatory definition of compensation, if you have a discriminatory benefit formula, you could have a pure-excess formula for all that. Tax reform did not band pure-excess formulas. It simply said that if you have a pure-excess formula, you can't satisfy 401(l) and get a safe harbor. I have had some pure-excess formulas. As recently as a week ago, I ran one through that was able to

satisfy the general test with some ease. The numerator has whatever your benefit formula is, whatever you get from the actual effect. You're going to measure that against, as Harlan said, a uniform guide, and that's where your denominator comes in. You have got to use testing service for the denominator; you have got to use testing compensation. The compensation has to satisfy a 414(s) basis.

On your accrued rates, I point back to normalization. I realize that may be necessary even with the normal rates. I've seen many people normalize to a single-life annuity for most valuable rates and then forget. For instance, I had a plan that had a normal form of a ten-year certained continuous annuity. The calculations for the tests are always done on the single-life basis, so in that case, even the normal rates had to normalize back to a single-life basis.

Under the optional methodologies, there were some dropped methods in the new regulations. You can't use the floor on the most valuable rate or the adjustment for certain disability benefits anymore. Frankly, I was never for using those anyway, because they made my test worst. There have been some open questions from some people about whether in the context of "do whatever is reasonable," maybe you could still do that if you could make a case to the IRS that it is reasonable. I understood the regulations to mean that those are dropped. You shouldn't be using those methodologies.

Cross-testing was one of the big optional methodologies that's necessary in the case of defined-benefit/defined-contribution (DB/DC) aggregation. You see the popularity of cross-testing primarily in the popular, age-weighted profit-sharing-plan idea, where a profit-sharing plan is simply converted to the defined-benefit basis. Anytime you do cross-testing you must go with the general test. There are a few cross-testing safe harbors: one for target benefit plans and one for cash-balance plans. Those are special cases. What I'm talking about is the normal type of plan situation: once you cross-test, you must run the general test.

I'll skip right past imputed disparity. That is a very, very powerful technique. You want to understand imputed disparity. You want to almost always use it when you're going through your calculations. It helps adjust the rates.

Harlan did tie in the 401(l) with the 401(a)(4) in a couple of ways. I'll make another tie here. In the same way that the overall limits work through 401(l), they also work their way through 1.401(a)(4)(7), which is imputed disparity. Take a close look at the 401(l) changes that came out, not just in terms of what kicks you in and out of the safe harbor, but how it might have an effect on your general test.

I'll skip right past rate banding. As I indicated before, that's where you can simply pull together rates within plus or minus a corridor to a particular rate. There's been some relaxation in that, which I think you need to look at. If you can tell by the way I've done my calculations here, I typically don't rate-band unless I have to. When I say to my employer that without rate-banding the plan would fail, but with rate banding it would pass, that is a blinking yellow light. You might have to watch out, because you're on the line. You're almost failing the general test.

What are my employer's objectives? Identify your testing unit, the employer, and the plan, and consider the safe harbor. I consider the safe harbor, 401(l) and all of that a part of running the general test. I'm not going to spin a lot of wheels doing it, but if you know why you failed the safe harbor, it's easier for you to understand the general test results that you get instead of just seeing them as figures on the wall. I almost always conduct a preliminary test, at least for a larger employer. For a smaller employer, it's just as easy to collect the data and run the figures through. But if I'm for a larger employer, before I collect the data, I'll usually run a sample through of some hypothetical employees with the benefit formula. It helps me to know whether I even need to run through the test. Sometimes you can tell the test is going to fail even before you run through, and it may also tell you some things that you need to look for when you actually conduct it.

We've been through the process of actually running through the general test. I want to now close with a few things that have made the general test less fearful. Three years ago, people like me were saying to take a closer look at the general test. It's a viable option alternative to the safe harbor. Now we have people saying they have to collect picture-perfect data, something that's sufficient to actually calculate the benefits. Or they are running PIA offset plan through, and with the PIA offset plan, it's not uncommon to come up with a situation where someone who is earning just over the base, who is just barely an HCE, who earns about $60,000, will blow the whole test. Or the timing situation might be such that collecting the data and running it through is going to be crazy. I think the IRS and Treasury have really opened it up so that people like me who were speaking theoretically can now speak practically and say the general test is something you can run now. If you hit these strange situations, there is a safety valve, at least for defined-benefit plans. The safety valve is not open to defined-contribution plans, nor to DB/DC aggregated plans. But if you're just running a defined-benefit plan alone, you have a safety valve. If you fail and you think that you still have a case to make to the IRS and say it's nondiscriminatory, you can come in and say it was just one oddball outlier, as Harlan has said.

With respect to the data, they've opened it up to the point where you don't have to use picture-perfect data. You still have to be sure. This isn't loosening up and saying to use loose data. You still have to assure yourself that it's kind of like an FAS paragraph-10-type thing. They're not going to look for the cookbook-type calculation, but you must assure yourself that if you did the exact calculation with the exact data, perfect data, you have reasonable certainty that the results would be no different from what you're doing with the data that you're actually using. You can now do snapshot testing under certain circumstances with one day of the year, instead of incorporating all of the people that came in or left during the year. In some circumstances, you may have to make some adjustments to your coverage test to do that. You can also do a testing cycle that says under certain circumstances, if my test appears to be stable, I'm only going to do the general test once every three years. Now if you've heard enough of what I've said, you know why none of my clients are doing that. I think with everything that the IRS has given to us, I'm in the process of incorporating the general test as a part of the valuation process in the same way that *SFAS 87* eventually came to be. If it's simply something where I push the button and all of these calculations are done like that along with the valuation, then there's no reason to do it once every three years. If they still let us run the valuations once

every three years, the way we used to be able to do, then I think I would be happy for that. If we want to try and get the three-year actuarial valuations back, unless your valuation data is so far off the mark that there's a question of whether you're really running, this is the data-quality-type question. If the data for your actuarial valuation is solid enough to confirm the deduction in the minimum funding, then it's generally solid enough to determine the numerators and the denominators, the 414(s) definition of compensation, everything you need. As far as I'm concerned, it makes it a practical, workable alternative to simply put it as an appendage to your valuation.

At this point, I see no reason to fear it anymore. It now comes down to a question of, do you want to do it? If you want to design plans the way you want, the general test is something to look at. If you don't want to bother with all of this, then yes, go safe harbor. I think you're going to find that there are many complex rules that are going to tell you how to get into the safe harbor in the first place, but it's a question of where you want that complexity – up front or on an ongoing basis.

MR. DONALD J. SEGAL: Adrien, I just want to follow up on one of your last comments. You said the safety valve is available only to DB plans. I have two DC plans that I am combining for testing, and I'm testing them on a benefits basis, not on a contribution basis. Can I use the safety valve?

MR. LABOMBARDE: Based on the re-proposed or proposed amendments, we call them the January regulations, no.

MR. WELLER: I think the origin of safety valve was to deal with the unexpected development of a person's accrual rate. We didn't think that there were going to be so many unexpected accrual rates in the context of DC plans. Even in cross-testing, you have more ability to shape the accrual rates or the allocations in the DC plan than you have to shape the accrual rates in the DB plan, especially given the concerns about most valuable accrual rates that show up in the DB plan and aren't an issue on the DC side.

MR. SEGAL: So it was really only available for a DB plan that's being tested as a DB plan?

MR. WELLER: Exactly.

MR. SEGAL: How about a combination of DB plans?

MR. WELLER: No. An aggregation of DB plans are treated after you have aggregated them in 410(b). They are now one plan in 401(a)(4), so it's available there.

MR. LABOMBARDE: If you have a defined-benefit plan, PIA offset plans are where we've seen the safety valve become a useful feature, something that helps out. If you've got a PIA offset plan, and you think you may be wanting that safety valve, be weary of doing an aggregation with a DC plan, because you're taking the safety valve away then.

MR. DALE LAMPS: If I'm evaluating a defined-contribution plan by using cross-testing and using imputed disparity, what flexibility do I have in terms of imputing disparity before I do the conversion to defined-benefit equivalent versus after?

MR. WELLER: You have no flexibility. The DC plans that are cross-testing as a defined benefit on a benefits basis must impute disparity after the conversion. The other way would inflate the value of the disparity in an enormous amount.

MR. LABOMBARDE: Exactly. There are some ordering rules under 1.401(a)(4)(7); they're specific. For instance, you impute disparity before you do rate-banding, and there's a whole set of rules like that. It comes after cross-testing but before rate-banding and certain other procedures that you do. Imputed disparity comes at a distinct point. There is no flexibility, as Harlan points out.

MR. WELLER: Let me clarify that. That was the case in the September package. The sort of simplifications that were in the January proposals do not specify the order other than the one critical order, which is that you cross-test first. If you go through the mechanics, you'll find out that it makes sense to do your rate-banding before doing your imputation of disparity. If you did it the opposite way, you would sort of undo the benefit of the rate-banding in the first place, but you could if you wanted to create more work for yourself.

FROM THE FLOOR: If I'm doing a general test, and I have two plans, and one is a 401(k) plan, to what extent can I use accruals that are generated by employee elections?

MR. WELLER: The 401(k) plans are carved out of the world of 401(a)(4), and you're sent to the actual deferral percentage (ADP) test under the 401(k) regulations to satisfy the amounts test under 401(a)(4), so it doesn't come into play. But it does come into play in the average-benefit percentage (ABP) context, and the 401(k) plan is still subject to other elements of the 401(a)(4) testing regime, including the Section-4 rules on benefits, rights and features, and the Section-5 rule on the plan amendments. You can't completely say don't worry about 401(a)(4), but the amounts testing is controlled solely in the 401(k) regulations through the ADP test, no cross-testing is available, etc.

MR. LABOMBARDE: I have a quick follow-up on that. As Harlan points out, 401(k) is out of the picture when we're looking at amount, so you'll never see a 401(k) elective deferral in a general test. You'll also never see a 401(k) elective deferral cross-tested, because you simply look at the ADP test. He did point out, however, that it does come into play if you're doing the ABP test to get a lower threshold, and the 401(k) has to be in there. If I want to do my ADP test on a benefits basis, Harlan, does that mean that I effectively get to cross-test – it's not cross-testing in the 401(a)(4) context, but converting the 401(k) elective deferrals to a benefits basis for purposes of satisfying the average-benefit percentage test?

MR. WELLER: I think that you do.