ASPPA
WORKING FOR AMERICA'S RETIREMENT

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August 9, 2013

Robert C. Post, J.D., Ph.D.
Dean
Sol & Lillian Goldman Professor of Law
Yale Law School
P.O. Box 208215
New Haven, CT 06520

Re: Professor Ian Ayres' Letter to Retirement Plan Sponsors

Dear Dean Post:

The draft research paper, entitled "Measuring Fiduciary and Investor Losses in 401(k) Plans," being prepared by the William K. Townsend Professor of Yale Law School, Ian Ayres, and Quinn Curtis, an associate professor at the University of Virginia School of Law, has been brought to our attention. We wish to alert you to some serious problems associated with this research which could expose your prestigious institution to otherwise unnecessary negative attention.

While we are certain Professor Ayres' research was undertaken with the benefit of the public in mind, the practical effect of some inappropriate activity he has already carried out in order to generate publicity for its publication has been alarming. Furthermore, fundamental errors in his paper's research model jeopardize not only the academic reputation of the professor and his associates, but also both Yale Law School and the University of Virginia School of Law.

We have reached out to Professor Ayres on two occasions requesting that he speak with us, but he has stated he is unavailable. We appreciated receiving an initial response to our concerns via an email from Yale Law School's Director of Communication, Janet Conroy. Ms. Conroy indicated: "While he intends to publicize the results of his research when the project is published, those results will be presented as aggregate data. He does not intend to publicize company-specific data based on 2009 data." Ms. Conroy's promise is kind, but irrelevant, because it does not include assurances that the company names will not be disclosed in the research paper and any related publicity. The companies themselves should not be falsely identified as sponsoring "high cost plans" when this claim cannot be proven by old, incomplete data alone.

In relation to his research paper, Professor Ayres has taken it upon himself to sign and send letters to thousands of employers who voluntarily sponsor 401(k) plans. In the letters, he informs these employers that the 401(k) plans they offer their employees are "potential high cost plans" and he threatens to publicize his conclusion in "newspapers (including the *New York Times* and [The] *Wall Street Journal*), as well as disseminate the results via Twitter *with a separate hashtag for your company*." (Emphasis added.) In some letters, Professor Ayres has even identified specific aspects of plans' fees and made suggestions, as though he were a plan fiduciary, about how to reduce those fees, implying a threat to the employer to reduce their fees *or else* be humiliated. Naturally, such a threat coming from an individual with the clout of a Yale Law School professor has shocked and alarmed employers as well as their trusted retirement plan professionals, many of whom are members of the American Society of Pension Professionals & Actuaries (ASPPA) and the National Association of Plan Advisors (NAPA).

In the financial world, trust is priceless, and often cultivated over the course of several years. To justify his irresponsible assertion about plan costs, Professor Ayres relies upon publicly available, yet incomplete, data from the 2009 plan year. By relying upon stale, incomplete data from nearly five years ago, and threatening employers to go public with this data to tell the world that the benefits they are voluntarily providing their employees are “high cost,” Professor Ayres has forced thousands of professionals who service 401(k) plans into an undeserved, unnecessary and potentially costly defensive position. John Rekenthaler, Morningstar, Inc’s director of research, told the *Wall Street Journal*, "Unsolicited and unwanted advice is what he offers, with a hint of menace.” We agree.

Additionally, the data Professor Ayres relies upon was accessed through the website of a company called Brightscope, Inc. Brightscope’s data is gathered from retirement plan filings with the Internal Revenue Service and the Department of Labor for the 2009 plan year (which is now severely out of date). The data included in these governmental filings is not illustrative of the actual value received by the participants of a 401(k) plan. Plan costs vary depending on the investment lineup, the services provided to participants, and other variables that are not reflected in Professor Ayres’ research paper. The data he relies upon does not explain this. It seems the professor may not understand this himself.

For the record, the nature of Professor Ayres’ use of this Brightscope data—to assert, without regard to the age or incompleteness of the information, that the plans in question were inferior and unreasonably costly—so shocked Brightscope, Inc. that the company has publicly disavowed any association with the professor or his research.

Since we initially heard about Professor Ayres’ research and his letters to thousands of retirement plan sponsors, much of the media coverage has been unfavorable to the professor’s study, which could potentially blemish your institution’s otherwise esteemed reputation. The criticisms have been nearly uniform: Mr. Ayres used incomplete, five-year old data, accumulated prior to an industry-wide era of declining fees, to threaten employers with misleading national publicity by accusing them of not being fair to their employees. We hope you will take a moment to read responses to Professor Ayres’ activities printed in the *Wall Street Journal*, RIABiz, BenefitsPro, *PlanSponsor* magazine, etc.

On behalf of a number of employers who received Professor Ayres’ threatening letters, some of whom have opted to cosign below, as well as ASPPA’s 16,000 members in the retirement plan industry, we wish to request that Yale Law School pre-empt any further activity related to Professor Ayres’ research which would publicly identify employers whose voluntary employee retirement plans are determined by the professor’s flawed research to be “high cost plans.”

We also request that the Yale Law School and the administration of Yale University discontinue Professor Ayres' research project until assurances can be made that it will be undertaken with sound methodological consideration and propriety towards the employers who *voluntarily* sponsor benefit programs for their employees. Professor Ayres must not be permitted to abuse his position as the William K. Townsend Professor of Yale Law School to make wild claims about present situations based on old data that does not completely illustrate the real costs of individual 401(k) plans and, therefore, cannot support any such claim about them.

We respectfully request to meet with you regarding Professor Ayres' study and the corresponding letters he has sent to employers. Please feel free to contact Brian H. Graff, Esq., APM at (703) 516-9300 or bgraff@asppa.org to set up a mutually agreeable time and venue.

We look forward to your response.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO of ASPPA
Executive Director/CEO of NAPA

cc: Peter Salovey, Ph.D., President of the University
Benjamin Polak, Ph.D., Provost of the University