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Executive Director (and American Retirement Association CEO) Brian Graff unveiled plans to address the expensive and outdated ERISA requirement to disclose information to 401(k) participants in paper form.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

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).

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 different 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.

**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 Schefller, 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 Schlicter Bogard & Denton, who offered insights into current 401(k) litigation trends.

While noting that plan sponsors take the brunt of litigation as fiduciaries, Schefller 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
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.

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 ERISA 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
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, Schefller 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 Tierman, 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.

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