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THE OFFICIAL MAGAZINE OF THE  
NATIONAL ASSOCIATION OF PLAN ADVISORS

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## THE YOUNG GUNS

**NAPA's 2018  
Top Retirement  
Plan Advisors  
Under 40**

| Hitting the High Notes:  
2018 NAPA 401(k) SUMMIT

| Building a "Moat"  
with NQDC

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by Judy Ward

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by John Ortman and Ted Godbout

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« BUILDING A MOAT

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« RECOMMENDING ROLLOVERS

by Fred Reish and Joshua Waldbeser

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*NAPA Net the Magazine* is published quarterly by the National Association of Plan Advisors, 4245 North Fairfax Dr., Suite 750, Arlington, VA 22203. For subscription information, advertising and customer service, please contact NAPA at the above address or call 800-308-6714, or [customer@napa-net.org](mailto:customer@napa-net.org). Copyright 2018, National Association of Plan Advisors. All rights reserved. This magazine may not be reproduced in whole or in part without written permission of the publisher. Opinions expressed in bylined articles are those of the authors and do not necessarily reflect the official policy of NAPA.

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# (Re)Solving the Retirement 'Crisis'

Several weeks ago, I was invited to participate in a group of academics, think tank representatives, advocacy groups, and some from Capitol Hill for a conversation on retirement and the future. The conversation touched on a wide range of topics, everything from the key challenges to the current system, the private sector's role in addressing these problems, the individual's role (and responsibility) for securing their own retirement, government's role and the potential for current congressional proposals to have an impact.

In view of the diversity of the group — the complexity of the topics — and the 90-minute window of time we had to thrash things about — you might well expect that we didn't get very far. And, at least in terms of new ideas, you'd be hard-pressed to say that we discussed anything that hadn't come up somewhere, sometime, previously. But then, this was a group that — individually, anyway — has spent a *lot* of time thinking about the issues. And there were some new and interesting perspectives.

## The Challenges

It seems that you can never have a discussion about the future of retirement without spending time bemoaning the past, specifically the move away from defined benefit plans, and this group was no exception. There remains in many circles a pervasive sense that the defined contribution system is inferior to the defined benefit approach — a sense that seems driven not by what the latter actually produced in terms of benefits, but in terms of what it promised. Even now, it seems that you have to remind folks that the “less than half” covered by a workplace retirement plan was true even

in the “good old days” before the 401(k), at least within the private sector. And while you can wrest an acknowledgement from those familiar with the data, almost no one talks about how few of even those covered by those DB plans put in the time to get their full pension.

Ultimately, the group coalesced around four key recommendations:

**The significance of Social Security** in underpinning America's retirement future — and the critical need to shore up the finances of that system sooner rather than later. The solution(s) here are simple; cut

have access to a retirement savings plan at work, there was little doubt that a government mandate could make a big difference. There was even less doubt that a mandate would be a massive lift politically. And not much stomach in the group for going down that path at the present.

**Expanded access to retirement accounts.** While the group was hardly of one mind in terms of what kind of retirement account(s) this should be, there was a clear and energetic majority that agreed with the premise that expanding

“Expanding access is an, and perhaps *the* — integral component to ‘securing retirement’ for future generations.”

benefits (push back eligibility or means-testing) or raise FICA taxes. The mix, of course, is anything but simple politically — but time isn't in our favor on a solution.

**The formation of a national commission** to study and recommend solutions. I'll put myself in the “what harm could it do,” particularly in that, to my recollection, nothing like this has been attempted since the Carter administration. We routinely chastise Americans for not taking the time to formulate a financial plan — perhaps it's time we undertook that discipline for the system as a whole.

**Requirements matter — but don't call it a mandate.** Since it's been established that workers are much more likely to save for retirement if they have access to a plan at work (12 times as likely), but you're concerned that not enough workers

access is an, and perhaps *the* — integral component to “securing retirement” for future generations.

And maybe even this one.

As you are reading this, we are, or will soon be, gathering in the nation's capital for our sixth annual NAPA DC Fly-In Forum. We'll be talking about some of the same challenges noted above, and hearing from lawmakers and regulators that could impact and/or influence those outcomes. If you've not been to this unique event previously, I encourage you to put it on your calendar for 2019. There's nothing quite like it. 🇺🇸

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BY JEFFERY ACHESON

# Innovate or Evaporate!

Staying relevant is critical to our futures, individually and collectively.

**T**he S&P 500 was introduced in 1957 as a benchmark index designed to track the value of the 500 largest companies in the United States. Today, approximately 60, or just 12% of that original 500, are still included in the index. Bankruptcies, mergers and acquisitions certainly have taken their toll on the 440 that are no longer included. But for many, their fate was driven by the fact that they simply lost relevance, credibility or positioning in the lives of the American people or on the world stage.

The lesson to be learned? *Innovate or evaporate — the future is promised to no one!*

With that lesson in mind, I have decided to start my term as NAPA President with a few observations and reflections that crossed my mind during and immediately following the recent, and I might add, spectacular NAPA 401(k) Summit in Nashville. The guiding question is: What must we do to maintain relevance, credibility and positioning, and are we doing it?

## Part of the Solution

Brian Graff has often stated that as an association and as advisors we must be enthusiastically committed to being part of the solution and not part of the problem when it comes to helping *all* Americans achieve retirement security. We must be perceived in such a manner by the legislative and regulatory bodies that affect our ability to fulfill our mission. That enthusiastic commitment was never more evident than when gauging the off-the-charts energy level of the advisors at this year's Summit.

## A Seat at the Table

We must acknowledge the age-old axiom about the political waters we navigate: "If you don't have a seat at the table, consider yourself on the menu." I think back to our

roots within ASPPA, where relationships and credibility have been forged for more than 50 years, and to our future under the American Retirement Association "umbrella." The ARA unites all voices across the retirement plan service provider spectrum — now including the perspective of plan sponsors through our new sister association, the Plan Sponsor Council of America.

We now have the depth, credibility and history to justify a seat at the biggest and most influential of tables. Unfortunately, getting a good table at the best restaurants can be an expensive commitment. So it is critical that we do

Furthermore, one of our very valued Firm Partners that exhibited at the Summit commented to me that the event is now the most important conference on their schedule each year by a wide margin. Maintaining relevance is easier when you are considered the biggest and the best!

When surveying the value propositions and technology on display in the exhibit hall, one couldn't help but notice how cutting-edge our industry has become. The tools and resources available to advisors, plan sponsors and participants is simply staggering. Innovation on display! Finally, growth is rooted in knowledge. To

What must we do to maintain relevance, credibility and positioning, and are we doing it?"


a better job of supporting the NAPA PAC — or we may find upon arrival the maître d' has not treated us well with our table placement. *Please remember, a contribution to the PAC is an investment in your future!*

## Inclusion and Diversity

While many may not be aware of this, let me assure you that a continuing agenda item for NAPA Leadership Council meetings is dialogue and action items focused on fostering inclusion, diversity and "Next Gen" leadership development. As you might imagine, we were quite pleased to receive an email from a first-time conference attendee saying the Summit was one of the most diverse industry conferences he had ever attended, and observing that that couldn't have been an accident. Let me assure you: a focus, yes; an accident, no!

that end, NAPA is committed to providing our members:

- Access to agnostic, unbiased education and thought leadership
- Exposure to best practices in business model execution
- Introductions to industry service providers

As a mentor of mine once told me, "The odds of success are highest when one has both pride in the outfit and confidence in the leadership." When it comes to NAPA, I have both — and I love our odds of staying very relevant in the important story that is just beginning to unfold. 

» Jeffery Acheson, CPFA, is NAPA's 2018-2019 President. Jeff is the founder of Advanced Strategies Group, LLC, which delivers a fiduciary-based business model focusing on high-income individuals, high-net-worth families, successful companies, mid-size retirement plan sponsors and charitable organizations.



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# Under Covered

Those laboratories of innovation could be creating monsters.



BY BRIAN H. GRAFF

In the four decades since ERISA was passed into law, millions of Americans have entered and retired from the workforce. Plan designs of many shapes and sizes have come into being. Defined benefit plans dominated, then faded, after 401(k)s sprang out of an obscure section of the Internal Revenue Code to become the way America saves.

But despite all the change and innovation — the advent of target-date funds, automatic enrollment, demographic shifts and workforce composition changes — through good economic times and bad, one thing hasn't changed: the percentage of American workers covered by a workplace retirement plan.

Incredible as it may be, despite positive growth in nearly every single retirement plan metric — more and higher levels of participation, more diverse and, thanks to asset allocation strategies and advisor interventions, better rebalancing of investment portfolios, as well as the lift provided by sustained bull markets — the retirement preparations of nearly 4 out of 10 American workers in the private sector have been left sitting on the sidelines simply because they don't have access to a retirement savings plan at work.

It's been an issue for a long time, but the tax reform debate has brought a whole new focus to the issue. Increasing access to coverage in a retirement savings plan is, without question, the next big policy issue for our industry.

This coverage gap was, in fact, the rationale underlying the proliferation of proposals at the state level to expand retirement plan coverage in the private sector. Some, like California and Oregon, have a mandate with a government-run default; others are looking into creating a 401(k) multiple employer plan (MEP) for employers in their state; and still others have created a marketplace for small businesses to find a plan provider or are

working on one. And while it's early in the implementation, we can already see that it's a mess for employers, advisors, and participants alike.

Proponents talk about the possibilities that could emerge from 50 state “laboratories” creating different solutions. What they never seem to remember is that Dr. Frankenstein also had a laboratory — and how did that turn out?

Solutions are emerging on a federal level. Rep. Richard Neal (D-Mass.), the ranking Democrat on the House Ways &

on contribution amounts and conveying needed information, such as employee lists and payroll data), and would provide relief from the one-bad-apple rule applicable to MEPs.

Plan accounts would be portable, but 50% of the account balance would have to be distributed in the form of a lifetime income vehicle.

And while no employer contributions would be required in the minimum plan, which would be a safe harbor plan with no testing, the bill would also change ERISA's

“Increasing access to coverage in a retirement savings plan is, without question, the next big policy issue for our industry.”

Means Committee, has introduced a game-changing national retirement plan coverage proposal called the Automatic Retirement Plan Act (ARPA). Under Neal's bill:


- All employers that have more than 10 employees and have been in business for at least three years would be required to provide an automatic enrollment 401(k) plan.
- After a 5-year transition period, all employees over age 21, including part-time workers, would have to be covered after no more than 3 months of service (plans would no longer be subject to the current 70% coverage rule).
- Auto-enrollment would start at 6%, with annual auto-escalation of 1% up to 10%.

The bill would allow for open MEPs, which under certain circumstances, would relieve small employers (up to 100 employees) of all fiduciary and administrative duties (other than passing

coverage rules — not just for the minimum plan, but for all existing plans.

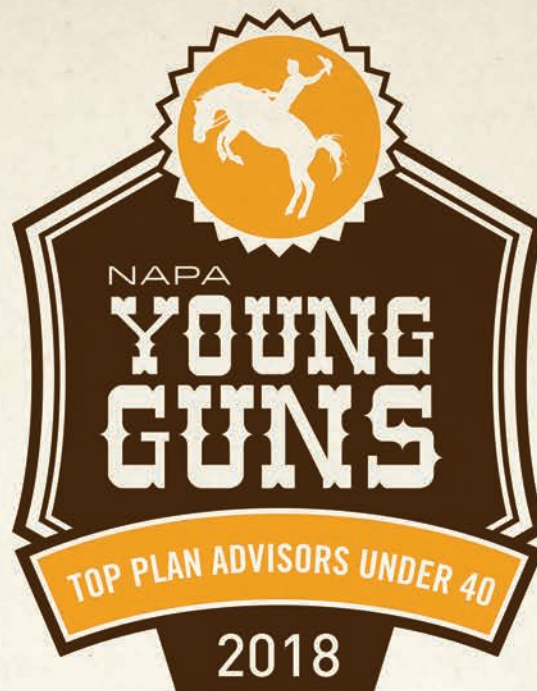
What would that mean for workplace retirement plans? For retirement savings? We're in active conversations with Rep. Neal regarding the proposal — and the advisor-delegates to the NAPA DC Fly-In Forum will have a chance to hear from him directly on the issue.

The bottom line is there are those who will, as they always do, fault the private system. But the 401(k) isn't the problem — it's that there are too many working Americans without one. The reality is that when even moderate-income workers do have access to a 401(k) plan, they are 12 times more likely to save for retirement than they would be on their own in an IRA.

The challenge — *our* challenge — is to expand the availability of retirement savings in the private workforce. 

» Brian H. Graff, Esq., APM, is the Executive Director of NAPA and the CEO of the American Retirement Association.





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BY JERRY BRAMLETT



# The Performance Trap and the Challenge of Immunization

Immunization strategies could make a difference if the rest of the developed world has a Japan-like market experience at some point.

**S**hould DC asset allocation programs (e.g., target-date funds, managed accounts) be all about maximizing performance, or should the focus be on increasing the certainty (and protection) of a steady stream of income in retirement? This is the thin line that DC asset allocators must walk.

## Background

Today, there are two distinct strategies behind individual DC portfolio design:

- Maximize total wealth while maintaining an acceptable level of diversification, so as to minimize the impact of market volatility
- Maximize hitting a retirement income goal, while immunizing future income streams against the fluctuating cost of retirement income

Both approaches assume that market performance will be cyclical over time as the markets expand and contract in response to the economy's recession/expansion cycles. Where these



approaches differ is in their view of how DC investors should be positioned when they arrive at their retirement date.

Most of the popular target-date funds that are focused on maximizing wealth ratchet down the equity exposure over time and, by the retirement date, have approximately 40% of the portfolio invested in equities with the balance in fixed income investments. This 40/60 mix often remains the recommended mix throughout retirement.

It could be argued that the wealth accumulation approach works just fine if the market behaves like it has since the Great Depression ended in 1939: expansion followed by a recession which, in turn, is followed by another expansion, and so on. However, what happens when the market goes down and stays down for an extended period of time? A case in point is Japan, which saw its markets plunge in value in late 1991 and early 1992. To this day, Japan has never fully recovered from that market downturn. In fact, the Japanese stock market's 20-year high is only half its 1980s peak. So much for the pattern of expansion/recession/expansion!

Could the U.S. markets (and other developed countries) experience the same type of market implosion as Japan's and stay down for an extended period of time? James Bullard, President of the Federal Reserve Bank of St. Louis, argued in a paper written shortly after the Great Recession that "the United States is closer to a Japanese-style outcome today than at any time in recent history." ("Seven Faces of Peril," *Federal Reserve Bank of St. Louis Review*, September/October 2010)

Predictions such as this are largely based on the assumption that the U.S. and other developed countries' stock markets could find themselves in the same "liquidity trap" that Japan did in the early '90s — a situation in which nominal interest rates cannot be sufficiently lowered to stimulate the economy because they are already close to zero. It is not hard to imagine that, given the Fed's loose monetary policy and where rates are today, the U.S. market could very well suffer the same fate as Japan. Would DC investors near or at retirement be in the position to "wait it out" if the U.S. stock

market tanks in a fashion similar to the Japanese scenario?

### The Performance Trap

The challenge faced by many asset allocation providers is that the market tends to focus on performance rather than on portfolio design. There are several reasons for this:

- Asset allocators overwhelmingly deploy their strategies via a suite of target-date funds.
- In general, "funds" are focused on performance (e.g., 3, 5 and 10 years) versus income protection.
- Investment performance is a relatively straightforward metric that fits nicely in an Investment Policy Statement (IPS) and in Investment Committee discussions.
- Portfolios that are designed to focus on and immunize future income streams may or may not look good in terms of their relative performance versus a fund focused on achieving the highest level of (mostly recent) return in a diversified portfolio.

### Immunizing Future Streams of Retirement Income

The focus of an immunization strategy is to optimize the positioning of investments on the date the DC investor retires. The following are two methods of immunization in use today:

- Starting at some period before retirement (e.g., 20 years), an increasing amount of the investors assets are shifted from "risky" assets to — as is the case of the Dimensional Fund Advisors Target Date Income Funds (TDIF) — a TIPs portfolio that is focused less on growing income and more on managing income risks. At the retirement date, an investor in a DFA TDIF should expect to have

approximately 80% in an inflation-protected bond portfolio that is designed to support 25 years of retirement income.

- Another approach (currently being utilized by BlackRock via their CoRI Retirement Indices and deployed through their iRetire planning software) is to create a duration-matched bond portfolio that is tied to the estimated future cost (annuity price) of retirement income. "The CoRI Indexes are bond funds," researcher Wade Pfau wrote in 2015. "But they are not just any old bond funds. Rather, they are bond funds whose prices are calibrated to move in lock-step with the price of an income annuity with a 2.5% COLA which will begin income at age 65." ("CoRI Index: A Tool to Lock-in Annuity Prices without Annuitizing," *Retirement Researcher*, Wade Pfau, March 25, 2015)

### Conclusion

Given that immunization strategies are not focused on achieving the highest performance numbers each and every year, they do not fit neatly into the "traditional" Investment Policy Statement. However, immunization strategies can make a difference, especially if the rest of the developed world has a Japan-like market experience at some point in the future. Nonetheless, as long as plan sponsors and advisors focus on superior "fund performance" versus advanced "portfolio design," the transition to an emphasis on creating — and most importantly, *protecting* — retirement income will be a difficult one. 

» Jerry Bramlett is the head of Ascensus' TPA Solutions division. Before joining Ascensus in April 2018, he was Managing Partner at Redstar Advisors and Managing Director at Sage Advisory Services.

## Would DC investors near or at retirement be in the position to 'wait it out' if the U.S. stock market tanks?"





# Trends ‘Setting’

Target-date funds top trillion-dollar mark, even as those fees (and that of mutual funds generally) continue to fall; HSA account counts seem to be leveling off; retirement confidence seems to be holding on to recent gains.

## TARGET ‘RANGES’

### TDFs top trillion-dollar mark

**A**ssets in target-date mutual funds totaled roughly \$1.11 trillion at the end of 2017, up from \$880 billion at year-end 2016 — but that’s not the most intriguing trend.

According to Morningstar’s “2018 Target-Date Fund Landscape,” nearly 95% of the \$70 billion estimated net flows to TDFs in 2017 went to target-date series that invest predominantly — i.e., at least 80% of assets — in index funds.

It’s a trend that Morningstar says started in 2015 when passive target-date series’ net flows exceeded those for active ones. Not that the underlying reliance on index funds means that the TDFs are truly “passive” in that, as the report’s authors acknowledge, every target-date manager makes active decisions in building a glide path and selecting asset classes.

While active series still have more assets, passive series accounted for 42%

of TDF assets at the end of 2017, up from 35% in 2014 and 24% in 2008.

However, the increasing reliance on indexed funds may be contributing to lower fees for TDFs. Morningstar notes that fees for TDFs continued their multiyear downward trend in 2017, and that the average asset-weighted expense ratio fell to 0.66% at the end of 2017, a notable decrease from 0.91% just five years earlier.

#### Flow Growth

While TDFs continue to see strong growth each year, those flows are favoring a handful of firms. Not surprisingly, with a growing emphasis on fees, Vanguard has been the big winner of new investments in recent years, attracting \$50.6 billion in estimated net inflows in 2017, bringing its total TDF assets to an industry-leading

\$381 billion. To put that in context, Morningstar explains that Vanguard’s 2017 net flows exceeded the sixth-largest provider’s total assets in TDFs.

American Funds’ \$24.1 billion in 2017 estimated net flows came in a distant second, but still represented a strong year, with the firm’s \$88 billion TDF assets making it the fourth-largest provider.

In fact, the report notes that only three other firms saw more than \$1 billion in estimated net flows to their target-date mutual funds in 2017:

- TIAA Investments (\$6.1 billion)
- BlackRock (\$4.6 billion)
- State Street Global Advisors (\$2.7 billion)

The report notes that TDFs now account for approximately one third of TIAA Investments’ mutual fund assets, and represent more than 40% of State Street Global Advisors’ mutual fund assets.



The report notes that the “Big Three” — Vanguard, Fidelity and T. Rowe Price — have long been the dominant players in the TDF space, but their collective market share has edged down to 70% from 75% five years ago. However, the five largest providers — Vanguard (34%), Fidelity (20%), T. Rowe (15%), American Funds (8%) and JP Morgan (4.8%) — held nearly 83% of the market share at year-end 2017.

#### **(Still) Going Strong**

Indeed, Morningstar notes that industry assets amounted to only \$158 billion at the end of 2008. The growth is systemic and organic; in 2017 the asset growth came from the combination of positive returns — the average return for TDF

Morningstar Categories ranged from 8.8% to 21.3% — and positive flows from investors. Regarding the latter, the estimated \$70 billion of net flows that went to TDFs in 2017 edged the previous high of \$69 billion set in 2015 and represented a notable increase from \$59 billion in 2016. The net flows have been consistently strong, exceeding more than \$40 billion each year since 2008.

By demographic — or, perhaps more precisely, by target date — the 2025 category’s \$13 billion in net flows in 2017 was the largest. On the other hand, the comparatively modest \$2 billion net flows in 2017 for the target-date 2060+ category comes from investors early in their careers (who typically earn and contribute less).

The report acknowledges that the categories that have passed their target retirement date can expect net outflows, though it’s unclear whether these TDF investors gradually withdraw assets for retirement income or move assets in a lump sum to another strategy once they reach retirement.

— NAPA Net staff



**'FLAT' SIGNS?****Has HSA enrollment stalled?**

**W**hile both the number of, and enrollment in, health savings accounts (HSAs) have grown significantly since HSAs first became available in 2004, data suggests that that growth may be slowing.

In 2017, enrollment estimates in HSA-eligible health plans varied considerably — from 21.4 million to 33.7 policyholders and their dependents, according to a new report. But, according to the nonpartisan Employee Benefit Research Institute (EBRI), there is one consistency among the enrollment estimates — most sources show that growth appears to have slowed in 2017, especially when looking at the market share of HSA-eligible health plan enrollment.

The report acknowledges that it can be challenging to determine how many people are enrolled in an HSA-eligible health plan and how that number has been changing. Indeed, the report notes that, for the most part, there are just a handful of surveys used to determine the number of people enrolled in an HSA-eligible health plan.

**HSA 'Accounts'**

America's Health Insurance Plans (AHIP), which, according to EBRI, generally reports the lowest estimate, has not released 2017 estimates yet. AHIP, EBRI/Greenwald & Associates and National Center for Health Statistics (NCHS) estimates are in the low-20-million range, while Kaiser Family Foundation (KFF) and Mercer estimates are in the low-30-million range. AHIP, EBRI/Greenwald & Associates, and NCHS cover the entire privately insured market, whereas KFF and Mercer cover only employment-based health plans. Hence, according to the report, the AHIP, EBRI/Greenwald & Associates, and NCHS estimates should be larger than KFF and Mercer — however, data shows just the opposite.

The EBRI report notes that these surveys are consistent in finding that there was very little growth in HSA-eligible health plan enrollment from 2014 to 2017. EBRI/Greenwald & Associates and KFF find that enrollment in HSA-eligible health plans was steady from 2016 to 2017, while Mercer and NCHS find that enrollment increased by 1 percentage point between 2016 and 2017. Three

surveys — NCHS, KFF and Mercer — find a 2-4 percentage point increase in enrollment between 2015 and 2016. However, similar to the lack of growth between 2016 and 2017, four of the surveys find either no growth (Mercer and NCHS) or a one-percentage point growth (AHIP and KFF) between 2014 and 2015.

**Signs of Growth?**

Despite all the surveys showing little or no recent growth in HSA-eligible health plan enrollment, the EBRI/Greenwald & Associates survey at least finds data that implies enrollment growth. Specifically, a question related to the length of time someone had been enrolled in their health plan finds that 19% had been enrolled in their health plan less than one year, 28% had been enrolled 1-2 years, and 23% had been enrolled 3-4 years. And the EBRI report notes that if you look at the number of HSAs, rather than enrollment in HSA-eligible health plans, there are signs of growth.

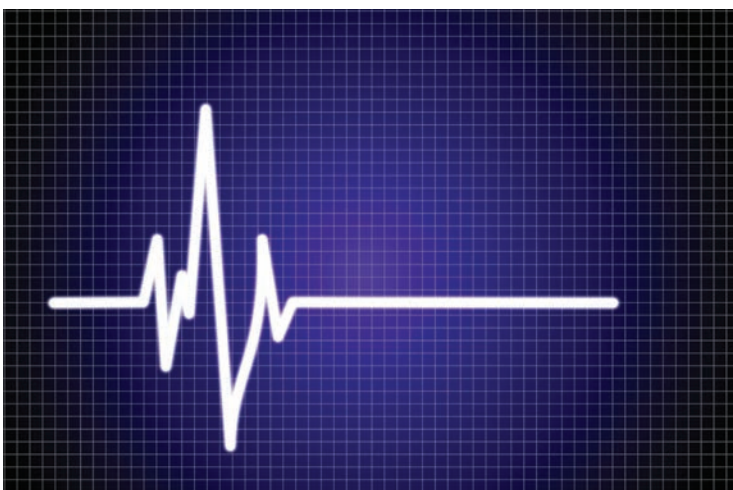
EBRI explains that the surveys on enrollment count the number of people enrolled in an HSA-eligible health plan at a specific point in time, and that while the EBRI/Greenwald & Associates survey finds that 19% of enrollees are new (implying there is enrollment growth), no survey directly measures disenrollment from HSA-eligible health plans that may be offsetting new enrollment. Unpublished EBRI tabulations of enrollment and disenrollment data in the Truven Health Analytics' MarketScan Commercial Claims and Encounters Database indicate that 10% of persons with individual coverage and 8% of persons with family coverage disenrolled from their HSA-eligible health plan between 2013 and 2014.

**Account/Plan Disconnect?**

Indeed, looking at data from the EBRI HSA Database, the report notes a potentially large number of HSAs that may no longer be currently associated with an HSA-eligible health plan. At the end of 2016, the EBRI HSA Database contained 2 million HSAs that did not receive any contributions in 2016, accounting for 36% of the accounts in the database. This lack of contributions may, according to EBRI, indicate that the accounts were no longer eligible for contributions because their account owner was no longer enrolled in an HSA-eligible health plan. In fact, EBRI notes that the percentage of accounts not receiving any contributions appears to be trending up, which they say would imply that simply looking at the number of accounts is not a good proxy to measure trends in HSA-eligible health plan enrollment.

While 2017 is a year with consistent low growth across the surveys, EBRI notes that there is at least one year in most of the surveys that shows low, no, and negative growth followed by a rather large jump in enrollment, and hence it is possible that such statistical anomalies are driving what appears to be low growth in 2017. Ultimately, the report concludes that "more years and more research into this question are necessary to better understand trends in HSA-eligible health plan enrollment."

— NAPA Net staff





## CONFIDENCE BUILDERS?

### A healthy 'bump' for retirement confidence?

Americans continue to feel better about their retirement prospects, especially if they are healthy, have a defined contribution plan — or are already retired!

This according to the 28th annual Retirement Confidence Survey from the non-partisan Employee Benefit Research Institute (EBRI). The survey purports to be “the longest-running survey of its kind,” measuring both worker and retiree confidence about their retirement confidence and other related aspects. In the 2018 version (taken prior to the recent waves of market volatility, it should be noted), the RCS found that the share of workers who feel very confident in their ability to live comfortably in retirement was about even with last year (17%, compared with 18% in 2017), but another 47% are somewhat confident, leaving nearly two-thirds of survey respondents very or somewhat confident.

#### Confidence Connection?

The RCS, conducted by EBRI and Greenwald Associates, this year found a connection between the impact health and health care expenses have on retirement confidence and financial well-being: 6 in 10 workers who are confident in retirement overall are in excellent or good health. As for those not confident about retirement, only 28% report such good health. The same is true for retirees: 46% of confident retirees are in good health compared to just 14% who are not

confident. What’s less clear is whether they are confident because they are healthy, or healthy because they are confident (or have a reason to be).

Uncertainty about financial needs in retirement certainly takes a toll on confidence, and concerns about future health care costs definitely loom large. That said, only 19% of workers and 39% of retirees have tried to calculate how much money they would need to cover health care costs in retirement. Not surprisingly, those with a retirement plan were noticeably more likely to have done so. (EBRI has previously estimated that some couples could need as much as \$370,000 to cover health care costs in retirement.)


Interestingly enough, retirees who made this calculation are less likely to have experienced higher-than-expected health costs and more likely to say costs are as expected (although arguably, having made an attempt to estimate the costs would provide a basis for those expectations). Worthy of note for employers and advisors: 7 in 10 employed workers and 6 in 10 employed retirees say that workplace education on health care planning for retirement would be helpful.

#### Declining Findings

Retirees, though still more confident than workers about retirement prospects (hey, they’re already living it, right?), this year registered a decline in overall confidence, likely because (as noted above) their

confidence in being able to afford medical and long-term care expenses in retirement is down significantly. This comes at a time when the RCS found that more than 4 in 10 retirees report that their health care expenses in retirement are higher than they expected, and another one in four say long-term care costs have been higher. Not helping matters is a decline in their confidence that Social Security and Medicare will continue to provide benefits equal to what retirees receive today. Still, a full three-quarters of retirees are very or somewhat confident they will have enough money for retirement — and that’s as high as it has been going all the way back to 1994 (except for last year, when 79% were that confident).

Surprisingly, only about half (48%) of retirees said that a workplace retirement plan has been a source of income in retirement. On the other hand, 60% of those who are zero to five years into retirement say it has. Meanwhile more than 4 in 10 retirees (44%) with a DC plan rolled at least some of that money into an IRA. In total, 7 in 10 took at least some of their money out of the plan.

As in previous years, the report finds some issues with retirement assumptions, notably that workers expect to retire later than retirees actually do, and that two out of three expect work for pay to be either a major or minor source of income in retirement, although only one in four retirees say working is a source of income for them. 

— Nevin E. Adams, JD





BY WARREN CORMIER

# The Roots of DC Participants' Stress

Many of the factors driving financial stress can be affected in large part by the plan sponsor, the recordkeeper and the advisor.



Everyone in the DC industry knows that productivity and stress are frequently discussed topics. In fact, it is one of the strongest rationales for offering financial wellness programs. The logic is that workers who are feeling stress are distracted, less productive and less healthy.

And financial issues are a major source of participants' stress. The National Institute of Health identifies four primary sources of stress:

- Finances
- Health
- Relationships
- Work

These four sources can be interrelated, with each category affecting the level of stress in the other categories. For example,

financial stress can affect relational stress, work stress can affect health stress, and so on. Plan sponsors, recordkeepers and plan advisors all can have a direct or indirect effect on the amount of stress related to finances that participants are experiencing. However, their direct impact on the other forms of stress is limited, with the exception of work-related stress.

To understand the dynamics of how financial stress is created, the National Association of Retirement Plan Participants performed a statistical analysis designed to isolate the factors that increase or decrease financial stress. Specifically, multivariate analyses (i.e., regression models) were used to identify the factors that drive levels of financial stress felt by participants. Interestingly, the models included factors

related to the so-called "sandwich generation," i.e., people who are supporting their parents, grandparents or adult siblings in addition to their own children.

## Predicting Participants' Financial Stress Levels

The question used to measure financial stress was: "How would you describe the amount of stress you feel when you think about your financial situation?"

Twenty-three factors thought to affect stress were used in this analysis. The model overall was highly predictive of stress, explaining a significant proportion of the differences in reported stress among participants.

## Factors That Reduce Financial Stress

The strongest factor determining stress was the sense of feeling comfortable about planning for retirement. That is, the more comfortable one is with retirement planning, the less stress he or she feels.

We have seen in other models that financial planning increases one's sense of control over their financial life, and greater control reduces stress. This is clearly a controllable form of stress that can be addressed by advisors' direct contact with participants or indirectly through financial wellness programs. Furthermore, the degree of control participants feel they have upon their finances, and life in general, directly impacts their sense of well-being overall and specifically in their financial lives. In fact, a sense of control is the key element that participants use to describe financial wellness.

As we've seen frequently, financial wellness is not a demographic. Rather, it is a psychographic that describes a person's sense of well-being when they think about their finances. For example, two people

with the same annual income can have vastly different levels of financial wellness. Similarly, two people with the same income replacement ratio can also have very different levels of financial wellness and different lifestyles in retirement.

Participants often described financial wellness as the freedom to make decisions that don't necessarily maximize their income, but rather maximize their sense of mission and significance. They often also described financial wellness as the freedom from the slightest negative event (e.g., a fender-bender or car breakdown) putting their financial life into deep crisis.

Other variables that reduce stress were also related to control (i.e., less uncertainty) over the future, including:

- 401(k) account balance. (The higher the balance, the lower the uncertainty about being able to retire, a major concern among participants. However, expressing the balance in terms of the monthly income it will produce in retirement is a more comforting way to show the data.)
- Being comfortable managing money. (The greater the level of understanding and comfort with money, the greater sense of control over their financial life.)
- Trust in the employer to do the right thing. (A sense that you can rely upon your employer to do the right thing and to be forthright is a great comfort to participants.)
- Knowing the amount of fees associated with one's retirement account. (Having more information about what something costs generally reduces stress.)

#### Factors That Increase Financial Stress

The analysis also identified the largest factors in increasing stress. Here is where the analysis showed the impact of having to support adult family members:

- The participant's amount of total debt. (Not surprisingly, a greater debt burden relative to income significantly increases financial stress.)
- The number of family members for whom they provide financial support. (Not only does this create

“Having to care for family members can have the effect of reducing one's sense of control.”

stress due to a greater economic burden, but having to care for family members can have the effect of reducing one's sense of control.)

- Having to tap into savings to support adults. (Related to the previous factor, having to actually reduce one's savings balance to support another adult further reduces sense of control.)
- Having to delay retirement to support adults. (If the ultimate result is having to delay retirement to support other adults, stress levels increase significantly.)

#### Factors That Do Not Affect Financial Stress

Sometimes it is just as interesting to look at the factors that *do not* drive financial stress. Most notably, the two factors that were *not* associated with higher or lower financial stress were:

- Years of education
- Household income

#### Predicting Trust in the Employer

Since trust in the employer is a significant driver of stress, an analysis was performed to identify the factors that affect trust in the employer. The question used to measure employer trust was: “How much of the time do you think you can trust your employer to do what is right?”

The model overall was also highly effective in determining the factors driving employer trust, explaining a significant proportion of the differences in reported trust among participants. Financial stress was included in this model as a potential factor in employer trust.

#### Factors That Increase Employer Trust

Interestingly, the strongest factor driving greater employer trust was the participant's total amount of debt. That is, respondents with higher levels of debt trusted employers more. The direction of causality is not known, but it may be that participants who are more trusting in their employer feel more confident in taking on more debt. Other factors increasing trust are listed below. Importantly, all these drivers are in the control of the employer through financial wellness programs, including effective education and tools for participants:

- Feeling comfortable with financial planning for retirement
- Knowing the amount of the management fees for their accounts
- Calling the recordkeeper's representatives more frequently
- Feeling more knowledgeable about financial matters
- Knowing the amount of savings required for retirement
- Feeling comfortable managing money

#### Factors That Reduce Employer Trust

Lower levels of employer trust were associated with:

- higher levels of financial stress (i.e., financial stress can have multiple levels of negative impact, including reducing trust in the employer); and
- being older (i.e., older employees tend to have lower trust in their employer).

The analysis showed that overall, many of the factors driving financial stress can be affected in large part by the plan sponsor, the recordkeeper and, most importantly, the advisor. Clearly, the advisor can play a substantial role in improving the level of financial wellness. This is an important potential value-add of advisors that should not be overlooked. 🗞

» Warren Cormier is the Executive Director of the DCIA Retirement Research Center and President and CEO of Boston Research Technologies. He is the author of the DCP suite of satisfaction and loyalty studies, and cofounded the Rand Behavioral Finance Forum with Dr. Shlomo Bernartzi.





BY REBECCA HOURIHAN

# The Sky is Falling!

Will you run for cover, or will you double down?



**L**awsuits to the left, regulations to the right, tax reform straight ahead — these days it seems like no matter which way you look, the retirement plan industry is in trouble. The sky is falling; panic is in the air. Throw your hands up; get out while you still can.

Wait, where have we seen all this before? That's right — the Pension Protection Act of 2006, *Tussey v. ABB*, the financial crisis, fee disclosure and all the news about the DOL's conflict-of-interest rule. Change can be cause for concern, but it doesn't have to be a reason to fear. Our industry has weathered sea changes like this in the past, and now should be no different.

So here's the question: Will you run for cover, or will you double down?

## Run for Cover?

Do you remember when the 408(b)(2) rules went into effect and some advisors backed away from their retirement plan businesses, figuring it was better to wait until talk of fee disclosure had cooled down? If you were one of them, how's your business doing today? Do you have more clients, or fewer, or about the same number? If you could do it all over again, would you make the same decision?

Following are two quotes by Warren Buffet that resonate strongly with the state of marketing today.

*Someone is sitting in the shade today because someone planted a tree a long time ago.*

The sooner you start promoting and advertising your retirement plan expertise, the better. It's like planting a seed. It's going to take time to develop your professional reputation. As it grows, more and more people will come to learn your experience and eventually seek you out to help them with their retirement plan.

*No matter how great the talent or efforts, some things just take time. You can't produce a baby in one month by getting nine women pregnant.*

Speaking of patience and effort: There's no shortcut to success here. Marketing takes time, organization and persistence, and no matter how much work you put into it, you won't see results overnight.

Your centers of influence need to develop trust in your services before they'll introduce you to their valuable clients. Your prospects will want to know about your experience and the processes you'll use to help them with their fiduciary responsibilities and participant engagement programs. Retirement plan committees will seek you out to find out more about you, reviewing your website, your social media and the web at large to find out what people are saying about you. It can be intimidating, but it's not impossible — it just takes time.

#### Double Down?

If you're serious about making it in this business, you need to recognize that fear and hesitation can spell opportunity for you. When your competitors are afraid to make a move, that's your chance to step in! Here are some things you can do:

- Seek out a retirement plan advisor who's on the fence about what to do with their book of business — and buy it from them!
- Speak with CPAs and accountants who used to sell insurance-based products and negotiate new deals with them.
- Look for local plans with corrective distributions, then team up with a TPA and try approaching those plan sponsors with conversations about plan design.
- Know any business owners with high incomes? You can bet they have been reading about the Tax Cuts and Jobs Act and whether they have QBI opportunities. Start a conversation with them on savings strategies such as HSAs, new compatibility, cash balance plans and others.

Now take a look at your current marketing materials. Are they awesome? If so, good job! If not, you've got some work ahead of you. Competition is fierce, and high-quality, professional-looking marketing materials can offer

You need to recognize that fear and hesitation can spell opportunity for you.”

an immediate way to stand out. Update your website, your biographies and social media profiles, your brochures, your presentations, your case studies — every single item you share with clients, prospects or centers of influence should provide a world-class representation of what it's like to work with you and your firm. You're an expert in the field of retirement plans, and your marketing needs to reflect that.

#### What's Next?

We can't know for sure right now. The most likely outcome is a wave of lawsuits that will change how plan fiduciaries document and adhere to their processes. We'll see advisors enter and leave the industry. Odds are good that the newly released SEC fiduciary proposal will come into play. Tax reform has gone into effect — and is having a huge impact on employers and employees. The bottom line: Things are going to change, and the industry will have to adapt to those changes.

While there are some major changes on the horizon, the sky isn't falling. Embrace the changes, market through them, and remember: *Someone is sitting in the shade today because someone planted a tree a long time ago.* Take the opportunity to plant the first seed today!

Thanks for reading, and happy marketing! 🌱

» Rebecca Hourihan, AIF, PPC, is the founder and CMO of 401(k) Marketing, which she founded to assist qualified experts operate a professional business with professional marketing materials and ongoing awareness campaigns.

## FOCUS ON THE THINGS YOU CAN IMPACT

Here are two marketing ideas that have nothing to do with lawsuits, regulations or tax reform:

- **Retirement Readiness.** It's common knowledge that many Americans are generally underprepared for retirement. Focus on a topic you are passionate about that helps people achieve the one thing a retirement plan is supposed to help them with: a happy and financially secure retirement. You can get in front of the conversation through financial wellness initiatives and auto plan design solutions.
- **Auto Features.** Surprisingly, despite how much the retirement plan industry talks about auto features, only a little over half of plans actually use them. Make sure you talk about how and why to implement them. Create case studies, with client examples, demonstrating their impact on participant outcomes.





BY SPENCER X. SMITH

# Want Your Employees to Share Your Company's Social Media Posts?



Then consider advocating for your employees first before you ask them to advocate for you.

**L**inkedIn is often credited with coining the term “employee advocacy” as the active promotion of your company by the people who work for it.

Sounds easy enough... just tell your employees that they need to share good news about your company or its products or services, and you're done, right? If that is your strategy, then say hello to limited engagement and mundane, template-sounding social media posts from your staff.

If you already have an amazing company culture, this strategy might work because your employees want to brag about the awesome company they work for. But for those companies looking to earn the respect of the tremendous social media force they have within their own walls every day, they're going to have to work for it.

There is an old adage: “We love our parents because they loved us first.” This is both straightforward and inherent. But

taking this lesson and applying it to your business is also the best way to make employee advocacy actually work. If you try to implement an employee advocacy program before you've shown your employees that you truly care about them, it might not be very well received. You're essentially asking your employees to love you before you love them.

Let's think about a service-based organization that's been around for a while. I bet you've seen one of those plaques hanging on the wall of a McDonald's — usually over the counter, but still visible enough for customers to notice. McDonald's has been naming an "Employee of the Month" long before social media existed. They do this to show appreciation to an employee that has recently gone above and beyond in their position. This strategy has merit, but it also has drawbacks, such as limited reach and a finite amount of real estate on the wall where they can display this act of kindness.

Fast-forward to 2018: every company in the world has an unlimited amount of space on their digital and social media platforms. Businesses have the opportunity to create an endless amount of content focused on their employees and their lives inside and outside of the office — what they're passionate about, their hobbies, their goals. This is the kind of authentic engagement and appreciation that will make an impact in their minds and, more importantly, their hearts. These are the types of posts that make employees want to share things about their employer, because they feel appreciated and cared for by the boss.

Are you doing this for your employees? If not, consider advocating for your employees first before you ask them to advocate for you. Give your employees a reason to care.

What should your employee advocacy strategy look like?

### **Outline an Approach**

Pick the platform you'll focus on first. I recommend LinkedIn since it's business-

centric and doesn't blur business/personal lines like Facebook. Then create a content calendar that includes an appropriate amount of posts highlighting someone or something else three-quarters of the time. Use the other one-quarter to say something about yourself or your business.

### **Get to Know Your Employees**

Spend time getting to know your employees. Have a conversation with them focused around what it is they do outside of work or what they are passionate about in their free time. Maybe they volunteer at

The long-term success of any company depends on its workforce. Your employees are the one component that makes your company unique. Recognize each employee's impact on your entire employee advocacy program. And it shouldn't be just the top performers — each person in your company contributes to a larger cause. Congratulate and recognize their contributions regardless of size.

And finally, let your team have a say in choosing material that truly resonates with their careers and personal lives. By doing so, you make them part of the entire

“Today every company in the world has an unlimited amount of space on their digital and social media platforms.”

the Humane Society or take care of elderly people on weekends. It's important to both hear and understand their stories. If you want them to tell yours, tell theirs first.

### **Create Content**

Once you have the information about an employee that you'd like to share, choose the medium that best suits their personality and story — video, image(s), simple text or anything else that conveys the message effectively.

### **Define Success**

Employee advocacy can drastically extend your reach and awareness. Since employee "shares" are regarded as more genuine because of their very personal approach, more people are going to engage with and participate in the content. This expanded network could eventually mean bigger sales. Today your brand's online visibility has never been more crucial, and your social media presence is a huge factor in that.

curation process, and this will result in much more authentic engagement.

Have you instituted an employee advocacy program at your company yet, whether in name or in practice? Are you sufficiently shining the spotlight on your employees before you're asking them to publicize you? 🗣️

» Spencer X Smith is the founder of [spencerXsmith.com](http://spencerXsmith.com), an instructor at the University of Wisconsin, and an Adjunct Faculty member at Rutgers University. He's a former 401(k) wholesaler, and now teaches financial services professionals how to use social media for business development. He may be reached at [spencerXsmith.com](http://spencerXsmith.com).



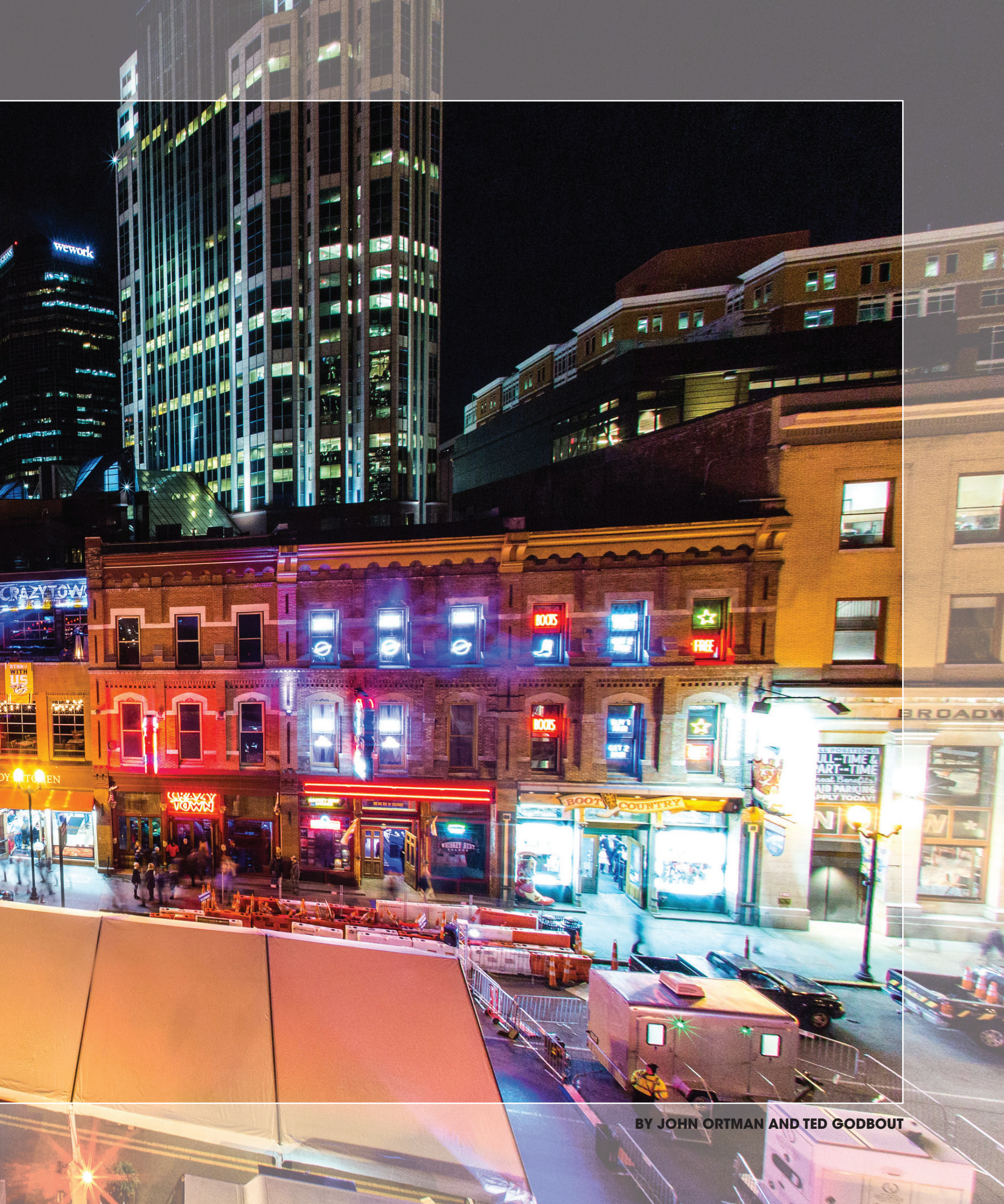
FEATURE

# BACK TO MUSIC CITY!

Bigger and better than ever, the NAPA 401(k) Summit returned to Nashville in April after a 2-year absence. Here are the highlights.

PHOTO BY DWAYNE C. BASS





BY JOHN ORTMAN AND TED GODBOUT



he nearly 2,000 attendees at the 2018 NAPA 401(k) Summit in Nashville were greeted by torrential rain the day before, followed by unseasonably chilly weather and even a few snow flurries. At a three-day event that included two nights of festivities on Nashville's Broadway Street, did that slow anyone down?

Are you kidding?

On the following pages you'll find our annual wrapup of the NAPA 401(k) Summit. This year's Summit featured five general sessions, 29 workshop sessions (including

peer-to-peer roundtable discussions for advisors, recordkeepers and home office staff), 16 sponsored workshops, and a two-night NAPA After Dark program that rocked Music City. There was also a CPFA credential exam afterward, as well as two "cram sessions" for the exam. Also, it snowed.

## GRAFF ANNOUNCES E-DELIVERY INITIATIVE

NAPA Executive Director (and American Retirement Association CEO) Brian Graff unveiled plans to address the expensive and outdated ERISA requirement to disclose information to 401(k) participants in paper form.





“Today the American Retirement Association is starting a campaign to *finally* get the 401(k) disclosure rules changed so that electronic delivery can be the default,” Graff announced at the Summit’s opening general session.

The ARA’s proposal would essentially flip the current orientation of the Department of Labor’s ERISA regulations, which emphasize providing paper disclosures — including the Summary Plan Description (SPD) and Summary Annual Report (SAR) — to plan participants but includes a safe harbor permitting electronic delivery to certain types of participants with online access. To utilize the safe harbor, however, plan sponsors using e-delivery must solicit participants’ consent, track their responses, store their e-mail addresses and monitor delivery of the disclosures — an administrative headache that constrains the use of e-delivery.

The ARA would make e-delivery the default method and retain the paper option. “Anyone who wants to get paper will have the option to do so,” Graff explained.

NAPA and the ARA recently partnered with the Investment Company Institute to examine the economic impact of the current 401(k) disclosure regime, Graff noted. The just-completed study “shows that approximately \$500 million a year is unnecessarily spent on these disclosures,” he said. Based on the average 401(k)



NAPA Executive Director/ARA CEO Brian Graff unveiled ARA’s e-delivery initiative at the Summit’s opening session (left).

account balance, that equates to 2.5% in lost retirement savings over a participant’s working life. “By having electronic delivery be the default for 401(k) disclosures, we will save the 401(k) system hundreds of millions — meaning more retirement savings for working Americans,” he said. The study was subsequently shared with members of Congress.

Graff noted that the federal Centers for Medicare and Medicaid Services, the Social Security Administration and the retirement plan for federal employees all utilize e-delivery as the default for communicating important information. “If it’s good enough for Medicare and Medicaid and the Social Security system, it should be good enough for the 401(k) system,” Graff declared.

Despite the common-sense ideas embodied in the ARA proposal, retirement professionals should expect opposition to it, Graff added. “This should be a slam dunk, right?” he asked. “Well, there will be opposition. AARP will raise concerns and there will be opposition from — you guessed it — the paper industry. They already have a website protecting their interests — check it out at [paperoptions.org](http://paperoptions.org).”

The e-delivery default idea does enjoy support in Congress. Late last year, bipartisan legislation that would allow for



e-delivery of pension and retirement plan information was introduced in the U.S. House of Representatives by Rep. Jared Polis (D-CO) and Rep. Phil Roe (R-TN), along with 26 cosponsors. The “Receiving Electronic Statements to Improve Retiree Earnings (RETIRE) Act” (H.R. 4610) would allow plan sponsors to auto-enroll participants in an e-delivery option for plan communications, while providing an opt-out option for employees who prefer to receive paper documents.

## WHAT KEEPS A HEAD OF CYBERSECURITY UP AT NIGHT?

The financial sector spent \$90 billion on cybersecurity last year. What keeps the technologists in charge of financial firms’ cybersecurity efforts up at night?

Rachel Wilson, head of cybersecurity for Morgan Stanley’s Wealth Management unit, shared the major concerns and provided some cybersecurity advice for advisors. Wilson joined Morgan Stanley in April 2017 following a 15-year career with the National Security Agency (NSA).

Rachel Wilson, Head of Cybersecurity for Wealth Management Technology at Morgan Stanley, shared insights on current cybersecurity threats, trends and industry initiatives to protect financial data.



Wilson listed the top four things that keep her and her cybersecurity peers up at night.

- **North Korea.** The North Korean government is funding the development of its nuclear weapons program by hacking into banks and stealing millions of dollars, most notably the theft of \$100 million from the Bank of Bangladesh.
- **Organized Cybercrime.** What Wilson termed “cyber crime syndicates” are aggressively targeting the financial sector, Wilson noted.
- **Fraud.** Financial institutions are facing a new strain of fraud, aided by cyber means, that “is much worse than just two years ago,” according to Wilson.
- **New Malware.** “All 40 major U.S. banks are suffering from “Marcher,” a new form of malware impacting Android devices,” Wilson explained. The program pretends to be a form of the popular Solitaire game for smartphones. When a user uses a mobile banking app on their smartphone, however, Marcher creates an overlay that allows hackers to capture their username and password — and thus access to their accounts. “Marcher can be purchased on the ‘Dark Web’ for \$60,” according to Wilson.

### *‘The Weakest Link’*

Wilson identified advisors as “the weakest link” in the financial services chain, and offered some suggestions for improving their personal and business practices — what she terms “cybersecurity hygiene.”

Drawing upon the lessons learned from last year’s Equifax breach, Wilson emphasized the importance of keeping all mission-critical software up to date by installing vendors’ updates — “patches” — immediately. Patches can be reverse-engineered by hackers, she noted, and used to hack into systems on which they have not yet been fully installed. “In the Equifax data breach, Equifax sent out a patch to their user firms, but some IT departments did not fully implement it, creating an opening for a breach,” she said. “The result: 150 million people had their personal information stolen.”

The Equifax breach also compounded a growing problem in cybersecurity, Wilson pointed out: authentication. For one thing, she noted, the breach highlighted the weakness of knowledge-based security authentication like Social Security number, mother’s maiden name, and other “secret” knowledge that, in today’s world, is no longer secret.

Phishing emails — as in the Nigerian prince archetype — are now informed by hacked personal information, Wilson noted, making them more authentic and much more difficult to identify as fraudulent. Wilson warned that advisors are now being targeted by hackers posing as prospects. “They are looking for personal information and information about the firm, and also for opportunities to download malware via links and spreadsheet files,” she warned.

Call centers have also emerged as a top target of cybersecurity fraud, Wilson noted, and thus a focus of financial firms’ cybersecurity efforts. In this type of scam, fake clients have been able to gain access to accounts and institute successful distribution



requests. Defensive actions now being implemented in this area include biometrics, especially a validated voiceprint from the account holder.

### *Action Steps*

Wilson offered some suggestions to help individual advisors avoid being victimized by cybercrime and cyberfraud:

- Don't use public Wi-Fi hotspots on a work device. Not only can they be used to gain access to email and other data, but also to download malware to your device without your knowledge. Use a personal hotspot instead.
- Don't download apps from a third party.
- Lock down what your permissions allow your apps to do.
- Don't use public charging cords to recharge your device, like those sometimes offered by Uber drivers.
- Replace your manual passwords with a password manager service, which creates and stores complex passwords in a secure, non-documented environment.
- Don't keep client data on a laptop or other device that you also use for email or browsing.
- If you deal with client data or communications outside your firm's secure internal system, have a single device that you use for that purpose and nothing else. No browsing, no apps, no games — and no teenagers allowed.

NAPA's Brian Graff is interviewed by Fox Business News correspondent Adam Shapiro in the exhibit hall.

## **PARTIES OF INTEREST INCREASINGLY BEING TESTED IN PLAN LITIGATION**

The plaintiff's bar is getting increasingly creative in bringing parties of interest into DC plan litigation efforts, panelists at a Summit workshop session said.

Karen Scheffler, Senior Vice President and Senior ERISA Legal Counsel with AllianceBernstein (AB), moderated a panel with Thomas Clark, Jr. of the Wagner Law Group and Michael Wolff, of Counsel with Schlichter Bogard & Denton, who offered insights into current 401(k) litigation trends.

While noting that plan sponsors take the brunt of litigation as fiduciaries, Scheffler inquired about the likelihood of recordkeepers and service providers being added as parties in litigation. Clark noted that the chances of that happening appear to be increasing.

"I'm sorry to say that the chances of it are more common now than they were five years ago," Clark stated, further adding





## NAPA Nation, Country-Style

This year's Summit featured two nights of festivities in downtown Nashville.

The first involved a friendly takeover of the huge Wildhorse Saloon featuring a musical program headlined by up-and-coming country star Brooke Eden. The second night featured an even friendlier takeover of an entire block of Nashville's famed Broadway, a.k.a. the "Honky Tonk Highway," for a block party, as well as four distinguished establishments — the Crazy Town, Whiskey Bent, Tin Roof and Valentine saloons.

» Photography by Martin H. Simon and Dwayne C. Bass

Photos:

1: Brian Graff with the 2018 NAPA "Young Guns" onstage at the Wildhorse Saloon.

2: Summit attendees packed the Wildhorse Saloon in downtown Nashville.

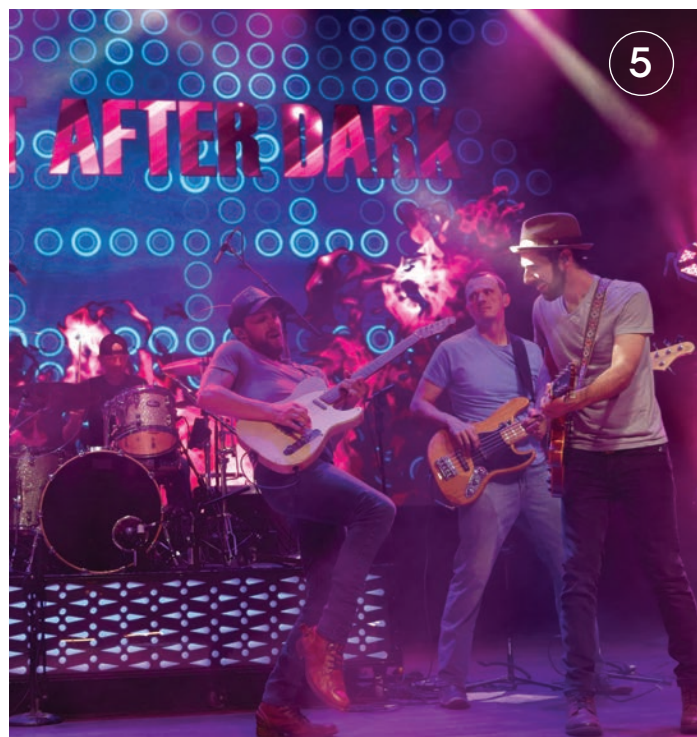
3: Brooke Eden headlined Sunday's Summit After Dark festivities at the Wildhorse Saloon.

4/5: Nashville's brother duo McKenzies Mill opened for Brooke Eden.

6: The 2017 NAPA Top Women Advisors were saluted at Sunday's NAPA After Dark event.











that “the theories are more aggressively being brought against advisors.” He explained that the plaintiffs’ firms are coming after the parties of interest, which could include any person or firm that offers services to a plan.

To that end, he explained that the plaintiffs’ firms are coming up with “‘newish’ legal theories that if you’re a party of interest, even though you’re not a fiduciary and you participate in another’s fiduciary breach, you can be held liable too, and this is being tested in the courts.”

Clark noted that one theory involved a plaintiff’s lawyer going after a recordkeeper that was named as a codefendant where the primary allegations were against the plan sponsor. He explained that the recordkeeper was swept in over allegations that they did not have a good 408(b)(2) process because the fees were allegedly not reasonable and claimed that they were liable for paying the fees back.

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What are plan sponsors looking for in their advisor relationship? T. Rowe Price’s Joshua Dietch (R) moderated this year’s plan sponsor panel — Richard Clegg (L), Director of Finance and Treasurer at OC Tanner; Marjorie Mann, Senior Attorney with Florida Power & Light; and Jacob Nichols, Director of Palmer Trucks.

Wolff noted that the theory is based on a Supreme Court ruling, such that any service provider to a plan is a party of interest and if they receive a portion of a plan’s assets knowing that it was the result of a fiduciary breach, then they can be held liable under ERSIA for restitution. Even still, he added, “it’s a hard theory to prove.”

Clark further emphasized that even though an advisor may be named in the plan documents as the named investment fiduciary, the liability lies with the plan sponsor and they will always be subject to getting sued under the theory that they failed to monitor the named plan investment fiduciary. “They might win on summary judgment, they may win a trial, but it’s not going to prevent them from getting sued,” Clark noted.

Another interesting case that Clark described involved a firm that went after a large recordkeeper for claims about how they were controlling the investments on the platform and setting their own fees. He noted that the plaintiffs were trying to go after a class of plans. The case started out against the advisor in a tiny plan getting sued, but apparently it was a “back door way” to suing the recordkeeper’s entire book of clients.

To that end, Wolff explained that his firm is seeing plan sponsors attempting to push off responsibility on the plan advisor when things have gone wrong. Often you’ll see plan sponsors claiming they were only doing what were told to do, so they



## Giving Back

**The NAPA 401(k) Summit** has a long tradition of giving back to local host communities. This year featured a fundraising drive on behalf of the Second Harvest Food Bank of Middle Tennessee to support their mission of feeding hungry people and working to solve hunger issues in the community. Summit attendees responded generously, donating a total of \$5,740 to help fight hunger in the Nashville area. Thank you!



Neil Howe, the nation's leading thinker on today's generations, shared insights into how today's generations will shape America's future and the future of retirement (below).



contend it's the advisor's responsibility, he noted. "The employer says it's your fault; if you're going to say it's the employer's fault, then it's one or the other, and we'll let the court figure it out," Wolff stated in describing the plaintiff's approach.

When asked to provide tips on avoiding litigation, both Wolff and Clark emphasized the importance of documenting a process when making decisions about a plan.

Quarterly meetings have minutes that lay out the reasons for all the decisions being made and if there is nothing in the minutes, then it suggests there wasn't a process followed, Wolff explained. He further noted that the advisor is in a "tricky situation" when they've recommended doing something and the employer hasn't done it. "You need to protect yourselves by having documented that you told your client to do this. If you don't do that, you're setting yourself up," Wolff cautioned.

Clark agreed with Wolff in terms of documenting process, but further suggested that advisors take a look at what they're recommending to their clients about what specifically they are disclosing to their plan participants. He cautioned against providing overly aggressive disclosures beyond the SPDs and 404(a)(5) participant disclosures, noting that there have been a number of defendants who have been successful under the three-year statute of limitations at the motion-to-dismiss stage.

Moreover, Scheffler urged advisors to make sure their service agreements are clear and define the scope of terms. She explained that she reviewed numerous agreements that were extremely vague in the scope of what the advisor was taking responsibility for, which could have led to anything being put on them.

## THE HEX ON GEN X: HOW THE 'LOST GENERATION' FOUND ITS WAY

Among all current generations, Generation Xers have faced some of the toughest cultural and financial headwinds, but they have found a way to get things done, according to Summit keynote speaker Neil Howe.

Howe, a best-selling author and renowned authority on generations in America, offered a look at the generations of the past 100 years, providing insight on who they are, what motivates them and how it impacts their financial decision-making. Currently Managing Director of Demography with Hedgeye Risk Management, Howe also is known for coining the term "Millennial Generation" along with the late William Strauss, who coauthored several books with Howe.

From the so-called Greatest Generation down to Millennials, Howe expounded on their "coming of age priorities, attitudes toward the establishment, and workplace reputation." According to Howe, much of their viewpoints and beliefs were shaped by major events and turning points that occurred during each generation, such as the Great Depression and World War II, the cultural wars of the 1960s, the war on terror and the financial crisis, as well as the post-financial crisis era.

Howe explained how each generation has its own unique perspective on financial planning and retirement, and how marketing and advertising have changed throughout the decades to target each generation's uniqueness. "The point of this is to say that



these different moods here say something very important about the message you respond to, the products that you buy and the candidates that you vote for,” Howe noted, adding that “... it says something about how to speak to different generations about preparing for the next phase of life.”

Howe implied that he is most worried about Generation Xers, who came of age during the decline of defined benefit plans and have not had as much time to save in a DC-dominated environment. They are also the generation with the most unequal levels of income and wealth than any generation alive today and they were also the generation that got hurt the most during the financial crisis, Howe notes.

Howe referred to them as the “lost generation” and “baby busters,” who, as a group, feel like they don’t belong in their respective generation. He also dubbed them the generation of “13,” alluding to the apparent “bad luck” their generation faced while growing up, such as an increase in the divorce rate, a lower birth rate and a changing culture that turned unfriendly to children. Their coming of age was shaped by parents with an attitude of “let them raise themselves,” Howe noted.

Possibly as a result of this dynamic, he also notes that they are more comfortable than any other generation in taking risks to get ahead. They prioritize individualism and an attitude that “we can get along” without the establishment, with a fallen trust in institutions. Generation Xers are also more accepting of 401(k) plans, but they also have a workplace reputation as not necessarily trusting their employer with the attitude of wanting to cash out and manage their own risk.

The appeal for Generation Xers is getting things done and delivering on the bottom line, according to Howe. He points out how these attitudes have helped shaped marketing campaigns geared toward “personal empowerment,” such as Nike’s “Just Do It” or Prudential’s “Own a Piece of the Rock.”

In turn, Generation Xers, who grew up as the *under*-protected generation, became the parents of *over*-protected kids — the Millennials. Howe noted that Millennials focus more on family values and taking care of their kids and parents.

One major change among Millennials, he explained, is a decline in personal risk-taking. They want to be part of the middle class, but many are avoiding the stock market because they perceive it as being “too volatile.” They are also the most stressed generation, constantly wondering whether they’re doing okay.

Millennials are also reversing the Generation X attitude of “leave me alone” to a protectionist attitude of wanting benefits and help with doing things, such as 401(k) orientation sessions and financial planning assistance.

## WHY HSAs SHOULD BE PART OF YOUR RETIREMENT SAVINGS CONVERSATION

Not convinced yet that health savings accounts should be incorporated in your retirement savings conversation with clients? Panelists at a Summit workshop session sought to dispel any reluctance about doing so.

Ryan Tiernan, National Accounts Manager with American Funds from Capital Group, moderated a discussion with Ken Forsythe, Assistant Vice President for Product Strategy with EMPOWER, Jamie Greenleaf, General Partner/Principal of Cafaro Greenleaf, and Tom McKenna, Director of Institutional Sales with Health View Services.

According to the panelists, an important component in today’s environment is educating plan sponsors about the benefits of HSAs. They noted that many sponsors and participants still confuse HSAs with FSAs and do not fully understand the triple tax benefit that comes with them. To that end, Forsythe cited a recent EMPOWER survey that found that 56% of participants confused the use-it-or-lose-it proposition of FSAs with HSAs and only 22% understand the triple tax benefit of HSAs.

Tiernan emphasized that the triple tax benefits make HSAs more of a financial services product than a health insurance

Bestselling author and business strategist Ian Altman emphasized the importance of understanding how customers make buying decisions.



product. “The money goes in tax free, grows tax free and comes out tax free,” he explained. Further highlighting the savings potential, Tiernan observed that, “The 401(k) is the bedrock of retirement savings in the United States, but to just pass over a triple tax free vehicle that is getting both employer and employee contributions would be hazardous to our book of business.”

How do you approach the value proposition? Greenleaf noted that it’s easier to promote to existing clients because they understand it’s adding another savings vehicle for retirement, but it’s a little more difficult with new clients. She noted that education is key and suggested that the value proposition should be “more about looking at a holistic benefits package and how to structure a benefit that is meaningful to employers.”

Echoing Greenleaf’s comments, Forsythe explained that, in integrating the HSA, his firm looked at ultimately trying to accomplish the best possible retirement plan experience. “The best way to help the advisor is to make sure the HSA does the right thing for both the employer and the participant,” he noted. “It makes the opportunity to position the solution by the advisor to a client or to a participant that much easier.”

Forsythe also explained that, as discussions about HSAs focus on their potential as a retirement savings vehicle, he suggested that the conversation can be addressed during the annual enrollment process. “As for implementation, the future of this is looking at annual benefit enrollment process as not a health care decision but a financial decision,” Forsythe proposed. He further noted that one misperception with HSA enrollment is that many believe a contribution decision is locked in for the year, when changes can be made throughout the year.

Looking at HSAs from a health and wellness standpoint and the savings that can be achieved, McKenna noted that 80% of companies offer wellness program, but only 6% of those actually measure their return on investment. McKenna explained that his firm is trying to have employees realize how much they could save from modifying their behavior, which could then be rolled up to the employer level.

As an example, McKenna noted that little incremental changes in lifestyle with respect to chronic conditions can result in average savings of \$1,200 per person per year, which can result in several million dollars a year in savings for a large company when extrapolated out.

“We’ve talked about this in the retirement space for quite some time, but if we can get in the position where we’re not just going in and saying we can save you some money in your 401(k), but we can add real money to your company’s bottom line is where I see the next phase of this industry going,” McKenna emphasized.

## WHAT HAPPENS TO WHAT HAPPENS IN VEGAS?

It stays there — everyone knows that. The thing is, *people* who go to Las Vegas go *home*, and come back to visit in the future. And that’s exactly what we’ll do next year. Make plans to attend the 2019 NAPA 401(k) Summit, April 6-7, 2019, in Las Vegas, NV. If you missed the last Summit in Vegas, in 2017, you can get a sense of what it was like by pointing your web browser to <https://bit.ly/2JmYoyW>. 🌐



Joined by NAPA’s 2018-2019 Vice President Jania Stout, the association’s incoming President Jeffery Acheson (L) thanked predecessor Paul D’Aiutolo.

## NAPA Welcomes Acheson as President

**NAPA welcomed Jeffery Acheson, CPFA**, as its 2018-2019 President at the opening session of the 2018 NAPA 401(k) Summit in Nashville.

Acheson has nearly 40 years of experience with advising and educating clients, providing industry leadership and building trusted relationships. He founded Powell, Ohio-based Advanced Strategies Group, LLC in April 2017, where he delivers a fiduciary-based business model focusing on high-income individuals, high-net-worth families, successful companies, mid-size retirement plan sponsors and charitable organizations. Previously Acheson headed up the advisory services team at Corporate and Endowment Solutions, Inc. He also spent 14 years as a co-managing partner of a CPA firm’s affiliated wealth management arm.

Other changes on the NAPA Leadership Council (LC) for 2018-2019 include:

- » Last year’s Vice President, Jania Stout, Co-Founder, Fiduciary Plan Advisors at HighTower in Baltimore, MD, is this year’s President-Elect.
- » Pat Wenzel, Managing Director–Wealth Management, Merrill Lynch, Houston, TX, replaces Stout as Vice President.
- » D’Aiutolo replaces his predecessor, 2016-2017 President Sam Brandwein, as an ex officio member.
- » Corby Dall, Barbara Delaney and Charlie Snyder join the LC as at-large members, replacing Wenzel, Jamie Greenleaf and Michael Perry.
- » Jon Anderson joins the LC as a Firm Partner representative, replacing Ken Pardue.





By Judy Ward

# The Young Guns

Meet NAPA's 2018 Top Retirement Plan Advisors Under 40 — the “Young Guns” — and hear from six Young Guns on how to develop and hold onto younger advisors.

## “Every Luke Skywalker needs an Obi-Wan Kenobi,”

says Young Gun Jake Connors, senior director, institutional consulting at Greensboro, North Carolina-based Compass Financial Partners, LLC. As an apprentice, the *Star Wars* hero Skywalker got invaluable guidance from the far more experienced Jedi Master.

“I have talked to several of the other Young Guns, and I don’t think there is one who’d say that they did it on their own. It is never, ‘I just started my business in my basement,’” Connors says. “They all say, ‘If it hadn’t have been for X, Y, and Z, I wouldn’t have made it in this business.’ There is always some support structure: Somebody is lowering a ladder down, so that you can climb up.”







From left: Jake Connors, senior director, institutional consulting at Compass Financial Partners, LLC.; Christopher Kulick, senior vice president at CAPTRUST; Steven Wilkinson, managing director at Monarch Plan Advisors.

That career-development ladder's a lengthy one for plan advisors, Connors says: It's a very complicated industry for learning how to serve clients well, and one with a "ridiculously long" sales cycle for developing new clients. "It is a long road," he says. "I was in wealth management for five years, then another five years in service before becoming a lead plan advisor. Even now, five-plus years into this role, I feel like I'm really just beginning to hit my stride."

Young Gun Christopher Kulick is not yet 40 years old, and in eight years at CAPTRUST, his practice has grown to have \$6.5 billion in assets under advisement. "It's been great, and it's just getting started," says Kulick, a senior vice president based in Doylestown, Pennsylvania. When he talks about what drew him to the advisory firm and what keeps him there, he focuses a lot on the support he gets internally from colleagues. "Culture was the most important part of the decision for me: the way the organization is structured and aligned, and the collaboration among advisors. We do not compete against each other here," he says. "In some other organizations, it is very competitive."

The advisory firm's culture of peer-to-peer outreach means Kulick never has to hesitate to seek another CAPTRUST advisor's help with a client's issue. "I can call any of the more than 100 other advisors

here with any question that comes up, and get an answer," he says. "And I can bring in our internal experts as I need them to help clients, in areas like investment research, operations, legal and compliance issues, and participant education. Their expertise frees me up to pursue my highest and best use, which is finding and keeping clients."

Six Young Guns talked about their advice on how to support talented young plan advisors, and how to avoid making mistakes that led them to switch firms.

### Don't Push Sales Too Hard

When Steven Wilkinson started as a financial advisor trainee at a large Wall Street firm, he was immediately expected to focus on prospecting for new business. "They said something like, 'Here's your desk, here's your phone, here's where the restroom is, good luck,'" recalls Wilkinson, now managing director at Monarch Plan Advisors in Simi Valley, California. "I would get in the office and start cold-calling at 5:30 a.m., and wouldn't stop until 7:00 p.m." He realizes now how valuable it would have been if he'd faced less sales pressure and had more time for expanding his knowledge base in areas like investment analytics, testing rules, and other regulations. "Definitely a structured training program for newer advisors would put them in a better position to succeed," he says.

Asked what mistakes get made with newer advisors, Mark Beaton points to not giving them enough support to let them develop. "A lot of times, people are kind of 'thrown to the wolves.' That's not the way to develop new advisors at all," says Beaton, Denver-based vice president and retirement plan consultant at Bukaty Companies Financial Services. "The biggest thing is that you can give a younger advisor all the weapons to go out and sell, but ultimately that person needs support. If an advisor who's only been in the business for six months sets up an appointment to talk with a \$50 million plan sponsor, that's going to be very intimidating for the new advisor."

Beaton enjoys sales work. "I like the hunt, I like getting in front of people," he says. But even he didn't like getting "thrown in the deep end" when he began his finance career at a municipal bond brokerage. "It was actually horrible for me. It was like, 'Here's the Yellow Pages, go.'"

However, when Beaton later cofounded a benefits consulting firm, he worked with two experienced colleagues who patiently showed him the better way to find new clients. "There was no formal training program, but I sat with them while they did meetings with sponsors. And starting to mirror the way that they were selling was the best way for me to learn," he recalls. Speaking about what he

“What are a lot of **advisory firms** doing wrong with **young advisors**? Not offering them a path to ownership.”

— Christopher Kulick,  
CAPTRUST

learned from them, he says, “Everybody wants to get in there and talk about how great they are. But it’s more about listening to the sponsor. A lot of times, sponsors don’t even understand their own needs. So for the advisor, it’s asking the right questions, and then listening as the sponsor talks, and helping to identify those needs.”

### **Develop Them from the Ground Up**

Jessica Ballin, who started her career at Wachovia Securities, says she learned gradually how to work effectively with client sponsors and participants. “In the beginning, I would go with the broker I worked with to all the committee meetings and education meetings he did, and just watch him present,” says Ballin, now a principal at 401(k) Plan Professionals in Edina, Minnesota. “Gradually, with smaller clients, I started doing meetings on my own.” It took her five to seven years to learn what she needed to take a lead role in advising clients. “The way to learn is from the ground up,” she says. “You have to learn things like the personalities of the clients. And you have to be confident in your knowledge about retirement plan issues: You have to sound like an expert,

especially when you are young in this business.”


Before newer advisors can focus on signing new clients, they need a foundation of understanding what’s involved in working effectively with existing plan clients, says Chris Krueger, managing partner at MHK Retirement Partners in Middleton, Wisconsin. He feels fortunate that he started his plan advisory career in a client service-focused path, rather than a pure sales-focused job. “Sixteen or seventeen years later, running an advisory practice, I’ve found that I do not want anybody who is newly hired here to sell anything,” he says. “First, I want them to learn the processes involved in client service. Why would you want people selling something that they don’t even understand?”

MHK Retirement Partners created a training program to teach newer advisors how to do plan advisory work. The program utilizes retirement plan management software Krueger developed called Standard of (k)are™. The software provides for a step-by-step, standardized approach to the processes needed to follow fiduciary requirements and industry best practices in retirement plan work. MHK couples that tool with having newer advisors “shadow” more-experienced advisors at the firm.



From left: Chris Krueger, managing partner at MHK Retirement Partners; Mark Beaton, vice president and retirement plan consultant at Bukaty Companies Financial Services.





“There’s a transition in the retirement plan business from, ‘I want to make a **lot of money**’ to, ‘I want to go out and **do good** for people.’”

— *Chris Krueger, MHK Retirement Partners*

“Advisors learn by doing here — but the caveat is that there’s no sales goal being put in place for them,” Krueger says. “The ‘shadowing’ side of it is that other, more-experienced advisors will take new advisors under their wing. We have a requirement that a newer advisor has to watch a more-experienced advisor do a certain number of meetings before we let them do the meetings on their own. We don’t just send newer advisors out and say, ‘Good luck, Godspeed.’”

### **Mentor Them — and Learn from Them**

When Connors transitioned to the retirement side of the business from wealth management, he took a job at a national retirement-focused RIA. “I totally grew up over there,” he recalls. “My first job there was in participant education, and that was a natural transition from wealth management for me. Then I was fortunate to work under two senior partners as an internal relationship manager, coordinating resources our sponsor clients needed within the organization. I got very lucky that the two advisors I was working with were really patient with me. I asked some pretty dumb questions at first.”


The two more-experienced advisors not only taught Connors, but welcomed his input, he remembers. “By the end, I was challenging their thinking,” he says. “It’s really easy, especially for more-senior folks who have had success, to believe that the way you’re doing it is *the* way to do it. But it’s rare that anyone corners the market on good ideas. Sometimes, younger advisors can improve the way things are done.”

Wilkinson, now in a position to hire newer advisors at Monarch Plan Advisors, has brought Michael Fine onto the team. He’s mentored Fine on the different aspects of the business, including plan pricing, investment analytics, regulations, and of course, prospecting. “He helps me stay sharp with the questions he asks me,” Wilkinson says. Now Fine’s interested in pursuing a new business-development direction for Monarch, putting on educational seminars for potential plan sponsor clients. “You need to give them the flexibility to follow the drumbeat they’re hearing,” Wilkinson says.

### **Understand What Motivates Them**

As Krueger made the switch into plan advisory work in 2008, he saw a real divergence starting to occur in what motivated older versus younger people in that career track. “There’s a transition in the retirement plan business from, ‘I want to make a lot of money’ to, ‘I want to go out and do good for people,’” he says. “Younger advisors want to make a difference in people’s lives.” Other, flashier areas of finance offer more opportunity to make as much early-career money as possible. “It’s a very slow grind to develop a career in the retirement plan business, but the learning opportunities are vast,” he says.

At the same time, several Young Guns pointed to a sense of ownership as an issue that leads accomplished young advisors to change firms. It’s common for newer advisors to work on a flat-salary basis, Ballin says. Their employers sometimes “don’t create a compensation structure that will give younger advisors an incentive to sign new clients,” she says. “If you want to retain younger advisors, you have to be willing to provide a compensation structure that makes it worthwhile — maybe a bonus that gives the younger advisors an incentive to generate leads, and to bring in new business.”

When Kulick thinks about mistakes advisory firms make with young advisors, his mind turns in part to incentivizing top performers. “What are a lot of advisory firms doing wrong with young advisors? Not offering them a path to ownership,” he says. “That was a draw for me, and it is a draw for a lot of other high-performing advisors. Some younger advisors get to the point where they have built out a great practice, but they don’t have the ability to get any equity in the firm. Maybe there are one or two senior advisors who are getting all the benefit of ownership.” He’s gotten ownership over time at CAPTRUST, in a system that rewards not only production and client retention, but internal collaboration. “Everyone has a chance to be an owner here,” he says. “So we have one common goal: to serve our clients, and grow our business.” 

» Judy Ward is a freelance writer who specializes in writing about retirement plans.



Jessica Ballin, principal at 401(k) Plan Professionals.



# COMMON ‘GROUNDS’

This year’s “crop” of top young advisors was diverse in tenure, aligned in purpose.

By Nevin E. Adams, JD



**Established in 2014**, the 2018 Top Retirement Plan Advisors Under 40 were drawn from hundreds of nominations provided by NAPA broker-dealer/RIA Firm Partners. Nominees were required to submit responses to an application comprised of a series of quantitative and qualitative questions about their experience, size and composition of their practice, awards and recognitions, and industry contributions, which were then reviewed by a panel of senior advisor industry experts, who, based on those criteria, and following a broker-check review, selected the top young advisors. These “Young Guns” are widely seen as the future leaders of the retirement plan advisor industry.

This year we received nearly 600 nominations, 15% more than in 2017 (which, in turn, was a 20% increase from the previous year). While each year’s nominations contain an inspiring pool of potential candidates, due to both the size and quantity of qualifying advisors this year, we kept the list to 75.

This year’s “crop” was a diverse group; roughly half had between 10-15 years of experience as a retirement plan advisor, just over a third had between 5 and 10 years, and just over 10% had more than 15 years. One had less than 5 years of experience as a retirement plan advisor — though they had industry tenure in other roles.

There was also diversity in the typical plan sizes for which they were lead advisor — which, of course, might be another way of saying there was no “typical” plan size focus in this group. A clear plurality — 40% — served plans in the \$10-50 million segment, but the rest of the group spread remarkably evenly between plans ranging from less than \$10 million (8%) to \$50 to \$100 million (9%) to \$100 million to \$250 million (15%) to \$250 million to \$1 billion (16%) to over \$1 billion (12%).

But what they all had in common was a focus on retirement plans, a commitment to helping plan sponsors fulfill their responsibilities, and a desire to help American workers achieve a financially successful retirement.

Our thanks to all who participated in the nomination and voting process, the hundreds of nominees, and our panel of judges, who gave selflessly of their time and energy to make this year’s process another resounding success.

Most importantly, our heartiest congratulations to this year’s Top Retirement Plan Advisors — and all you have done, and will continue to do, for the many plans, plan sponsors, and plan participants you support.

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## **Garrett Anderson**

Firm: **Plan Sponsor Consultants**  
Broker-Dealer / RIA: *LPL Financial*

## **Alexander G. Assaley III**

Firm: **AFS 401(k) Retirement Services**  
Broker-Dealer / RIA: *Commonwealth Financial Network*

## **Jessica Ballin**

Firm: **401k Plan Professionals**  
Broker-Dealer / RIA: *Global Retirement Partners*

## **Ken Barnes**

Firm: **SageView Advisory Group**  
Broker-Dealer / RIA: *SageView Advisory Group*

## **Andrew Bayliss**

Firm: **Marsh & McLennan Agency**  
Broker-Dealer / RIA: *MMA Securities*

## **Mark Beaton**

Firm: **Bukaty Companies Financial Services**  
Broker-Dealer / RIA: *Resource Investment Advisors*

## **Tony Black**

Firm: **SevenHills Benefit Partners**  
Broker-Dealer / RIA: *Pensionmark Financial Group*

## **Natasha Bonelli**

Firm: **Merrill Lynch**  
Broker-Dealer / RIA: *Merrill Lynch*

## **Julie Braun**

Firm: **Morgan Stanley**  
Broker-Dealer / RIA: *Morgan Stanley*

## **Eric Brunton**

Firm: **Merrill Lynch**  
Broker-Dealer / RIA: *Merrill Lynch*

## **Ryan Campagna**

Firm: **Sentinel Benefits and Financial Group**  
Broker-Dealer / RIA: *Sentinel Pension Advisors*

## **Dominic Casanueva**

Firm: **Merrill Lynch**  
Broker-Dealer / RIA: *Merrill Lynch*

## **Brian Catanella**

Firm: **UBS Financial Services Inc.**  
Broker-Dealer / RIA: *UBS Financial Services Inc.*

## **John Clark**

Firm: **Heffernan Retirement Services**  
Broker-Dealer / RIA: *Global Retirement Partners*

## **Jake Connors**

Firm: **Compass Financial Partners**  
Broker-Dealer / RIA: *LPL Financial*

## **Joseph Conzelman**

Firm: **Peak Financial Group, LLC**  
Broker-Dealer / RIA: *LPL Financial*

**Dominic Corleto**

Firm: **Rouleau Bevans Corleto Investment Consulting Group**  
Broker-Dealer / RIA: *Wells Fargo Advisors*

**Brady Dall**

Firm: **401k Advisors Intermountain**  
Broker-Dealer / RIA: *Resources Investment Advisors*

**Taylor Dance**

Firm: **GBS Retire**  
Broker-Dealer / RIA: *Resources Investment Advisors*

**Kelli Davis**

Firm: **CSI Advisory Services**  
Broker-Dealer / RIA: *LPL/Global Retirement Partners*

**Jeffrey Dykstra**

Firm: **Merrill Lynch**  
Broker-Dealer / RIA: *Merrill Lynch*

**Shaun Eskamani**

Firm: **CAPTRUST**  
Broker-Dealer / RIA: *CAPFinancial Partners*

**Derek Fiorenza**

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Broker-Dealer / RIA: *LPL/Summit Group Retirement Planners, Inc.*

**Jessica Fitzgerald**

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Broker-Dealer / RIA: *Morgan Stanley*

**Geoffrey Forcino**

Firm: **Kathmere Capital Management**  
Broker-Dealer / RIA: *LPL Financial*

**Thomas B. Ford**

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Broker-Dealer / RIA: *Morgan Stanley*

**John Frady**

Firm: **CAPTRUST**  
Broker-Dealer / RIA: *CAPTRUST*

**Christian R. Garces**

Firm: **Key Client Financial Advisors**  
Broker-Dealer / RIA: *Wells Fargo Financial Network*

**Steven Gibson**

Firm: **Plante Moran Financial Advisors**  
Broker-Dealer / RIA: *Plante Moran Financial Advisors*

**Wesley Golie**

Firm: **First Interstate Bank**  
Broker-Dealer / RIA: *LPL Financial*

**Rick Gumina**

Firm: **Morgan Stanley**  
Broker-Dealer / RIA: *Morgan Stanley*

**Austin Gwilliam**

Firm: **GRP Financial**  
Broker-Dealer / RIA: *LPL/Global Retirement Partners*

**Erin Hall**

Firm: **Wells Fargo Advisors**  
Broker-Dealer / RIA: *Wells Fargo Advisors*

**Michael D. Hill**

Firm: **Graystone Consulting**  
Broker-Dealer / RIA: *Morgan Stanley*

**Jared Holden**

Firm: **Merrill Lynch**  
Broker-Dealer / RIA: *Merrill Lynch*

**Zach Hull**

Firm: **Compass Financial Partners**  
Broker-Dealer / RIA: *LPL Financial*

**Kameron Jones**

Firm: **NFP**  
Broker-Dealer / RIA: *NFP Retirement*

**Joseph M. Juliano**

Firm: **Merrill Lynch**  
Broker-Dealer / RIA: *Merrill Lynch*

**Jonathan Karelitz**

Firm: **Morgan Stanley**  
Broker-Dealer / RIA: *Morgan Stanley*

**Mike Kasecamp**

Firm: **CBIZ Retirement Plan Services**  
Broker-Dealer / RIA: *CBIZ Financial Solutions*

**Jack Keller**

Firm: **CBIZ Retirement Plan Services**  
Broker-Dealer / RIA: *CBIZ Financial Solutions*

**Amy Kinsman**

Firm: **Cafaro Greenleaf**  
Broker-Dealer / RIA: *American Portfolios*

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Firm: **Plante Moran Financial Advisors**  
Broker-Dealer / RIA: *Plante Moran Financial Advisors*

**Vincent Ko**

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Broker-Dealer / RIA: *Precept Advisory Group*

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Firm: **CBIZ Retirement Plan Services**  
Broker-Dealer / RIA: *CBIZ Financial Solutions, Inc.*

**Matt Kory**

Firm: **PANGEA Retirement Partners**  
Broker-Dealer / RIA: *LPL Financial*



**Chris Krueger**

Firm: **MHK Retirement Partners**  
Broker-Dealer / RIA: *Private Advisor Group*

**Christopher Kulick, Jr.**

Firm: **CAPTRUST**  
Broker-Dealer / RIA: *CAPTRUST*

**Vanessa Larareo**

Firm: **SageView Advisory Group**  
Broker-Dealer / RIA: *Cetera*

**Jasper Mallard**

Firm: **Hub International Investment Services**  
Broker-Dealer / RIA: *Cambridge Investment Research*

**Damon Marra**

Firm: **Retirement Plan Consulting Group**  
Broker-Dealer / RIA: *LPL Financial*

**Jared Marshall**

Firm: **Merrill Lynch**  
Broker-Dealer / RIA: *Merrill Lynch*

**Joseph T. Matis**

Firm: **Morgan Stanley**  
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Broker-Dealer / RIA: *Independent Financial Partners*

**David Morehead**

Firm: **Retirement Benefits Group**  
Broker-Dealer / RIA: *LPL Financial*

**Travis Power**

Firm: **Bukaty Companies Financial Services**  
Broker-Dealer / RIA: *Resources Investment Advisors*

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**Stephanie Reese**

Firm: **Tutton Insurance Services, Inc.**  
Broker-Dealer / RIA: *Pensionmark Financial Group*

**Jim Reimold**

Firm: **Mid-Atlantic Planning Services**  
Broker-Dealer / RIA: *LPL Financial*

**Tony Robke**

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Firm: **Morgan Stanley**  
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**Richard Sauerman**

Firm: **NFP**  
Broker-Dealer / RIA: *NFP Retirement*

**Mark Schatzel**

Firm: **The Beacon Group**  
Broker-Dealer / RIA: *LPL Financial*

**Jason Schultz**

Firm: **Morgan Stanley**  
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**Brian Wiese**

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Broker-Dealer / RIA: *LAMCO Advisory Services, Inc.*

# Recognizing leadership and commitment to clients' retirement plan needs

Congratulations to the NAPA Top Retirement Plan Advisors under 40 winners from Wells Fargo Advisors.



**Dominic Corleto**

Rouleau Bevans Corleto  
Investment Consulting Group  
*Wells Fargo Advisors  
Eugene, OR*



**Christian Garces**

Key Client  
Financial Advisors, LLC  
*Wells Fargo Advisors  
Financial Network  
Fairfield, NJ*



**Erin Hall**

Bermudez/Hall Retirement  
Plan Group  
*Wells Fargo Advisors  
Rolling Hills Estates, CA*



**Nicholas F. Ravella**

King Wagle Smith Financial  
Consulting Group  
*Wells Fargo Advisors  
Pittsburgh, PA*

As a NAPA Top 75 Retirement Plan Advisors under 40 recipient, you reflect Wells Fargo Advisors' long tradition of working with clients to create solutions for their specific retirement needs.

To learn more about the NAPA Top Advisors under 40 and their impact as future leaders of the retirement plan advisor industry, please visit [napa-net.org](http://napa-net.org).

The National Association of Plan Advisors (NAPA) Top 75 Advisors Under 40 were nominated and voted on by industry peers and selected by a NAPA panel of judges based on information about their practice, experience, and accomplishments as provided by nominees. Investment performance is not an explicit component.





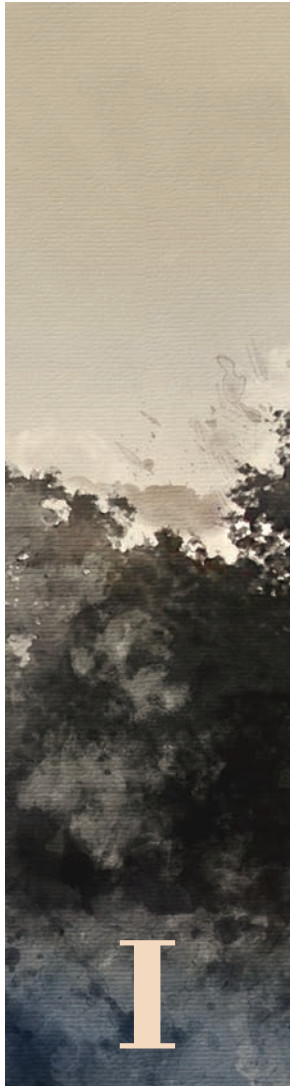
FEATURE



# Building A Moat

That's how nonqualified plans can complement  
an advisor's business. **BY JUDY WARD**





**I**ntensifying competition for 401(k) clients has driven many plan advisors' fees down lately, NAPA President Jeff Acheson says. "So now they're asking, 'What else can I do to develop more relationships and offer more services to my existing clients?'" says Acheson, Certified Private Wealth Advisor with the Advanced Strategies Group in Powell, Ohio. "It's about not being commoditized as an advisor."

Acheson suggests that advisors think about adding work with nonqualified deferred compensation plans (NQDCs) to their service model, as he has. "For advisors competing against other advisors for business, similarities don't sell — differences do," he says. An advisor knowledgeable about NQDC plans can add another dimension, he says: Talking to existing and potential clients about utilizing a nonqualified plan as a way to better recruit, reward, and retain key employees, while also giving those key employees more opportunity to defer income and boost their saving for retirement.

"Think of the client's 401(k) plan as a castle. By adding a nonqualified plan, I'm building a moat around it," Acheson says. "The more things that I'm doing for that employer, the less likely I am to lose that relationship to another advisor. Because I can serve both the qualified and nonqualified plans, I keep the 'barbarians at the gate.' Plus I'm getting paid to deepen my relationship with that client, through the key executives."

## A Bridge

For Acheson, qualified plans make up 50% of his work and nonqualified plans another 20%, with wealth management accounting for the other 30%. There's a synergy in that mix, he says: Top executives generally sit on the qualified plan's oversight committee, participate in the nonqualified plan, and are potential wealth management clients as well. "For me, nonqualified plans are a bridge between the qualified plan and my work in wealth management," he says. "When I work on a nonqualified plan, I have a very personal and specific reason to go talk to the highly compensated executives. Talking about the nonqualified plan often flows naturally into a discussion of how that ties into what the executives are doing independently, outside the plans, with their planning and other investments."

Acheson thinks that the Tax Cuts and Jobs Act — which as initially proposed would have killed deferred compensation plans — wound up benefitting NQDC plans. "Both the initial House and Senate versions of the legislation would have decimated nonqualified plans, but they quickly backed away from that," he says. "And the end result has actually had the opposite effect on nonqualified plans." For example, the new limits on state and local income tax deductions may motivate more eligible employees to think about their company's deferred compensation plan. "If they live in a high-tax state, that may cause them to say, 'I want to find ways to defer more income,'" he says. Plus, he says that lower corporate tax rates make the math work better for employers.

Principal Financial sees plenty of potential now for advisors to help employers create new nonqualified plans, says Gregory Linde, Principal's SVP-Individual Life in Des Moines, Iowa. "We think there's a lot of opportunity in the smaller market, at companies with less than 1,000 employees," he says. "With the improving economy and the tighter labor market, companies are having more trouble attracting and retaining key executives. Putting in a good nonqualified plan allows smaller employers to compete for talent on a more even footing with larger companies."

"A nonqualified plan has to evolve as the employer evolves," Linde says. "Some plans have not been kept up to date. Helping a client do that is a way for advisors to differentiate themselves to employers and extend that relationship. The key opportunity is for them to help an employer on a more holistic basis if they're providing advice on both the qualified and the nonqualified plan."

Ryan Campagna, one of this year's NAPA Top Advisors Under 40 (a.k.a. "Young Guns") and a Wakefield, Massachusetts-based senior vice president at Sentinel Benefits & Financial Group, works with both types of plans. "The more you can differentiate yourself as an advisor, the better," he says. "If I can help a sponsor solve the unique issues it has with the nonqualified plan — which not a lot of advisors can help them solve — that can help set me apart."



**“Very few people ask for a nonqualified plan by name. The conversation more likely starts with, ‘Ryan, here’s what I’m ticked off about...’”**

— Ryan Campagna, Sentinel Benefits & Financial Group



Asked how to broach the topic of helping a client start a nonqualified plan, Campagna says he looks first for indications of the need for one at a particular client. “Sometimes you will hear the employer talk about how it wants to look at providing an additional benefit to help retain key talent. Sometimes it’s key people complaining about taxes or talking about how they want to defer more of their compensation,” he explains. “It’s more about looking for the warning signs, not about just trying to promote it. And very few people ask for a nonqualified plan by name. The conversation more likely starts with, ‘Ryan, here’s what I’m ticked off about...’”

Working on a nonqualified plan can be very challenging because of both the considerable flexibility and the expertise needed, Campagna says. “Within the boundaries of the plan documents and the typical plan design, there are only so many ways that you can design a qualified plan. With a nonqualified plan, you can design it any way you want, so the possibilities are limitless,” he says. “Also, if you want to advise nonqualified sponsors on areas like how to fund their plan, you’re looking at whether to fund it with mutual funds or with life insurance. Now you are bringing in the need for insurance expertise. If you are not comfortable that you’re an expert in areas like that, you have to look to partner with someone who is.”

### **Where You Can Add Value**

In its work as a nonqualified plan provider, Walnut Creek, California-based Newport Group, Inc. utilizes a diagnostic tool that looks at a plan’s status in five major areas: plan design, investment menu, funding strategy, recordkeeping platform, and participant education/communications. “Ninety percent of the time with new clients, we find significant

deficiencies for a plan in one or more of those areas,” Senior Vice President Mike Shannon says. He and others talked about where a plan advisor could add value on the following four issues.

#### **PLAN DESIGN**

“It’s all about constructing the plan design to meet the sponsor’s goals and objectives *today*,” Campagna says. “Oftentimes, you find that they have an antiquated plan design — there is often a ‘set it and forget it’ approach. As an advisor, you want to make sure that the plan they have today accomplishes what the employer wants it to accomplish.”

Nonqualified plans often get designed originally with a lot of input from the key executives who’ll participate. “If the plan was set up 10 years ago for the CEO, CFO, and CIO, today the company may have three different people in those jobs,” he says. “Is the plan still relevant for them?”

Advisors who become involved in the decisions regarding the design of a nonqualified deferred compensation plan need to keep in mind that highly technical rules in Code Section 409A apply, says attorney Bruce McNeil, a partner at The Wagner Law Group in Boston. These rules differ from the rules that apply to qualified plans, he says, and an advisor should get someone with legal expertise in that area involved. “If the plan is designed in a way that does not satisfy 409A, and the IRS or an auditor finds it, the plan participants can be subject to significant compliance-failure penalties under Section 409A,” he explains. “The plan participants can be subject to taxation on their deferred compensation at the highest tax rate, plus an additional excise tax of 20% on the amount involved. The participating executives would be unhappy about that — and if they were unhappy, others with the company would be unhappy, too.”

### FUNDING AND INVESTMENTS

In a nonqualified plan, deferred compensation does not have to be set aside by an employer, but employers have the option to set money aside in a rabbi trust, McNeil says. Then those assets get invested pursuant to the rabbi trust's terms. "That is where the advisor has an opportunity to help the employer invest the assets and increase the benefits provided by the plan," he says. "Those investments may look exactly like the investment options available under the qualified plan, or they may look very different."

Employers often seek to set aside invested assets to address the nonqualified plan's liabilities, Linde says. "There's a need to review whether the employer has appropriately financed its plan," he says, "to make sure that the employer understands the future liabilities that exist, and has made conscious decisions about if it wants to finance the liabilities — and if so, how to finance the liabilities."


Frequently the same level of oversight has not been brought to investing nonqualified plan assets as in qualified plans — and that's an opportunity for advisors, Shannon says. "Oftentimes the plan provider will say something like, 'Here's the 50 investments we offer,' and the plan will utilize all of them. We like to see the same level of rigor with investment oversight that we see in qualified plans."

### VENDOR SELECTION

There is a much smaller universe of providers for nonqualified plans than qualified plans, Acheson says. "If you count the prominent players in the nonqualified space, it is probably less than 15," he says. "But they all differ in what they offer. An advisor can position himself or herself as a concierge to introduce the sponsor to the right third-party vendors."

Don't let the tail wag the dog in picking a vendor for a nonqualified plan, Shannon recommends. "What I mean is that the recordkeeping platform's capabilities should not limit plan design for a nonqualified plan, just because there are certain things the platform can't handle," he says. "You need to look for a platform built specifically for nonqualified plans."

### EDUCATION

An advisor can make a meaningful contribution by helping eligible employees understand how the nonqualified plan works and how it differs from the qualified plan, Shannon says. "When we do surveys, it's always true that one of the top reasons eligible executives don't participate in their nonqualified plan is that they don't understand the plan," he says. "Just because someone is an executive doesn't mean he or she will take the time to understand the plan on their own. In actuality, they probably have less time to spend understanding the plan." 

» Judy Ward is a freelance writer who specializes in writing about retirement plans.



For advisors interested in this market, NAPA soon will launch a certificate program and an annual conference focused on nonqualified plans.

The September 23-25 conference in Chicago will include a bootcamp for advisors seeking an educational certificate, a full day of conference sessions on topics like nonqualified plan design, best practices in business development, and opportunities to network with NQ industry providers.

Additional information about the Nonqualified Plan Advisor Conference is available at <http://napanqdcforum.org>.



FEATURE



# RECOMMENDING ROLLOVERS

## WHAT ADVISORS (STILL) SHOULD KNOW AND DO.

BY FRED REISH & JOSHUA WALDBESER

**L**ove it, hate it, or somewhere in between, everyone can agree that the 5th Circuit's decision to vacate the DOL fiduciary rule has created uncertainty about a number of issues. One of them is the nature of an advisor's<sup>1</sup> obligations when recommending a rollover from a retirement plan to an IRA. Separate and apart from the rule, it is important not to lose sight of other sources of regulation. As applicable to different types of advisors, FINRA and the SEC have both issued guidance on this important topic.

In this article, we hope to help advisors cut through the confusion. Let's start by discussing the effect of the 5th Circuit's ruling.

### REINSTATED DOL GUIDANCE

The 5th Circuit's ruling says that the rule is vacated *in toto*, meaning entirely.<sup>2</sup> This means the narrower 1975 DOL regulation defining "fiduciary" investment advice still applies. It also means that the Best Interest Contract (BIC) Exemption is not available.

#### *The 1975 Regulation*

The now-reinstated 1975 regulation says that, to be an advice fiduciary, a person must provide investment advice that satisfies five distinct requirements —

one of which is that the advice must be provided on a "regular basis." If an advisor doesn't have an existing relationship with the plan, a recommendation of an IRA rollover would not generally satisfy the "regular basis" prong, and possibly others. In that case, because the recommendation is not fiduciary advice, ERISA's duties of prudence and loyalty don't attach, and the advisor does not commit a prohibited transaction for "fiduciary self-dealing" by recommending a rollover to an IRA that will pay the advisor additional compensation.

In our experience, RIAs usually act as fiduciaries to their retirement plan clients. For brokers, the issue may be more "facts-and-circumstances" driven. But both

types of advisors can be advice fiduciaries under the functional five-part test, which is important in light of the discussion below.

#### *Advisory Opinion 2005-23A*

Another effect of the 5th Circuit's ruling is that previous DOL guidance on IRA rollovers is reinstated. In Advisory Opinion 2005-23A, the DOL adopted a position that a person recommending an IRA rollover would not be acting in a fiduciary capacity so long as that person is not otherwise a plan fiduciary. However, it went on to indicate that if the person is otherwise a plan fiduciary, such a recommendation (including merely "responding to participant questions" about the advisability of distribution options) would



constitute an exercise of fiduciary discretion over plan management. In this latter case, ERISA's duties of prudence and loyalty, and the requirement to avoid prohibited self-dealing, would apply.

Particularly on the second point, the DOL's position is controversial. Under ERISA, only certain functions are "fiduciary" in nature, and fiduciary status attaches only "to the extent" a fiduciary function is being carried out. This is understood to mean that whether a particular function is a fiduciary function should not depend on the person's fiduciary status as to other

may, according to the advisory opinion, constitute a prohibited transaction. The BIC Exemption is gone, and "pre-rule" prohibited transaction exemptions that are still on the books don't provide clear relief for rollover recommendations. So, for advisors who are otherwise plan fiduciaries — say, advisors to the plan — the question is: what now?

Fortunately, the DOL has recognized this vacuum. On May 7, 2018, it issued Field Assistance Bulletin (FAB) 2018-02 announcing a temporary enforcement policy as to prohibited transactions. The FAB is applicable retroactively to the rule's implementation date of June 9, 2017, and

transactions will not be assessed under the same conditions that preclude DOL enforcement. Remember that the BIC Exemption's impartial conduct standards require that:

- advice be in the "best interest" of the investor;
- the compensation to the advisor and firm, their affiliates, etc. not exceed a reasonable level (this is an industry standard); and
- no misleading statements be made to the investor.

The FAB does not bind private parties, meaning that it cannot directly prevent ERISA fiduciary breach claims. However, the "best interest" standard is functionally the equivalent of ERISA's prudence and loyalty requirement. A fiduciary advisor who satisfies the "best interest" and other impartial conduct standards is unlikely to have breached any ERISA-imposed duties.

So, even though the BIC Exemption has been set aside along with the rest of the fiduciary rule, what the FAB essentially does is to provide for non-enforcement where the impartial conduct standards set forth in the BIC Exemption are satisfied. Since the BIC Exemption was the only "clearly applicable" exemption for IRA rollovers, it contains the most reliable guidance we have on what the DOL thinks "best interest" means in the context of a rollover recommendation.

### *BIC 'Best Interest'*

Under the BIC Exemption, to determine whether an IRA rollover would be in the investor's "best interest," the advisor would have been required, *at a minimum*, to consider for the plan and the IRA the:

- investment options;
- fees and expenses; and
- services.

This would require the advisor to request certain information about the plan (including the "comparative chart" of investment options provided to defined contribution plan participants)<sup>3</sup> and consider the investment objectives, risk tolerance, financial circumstances and needs of the participant before making a recommendation. For example, IRAs usually offer a broader range of investment options than plans, unless the plan has a brokerage window. But in applying this



matters. Furthermore, the characterization of a rollover recommendation as a discretionary act is arguably dubious.

However, this is the DOL's position, and the safe approach is to follow the guidance in the advisory opinion until different guidance is issued. "Existing" fiduciary advisors to plans should therefore expect that they will be considered fiduciaries when recommending IRA rollovers, and conduct themselves accordingly.

### TRANSITION RELIEF

Unless the IRA pays the advisor and his or her firm the same level of compensation as they received under the plan (or less), a rollover recommendation made by a fiduciary advisor

prospectively until further exemptions or guidance are issued. In relevant part, it states that:

*...the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted in the BIC Exemption...* (Emphasis added).

The FAB is also binding on the IRS, meaning that excise taxes for prohibited

# “THE SAFE APPROACH IS TO FOLLOW THE GUIDANCE IN THE ADVISORY OPINION UNTIL DIFFERENT GUIDANCE IS ISSUED.”

factor, an advisor should consider whether the investor actually would benefit significantly from access to investments that aren't available under the plan. If not, this factor may not favor the IRA.

The preamble of the BIC Exemption also encouraged the examination of those additional factors set forth in FINRA Regulatory Notice 13-45, which is discussed below.

## OTHER STANDARDS

FINRA and SEC conduct standards, as applicable, still apply separately to advisors whether or not they are ERISA fiduciaries.

### FINRA

In Notice 13-45, FINRA explained that IRA rollover recommendations are typically securities recommendations subject to FINRA rules — and thus must be “suitable” for the investor. It then delineates seven factors that brokers should take into account. The first three — investment options, fees and expenses, and services — overlap the specifically required “best interest” factors. The other four factors are:

- penalty-free withdrawals (for investors between ages 55 and 59½, which are available from plans but not IRAs);
- creditor protections (which may be more limited for IRAs);
- required minimum distributions (which can be deferred under plans, but not IRAs, for age 70½ investors who remain employed); and
- employer stock (favorable tax treatment vs. diversification).

This is not an exhaustive list and other

factors may be relevant in many cases. For example, say the investor needs to take periodic withdrawals, but the plan doesn't offer partial withdrawals, or does but charges check-writing fees. Assuming that's not the case for the IRA, the additional “distribution flexibility” may be a factor that favors the rollover.

### SEC

In 2015, the SEC launched its Retirement-Targeted Industry Reviews and Examinations (“ReTIRE”) initiative. SEC materials on ReTIRE explain that an IRA is a “type of account” which any advisor subject to SEC registration must have a “reasonable basis” to recommend, citing to Notice 13-45 as an example of the rules that may attach to such recommendations.

## TYING IT ALL TOGETHER


Advisors should consider whether they will be treated as ERISA fiduciaries when recommending IRA rollovers, due to “existing” plan fiduciary status.

If the answer is no, then complying with FINRA and/or SEC rules, as applicable, may be all that is necessary. Despite many similarities, FINRA “suitability” and the SEC “reasonable basis” standards may arguably be somewhat lower than “best interest.” However, this is largely a distinction without a difference. After all, an advisor needs to gather the relevant information and analyze it, and consider the investor's personal circumstances, to make a “suitable” recommendation of an IRA rollover, or form a “reasonable basis” for such a recommendation, anyway.

What if the answer is yes? We've explored why adherence to the “best

interest” and other impartial conduct standards will protect advisors from DOL enforcement and excise taxes for prohibited transactions. We've noted that this should also help ensure that the advisor's ERISA fiduciary duties have been satisfied, so as to avoid breach claims. And because “best interest” is a similar (even if somewhat higher) standard than “suitability” or “reasonable basis,” it seems safe to presume that satisfying “best interest” should preclude violations of FINRA and SEC rules as well.

This is the approach we recommend. An advisor who gathers and analyzes the necessary information, taking into account all the factors above (and others that are relevant), and recommends IRA rollovers only where they are in the investor's best interest, will be most protected against liability from all sides.

As a final note, we should point out that all advisors who recommend IRA rollovers, whether or not as ERISA fiduciaries, need to maintain records and document the reasons for those recommendations, in each case in accordance with all applicable standards. In the event of a dispute or regulatory examination, an advisor's process is only as good as can be shown. 

» Fred Reish is a partner in the Drinker Biddle & Reath law firm. He chairs the firm's Financial Services ERISA Team and co-chairs the Best Interest Compliance Team.

» Joshua Waldbeser is a partner in the Drinker Biddle & Reath law firm. He is part of the firm's Financial Services ERISA Team and is a member of the firm's Best Interest Compliance Team.

<sup>1</sup>For simplicity, we use the term “advisor” to refer to broker-dealer registered representatives and individual adviser representatives of RIA firms alike.

<sup>2</sup>As of the current date, the 5th Circuit's order officially vacating the fiduciary rule has not yet been issued, but we are writing this article as if it has (and presuming that it will).

<sup>3</sup>The DOL has indicated that benchmarks and “general” industry data may be relied upon in some cases where the participant refuses to provide plan-specific information.





# 'MULTI' FACETED

## 2018 Top DC Advisor Multi-Office Firms

*By Nevin E. Adams, JD*


**F**rom the day we launched our call for Top DC Advisor Teams, there has been an interest in a related compilation – one that captures the defined contribution (DC) assets of an entire firm, or a multi-office arrangement.

During our call for Top DC Advisor Teams last year, a number of firms provided this information – but the focus of that initial list was on individual teams.

The list is based on self-reported DC assets under advisement (AUA) as of Dec. 31, 2017, for the organizations that submitted data. Firms listed had to have more than one office/physical location to be included. Additionally, for this inaugural list, we decided that every multi-office firm should have in excess of \$1 billion in DC assets under advisement.

Sure, we know it's not just about the numbers – but the reality is that advisors are having a huge impact every single day, not only on the quality of retirement plan advice, but in building a more financially secure retirement for millions of Americans.

We appreciate the commitment and hard work of the teams acknowledged – and are proud to have the opportunity to share it here.

In future publications, this multi-office listing will accompany that of the individual teams. If your firm was not included, and you'd like to be considered for future lists, please email me at [nevin.adams@usaretirement.org](mailto:nevin.adams@usaretirement.org). 

Advisor Firm	City / State	Website	Number of individual offices	*Total asset value of the defined contribution plans supported	*Total number of defined contribution plans supported	*Total participants covered by the defined contribution plans supported
<b>RPAG</b>	Aliso Viejo, CA	<a href="http://www.rpag.com">http://www.rpag.com</a>	450	\$382,598,260,333	36,872	4,070,194
<b>GRP Advisor Alliance</b>	Carlsbad, CA	<a href="http://www.grpaa.com">http://www.grpaa.com</a>	120	\$220,000,000,000	25,000	3,200,000
<b>CAPTRUST</b>	Raleigh, NC	<a href="http://www.captrustadvisors.com">http://www.captrustadvisors.com</a>	29	\$203,720,207,284	2,078	4,600,000
<b>NFP</b>	Aliso Viejo, CA	<a href="http://nfp.com">http://nfp.com</a>	25	\$135,000,000,000	1,391	1,400,000
<b>Morgan Stanley</b>	Purchase, NY	<a href="http://Morganstanley.com">http://Morganstanley.com</a>	187	\$129,000,000,000	23,000	3,200,000
<b>UBS</b>	Weehawken, NJ	<a href="https://www.ubs.com/rpcs">https://www.ubs.com/rpcs</a>	297 (U.S.)	\$112,119,740,791	12,745	2,100,000
<b>Cammack Retirement Group</b>	New York, NY	<a href="http://www.cammackretirement.com">http://www.cammackretirement.com</a>	3	\$104,000,000,000	315	900,000
<b>Wells Fargo Advisors</b>	St. Louis, MO	<a href="http://wellsfargoadvisors.com">http://wellsfargoadvisors.com</a>	N/A	\$85,161,145,056	47,012	N/A
<b>SageView Advisory Group</b>	Irvine, CA	<a href="http://www.sageviewadvisory.com">http://www.sageviewadvisory.com</a>	22	\$84,025,000,000	1,221	550,000
<b>Independent Financial Partners</b>	Tampa, FL	<a href="http://www.ifpartners.com">http://www.ifpartners.com</a>	97	\$41,440,000,000	1,640	400,000
<b>Cetera Financial Group</b>	El Segundo, CA	<a href="http://www.cetera.com">http://www.cetera.com</a>	N/A	\$28,500,000,000	13,750	unknown
<b>Commonwealth Financial Network</b>	Waltham, MA	<a href="http://www.commonwealth.com">http://www.commonwealth.com</a>	902	\$16,763,988,814	5,945	158,635
<b>Centurion Group, LLC</b>	Plymouth Meeting, PA	<a href="http://www.centuriongroupllc.com">http://www.centuriongroupllc.com</a>	3	\$16,200,000,000	180	545,000
<b>CBIZ Retirement Plan Services</b>	Cleveland, OH	<a href="http://www.cbiz.com/retirement">http://www.cbiz.com/retirement</a>	16	\$14,752,180,591	959	252,500
<b>Marsh &amp; McLennan Agency Retirement Services</b>	Boston, MA	<a href="http://www.mma-ne.com">http://www.mma-ne.com</a>	11	\$13,300,000,000	892	330,000
<b>Lockton Retirement Services, Northeast</b>	Washington, DC	<a href="https://www.lockton.com/retirement-overview">https://www.lockton.com/retirement-overview</a>	5	\$13,000,000,000	171	N/A
<b>Sheridan Road Financial</b>	Northbrook, IL	<a href="http://sheridanroad.com">http://sheridanroad.com</a>	9	\$12,260,227,301	277	400,000
<b>Newport Capital Group</b>	Red Bank, NJ	<a href="http://www.newportcapitalgroup.com">http://www.newportcapitalgroup.com</a>	6	\$10,800,000,000	126	127,785
<b>Resources Investment Advisors</b>	Overland Park, KS	<a href="http://www.riaadvisor.com">http://www.riaadvisor.com</a>	22	\$10,800,000,000	1,031	120,000
<b>Institutional Investment Consulting</b>	Bloomfield Hills, MI	<a href="http://www.iic-usa.com">http://www.iic-usa.com</a>	3	\$10,600,000,000	43	122,000
<b>Compass Financial Partners</b>	Greensboro, NC	<a href="http://www.CompassFP.com">http://www.CompassFP.com</a>	4	\$8,900,000,000	142	98,000
<b>Blue Prairie Group</b>	Chicago, IL	<a href="http://www.blueprairiegroup.com">http://www.blueprairiegroup.com</a>	7	\$7,989,000,000	96	100,000
<b>PFE Advisors, Inc.</b>	Southborough, MA	<a href="http://pfegroup.com">http://pfegroup.com</a>	2	\$7,800,000,000	158	150,000
<b>Qualified Plan Advisors</b>	Overland Park, KS	<a href="http://qualifiedplanadvisors.com">http://qualifiedplanadvisors.com</a>	11	\$7,800,000,000	410	70,900
<b>Strategic Retirement Partners</b>	Shorewood, IL	<a href="http://www.srpretire.com">http://www.srpretire.com</a>	15	\$7,000,000,000	600	100,000
<b>MRP</b>	Denver, CO	<a href="http://www.MRPretire.com">http://www.MRPretire.com</a>	2	\$5,200,000,000	209	58,000
<b>intellicents</b>	Albert Lea, MN	<a href="http://intellicents.com">http://intellicents.com</a>	3	\$2,994,825,000	200	37,500
<b>Cafaro Greenleaf</b>	Red Bank, NJ	<a href="http://www.CafaroGreenleaf.com">http://www.CafaroGreenleaf.com</a>	5	\$2,470,000,000	130	35,000
<b>Bukaty Companies Financial Services</b>	Overland Park, KS	<a href="http://www.bukatyfs.com">http://www.bukatyfs.com</a>	5	\$2,250,000,000	305	50,000
<b>Plan Sponsor Consultants</b>	Alpharetta, GA	<a href="http://www.plansponsorconsultants.com">http://www.plansponsorconsultants.com</a>	5	\$1,650,000,000	164	43,500
<b>The Trust Company of Tennessee</b>	Knoxville, TN	<a href="http://www.thetrust.com">http://www.thetrust.com</a>	3	\$1,351,000,000	189	25,377

\*as of 12/31/17



# A New '10-10-90' Plan

Are all of your clients profitable and knowledgeable? Do you enjoy working with all of them?



BY STEFF CHALK



**A**s industry practitioners and retirement plan specialists we maintain more than a passing interest in seeing that plan participants are collectively progressing toward achieving better outcomes.

Whether we help 85% of the workforce at a multinational company get retirement ready, or we help a local company's third-shift workers feel comfortable with paying off credit card debt before saving for retirement, we are all in this together. Plan advisors, wholesalers, recordkeepers and broker-dealers — we are all working for Americans' retirement.

## Our Collective Rearview Mirror

As we barrel down the road of "everyone's future retirement," we can look back at a long list of experiences that have carried us to this point. To name just a couple:

- **Auto-enrollment** — Without this ground-breaking innovation, the U.S. workforce would be much less prepared for retirement.

- **The "90-10-90" Formula** — In his book, *Save More Tomorrow*, Shlomo Benartzi suggested that 90% of eligible employees should be saving for retirement; 10% is the low-water mark for what participants should be deferring; and 90% of savers should be utilizing a managed account structure for investments. Thus, "90-10-90" became a goal for achieving plan success. Advisors and wholesalers have been extolling its virtues to clients and prospects ever since.

## What's Immediately Ahead?

In some cases, retirement plan fiduciaries are aware of what they want and need. In other cases, they are not. Based upon anecdotal experience, I estimate less than 50% of plan fiduciaries are knowledgeable. The silver lining in that number is that today, nearly 100% of plan fiduciaries are aware that they have work to do. They have been awakened to their own knowledge gap.

They may not know exactly what they need to learn, but they are aware that

they need to be better educated about their fiduciary duties and responsibilities.

Plan advisors, recordkeepers and investment managers should be quietly rejoicing about this. The message is finally being heard by those who need to hear it: the individuals who are responsible for outcomes at companies that sponsor a retirement plan.

## Down the Road


Responsible plan fiduciaries are becoming discerning purchasers of retirement-based products and services. So seize the moment.

Know your customer — not in the traditional sense, but as an offensive strategy. Know your customer to protect and grow your business and client base. A good practice would be to identify clients that fall into these three problem areas:

- not profitable for you
- not knowledgeable plan fiduciaries
- you do not enjoy working with them

Most experienced advisors can easily identify 10% of their client base that falls squarely into one of these areas. Once you have identified that 10%, immediately raise the fee to those clients by 10%. The logic here is simple. First, if you don't enjoy working with them or the accounts are not profitable, then losing them may result in a net gain. And second, if a client is not knowledgeable, then add fiduciary education to your business model for that client to justify the 10% fee increase.

Repeat this process every 90 days — or until all your clients have made the transition to being profitable, knowledgeable clients you enjoy working with.

This strategy can become your own "10-10-90" plan for success in your practice. Don't let the race to the bottom drive your business. Treat your business as though it is your own! 

» Steff C. Chalk is the Executive Director of The Retirement Advisor University (TRAU), The Plan Sponsor University (TPSU) and 401kTV.



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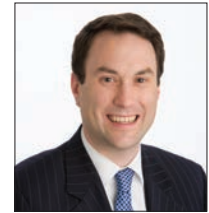
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*\*as of June 21, 2018*

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To learn more contact [SAMTeam@usaretirement.org](mailto:SAMTeam@usaretirement.org)





BY DAVID N. LEVINE

# Our Baskin-Robbins Industry

31 flavors of fiduciary for all!

**W**ell, here we go again. After years and years spent on the fiduciary rule, we're back to the start. It truly is *Groundhog Day*. At this point, we can all make guesses, but I'm going to refrain from suggesting where the Department of Labor, Securities and Exchange Commission, state legislatures, or other self-regulatory bodies are going to land with their different flavors of a fiduciary rule. Instead, for now we'll focus on a few key considerations plan advisors and their clients now face in light of our new unknown fiduciary landscape.

First, regardless of whether you grimaced or rejoiced at the 5th Circuit's decision vacating the DOL's fiduciary rule, as an advisor, you now face a key decision tree — what services was I providing as a fiduciary? Are some or all of these services still fiduciary services? Do I still want to say I'm a fiduciary for some or all of these services? Just as under the DOL fiduciary rule you had to segment each activity, fiduciary rule de-implementation works the same way. It doesn't need to be too hard or require that much effort, but it isn't always as easy as waving a magic wand!

Second, beyond the basic decision tree, there is a business and marketing side to consider. How have you positioned yourself with your clients? Some would argue that the DOL fiduciary rule permanently transformed the market, while others might not. Regardless, many advisors have now told their plan sponsor clients that they are fiduciaries. If you decide that you will apply a different standard of care to one or more services going forward, how do you explain this change to your clients?

Third, how do you avoid confusion going forward? In the late 1990s and early



2000s, many registered investment advisors made names for themselves as acting as fiduciaries for their clients. The market then adapted with a wide range of service providers calling themselves fiduciaries. They created a world in which what it meant to be a fiduciary varied widely among service providers. This same world is likely to be our reality again for the foreseeable future; advisors will need to be able to clearly explain how the providers to their clients are or are not fiduciaries — as well as what that term means in each case.

Fourth, while the DOL fiduciary rule triggered many business changes, two services received significant attention: in-plan advice and distribution advice. Some advisors and other service providers saw the change in the fiduciary rule as an opportunity to begin or enhance their in-plan advice and distribution

advice services as ERISA fiduciaries. Others decided not to provide these services. Now some who went into one or both of these areas are revising their service models, with some providers ceasing their fiduciary status and others maintaining fiduciary status for some (but maybe not all) of these services. An advisor's insight and guidance on what these changes mean, and how they are disclosed, is more essential than ever.

These four considerations are just the tip of the iceberg. With the 31 flavors — and more — of what it means to be a fiduciary floating around, advisors need to evaluate their own practices as well as continue to refine their services to their clients in this constantly changing world. **N**

» David N. Levine is a principal with the Groom Law Group, Chartered, in Washington, DC.

# Crisis ‘Management’

I shudder when I hear an industry leader or advisor proclaim that there is a retirement crisis...



BY NEVIN E. ADAMS, JD

**R**arely a week goes by that a headline, survey or academic paper doesn't proclaim the reality of a retirement crisis with the certainty generally reserved for topics like the existence of gravity, or the notion that the sun will rise in the east.

And certainly based on the data cited, there would seem to be a compelling case that trouble lies ahead for many. That said — as was pointed out by Andrew Biggs at the recent Plan Sponsor Council of America conference — the reality is that good, reliable data is hard to come by. Indeed, many of the reports cited in those headlines rely on what you would expect to be a reliable source; the Census Bureau's Current Population Survey, or CPS. Unfortunately, that reliable source turns out to be not-quite-so-reliable. It suffers from relying on what people tell the survey takers, but perhaps more significantly, Biggs, resident scholar at the American Enterprise Institute, pointed out that the survey only counts as income in retirement funds that are paid regularly — like a pension. “Irregular” withdrawals from retirement accounts — like IRAs and 401(k)s — aren't included.

In fact, when you compare what retirees report to the IRS with what they report to the Census Bureau, only 58% of private retirement benefits are picked up, according to Biggs. Now, who do you suppose gets a more accurate read; the IRS or the Census Bureau? And yet, the CPS data serves as the basis for a huge swath of academic research on retirement savings.

## Social ‘Security’

Biggs noted that IRS data also draws into question some of the “common wisdom” on things such as dependence on Social Security. Consider that the Social Security Administration — who arguably has “skin” in the game — claims that a third of retirees are heavily dependent — to the tune of 90% or more of their income — on Social

Security. However, a study based on IRS data found that only 18% of retiree households are heavily dependent on Social Security, and just one in eight retirees receive 90% or more of their income from Social Security. Don't get me wrong — Social Security is clearly a vital and essential component of our nation's retirement security — but the IRS data indicates that, for most, it isn't a primary source at present.

Pundits have long worried that retirees wouldn't have accumulated enough to live on in retirement, but data suggests that today's retirees are actually in pretty good shape. In addition to the IRS data

adjusted basis. Even at an 80% replacement rate, 67% of the lowest-income quartile would still meet that threshold — and that's making no assumptions about the positive impact of plan design features like automatic enrollment and annual contribution acceleration.

Not that there isn't plenty to worry about; reports of individuals who claim to have no money set aside for financial emergencies, the sheer number of workers entering their career saddled with huge amounts of college debt, the enormous percentage of working Americans who (still) don't have access to a retirement

“Responsible plan fiduciaries are becoming discerning purchasers of retirement-based products and services. So seize the moment.”


cited above, that sentiment is borne out by any number of surveys (perhaps most notably the Retirement Confidence Survey, published by the nonpartisan Employee Benefit Research Institute (EBRI) and Greenwald Associates) that continue to find that those already in retirement express a good deal more confidence about their financial prospects than those yet to cross that threshold. And certainly, the objective data available to us suggests that today's retirees are better off than previous generations, though their retirement — and potential health issues — may at some point take a toll.

Still, in 2014, EBRI found that current levels of Social Security benefits, coupled with at least 30 years of 401(k) savings eligibility, could provide most workers — between 83% and 86% of them, in fact — with an annual income of at least 60% of their preretirement pay on an inflation-

plan at work (though not as enormous as some claim)...

That said, I shudder every time I hear an industry leader or advisor stand up in front of an audience and proclaim that there is a retirement crisis — because, however well-intentioned — they are almost certainly providing “aid and comfort” to those who would like to do away with the current private system as a failure, not a work in process.

What seems likely is that at some point in the future, some will run short of money in retirement, though they may very well be able to replicate a respectable portion of their pre-retirement income levels, certainly if the support of Social Security is maintained at current levels.

However, what seems even more likely is that those who do run short will be those who didn't have access to a retirement plan at work. 





# Case(s) in Point

Excessive fee litigation comes from a new direction, another one targets plan advisor, Wildcats win 403(b) suit, and custodian pushes back in Vantage Benefits suit.

## SUIT ROUTE

### New excessive fee litigators emerge

A new excessive fee suit has been filed — this time against a hospital's retirement plan — and from a different direction.

The suit (*Disselkamp v. Norton Healthcare, Inc.*, W.D. Ky., No. 3:18-cv-00048, complaint filed 1/22/18) was filed in the U.S. District Court for the Western District of Kentucky by participants in the Norton Healthcare Retirement Plan. The suit, which seeks class action status to represent more than 13,000 participants in the hospital's \$714 million 403(b) retirement plan, accuses the plan's fiduciaries of committing what the defendants claim is "one of the most common and well-known examples of an imprudent investment" — purchasing a more expensive share class of a mutual fund when a less expensive share class is available. "A prudent fiduciary does not make such an elementary mistake," the plaintiffs state.

Indeed, unlike other suits that argued that there were less expensive fund families, or less expensive fund types (such as CITs), or even less expensive types of funds (say, passively managed rather than active), most of the 38-page complaint is comprised of comparisons of the cost of the share class(es) of the various funds in the plan side-by-side with alternate and less expensive share classes of the very same funds that ostensibly were available to the plan. All told, the plaintiffs claim that, by virtue of having chosen these share classes, plan participants paid "unnecessary, excessive fees in the amount of approximately two million dollars." Moreover, they claim that not only did participants lose the amounts "unnecessarily wasted on fees, but also the investment returns they would have earned had these amounts remained invested in the Plan" — a variance that, according to plaintiffs, over a six-year period, resulted in an additional \$500,000 loss to the plan.

But perhaps what is most interesting about this particular litigation is that the plaintiffs are represented by counsel that doesn't appear to have a track record in ERISA litigation. According to Bloomberg BNA, Bishop Korus Friend is a Kentucky-based general practice law firm that, according to its website, represents clients



in employment, consumer and personal injury disputes. The other three law firms, Tomlinson Law, James White Firm and Johnston Law Firm, are based in Birmingham, AL. The lawsuit against Norton is also the first class action under ERISA filed by each of the three law firms, according to Bloomberg Law dockets.

They are not the first firms that appear to be cutting their ERISA litigation teeth in this line. Last year Franklin D. Azar & Associates P.C., which held itself out as a personal injury law firm that specializes in motor vehicle accidents, defective products and slip-and-fall accidents, filed a couple of cases which, while smaller than the multibillion-dollar plans that have characterized most plaintiffs over the past decade, are nonetheless constitute several hundred thousand dollars in plan assets.

— Nevin E. Adams, JD

## WILDCATS WIN

### Another 403(b) university plan excessive fee suit has its day in court

The suit — filed against Northwestern University in 2016 by the law firm of Schlichter Bogard & Denton — had argued that Northwestern “eliminated hundreds of mutual funds provided to Plan participants and selected a tiered structure comprised of a limited core set of 32 investment options,” including five tiers: one a TDF tier, the second five index funds, the third consisting of 26 actively managed mutual funds, an insurance separate account and an SDBA. However, the suit notes that Northwestern continued to contract with two separate recordkeepers (TIAA-CREF and Fidelity) for the retirement plan and only consolidated the Voluntary Savings Plan to one recordkeeper (TIAA-CREF) in late 2012.

The suit also took issue — as most of these suits do — with the alleged inability of the plan fiduciaries to negotiate a better deal based on its status as a “mega” plan (the Retirement Plan had \$2.34 billion in net assets and 21,622 participants with account balances, while at the same point in time the Voluntary Savings Plan had \$529.8 million in net assets and 12,293 participants with account balances), for presenting participants with the “virtually impossible burden” of deciding where to invest their money, and for including active fund choices when passive alternatives were available.

#### ‘Massive’ Complaint

The decision, rendered by Judge Jorge L. Alonso in the U.S. District Court for the Northern District of Illinois (*Divane v. Northwestern Univ.*, 2018 BL 186065, N.D. Ill., No. 1:16-cv-08157, order granting defendants’ motion to dismiss 5/25/18) took issue with the plaintiffs’ case right from the start, commenting on the “massive” size of the plaintiffs’ amended complaint and proposed second amended complaint (taking the time to count not only the pages, but the paragraphs in each), quickly dismissing the quantity as “not specific to the defendants and the plans in this case.” Rather, Judge Alonso said that most of the plaintiffs’ allegations



“constitute a description of plaintiffs’ opinions both on ERISA law and on a proper long-term investment strategy for average people who lack the time to select either individual stocks or actively-managed mutual funds.”

#### ‘Paternalistic’ Theories

“Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kinds of benefits employers must provide if they choose to have such a plan,” Alonso wrote, moving on to invoke the U.S. Supreme Court decision in *Varity Corp. v. Howe*. Alonso went on to point out that “Ultimately, plaintiff’s theory is paternalistic, but ERISA is not.”

Alonso even went so far as to contest the notion that a mega plan should be able to command a better price, citing *Loomis v. Exelon Corp.*, where the court opined “...it isn’t clear to us why mutual funds would offer lower prices just because participants in this Plan have pension wealth that in the aggregate exceeds \$1 billion”). That court also pushed back on the presumption that a per-participant charge was preferable to the asset-based recordkeeping fee approach, when it noted

“a flat-fee structure might be beneficial for participants with the largest balances, but, for younger employees and others with small investment balances, a capitation fee could work out to more, per dollar under management...” Not that those arguments wound up being persuasive here, because Judge Alonso noted that “in any case, the participants had options to keep the expense ratios (and, thus, record-keeping expenses) low.”

#### ‘Control’ Voice

All in all, Judge Alonso noted that “the amount of fees paid were within the control of participants, because they could choose in which funds to invest the money in their account.”

Judge Alonso granted defendants’ motion to dismiss, denied plaintiffs’ motion for leave to amend, and their motion for leave to file under seal. All other pending motions were denied as moot, and he dismissed the case — with prejudice.

This was the second of the 403(b) university excessive fee suits to go to trial — and the second in which the university defendants prevailed.

— Nevin E. Adams, JD



## SUIT 'TIES'

## New ground(s) emerge in NYU excessive fee suit



**A**n amended claim in an excessive fee litigation treads some new ground — including naming the plan’s investment advisor as a defendant.

New York University was the target of one of the first of the university 403(b) excessive suits filed in August 2016, and representing the plaintiffs then (and now) was the law firm of Schlichter, Bogard & Denton.

A year ago, the NYU fiduciaries were able to persuade the court to reject some allegations, notably that there were too many investment options in the plan. But claims regarding excessive recordkeeping fees and failure to prudently monitor plan investment options by continuing to offer funds with high fees and poor performance remained. Then in November came a new filing, expanded to include the university’s hospital system, school of medicine, the retirement plan committee and 21 named individuals.

Enter January’s new, amended complaint — 143 pages long — in the U.S. District Court for the Southern District of New York, with new ground(s) that includes naming as a defendant Cammack LaRhetta, which, according to the plaintiffs, has served as the plans’ investment advisor since 2009. “As a result of Cammack’s imprudent investment advice failing to recommend the removal of the imprudent TIAA Real Estate and CREF Stock Accounts despite their high fees and histories of abysmal performance, the Plans suffered tremendous losses,” according to the suit.

#### Retail ‘Fail’?

The plaintiffs note that since jumbo plans (such as NYU’s) “can obtain much lower fees for investment management, benchmarking fees in NYU’s Plans to small plans or retail fees is wholly inappropriate,” and that the

“use of Morningstar weighted averages is an inappropriate benchmark for evaluating fees charged by the investment options offered in the Plans because these averages include mostly retail share classes of funds that carry far higher fees than those appropriate for inclusion in massive jumbo plans, like the NYU Plans.” They go on to note that using “the Morningstar blended average to evaluate the appropriateness of the fees in the Plans would produce distorted results that give the incorrect appearance that high-fee funds in the Plans had reasonable fees compared to industry averages that fail to account for the massive size and bargaining power of the Plans.”

While the excessive fee suits have tended to treat the defendant fiduciaries as a block, this one took pains to outline actions and comments attributed to Margaret Meagher, co-chair of the plan’s retirement committee.

The suit says Meagher “conceded that the Retirement Plan Committee, and all of its members, accepted Cammack’s use of this admittedly flawed benchmark for years (continuing through the present) and never once questioned why Cammack used this inappropriate benchmark. Indeed, she admitted that not a single Committee member ever questioned the use of these Morningstar averages, took issue with their use, or even brought it up at a Committee meeting.”

Bearing in mind that this is only one side of the story, despite what plaintiffs described as “their long histories of dramatic underperformance and exorbitant fees detailed below, Cammack never recommended removing the CREF Stock or TIAA Real Estate Accounts.”

management products to participants as they neared retirement and before retirement,” and that the plan fiduciaries “allowed TIAA to market and sell its services and investment products outside the Plans, benefitting TIAA enormously.”

#### **Familiar ‘Grounds’**

There were, of course, many familiar allegations: that “jumbo” plans have “tremendous economies of scale for purposes of recordkeeping and administrative fees” that were not leveraged here, that asset-based fees “have nothing to do with” recordkeeping services, and that “a flat price based on the number of participants in the plan ensures that the amount of

plan reviews,” and that “had Defendants conducted such a review of the Plans, Defendants would not have allowed the Plans to continue to pay excessive administrative fees; would not have maintained an inefficient multi-recordkeeper structure; would not have continued to include an excessive number of investment options in the Plans, including duplicative funds in numerous investment styles and higher-cost retail share classes for which an identical lower-cost version of the same fund was available; and would not have retained investment options in the Plans despite a sustained track record of underperformance.”

The plaintiffs also alleged that “a reasonable annual recordkeeping fee for the Plans would be no more than \$840,000 in the aggregate for both Plans combined (a rate of no more than approximately \$35 for each participant in the Plans per year) using a recordkeeper who does not sell investment products and does not benefit as TIAA did from its position as a recordkeeper in selling lucrative retirement products outside of the Plans to the Plans’ participants.”

The complaint is, of course, only one side of the story, and here makes a number of charges and allegations that may well be disputed or rejected at trial. However, this case does make a number of extraordinarily detailed claims about what defendants have not only done, but said on the record. It will be interesting to see how this case — particularly in view of the expanding and evolving claims — develops.

Oh, and if you’re having trouble keeping track of these suits, it’s no wonder. The list now includes plans at Cornell University, Northwestern University, Columbia University and the University of Southern California, as well as Yale. Meanwhile, some of the earlier suits are just getting to hearings on motions to dismiss, specifically Emory University and Duke University — both of which are currently proceeding to trial — and the University of Pennsylvania, which recently prevailed in a similar case. Another — involving Princeton University’s 403(b) plans — is on hold awaiting an appeal in the University of Pennsylvania litigation.

— *Nevin E. Adams, JD*

**Fiduciaries locked their plans into an arrangement in which certain investments could not be removed from the plan.”**

#### **RFP Route**

The suit also noted that “prudent fiduciaries conduct an RFP every three years in order to ensure their plans’ recordkeeping fees are reasonable,” but that “the NYU Defendants waited approximately seven years, or not until late 2016, to conduct another RFP after the one conducted in 2009,” and that that one “...was executed only after the filing of a related lawsuit in this District against NYU by these same Plaintiffs challenging the fiduciaries’ management of the Plans.”

Another unique allegation in this litigation charges that TIAA “used its position as recordkeeper in the NYU Plans to obtain access to participants, learning their ages, length of employment, time until retirement age, the size of their accounts, and choices of investments, and used that information for its benefit to market and sell lucrative investment products, insurance, 529 plans, IRAs, and wealth

compensation is tied to the actual services provided,” challenges the use of multiple recordkeepers (in this case TIAA-CREF and Vanguard), and touts the advantages of open architecture (in offering options beyond proprietary provider funds), while noting that “...among the thousands of mutual funds in the market, not a single fund other than the proprietary funds of the recordkeepers (27 TIAA-CREF and 74 Vanguard) was allowed in the Plans,” and that “by using TIAA-CREF, fiduciaries locked their plans into an arrangement in which certain investments could not be removed from the plan — even if the funds were not prudent investments, in violation of prudent accepted fiduciary practices.”

The plaintiffs alleged that the “use of multiple recordkeepers and proprietary funds required by the recordkeepers to be included in the Plans” illustrated their failure to conduct “comprehensive



# Time for a Digital Disclosure Default?

In a recent NAPA Net poll, readers shared their answers. By Nevin E. Adams, JD

**L**ove 'em or hate 'em, retirement plan disclosures are a reality — but could they be “better,” and could they be just as effective (and perhaps more so) if they weren't paper?

It's a topic of interest — retirement plans are a complicated business — and a process that adds a lot of cost to the process. At the same time, it's not altogether clear that the current process is effective, at least in terms of getting participants to read, and perhaps more importantly, understand these disclosures.

## Personal Perspectives

In early April we asked NAPA Net readers what they did with the disclosures they received with their accounts. A solid plurality (42%) said they “throw them away,” though another 18% went with “read them, then throw them away.” Just over a quarter (28%) said that it depended on the disclosure, while 8% went right into their files (without being read), and the rest — well, they said that, “without realizing what they were, threw them away.”

We then asked readers what they thought about the number of retirement plan-related disclosures, and found that while about a quarter (24%) thought there were too many, even more (36%) thought there were “way too many,” and roughly 1 out of 10 thought it was “about right.” Another quarter (26%) said it isn't a matter of how many, it's “how much is in those disclosures (and it should be less).”

“There are too many, they are not easy to understand and many of them do not provide useful information,” noted one reader. “They need to be less wordy and simple to understand,” commented another — a theme that would emerge later and throughout the responses this week.

## Participant ‘Accounts’

So, what do readers think that “regular” participants do with the disclosures? Well, let's just say it's a lot less ambiguous. Nearly three-quarters (73%) say they throw them away, and another quarter say that “not knowing what they are, they throw them away.” The rest — and bear in mind, we're only talking about 2% — said they throw them away without reading them.

Turning to the perspectives of their plan sponsor clients, more than half (59%) said that those clients and the recordkeepers they work with comment on the disclosure requirements “all the time.” Another quarter (23.5%) said the subject came up “only occasionally,” and about 7% said it hasn't come up. The rest were in what amounts to an “other” category, with comments like the following:

“It is tough for them to keep up with what disclosures are required, when they are required, and to whom they should be delivered.”

“They hate sending them out.”

“Clients comment to me, only every time they come out, usually something along the lines of, ‘Do I have to do anything with this?’ or ‘Didn't I just do this?’”

“Many sponsors ask if they can email disclosures. It comes up most often when there's a fund replacement.”

“I don't know that I would say ‘all the time’ but it is frequent.”

Apparently it's come up often enough that one reader's firm has crafted a solution: “We've built a proprietary system that collects the notices from the providers and combines them. We'll send the notices

out that meet the wired-at-work standards for clients that qualify. Removing the need for paper disclosures for most clients.”

## Default Defined?

While participants can opt to receive many of the currently mandated disclosures in electronic form, the default is paper — and so, we asked readers if they thought the default should be changed.

Here again — and doubtless reflecting their sense of how those disclosures are treated now — nearly 77% of respondents said the default should be changed, though 1 in 10 said it depended on the disclosure, and about 6% thought that a paper default was appropriate. “I was going to answer ‘depends on the disclosure,’ but I do believe the answer is, ‘no, a paper default is appropriate for relevant disclosures,’” commented one reader. “The answer for the rest of the disclosures, like the SAR, is to discontinue this disclosure entirely. Other disclosures also need significant revisions to make them easy to read and understandable.” Another opined that “the employer should be able to choose the default on a plan level. As long as all employees have regular access to company email, electronic should be fine. But employees who do not have regular access to company email will still need paper delivery.”

## Other Comments

As we generally do, we did get a number of interesting comments. Here's a sampling:

“Disclosures should be allowed to just be posted to the recordkeepers' websites. People don't read them anyway, they tend to be too long, and when they are read no one understands them.”

“The disclosures should follow a standard template. Depending on the

recordkeeper, the information varies and, at best, is incomplete.”

“Still trying to figure out the purpose of the Summary Annual Report. That one wins craziest disclosure of all.”

“I don’t think plan sponsors or participants look at the disclosures. What it has done is put fees front and center, making plan sponsors aware that their plan is not ‘free.’ This has led to more productive discussions on costs, reduced fees, and improved participant outcomes.”

reading didn’t understand a term/etc. they could be linked to more info.”

“Even though disclosures are important, they seem to be more important to everyone except the participant. Until these disclosures can be written in the ‘King’s English’ and ‘bulletized’ for easy reading and understanding, this is a tremendous waste of time, money and resources designed to CYA instead of fostering clarity and learning.”

“I have several issues with the disclosures; two with content and a

requirement to show ‘total annual operating expense,’ which can be significantly higher than the actual expense ratio. I had a conversation with a member of the DOL committee that developed the disclosure and she confessed that the committee thought total annual operating expense was the expense ratio. Wow!”

“Electronic makes a lot more sense. An e-mail address is far easier to track than a physical address. Better yet, each participant should be part of a social media group where documents and notices can be shared.”

“It would be great if the requirements for electronic disclosures were all identical instead of minute differences between them. It would make it easier for providers. In today’s day and age, there’s no reason the ‘default’ can’t be electronic with, of course, the participant having the option of paper.”

“Disclosures are supposed to user friendly. There are some disclosure people in the profession have a hard time reading, how do you suppose the person not in the profession thinks about them?”

“I think employees should get a link to disclosures upon hire, be allowed to request paper and be reminded if the link annually.”

There were some humorous responses as well...

“They are great for lighting fires.”

“YouTube has some great videos on how to make fire logs out of paper.”

But my favorite — and it’s funny, but not so funny at the same time — came from a reader who noted, “The running joke I have about the SPD is that it is written in a manner calculated to be thrown away by the average plan participant.”

Thanks to everyone who participated in this (and every) week’s NAPA Net reader poll! 🗳️



“Disclosures need to be pared down and streamlined to ease administrative burden associated with these often unread notifications.”

“While the intention of the disclosures is admirable, they are far too lengthy to be useful. The supposedly participant friendly language has been hijacked by legalese.”

“I think they need to be simplified. If they were electronic, they could have hotlinks in them so that if the person

third with the timing requirement. I think the timing should be once per plan year. Under the current requirement, fiduciary decisions concerning the plan’s investment menu are negatively impacted by the timing requirement. With respect to content, the disclosure overemphasizes fees and returns. As we know, these are only two components of mutual fund analysis. And the focus on those items detracts from the need for proper asset allocation, which is vastly more important. The other problem is the





# Regulatory Review

The fiduciary rule loses in court, the SEC (re)enters the fiduciary fray, and the DOL pulls back on its enthusiasm for ESG.

## ENVIRONMENTAL IMPACTS

### DOL pulls back on ESG guidance

**W**hile reiterating some long-standing positions on socially responsive investing, the Labor Department has some new cautions about an ESG emphasis in plan design and proxy voting.

It has done so in the form of Field Assistance Bulletin 2018-01, issued April 23, which is designed to provide guidance to the Employee Benefits Security Administration's national and regional offices "to assist in addressing questions they may receive from plan fiduciaries and other interested stakeholders," specifically about Interpretive Bulletin (IB) 2016-01 (relating to the exercise of shareholder rights and written statements of investment policy) and Interpretive Bulletin 2015-01 (relating to "economically targeted investments" (ETIs)).

Once termed SRI (for socially responsible investments, or socially responsive investments), these days such factors are often referred to as ESG — environmental, social, ethical and governance.

By way of background, the Labor Department restated what it termed its "longstanding position" that the fiduciary act of managing plan assets that involve shares of corporate stock includes making decisions about voting proxies and exercising shareholder rights, reminding of its previous effort to "assist plan fiduciaries in understanding their obligations under ERISA" in Interpretive Bulletin 2016-01. The Labor Department also called to mind its "similarly longstanding position" that ERISA fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals, citing IB

2015-01 as being its interpretation of ERISA sections 403 and 404 as applied to employee benefit plan investments in economically targeted investments ("...investments selected for the economic benefits they create apart from their investment return to the employee benefit plan").

In the latter, the Labor Department said it "reiterated its longstanding view that, because every investment necessarily causes a plan to forego other investment opportunities, plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk as a means of using plan investments to promote collateral social policy goals." Moreover, that IB 2015-01 reiterated the view that when competing investments serve the plan's economic interests equally well, plan fiduciaries can use such collateral considerations as tie-breakers for an investment choice.

#### More Than Mere Tie-Breakers

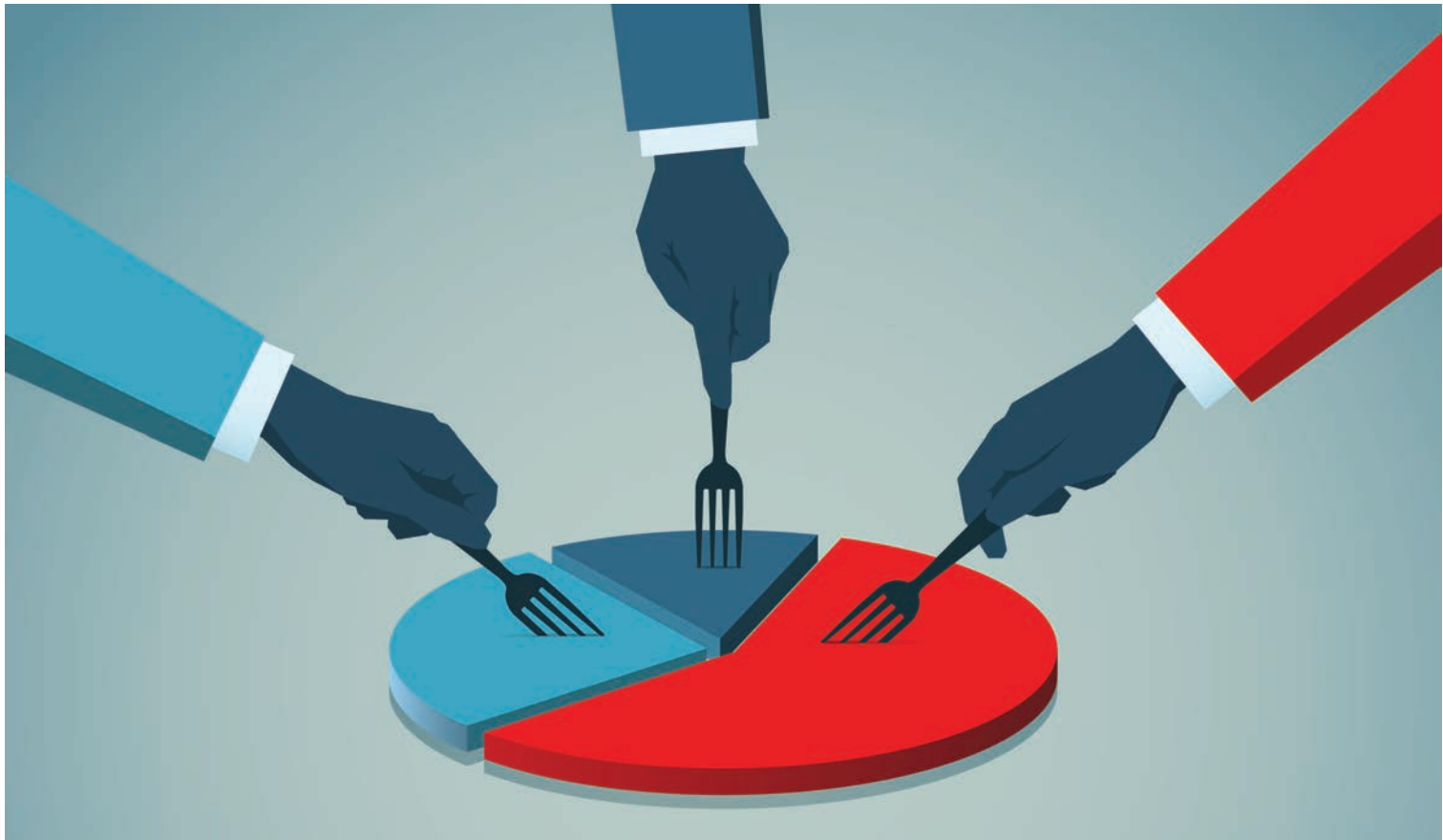
In the new FAB, the Labor Department characterized that observation as one that "merely recognized" that there could be instances when otherwise collateral ESG issues present material business risk or opportunities to companies that company officers and directors need to manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations under generally accepted investment theories, and that these "ordinarily collateral issues" should be considered by a prudent fiduciary along with other relevant economic factors to evaluate the risk and return profiles of alternative investments. "In other words,"

the FAB states, "in these instances, the factors are more than mere tie-breakers," and that "the weight given to those factors should also be appropriate to the relative level of risk and return involved compared to other relevant economic factors."

That said, the Labor Department cautions here that "fiduciaries must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision," and that "it does not ineluctably follow from the fact that an investment promotes ESG factors, or that it arguably promotes positive general market trends or industry growth, that the investment is a prudent choice for retirement or other investors."

Rather, the FAB reminds us that ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits. "A fiduciary's evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan's articulated funding and investment objectives."

As 2016 (and the Obama administration) wound to a close, the tone of the Labor Department's Interpretive Bulletin expressed concern that fiduciaries had been reluctant to incorporate ESG considerations in proxy voting "or undertaking other shareholder engagement activities." The current FAB acknowledged that in IB 2016-01, the DOL had noted that investment policy statements are permitted to include



policies concerning the use of ESG factors to evaluate investments, or on integrating ESG-related tools, metrics, or analyses to evaluate an investment's risk or return. However, the new FAB goes on to clarify that that former discussion "...does not reflect a view that investment policy statements must contain guidelines on ESG investments or integrating ESG-related tools to comply with ERISA," nor does that IB "imply that if an investment policy statement contains such guidelines then fiduciaries managing plan assets, including appointed ERISA section 3(38) investment managers, must always adhere to them." In other words, "if it is imprudent to comply with the investment policy statement in a particular instance, the manager must disregard it."

#### **ESG and Investment Menus**

The FAB explains that in the case of an investment platform that allows participants and beneficiaries an opportunity to choose from a broad range of investment alternatives, adding one or more funds to a platform in response to participant requests for an investment alternative that reflects

their personal values does not necessarily result in the plan forgoing the placement of one or more other non-ESG themed investment alternatives on the platform, and that "a prudently selected, well managed, and properly diversified ESG-themed investment alternative could be added to the available investment options on a 401(k) plan platform without requiring the plan to remove or forgo adding other non-ESG-themed investment options to the platform."

It cautions, however, that in the case of a qualified default investment alternative (QDIA), "...selection of an investment fund is not analogous to merely offering participants an additional investment alternative..." The new FAB states that "nothing in the QDIA regulation suggests that fiduciaries should choose QDIAs based on collateral public policy goals," and that in the QDIA context, "the decision to favor the fiduciary's own policy preferences in selecting an ESG-themed investment option for a 401(k)-type plan without regard to possibly different or competing views of plan participants and beneficiaries would raise questions about

the fiduciary's compliance with ERISA's duty of loyalty."

#### **Proxy Voting**

As for proxy voting, the FAB notes that while in IB 2016-01, the Department stated that an investment policy that contemplates engaging in shareholder activities that are intended to monitor or influence the management of corporations in which the plan owns stock can be consistent with a fiduciary's obligations under ERISA, "if the responsible fiduciary concludes there is a reasonable expectation that such activities are likely to enhance the economic value of the plan's investment in that corporation after taking into account the costs involved." Indeed, the current FAB emphasizes the cost aspect, cautioning that the 2016 IB "was not intended to signal that it is appropriate for an individual plan investor to routinely incur significant expenses to engage in direct negotiations with the board or management of publicly held companies with respect to which the plan is just one of many investors."

— *Nevin E. Adams, JD*



## FIDUCIARY FOCUS

## On keeping up with the fiduciary rule.

The Department of Labor's fiduciary (or "conflict of interest") rule, issued in final form April 6, 2016, is a package of rules and exemptions aimed at curbing perceived abuses by advisors. It's an ambitious proposal with potentially wide-ranging consequences for you and your business. It's been challenged in court in multiple circuits, and prevailed in all but one — the 5th Circuit Court of Appeals which, on March 15, rejected the fiduciary rule "in toto." Since then an enormous amount of speculation has focused on what might happen next — and just to keep things "interesting" — on April 18, 2018, the Securities and Exchange Commission voted to release for public comment its own proposal to create a new fiduciary standard for advisors.

As we all know, this is an evolving situation, and as we go to press, it is by no means certain where things will stand as you read this issue. We've been tracking these developments on a daily basis on NAPA Net, and archiving those developments in a special section of the website devoted to the DOL and SEC fiduciary rules, and your very best source for the most current read can be found online at <https://www.napa-net.org/industry-lists/game-changer/> or via the "Fiduciary Rule" tab underneath the Industry Intel tab at [www.napa-net.org](http://www.napa-net.org).

As we continue to remind readers — stay tuned.

— Nevin E. Adams, JD

## HOLDING "PATTERN"

## DOL puts fiduciary rule enforcement on hold

As anticipated, in early May the Department of Labor extended until further notice its temporary enforcement policy relating to its rule defining who is a fiduciary and the associated prohibited transaction exemptions.

In Field Assistance Bulletin 2018-02, the DOL advised that based on questions regarding fiduciary obligations in the aftermath of the March 15 ruling by the U.S. Court of Appeals for the 5th Circuit, it has concluded that financial institutions should be permitted to continue relying on its temporary enforcement policy, pending the issuance of additional guidance. Specifically, that neither the DOL nor IRS will pursue prohibited transaction actions against investment advice fiduciaries who are working diligently and in good faith to comply with the impartial conduct standards for transactions that would have been exempted in the Best Interest Contract (BIC) and Principal Transactions Exemptions, nor will they treat such fiduciaries as violating the applicable prohibited transaction rules.

While the 5th Circuit's decision has the effect of eliminating the requirements of the fiduciary rule, it also does away with the BIC exemption, which provided a means for advisors to provide advice



as an ERISA fiduciary and still receive commissions, also known as "conflicted" advice, in that it varied based on the advisor's recommendation.

"The uncertainty about fiduciary obligations and the scope of exemptive relief could disrupt existing investment advice arrangements to the detriment of retirement plans, retirement investors, and financial institutions,"

the DOL stated. "Further, some financial institutions have devoted significant resources to comply with the BIC Exemption and the Principal Transactions Exemption and may prefer to continue to rely upon the new compliance structures."

The DOL's temporary enforcement policy was first announced in FAB 2017-01 and subsequently extended in FAB 2017-02 and again in November 2017 as part of the 18-month extension in the transition period for the PTE amendments.

The new FAB 2018-02 further advises that investment advice fiduciaries may rely on other available exemptions to the extent applicable after the 5th Circuit's decision, such that the DOL "will not treat an adviser's failure to rely upon such other exemptions as resulting in a violation of the prohibited transaction rules if the adviser meets the terms of this enforcement policy."

In the meantime, DOL notes that it is evaluating the need for other temporary or permanent prohibited transaction relief for investment advice fiduciaries, including possible prospective and retroactive prohibited transaction relief.

— Ted Godbout

## SHARE 'ALIKE'?

### SEC issues answers to FAQs on share class selection disclosure initiative

**T**he Securities and Exchange Commission's Division of Enforcement has provided additional guidance on its Share Class Selection Disclosure (SCSD) Initiative in the form of 19 frequently asked questions relating to adviser eligibility, disgorgement and the distribution of funds to clients.

The SCSD Initiative was launched Feb. 12. Under the initiative, the SEC's Enforcement Division says it will recommend "standardized, favorable settlement terms" to investment advisers who self-report that they failed to disclose conflicts of interest when investing advisory clients in a share class paying 12b-1 fees when a lower-cost share class of the same mutual fund was available for the advisory clients.

"It appears that many investment advisers are working diligently to evaluate whether they can take advantage of the initiative and we believe that providing these FAQs will help them make that determination," C. Dabney O'Riordan, Co-Chief of the Division of Enforcement's Asset Management Unit explains in a press release. "The initiative provides a framework to quickly and efficiently resolve these issues with self-reporting advisers and return money to their clients."

#### Settlement Terms, Timing and Disgorgement

The FAQs clarify that the settlement terms apply only to the conduct identified in the announcement and only to those advisers who meet the definition of a "Self-Reporting Adviser" (SRA) and have self-reported their conduct in the prescribed manner.

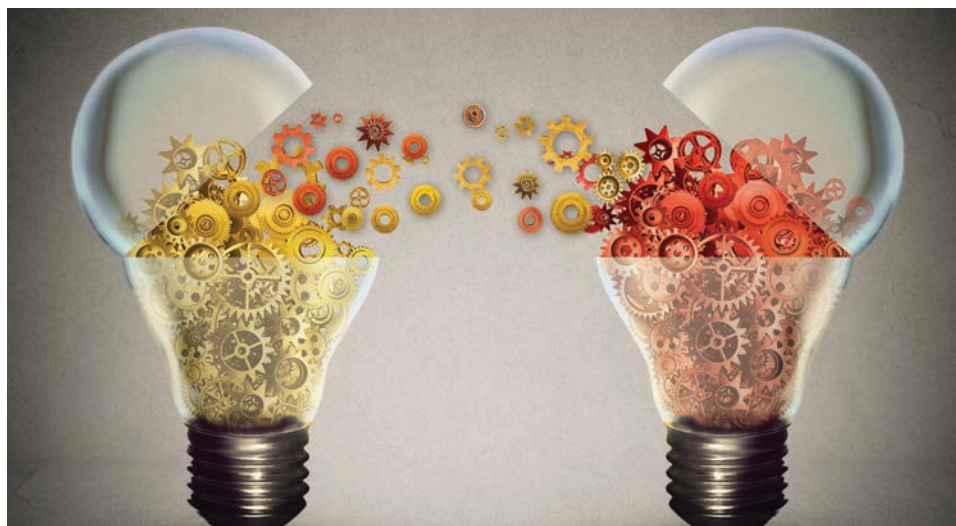
The Division also indicates that it does not plan to recommend fundamentally different settlement terms with any SRA based on "the severity and scope" of the conduct, adding that an SRA should be prepared to enter into a settlement with the Commission under the terms in the announcement.

As to whether the Division will take into account that the adviser reduced or

offset its advisory fee by the amount of the 12b-1 fees in seeking disgorgement, an FAQ explains that it depends on the facts and circumstances. To illustrate, the FAQ offers two scenarios that both assume an SRA had an agreement with its client to charge an annual management fee of 1% of AUM.


In the first scenario, where an SRA contends that their management fee would have been 1.25% absent the receipt of 12b-1 fees, the Division does not expect to recommend any offset to the disgorgement in circumstances similar to this scenario. Under the second scenario, where the SRA applied a portion of the 12b-1 fees it received to reduce the annual management fee so that the client was ultimately charged a management fee less than 1%, the Division says that it may recommend an offset to the disgorgement.

Addressing whether an adviser is still eligible to participate in the initiative after their firm has been contacted, an FAQ advises that if the Division contacted their firm on or after Feb. 12, 2018, the adviser is still eligible for the initiative. But if the Division contacted the firm before Feb. 12, 2018, the adviser should contact the SEC enforcement attorney working on that investigation to inquire as to whether the adviser is still eligible to participate in the initiative.



Other questions answered in the FAQs include:

- Does the SCSD Initiative apply to instances in which an adviser failed to disclose a conflict with respect to other fees it received in connection with recommending, purchasing, or holding a higher-cost share class, i.e., not just 12b-1 fees?
- OCIE already conducted an exam of my investment advisory firm concerning these issues. Does this exam make my advisory firm ineligible for the SCSD Initiative or immune from future enforcement action regarding these issues?
- Does the SCSD Initiative apply to higher-cost share classes purchased in brokerage accounts?
- What does it mean to have a lower cost share class "available" for the same fund?
- How will Division staff determine an investment adviser's amount of disgorgement?

The cut-off date for self-reporting under the initiative is June 12. The FAQs note that the agency does not anticipate extending this deadline by which an investment adviser must notify the Division of its intent to participate in the SCSD Initiative. 

— Ted Godbout



# Millennial Matters

Are the Young Guns coming for your business?



**A**s retirement plan advisors we are in tune with what is happening with the stock market every day, but how many of us are aware of what is happening with the marketplace of buyers out there?

The largest contingent of today's working population consists of Millennials. Think about that for a second. The largest percentage of the working population consists of a demographic that other generations stereotype as entitled, lazy and more interested in Snapchat than in doing their job.

To combat those stereotypes and create a wake-up call to other generations in the retirement plan space, here are a few statistics to get your attention:

- Millennials are the largest generation in U.S. history, consisting of 92 million people. Bigger than the Baby Boomer population. Those in the largest part of this group are 26 years old right now, and are primed to enter the workforce and to start deferring to their employer retirement plan.
- This generation grew up in a digital-first world. They spend more time, on average, communicating via chat/text message, and they use social media more than other generations.

- The power of social media is most evident with this generation. Thirty-four percent of 18- to 35-year-olds prefer a brand that uses social media, significantly more than other generations.
- When we look at which factors make Millennials loyal to a brand, price is more of a factor than quality. (Low-cost index funds, anyone?)

So, what impacts do these items have on retirement plan advisors?

First, plan advisors will have to adjust to the fact that many of the people who purchase their services (i.e., HR, COO, CFO, etc.) will slowly start to consist of Millennials. Being aware of their buying patterns and preferences is important. That means that having a strong presence on social media is important. It will require advisors to have a specific strategy for social media, not just post market update reports on LinkedIn.

Second, advisors will have to ensure their recommended recordkeepers and the outside tools they use are enabled for a digital world. I am still surprised at how many recordkeepers don't have basic features that allow participants to access information or make changes from their phone. Nearly 4 in 10 Millennials say they interact more with

their smartphone than they do with their significant others, parents, friends, children or co-workers.

If you don't have a platform that can interact with their smartphone, you are toast to them. And you may be toast as their advisor if you are making recommendations that don't meet their preferences. This may mean changing the vendors you use or pushing them to update their capabilities.

Third, price is more of a factor than quality. We have been in many meetings with Millennials and they are very sensitive to the price of investments, sometimes too much. So, I would approach any conversations with this group regarding the cost of investments and recommendations of an active manager versus an index fund, with lots of research to back up your position. This generation may be price-sensitive, but they also do their homework.

In closing, I'll turn back to the question I asked at the beginning: As retirement plan advisors we are in tune with what is happening with the stock market every day, but how many of us are aware of what is happening with the marketplace of buyers out there? I would say there are a portion out there who are acutely aware of what changes are taking place regarding buying patterns, who those buyers are, and which factors play into their decisions to hire an advisor.

Look no further than the list of NAPA Young Guns in this issue to see an example of who understands these new realities. These advisors are adjusting to these new realities and meeting the buyers of today and tomorrow where they are, and they are winning business (lots of business). Unless you are prepared to change, prepare to lose business to this new group of advisors, because they are coming and they're hungry. **N**

» Aaron Pottichen is the President of CLS Partners Retirement Services. He is a member of NAPA's NextGen Committee.

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NFV-1370AO (04/18)



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