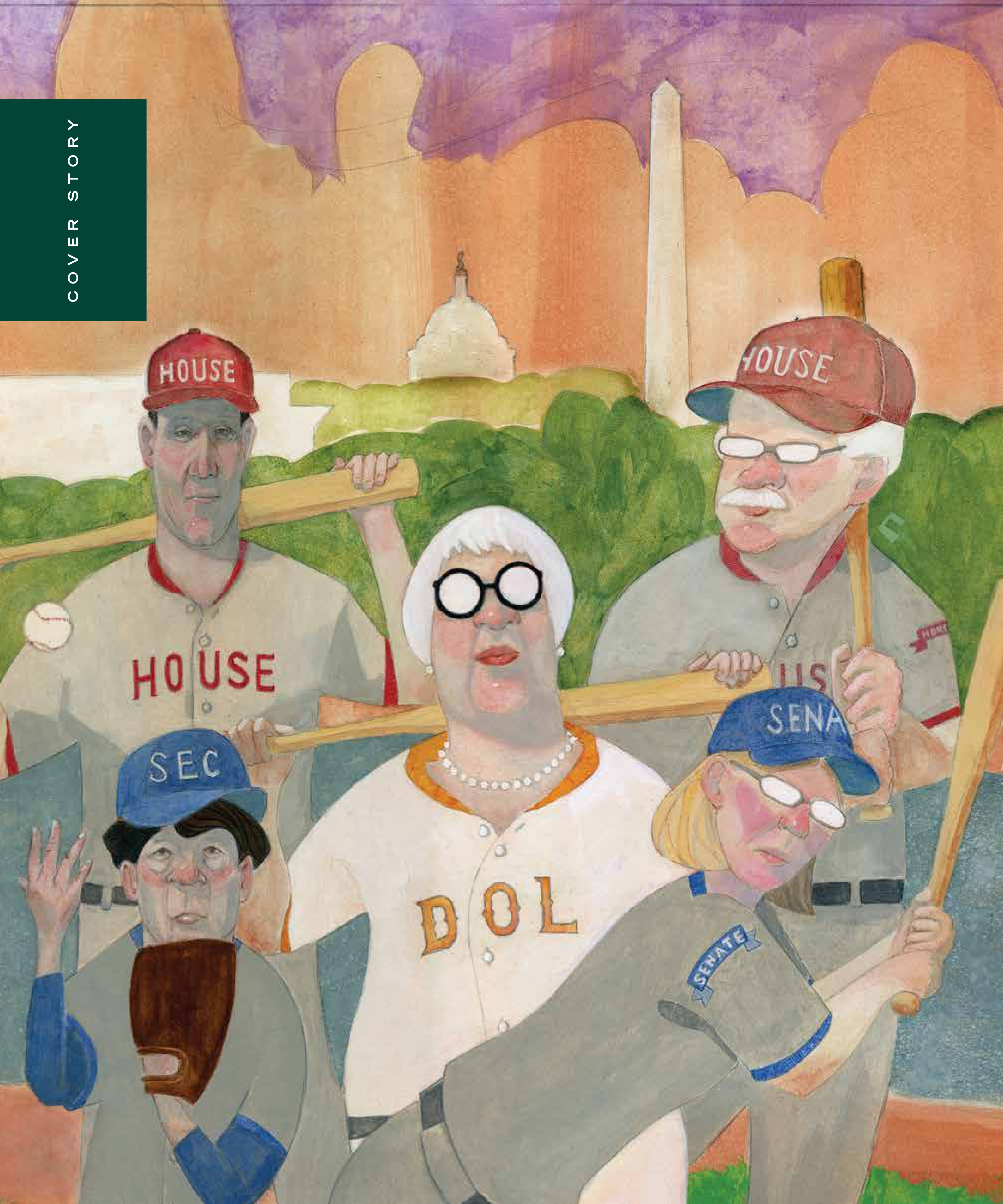
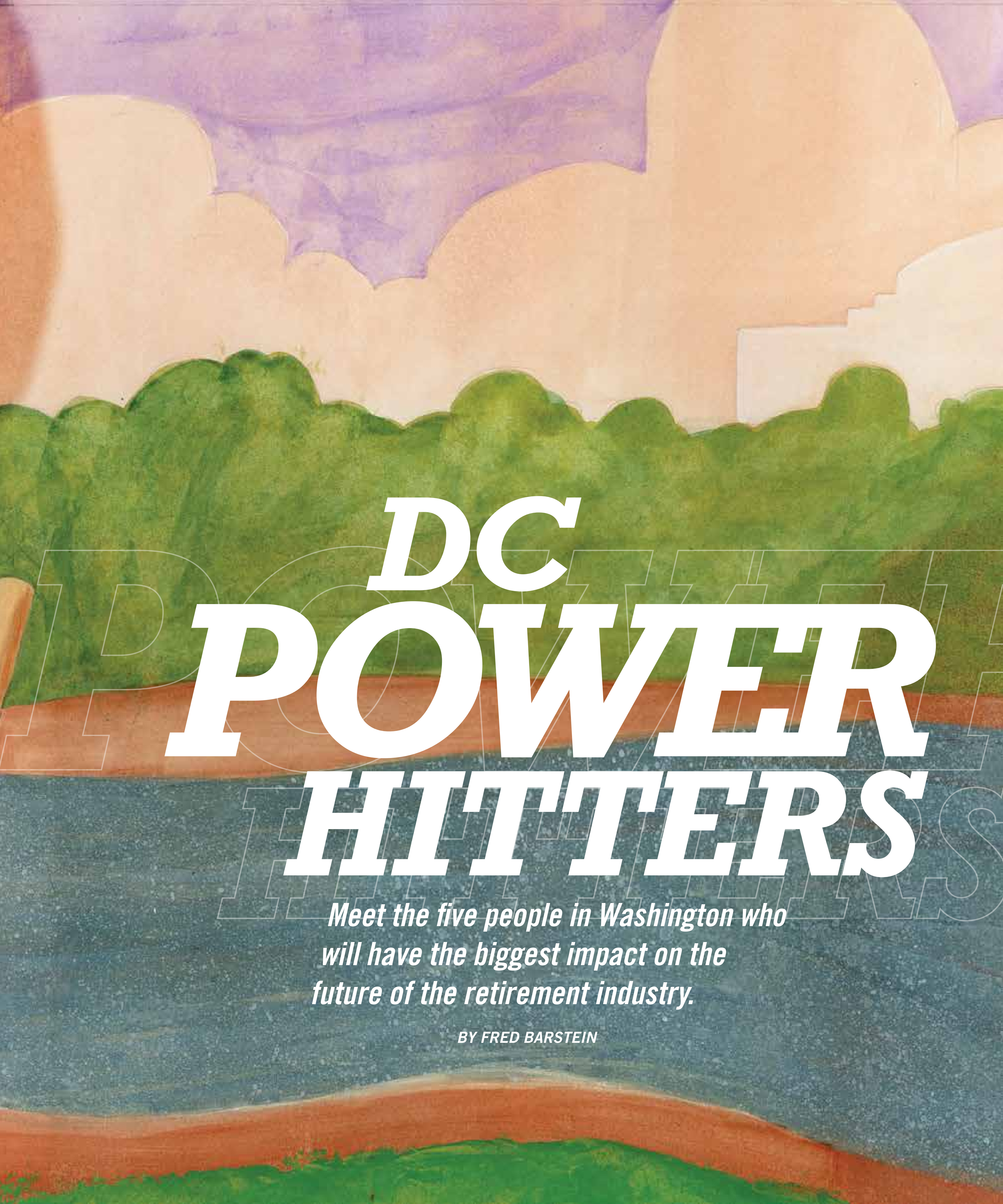
COVER STORY





# DC POWER HITTERS

*Meet the five people in Washington who will have the biggest impact on the future of the retirement industry.*

BY FRED BARSTEIN

**MANY PLAN ADVISORS, ESPECIALLY THE MORE EXPERIENCED ONES, GRUMBLE THAT THE GOVERNMENT IS "MESSING WITH THEIR BUSINESS."** With good intentions, these plan advisors believe that, if left alone to conduct their business without government interference, everyone would be better off.

But these advisors are forgetting an essential fact: that 401(k) plans and related retirement programs are a wholly owned subsidiary of the federal government. Without the tax deferral on contributions to an employer sponsored plan under the tax code, the system would crumble.

So complaining obviously will do no good, other than to make those advisors feel better — for the moment, that is. After they get over it, the next question is what to do about it. Certainly, learning the ins and outs of ERISA plans is required, as is keeping up with all the changes that result from legislative and regulatory activity in Washington. But beyond that, some plan advisors would like the opportunity to actually bring about change, so that a retirement system that the rest of the world covets — and that is performing better than the legislators who created Code Section 401(k) could have imagined — can get better.

> "Many are concerned that the uniform fiduciary rule being considered by the SEC will not be compatible with the DOL's new definition, which could cause further confusion in the market."

The awareness that the voice of plan advisors needs to be heard in Washington was the impetus behind the creation of the National Association of Plan Advisors. It also may be the reason that NAPA has become one of the fastest growing associations in history, with nearly 7,000 members as of September 2013, a month shy of its second anniversary. As NAPA's CEO and Executive Director Brian Graff succinctly puts it, "Better to be at the table than on the menu."

If plan advisors feel like they have a target on their back, they are probably paying attention. Legislators and regulators have recently awakened to that fact that 85% of plans with 25 to 10,000 employees use an advisor, according to recent research by Fidelity's DCIO group. The financial services industry is not that far ahead of Washington — most broker dealers do not have a clue about the needs of qualified retirement plan advisors, with fewer than 50 firms dedicating at least one person to support them and fewer than 50 money managers dedicating sales consultants to work with plan advisors.

So for the first time, plan advisors who want to effect change rather than react or complain have a group that speaks for them and a way to engage with Washington. The first step in the process of engagement is understanding the issues and the people in Washington who have the most influence over them.

That's why we created our list of the 25 most influential government officials affecting retirement plans — and why this cover story of our inaugural issue, which reviews the major issues at stake and the five people in Washington who are most likely to affect them, is so important.

Like the defined contribution market, it all comes down to people — and, just like our industry, it's surprising how few really matter. It's important for plan advisors to understand not just the issues, but also the people driving them, to get a sense of the directions they may take.

There are four major issues on the table in Washington affecting plan advisors. Following are the issues and the officials who are the "power hitters" in each area.

1. Redefinition of fiduciary — DOL's Phyllis Borzi
2. Uniform fiduciary rule — SEC's Mary Jo White
3. Tax reform — Rep. Dave Camp
4. IRAs — Sen. Elizabeth Warren and Rep. George Miller

### Redefinition of Fiduciary Rule: Phyllis Borzi

The DOL's proposed expanded definition would force advisors to decide if they can (or want to) serve as fiduciaries, which would dictate their business model and compensation structure. Rather than the current five-part test, an advisor would be a fiduciary under the expanded definition if it renders individualized advice and that advice is considered by the investor when they make investment decisions — which includes practically all advisors currently working on qualified plans and IRAs. If the advisor is a fiduciary, then compensation must be level.

While the proposed rule has been delayed, the DOL is moving ahead; the rule is expected early next year. It may force most advisors who work on rollovers to be fiduciaries. In turn, this could force out commissioned advisors, who will not easily be able to receive level compensation.

From the DOL's perspective, the issue is about focusing on putting clients' interest first. Though the DOL claims that they have detailed economic analyses on the cost/benefit effects of the rule, there is stiff opposition ahead. For example, the Congressional Black Caucus has expressed concerns about the effects of the proposed rule on lower-income investors, many of whom may lose access to brokers who are unable or unwilling to serve as fiduciaries under the rule.

In addition, many are concerned that the uniform fiduciary rule being considered by the SEC (see below) will not be compatible with the DOL's new definition, which could cause further confusion in the market. For example, the House Committee on Financial Services has approved a bill introduced by Rep. Ann Wagner (R-MO) to slow down the rulemaking process at both the DOL and the SEC on the definition of a fiduciary and force the two agencies to act in concert.

### Uniform Fiduciary Rule: Mary Jo White

Under the Dodd-Frank Act, the SEC has the power (but not the obligation) to create a uniform fiduciary rule. Currently, advisors working as RIAs are considered to be fiduciaries, while brokers working under FINRA jurisdiction can work under the so-called "suitability" standard.

Responses to the SEC's "Request for Information" were submitted last July. In their RFI, the SEC Staff outlined two primary objectives:

- to address, among other things, retail customer confusion about the obligations broker dealers and investment advisers owe to those customers; and
- to preserve retail customer choice without decreasing retail customers' access to existing products, services, service providers or compensation structures.

To address retail customer confusion, the first SEC staff recommendation was that the Commission "engage in rulemaking to implement a uniform fiduciary standard of conduct for broker dealers and investment advisers when providing personalized investment advice about securities."

Sounds simple. But like most things in Washington, it isn't. Not only are there concerns about conflicts with the DOL's proposed rule, there is concern about the economic effect of a uniform


**NO MATTER WHO SITS IN THE EBSA DIRECTOR'S CHAIR,** they will wield considerable influence over corporate retirement plans. But the current director, Phyllis Borzi, may have a greater impact than her predecessors if the redefinition of fiduciary rule is promulgated. Appointed in July 2009 as Assistant Secretary of Labor of the EBSA — and with the potential to stay on until the end of President Obama's second term or longer — Borzi's impact on DC plans and advisors has been significant, and will continue to be.

Previously, Borzi served as lead staffer to Rep. George Miller's House Sub-Committee on Labor Management Relations of the Committee on Education and Labor from 1979 to 1995 and was a research professor at George Washington University Medical Center focused on health care. She also served on Hillary Clinton's health care reform task force in 1992 and has been of counsel to a Washington law firm.

The EBSA oversees more than 700,000 retirement plans under Title 1 of ERISA, as well as 2.3 million health plans and a similar number of other welfare plans covering 141 million Americans. Her pet project is the redefinition of fiduciary because she is concerned about conflicts of interest among advisors who do not act in a fiduciary capacity. Her comments have led some to suggest that she questions the value proposition of financial advisors — an issue that she seems to be addressing in the proposed rule.

ASPPA's General Counsel Craig Hoffman and his staff have been working closely with Borzi and EBSA officials on the fiduciary rule to ensure that the role of an advisor is clearly understood, as is the rule's potential impact on plan sponsors and participants.


**AS CHAIR OF THE SECURITIES AND EXCHANGE COMMISSION, MARY JO WHITE HAS JURISDICTION OVER RIAS** and great influence over all financial advisors. White earned her reputation as U.S. Attorney for the Southern District of New York from 1993 to 2002, where she focused on complex securities and financial institution fraud. She went on to lead the litigation department of a large New York law firm before being confirmed as SEC Chair in April 2013.

White's influence over plan advisors in particular could make an impact as her agency tackles the issue of uniform fiduciary standards for financial advisors, just as the DOL is pushing ahead with its own rule. With the appointment of Thomas Perez as Secretary of Labor this summer, followed closely by the two agencies signing an official agreement to work closely together on matters of mutual interest, the SEC could change how plan advisors interact with their retirement plan and IRA clients.

fiduciary rule, which Rep. Wagner's bill addressed. Additionally, establishing a uniform fiduciary standard for broker dealers and investment advisors within the parameters of Dodd-Frank could actually cause more confusion among retail customers when selecting investment professionals.

According to Brian Graff, Executive Director/CEO of NAPA and ASPPA, "The 2010 financial services reform legislation, more commonly referred to as Dodd-Frank, explicitly provided that any uniform fiduciary standard imposed by the SEC cannot prohibit commission-based compensation and cannot require that the advisor continuously monitor investments." These provisions were included out of congressional concern that investors with smaller amounts of assets and lower incomes would otherwise not have access to the services of an advisor, Graff explains.

The SEC's proposed uniform fiduciary rule would create two types of fiduciaries:

- "traditional" fiduciaries (*e.g.*, RIAs) who do not receive commissions and have a duty to monitor their clients' investments; and
- "new" fiduciaries (*e.g.*, brokers) who are free to continue to accept commissions and are still not required to monitor investments.

While Graff agrees that average investors need better information about the role of their advisors, he is concerned that "the kind of 'non-uniform uniform' fiduciary standard being considered by the SEC will certainly not accomplish that, and in fact will lead to even more confused investors." Therefore, the recommendation of ASPPA and NAPA is a standardized disclosure given to investors before engaging an advisor (and annually thereafter). "One that explains what standard is applicable to the advisor (*i.e.*, fiduciary or suitability), what services that entails, and how the advisor is compensated would give investors the right amount of information so they can make the choice that works best for them," says Graff.

It's not certain what the next step will be, or when it may occur. During testimony in late July at a Senate Banking Committee hearing, SEC Chair Mary Jo White indicated that the rule was on the "back burner."

**Tax Reform: Rep. Dave Camp**

In an effort to close the budget deficit, congressional tax writers are looking at all deferrals and deductions to determine how each can contribute to either increasing revenue or lowering costs. As part of that exercise, the tax incentives for retirement saving are being examined closely.

For its part, the Obama administration proposed a cap on those deductions for people whose retirement benefits reach an estimated $205,000 in annual benefits or $3.4 million at the prevailing interest rates when the proposal was made in April 2013.

On the other hand, Rep. Dave Camp (R-MI), Chairman of the House Ways and Means Committee, and Sen. Max Baucus (D-MT), chairman of the Senate Finance Committee — the two most influential taxwriters in Congress — have stated that they intend to take a '"blank slate" approach to tax reform. Their plan for tax reform is to begin with a tax code without all of the special provisions in the form of exclusions, deductions and credits and other preferences that some refer to as "tax expenditures."

This approach could prove to be catastrophic for the nation's retirement system, according to Graff. Eliminating the tax deferral incentive "would destroy retirement security for working Americans," Graff believes. "The benefits of this deferral incentive are very real, and the revenue that would be gained by eliminating it is not. Every dollar of retirement savings excluded from income today will be included as income when it is paid out in retirement. Treating the retirement savings income deferral like a permanent exclusion is terribly misleading, and could lead to bad policy decisions," says Graff.

Graff makes a strong case that the workplace retirement plan system works for middle-class Americans, noting that workers earning $30,000 to $50,000 per year are 14 times more likely to save at work than on their own. He also emphasizes that the tax incentive for retirement savings is a deferral, not a deduction or


**REP. DAVE CAMP (R-MI) IS THE CHAIRMAN OF THE HOUSE WAYS AND MEANS COMMITTEE,** which has primary jurisdiction over tax reform. If tax reform happens, it will start in the House. Camp seems to be taking the lead on tax reform, not only because of his position on the Committee but because of his close working relationship with House Speaker John Boehner. Camp is term-limited as Chairman until November 2014.

Though Camp has publicly supported the retirement system, all bets are off as the federal government struggles to balance the budget. According to Jim Dornan, ASPPA's Political Director, who meets regularly with House and Senate leaders, "In the numerous times we have met with Chairman Camp stressing the importance of preserving the current system, it seems that everything is still on the table, include retirement tax incentives."

an exclusion. Failure to account for this deferred tax revenue, he argues, overstates the retirement tax expenditure estimate by more than 50%.

In addition, because of non-discrimination rules, retirement plan tax incentives are more equitably spread among lower and middle income taxpayers than are other tax incentives like capital gains or mortgage deductions. Judy Miller, ASPPA's Director of Retirement Policy, estimates that in 2012, more than 70% of the defined contribution tax benefit went to families earning under $150,000. Miller also notes that the majority of tax benefits go to middle class families.

If we have a retirement crisis now, it's hard to imagine that it will get better if the tax incentives to save are cut.

**Regulation of IRAs: Sen Elizabeth Warren and Rep. George Miller**

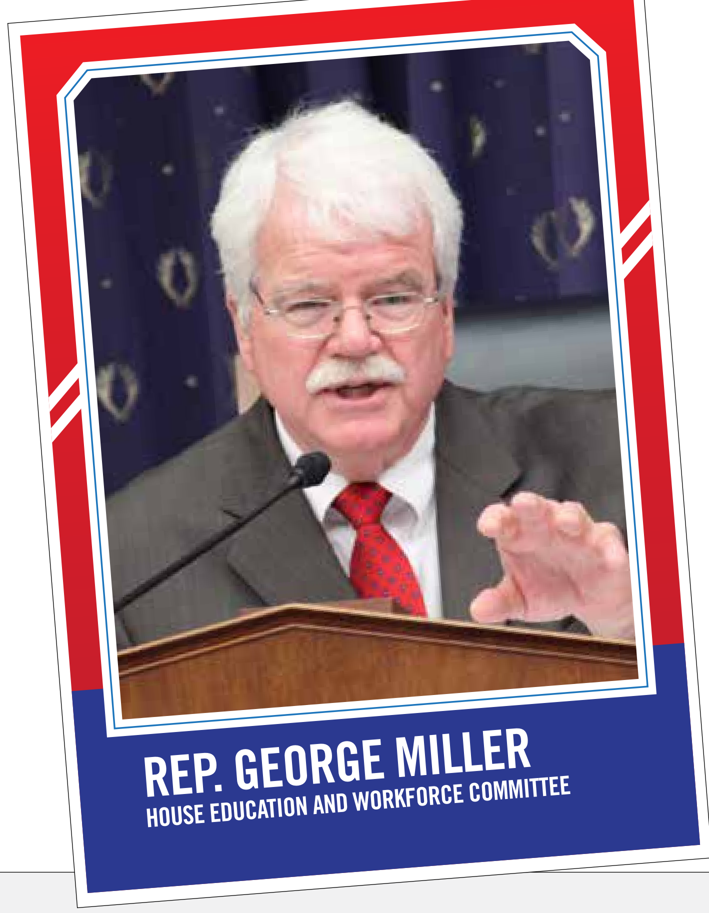
IRAs accounted for $5.1 trillion in 2012, according to the Investment Company Institute, growing 10.5% last year. DC plans and IRAs are growing at the expense of DB and government plans, accounting for 54% of retirement assets in 2012 — up from 51% in 2007. During that same period, DB plans and government plans both declined more than 20%.

As Baby Boomers start to retire, they are rolling DC and other retirement assets into IRAs — what some call the beginning of the greatest transfer of wealth in history. It's likely that these individual retirement plans will start getting the same levels of scrutiny and attention from regulators that ERISA plans have received for years.

In the spring of 2013, an undercover investigation by the Government Accountability Office added fuel to the fire. The GAO study looked into misleading fee disclosure and marketing practices by IRA service providers regarding IRA rollovers from 401(k) plans. Undercover investigators from the GAO contacted 30 IRA providers, posing as workers about to change jobs. Seven of


**FRESHMAN SEN. ELIZABETH WARREN (D-MA) HAS MADE A BIG IMPACT IN WASHINGTON IN A RELATIVELY SHORT TIME.** For example, she was given a seat on the Senate's Health, Education, Labor and Pension Committee, which makes her a key player for retirement plans.

Warren was a consumer bankruptcy law professor at Harvard Law School before defeating incumbent Scott Brown in 2012. She is well known as a consumer advocate on financial services issues, and her work with the Department of Treasury after the financial crisis is largely credited with the formation of the Consumer Financial Protection Bureau. Along with her position on the HELP committee, her background and interests, as well as good working relationship with Rep. Miller, puts her in a key position when Congress eventually focuses on IRA fee disclosure and transparency.




**REP. GEORGE MILLER (D-CA) IS THE SENIOR DEMOCRAT ON THE HOUSE EDUCATION AND WORKFORCE COMMITTEE** which has jurisdiction over the DOL, ERISA, education and labor unions.

Miller is well known to retirement industry professionals. He led the charge for more fee disclosure in qualified plans, which eventually led to the DOL's 408(b)(2) and 404(a)(5) rules. Now Miller seems poised to champion fee disclosure for IRAs, a move supported by ASPPA and NAPA. Along with Sens. Nelson and Harkin, Miller called for greater fee disclosure after the 2013 GAO report on potential abuses and misleading information by service providers.

According to Judy Miller, ASPPA's Director of Retirement Policy, ASPPA supports greater disclosure and transparency for IRAs and is "working closely with Congressman Miller on these issues. We are confident and optimistic that it will end with a positive result."

the firms provided incorrect information, including the statement that there would be no cost to roll over the money. The GAO also found that five of 10 websites indicated that there were no fees for opening an IRA.

Their conclusion: Even though it would be better for employees to leave their money in their current plans, the firms encouraged IRA rollovers with misleading statements to harvest bigger fees.

In response, Rep. George Miller (D-CA) and Sens. Bill Nelson (D-FL) and Tom Harkin (D-Iowa) called on the DOL and the Treasury Department to provide uniform disclosure notices, with IRA fees clearly stated, thus encouraging workers to keep the money in their employer sponsored plans. (Roughly 90% of new IRA money comes from employer plans.)

FINRA has also weighed in about misleading advertisements by its members about IRA fees. In a notice, FINRA stated: "FINRA is concerned… that some broker dealers' communications that discuss fees may not be fair and balanced, and could be misleading." Specifically, FINRA is concerned about what it characterized as overly broad language about no-fee (or "free IRAs") that leaves out the fact that there may be fees for opening, maintaining and closing accounts and fees for ancillary services, as well as fees imbedded in the products. Highlighting services that are provided free of charge without listing services for which fees are charged was also cited as a concern.

With an issue as far-reaching as IRAs — and that has major implications for most American families — it's hard to imagine that Congress and the regulatory agencies with jurisdiction over IRAs will not act decisively to close any informational gaps and misleading practices.

## TOP 25 DC POWER HITTERS

**Tax Reform**
Rep. Dave Camp
Sen. Max Baucus
Sen. Orrin Hatch
Sen. Ben Cardin
Sen. Rob Portman
Rep. Pat Tibieri
Rep. Ron Kind
Mark Iwry, Treasury Dept.
Sen. Ron Wyden

**DOL Fiduciary Definition**
Rep. John Kline
Rep. Phil Roe
Rep. Rob Andrews
Phyllis Borzi, EBSA
Sen. John Isaacson
Sen. Kay Hagan
Rep. Maxine Waters
Sylvia Mathews Burwell, Office of Management and Budget

**IRA Regulation**
Rep. George Miller
Sen. Elizabeth Warren
Sen. Tom Harkin
Richard Cordray, U.S. Consumer Financial Protection Bureau

**SEC Uniform Fiduciary Standard**
Rep. Jeb Henserling
Mary Jo White, SEC
Rep. Ann Wagner
Richard Ketchum, FINRA

*More information about each of our top 25 DC power hitters is available on the NAPA Net web portal, www.napa-net.org.*