

THE OFFICIAL MAGAZINE OF THE NATIONAL ASSOCIATION OF PLAN ADVISORS

# napanet

*the magazine*

Powered by the American Retirement Association

FALL  
2023

[napa-net.org](http://napa-net.org)

## HELP OR HYPE.

### AI'S IMPACT ON THE RETIREMENT PLAN SPACE

GLOBAL ADOPTION OF  
ARTIFICIAL INTELLIGENCE  
IN ALL INDUSTRIES  
IS HAPPENING AT  
BREAKNECK SPEED—  
THE RETIREMENT PLAN  
SPACE INCLUDED. HOW  
WILL IT AFFECT PLAN  
ADVISORS, SPONSORS,  
AND PARTICIPANTS?

**plus**

2023 Advisors' Choice (Top Recordkeepers) Awards • A Retirement Income  
Call to Action • Tackling the 'Late' Boomer Savings Dilemma



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**Nevin E.  
Adams, JD**

*Former Chief Content Officer  
American Retirement Association*

Former Chief Content Officer of the American Retirement Association, Nevin now claims to be “retired.” One of the industry’s most prolific writers, during his more than four decades in the retirement industry, he’s served as the Employee Benefits Research Institute’s (EBRI) Director of Education and External Relations, spent a dozen years as Global Editor-in-Chief of PLANSPONSOR/PLANADVISER, and after two decades working with retirement plans, entered journalism as the originator, creator, writer and publisher of PLANSPONSOR.com’s NewsDash.



**Steff  
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*Executive Director  
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Prior to his current leadership roles at TRAU, TPSU and 401kTV, Steff was the founder and past CEO of Fiduciary Consulting, Inc., the Governance Group, Inc. and the CHALK Advisory Board. He served on NAPA’s founding Leadership Council and is co-author of the book, *How to Build a Successful 401(k) Retirement Plan Advisory Business*. Steff writes the magazine’s “Inside the Plan Sponsor’s Mind” column.



**Rebecca  
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Rebecca founded 401(k) Marketing in 2014 to assist qualified experts operate a professional business with professional marketing materials and ongoing awareness campaigns. Previously she held a variety of positions at LPL Financial, Guardian Life, Northwestern Mutual and Fidelity Investments. Rebecca writes the magazine’s “Inside Marketing” column.



**David N.  
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David is an attorney who advises plan sponsors, advisors and service providers on retirement and other benefit plans, and is a popular speaker on plan design, fiduciary governance, regulatory and legislative issues. He writes the magazine’s “Inside the Law” column.



**Spencer X.  
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*Founder  
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Spencer is the founder of AmpliPhi Social Media Strategies. A former 401(k) wholesaler, he now teaches financial services professionals how to use social media for business development, and is a popular speaker on social media and the author of *ROTOMA: The ROI of Social Media Top of Mind*. He writes the magazine’s “Inside Social Media” column.



**Bonnie  
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*Chief Solutions Officer  
Endeavor Retirement*

Bonnie Triechel, the Founder of Endeavor Retirement and Endeavor Law, is an ERISA attorney that works with advisors, plan sponsors and others in the retirement plan ecosystem. She is a regular contributor to NAPA’s publications and enjoys working with advisors as a subject matter expert to NAPA and ARA training programs such as the ESG(k) program, 401(k) Rollover Specialist (k)RS™ program, and others to come.



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# Another Fiduciary Rule Sequel in a Familiar Franchise

*We have no idea how it will end, but it will undoubtedly make for an entertaining show.*

**L**ike *Friday the 13th's* Jason Voorhees, the proposed fiduciary rule won't (and seemingly can't) die. No matter the weapon—lawsuits, changing administrations, powerful political opposition, the Fifth Circuit—it bats it aside and just keeps coming.

I do not know if it will ever be implemented, and I'm starting to think its routine reintroduction is an elaborate trick to excite nerds like me.

On a late Friday in September, the Department of Labor (DOL) sent the latest proposed version to the Office of Management and Budget (OMB) for review. We don't yet know what's in the officially named "Conflict of Interest in Investment Advice" proposed rule, and the public will probably get a look in October.

"While we won't see what the proposed regulation and exemptions say until the OMB has reviewed the rule and it is published in the Federal Register—probably in 45 to 60 days from [the date it was sent to OMB]—it almost certainly says that rollover recommendations are fiduciary advice and that recommendations of annuities for plans or IRAs will be subject to more demanding conditions," Fred Reish, Partner and Chair of the Fiduciary Services ERISA Team with legal powerhouse Faegre Drinker Biddle & Reat, said. "For example, PTE 84-24 for fiduciary recommendations of insurance and annuity products to retirement accounts will likely be amended to require fiduciary acknowledgment, disclosure of



conflicts of interest, and a best interest process for developing the recommendation."

"This will be the fourth major attempt by the DOL since 2010 to revamp the 1975 rule," Thomas Clark, JD, LLM, Partner and Chief Operating Officer with the Wagner Law Group, added. "There's no question the DOL has the authority to regulate in this area. The issue is what are the outer bounds of that authority. We expect the DOL will have carefully crafted this proposed regulation, taking into account the last 13 years of trying, the myriad court decisions, and the rule-making that has been done by the SEC."

According to a post on the OMB's website, "This rule-making would amend the regulatory definition of the term fiduciary ... to more appropriately define when persons who render investment advice for a fee to employee benefit plans and IRAs are fiduciaries within the meaning of section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code."

It would consider advisor practices, plan sponsor and participant expectations, and IRA owners who receive investment advice. It would also consider "developments in the investment marketplace," including compensation structures that could expose advisors to conflicts of interest.

The Employee Benefits Security Administration (EBSA) will also evaluate available prohibited transaction class exemptions and propose amendments or new exemptions.

The proposed rule suddenly resurfaced after months of speculation regarding if and when the DOL would propose a revised rule. On Aug. 31, two top Republican lawmakers serving on the House and Senate committees with jurisdiction over ERISA called on the Department of Labor (DOL) to halt any further changes to the definition of fiduciary.

The letter from Rep. Virginia Foxx (R-NC), chair of the House Education and the Workforce Committee, and Sen. Bill Cassidy, MD (R-LA), the ranking member of the Senate Health, Education, Labor and Pensions (HELP) Committee, urged Acting Labor Secretary Julie Su to cease any further action to amend the definition of an investment advice fiduciary.

"We write to oppose the Department of Labor's continuing efforts to promulgate a rule on 'Conflict of Interest in Investment Advice' to revise the definition of fiduciary under section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA)," the lawmakers said.

The OMB received the rule a little over a week later, and that, as they say, was that, at least for now. The plot, people, and formula feel familiar. We have no idea how this sequel will end, but it will undoubtedly make for an entertaining show.

**John Sullivan**  
Editor-in-Chief

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# Why I Advocate for Advocacy

*Each of us has the obligation and opportunity to carry our message to lawmakers on the Hill.*

By Renee Scherzer

A gift in serving as the NAPA President has been the strategic conversations that I have had with those whose knowledge and energy motivate me to continue to do more. We have many impactful individuals effectively enhancing and protecting our industry and the lives of all working Americans. And, as with many of you, there is no shortage of areas that I want to make an impact on myself, not just through my term but for years to come.

As someone who has prided herself in contributing to causes that I am passionate about, I needed to learn how our industry was being protected. In fact, it is one that is so important that without it, the future of what we do is at risk. Over the past few years, I have witnessed the true impact that our peers, along with the powerful team at the American Retirement Association, were making through advocacy efforts.

Advocacy helps public policymakers who need—and often want—our input. Each of us has the obligation and opportunity to carry our message to lawmakers on the Hill with our voice and through financial support through the ARA PAC.

For those unfamiliar, the American Retirement Association's bipartisan political action committee (ARA PAC) and our PAC Endorsed Candidate program are critical to advancing ARA's policy priorities and strengthening the private retirement industry's voice in Congress.

In 2022, member support of the ARA PAC was essential in educating legislators who helped us get the SECURE 2.0 Act across the finish line. And anyone who has attended a NAPA Fly-In had

a front-row seat to witness the impact that our presence makes.

Just weeks ago, I had the pleasure to join over 200 delegates at the 2023 NAPA Fly-In, more than ever before. Over two days, there were over 160 meetings with representatives thanks to the hard work of the ARA team.

Delegates from across the nation represented different firms and experiences, all united with one purpose of protecting the private retirement system. Everyone I spoke with left filled with a sense of empowerment and armed with the knowledge that our voice mattered and there is an unceasing need for our presence.

Since leaving Washington, D.C., we've witnessed how continued work needs to be done with the SEC's controversial swing-pricing proposal, the DOL's continuing efforts to promulgate a rule on "Conflict of Interest in Investment Advice" to revise the definition of fiduciary. Alternatively, we all celebrated the success that the advocacy efforts had when learning of the transition relief for two years from the Roth catch-up contribution requirements under Section 603 of the SECURE 2.0 Act.

The unrelenting energy needed to continue protecting the private retirement system requires members' participation through our unified voice and resources. You can make a financial contribution and learn more at [araadvocacy.org](http://araadvocacy.org). The ARA PAC can assist you in contributing based on your respective firms, and for contributions under \$200, disclosure of contributors is aggregated.

This month, I will join, for the first time, the NAPA Non-Qualified Deferred Compensation conference that began in 2018 by



*Renee Scherzer is a Senior Vice President of OneDigital's Retirement + Wealth division specializing in retirement plan consulting. This is her inaugural column as NAPA's 2023/2024 president.*

Brian Graff, Jeff Acheson, and a few others.

As with many of you, my days are full, so having the opportunity to learn from experts over two days and bring that knowledge to my clients is something that I cannot pass up. Our clients count on us to bring them solutions, and this is a tool that we all need in our toolbox, as stated by my predecessor, Corby Dall.

A couple of other items that I would like to share is that our DEI&B committee has been identifying the priorities and goals they will be rolling out in the coming months, and I look forward to supporting their efforts.

And our Women in Retirement Conference (WiRC) committee has been working hard on a powerful agenda. If you are a female leader or can sponsor a female leader, this will be an event to remember January 10 - 12, 2024, so look out for registration information that will be coming soon.

I leave you with a quote from Benjamin Franklin, "Tell me and I forget, teach me, and I may remember, involve me and I learn." My involvement in committees, conferences, conversations, and decisions has been nothing short of rewarding, and I encourage each of you to get involved. And, to those who have allowed me the opportunity to gain knowledge from, I thank you.

I am honored to work alongside each one of you and serve as your NAPA President. Also, get out your calendars and save the date for NAPA Summit 2024 on April 7 - 9 in Nashville! [NNTM](https://www.nntm.com)

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# Getting it Right with Roths

*A major retirement savings incentive for millions of Americans involving billions of dollars was secured.*

By Brian H. Graff

**I**'d like to mention a MAJOR win for retirement plan advisors and, more importantly, American workers and savers overall, and thank NAPA members for their involvement in securing the outcome.

The IRS caused a collective sigh of relief in late August by issuing guidance regarding a technical error in Section 603 of the SECURE 2.0 Act concerning Roth catch-up contributions.

More specifically, it granted a two-year delay in the provision's effective date that mandates catch-up contributions must be Roth for those earning more than \$145,000. Catch-up contributions can now be made pre-tax through 2025, regardless of income.

While certainly welcome, it was unexpected. Most observers believed a fix to the technical error, first identified by the American Retirement Association, would require an act of Congress. With the clock ticking and the implementation date rapidly approaching (Jan. 1, 2024), it was far from certain lawmakers would have the bandwidth and wherewithal to get it done.

Speaking to delegates at the 2023 NAPA D.C. Fly-In in late July, Congresswoman Virginia Foxx, R-N.C., Chair of the powerful House Committee on Education and the Workforce, was confident yet realistic about its chances, calling the process "complicated, which it always is with the federal government."

She then urged Fly-In attendees to explain the issues in their meetings with congressional staff later that day, which they did, capping off a period of intense lobbying since NAPA first identified the error in January. We'd made our points and

exhausted our arguments, and the wait was on.

By now, the issue is well known. According to the wording in Section 603(b)(1) of SECURE 2, no participants would be able to make catch-up contributions (pre-tax or Roth) beginning in 2024.

It was the result of the elimination of a subparagraph in the body of the legislation to allow for a conforming amendment—but in the process, inadvertently eliminated the ability to make any pre-tax catch-up contributions.

Additionally, since under current law, Roth catch-up contributions can only be made for amounts that could have been excluded from income but for the



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The new guidance refers to an administrative transition period, stating that "the first two taxable years, beginning after Dec. 31, 2023, will be regarded as an administrative transition period with respect to the requirement under section 414(v)(7)(A) of the Code that catch-up contributions made on behalf of certain eligible participants be designated as Roth contributions."

"The IRS basically announced that they are going to interpret around the legislative text glitch," Kelsey Mayo, Outside Director of Regulatory Affairs for the American Retirement Association, added. "They're essentially saying catch-up provisions have not been

**“The IRS caused a collective sigh of relief in late August by issuing guidance regarding a technical error in Section 603 of the SECURE 2.0 Act concerning Roth catch-up contributions.”**

Roth election—the legislative text put all such future contributions at risk.

ARA Retirement Education Counsel Robert Richter warned that it took Congress three years to make minor technical corrections to the SECURE Act of 2019 (a.k.a. SECURE 1.0), so doing so with SECURE 2.0 could prove difficult. It was yet another reason why the relief and guidance in August, not even a year after SECURE 2.0 passed, was so welcome.

eliminated, period. That's point No. 1. And point No. 2 is now you don't have to make it a Roth for two years, and it can continue to be pre-tax catch-ups until 2026, regardless of income."

With that, a major retirement savings incentive for millions of Americans involving billions of dollars was secured. So, congratulations, NAPA Nation, and thank you for your hard work and support. **NNM**



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# Trends 'Setting'

*First world retirement issues dominate recent trends, but tech (once again) seems to be the answer.*



## High-Income Insecurity

*No one is immune.*

A recent study found that even those at the top of the income and wealth scale are among those who worry they might outlive their savings.

According to findings from the high-net-worth section of *Northwestern Mutual's 2023 Planning & Progress Study*, nearly half (47%) of U.S. adults with more than \$1 million in investable assets believe that their financial planning still needs improvement,

and a third (33%) think they could outlive their savings.

One positive is that the study finds that 84% of wealthy people say they have a long-term financial plan that considers up and down economic cycles; that compares to 52% who say the same among the general population.

"Wealthy people hold themselves to an exceptionally high standard when it comes to managing their finances," Aditi Javeri Gokhale, chief strategy officer, president of retail investments and head of institutional investments at

Northwestern Mutual, said in a statement. "They don't go on autopilot. Instead, they aim to see well beyond today. That includes the possibility of twists and turns in their financial lives."

In fact, regarding financial planning, the firm notes that its research reveals seven financial habits that American millionaires tend to employ.

1. Focus on the big picture
2. Act, but don't overreact
3. Be open to improvement
4. Don't take chances
5. Stay optimistic about what you can't control



- 6. Stay connected with others
- 7. Seek professional finance advice

### Trust in Financial Advisors

The study also finds seven out of 10 (70%) wealthy Americans work with a financial advisor—nearly double the amount of the general population (37%).

Moreover, over half (53%) of wealthy people consider advisors their most trusted source of financial advice—more than four times any other source. Spouses/partners ranked a distant second at 11%, followed by business news at 10%.

That said, the study further shows that recent economic uncertainty has led to a re-evaluation among some wealthy Americans. Nearly half (48%) of wealthy people who work with an advisor said that—if they were seeking a change—they would select another advisor who could offer more comprehensive financial guidance than their current advisor.

Also notable is that slightly more than a third (34%) said they would switch to an advisor who better understands their life stage and priorities.

"It's wise for the wealthy to seek a second opinion about the strength of their financial plans," Javeri Gokhale further emphasized. "Periods of uncertainty like the one we're in now are spurring people to take inventory about their choices and reconsider if their advisors are the right fit for them. As more affluent Americans intentionally seek out comprehensive financial advice instead of individual financial products, I expect to see this trend of second-opinion-seekers to grow."

— Ted Godbout

### Mobile Mania

*Mobile apps have emerged as a critical tool for retirement plan providers.*

**I**t might seem like a dated headline, but the retirement plan industry isn't exactly known for moving fast with technology.

Amid ongoing market volatility, it's little wonder that plan

participants are keeping a close eye on their retirement account balances and are increasingly doing so via mobile apps.

As a result, mobile apps have taken center stage as critical tools for retirement investors, according to J.D. Power's *2023 U.S. Retirement Plan Digital Experience Study*.

And while improved market performance has helped lift overall satisfaction with retirement plan digital tools, for firms that want to differentiate and increase customer satisfaction—whether in good markets or bad—more work needs to be done on the digital front, especially regarding mobile apps.

"The good news is that overall satisfaction with the retirement plan digital experience is up considerably this year, but when we compare those scores to similar customer-facing industries such as wealth management, property and casualty insurance, and automotive, it's clear that retirement plans still have a lot of opportunities to improve their digital offerings," explained Craig Martin, managing director and global head of wealth and lending intelligence at J.D. Power.

To that end, Martin noted that they're finding that improved digital experiences are critical to strong financial performance.

"Participants who have a great digital experience vote with their dollars, with roughly double the amount of participants rolling in assets from other plans and more than triple the amount saying they will keep their money with their current provider if their job situation were to change," he said.

Martin added that the effects of the digital experience on plan providers will only become more important when an inevitable market downturn occurs and satisfaction is affected.

As to the study's key findings, J.D. Power reported that overall satisfaction with retirement plan digital experiences increased to 685 this year (on a 1,000-point scale), a 22-point increase from 2022.

What's more, retirement plan mobile apps have shown substantial increases in adoption

and continue to drive higher satisfaction levels when used.

Nearly half (47%) of participants have downloaded their retirement plan's mobile app, up from 35% in 2021, and 38% have used the mobile app in the past 30 days, up from 27% in 2021.

Overall satisfaction with retirement plan mobile apps is 728, which is 38 points higher than mobile websites and 72 points higher than desktop websites.

### Stronger Bottom Lines

The study further observes that strong digital experiences drive strong bottom lines. More than a third (34%) of retirement plan participants who give their provider the highest marks for their digital experience have rolled over money from other retirement accounts, compared with just 20% among clients who give their retirement plans poor ratings on their digital experience.

Likewise, the percentage of participants who say they "definitely will" keep assets with their current provider in the event of a job change is 48% among those giving their retirement plans the highest ratings for digital, which compares with just 15% among those with low digital satisfaction.

Regarding overall ratings, however, just 38% of retirement plan participants give their plans high marks for their digital capabilities. J.D. Power observed that overall satisfaction lags significantly behind other industries it conducts studies for, such as wealth management (701), property and casualty insurance (702), and automotive (718).

"The digital playbook for retirement firms could not be any clearer," said Jonathan Sundberg, Director, Digital Solutions at J.D. Power. "More clients than ever are interacting with their brands via mobile apps, and when they do, virtually every mark of customer engagement, retention, and asset acquisition increases."

"Right now, a handful of standout firms are really delivering well when it comes to the mobile digital experience, but many more still have a great

**“Amid ongoing market volatility, it’s little wonder that plan participants are keeping a close eye on their retirement account balances and are increasingly doing so via mobile apps.”**

deal of work to do to get to the level of experience participants expect based on their interactions in other industries,” added Sundberg.

As to the study rankings, Capital Group/American Funds ranked highest in retirement plan digital satisfaction, with a score of 753, followed by Charles Schwab (746) and Bank of America (including Merrill) (715). Rounding out the top five were Vanguard (708) and Fidelity Investments (707).

— Ted Godbout

## Up and Down

*The United States slips two notches in latest Global Retirement Index.*

**F**or the first time in 10 years, nearly all developed countries, including the United States, received a higher overall score for retirement security over the previous year, but most Americans apparently aren’t feeling it, as other factors pushed the U.S. down in the rankings.

This is according to Natixis Investment Managers’ 2023 Global Retirement Index (GRI), which shows that the U.S. dropped two spots to 20th place from 18th in the firm’s annual ranking of retirement security among the 44 countries in the index.

The rankings are based on an aggregate of mean scores for 18 performance measures in each of four sub-indices—finances in retirement, material well-being, health, and quality of life—which are combined to provide an overall picture of the environment for retirees.

For the four sub-indices, the U.S. ranks as follows in the 2023 GRI compared to the year prior:

- 13th for finances in retirement, down from 11th
- 21st for material well-being, up from 30th
- 21st for quality of life, no change
- 25th for health, down from 17th

The U.S. received an overall score of 71% in 2023, up from 69% in 2022. The higher overall score is primarily the result of an increase in the material well-being sub-index driven by employment and wage gains. In contrast, the U.S. also saw a sharp decline in the health sub-index, as life expectancy took a hit from the pandemic and an increase in drug-related and accidental deaths. And while the annual index shows improved economic conditions, the research also reveals that optimism at the macro level is not being felt in the everyday lives of retirees and working Americans.

Meanwhile, the firm’s survey of individual investors with at least \$100,000 in investable assets found that nearly half (46%) of working respondents in the U.S. feel inflation is killing their dreams for retirement. At the same time, many Americans are contemplating the potential threat of reduced Social Security benefits, which, the study notes, ranks as their top fear about retirement.

While 52% of working Americans envision having the financial freedom to do what they want in retirement, nearly half (48%) also expect to make tough choices and trade-offs, including:

- 42% expect to have no other option but to live frugally
- 31% anticipate being stuck having to work in retirement

- 31% expect to be forced to move somewhere less expensive
- 28% think they will have to rely on family and friends to make ends meet
- 26% expect to have to sell their home

## Five Risks to Retirement Security

As a result, based on the GRI and additional research by the firm, Natixis IM identified five key risks to retirement security, including:

- 1. Inflation:** Inflation ranks as the No. 1 investment concern for 65% of respondents overall, especially among retirees (72%). Higher everyday expenses are also the biggest financial fear for workers (66%) and retirees (81%), many of whom live on fixed incomes.
- 2. Public debt:** The same inflation spike that hurt consumers helped alleviate public debt concerns in the short term. Still, 77% of Americans worry that high levels of public debt will result in reduced retirement benefits down the road. When asked about their greatest fears about retirement, the top answer was a cut in government benefits (49%), which 51% agree would make it difficult to make ends meet financially.
- 3. Rising interest rates:** Higher interest rates should be good news for retirees, creating more favorable conditions to generate steady income from their retirement savings and enhancing the ability of bonds to provide



a risk ballast in portfolio construction. Yet, as interest rates have risen, only 22% of retirees and 45% of workers plan to add bonds to their portfolios this year, in part because only 3% of U.S. investors understand how rates affect bond prices and yields.

- 4. Demographics:** Natixis IM further observes that the math at the heart of the U.S. retirement system no longer adds up, with the elderly becoming the fastest-growing segment of the U.S. population and the fertility rate dropping by nearly half since the end of the post-war baby boom. To that end, 8 in 10 respondents, including 85% of retirees, agree that government programs don't consider the fact that people are living longer now. Moreover, 64% agree that women are disadvantaged more because of their longer lifespan.

- 5. Big expectations and bad assumptions:** 53% of working Americans accept that they will have to keep working longer than anticipated. However, 38% are worried they won't be able to stay employed as long as they'd like. In fact, surveyed retirees said they had planned to quit working at age 65 but actually retired four years earlier, at age 61, on average.

"Saving for retirement was already a challenge. Now, as people think about the impact of higher prices, longer lives, and the potential for reduced retirement benefits, many are doubting whether they will be able to put all the pieces together," said Dave Goodsell, Executive Director of the Natixis Center for Investor Insight. "They may think they need a miracle, but the best course of action is to face the challenges head-on through planning and education."

### The Global Rankings

As to those global rankings, for the second consecutive year, Norway held on to first place on the GRI, followed by Switzerland, Iceland, and Ireland, all of which held the same rankings as in 2022.

Luxembourg and the Netherlands climbed two places in the rankings to 5th and 6th, respectively. In doing so, they outpaced Australia, which dropped out of the top five to 7th, and New Zealand came in at 8th. Germany moved into the top 10 at No. 9, replacing Denmark, which dropped from the 9th to 10th spot.

Meanwhile, the U.K. moved ahead of the U.S. for the first time in five years to 16th from 19th in the index. The common drivers of performance among the top 25 countries on the GRI are higher interest rates, improvements in employment levels, and progress on environmental policies. **NTM**

— Ted Godbout





# NAVIGATING THE LANDSCAPE OF NONQUALIFIED DEFERRED COMPENSATION PLAN OPPORTUNITIES

In the ever-evolving landscape of financial and retirement planning, individuals and organizations are continuously seeking innovative ways to secure their financial futures.

Nonqualified Deferred Compensation (NQDC) plans may be a powerful tool, offering flexibility and strategic advantages that can substantially impact long-term financial well-being for key stakeholders and employees.

## ABOUT NQDC:

Deferred Compensation is any compensation that has been earned by an employee, but not yet received. As such, the amount that is deferred is not counted as currently taxable income. A Nonqualified Plan is one that is not subject to the same reporting and funding requirements of an Employee Retirement Income Security Act (ERISA) Qualified plan. Therefore, these plans are well-suited to high income earners, offering greater flexibility, allowing for a higher level of contributions than commonly offered qualified retirement plans like 401(k)s.

NQDC plans may also benefit the employer, offering a powerful way to recruit, retain, and reward top talent. Customizable informal funding and payout structures allow employers to make discretionary contributions based on company or individual performance or other metrics to drive business growth.

Identifying a potential opportunity for a NQDC plan is not as challenging as you might think. Here are some key factors to look and listen for when speaking with employers or business owners:



## THINGS TO ASK

### Recruitment & Retention

- What are you doing to attract talent or to keep your talented key people from leaving?
- What would the impact be to the company if one of your key employees departed for a competitor?
- What are your plans for growth over the next 3 years? Do you plan to expand or change your management team over time?

### Current Qualified Plans

- Have any executives received corrective distributions/refunds from the 401(k) plan?
- Are there executives who can't capture the full company match because of maximum contribution limits to their 401(k) plan?
- Are your key people limited in what they can contribute to the company's 401(k) plan due to discrimination testing?

### Beyond Qualified Plans

- Do you currently maintain some form of executive retirement plan, beyond the 401(k) plan for key employees or highly compensated employees/executives? If you do have an existing deferred compensation plan in place, have you had it analyzed for efficiency lately?

### Corporate Owned Life Insurance (COLI)

- Do you currently informally fund your deferred compensation plans? Why or why not?
- If you currently maintain COLI to informally fund nonqualified plan obligations, are you comfortable with how it's performing? Have you had it analyzed for efficiency in light of potential enhancement alternatives or funding approaches available in the marketplace today?



## THINGS TO LISTEN FOR

### Recruitment & Retention

- “We have lost key people over the last year or two and are having trouble finding qualified candidates.”
- “We are concerned with the retention of our key talent, management or executive group. We’d like to retain them without diluting ownership.”
- “Rather than a sign-on or other form of bonus, maybe we can set these aside for future compensation.”

### Current Qualified Plans

- “Many of our executives have ‘maxed-out’ under our basic 401(k) or other qualified plan limits and they have expressed a desire to save more for retirement.”
- “Our qualified plan is top-heavy and the executive group is excluded from the plan altogether.”
- “We’re concerned about protecting/enhancing the retirement of our owners without having to rely on the business being sold or liquidated in the future.”

### Beyond Qualified Plans

- “The accounting accruals for our NQDC post-retirement benefit payments are creating an incredibly negative drain on our earnings. We’d like to start to address that future liability now rather than rely exclusively on future earnings.”
- “We are having administrative challenges/difficulties with our current executive benefits/deferred compensation plans.”

### Corporate Owned Life Insurance (COLI)

- “We’ve purchased life insurance in the past, to informally fund our NQDC plan, but we’re not sure what the benefit of this is, how it’s working, or even if it is necessary to maintain. What are my options? How can we maximize the value from these policies?”
- “Our current life insurance policy/policies are not performing as efficiently as we anticipated or expect them to.”

As you start to navigate the landscape of identifying NQDC plan opportunities, this journey will take you into the depths of plan structures, tax implications, and distribution strategies. You are taking the steps towards providing unique tools to your clients to ensure their key executives and intellectual capital are looked after, well into the future.

Embracing the opportunities that NQDC plans present requires a commitment to learning, a willingness to seek guidance from executive benefit specialists, and the prudence to balance risk and reward. As your clients prepare their financial futures, take it upon yourself to be educated in all offerings that can bring value to their business, as well as yours.

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# Don't Mess Up the Referral: Why Small Interactions Matter

*Reviewing these small interactions can help your business stand out and provide clients with the assurance and peace of mind they need to make informed decisions.*

By Rebecca Hourihan

I was recently referred to a trust attorney. Based on the strong recommendation, she seemed like a great professional who could solve my will, power of attorney, and other document needs.

As a normal reaction, I Googled her and visited her website. It was fine, nothing flashy, but it checked the boxes. Looking at the website, it seemed like they preferred a phone call to set up an appointment. Pretty typical so far, right?

I called the office and got the receptionist. During the call, the kind receptionist said she would email me a form to complete before the initial consultation. The form was 12 pages long, which seemed overwhelming for a first meeting. Plus, it asked for sensitive information such as social security numbers, bank account numbers, passwords, and other confidential information.

On the day of the meeting, I had the paperwork partially filled out because I felt uncomfortable having all that sensitive information gathered into one set of printed papers. I've taken a class or two on Personally Identifiable Information (PII), and this had red flags written all over it.

We scheduled the meeting for 2:00 p.m. Around 2:10, the receptionist opened the door to see the attorney. During the meeting, I asked about the firm's cybersecurity protocols and how they keep client information secure. You can't make this up; the attorney pointed to a series of

manilla files behind her desk and said, "No one's breaking in here."

While this is far from the experience professional retirement advisors create for new clients, it does underscore the importance of small interactions in building trust. We can gain insight into their impact on the overall client experience by analyzing small interactions. Taking steps to improve these interactions can create a more secure and confident environment for prospective clients, leading to stronger relationships and better outcomes. By being mindful of these details, retirement plan advisors can provide clients with an exceptional experience from the very beginning.

## Make Google Your Friend

If you haven't set up a Google Business Profile yet, now is the time. This free service allows you to provide important information, such as your phone number, address, website, business hours, and customer reviews, while improving your search engine optimization (SEO).

## First Digital Impression

Your website is often the first impression potential clients have of your business, with almost 90% of people researching online before accepting a meeting. An outdated website could be an obstacle that prevents clients from moving forward.

However, a compelling website that clearly represents your brand could be a game-changer. This

includes a modern design, a mobile-friendly interface, an active blog, and supporting content, plus welcoming team photos with approachable biographies.

## Information Overload

When onboarding new retirement plan clients, it is crucial to gather essential information such as plan name, ownership, tax status, employees, participants, total assets, annual deferrals, investment menu, etc.

However, timing is critical. To avoid overwhelming the plan sponsor, consider their readiness to divulge information and if they are still assessing you, your firm, and your capabilities. Instead of sending them a lengthy discovery questionnaire, consider providing a retirement plan brochure that gives them a glimpse of how you can help them and their company's plan.

## Timeliness Etiquette

Today's busy professionals live and breathe by the clock. One minute over, and you're infringing on the next meeting's time. When a person is asked to wait, they feel unimportant. The sweet spot is to be on time and stick to the allotted amount. If the meeting is going over, pause and announce it. Allow that person to make the decision to continue the meeting or reschedule for a future time. If you're running late, contact them and explain the tardiness. We all understand, and it's better to get in front of it than to ignore it.

## Explaining the Client Experience

As a seasoned practitioner, you know that every employer is different. Some want to take it slow and conduct a lot of due diligence before moving forward. Others want a quick "sign-here" experience. Therefore, it is essential to determine what your initial meeting will entail. Do you start by explaining who you are, what you do, and how you can help them? Do you have a PowerPoint presentation that walks new prospects through the client experience?

A brochure can also give clients an overview of what they can





expect from your firm. Additionally, showing sample reports and explaining their importance can help build trust and clarity.

During the initial meeting, consider asking targeted questions to understand better the employer's goals for the company retirement plan. This will help you tailor your solutions to meet their specific needs. By providing clear and concise information about your services, along with a detailed explanation of your client experience, potential clients can confidently make informed decisions.

### **Cybersecurity is Everyone's Concern**

In today's digital age, cybersecurity is a significant

concern for all businesses. In the 401(k) industry, it is crucial to ensure that your office, TPA partners, recordkeepers, payroll, asset managers, home offices, and other business relationships have cybersecurity in place. An internal audit to assess your processes is an excellent way to evaluate your security measures. It's also essential to ask your partners about their cybersecurity processes as well. Being proactive about cybersecurity can help mitigate risks and prevent data breaches, which can be costly and damaging to your business.

### **Earning A New Client**

In the competitive 401(k) world, referrals are a key driver of new clients. Taking a few moments

to step back and experience your introduction from their perspective can create an onboarding experience that delights.

Reviewing these small interactions can help your business stand out and provide clients with the assurance and peace of mind they need to make informed decisions. Ultimately, this can help your business grow and thrive while providing exceptional client service.

Thanks for reading, and Happy Marketing! [NTM](#)



# Is A Lack of a Personal Brand Costing You Clients? A 7-Step Fix



*Do you feel that a lack of a solid online presence costs you clients? You're not alone.*

By Spencer X Smith

**I**t started with a recent LinkedIn alert. I hadn't talked to this guy in about a year, and he hit me up:

"Hey Spencer, business is going great, but I've realized that I never spend time building my personal brand, and I think sometimes that hurts some

business deals. Can you help me understand what personal branding really means and why it's important?"

After a few more messages, we decided to hop on a call. Here's how it went:

**Me:** "Man, it's awesome to hear business is going so

well! So, you're worried about personal branding costing you clients? It's not as complicated as it sounds. Think of it like your reputation. When you walk into a room, people have an opinion about you before you even say hi. Why? Because they've already met you online. Your brand is



how you connect with people, make them trust you, and it can be the thing that seals the deal. It's not about bragging or pretending; it's about showing who you are."

**Friend:** That's a new way to look at it, but isn't that like putting on a show? I want to be authentic. How can I build this 'brand' without losing myself or sounding like I'm tooting my horn?"

**Me:** "Hey, I get that. It's all about being yourself but louder. You know when you meet someone at an event, and you share something you love? That's your brand in action. Just do that online. Share your ups and downs, help others with your knowledge, talk to people like you do face to face, and be you. It's not marketing; it's just being real and connecting."

**Friend:** "I'm starting to get it, but there's one big problem: time. I'm swamped as it is. How can I do all this without it taking over my life? I don't want to be glued to my phone all day."

**Me:** "You're not alone in feeling that way, but here's the cool part - that's why most people don't do it, so you've got less competition. You don't have to make this a full-time gig. Start small, like focusing on LinkedIn. Plan with a content calendar, repost stuff you've already shared, and spend just 15 minutes a day on it. Get your team involved, be flexible with what works, and remember, it's a long game. It's all about building trust over time. You can make it part of your routine without it taking over."

**Friend:** "Man, you've made it sound doable. I love the idea of repurposing content and starting small. How do I find my voice in all this? How do I stand out?"

**Me:** "Your voice? It's just how you talk to clients or get fired up about your work. Write like you speak, share what excites you, ask friends if it sounds like you, and don't be afraid to be yourself. And hey, give yourself time. It'll come naturally as you get into it."

**Friend:** "You've cleared things up for me. I was freaking out, thinking it would be another massive task, but you've shown

**"Your brand is how you connect with people, make them trust you, and it can be the thing that seals the deal."**

me how to slide it into my day. Thanks for breaking it down like that. I feel like I've got a plan now."

**Me:** "No problem at all! Remember, it's just about amplifying who you are. You have a great story, unique insights, and much to share. I can't wait to see how you bring it to life online. Reach out anytime if you need more help. You've got this, and I'm here to back you up!"

As an epilogue to the conversation, I sent him this seven-step plan:

**1. Start Small:** You don't have to be everywhere all at once. Pick one or two platforms where your target audience is most active and focus your efforts there. It's better to be effective on a few channels than spread thin across many. Knowing your business, I'd go all-in on LinkedIn first and only look at other platforms if that doesn't work.

**2. Create a Content Calendar:** Planning can save you time. Outline topics or themes you want to share over the next month or quarter. Having a roadmap makes it easier to create and schedule content.

**3. Repurpose Content:** This is the biggest "hack" I can give you - as your audience grows, those new people haven't seen what you've already shared. Save yourself some time and some work and repost past content.

**4. Set Aside Specific Time:** Dedicate a small amount of time each day or week for

social media engagement. It could be 15 minutes in the morning or during lunch. Consistency is critical, not the quantity of time.

#### **5. Involve Your Team:**

Encourage your team to share insights or contribute content that aligns with your brand. Collaborative efforts can lighten your load and help you find ideas/topics you wouldn't have shared otherwise.

**6. Measure and Adjust:** Keep track of what's working and what's not. If something doesn't resonate with your audience, don't be afraid to adjust your strategy. Being agile can save you time in the long run. Some posts will do well, and some will fall flat. Expect that ahead of time.

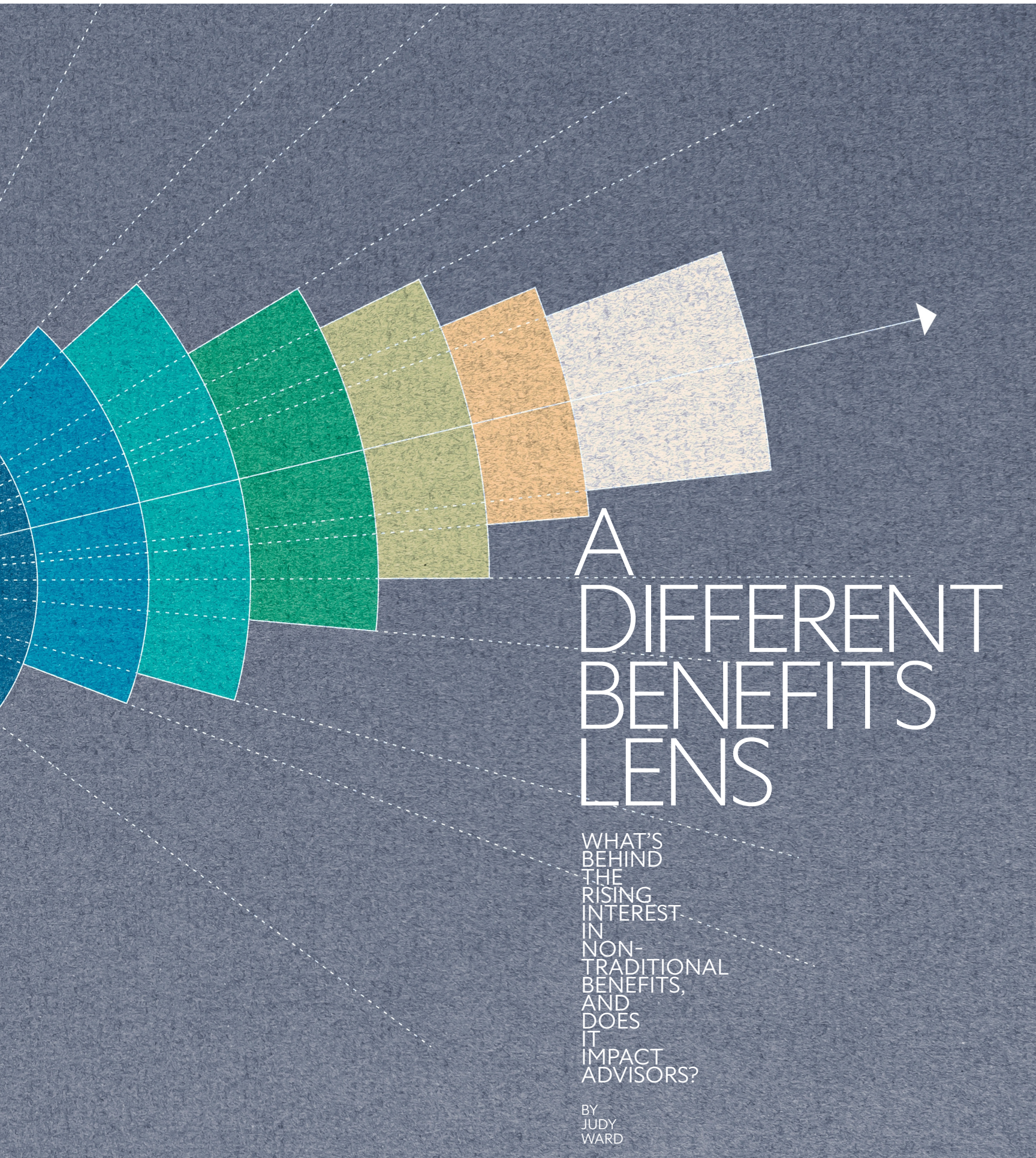
**7. Cliche but True:** Personal branding is a marathon, not a sprint. It's about building relationships and trust over time. By integrating these strategies, you can make the process part of your routine without it becoming overwhelming.

Do you feel that a lack of a solid online presence costs you clients? You're not alone. And you don't need to dedicate half your day to these activities. Just follow this simple seven-step plan, and you'll be one of the few people out there showing up consistently in front of your target demographic, winning you more clients. **NNTM**







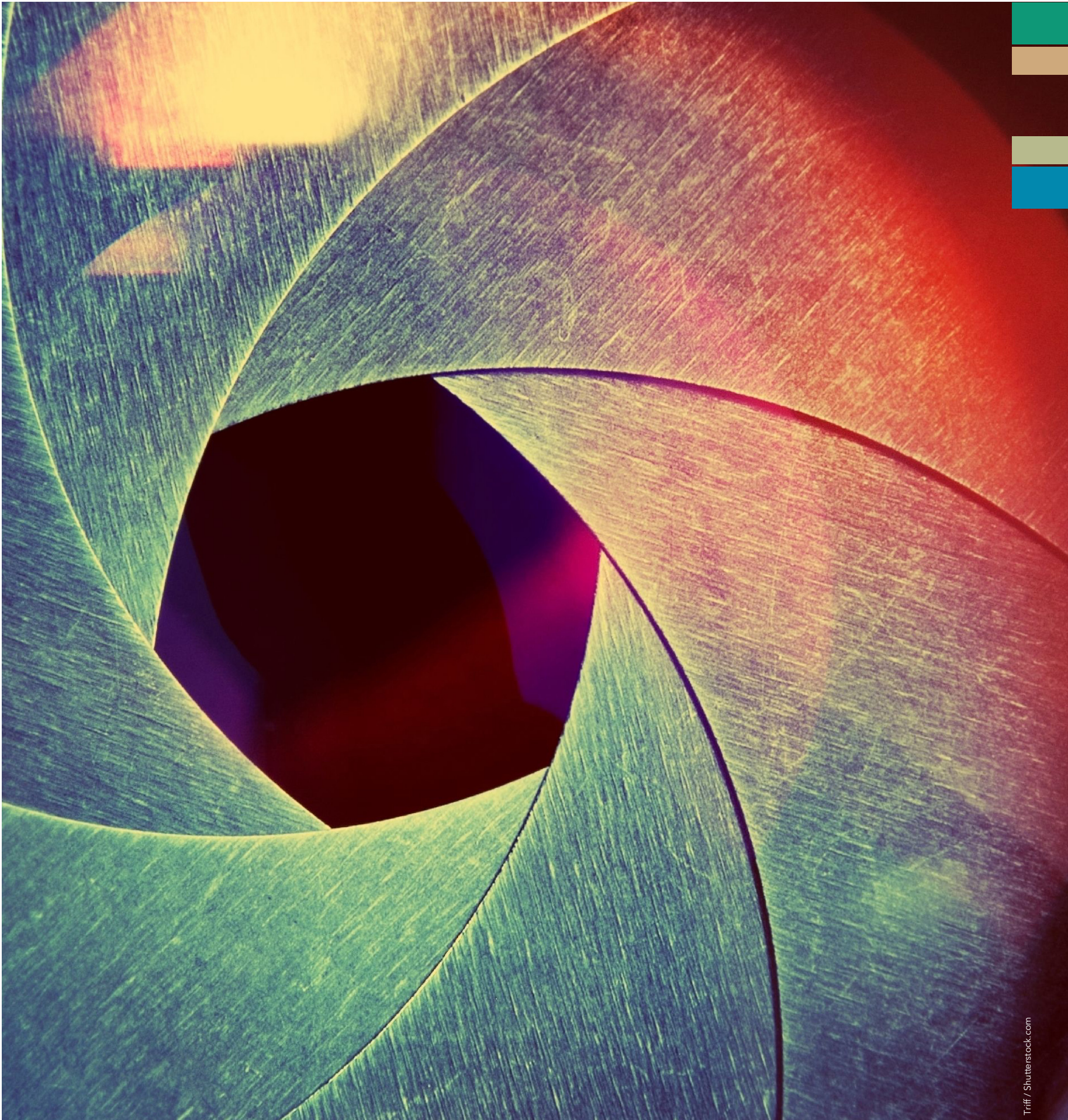


# A DIFFERENT BENEFITS LENS

WHAT'S  
BEHIND  
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BENEFITS,  
AND  
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JUDY  
WARD







## NAPA PRESIDENT-ELECT KEITH GREDYS THINKS THE RISING EMPLOYEE INTEREST IN NON-TRADITIONAL BENEFITS WILL LEAD MANY EMPLOYERS TO EXPAND THE BENEFITS PACKAGE THEY OFFER—AND THAT ADVISORS WOULD BE SMART TO THINK THROUGH THE IMPLICATIONS FOR THEIR CLIENT WORK.

"It has gone well beyond employers just saying to employees, 'Hey, I've got a 401(k) for you.' Employers are trying to adjust their priorities because there are so many different benefits that can be provided now," Gredys, Chairman, President, and CEO of Urbandale, Iowa-based Kidder Advisers, Inc., said. "They don't have all the answers, and they're asking us, 'Can you help?' If you can't help as an advisor, they're potentially going to go elsewhere to somebody who can be that more comprehensive advisor."

Among large employers with 1,000 or more employees, 62% of those surveyed anticipate they'll offer more benefits over the next five years, according to *Harnessing Growth and Seizing Opportunity: 2023 Workforce Benefits Study*, a report issued in June by LIMRA and consultancy EY (Ernst & Young). Among midsize employers with 100 to 999 employees, 58% expect to increase their benefits offerings within five years, as do 50% of small employers with 10 to 99 employees.

Most of those additions likely will go beyond traditional medical and retirement benefits.

"The pandemic really provided an opportunity for workers to step back and reevaluate what they're looking for in their work relationship with their employer," Patrick Leary, Corporate Vice President, Workplace Benefits Research

at Windsor, Connecticut-based LIMRA, said. "Younger employees, particularly, are looking at what they want through a different lens now. Part of that is feeling, 'I want my employer to take an interest in me as a whole person.' They are looking to their employer for help with their holistic wellness, not just a health-care plan and a 401(k)."

**THE CHANGING WORK CONTRACT**  
NFP Corp.'s *2023 U.S. Benefits Trend Report* identified a disconnect between what benefits many employers provide and what benefits employees need, such as more mental health support. Only 18% of employees surveyed for the NFP report thought their employer considers employee feedback in their benefits offerings, and 61% said their benefits package hadn't kept pace with their professional and personal life changes. Just 31% of workers agreed that their employer offers benefits for "people like them," according to the survey, which NFP released in June.

Today's younger workers still value traditional benefits such as medical insurance and a retirement plan but also rate non-traditional benefits almost as highly, according to survey results in the *2023 BEAT Study: Benefits and Employee Attitude Tracker*, issued by LIMRA in May. Asked which benefits they feel are extremely important or very important to them, a flexible work

schedule was most popular with all generations, including Gen Z (76%) and Millennials (74%). A mental health benefit was the second most common choice among younger workers, with 62% of Gen Z and 56% of Millennials citing it as extremely or very important.

MetLife's *21st Annual U.S. Employee Benefits Trends Study*, released in March, revealed a growing desire among employees surveyed to feel "cared for" by their employer.

"On a fundamental level, being 'cared for' by an employer means that the employer shows an authentic interest in their overall well-being: in their work, and also in their life outside of work," Missy Plohr-Memming, Chicago-based Senior Vice President, National Account Sales at MetLife, said in an interview. "Unfortunately, the fact is that our research shows that 42% of employees say they *don't* feel cared for by their employer."

"There has been a change in employees' definition of what the 'work contract' means," Plohr-Memming continued, meaning the desire for genuine employer interest in their overall well-being.

"And when people don't feel cared for, they are less happy in their job, and over the longer term, they become less productive and less loyal."

**YOUNGER EMPLOYEES,  
PARTICULARLY, ARE LOOKING AT  
WHAT THEY WANT THROUGH A  
DIFFERENT LENS NOW**

— PATRICK LEARY, LIMRA

**BASICALLY, MORE EMPLOYERS ARE GETTING TO A PLACE OF, 'LET'S MAKE SURE THAT WE'RE BEING INCLUSIVE OF EVERY TYPE OF PERSON,' AND A LOT OF THAT IS BECAUSE OF AN ORGANIZATIONAL CULTURE CHANGE.**

— RYAN MEISSNER, WOODRUFF SAWYER & CO.

Among employees who said they don't feel cared for by their employer, the survey found that only 58% characterized themselves as productive at work versus 90% of employees who felt cared for by their employer. And just 54% of those who didn't feel their employer cared about them said they felt loyal to their employer, versus 89% of employees who did feel cared for by their employer.

After three years of pandemic-fueled talk about short-term trends such as the Great Resignation and Quiet Quitting, "I definitely see that we're having some actual lasting changes in workforce dynamics," said Sarah Berkley, a Boston-based Assistant Vice President, Well-Being & Engagement at NFP. She pointed to three interconnected areas: widespread employee desire for flexible working conditions, help with their caregiver roles, and mental-health support.

"I really do feel like there was a huge shift in how employees and employers see benefits, to make sure that people get the support they need to do their work, but also the support they need for their life beyond work," she said.

The shift to a remote or hybrid home/

office workforce has had a lasting impact on what employees want, NAPA Vice President Lisa Garcia argued.

"Working at home is a change that's here to stay, so a lot of organizations we work with are adapting to that," said Garcia, West Palm Beach, Florida-based Retirement Plan Consultant at SageView Advisory Group. "For the younger workforce, sometimes having that flexibility and that lifestyle they want can almost be more important to them than compensation."

The strong desire to work remotely means employers face more challenges in creating a sense of belonging and loyalty among employees.

"To build that cohesiveness is harder to manage when your workforce is remote," she added.

So some employers are thinking outside the box about how to help show employees that they care about them. For instance, Garcia heard talk recently about employers offering an employer-funded lifestyle spending account (LSA) or a Care Fund. Employees can spend the money on things they choose to help their well-being, such as a gym membership or subsidizing their childcare expenses.

"As advisors, we're always focused on saving, saving more, budgeting, and paying down your debt," she said. "But a lifestyle spending account could be a benefit that some employees appreciate even more because they can use it for things they want to do but can't necessarily afford to do with their paycheck. Younger employees especially want a sense of belonging and inclusion and a sense that their employer cares about them."

#### TWO KEY AREAS

Two areas came up most often when talking to sources for this article about growing interest in non-traditional benefits: mental health resources and family support services. "With mental

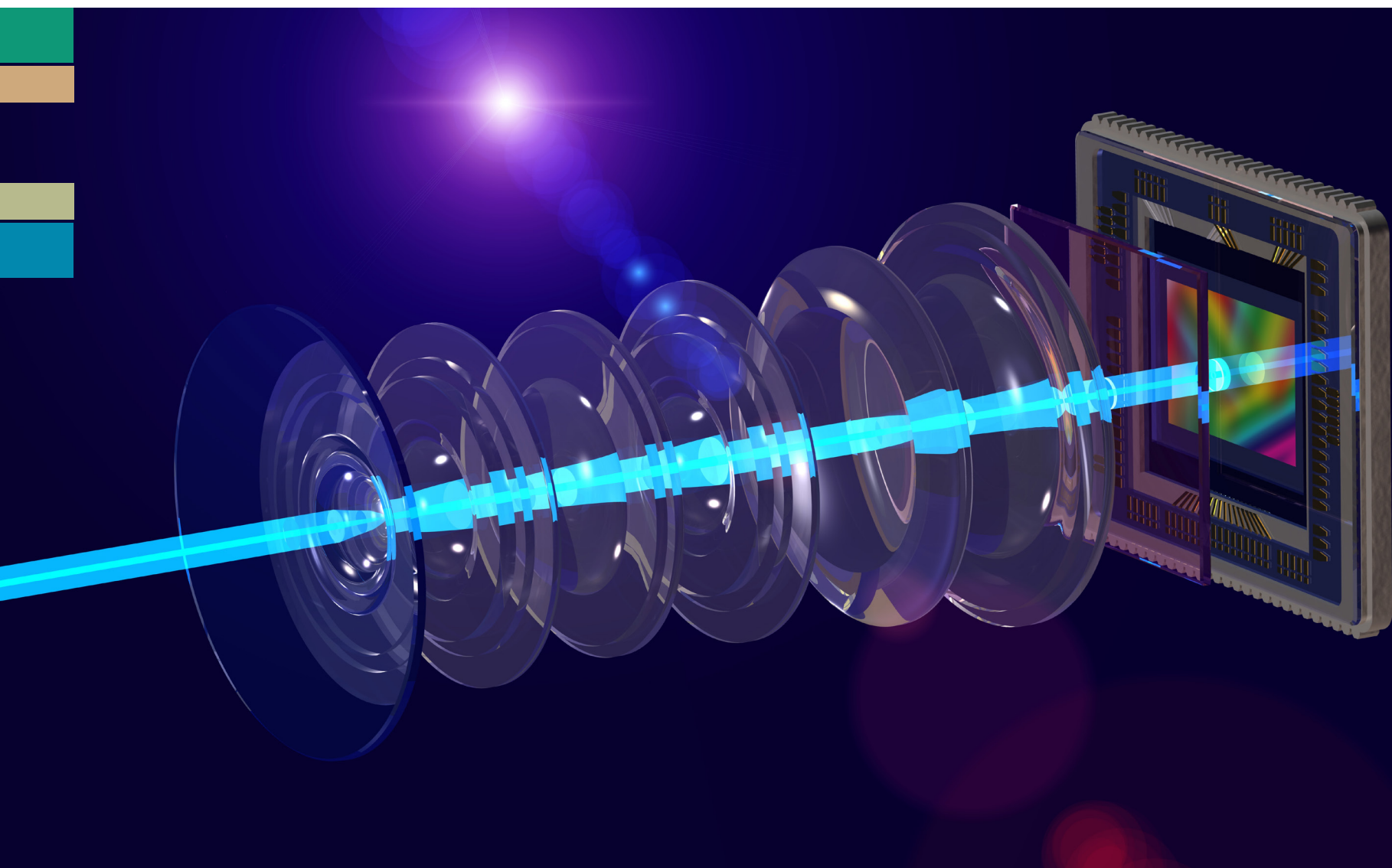
health benefits, I know it's coming up a lot with employers," Garcia said. "Many employers already have an EAP (employee assistance program), which has been around for a long time, but employees usually can only have a limited number of sessions. There's a lot more employee demand for mental health services now, and employers need to resolve that gap in what they provide."

The area of mental health resources for employees "is probably where the biggest changes have occurred," Ryan Meissner, Senior Vice President and Employee Benefits Practice Leader at Woodruff Sawyer & Co. in Irvine, California, said. "Number one, there are a lot more players in that space now, a lot more mental health support offerings and the offerings have become very specified in nature (to help with a specific issue). And number two, more employers are recognizing that robust mental health benefits are something they should offer."

Leary believed that the pandemic and remote work had driven a lot of the increased employee desire for mental health support.

"People were working at home—and many still are—and a large increase in mental health issues emerged," he said. "And another thing that is changing is the perception of mental health issues. Historically, older workers might be hesitant to share their mental health needs and challenges with their employers. But Gen Z and Millennials are more willing to share that, and they want their employer to look out for their holistic wellness. They want help that goes beyond, 'OK, you can call this EAP number and talk to someone.'"

Some employers are thinking about enhancing their EAP to allow more sessions or expanding the therapist network to include a broader demographic group of counselors that more closely reflects the employee base,



Berkley said. And some employers are giving managers training on emotional resilience and what's called "mental health first aid": training that helps managers identify when an employee is in a mental health crisis or just needs some mental health help and how to approach that person in a safe and sensitive way. She said that some employers also are introducing benefits that focus on proactively maintaining mental health well-being, such as virtual or in-person mindfulness meditation sessions, or a "quiet room" being added to an office, so that an employee who needs calming time can stop by there.

The pandemic intensified the sense of pressure that many people feel to care for both their children and their aging parents, Meissner said, which also increased employees' need for family support services.

"Now, employers are looking at benefits that hopefully will help to

alleviate that caregiving pressure," he said. "For example, there are critical care plans that are being extended to cover employees' parents, and that fills in the holes in Medicare coverage. And some employers are now offering (paternity) leave for new fathers. There are also a whole new suite of products for LGBTQ employees, like helping with adoption planning.

"Basically, more employers are getting to a place of, 'Let's make sure that we're being inclusive of every type of person,' and a lot of that is because of an organizational culture change," Meissner continued. "In the past five years, there has been a shift in leadership at many employers: More Baby Boomer leaders have retired, and that has opened up leadership positions for people in their 30s and 40s, who have different views."

NFP sees more interest now among employers in subsidizing employees'

**I REALLY DO FEEL LIKE THERE WAS A HUGE SHIFT IN HOW EMPLOYEES AND EMPLOYERS SEE BENEFITS, TO MAKE SURE THAT PEOPLE GET THE SUPPORT THEY NEED TO DO THEIR WORK, BUT ALSO THE SUPPORT THEY NEED FOR THEIR LIFE BEYOND WORK.**

— SARAH BERKLEY, NFP







caregiving expenses or adding a program from a specialist provider that helps employees find caregiver help, Berkley said.

"Offering that kind of benefit helps with employees' mental health. Caregiving responsibilities are such a huge stressor for many people, and this is a way to address employees' mental health without saying explicitly that you're addressing employees' mental health," she explained.

Employees hesitant to utilize therapy services through their employer may be more likely to choose a benefit that assists them indirectly with their mental health, she added.

And employer interest has grown in adding family planning benefits such as a program that focuses on helping people with infertility treatment, Berkley said. "Family planning benefits are a huge issue now," she adds. "These are benefits that people will stay at an employer to get or leave an employer to get elsewhere."

#### **"IT'S NOT STATIC, THAT'S FOR SURE"**

Employees' growing desire for a broader benefits menu that speaks to their specific needs should impact employers' thinking about their benefits strategy, Plohr-Memming suggested.

"Historically, many employers have taken this 'one size fits all' approach to their benefits and compensation," she said. "And our (MetLife) study shows that approach is not likely to work in the future to create a sustainable workforce. Different cohorts of employees need something that is uniquely designed for them. So employers need to understand: What is most important to their employees to make their lives easier?"

It really starts with employers recognizing that they want to do something and then listening to employees, Plohr-Memming said. Employers may work with an advisor or provider to utilize surveys, small-group meetings, or the employer's social



media channels to give employees a list of potential benefits and ask each employee to prioritize the individual benefits' value to them.

"It starts with saying to employees, 'Hey, we want to do things that add value for you,'" she said. "Then you've got to look at employees' responses and start prioritizing those programs that employees said would be the most meaningful. And then you've got to take action. At the end of the day, taking action actually demonstrates that an employer cares, and that will go a long way with employees."

Leary also recommended surveying different segments of employee demographics on the value of individual benefits, as well as leveraging data and analytics on an employer's existing voluntary benefits.

"Employers can work with their advisor and providers to look at how many employees are aware of the voluntary benefits the employer already has and what the participation rate is. If a voluntary benefit is only getting 2% participation, you may want to dig into it and find out why."

Meissner was asked how the rise of non-traditional benefits impacts Woodruff Sawyer's benefits consulting work.

"Part of it is having to be more knowledgeable in spaces that we didn't

choose to specialize in before," he said. "It's also getting to a place where having a proactive nature is even more important to working with clients. We need to help them identify what their employees feel they are missing out on and help the employer to create a suite of benefit offerings that meet those needs. There's a lot of need to help employers structure the suite of benefit options they offer."

Gredys said that the growing interest in non-traditional benefits broadens the scope of Kidder Advisers' work.

"We're still that trusted advisor, but we also have to step back and see the big picture. We're not just in a retirement silo," he said. "We may not actually deliver a new benefit program's services, but we are going to be that quarterback still: We would like to help the client find the right program and implement it and help them oversee it on an ongoing basis."

"It broadens the focus of the relationship with the client to become much more comprehensive," Gredys continued. "It's looking at, 'What do your employees really need?' It becomes a financial buffet of finding the answer to, 'What's the right fit of benefits for this specific employee base?' I think that moving forward, there will be much more customization of the client relationship."

"I see this as an interesting challenge for all advisors over the next few years: how to deliver new services effectively and to stay up on what services are working well and what's not working well," he concluded. "Everybody is trying to figure out, how do you do it? Over the next three to five years, it's going to be interesting to see what works. I think we will see a lot of disruption in the advisor space and the recordkeeper space, continue. It's not static, that's for sure." **NNTM**

*Judy Ward is a freelancer specializing in writing about retirement plans.*

# HELP OR HYPE.


## AI'S IMPACT ON THE RETIREMENT PLAN SPACE

GLOBAL ADOPTION OF ARTIFICIAL INTELLIGENCE IN ALL INDUSTRIES IS HAPPENING AT A BREAKNECK PACE—THE RETIREMENT PLAN SPACE INCLUDED. IT'S NOT A QUESTION OF IF, BUT HOW, IT WILL AFFECT PLAN ADVISORS, SPONSORS, AND PARTICIPANTS. WE SPOKE WITH TOP ADVISORS AND EXPERTS ABOUT WHAT TO EXPECT. BY JOHN SULLIVAN





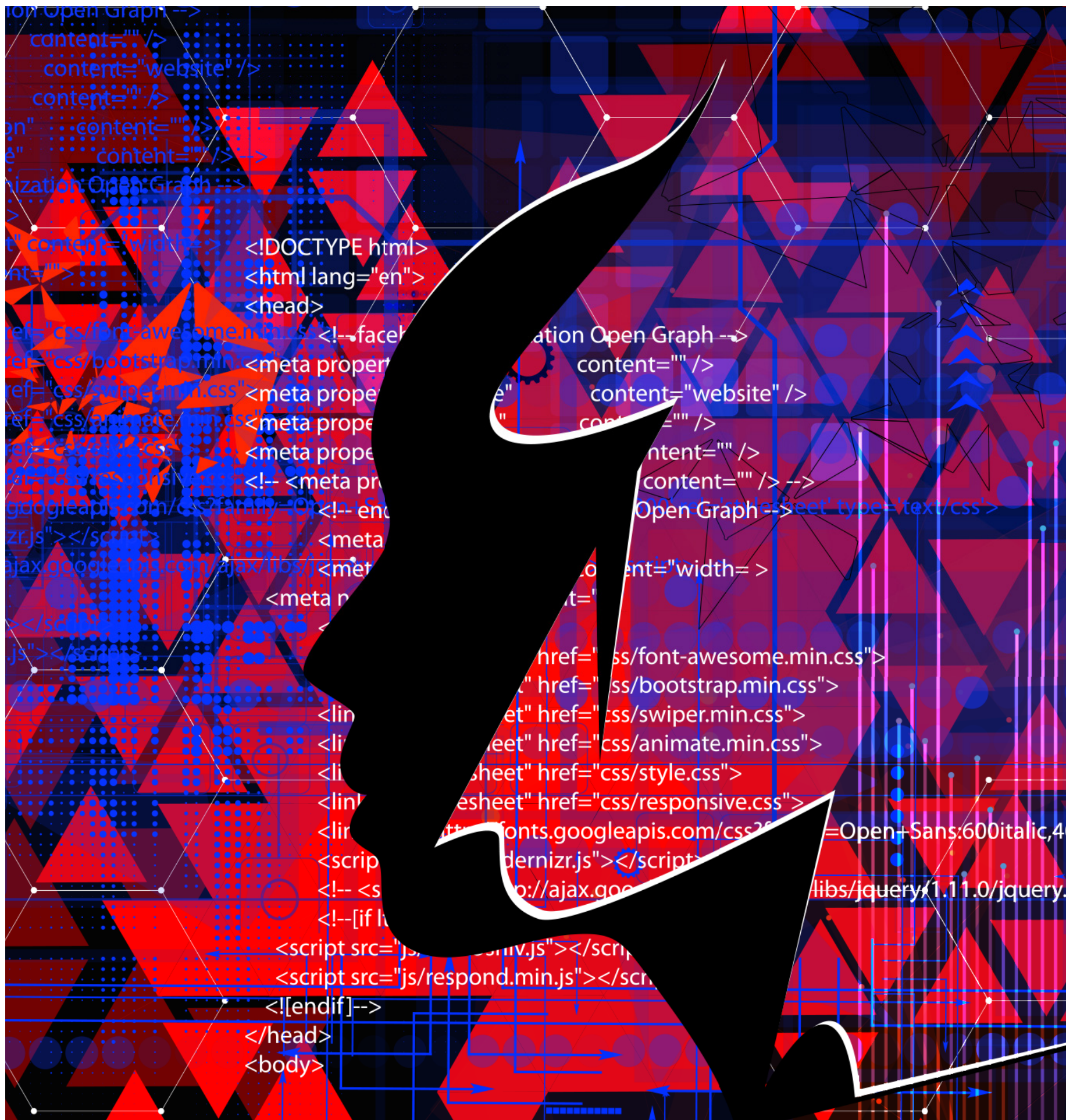




WE  
ASKED  
CHATGPT  
TO WRITE  
AN OPENING  
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FOR AN  
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ON AI'S  
EFFECT  
ON 401(k)  
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AND  
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THE  
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*"In recent years, the financial industry has experienced a groundbreaking transformation, thanks to the rapid advancement of artificial intelligence technology. As robo-advisors and intelligent algorithms increasingly dominate the financial landscape, traditional 401(k) advisors are facing a paradigm shift in their role and the way they approach wealth management for retirement.*







*This article delves into the profound impact of AI on 401(k) advisors, exploring the benefits, challenges, and the evolving relationship between human expertise and machine intelligence in shaping the future of retirement investment strategies."*

It pretty much nailed it, and we couldn't resist using AI to introduce an AI piece. Human nature requires an initial rejection of new technology—electricity was sorcery and automobiles impractical. Even Nobel Prize-winning economist Paul Krugman famously predicted that the Internet "would go the way of the fax machine."

Not so with AI. Its rapid advancement, especially in the roughly 10 months since the introduction of ChatGPT (an acronym for Chat Generative Pre-Trained Transformer), overwhelmed early skepticism. Even before ChatGPT's release, AI was trending (mostly) positive, with well over half of respondents to an International Science Survey viewing AI as "mostly a good thing for society."<sup>1</sup>

Its impact on the retirement plan space, specifically, is the proverbial hot topic at many conferences and industry gatherings, with keynotes and breakout sessions dedicated to exploring its potential. That "potential" typically includes, among other things:

- More efficiently performing advisor and home office operational and administrative processes.
- Communicating with clients through next generation chatbots and other automated features.
- Gathering, sorting, and applying industry data.
- Improving regulatory and compliance monitoring and oversight.
- Addressing inherent and detrimental human biases identified with behavioral economics.

## PLAN BENCHMARKING ON STEROIDS

Using artificial intelligence to scour, collect, process, and use Form 5500 data?

While most retirement plan firms and advisors are taking a wait-and-see approach to incorporating artificial intelligence (AI), one that aligns with the late adopter attitude for which they're known, a few firms are racing ahead.

In May, one such company, San Francisco-based Newfront Retirement Services, organized a hackathon, bringing together its engineers, developers, and related personnel to brainstorm new ideas (hacks) to improve efficiency and customer experiences.

"We asked, 'What can we do?'" Greg Kaplan, the firm's SVP and Practice Leader, said. "Especially since AI is eating the world and taking over. How do we leverage it in strategic ways for our business, which is very much centered around having human expertise in the loop—not replacing but empowering them to focus on strategic value-adds and figuring out how to leverage technology to get rid of the mundane, boring tactical stuff."

The hackathon resulted in roughly 20 project ideas, and seven were selected. Kaplan's idea, plan benchmarking on steroids, was one.

"We have very detailed information in our book of business," he explained. "We benchmark clients based on specific peer groups they give us. We generally tease that info from the 5500 and then add it to our database one at a time. It allows us to enrich the database by including 600,000-plus plans. The AI capabilities focus on the audit reports and pulling out unique plan provisions that are unavailable in just the 5500 CSV data exports."

It's pretty cool, something Newfront acknowledged with the project's development code name—Ray-Bans, after the sunglasses.

"We're already really good, but I said, 'Let's prove we can take this to the next level. And in four days, it was born.'"

As a wholly owned subsidiary of Newfront, which Kaplan describes as the world's first "bionic, tech-enabled insurance broker," it's not your typical independent RIA and 401(k) advisor shop. It employs 60 engineers as well as insurance and retirement planning professionals, a roster of talent he claims, "come from the unicorns who've created the companies that everybody talks about today."

"On the retirement side, we're pure-play defined contribution retirement plan consulting with no private wealth management. So, we're hyper-focused on what we do and do that really well. We're not trying to build the biggest; we're trying to build the best. The AI project is just the latest example of what we've already been hyper-focused on; always disrupting and figuring out how we be most efficient, deliver the best insights, and build the best retirement services business out there."

## LOW (AND SLOW) ADOPTION

Yet, despite its overall favorability (in theory) and firms like Newfront, AI is something that few advisors, at this point, are using.

"I would say it's definitely on our radar," Alicia Malcolm, Senior Vice President, Wealth Management with UBS Financial Services, said. "I'm at a



## AI'S HELP IN BUILDING A SOLID RETIREMENT SAVINGS PLAN

A high-profile 2019 whitepaper from Invesco, titled *Using artificial intelligence to Power the Retirement Savings Plan of the Future*, drilled deeper into AI's retirement plan uses. It described AI's application to what it called "four building blocks of a retirement savings plan," including:

- **Plan design**—Capturing and analyzing information underpinning plan design weaknesses at both a generic and a personalized level can translate into improved results.
- **Participant engagement**—The most common AI-related participant engagement tool is the chatbot ...AI can enable the chatbot to evolve from a reactive service (e.g., I have a question and need help) to being a proactive device informed and activated by broader participant milestones such as salary raises.
- **Plan governance**—AI technologies empower plan fiduciaries to take more proactive steps to fulfill their obligations. For example, participants experiencing a positive relationship with their retirement savings plan may be more likely to remain with the plan after leaving the company or retiring. Maintaining a larger participant pool, in turn, helps the plan sponsor to keep fees low.
- **Investment strategy**—AI technology can aid sponsors with the ongoing design and revision of investment offerings to best reflect each participant's individual profile. For example, a plan sponsor can analyze participant withdrawal data to create target-date offerings best suited to the particular needs of their plan's participants.

larger firm, and I think we've started to incorporate it more on the wealth side versus the 401(k) world, but not overly at this point."

It's to be expected, according to Lisa Kottler, Chief Growth Office with digital retirement plan solution Sallus Retirement, especially given entrenched attitudes in the retirement plan industry.

"I think AI is absolutely the real deal," Kottler, who received a master's degree in technology commercialization from the University of Texas, said. "We've seen such advancements with generative AI even just in the last 10 months since the Chat GPT launch. The impact is incredible, and there's so much that we could leverage from retirement plans."

The challenge, she explained, is the highly regulated, and therefore slow-moving, retirement plan industry, one that's never a first mover of early adopters in anything.

"But there are so many powerful ways that [AI] can help us," Kottler added. "One is that recordkeeping is such an expensive, costly, and cumbersome business. With the ability to use generative AI robots to do some of the more mundane, repetitive kinds of tasks, we could absolutely see improvement."

And it could help with better customer engagement, she noted. While chatbots have been available for some time, an "elevated version" could go far beyond their basic functionality in their support and help.

It raises a potential downside, at least in the near term, which is staffing. While good for companies in the form of automated cost savings, people will lose their jobs. Indeed, they already are, particularly in marketing and copywriting.

"We've already seen thousands of layoffs across all industries, particularly around marketing and any kind of writing," Kotler said. "You could now do almost an entire marketing campaign—the visual and writing—with AI. So, you're seeing large and small companies laying off almost entire marketing departments because of that."

Yet she struck an optimistic tone, arguing that because AI will be so disruptive and revolutionizing, and the paradigm shift so large, that opportunity will emerge.

"I often almost jokingly say maybe a 'prompt engineer' is a new role. For those who use Chat GPT or Google's Bard or any of the others, it's only as good as how you prompt it. If you're good at prompting it, you can get amazing information back. It's about what you ask for and how you ask for it. So, who knows, maybe prompt engineers are a new role."

## ADVISOR INSIGHT

While he shares Kottler's optimism, John Abeyta believes the key is how AI is rolled out in the retirement plan space.

"I think it's going to be really good, but I think it's going to be a little challenging because we don't know where we're going," Abeyta, Corporate Retirement Director and Financial Advisor with Morgan Stanley, said. "The benefit is that we're in a continuously more complicated industry that requires more time and energy, and we have fewer people. I see it as a great benefit to leverage our time and do what people can do better than machines, which is the emotion and the connection with the folks we serve."

UBS Financials' Malcolm agreed, arguing, "At the end of the day, humans always want human interaction. I don't think it necessarily







jeopardizes our job. In some ways, I think it might make our jobs easier, and in some ways, I think there might be challenges to our jobs with AI, but I still think people want human interaction."

It's a far cry from the reaction to robo advisors when widely introduced roughly a decade ago. Many advisors thought they would compete with, rather than complement, their practices in a John Henry-like machine-versus-man duel to the death. Today, far more accept AI and its role, and Abeyta used an agriculture metaphor to make his point.

"Humans used to do all the labor until we could use plows, and once we could use plows, we then invented tractors. With every advancement, we could produce more food at a lower cost for more people."

When asked about any worrying red flags, he said it's too soon to say and difficult to predict how quickly it all advances.

"The original question," Is it overhyped? It could be, but in six months, we might say, 'Wow, this thing taught itself very quickly,'" Abeyta added. "That's where we want to make sure it goes to the right schools. Like people, if we're in the wrong environments, social settings, value structures, and education, whether formal or learning from the streets, we have very different outcomes in how we think, what we believe, and what's important to us."

His point is reinforced by recounting a particularly distressing 2016 incident involving Tay, Microsoft's AI chatbot. Soon after launch, certain Twitter (now X) users started tweeting racist and misogynist comments to the bot, which it learned and replicated within 24 hours.

"If we're creating something that's starting to replicate the intellectual power of humans, we need to make sure that the values and these systems are in line with our values and systems," he concluded. "That's important."

## DRY, DEFINED, DEFINITE

Despite the numerous possibilities artificial intelligence offers, advisors and industry professionals appear at this point to mainly focus on generative AI. It's technology that boils down to garbage in, garbage out, Bill Chetney, President of the Viking Cove Institute, said.

"When it comes to artificial intelligence, it's important to think about its application," Chetney explained. "When I think of AI, I think of technology. It should make work easier, and I think in a lot of ways we're going to see it make work easier."

He mentioned LinkedIn and how it offers to have AI rewrite user posts.

"Did I like how it rewrote it every time?" he rhetorically asked. "Not necessarily. It's a good tool, but it's not a perfect tool. I think there's a way to go. For example, if you were to feed AI information that wasn't necessarily correct, it would confidently give you a wrong answer."

However, take a piece of legislation, a plan document, or ERISA rules and regulations vetted for accuracy, and the likelihood of quality output, either as an answer to a question or a meaningful summary, increases exponentially.

"In that regard, it will play an important role in reducing that workload that we all carry," Chetney argued. "But I am worried about that confidently wrong answer because people take the path of least resistance in macro. If you were to lean on it without a grain of salt, you would set yourself up for failure. But I think the best people in the industry won't fall for that trap." **NTM**

## AN ADVISOR RAN SECURE 2.0 THROUGH CHATGPT—HERE'S WHAT HAPPENED

Neil Plein, Lead Consultant of Corporate Retirement Plans with Aldrich Wealth, decided to run SECURE 2.0 through ChatGPT and write an article about it.

Including the original legislation language first (too long to include here), he entered it into ChatGPT. Here is what ChatGPT returned:

**ChatGPT:** *This section of the proposed legislation amends subpart B of part I of subchapter D of chapter 1 of the US tax code to include a new section (414A) that requires certain retirement plans to have automatic enrollment features. The plans that are affected are those that are described in sections 401(k) and 403(b) of the tax code. The automatic enrollment requirements state that the arrangement must be an eligible automatic contribution arrangement (as defined in section 414(w)(3)), allow employees to make permissible withdrawals, have a minimum contribution percentage of between 3% and 10% (increasing by 1 percentage point each year up to 15%), and be invested in accordance with the requirements of a specific regulation. Exceptions are made for certain types of plans, such as simple plans, plans established before the enactment of this section, governmental and church plans, and new and small businesses.*

Plein then used the commonly cited 'Summarize for a 2nd grader' command in ChatGPT and applied that to the Section 101 text, which generated the following:

**ChatGPT:** *This is talking about how companies should make it easier for their workers to save money for when they retire. It says that the company should automatically take a little bit of the worker's pay and save it for them, unless the worker says they don't want them to. And as time goes on, the company should save a little bit more. This way, the worker will have more money saved up when they stop working.*

Not at all difficult to understand.







# HELP PLAN PARTICIPANTS AVOID THEIR RETIREMENT INCOME NIGHTMARE

WHEN IT  
COMES TO  
EDUCATING  
OURSELVES  
AS ADVISORS  
ABOUT  
LIFETIME  
INCOME  
PRODUCTS,  
THERE ARE  
SPECIFIC AREAS  
ON WHICH  
TO FOCUS:  
PROCESS,  
PORTABILITY,  
FEES, AND  
FEATURES.

BY  
NICOLE  
CORNING





father worked third shift manufacturing parts for fighter jets in Lynn, Massachusetts, for thirty-five years. As a child, the plant where he worked was the thing of nightmares—a hulking, intimidating, dystopian structure. I don't know if this is reality or a youthful fantasy, but I remember fire belching into the night from its gargantuan smokestacks.

To this day, I believe that when I die, if I don't go to heaven, I'll work an eternal night shift at that factory. How my father was able to show up every weeknight for 35 years of grueling work still boggles my mind.

As an advisor who works with thousands of retirement plan participants, I now have a different perspective. As awful as those working conditions seemed, I think my father may have traded 35 years of his youth for something that brought the peace of mind most retirees covet: guaranteed income in retirement. When my dad went to work at the factory, his company hired an actuary to calculate how much was needed to be saved on his behalf so that he could retire at age 59 with two-thirds of his salary for the rest of his life. Today, he doesn't sweat market volatility because he can count on his pension every month.

Is a pension a perfect solution? Certainly not. But as hard a worker as my father was, planning—especially investment planning—was not his forte. If it weren't for that pension, I don't see how he could have figured out how to save the right amount while he was young and then create a sustainable cash flow in retirement. My father is not unique. I think he represents the attitude and aptitude of most of America's plan participants today.

Study after study shows that retirees' top concern is running out of money in

retirement—something recent market volatility has only exacerbated. In 2022, Kiplinger and Athene conducted a poll that showed that 57% of responding retirees believe that income guarantees could help them to not run out of money in retirement.

As retirement plan advisors, we've met with participants who share this concern. It's heartbreaking to see those living with the constant fear of running out of money, so they watch the markets and their retirement plan balance with a feverish obsession, convinced that the next policy change out of Washington or Wall Street market correction will plunge them into total financial ruin. We've also all met with participants who anchor to a particular account balance and refuse to spend past that amount, believing it will also lead to financial ruin. They then die with money they could not have statistically spent down to zero in the remainder of their life. They never took that trip, visited family, or bought that car because they were terrified of running out of money.

Either way, it's fear. Running out of money in retirement is our participant's biggest concern. It ties them to bad behaviors because they don't know what to do. They are scared to—and until—death.

As advisors, we are hyper-focused on plan design and best practices that help our participants during their accumulation phase. We have all sorts of messaging around saving: start early and do it often. But the minute a participant moves into retirement, we ghost them like a bad match on a dating app. It kills me, because if we really take seriously the heart of the Employee Retirement Income Security Act (ERISA), it's to place the participants' best interest at the center of any decision. If that is the case, shouldn't we be trying to solve for every participant's greatest fear?

I'm not arguing that we're totally ignoring the issue. Most of us are trying to work with what we have: Providing financial wellness and, if we have a wealth management arm, providing individual support for participants through investment planning. But our current tools are inadequate at best.



IT'S  
HEART-  
BREAKING  
TO SEE  
THOSE  
LIVING  
WITH THE  
CONSTANT  
FEAR OF  
RUNNING  
OUT OF  
MONEY.





WE HAVE ALL SORTS OF MES- SAGING AROUND SAVING: START EARLY AND DO IT OFTEN. BUT THE MINUTE A PAR- TICIPANT MOVES INTO RE- TIREMENT, WE GHOST THEM LIKE A BAD MATCH ON A DATING APP.



They do not have significant uptake on the participant side. Few plans can show how the needle moves with financial wellness (which I still think is critical to provide). And most wealth management advisors have asset thresholds and cannot help most of our clients, with an average balance of approximately \$100,000 per Fidelity's 2023 research.

This is why I think the slow build-up to offering income products in retirement plans, which started in 2012 with Treasury allowing plan sponsors to treat lifetime income solutions as products rather than a protected benefit, and more recently Secure 1.0 and Secure 2.0's safe harbor protections, are so exciting.<sup>1</sup>

We are standing at the brink of what I believe will be the next evolution in retirement plans. There is an identified need, and now just about every recordkeeper and investment company is trying to bring workable solutions to the marketplace. It represents a sizable list of well-known companies in the retirement plan industry. We have this amazing opportunity to give our participants the peace of mind they crave.

It will take a lot of work, beginning with our own education. I encourage each of you to set aside your skepticism and embrace the change by engaging with your providers to start researching the options available to your plan sponsors. Change will begin with us, and as advisors, we are the gatekeeper to industry trends and best practices. When we think something is important, we have a way of bringing our plan sponsors around to our way of thinking. I can't count how many of my retirement plan clients I spent years preaching the efficacy of automated features to, only to have it fall on deaf ears. I eventually ground down the few that didn't initially come around to my way of thinking with supporting data and the anecdotal wins of similar plans. Eventually, nearly every one of them incorporated automated features. It took some years, and in an odd turn of events, the last holdouts almost always somehow came to

believe they had pushed for automated features—Stockholm Syndrome, in a way.

My point is that if I had waited for my plan sponsors to become interested in auto-features before I brought the solutions to them, I'd still be waiting. More importantly, so would their participants.

When it comes to educating ourselves as advisors about lifetime income products, there are specific areas on which we should focus: process, portability, fees, and features. There is a lot to unpack when it comes to each of these, and certainly, there is complexity, but I think about each in the following way:

**PROCESS:** This is foundational to all the work we do with committees. Incorporating lifetime income products will require us to adjust our current processes to accommodate these new additions to the fund offerings. Investment Policies will need to be revised. New processes for RFPs will have to be created. Not to mention ongoing due diligence to review at least annually the financial soundness of any provider we choose to incorporate into a plan.

**PORTABILITY:** This issue annoys me to no end. Many of the recordkeepers are rolling out their proprietary lifetime income offerings and are not—at least initially—inclined to play nice in the sandbox. Meaning, if you incorporate their solution, you are marrying yourself in some way to that recordkeeper. These products seem to be in the minority, and I believe they will go the same way as proprietary funds on recordkeeping systems—the bad old days when you could only get the recordkeeper's namesake funds for your plan sponsors. Thankfully, it's no longer the case, and I believe after some initial posturing, recordkeepers will realize there is a way to monetize their product across other providers. In the meantime, options are embedded in target date funds or within managed accounts (one of the only times I feel there could be value in managed accounts), and non-recordkeeper-specific products can be

moved with the right tracking system. It's not perfect yet. But don't let the perfect get in the way of the good.

**FEES:** While fees are important, as with any fund in a plan, they are not the only consideration. There can be value in higher costs in return for guarantees. I certainly utilize that principle in my wealth management practice when it is in the client's best interest, and I will do the same when it comes to what's best for plan participants. Again, there will have to be verbiage incorporated into our investment policy statements to account for the idiosyncrasies of insurance company fee disclosure and calculations. And we, as advisors, will probably have to engage in the most mental gymnastics of our careers to wrap our brains around how to conduct any valid fee analysis. But don't let a little thing like that scare you.

**FEATURES:** Here's the fun part. I love the connection I have with each of my retirement plans and how they reflect both the individuals and their demographic-driven needs. With so many possible options, it will be satisfying to sort through and figure out which products are the best fit to help each unique population.

Cracking the lifetime income code for our plans and participants will require a lot of blood, sweat, and tears from those of us in the advisor community. I know this is asking a lot. I know you are already exhausted from watching an endless number of presentations on Secure 2.0. I know the quiet quitting, awkward office life post-covid, and tight labor market make your already stressful lives even more so. I know fee compression and market volatility concerns keep you up at night. And I am still asking you to add this to your already overflowing plate. Because some day we can give peace of mind to a hard-working father who just wanted to do right for his family. To me, that's worth it. **NTM**

*Nicole Corning, CFP®, CRPC®, AIF® is Managing Partner, Fundamental Choice Portfolio Manager with Scottsdale, Ariz.-based Pathlight Advisors.*

*Authors note: Wells Fargo Advisors Financial Network did not assist in preparing this article, and its accuracy and completeness are not guaranteed. The opinions expressed in this report are those of the author(s) and are not necessarily those of Wells Fargo Advisors Financial Network or its affiliates. The material has been prepared or is distributed solely for information purposes and is not a solicitation or an offer to buy any security or instrument or to participate in any trading strategy. Additional information is available upon request.*

#### FOOTNOTES

<sup>1</sup> SECURE Act of 2019, Section 204





# The Baby Boomer Savings Dilemma

Why do many Late Boomers lag behind in their retirement savings? By Judy Ward





# Ok Boomer

—or maybe not.  
A paper published in May by the Center for Retirement Research at Boston College (CRR), “Why Do Late Boomers Have So Little Wealth And How Will Early Gen Xers Fare?,” looked at why many Late Boomers (born between 1960 and 1965) lag behind older Boomers in their retirement savings.

“Late Boomers have low levels of wealth regardless of how it is defined – total wealth, retirement wealth, and 401(k)/IRA wealth,” the paper said.

“A decline in some wealth components had been expected as a result of the rise in Social Security’s FRA (full retirement age), the shift from DB to DC plans, and a drop in housing values during the Great Recession. But increasing DC balances were predicted to offset the gap, since Late Boomers were the first generation where workers could have spent their whole career covered by a 401(k) plan,” it continued. “That did not happen; average DC (defined contribution plan) wealth for those in the middle quintile dropped from \$52,300 for Mid

Boomers to \$32,700 for Late Boomers. In fact, declines occurred across all but the top quintile.”

The CRR researchers utilized 2016 data from the University of Michigan’s Health and Retirement Study (HRS), adjusting the data for inflation to reflect 2020 dollars.

## A Unique Moment

Why do many Late Boomers lag behind in their retirement savings? For one thing, Baby Boomers overall began saving for retirement at a median age of 35, according to *Post-Pandemic Realities: The Retirement Outlook of the Multigenerational Workforce*, a survey report released by the Transamerica Center for Retirement Studies (TCRS) in July.

“Baby Boomers were well into their careers when defined contribution plans became available at many employers,” Catherine Collinson, Los Angeles-based CEO and President of TCRS, said. “One of the impacts is Baby Boomers just haven’t had the same time horizon to grow their savings. Starting to save as young as possible enables people to leverage the time value of money to a greater extent.”

Late Boomers started working too late to have a defined benefit plan for the most part but too early to benefit throughout their career from 401(k) automated plan design features.

"These Boomers joined the workforce in the midst of the pension-to-401(k) evolution," Michael Shamrell, Boston-based Vice President of Workplace Investing Thought Leadership at Fidelity Investments, said. "And many spent a lot of time in the workforce before the Pension Protection Act passed (in 2006), so they haven't benefitted as much from automatic enrollment and auto-escalation. This group has been on their own, to a large extent."

Many people in this age group started saving before automatic enrollment into QDIAs (qualified default investment alternatives), and some have more in equities than Fidelity would recommend for their age range, Shamrell continued.

"So many are 'do-it-yourselfers,' so they don't have a professionally managed portfolio," he added. Among participants aged 55-59 in plans that Fidelity recordkeeps, he said, 54.3% have an asset allocation in line with what Fidelity would recommend for that age range, while 51% of those 60-64 do.

"Retirement savings is one of those topics where some people focus on looking at the glass as being half full, and some focus on it being half empty. I feel like this group—because they were more a part of the pension-to-401(k) shift—has been discussed in terms of, 'Are they behind the 8-ball?'" Shamrell added. "But we feel that the numbers show that the younger Boomers are not doing that badly. Is there some room for improvement? Yes." Fidelity recordkeeping data pegs the average account balance of participants age 55-59 at \$204,600 and \$211,700 for those 60-64. (As he points out, many participants also may have assets outside of their workplace retirement account at Fidelity.)

Before the Great Recession, Late Boomers were working at the same rate as older Boomers, said Anqi Chen, a CRR Senior Research Economist and Assistant Director of Savings Research, who co-wrote the CRR Late Boomer paper. But then they dealt with the repercussions of the Great Recession, which ran from December 2007 to June 2009.

"This was the biggest factor," she said. "It wasn't really a one-time event: The effects lasted until at least 2010. There was an initial shock to the job market at a time when Late Boomers were in their peak earning years, and that really hurt them in terms of earnings."

CRR's analysis indicates that until their mid-40s, Late Boomers held more 401(k)/IRA assets than earlier cohorts had at the same age.

"With their 401(k) savings, Late Boomers were actually doing pretty well early on in their career cycle, but when the Great Recession hit, their savings rate dipped for many, and they weren't able to make that up later," she explained. "They were in a unique moment: They were at the peak of their career and earnings, and then they got hit by the Great Recession."

When T. Rowe Price's Sudipto Banerjee thinks about why many Late Boomers haven't saved as much as they need for retirement, the impact of the Great Recession looms as the most significant factor.

"The timing of this recession could have been crucial to Late Boomers because that's when they were in their late 40s, and that's usually when earnings peak and people save more for their retirement," Banerjee, Director of Retirement Thought Leadership in T. Rowe

Price's Investment Product and Retirement Content Group in Baltimore, said. "A lot of Late Boomers could have lost their job, so for a time, they were not saving at all for retirement. And even if they kept their job, a lot of 401(k) plan sponsors stopped their contributions to employees for a time."

The stock market's dive during the Great Recession impacted many Boomers' retirement-savings outlook, said Richard Johnson, Senior Fellow in the Income and Benefits Policy Center at the Urban Institute in Washington, D.C.

"The Great Recession had quite a substantial impact on Boomers and particularly the stock market decline," he explained. "For Boomers, certainly a loss of earnings hurt some of them, but the larger issue was the drop in the value of their accumulated retirement wealth."

The Urban Institute's research has estimated that 28% of Boomers overall are at risk of having inadequate resources in retirement (an inability to replace 75% of their pre-retirement income), he said.

The Great Recession proved to be a setback for Baby Boomers, especially, Collinson agreed.

"For those further along in their careers, it is more difficult to recover from any financial setbacks on their savings journey, simply because they have less time to do so before retirement," she said. "For years following the Great Recession, we (TCRS) asked workers about the status of their recovery from the Great Recession."

As recently as a TCRS paper published in April 2019—*What is "Retirement"? Three Generations Prepare for Older Age*—she said, "We found that 61% of Baby Boomers said that they were still recovering from the Great Recession."

More specifically, 42% said they had somewhat recovered, 11% said they had not yet begun to recover, and 8% said they might never recover.

**"One of the impacts is Baby Boomers just haven't had the same time horizon to grow their savings."**

— Catherine Collinson, TCRS



Beyond the Great Recession, the CRR paper attributes most of the remaining wealth differential among Late Boomers to a shift to households with lower average 401(k)/IRA balances, including a rising share of Black and Hispanic households in that age group and a declining share of married households and those with college degrees. Average DC wealth at ages 51-56 for middle quintile Late Boomer households totaled \$67,265 for white households in 2020 dollars, the paper said, versus \$13,606 for Black households and \$9,284 for Hispanic households.

"Largely, what is driving the racial disparities in retirement readiness is that people of color tend to earn less than white people," Johnson said. "People of color also are less likely to have a job that offers a retirement plan, and when they do have a job that offers a retirement plan, they tend to save less than white workers, just because of the financial pressures they have."

A couple of things stand out when T. Rowe Price has looked at why people of color often save much less for retirement, Banerjee added.

"One, which is not talked about a lot, is *when* people start to save for retirement. More white households start saving in their 20s and early 30s, but in minority households, many do not start saving until their late 30s or early 40s," he said. "And it's just too hard for people to catch up if they start saving late, even if they are saving at a higher rate."

Another factor T. Rowe Price's research points to is differing financial priorities across different races, Banerjee said.

"Saving for retirement is the number-one savings priority across all races, our research shows. But Black households say that saving for emergencies is almost as important as saving for retirement."

Black and Hispanic workers also are more likely to carry credit card debt and medical debt, according to a T. Rowe Price paper written by Banerjee and published in March 2022, "Race, Retirement, and the Savings Gap." And 41% of Black participants have student loan debt, the research found, versus 18% of white participants. "Debt, unfortunately, can be more detrimental to financial well-being than other financial troubles," the paper added.

### Waiting to See

Among different age groups, people aged 55 and older typically express the highest confidence that they'll have enough money to live comfortably throughout their retirement, said Craig Copeland, Director of Wealth Benefits Research at the Employee Benefit Research Institute (EBRI) in Washington, D.C. That held true for

EBRI's 2023 Retirement Confidence Survey (RCS), as 66% of people 55 and older said they feel confident that they'll have enough money to live comfortably throughout their retirement. But just 16% of people 55 and older feel very confident about that, down 27% from the 2018 RCS, when 22% of the 55-and-older group surveyed felt very confident.

"The big thing for Late Boomers now is that they could be nearing retirement at a point where the stock market has been down, and inflation has been high," Copeland said. "They've had two big things happen that you don't want to happen as you near retirement. So, the concern is, how do they get back that money that they lost from the stock market? That puts them in a spot that they need to think about planning out their lifestyle, and how they can live with the financial situation that they face."

"The issue is, can they maintain their lifestyle in

retirement, or at least live above the poverty level?" Copeland continued. "Ultimately, it's really hard to say what's going to happen for this group in the next 30 years down the road. We can get an idea by projecting out their accumulated retirement account balance, but we don't know some of the other underlying factors that will impact them, such as whether they plan to downsize from their house and move, or whether they are physically healthy and plan to work longer."

The past few years have created a lot of uncertainty for Boomers approaching retirement age, and the full implications for their long-term outlook remain unknown, Johnson said.

"What we're still waiting to see is whether one of the big impacts that we've seen over the past 20 years—people working longer, which has been a real

contributor to increasing retirement security for people who are behind on their savings—will continue. Has the pandemic changed that?" he said. "Employment rates are now pretty much up to pre-pandemic levels for everyone except people over 65: We still haven't seen a full return to work for people over age 65, so I don't know what the impact will be on Late Boomers. But if you look at why people have been working longer—concerns about their retirement security, people over 65 still being in good health, and the ability to have less-physical jobs—all of those factors are still in play."

Working longer likely would be a good option for many who don't have enough saved, Chen said. "From an individual perspective, for those who can work longer, that's going to be the most powerful lever to increase their income in retirement," she says. "They can then start claiming Social Security later, not draw down on their savings while they're still working, and maybe even save more."

**"These Boomers joined the workforce in the midst of the pension-to-401(k) evolution."**

—Michael Shamrell, Fidelity Investments



The TCRS study released in July found 49% of Baby Boomers said they expect to work past age 70 (or are already doing it) or do not plan to retire at all. And only 34% of Baby Boomers say they have a backup plan for income if they're forced into retirement sooner than expected.

"Our research finds that Boomers who are still in the workforce are seeking to work longer and have the mindset that work and retirement are not mutually exclusive," Collinson said. "That's a great vision to have, but it's not necessarily a reality. Unfortunately, the statistics are that when older workers find themselves unemployed, it is much harder for them to find a new job."

Collinson was asked if any policy changes could help Late Boomers falling short in their retirement savings, and her response focused on Social Security. In the TCRS survey released in July, 41% of Baby Boomers said they expect Social Security to be their primary source of retirement income.

"First and foremost is rebuilding confidence in the Social Security system. Our research shows that a high percentage of Baby Boomers (40%) say they fear that Social Security will be reduced or cease to exist in the future," Collinson said. "We need a concerted effort to address the depletion of the Social Security Trust Funds, which is expected to happen in the next 10 years."

"After that, we need to look at other ways to strengthen the Social Security system," Collinson concluded. "With people living and working longer now, we should consider extending the maximum age to claim benefits beyond age 70 with a higher monthly benefit than is currently available. And many Boomers expect to work part-time in retirement, so maybe we should change the income-test limit so that more people do not get taxed on their Social Security benefits while working part-time." **NNTM**

*Judy Ward is a freelancer specializing in writing about retirement plans.*



# REIGNING RECORDKEEPERS— 2023 ADVISORS' CHOICE



## WHO DOES IT BEST?

Which recordkeepers—and the services, support, products, and processes they provide—truly stand out? There are few in a better position to evaluate the multitude of offerings now available than

advisors, who typically work with various firms across different market segments involving plans of all sizes.

For the second year, we called on advisors to rate different service categories and five distinct market segments. Advisors are “in the trenches,” dealing day in and day out with recordkeeper partners, and are therefore most qualified to evaluate the strengths and weaknesses of the companies that occupy this critical industry space. They see and experience first-hand the features, flexibility, and support these

organizations provide across a wide variety of circumstances.

We asked advisors to vote only on the services in their target markets—and to evaluate the services on a five-point scale, ranging from “world-class” to “functional” to “needs work.”

We highlighted the top five in five distinct target markets based on size:

- **Micro:** under \$1 million in plan assets
- **Small:** between \$1 million and \$10 million in plan assets
- **Mid-Market:** between \$10 million and \$100 million in plan assets

- **Large Market:** between \$100 million and \$250 million in plan assets
- **Mega Market:** over \$250 million in plan assets

The following pages reveal the results of that assessment—the top five in each service category (sorted alphabetically). Advisors chose the firms—literally, the Advisors’ Choice. [NTM](#)

# THANK YOU, ADVISORS. WE APPRECIATE YOU, TOO!

## Recognized by the Folks Who Should Know

Humbled and proud — those words came to mind as NAPA announced its Advisors' Choice Awards for 2023. We want to extend a hearty **"Thank you!"** to the advisors who placed their confidence in us as recordkeeping partners and whose votes resulted in **Advisors' Choice Awards** for our team.

### NAPA ADVISORS' CHOICE AWARDS

 Calculator	 Plan Sponsor Website	 Mobile App	 Regulatory Support
 Staff Credentials	 Advisor Support	 Participant Statement	 Educational Materials
 Multi-lingual Capabilities	 Plan Health	 Retirement Income	





#### PLAN SPONSOR WEBSITE

- 401GO
- Empower
- Principal Financial Group
- Ubiquity Retirement + Savings
- Vestwell



#### MOBILE APP

- Empower
- Fidelity Investments
- The Standard
- Vestwell
- Voya Financial Inc.



#### ADVISOR SUPPORT

- 401GO
- Empower
- T. Rowe Price
- Vestwell
- Voya Financial Inc.



#### PARTICIPANT STATEMENT

- 401GO
- Empower
- T. Rowe Price
- Vestwell
- Voya Financial Inc.



#### PLAN HEALTH

- 401GO
- Empower
- Principal Financial Group
- Vestwell
- Voya Financial Inc.



#### WELLNESS

- Empower
- Fidelity Investments
- NWPS
- Vestwell
- Voya Financial Inc.



#### PARTICIPANT TOOLS

- Empower
- John Hancock Retirement Plan Services
- J.P. Morgan Asset Management
- Vestwell
- Voya Financial Inc.



#### REGULATORY SUPPORT

- 401GO
- Empower
- Pentegra Retirement Services
- The Standard
- Vestwell



#### EDUCATION MATERIALS

- Empower
- Principal Financial Group
- Transamerica
- Vestwell
- Voya Financial Inc.



#### RETIREMENT INCOME

- 401GO
- BPAS
- Empower
- Principal Financial Group
- Vestwell



#### CALCULATORS

- 401GO
- Empower
- Principal Financial Group
- Vestwell
- Voya Financial Inc.



#### STAFF CREDENTIALS

- 401GO
- American Funds
- The Standard
- Ubiquity Retirement + Savings
- Vestwell



#### MULTI-LINGUAL CAPABILITIES

- 401GO
- BPAS
- Empower
- Ubiquity Retirement + Savings
- Vestwell



#### PLAN SPONSOR WEBSITE

- 401GO
- BPAS
- John Hancock Retirement Plan Services
- Principal Financial Group
- Voya Financial Inc.



#### ADVISOR SUPPORT

- Ascensus
- BPAS
- Fidelity Investments
- Vestwell
- Voya Financial Inc.



#### PLAN HEALTH

- 401GO
- BPAS
- Empower
- NWPS
- Vestwell



#### MOBILE APP

- 401GO
- Fidelity Investments
- Principal Financial Group
- Vestwell
- Voya Financial Inc.



#### PARTICIPANT STATEMENT

- 401GO
- BPAS
- Fidelity Investments
- John Hancock Retirement Plan Services
- Vestwell



#### WELLNESS

- 401GO
- John Hancock Retirement Plan Services
- NWPS
- Vestwell
- Voya Financial Inc.



#### PARTICIPANT TOOLS

- 401GO
- Fidelity Investments
- John Hancock Retirement Plan Services
- Principal Financial Group
- Vestwell



#### REGULATORY SUPPORT

- 401GO
- Fidelity Investments
- John Hancock Retirement Plan Services
- Pentegra Retirement Services
- Vestwell



#### EDUCATION MATERIALS

- 401GO
- BPAS
- Fidelity Investments
- Vestwell
- Voya Financial Inc.



#### RETIREMENT INCOME

- 401GO
- BPAS
- NWPS
- OneAmerica
- Vestwell



#### CALCULATORS

- 401GO
- BPAS
- Empower
- Vestwell
- Voya Financial Inc.



#### STAFF CREDENTIALS

- 401GO
- NWPS
- The Standard
- Vestwell
- Voya Financial Inc.



#### MULTI-LINGUAL CAPABILITIES

- 401GO
- Empower
- John Hancock Retirement Plan Services
- Vestwell
- Voya Financial Inc.





### PLAN SPONSOR WEBSITE

- Fidelity Investments
- John Hancock Retirement Plan Services
- Pentegra Retirement Services
- Schwab Retirement Plan Services
- Transamerica



### ADVISOR SUPPORT

- Ascensus
- John Hancock Retirement Plan Services
- J.P. Morgan Asset Management
- Milliman, Inc.
- Transamerica



### PLAN HEALTH

- Ascensus
- Fidelity Investments
- John Hancock Retirement Plan Services
- Milliman, Inc.
- Transamerica



### MOBILE APP

- Fidelity Investments
- John Hancock Retirement Plan Services
- Pentegra Retirement Services
- Slavic401k
- Touchstone Retirement Group



### PARTICIPANT STATEMENT

- BPAS
- Fidelity Investments
- John Hancock Retirement Plan Services
- Pentegra Retirement Services
- Transamerica



### WELLNESS

- BPAS
- Fidelity Investments
- John Hancock Retirement Plan Services
- Pentegra Retirement Services
- Schneider Downs Wealth Management Advisors



### PARTICIPANT TOOLS

- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Principal Financial Group
- Schwab Retirement Plan Services



### REGULATORY SUPPORT

- BPAS
- John Hancock Retirement Plan Services
- Milliman, Inc.
- Schwab Retirement Plan Services
- Transamerica



### EDUCATION MATERIALS

- BPAS
- Fidelity Investments
- John Hancock Retirement Plan Services
- Pentegra Retirement Services
- Schneider Downs Wealth Management Advisors



### RETIREMENT INCOME

- BPAS
- Fidelity Investments
- OneAmerica
- Touchstone Retirement Group
- Transamerica



### CALCULATORS

- Fidelity Investments
- John Hancock Retirement Plan Services
- J.P. Morgan Asset Management
- Pentegra Retirement Services
- Transamerica



### STAFF CREDENTIALS

- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Milliman, Inc.
- PCS Retirement
- Transamerica



### MULTI-LINGUAL CAPABILITIES

- BPAS
- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Transamerica

# Thank! YOU!



We're honored that Advisors' votes placed BPAS in the **Top 5 Recordkeepers** covering 18 categories across all markets, micro to mega.

It's reassuring to know that advisors see us as trustworthy partners they can build a business around.

We couldn't be more excited and grateful for your votes. But, we won't let it go to our heads; we'll keep working hard and being accountable to you and our mutual clients every day.

**Thank you!**



**One Company. One Call.**

866.401.5272 | [TrustSales@BPAS.com](mailto:TrustSales@BPAS.com)  
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Workplace Retirement Plans | Actuarial & Pension | Healthcare Consulting | IRA | VEBA HRA  
Health & Welfare Plans | Fiduciary | Collective Investment Funds | Fund Administration | Institutional Trust





#### PLAN SPONSOR WEBSITE

- Milliman, Inc.
- OneAmerica
- Schwab Retirement Plan Services
- T. Rowe Price
- Transamerica



#### MOBILE APP

- Fidelity Investments
- OneAmerica
- Schwab Retirement Plan Services
- T. Rowe Price
- Transamerica



#### ADVISOR SUPPORT

- Ascensus
- Empower
- Milliman, Inc.
- Schwab Retirement Plan Services
- T. Rowe Price



#### PARTICIPANT STATEMENT

- Empower
- John Hancock Retirement Plan Services
- Principal Financial Group
- T. Rowe Price
- TIAA-CREF



#### PLAN HEALTH

- Empower
- Fidelity Investments
- Milliman, Inc.
- OneAmerica
- T. Rowe Price



#### WELLNESS

- Empower
- Fidelity Investments
- Milliman, Inc.
- OneAmerica
- Principal Financial Group



#### PARTICIPANT TOOLS

- Empower
- Milliman, Inc.
- OneAmerica
- T. Rowe Price
- TIAA-CREF



#### REGULATORY SUPPORT

- Equitable
- Milliman, Inc.
- OneAmerica
- Schwab Retirement Plan Services
- T. Rowe Price



#### EDUCATION MATERIALS

- Fidelity Investments
- Milliman, Inc.
- OneAmerica
- Principal Financial Group
- Schwab Retirement Plan Services



#### RETIREMENT INCOME

- BPAS
- Empower
- Fidelity Investments
- OneAmerica
- Voya Financial Inc.



#### CALCULATORS

- Empower
- Fidelity Investments
- OneAmerica
- Schwab Retirement Plan Services
- Voya Financial Inc.



#### STAFF CREDENTIALS

- Fidelity Investments
- Milliman, Inc.
- OneAmerica
- Schwab Retirement Plan Services
- T. Rowe Price



#### MULTI-LINGUAL CAPABILITIES

- Empower
- Fidelity Investments
- OneAmerica
- Schwab Retirement Plan Services
- Voya Financial Inc.





#### PLAN SPONSOR WEBSITE

- Empower
- Fidelity Investments
- Lincoln Financial Group
- Schwab Retirement Plan Services
- Voya Financial Inc.



#### ADVISOR SUPPORT

- BPAS
- Empower
- Fidelity Investments
- Milliman, Inc.
- OneAmerica



#### PLAN HEALTH

- Empower
- Fidelity Investments
- OneAmerica
- Principal Financial Group
- Voya Financial Inc.



#### MOBILE APP

- Empower
- Fidelity Investments
- OneAmerica
- Schwab Retirement Plan Services
- Voya Financial Inc.



#### PARTICIPANT STATEMENT

- Fidelity Investments
- The Heberts Company
- PCS Retirement
- Schneider Downs Wealth Mgmt Advisors
- Securian Retirement



#### WELLNESS

- J.P. Morgan Asset Management
- Lincoln Financial Group
- Newport Group
- OneAmerica
- Voya Financial Inc.



#### PARTICIPANT TOOLS

- Empower
- Fidelity Investments
- Milliman, Inc.
- Schwab Retirement Plan Services
- T. Rowe Price



#### REGULATORY SUPPORT

- Fidelity Investments
- Lincoln Financial Group
- Schwab Retirement Plan Services
- T. Rowe Price
- Voya Financial Inc.



#### EDUCATION MATERIALS

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- Principal Financial Group
- Voya Financial Inc.



#### RETIREMENT INCOME

- BPAS
- Empower
- Fidelity Investments
- Lincoln Financial Group
- OneAmerica



#### CALCULATORS

- Empower
- Fidelity Investments
- Milliman, Inc.
- TIAA-CREF
- Voya Financial Inc.



#### STAFF CREDENTIALS

- Empower
- Fidelity Investments
- Schwab Retirement Plan Services
- T. Rowe Price
- Voya Financial Inc.



#### MULTI-LINGUAL CAPABILITIES

- Empower
- Fidelity Investments
- OneAmerica
- Principal Financial Group
- Voya Financial Inc.



# Trouble Lurking for 401(k) Plan Participant Retirees



*A danger when retirees can least afford it is an ill-timed, significant loss occurring immediately after they begin plan distributions.*

By Steff Chalk

**P**lan sponsor trustees hold the “power seat” for retirement plan participants by providing oversight for plan investments. It’s seen in the names, titles, and job functions historically cited in fiduciary

breach lawsuits. ERISA comes with rules, regulations, and a rudimentary roadmap. When a plan fiduciary lacks the required knowledge to serve as an ERISA fiduciary, it creates a fertile hunting ground for lawsuits. Fortunately, regulators largely

support plan fiduciaries engaging prudent professionals when they lack the requisite expertise.

After a retirement committee engages a team of experts to orchestrate the plan’s duties, it seems all appropriate boxes are checked. An inexperienced

plan fiduciary may feel there is not much left to do. However, retirement planning goes well beyond the accumulation period.

Once prudent processes are defined and followed, and appropriate funding mechanisms are in place—there remains an all-encompassing next step.

### Getting People Ready to Retire

The task at hand in retirement is building upon the past good work of plan sponsors, plan providers, fiduciaries, and advisors for the past 20 or 30 years. The challenge then becomes structuring that asset into one that can best deliver the participant through whatever life might throw at them.

A retiree's final 20 years of retirement living is far less clear or structured than during the accumulation period. To assist plan sponsors and plan participants during the decumulation period, there are a few macro-concepts of which the retiree should be aware, beginning with inflation.

### Inflation

Inflation needs no explanation for those who can recall the Carter and Reagan Administrations. Consumers and borrowers in the 1980s can remember residential mortgages peaking at over 18.5%. Inflation can still be defined simply as the erosion of a currency's buying power.

**“When a plan fiduciary lacks the required knowledge to serve as an ERISA fiduciary, it creates a fertile hunting ground for lawsuits.”**

Retirees must be aware of inflation's impact on their existing portfolio. One individual cannot stop inflation. However, one good advisor can periodically perform a stress test on a client's portfolio to provide a retiree with a clear understanding of the impact inflation could have on their portfolio.

### Asset Allocation Surprises

Many retirees maintain a substantial amount of financial assets committed to equity securities. Unfortunately, equities can reprice instantaneously with an unfavorable earnings report that drives a market selloff or with deteriorating global conditions in general.

A large drop would not be devastating if a retiree holds only 5% of their post-retirement portfolio in equities. However, if a

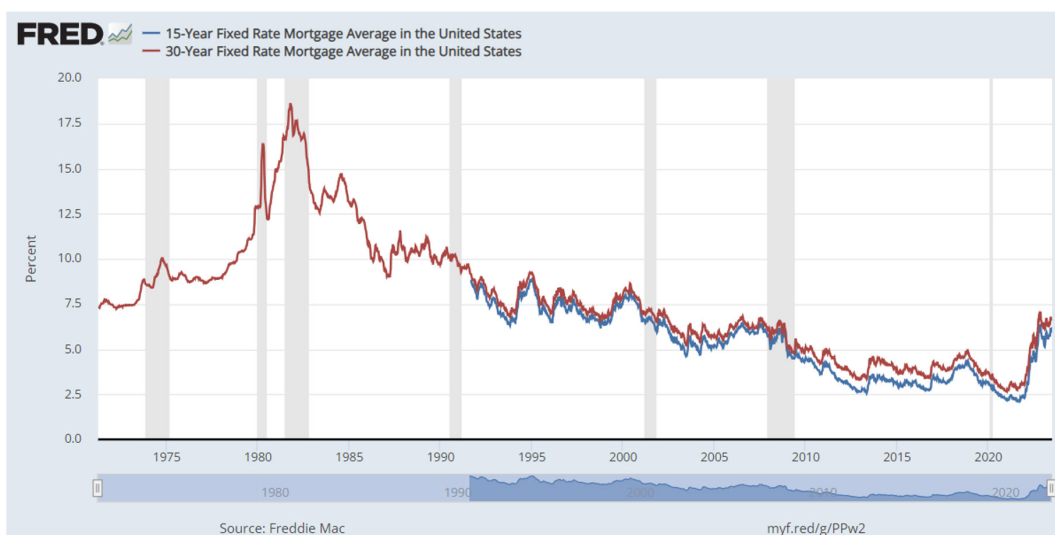
considerable portion of a retiree's retirement assets are held in equities, then discussions around diversification, correlation, and downside protection become more pertinent. In most cases, a retiree will not think that far ahead, but a good retirement advisor will.

### Sequencing-of>Returns—Does it Matter?

Another danger that creeps into a portfolio when retirees can least afford it is an ill-timed, significant loss occurring immediately after they begin plan distributions. Spending-down/withdrawal modeling is normally computed with asset allocation ranges and average return assumptions. Yet, what is not normally built into the model is a significant loss—or a series of losses—in the portfolio during the first few years of retirement. A substantial loss during the early years of retirement can profoundly impact the following 10 or 20 years. If sequencing of returns is not in your lexicon, Moshe Milevsky's articles on the subject should be both eye-opening and required reading.

It's not the returns that are the problem; it's the timing. Taking 4% withdrawals with multiple years of negative returns in the portfolio can be a significant issue.

By keeping their eyes open to portfolio risk, seasoned retirement advisors who maintain plan participant relationships beyond the qualified plan can consistently be of great value and service to a plan sponsor's employee base. **NTM**



Source: "What's the story with mortgage rates?" [fredblog.stlouisfed.org](http://fredblog.stlouisfed.org).



# Health & Welfare Litigation: A Self-Fulfilling Prophecy?

*An advisor is well served to evaluate how they can provide support for the unique health plan ecosystem.*

By David N. Levine

I live in Washington, D.C. It's well known that Washington can be an echo chamber, where one rumor gets repeated over and over—until it almost becomes a fact.

The benefits industry is similar. In the fall of 2022, many kept hearing that “the new fiduciary rule” would be out by the end of the year.

In reality, a new fiduciary rule had never even been submitted to the Office of Management and Budget review process (which you can check online), which meant it was nowhere near being issued. So, what's the newest rumor? A wave of 401(k)-like fiduciary litigation is coming to health plans.

So, let's cut to the basics of rumor versus reality, starting with reality:

- ERISA has always applied to health and retirement plans. ERISA's provisions for health plans are basically the same as those for retirement plans, although there are some differences in the regulations for the two types of plans. Of course, health plans can be subject to other laws—like the Affordable Care Act, COBRA, GINA, HIPAA, and more.
- The distinction between settlor and fiduciary duties applies to health plans just like retirement plans. Importantly, selecting the features of a plan, including coverage items, copays, and premiums, are design, not administration activities.
- Some employers have their retirement plan committees serve in a fiduciary role for their health plans, some employers have separate committees, and some employers take other approaches. There is no one required approach.
- As enacted in late 2020, the Consolidated Appropriations Act does add some transparency requirements for health care coverage, including limiting the use of specific gag clauses. Still, it does not require a complete “open book” of health plan contract provisions and operational activities. In fact, proposed legislation would now further expand the transparency and disclosure rules for health plans and their services, so if it was indeed an “open book” now, this proposed legislation would serve no purpose.
- Lawsuits have already been filed about compensation paid to various providers supporting health care plans. For example, in one case our firm defended, consultant and broker compensation for a health plan was challenged by a well-known 401(k) fee litigation firm, and the courts dismissed the claim both at the trial and appeals levels.
- Large plaintiffs-side 401(k) fee lawsuit law firms continue to consider bringing 401(k)-style lawsuits against health plans. While there are evolving theories on the plaintiff's side, none have “stuck” with significant success at this point.
- Advisors can play a helpful role in fiduciary matters for health plans while keeping in mind the settlor and fiduciary distinctions so essential in determining what is a fiduciary act—and what is not.

On the rumor side:

- Just because a plaintiff's attorney and their firm say they are “investigating” large employers' health plans does not mean a tsunami of litigation is automatically coming. Once, there was a belief of never-ending lawsuits over cash balance pension plans, church plans, and company stock in 401(k) plans. However, these types of lawsuits have significantly receded in recent years. Could lawsuits proceed? Yes, but we will have to see where things go.
- Health plans are often well supported by their existing brokers and consultants. Like in the retirement space, are there opportunities for new providers? Absolutely. However, it is not the untouched field where a retirement advisor applies the same knowledge. Advisors looking to support the health plans of their clients should look before they leap to make sure they understand the existing landscape with their clients as well as their own knowledge and resources. Also, for those working in consolidated or aggregated firms, you may already have teams focused on this area, and looking at their skills is important.

So where to go from here? Retirement advisors have great insight they can bring to health plans. Still, before we create a reality of waves of health litigation, an advisor is well served to evaluate how they can provide support for the unique health plan ecosystem. [NNTM](#)





# The True Cost of ‘The True Cost of Forgotten 401(k) Accounts’

*The number is nonsensical on its face, even with the most liberal definition of ‘forgotten.’*

By Nevin E. Adams, JD

**A**n update of a so-called “study” has been making the rounds—again—and its authors have doubled down (and then some) on the assumptions in an updated version.

I’m referring to something called “The True Cost of Forgotten 401(k) Accounts (2023)—an update to a report circulated about a year ago of the same title (sans the “2023” qualifier) by a firm called

Capitalize. The first report claimed that there was \$1.35 trillion in “forgotten” 401(k) accounts—the latest iteration has upped that number to \$1.65 trillion.

That’s right, \$1.65 TRILLION.

Not that the report’s authors make it hard to be skeptical about their results. Their executive summary claims that a full 25%—that’s a full QUARTER—of all 401(k) plan assets are, by their definition, “forgotten.” And if you’ve ever

“left behind” a 401(k) account at a previous employer—well, apparently, you’ve “forgotten” that account by their definition.

Now if that definition of “forgotten” winds up being more credible than the one hinted at a year ago—the notion that these balances were truly lost, a.k.a. the “orphan” accounts that individuals truly have lost track of—a category that the Employee Benefit Research Institute (EBRI)



**“The first report claimed that there was \$1.35 trillion in “forgotten” 401(k) accounts—the latest iteration has upped that number to \$1.65 trillion..”**

has estimated<sup>1</sup> at \$1.5 trillion OVER A 40-YEAR TIME PERIOD—well, the underlying assumptions—not to mention the mathematical extrapolations based on those underlying assumptions—are not.

The authors mostly took the baseline they conjured up a year ago (see “Compounding the Problem(s)”—this includes some assumptions not only about the rationale for the decision<sup>2</sup> to leave the account where it is, but an alleged fee differential between IRAs and 401(k)s (they claim IRAs are less expensive), make a swag assumption about the average size of those accounts, and cut that alchemy in half (to be “conservative”). The new version builds on that shaky foundation by applying some assumptions about job turnover from the Great Resignation—and, no surprise, job turnover (apparently) means (even) more 401(k) accounts “left behind.”

### The Assumptions

At a high level, they assume: 40% of workers cash out<sup>3</sup> their 401(k) (with no apparent allowance for account balance), say they used IRS data on rollovers to determine rollovers, assume 2-3 million workers rollover their 401(k) (based on GAO data that said 401(k) to 401(k) rollovers account for 10-15% of total rollovers, and “impute” (their word) the number of “newly forgotten 401(k)s based on the difference between the total number of 401(k) accounts tied to job-changers and those

who cash out, roll over to IRAs, or roll over into 401(k)s.” Bearing in mind that they will then take the number of accounts and multiply THAT by the average account balances they derived earlier.

That might explain why they wind up with a number that represents a jaw-dropping quarter of 401(k) balances allegedly “forgotten,” but it fails to explain why any credence should be put on that derivation. It is, quite simply, math that takes questionable assumptions, pulls a number out of the middle of those, and multiplies it by other questionable assumptions, producing a large number that is then said to be drawn from credible sources. But even credible sources are quickly waylaid by bad assumptions concocted from some kind of unarticulated triangulation.

Yet another example is the \$115 BILLION they say is the “potential collective opportunity cost” from these accounts left behind—the result, they claim, “as a result of poor allocation and above average fees these accounts could experience.” To get to that number, they take the number of accounts they’ve conjectured (29.2 million in 2023) and then multiplied THAT “by the foregone savings one of these accounts would experience in a single year based on our scenario analysis (~\$3,900).” “One of those accounts” being that \$55,000 average they started with. I kid you not.

### The Motivation?

That said, this time, the motivations behind Capitalize’s report are more evident to me than they were a year ago. Their assertions are primarily that these balances left behind are paying fees over what they might—presumably in the warm embrace of firms like Capitalize that offer a rollover solution. This time, the report wastes no time highlighting the potential issues with leaving your 401(k) balances “behind”; that it becomes harder to track fees, allocate funds, and that your fees may be larger if you leave it with the plan of a smaller employer. They even invoke the notion that “unlike retail accounts,” you may have limited choice about fees “or other preferences.”

Honestly, I have tried to ignore this aberration. The number is nonsensical on its face, even with the most liberal definition of “forgotten.” But it’s August—a slow news month—and journalists scrambling for a catchy lead apparently just can’t resist the opportunity. More distressing (at least to me) is the number of ostensibly well-meaning industry professionals who (continue to) share links to the uncritical coverage of this report.

Interestingly enough, the dictionary defines “capitalize” as “to take the chance to gain advantage from.”

Hmmm... **NNTM**

### FOOTNOTES

<sup>1</sup> As a stand-alone policy initiative, EBRI has projected that the present value of additional accumulations over 40 years resulting from “partial” auto portability (participant balances less than \$5,000 adjusted for inflation) would be \$1.50 trillion, and the value would be \$1.99 trillion under “full” auto portability (all participant balances). Under partial auto portability, those currently age 25–34 are projected to have an additional \$659 billion, increasing to \$847 billion for full auto portability. But that picks up all potential rollovers, and they certainly aren’t “forgotten.”

<sup>2</sup> Full disclosure—the author CONSCIOUSLY left behind every single one of his 401(k) accounts until recently. For account balances above \$5,000, it was the easiest thing to do (e.g., “nothing”); for some of them, it was a matter of appreciating the institutional pricing and/or options available there versus the new 401(k), and for at least one it was simply the aggravation involved in trying to get the funds from the old 401(k) mailed to me in a check. I’m happy to say that the process has improved somewhat over the years, though all three prior providers insisted on sending me a hardcopy check (two, where Roth balances were involved). Oh, and I never “forgot” a single one.

<sup>3</sup> Don’t get me wrong; “leakage” is a real concern, and rollovers, for the most part, remain a tedious process for your average participant. Too many smaller (and perhaps some larger) balances do, in fact, get lost or overlooked, and “attribution” via escheatment or force-outs does occur.





# Investment Advice to Plans and Participants and Litigation Risks

*Litigation against retirement plan advisors is here to stay. Indeed, it may pick up in the months ahead.*

By Fred Reish, Megan Hladilek & Emily Kile-Maxwell

**W**hile plan sponsors are generally the focus of ERISA litigation, retirement plan advisors can be a target of lawsuits for breach of fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA).

There has been a recent increase in ERISA claims filed against retirement plan advisors, and this article discusses the allegations and the courts' conclusions in selected cases.

However, our discussion should not be viewed as a commentary on the merits of plaintiffs' allegations.

## Duties of ERISA Fiduciaries

Retirement plan advisors are fiduciaries under ERISA if they have or "exercise any discretionary authority or discretionary control" over plan assets (referred to as 3(38) investment managers) or if they provide "investment advice for a fee or other compensation, direct or indirect" for plan assets (referred to as 3(21) investment advisers).

In other words, if an advisor has discretionary control over plan investments or provides ongoing nondiscretionary advice regarding investments, the adviser is an ERISA fiduciary.

The core ERISA fiduciary duties for retirement plan advisors are the duties of loyalty and prudence. Intertwined in both duties is a responsibility to ensure that only reasonable fees are charged for the services and investments recommended or selected by the adviser.

## Cases Against Plan-Level Advisors

One recent case brought against plan-level retirement plan advisors is *Lauderdale v. NFP Retirement, Inc.*, No. 21-301 JVS (KESx), 2022 WL 4222831 (C.D. Cal. Feb. 8, 2022). The participant/plaintiffs sued the plan sponsor (Wood Group Holdings, Inc.) and two plan-level retirement plan advisors (NFP Retirement, Inc. and flexPATH Strategies, LLC).

Wood Group had hired NFP as the plan's fiduciary investment advisor and flexPATH as the plan's discretionary investment manager with authority over selecting, monitoring, and replacing the plan's qualified default investment alternative (QDIA). The plaintiffs alleged that NFP and flexPATH "are operated and controlled by the same senior executives in the same office."

Plaintiffs' claims challenged several of NFP and flexPATH's recommendations, specifically that:

- On NFP's recommendation, in February 2016, Wood Group added flexPATH target date funds (TDFs) to the plan's investment lineup.
- NFP recommended the flexPATH TDFs to Wood Group before the TDFs were launched and, therefore, before there was a track record of performance.
- flexPATH exercised its discretionary fiduciary authority to designate its own flexPATH TDFs as the plan's QDIA.
- The flexPATH TDFs subsequently underperformed.

- In 2018, the Wood Group (acting contrary to NFP's advice) removed the flexPATH TDFs from the plan's investment lineup and removed flexPATH as the plan's discretionary investment manager with authority over the plan's QDIA.
- Acting on NFP's recommendation, Wood Group later added three other flexPATH funds—collective investment trusts ("CITs")—to the plan's investment lineup.
- The same funds were available in otherwise identical but lower-cost share classes.

The court dismissed some of these claims early on, holding that flexPATH's appointment as a designated investment manager shielded Wood Group and NFP from direct liability as co-fiduciaries for actions that flexPATH took in its capacity as the plan's designated investment manager.

While plan fiduciaries may sometimes be liable for the breaches of co-fiduciaries, where—as in this case—an investment manager has been prudently appointed under ERISA, co-fiduciaries are not liable for the acts or omissions of the investment manager. Accordingly, the court held that ERISA shielded Wood Group and NFP from liability for flexPATH's actions as the plan's investment manager.

After discovery, the court dismissed all claims against NFP



“These recent cases are good reminders of the importance of having—and documenting—good processes.”

and most claims against Wood Group but allowed the remaining claims against flexPATH to proceed to trial. The court focused on the plaintiffs’ inability to prove a “causal link” between NFP and Wood Group’s conduct and losses to the plan.

Despite harsh words from the court regarding what it viewed as evidence of conflicts and an imprudent process related to the flexPATH TDFs, the court held that even if Wood Group or NFP had breached their fiduciary duties, those breaches had not caused the losses to the plan, since flexPATH had made the final decision to select those funds.

As to the plaintiffs’ claims against Wood Group and NFP regarding lower-cost share classes of the plan’s investment options, the court dismissed those claims. It said it was undisputed that NFP had negotiated the best-value share class for the plan’s size and that the Wood Group had appropriately balanced the benefits and “tradeoffs” of alternate share classes.

However, as noted above, the court allowed all claims against flexPATH to proceed to trial, noting that:

- Evidence supported plaintiffs’ claims that “flexPATH prioritized its own interests in growing its investment business at the expense of Plan participants”;
- flexPATH had failed to exercise “independent” judgment in selecting the flexPATH TDFs, relying instead on analyses that NFP performed before the Wood Group retained flexPATH as the plan’s discretionary investment manager and
- There was disputed evidence as to whether the flexPATH

TDFs were objectively prudent investment options.

While this part of the case is still ongoing, the fact that the court has allowed these claims to proceed to trial means only that the plaintiffs had submitted what the court considered to be sufficient evidence of flexPATH’s conduct at the summary judgment phase (where the defendants requested a judicial determination without going to trial) to create disputes of material fact that required a trial to evaluate fully.

NFP was also recently named in a lawsuit involving similar claims related to the Molina Salary Savings Plan sponsored by Molina Healthcare, Inc., *Mills v. NFP Retirement, Inc.*, No. 8:22-cv-994-JVS-DFM (C.D. Cal. May 16, 2022). NFP served as the plan’s fiduciary investment advisor.

As in *Lauderdale*, the plaintiffs challenged NFP’s advice regarding the flexPATH TDFs. The NFP case was consolidated with a parallel case that the plaintiff brought against Molina in July 2022, *Mills v. Molina Healthcare, Inc.*, No. 2:22-cv-1813-ODW (GJSx) (C.D. Cal.). The *Mills* case is also still pending.

Notably, on a motion to dismiss, the *Mills* court disagreed with the *Lauderdale* court’s holding that a plan sponsor’s delegation of discretionary investment authority could shield co-fiduciaries from liability, indicating that different courts may come out differently on that question.

#### **Cases Against Participant-Level Advisors**

Plaintiffs are also filing lawsuits related to advisors that provide participant-level investment advice, such as managed account

services. These lawsuits have fallen into one of two categories: lawsuits against ERISA plan sponsors that allegedly contract with managed account providers for allegedly excessive fees; and lawsuits against managed account providers for allegedly providing imprudent, conflicted, and excessively expensive advice to participants.

*Gosse v. Dover Corporation*, No. 1:22-cv-04254 (N.D. Ill. Aug. 11, 2022), is an example of a recent lawsuit against a plan sponsor related to a plan’s managed account provider. The plaintiffs in this case alleged that the managed account fees were excessive and unreasonable and that the managed account services did not provide any value to participants. The reasoning is that the “asset allocations created by the managed account services were not materially different than the asset allocations provided by the age-appropriate target date options ubiquitously available ... in the market.” Plaintiffs brought ERISA breach of fiduciary duty claims against the plan sponsor in its fiduciary role.

*Shaffer v. Empower Retirement, LLC*, No. 1:22-cv-02716-NYW (D. Colo. Oct. 14, 2022), is an example of a recent lawsuit against a managed account service provider. Here, the plaintiffs alleged that the provider (Empower) misrepresented the nature and scope of its managed account advisers’ compensation, the services that the managed account advisers provided, and the relationship between the provider and the funds its managed account advisers recommended to clients.

Plaintiffs brought breach of fiduciary duty claims under the Investment Advisers Act, as

well as common law charges of fraudulent misrepresentation, fraudulent omission, and negligent omission claims.

### Limit Litigation Exposure

These recent cases are good reminders of the importance of having—and documenting—good processes.

- **For plan-level advisory services:** Be aware of the plan's Investment Policy Statement. Courts will generally pay special attention to a plan's written Investment Policy Statement, if one exists. In the *Lauderdale* case, for example, plaintiffs alleged that the defendants' selection and retention of the flexPATH TDFs was inconsistent with the plan's Investment Policy Statement.
- **Have a strategy for new investment funds.** As in the *Lauderdale* and *Mills* cases, Plaintiffs' attorneys will often assert that newly formed funds that underperform would not have been selected by a prudent fiduciary (or recommended by a prudent fiduciary adviser). Advisors who want to add funds without at least a three-year track record might consider recommending the adoption of specific provisions in the IPS that would allow for the inclusion of those type funds in the plan, for example, acknowledging the investment manager has a proven track record in managing similar funds.
- **For participant-level advisory services:**
  - **Communicate clearly with participants (and the plan fiduciaries who have appointed you as a participant-level investment advisor) about your services.** As evident by the allegations in the *Shaffer* and *Gosse* cases, participants who feel misled by their managed

account providers or who are not educated about the value their managed account advisers provide are more likely to think that account fees are too high or that managed account advisers are providing imprudent advice. Participant-level advisers should disclose to participants the investment advice's nature, scope, and limitations. In addition, the advisers should consider providing participants with a report each year on the services provided and results. Participant-level advisers should, of course, be monitored by plan fiduciaries the same way the plan fiduciaries would monitor any other service provider (see, e.g., EBSA Field Assistance Bulletin 2007-01), including the managed account's performance and the managed account provider's compensation. Participant-level advisers should, therefore, provide information to plan fiduciaries to fulfill that obligation.

- **Consider how the managed accounts differ from the plan's target date funds.** Plaintiffs in the *Gosse* case alleged that the managed account provider's services lacked value because they were too similar to what plaintiffs could have received—at a lower cost - by investing in a TDF. While there is no legal requirement to invest participant accounts with allocations different than a TDF, plaintiffs' attorneys may use similar allocations to challenge the reasonableness of advisory fees. In addition, if an allocation corresponds to a participant's age-appropriate TDF, that may support an argument that the account was managed only based on the age of the participant (and therefore was not a

personalized managed account that might support a higher cost rationale for the choice.

- **Consider other legal issues and value propositions.** If there is little investment activity in a managed account, is there a risk of a challenge of reverse churning? In terms of value, does the management of the account consider several factors about the participant rather than just age? More specifically, is the account personalized to the investment profile of the participant? Also, are other services offered in connection with investment management? For example, advice about whether the participant is on course to a financially secure retirement. These services provide value that can support the reasonableness of the advisory fee.

### Conclusion

Litigation against retirement plan advisers is probably here to stay. Indeed, it may pick up in the months ahead.

Advisors can protect themselves against these kinds of claims by documenting the processes behind their investment advice, understanding and following a plan's investment policy statement (including recommending changes to the IPS where appropriate), adequately communicating with participants about the nature and scope of their services, and ensuring that participants understand and better appreciate the value they are receiving.

Of course, and as is almost always the case under ERISA, specific facts matter in every case, and having adequate documentation of your process and communications can be the key to defending against these claims. **NTM**

*Fred Reish, Partner Faegre Drinker Biddle & Reath LLP, Megan Hladilek, Partner Faegre Drinker Biddle & Reath LLP, Emily Kile-Maxwell, Associate Faegre Drinker Biddle & Reath LLP.*





# Schlichter, BlackRock and the New ‘Plausibility Standard’

*The ‘new’ standard of plausibility mentioned last quarter continues to prevail in some federal court districts, dismissing suits before trial.*

By Nevin E. Adams, JD & Bonnie Triechel

**E**RISA breach of fiduciary duty litigation in 401(k) and 403(b) cases continues to persist, with new litigants rapidly emerging. Though these cases remain primarily confined to the mega-plan market where plan assets are typically more than \$1 billion, “copycat” filings are beginning to move down-market, betting on quick settlements (which they are increasingly getting).

That said, the “new” standard of plausibility mentioned last quarter continues to prevail in some federal court districts, dismissing suits before trial—if the insurance policies cover those expenses.

Here’s what you need to know:

- Different federal court districts are applying various standards in determining what must be established to go to trial; a growing number want more than just comparisons of fees paid by plans of similar size, while others continue to view recordkeeping services as “fungible”.
- A new litigation threat looms regarding a plan sponsor’s role as health plan fiduciaries.
- The politicization of environmental, social, and governance (ESG) investment focus has produced a lot of headlines and some litigation (with the potential for more to come).

Let’s dive In...

## What’s Enough to Be Considered ‘Plausible?’

Lawsuits based solely on comparing plan fees per Form 5500 against plans of allegedly comparable size (participants and assets) are being ruled as insufficient to beat a motion to dismiss by fiduciary defendants—particularly where there is evidence of a prudent, thoughtful process. In those districts, courts expect an accounting based on services provided for those fees.

But some courts are still persuaded that recordkeeping (not investment management) is “fungible,” a commodity for which plans of similar size should pay the same fee. There remains a significant cost in time and expense in responding to suits, regardless.

Picking up on the trends noted in the last quarter, there were several settlements with common factors. These excessive fee suits are settling more quickly and for less money than in the past, likely a function of insurance considerations. However, there has also been—particularly in federal court districts in the South and Midwest—a tendency for the courts to require more than a “mere” assertion that fees over those paid by plans of similar size (assets and/or participant count) to be sufficient reason to move past a motion to dismiss and proceed to discovery and trial.

Consequently, suits in those districts are increasingly dismissed for lack of presenting a “plausible”

argument for proceeding. (Though many of these cases allow the folks bringing the suit an opportunity to improve their lawsuit, this is known as dismissal without prejudice).

## A Prudent Process (Still) Trumps Excessive Fees Allegations ...

In this vein, the fiduciaries of the Georgetown University 403(b) plan won their appeal. While even the judge in the case admitted it had a “complicated” history, this was another case where the judge insisted on more than mere allegations.

More specifically, the court commented, “Although they have supplied examples of defined contribution plans that consolidated the recordkeeping function for all funds with a single provider, they do not include facts comparing the scope and quality of the recordkeeping services being provided; the number and variety of funds or tools and options offered to plan members; the size of the plans, the number of participants in the plans, or the total amount of assets under management; or even the recordkeeping fees paid by the plans.”

Think of this as a fiduciary checklist that a prudent fiduciary should consider when selecting a service provider.

As the quarter ended, Yale University finally won its excessive fee lawsuit (filed in August 2016) in an unprecedented (for this type



## “The politicization of ESG-focused investments has resulted in a variety of suits—primarily by and on behalf of public pension plan investments.”

of suit) jury trial. Yale prevailed despite the jury's findings of a breach of reasonable fees (but a determination that the damages were \$0.00) and their view that the decisions made by the plan committee aligned with those of a prudent fiduciary—another win for a prudent process.

### **BlackRock Target Date Suits Stumble in Court**

We've also been tracking a group of about a dozen suits against national employers' whose plans invested in the BlackRock LifePath target date funds. The basic argument made by the plaintiffs in these cases (all represented by the law firm of Miller Shah) was that the plan fiduciaries “chased low fees” and myopically ignored the poor performance of the BlackRock LifePath TDFs.

While those funds arguably performed well compared to the selected benchmarks, the plaintiffs said they should have been compared with the performance of a half-dozen leading target-date fund families—though those funds all employed a “through” retirement date glide path, unlike the BlackRock funds that have opted for a “to” retirement date glide path.

That said, suits against Capital One and Booz Allen Hamilton had their cases dismissed, and subsequently, after announcing their intention to appeal that decision, have now said they do not plan to do so. Additionally, the suit brought against the Microsoft 401(k), which had been dismissed, was allowed to amend their claims and did so (basically by adding additional benchmarking comparisons<sup>2</sup> that the court felt added nothing) but then had those amended claims dismissed in May.

In dismissing the case, U.S. District Judge James L. Robart

said, “Plaintiffs’ allegations, which again are based solely on the BlackRock TDFs’ alleged poor performance during a brief timeframe, are insufficient, without more, to raise Plaintiffs’ claim above the level of speculation and into plausibility.” Significantly, the judge in the Capital One and Booz Allen cases commented that the plaintiffs’ arguments were, “completely devoid of facts about the particular decision-making process undertaken by Defendants with respect to the Plan at issue here” — a reminder that a prudent (and documented) process can prevail.

### **(Some) States Challenge DOL's ESG Regulation**

The politicization of ESG-focused investments has resulted in a variety of suits—primarily by and on behalf of public pension plan investments. It has also produced a challenge to the Labor Department's (DOL's) so-called “ESG rule” (more precisely the Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights) led by a coalition of 25 state attorneys general,<sup>3</sup> along with Liberty Energy, Inc. (a Delaware corporation and publicly traded energy company), Liberty Oilfield Services LLC (a Texas limited liability company and subsidiary of Liberty that sponsors a defined contribution 401(k) plan for its employees), Western Energy Alliance (a 501(c)(6) nonprofit trade association that “represents 200 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West”), and James R. Copland (a participant in a retirement plan subject to ERISA).

As expected, the DOL has pushed back on the claims made

in the suit, though it's been filed in the same federal court district in Texas that rejected the DOL's fiduciary rule. So far, the only ruling on the case has been a rejection of the DOL's motion to move the case to the D.C. Federal Court.

In addition to the Texas case, a second and similar case in Wisconsin is tracking the same trajectory. Filed by two plan participants, this case also seeks to reject the DOL's ESG rule based in part on the argument that because the rule doesn't have the same documentation requirements as a prior version of the rule under the Trump administration, plans can unjustifiably add ESG without documented reasoning.

In what remains an outlier case, in June, an American Airlines participant filed suit against those plan fiduciaries, claiming that they put retirement savings at risk by investing with managers and funds that “pursue leftist political agendas through [ESG] strategies, proxy voting, and shareholder activism.” Oddly enough, his suit appears to be based on holdings within the plan's self-directed brokerage account rather than the main menu.

### **Conversion Delays Trigger Participant Suit**

Transitions to new recordkeeping platforms have been known to result in some bumps along the way, but a recent lawsuit charges those overseeing and operating the federal government's \$766 billion Thrift Savings Plan (TSP) with “breaches of fiduciary duties, negligence, unjust enrichment, and breach of contract.”

The suit charges the plan fiduciaries and the recordkeeper hired by the plan fiduciaries for damages resulting from



substantial delays in providing funds related to participant loan and distribution requests. This is a reminder that plan fiduciaries are responsible not only to prudently select but also for monitoring the actions of the service providers it engages on behalf of the plan participants and beneficiaries.

### Attention: Health Plan Fiduciaries!

While it's not yet active litigation, we've taken note of the "trolling" for potential participant-plaintiffs by the law firm of Schlichter Bogard LLC—the firm responsible for the flurry of excessive fee litigation in both the 401(k) and 403(b) space. This time, they're contacting employees of several large national firms who participated in their employer's health plan.

This all comes following the passage of the Consolidated Appropriations Act of 2021 (CAA)—provisions said by some to be "the most significant

compliance challenge employers have faced since the Affordable Care Act." The law requires, among other things, a determination of "reasonableness" of vendor fees and services for healthcare by employer-fiduciaries. And it looks like it may open a whole new litigation arena for plan sponsors.

As always, plan fiduciaries (and those who support them) should remember that it's ultimately about prudence and a documented process, not results per se.

#### Action Items for Plan Sponsors

Even if you are the fiduciary of a smaller plan that might not be the perceived subject of a class-action case, these back-to-the-basics best practices apply to plans in all market segments. For plan sponsors of all sizes, consider:

The importance of having an investment committee that is qualified and engaged, supported by experts and the structure of an

investment policy statement (the latter has been a noted factor in several of the litigation decisions).

Remember that prudence is important both in selecting AND monitoring the products and services engaged on behalf of the plan.

Be thoughtful about the information that the committee makes publicly available, including agendas, minutes, and reports. Decisions can and should be summarized—the discussion itself need not be.

Make sure you have an ERISA fiduciary liability policy in place. Generally speaking, your standard E&O policies do not cover this type of litigation, and ERISA fiduciary liability is personal. To be clear, this is different from the fidelity bond the plan is required to have. **NTM**

#### FOOTNOTES

<sup>1</sup> The suits have been filed against the 401(k) plans of Citigroup Inc., Cisco Systems Inc., Genworth, Stanley Black & Decker Inc., Microsoft, Marsh & McLennan Cos., Advance Publications, and Wintrust Financial Corp.

<sup>2</sup> Specifically, they added comparisons of the BlackRock TDFs against the S&P Target Date Indices and also added a new metric — the Sharpe ratio — to illustrate the BlackRock TDFs' risk-adjusted returns relative to the Comparator TDFs. They had done so in the Capital One and Booz Allen cases as well, with identical, unsuccessful results.

<sup>3</sup> The states in this coalition are Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming.





# Regulatory Radar

*Significant movement for the Department of Labor and the Securities and Exchange Commission promises an interesting few months for serious issues that affect retirement plan providers and the people they serve.*

## Here We Go Again ...

*We've been here before.*

It's a big deal, so we don't mind mentioning it in multiple places, even if more news on the topic happens soon after we go to print.

The Department of Labor sent a new version of a proposed fiduciary rule to the Office of Management and Budget in early September for review.

Known officially as "Conflict of Interest in Investment Advice," it would redefine fiduciary investment advice under the Employee Retirement Income Security Act (ERISA).

According to a post on the OMB's website, "This rulemaking would amend the regulatory definition of the term fiduciary ...to more appropriately define when persons who render investment advice for a fee to employee benefit plans and IRAs are fiduciaries within the meaning of section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code."

American Retirement Association (ARA) CEO Brian Graff said the proposed rule is expected to be publicly released in October.

It would consider advisory practices, plan sponsor and participant expectations, and IRA owners who receive investment advice. It would also consider "developments in the investment marketplace," including compensation structures that could expose advisors to conflicts of interest.

Additionally, the Employee Benefits Security Administration (EBSA) will evaluate available prohibited transaction class exemptions and propose amendments or new exemptions.

"This will be the fourth major attempt by the DOL since 2010 to revamp the 1975 rule," Thomas Clark, JD, LLM, Partner and Chief Operating Officer with the Wagner Law Group, said. "There's no question the DOL has the authority to regulate in this area. The issue is what are the outer bounds of that authority. We expect the DOL will have carefully crafted this proposed regulation, taking into account the last 13 years of trying, the myriad court decisions, and the rulemaking that has been done by the SEC."

Friday's news comes after months of speculation regarding if and when the DOL would propose a revised rule. Just last week, two top Republican lawmakers serving on the House and Senate committees with jurisdiction over ERISA called on the Department of Labor (DOL) to halt any further changes to the definition of fiduciary.

The Aug. 31 letter from Rep. Virginia Foxx (R-NC), who is chair of the House Education and the Workforce Committee, and Sen. Bill Cassidy, M.D. (R-LA), who is the ranking member of the Senate Health, Education, Labor and Pensions (HELP) Committee, urged Acting Labor Secretary Julie Su to cease any further action to amend the definition of an investment advice fiduciary.

"We write to oppose the Department of Labor's continuing efforts to promulgate a rule on 'Conflict of Interest in Investment Advice' to revise the definition of fiduciary under section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA)," the lawmakers said.

— John Sullivan

## 'Swinging' Back

*A controversial rule proposal provokes opposition.*

A bipartisan group of House members has called on the Securities and Exchange Commission (SEC) to withdraw its open-end fund liquidity risk management and swing pricing proposal, citing the potential harm it could do to the millions of retirement savers who invest in mutual funds.

In a letter to SEC Chairman Gary Gensler, Reps. Brad Sherman (D-CA) and Ann Wagner (R-MO)—both senior members of the House Financial Services Committee—were joined by 36 of their colleagues from both parties urging the withdrawal of the regulatory proposal.

"We write today to voice our concerns with the SEC's open-end fund liquidity proposal (RIN 3235-AM98), given its potential to harm retail investors and retirement savers," the lawmakers wrote, adding that a "diverse array of market participants have questioned the need for the proposal and expressed concern with its potential to increase costs, reduce returns, and limit choice for millions of investors."

## Two-Tiered Market

The proposal, first released in November 2022, would require an open-end mutual fund to adjust its NAV so the transaction price effectively passes on costs stemming from inflows or outflows to the investors engaged in that activity rather than diluting other shareholders. It also would require a "hard close" for the fund, such that an investor's order to purchase or redeem shares





would be eligible for a given day's price only if received before 4:00 p.m. (ET).

The letter contended that, without clear evidence to support the rationale behind the proposal, the purported benefits are speculative and that there is widespread agreement that the proposal will cause harm.

The clearest example, the lawmakers note, is the proposal's requirement that mutual funds implement "swing pricing" and a "hard close" on trade placement. If adopted, this would require the majority of individual investors to place trades several hours earlier than a mandated 4:00 p.m. (ET) deadline.

As such, implementing a hard close on mutual fund orders would require retail investors to submit their orders well in advance to receive that day's price—a significant disadvantage for those living in the Pacific Time zone who may have to submit orders as early as 9:00 a.m. (ET) to receive that day's price.

"This fundamental change to mutual fund operations would create a two-tiered market that would disadvantage retail and retirement investors. Forcing investors to accept the next day's price for trades placed after their intermediary's cut-off time would limit the investor's ability to react to shift in the market on any

given day," the House lawmakers emphasized.

#### **ARA Opposition**

These concerns echo the American Retirement Association's earlier comment letter to the SEC.

"The ARA has serious concerns about the Hard Close and its impact on DC Plans and participants," American Retirement Association CEO Brian Graff and General Counsel Allison Wielobob wrote to Gensler at the time.

Not only would mandating a hard close require a complete overhaul of intermediaries' systems and processes, vastly increasing costs to participants, "it would create inequities among investors in open-end fund and eventually, increased flows of investor money into less-regulated vehicles and potentially, a push for many asset managers to create alternative funds instead," they added.

The lawmakers further observed how the proposal is based on assumptions about the operation of open-ended funds that the "historical record contradicts."

For example, the SEC stated that one of the proposal's key objectives is to ensure open-end funds are better equipped to face stressed conditions, but the agency acknowledged that funds were, in fact, adequately prepared

for the liquidity concerns that actually materialized in the markets during the pandemic.

"The events of March 2020 do not justify wholesale changes to mutual fund operations. Rather, they demonstrate the resilience of mutual funds and their ability to meet shareholder redemptions even during a time of unprecedented market volatility," the lawmakers further argued.

Meanwhile, many were optimistic the proposal would, in fact, be dropped. Speaking on July 25 at the NAPA D.C. Fly-In Forum, Securities and Exchange Commissioner Hester Peirce told delegates she hoped the proposal would be tabled.

Adding fuel to the speculation was the SEC's decision in July to abandon "swing pricing" requirements for money market funds; this move led industry pundits and professionals to predict the same fate for the proposed rule regarding open-end funds.

Notably, the SEC has received bipartisan opposition to this proposal from Congress. In addition to the letter led by Reps. Sherman and Wagner, the chairs and ranking members of House and Senate tax-writing committees have expressed concerns with the proposal's impact on retirement savers and retail investors. **NNTM**

— Ted Godbout



# D.C. PENSION GEEKS



HOSTED BY

*Brian Graff*

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