THE OFFICIAL MAGAZINE OF THE NATIONAL ASSOCIATION OF PLAN ADVISORS

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SPRING 2023

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WHAT TO LOVE (& FEAR) ABOUT SECURE 2.0 NOW

plus

2023 Top Young Retirement Plan Advisors ("Aces")

Non-Qualified Defined Contribution Plan Special Section

Press Start With 401(k) Gamification

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How to Beat Back a Beltway Broadside

What happens when the government looks to solve nonproblems in the private-sector retirement system? Problems.

We routinely report on the defined contribution criticism du jour from pundits and politicians upset about a highly effective—yet still imperfect—retirement saving system. Rarely is a coherent alternative offered or any thought to what comes next.

We wish we could say the same about the latest bad idea, yet it boasts plenty of intellectual heft, which makes it more dangerous. It represents a significant threat to the private retirement plan sector and will likely result in a sustained ideological battle that could involve the private sector overall.

Senators John Hickenlooper and Thom Tillis introduced the bipartisan, bicameral Retirement Savings for Americans Act (RSAA) in December, supported by Representatives Terri Sewell and Lloyd Smucker in the House. The fact that it's supported by Republicans and Democrats and backed by deep pockets should sound additional alarms.

It's innocently positioned as something that will sit alongside the current private sector plan, rather than compete with it, but don't be fooled.

American Retirement Association (ARA) CEO Brian Graff called it "a camel's nose under the proverbial tent" and something about which retirement plan advisors should be EXTREMELY aware, especially since the bill's reintroduction is expected soon.

The bill is championed by the Economic Innovation Group (EIG), an organization founded by Napster and Facebook billionaire Sean Parker and co-founder Dan Gilbert who made his fortune with Quicken Loans/Rocket Mortgage.

FOLLOW THE DISCUSSION...

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EIG publishes research from high-profile 401(k) critic Teresa Ghilarducci of Government Retirement Accounts (GRA) fame, a longtime advocate for more federal involvement in retirement saving who once called employer-based plans in their current form an "immature, underdeveloped child."

In fact, RSAA is based on a 2021 white paper authored by Ghilarducci and conservative economist Kevin Hassett, former Chairman of the Council of Economic Advisers. It's supposedly billed as a way to improve retirement security and financial wellbeing for low- and moderate-income workers.

Yet skeptics—particularly those who have tracked the various permutations of Ghilarducci's proposals over time—see it as a first step in an eventual public takeover of private sector plans, and an unnecessary one.

"While pitched as helping low- and moderate-income workers save, the proposal language allows individuals that make up to $150,000 to contribute", Graff said. "You're basically setting up a federally sponsored multiple employer plan (MEP) that directly competes with private plans. And there's no prohibition on discontinuing a current retirement plan to opt into the government's version."

Further tilting the scales in the government's favor is an exemption from ERISA's eligibility and participation requirements, as well as ADP testing or top-heavy requirements (to which private sector plans must adhere). Also, the program is fueled by a government-subsidized match and non-elective contributions for which the employer would not be responsible—at least for those eligible for the program.

Click here for more information about the match.

When challenged that SECURE 2.0 legislation addressed many of EIG's complaints and should have time to work, CEO John Lettieri was steadfast in his criticism—and condemned it as futile.

"Of course, we should give it a chance to work, but we know it's not going to work on the issue I just described," Lettieri said. "That issue is fundamentally premised on the current structure, meaning if you have access to a retirement account already, it's going to make your life better if you're a low-income saver. But it's not going to fundamentally change who has access."

Numerous SECURE 2.0 provisions specifically refute that assertion. They include generous small business tax credits, simple-to-administer Starter K plans, and auto-enrollment requirements for new plans, as well as auto-portability to help preserve retirement savings, a significantly expanded and enhanced Saver's match, and expanded eligibility for long-term, part-time workers—the very people Lettieri claims are overlooked by the current system.

Ultimately, the bill looks to be nothing more than the product of individuals wholly enamored of big government solutions, ignorant of the balancing effects of structures like non-discrimination testing, and dismissive of the remarkable voluntary track record of the nation's private-sector retirement system. It's a solution searching for a problem the private sector has already (very competently) solved.

John Sullivan
Editor-in-Chief

A Rosy Future

I am so grateful for the opportunity to work with the best and the brightest people in the retirement industry—amazing people with real integrity and good intentions.

By Corby Dall

This is my last column as President of NAPA (a sigh of relief for you and me), and as I ponder the past year in this role, and more importantly the experiences I have been afforded, I have an overwhelming feeling of gratitude.

First, I am so grateful for the opportunity to work with the best and the brightest people in the retirement industry—amazing people with real integrity and good intentions. NAPA serves as a conduit to so many great ideas, innovations and solutions, not to mention instruction and direction for plan advisors and lawmakers. I'm very proud to be a part of that. Together we can bring about change!

For example, SECURE 2.0 was enacted recently, due in no small part to the efforts of our NAPA Government Affairs team, the ARA team and our advisor members. It is amazing to see that lawmakers really do listen to ARA and NAPA when crafting legislation. That could not happen without your participation and generous contributions to the ARA PAC.

I have had a great life so far, a few bumps and bruises and my share of close calls, but overall great! At my age it's hard not to start thinking about the future in a different way than I always have. I am the eternal optimist and hopefully always will be, but now I'm optimistic about different things, like seeing my kids and grandkids thrive and succeed. You always want your kids to have a better life than you did. I have a great affection for living vicariously through others, and when that can be your own kids it is even more special. I am very grateful that Brady and Payton have chosen retirement plans as a profession, and we are working to convert my other son Tanner! This is a noble endeavor that benefits so many people.

An article that Nevin Adams wrote a few months ago about his impending quasi-retirement made me think about my own version. I'm not sure exactly when or how that will play out—but I am reminded by my grandson Dexter that I am "old." I asked him how old he thought I was, and he said: "about 100"! So I'd better at least start thinking about this new future.

Nevin wrote about rebalancing, which is a great idea for your investments, but I think applies to our lives in certain stages as well. For instance, different things become more important. I am now more concerned about the time I spend making memories than the time I spend making money. I am more concerned about how to fit more in, but I think of it in terms of "for the rest of my life" than "before I retire," if that makes sense to you. It puts an emphasis on what we do collectively for American workers by helping millions of them achieve financial security so they can think about "for the rest of their lives."

The years fly by quickly at this point, and this year has been no exception. I have really enjoyed my time as president of NAPA and I appreciate the privilege and experience. A big thanks to everyone who has boosted me up and supported me, not just at NAPA, but in life!

I also want to thank Brian Graff and the amazing team that supports all of us! Nevin Adams has also been a big source of support and I wish him the best in his own version of retirement. I really appreciate the efforts and care that the Leadership Council provides and the time they donate to this worthy cause so generously. Following me as NAPA President is Renee Scherzer, who already does so much for NAPA. She will be awesome! She has so much energy and her heart is always in the right place. Best of luck, Renee!

Here's to a rosy future! NNTM

Corby Dall is an SVP of OneDigital's Retirement & Wealth division specializing in retirement plan consulting. He is NAPA's 2022-2023 President.

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Beware The Trojan Horse

Is a public takeover of the private retirement sector imminent? It's increasingly possible, and something to watch.

By Brian H. Graff

You may recall the story of the Trojan Horse—how a Greek army, held to a stalemate outside the ancient city of Troy, built a giant wooden horse, left it outside the city gates, and departed.

Those inside the walls of Troy saw the horse as a peace offering to their gods (the horse was the symbol of the city) and an acknowledgment of the victory after a long siege. They celebrated it and brought it inside those walls, only to later find that it contained Greek soldiers and, with them, the destruction of their city. It's no coincidence that today we refer to software that sneaks computer viruses into our networks as a "Trojan horse."

There is a Trojan Horse outside the walls of retirement these days—and those who ignore it do so at their peril.

Like the Trojan horse of old, this proposal—the American Worker Retirement Plan—probably looks like a gift to those looking to solve the retirement coverage gap. Its proponents proclaim it will "fix major shortcomings in the U.S. retirement system and build bottom-up wealth in a manner that rewards work and strengthens faith in the basic fairness of our economic system."

Introduced into law while the ink in the SECURE 2.0 Act of 2022 was still damp, it purports to offer a solution for those millions of American workers who don't already have access to a plan at work (or covered by one of those state-run IRA programs), with a special "shout out" for those gig economy workers who arguably don't have a (separate) employer to set up their plan. It relies on a mandate for effect, coupled with automatic enrollment (at 3%), includes a government match (at least for low and moderate-income workers, it phases out at "median" income), and is modeled on a program popular among those on Capitol Hill—the government's own Thrift Savings Plan (TSP).

If the proposal sounds familiar, it should. The legislation (the ironically named Retirement Savings for Americans Act) was introduced on a bipartisan (well, one member from each party, anyway) basis in both the U.S. House and Senate. More ominously, it's the brainchild of none other than Teresa Ghilarducci and her most recent "conservative" cohort, Kevin Hassett—but this time backed by the Economic Innovation Group and a major lobbying effort on the Hill. None of which keeps this not-very-new-idea from being what it has always been—a thinly veiled attempt to "catfish" a big government takeover of the private retirement system.

And while there's no mention here yet of the elimination of tax preferences for regular 401(k)s to pay for this approach, it's been long part of previous proposals (and make no mistake, earlier versions of a very similar proposal have put a price tag of \$60-\$100 billion/year on the government match).

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

The timing—just ahead of the signing of the SECURE 2.0 Act—is odd, particularly considering the wide range of provisions in that legislation specifically targeted at encouraging more employers to offer a workplace retirement plan. The Starter (K) alone is conservatively projected to expand coverage to nearly 20 million new savers and, in conjunction with the greatly enhanced start-up tax credits and automatic enrollment mandates, seems likely to produce even more. Those, coupled with the expanded saver's match that could benefit more than 100 million American workers, seem likely to be true game changers.

So why, on the brink of dramatic, positive change, would there be any interest in this proposal? The trendline here is consistent and troubling—to first claim that the current system isn't working, to then create a "solution"—which turns out to be an alternative system (that looks very much like it in structure). It would operate under the auspices/control of the federal government, fueled with a mandate, and—eventually—would question why we need a private retirement system at all. Could it be that there are forces at work looking to manage and control that big, new, consolidated pool of savings?

> **"So why, on the brink of dramatic, positive change, would there be any interest in this proposal?"**

Like the Trojan horse, it might look harmless—might even look like a "gift"—but you need to check it out carefully before letting it inside the gates. NNTM

Hyejin Kang / Shutterstock.com

Trends ‘Setting’

In the wake of the COVID-19 pandemic, certain seismic shifts in behaviors, assumptions and expectations are to be expected. In this issue, we highlight trends in withdrawals, as well as more holistic advisor practices, new opportunities, and… longevity literacy.

‘Long’ Story

The language of longevity: how understanding prompts action

Financial literacy, financial wellness, and now… longevity literacy.

It’s the latest phrase in the fight to raise awareness of—and preparation for—later-in-life issues, financial, medical and otherwise, and an idea the TIAA Institute hit upon during its research.

“When we think about financial literacy, that’s been a conversation that has been had for many years,” says Surya Kolluri, who leads the institute. “As we were doing our research here, we said, ‘Can we test another kind of literacy and then follow the thread based on how people respond to it?’ We identified this term longevity literacy.”

He and the team asked respondents about their life expectancy knowledge, not of themselves individually, but of the associated probabilities and statistics surrounding the discipline. For example, what is the life expectancy among 60-year-old men and women in the U.S.? A simple mortality table average is 85 years old for women and 82 years old for men.

“However, we didn’t want to just give a blank quiz for respondents, so we gave them some options that seemed reasonable, and they would then pick one,” Kolluri explained.

Predictably, only 37% of the respondents identified the correct answer, and 28% said they didn’t know, even given answer options.

“If it was a blank response and they said they didn’t know, it would be understood, but they were given choices and still said they didn’t know,” he marveled.

Additionally, a quarter of respondents underestimated life expectancy, and a 10th overestimated their life expectancy, revealing a wide distribution in the answers.

A-ha Moment

What surprised Kolluri most about the longevity literacy responses he calls an a-ha moment, something that first needed context.

“When we administer the financial literacy question, we find women lag men in law in financial literacy, women lag men in financial confidence, and women lag men in how quickly they build investment confidence,” he noted. “With longevity, that pattern flipped.”

Fully 43% of women demonstrated longevity literacy compared with 32% of men, an 11-percentage point gap, which is significant. While acknowledging that more research is needed, Kolluri offered three potential reasons. The first involves household decision-making and who deals with financial issues versus health care issues. “I might postulate that perhaps the female in the household is closer to healthcare decisions,” Kolluri said.

The second involves the household caregiver, for either parents or in-laws, which in older generations typically is more female than male.

“The third reason is that if we agree actuarially that women live longer than men, then they’re thinking about grandma outliving grandpa and mom outliving dad, just in your own life experience,” he added. “Bundle all these things together, and intuitively I could explain why this is the case.”

Whether an increase in awareness leads to an increase in confidence and action is an interesting question. TIAA research found 81% saved for retirement while working, compared with 57% of those with poor longevity literacy—again, a significant difference. And 54% of those with higher longevity literacy tried to calculate the overall amount they needed to save, compared with only a third with poor longevity literacy.

“So, there are two actions here already,” Kollouri explained. “One, they tried to calculate how much, and two, they’re actually

> "According to Bank of America's data, the average plan participant contribution rate dropped slightly from 6.6% at the end of 2021 to 6.4% at the end of 2022, suggesting consumers may have been a bit more focused on short-term financial needs last year."

saving. We also found 40% were confident about having enough money, compared to only a quarter with low longevity literacy. So, we got some interesting data points on those three fronts."

He claimed that it all boils down to a need to reframe the thinking around retirement. It's not only about whether or not they've saved enough for retirement but rather, given the longevity considerations he mentioned, have they set themselves up for income to last a lifetime?

"The chances that one spouse might outlive the other is pretty high, obviously," he concluded. "We should be thinking about the longevity of one of the two spouses. Are we securing income, so it's not just about accumulating assets but also having a lifetime income that supports us during retirement?"

— John Sullivan

Decrease 'Zing'

401(k) loans and hardship withdrawals decreasing

In a recent quarterly report that draws on data from more than 3 million 401(k) plan participants, Bank of America's 401(k) Participant Pulse reveals that fewer participants took hardship withdrawals for immediate financial needs.

Participants taking a hardship distribution declined in the fourth quarter of 2022, with the average at 0.4% (down from 0.5% in the third quarter) and the number of participants totaling 12,350 (down 18% compared with the third quarter). In addition, the average hardship amount also declined by 8% from the third quarter to the fourth.

Loan Activity

What's more, the fourth quarter data show that 60,789 participants borrowed from their workplace plan, which was a decline of 12% from the third quarter. Loan defaults rose slightly to 15.9%, up from 15.7% in the third quarter, totaling more than $450 million. Meanwhile, the average loan amount in the fourth quarter was $7,500—the lowest average for all four quarters in 2022, the report notes.

Perhaps not surprisingly, 30- and 40-year-olds drove borrowing for the year, the research found. More than half of loans taken in 2022 were participants ages 30-49. Gen X (age 43-58) had more participants (3.1%) with loans in default at year-end than any other generation.

Contribution Rates

Additional findings show that contribution rates were down slightly in 2022. According to Bank of America's data, the average plan participant contribution rate dropped slightly from 6.6% at the end of 2021 to 6.4% at the end of 2022, suggesting consumers may have been a bit more focused on short-term financial needs last year.

And compared with their older counterpart, Millennials apparently led the way in savings rates. Almost half of Millennials (47%) contributed 7% or more to their plan—more than any other generation. Meanwhile, Baby Boomers had the highest percentage of participants (43%) contributing 3% or less, although 24% were saving at 6%.

Bank of America's inaugural report analyzes activity across 401(k) loans, hardship distributions and overall contribution rates, and aims to help gauge the extent to which short-term economic trends may be affecting consumers' long-term financial planning.

— Ted Godbout

Household 'Finance'

The next advancement in aggregation: 'Householding'

So says a new report from Cerulli suggesting that, as fee-based financial advice combined with financial planning becomes the industry standard, financial advisors must find new ways to differentiate their practice.

And one way in which they can do so is to aggregate client relationships on the household level, rather than focusing on individual account-level relationships, according to The Cerulli Edge—U.S. Advisor Edition, 1Q 2023 Issue.

In fact, Cerulli expects that "householding" will become more common in 2023 and beyond, as it gives financial advisors greater opportunities to customize portfolios and can allow for more efficient tax outcomes.

For wealth managers, streamlining and consolidating wealth management platforms is a significant priority for 41% of managers this year. But the potential benefits of householding and the stronger outcomes it can create seem to be apparent. According to Cerulli, nearly three-

quarters of wealth managers say consolidating to a unified managed household (UMH) is a priority for their firm moving forward, with 22% saying it's a "significant priority" and half (50%) reporting it as a "moderate priority." This comes as wealth managers continue to shift toward fee-based assets and away from transactional brokerage relationships and consolidate accounts from multiple sources, the report adds.

Cerulli further explains that the UMH moves beyond the account-level aggregation of the unified managed account (UMA) and considers not just the client's financial picture, but also that of their entire household, taking all assets, accounts and holdings from a household and coordinating them to ensure the best possible financial return across the household. The UMH also considers income from less traditional sources (e.g., Social Security) to create a more complete revenue picture.

"Householding gives financial advisors an additional opportunity for customization best suiting the needs of their clients while adding the tax savings clients desperately crave," explains Matt Belnap, Associate Director at Cerulli. "Advisors who can implement a household level view have a better chance of standing out from their peers and retaining client assets."

Asset Location and Reframing

According to the report, the crux of the UMH is asset location, algorithmically determining the best place to allocate client assets. "This builds upon something many advisors already do in an ad hoc manner; for example, placing income-producing securities in qualified accounts to minimize taxes," notes Belnap. "By systematizing this process, and by combining that with other strategies such as tax-loss harvesting and intelligent rebalancing, householding through a UMH can create better outcomes for clients."

Viewing the client relationship on a "household level" rather than on an "account level" requires a certain level of reframing and reconsideration, for both the financial advisor and the client, the report emphasizes. Many advisors, as well as clients, are used to a certain style of performance review, centered on how an account performed compared to the benchmark. When the relationship is focused on the account level, this makes sense, but once consolidation and householding occurs, this account-level attribution becomes far less meaningful, Cerulli notes.

As such, the firm believes that asset managers, and especially distribution teams, can assist with this transition. "Rather than focusing merely on performance, which remains important but increasingly is commoditized, asset managers that can help advisors understand how their strategies fit into a financial plan, and how to communicate that information to clients, have an

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opportunity to win assets and strengthen relationships," the report emphasizes.

— Ted Godbout

Growth 'Spurt'

Advisors expect 'significant practice growth' in small plan 401(k) market

New state mandates, tax incentives and other factors are leading many plan advisors to anticipate significant practice growth in the small plan 401(k) market in the coming year.

Results from Vestwell's fourth-annual Retirement Trends Report reveal that 40% of advisors anticipate their practice to grow significantly as a result of an expansion in the small plan market. Also of note is that over 70% of advisors said that recent market volatility has not affected their retirement business in the small plan market within the last year.

These findings are based on a series of surveys Vestwell conducted in the summer and fall of 2022 to identify the ways in which technology and new savings products are transforming the retirement industry. The firm surveyed more than 1,300 employees, 500 advisors and 250 small business owners across the country.

While the surveys were conducted before the SECURE 2.0 Act was enacted, the results suggest that increases in the tax credits available to small employers that open a new plan may also contribute to advisors' interest in expanding their business. Not only can the law be expected to increase the number of plans that are offered, but its auto-enrollment features can also be expected to increase the average value of each plan, the report contends.

"Regulatory tailwinds and advanced technologies have enabled a monumental shift in the industry, expanding retirement access to small businesses and savers that are historically difficult to reach," observes Vestwell founder and CEO Aaron Schumm.

Benefit Offerings

Further supporting the expansion argument is that the ongoing war for talent has small business employers looking to boost their benefit offerings to address employee demand for additional savings opportunities. The report found that an overwhelming majority of employee respondents rank employer-sponsored retirement programs and employer matching as a top priority. In fact, of the nearly 1,300 employees that participated in the survey, more than 72% said they "expect employers to offer a 401(k)/403(b)" considering the tight labor market.

The survey found that almost a quarter (23.7%) of participating employers increased their 401(k) match last year. Excluding employers who made no change at all, the increased match was by far the most popular enhancement, representing 41% of plan changes. What's more, for employees who are not yet contributing to their retirement plan, an increased match was one of the most powerful motivators for getting started, behind only an increase in salary. Vestwell also reports that, among employers who made a change to their plan in the last year, 18% relaxed their eligibility standards over this time.

For advisors, more than half (55%) indicated that they are utilizing managed accounts to better serve their clients and 18% who do not currently offer managed accounts intend to introduce them in the next year, the survey found. Many advisors are also looking to expand their offerings to include new savings vehicles, including interest in adding health savings accounts (HSAs) (46%), 529 plans (32%), and emergency savings accounts (19%) in 2023.

Advisor Relationships

And with an eye on expanding benefit offerings, employers apparently are seeking deeper relationships with their advisors, giving an advantage to those who can scale their practice effectively while providing personalized recommendations to their clients, the report suggests.

When asked what they look for in a relationship with their advisors, the top three qualities employers listed were:

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> “The survey also found that even with volatility in the market, 57% of investors plan to keep their money ‘as is’ and stick to their long-term strategy, a sign that stay-the-course messaging is resonating.”

1. recommending and monitoring plan investment;
2. educating employees; and
3. recommending plan design.

In fact, an overwhelming majority of both small business employers and employees (90%) are interested in utilizing the support of a financial advisor to guide them through their options, the report notes. Additionally, nearly half (47%) of employers believe that advisors add the most value when educating employees about 401(k)s and investment decisions. Advisors also believe the area where they add the most value is employee education (22%), followed by plan administration education (21%), plan design recommendations (21%), investment recommendations and management (20%) and fiduciary oversight (16%).

These findings result in an interesting dynamic, the report suggests. Savers want their employers to be more involved with retirement education; employers wish advisors provided more education; and advisors see offering educational resources as one of their key value propositions.

“It’s clear that small business owners see the value that the expertise of a financial advisor can bring to their business. In today’s competitive market, it’s essential for small businesses to attract and retain top talent. Working with a financial advisor not only sets these businesses up for success, they can also support the growth of their benefits offerings as their businesses grow,” Schumm emphasizes.

Among the survey group, 80% of small businesses were found to work with a financial advisor and 34% of employers came to offer a retirement plan as a result of an advisor or accountant’s recommendation.

— Ted Godbout

Rising ‘Tied’

Investors turn to advisors as retirement worries rise

Worries about retirement are seeing an uptick, with 52% of respondents to a new survey indicating concern about saving enough for retirement compared with 45% in June. Similarly, 50% fear running out of money in retirement versus 46% in June.

However, an “overwhelming majority” of investors who work with an advisor remain confident in their insight and guidance, even as 2022 closed with lingering concerns over inflation and the potential for continued market volatility.

State Street Global Advisors found the percentage of U.S. investors indicating they value their financial advisors’ knowledge and guidance even more during uncertain times held steady at 89% compared with June 2022, when it was 91%; 81% indicate their financial advisor has helped them remain confident in this period of rising inflation and market volatility, compared to 86% in June.

“Helping clients remain confident and committed during times of volatility can be a challenge for advisors whose clients may have a kneejerk reaction to abandon their investment strategy if markets get choppy,” Brie Williams, head of Practice Management at State Street Global Advisors, said in a statement. “Our survey found 86% of investors have discussed market volatility with their financial advisor and 83% say their advisor has informed them of how volatility will affect their long-term financial goals.”

The survey also found that even with volatility in the market, 57% of investors plan to keep their money ‘as is’ and stick to their long-term strategy, a sign that stay-the-course messaging is resonating.

Furthermore, 17% plan to leave their money as is, but opportunistically invest more if market conditions permit, while 18% indicate they will move money to other investments to reduce the risk of loss. A mere 8% plan to retreat to cash to avoid potential loss.

Top Financial Concerns

The survey found 71% of investors are “optimistic” or “very optimistic” about their own financial future over the next 12 months. While this number may seem high, it is significantly lower than pre-pandemic levels when it was 88% toward the end of 2019, at the close of a decade-long bull market.

Today, nearly three-quarters (74%) of investors are worried about inflation. Although inflation concerns have waned slightly since June (76%), they’re still relatively high when compared to the pre-pandemic levels of 71%.

Since last June, general concern over market volatility has declined 11 percentage points to 46%. Still, the percentage of those concerned about the value of their actual investments eroding has held steady since June, when it was at 59% compared with 56% today. NNTM

— John Sullivan

6 Easy Ways to Stand Out in Today's Market

Now is your chance to leverage new strategies, deliver relevant topics, refresh designs and write copy that can truly differentiate you!

By Rebecca Hourihan

Retirement plan advisors know how hard it can be to find the time and resources for effective marketing. It's easy to settle for "just getting by" with outdated content, lackluster designs and text that fails to stand out in today's competitive market. But that trio can hurt your business. Don't miss out on potential opportunities. Now is your chance to leverage new strategies, deliver relevant topics, refresh designs and write copy that can truly differentiate you!

Stay Ahead of the Joneses

The recent wave of legislative and regulatory changes has created a unique opportunity. Updating content shows that you are aware of industry trends and allows you to emphasize what sets you apart from other advisors. This ensures that existing and potential clients will see you as a go-to source and their ideal retirement plan partner.

Boosting Audience Engagement: New Regulations

As part of the SECURE Act 2.0, employees who participate in a 401(k) or 403(b) plan can now receive small incentives that applaud their good savings behavior. Here's the idea: the next time you host an education meeting, ask the audience relevant questions. For example, what is a target date fund? What is the maximum amount available to save in 2023? What is a beneficiary and why is that

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important? Then hand out $5 gift cards as rewards. This easy-to-implement idea gets the audience involved and could drive home the key information you want them to learn.

Quick Refresh: Statistics and Sources
Take a look at your current marketing materials. Do you cite any statistics or list any sources? Common examples include your website, pitch deck, brochures, overviews and presentations. Gather these evergreen materials and check each source's publication date. If the date is older than 2020, it's time for an update. Find the newest version of that same study and revise the information. Not only will this keep your compliance department happy, but it'll also keep your marketing materials fresh and relevant.

Culture Shift: ESG(k)
With 75% of plan sponsors wanting to know more about ESG options and 65% of plans intending to add an ESG option this year (Fidelity Investments, *Plan Sponsor Attitudes*, 13th Edition, Nov. 16, 2022), a culture shift is happening. People are interested in learning more about climate change and the inclusion of environmental, social and governance factors for growing and protecting retirement savings. Even if you don't personally agree with ESG or climate change, it's still beneficial to understand it. And what better way than to attend the NAPA 401(k) Summit's ESG(k) bootcamp on April 2 and learn the pros, cons and thought process behind ESG investing.

"There's no time like the present to revamp any outdated materials and create fresh content to make you stand out in today's competitive market."

Give Your Firm a Design Edge

Likewise, updating your design gives you an edge when it comes to capturing attention. Often, we hear advisors describe their content this way: "It's not pretty, but it gets the job done. It's a little outdated and/or it doesn't represent who we are." So, change it. You are probably not the only one noticing the need for a design update.

High-quality visuals can help tell your story quickly and effectively—which is key when competing for a plan sponsor's business.

Easy: Style Guide
To strengthen your visual reputation, begin with a solid brand foundation that includes a consistent logo, colors, fonts and imagery style. Unite all these elements in a single document. This ensures that everyone is on the same page. It will help you and your team create cohesive business assets that reflect your professional advisory office.

Intermediate: Layout
Standardizing the look and feel of your communication material can enhance your firm's professionalism and emphasize a consistent, dependable brand. Create an email template that all employees can use to ensure consistency across communications. Or design master slides for your finalist PowerPoint presentations to make sure they flow together harmoniously—no more mismatched graphics or jumbled content. Presenting at the boardroom level should include high-quality visual consistency that creates trust.

Advanced: Brand Alliance
Every interaction is an opportunity to foster trust, loyalty and ultimately business growth. Leverage your visual identity across all of your touchpoints—social media, email, guides, presentations, etc. One idea is to appoint a team member as your designated Brand Lead, who will ensure consistent high-quality output. This in turn can reduce the time it takes to close new 401(k) plans while retaining existing clients and building referrals through business development campaigns.

New Business Development Strategies

Leveraging new strategies can present growth opportunities while positioning yourself as an expert in the retirement plan industry. Consider starting a blog or podcast series in which you discuss topics related to fiduciary responsibility, investment oversight, plan design modifications, new legislation, financial wellness trends and other creative tips that can help employers offer appreciated retirement plan benefits.

Not only will these types of initiatives help position you as an authority in your community, but they can also act as great lead generation tools as well. Since the people looking you up online are going to find digital proof that you are a qualified plan expert, they are likely interested in learning more about your retirement plan services.

Sprucing Up Your Business

Ready to give your marketing efforts a much-needed refresh? Great! There's no time like the present to revamp any outdated materials and create fresh content to make you stand out in today's competitive market. With a little bit of effort, you can share materials that position you as an authority in your plan sponsor community, retain happy clients, capture more leads and boost your overall business.

So start looking into ways that you can update your content and design today—it will be worth it. At the end of the day, you (and your clients) will be glad you did. It is easier than you think to create a path to success if you have a clear game plan.

Thanks for reading and happy marketing! NNTM

Crypto 101

Confused about cryptocurrency? Here's how investors are making money.

By Spencer X Smith

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Warren Buffett famously said, "If you've been playing poker for half an hour and you still don't know who the patsy is, you're the patsy." A close relative of this maxim was coined regarding social media: "If you're not paying to use the product, you're the product."

And applying this to cryptocurrency, "If you're earning yield and you don't know where the yield comes from, you're the yield."

Here are three ways interest-bearing crypto works, and the risks associated with each.

Centralized Exchanges (CEX)

Buy crypto, hold it on an exchange, and you receive more of that token effortlessly. Pretty great, right? It's great until the CEX handling your money makes bad loans. CEX make money by:

1. holding your crypto;
2. paying you a yield;
3. lending your crypto out to others; and
4. keeping the spread for their profit.

The third item has been especially problematic lately. Risk management policies, or lack thereof, resulted in many bad loans supporting leveraged positions.

Voyager, Celsius, BlockFi, Genesis and many other CEX platforms have failed recently due to poor lending decisions, and their depositors have lost some, if not all, of their money.

> "Buy crypto, hold it on an exchange, and you receive more of that token effortlessly. Pretty great, right?"

Using a CEX for yield, as easy and appealing as the process may be, has proven to be extremely risky. Where does the yield come from on a CEX? You placing your assets into the hands of risk managers.

If you hold your crypto on a CEX, and that CEX is lending out your assets, understand where the yield is coming from. The next two interest-bearing strategies will cover Decentralized Finance (DeFi), and how those yields work.

DeFi Through Token Emissions

What does Decentralized Finance (DeFi) actually mean?

DeFi is a series of permissionless systems. Unlike other financial tools (banks, brokerages, qualified retirement plans, credit cards, etc.) which require you to create an account, DeFi allows anyone with a digital wallet to interact with the platforms.

DeFi platforms, then, are in a race to gather as many users as possible. Think about startup companies that have grown to become huge, like Amazon, Facebook and Uber.

They've all succeeded where their competition failed by acquiring more users/customers.

DeFi is closer to Uber than the other two examples. Uber (and their main competitor, Lyft) attracted customers by offering subsidized rides—new users got to both try the new "push a button, get a ride" technology while paying less than the cost of a cab.

With DeFi, platforms earmark tokens as a reward for those using the platform. This is a component of what's called "tokenomics." Tokenomics—a mash-up of the words 'token' and 'economics'—is the calculation used in crypto protocols to determine value.

Much like stocks, where the market capitalization is the price of a stock multiplied by the outstanding number of shares, crypto follows a similar formula: price of the crypto multiplied by the outstanding number of coins.

DeFi platforms—as a component of their tokenomics strategy—will earmark a portion of their tokens for emissions, which creates inflation. As the outstanding number of coins grows, it creates downward price pressure on the token.

Fully diluted value, similar to market capitalization, is a dollar representation of the price of the crypto multiplied by the total supply that will ever exist. If there's a difference between the fully diluted value and the market cap, this indicates there are still tokens that are yet to hit the public market. These could be locked tokens (for venture capitalists or other early investors), team allocations for those who work there, or tokens set aside for future projects, such as pre-engaged emissions.

Users on a DeFi platform could benefit from these prearranged emissions by participating in myriad ways, and each platform is different. Some users may choose to "stake" their cryptocurrency, which can act as both a liquidity mechanism or even support the security of the token's underlying blockchain. Other DeFi platforms will "reward" users if they contribute to the community, produce educational content or serve in roles requiring their time or expertise.

Some platforms have chosen to emit tokens to users who are simply conducting transactions such as buying and selling. Since all crypto transactions—and the underlying blockchains that support them—are fully transparent and auditable, buying and selling will drive volume (and by extension, attention) to the platform.

Where does the yield come from in this token emissions example? Tokenomics designed to reward users, giving them more of the tokens from the platform. Poor tokenomics design could put you or your clients' crypto returns at risk, however, as runaway token inflation may drive down the price.

DeFi Through 'Real Yield'

Unlike emission-based yield, some interest-bearing options come from fee generation... called 'real yield.' Platforms make money by providing a service, and those holding that platform's tokens can benefit as user adoption grows and value transacted increases.

Crypto platforms with real yield offer us the opportunity to conduct fundamental research, such as a discounted cash flow analysis. If the token has claims on the profit, we can value the token by analyzing the sequencing of the future cash flows of the protocol. More mature platforms—with many users and demand for transactions—have generated revenue via these users utilizing the platforms.

Where does the yield come from in a 'real yield' scenario, then? A platform earning money through fee generation. The main risk? People stop using the platform, and the fee generation disappears. Earning yield on your crypto investments has great appeal, especially if the alternative is zero interest. Understanding where yield comes from, however, is critical to participating in these platforms confidently.

Conclusion

When analyzing or considering a yield-bearing crypto project for yourself or your clients, assess which of three scenarios is producing the cash flows. Is it the risk of a centralized exchange? A token driving up its supply through emissions? Or a protocol generating revenue via its use? All three can play a factor when building a crypto portfolio. NNTM

NONQUALIFIED KNOW-HOW

SEVEN ACES TALK ABOUT HOW TO WORK EFFECTIVELY WITH DEFERRED COMPENSATION PLANS

BY JUDY WARD

My Life Graphic / Shutterstock.com

Butusova Elena / Shutterstock.com

BRADY DALL STARTED SPENDING A LOT OF TIME WORKING WITH NONQUALIFIED DEFERRED COMPENSATION (NQDC) PLANS ABOUT SEVEN YEARS AGO, and the Salt Lake City-based senior vice president at OneDigital Retirement + Wealth says nonqualified plans have become a really important part of his practice.

"Number one, we are solving a problem for some of the most important people in our client relationships. If you think about the key employees, a 401(k) plan's contribution limits mean they can't completely save what they need to for tax-advantaged retirement savings. So we're bringing in a solution to that problem that is truly meaningful for these people," Dall says. "As we do that, we are directly connecting with the key people at our clients, through one-on-one participant meetings, to solve their retirement-savings challenges for them. And these are typically the same people who decide if we stay or go as the plan advisor."

Seven of the 2023 Top 100 Retirement Plan Advisors Under 40—known as Aces—talked about lessons they've learned about how to build their nonqualified plan practice, and where advisors can make a real difference for these plans. David Morehead, a San Diego-based vice president at OneDigital Retirement + Wealth, was fortunate early in his career to have a mentor who'd specialized in deferred compensation plans for 25 years, so he learned a lot about how he could help these plans and participants. When top executives can't save as much of their pay as they want to in a qualified plan, "These are kind of 'champagne' problems—but they're problems nonetheless," he says. "Working on nonqualified plans gives me another way to be a problem-solver for my clients."

FIRST, IDENTIFY A NEED

Patrick Flint, a Raleigh, North Carolina-based vice president and financial advisor at CAPTRUST, has the problem-solver mindset when deciding which qualified plan clients may benefit from also having a deferred compensation plan. "The key is taking a holistic approach to identifying the client's needs for retirement savings, and not starting a nonqualified plan just to start a plan, without a specific goal in mind," he says. "It's about being able to identify a problem that your client has, and helping them to solve it. If you can do that, it strengthens the client relationship, and their sense of the help that they know you can provide. When the nonqualified plan does what we hoped it would accomplish, I think it continues to build trust."

Rick Sauerman, Atlanta-based senior plan advisor at NFP Retirement, shares

"MORE THAN ANYTHING, FOR THE ORGANIZATION SPONSORING IT, THIS PLAN IS A COMPENSATION TOOL: THE EMPLOYER CAN USE IT AS A 'GOLDEN HANDCUFF' TO RETAIN AN EXECUTIVE WITH VESTING REQUIREMENTS, OR AS A SIGNING BONUS OR A RETENTION BONUS."

— RICK SAUERMAN, *NFP Retirement*

how he decides which qualified plan clients to approach about starting a nonqualified plan: "You can't go into this thinking of it as a sale. You have to think of it as, you are solving a problem for your client. So first I'm looking at, what clients might need a nonqualified plan?"

That boils down to three key areas, in Sauerman's experience. "The first is if they are failing testing on the qualified plan. Often, that means they are making refunds to the highly compensated employees (HCEs), which certainly doesn't instill a lot of 'good feels' in that group," he says. "The second is if a client is having issues with recruiting and retention of key staff. And the third is if the client has a population of pretty high earners that the qualified plan is not allowing to save enough for their retirement." These can be safe harbor plans or other plans that can pass testing, but IRS contribution limits mean the HCEs often can't save as much pre-tax as they'd like.

HELP PINPOINT THE NQDC STRATEGY

"What do I wish my clients knew about deferred compensation plans? The answer is *more*," Morehead says. "Nonqualified plans can be really beneficial to a lot of companies, but a lot of them are oversold." Sponsors of an existing nonqualified plan often don't fully understand how to utilize it best to benefit both participants and the organization, he has seen.

For Jeremy Weith, talking to a qualified plan client about a nonqualified plan comes naturally as part of his team's positioning as advisor for an employer's comprehensive retirement strategy. "We never position ourselves as just 'the 401(k) guys,' says Weith, managing director at Northbrook, Illinois-based Sheridan Road Advisors, a part of HUB International. "The consulting work we do on retirement benefits not only includes rank-and-file employees, but also the executives. We always talk to our clients to make sure their retirement benefit is working for all of their employees."

When he talks to new or potential clients that already have a nonqualified plan, Weith often discovers that they don't fully understand how to utilize the plan strategically to help achieve their organization's goals. "These deferred compensation plans, in my opinion, have been sold more than they have been bought," he says. "There are a lot of nuances to nonqualified plan design, and a lot of our value as advisors comes down to educating the sponsor about the options they have. The more you can educate them on how to leverage the plan, the more you can help them."

Nate Moody, a retirement advisor at Falmouth, Maine-based Lebel & Harriman, LLP, sees a lot of value in an advisor explaining how to utilize nonqualified plan design to help an organization competing for talent in a tight job market. "Nonqualified plans, in terms of their recruiting and retention capabilities, are like a 401(k) plan on steroids," he says. "The participants are able to contribute significantly more than they can to the qualified plan, and the plan also can add value for the employer by being more restrictive on vesting then you could with a 401(k)." A nonqualified plan sponsor can pick a more creative vesting schedule for employer contributions, he explains, and longer vesting can help keep top talent at an employer.

Most of Dall's conversations with employers about a nonqualified plan start because the organization's higher-paid employees want to save more for their retirement in a tax-advantaged way. Nonqualified plans have no annual contribution limits for participants, so they provide a way to do that. "That appetite to save usually starts the conversation with the employer about, 'What long-term incentive program do you want to have for your key employees?'" he says. "Then they see that a nonqualified plan can be a chassis to build a more flexible approach to long-term incentives. If an employer puts a contribution into a nonqualified plan for a key employee, it can prolong the value of the money that employer is spending, through the vesting schedule. Or an employer could use a contribution for a recruiting bonus. If you pay a recruiting bonus in cash, it is very hard to claw back. But if you pay it into a nonqualified plan, it is very easy, because the money is already there."

EXPLAIN THE RECRUITING AND RETENTION CONNECTIONS

Moody has worked on both the nonqualified plans of for-profit companies and the nonqualified plans of nonprofits and public employers. A lot of nonprofits struggle with hiring and retaining an executive director, he says, and smaller nonprofits in particular may start a nonqualified plan that offers eligibility only to its executive director.

A for-profit company typically starts a deferred compensation plan more as a kind of "golden handcuff" to help motivate a group of key employees to stay via vesting requirements for the employer contribution, Moody says. "As a sponsor, you can be more restrictive than you can with vesting for a qualified plan," he says. An employer seeking to retain top talent for the long term "can put in a restriction that says, 'If you don't work for us for at least 10 years, or if you don't retire with us, you aren't vested,'" he adds.

Eligibility parameters, vesting rules, and an employer contribution are all elements that can be utilized by an employer with a deferred compensation plan to help retain its top talent, says Cullen Reif, a Minneapolis-based retirement plan consultant at SageView Advisory Group. "Nonqualified plans are the wild, wild west of retirement plans" in their design flexibility, he says. "An employer could offer an employer contribution that goes above and beyond the match in its qualified plan. The employer could tie the contribution

"THERE ARE A LOT OF NUANCES TO NONQUALIFIED PLAN DESIGN, AND A LOT OF OUR VALUE AS ADVISORS COMES DOWN TO EDUCATING THE SPONSOR ABOUT THE OPTIONS THEY HAVE. THE MORE YOU CAN EDUCATE THEM ON HOW TO LEVERAGE THE PLAN, THE MORE YOU CAN HELP THEM."
— JEREMY WEITH, *Sheridan Road Advisors*

to performance-related measures for the quarter or the year. And you can get pretty specific, to each person in the plan, on an individual vesting schedule for the employer contribution."

Sauerman encourages advisors not to think of a nonqualified plan as only an addition an employer's benefits package. "When you think about framing the conversation to have with clients about adding a deferred compensation plan, it's very important to understand that for the employer, this is as much a compensation-management tool as it is a benefits-management tool," he says. "With a nonqualified plan, yes, it's a benefit for highly compensated folks. But more than anything, for the organization sponsoring it, this plan is a compensation tool: The employer can use it as a 'golden handcuff' to retain an executive with vesting requirements, or as a signing bonus or a retention bonus."

KNOW RECORDKEEPERS' STRENGTHS AND LIMITATIONS

There's a smaller pool of recordkeepers for nonqualified plans than for qualified plans, Flint notes. "And some providers do try to fit you into a pretty tight box, in terms of what's allowed in the nonqualified plan and what is not," he says. A recordkeeper may prefer for a nonqualified plan sponsor to utilize the recordkeeper's prototype plan document, for example, which means the plan design and investment menu parameters aren't negotiable. That may or may not work for a particular program.

There are plenty of recordkeepers and TPAs that say they can do nonqualified plan work, "but there is only a select group that can do a really good job on a nonqualified plan," Sauerman says. "So understanding the strengths and limitations of each provider is going to be absolutely key."

Some nonqualified plan sponsors may want to simply mirror the qualified plan investment menu, for example, while others may want a different investment lineup. A lot of nonqualified plan sponsors are interested in a more robust investment menu, Dall says, because the average investor in the nonqualified plan is (at least theoretically) more knowledgeable about investments.

"At the plan level, the nonqualified market has been like the 401(k) market was years ago," Dall continues. "Sometimes a recordkeeper comes in to a potential nonqualified plan client and says, 'Here is our investment menu: Use it or don't use us.' But there is an opportunity for us as advisors to take the things we've learned about the 401(k) market and apply them in the nonqualified plan arena. So we've learned to not just take what the recordkeeper offers us for nonqualified plan investments. We have been pretty successful in applying some pressure on recordkeepers, and once a consultant gets involved, in our experience the recordkeeper typically says, 'OK, here's an investment menu that you can choose from.'"

And some recordkeepers may be able to handle the administrative work for the plan design provisions a sponsor wants, while others may not, Sauerman says. It may be important to a sponsor and its participants that the nonqualified plan permits in-service distributions, but some recordkeepers' systems may not allow that. And some employers may want to utilize the nonqualified plan to pay signing bonuses to key hires and attach individualized vesting requirements, which some recordkeepers can facilitate and others may not be able to do.

MAKE ONE-ON-ONES A PRIORITY

Asked how a plan advisor can best spend his or her ongoing time working with a nonqualified plan, Morehead says that in his experience, it's helping participants one on one. "Qualified plans are complicated, and nonqualified plans are even more complicated," he says. "We get the most positive feedback from our clients based on the work we do individually with the employees participating in the nonqualified plan."

One-on-ones are definitely more important for nonqualified plans, Moody says. "The only thing that's consistent about nonqualified plans is that they are all different," he says. "Every plan is truly customized to that employer, and typically the participant education is very one-on-one based." For example, he's seen nonqualified plans in which individual employees have negotiated a specific employer contribution and vesting schedule for their participation in the plan, so group education doesn't work well.

Dall and his team have found that they have a lot more success working with nonqualified plans by doing one-on-one meetings for every single eligible employee. "This is a much more complex benefit to roll out than a 401(k) plan; it is probably the most complex benefit that the eligible employees have," he says. For example, nonqualified plans have an annual enrollment period that requires a participant to make a deferral election for the next year, which can't be changed until the next annual enrollment.

"One of the things that's complicated is just the fundamentals of how this nonqualified plan works," Morehead says. "In a 401(k) plan, a participant can put away up to $22,500 this year in deferrals. In a deferred compensation plan that allows employee contributions, a participant could put away 100% of their salary. It's also complicated for people to think about their distribution options: whether to take in-service distributions versus only at retirement, and how to structure the distributions."

Participants in nonqualified plans also may have substantial assets outside their workplace plans, complicating their decision-making. "The folks using a nonqualified plan typically have much more complex financial issues," Flint says. "In a group setting, you can talk about the basics of how the plan

DAVID MOREHEAD
OneDigital Retirement + Wealth

NATE MOODY
Lebel & Harriman, LLP

PATRICK FLINT
CAPTRUST

CULLEN REIF
SageView Advisory Group

BRADY DALL
OneDigital Retirement + Wealth

works. But for the most part, people in a nonqualified plan want to sit one on one with someone, to dive into those personal financial conversations."

GUIDE PARTICIPANTS TOWARD THEIR OWN BEST PATH

Of course, it's important in one-on-one meetings to help participants understand how best to utilize the nonqualified plan for their retirement savings. But Reif says there's also an opportunity for an advisor to show participants how they can utilize a nonqualified plan to save for their other, specific priorities.

"We help them to understand that the nonqualified plan can be used in so many different ways, to fit into their overall financial picture," Reif says. "There's sometimes a misconception that a nonqualified plan can only be used to save for retirement, but the plan can be used in so many ways besides saving for retirement. For the individual who needs to plan 5, 10, 15 years out, the plan can be used as a very effective way to save for things like a child's college education or a significant purchase like a house." The flexibility of a nonqualified plan, he adds, can help an employer create "stickier" employees who don't want to lose this opportunity.

Weith has seen that he and his Sheridan Road colleagues add significant value when they succeed in helping nonqualified plan participants understand how they can best use the plan—especially their contribution and distribution decisions—for their individual situation. "Helping these participants one on one has also opened up an opportunity for us to work with some of these employees on a personal (wealth management) basis," he adds. "I don't do any wealth management work, but we have members of our team who do a lot of individual work. There is a lot of planning work for people in the plan to do."

DO YOUR HOMEWORK BEFORE JUMPING IN

Last but not least, the advisors interviewed for this story encourage their peers to learn about deferred compensation plans *before* suggesting to any clients that they consider adding one. "One of the quickest ways to lose a good qualified plan client is by implementing a bad nonqualified plan," Sauerman says. "Let's think about who the people are who participate in the nonqualified plan: It's the C-suite, all the big salespeople, and the divisional heads. These are high-profile people in the organization, and their opinions matter. You have an amazing opportunity as an advisor to be a hero to these folks. But it's a sink-or-swim situation—if the plan is poorly implemented and the participants can't get a distribution when they want, or the plan has bad investments, or the participants just don't understand the plan design, now you're on thin ice. There is an opportunity to make this the stickiest client you've ever had, or an opportunity to run off a good client."

"The best piece of advice that I could offer is, do your homework first," Sauerman continues. "You have to be an expert, or at least know what you know and what you don't know. For the most part, the client is not expecting you to be the plan's one-stop shop: They want you to have the strategic vision for the nonqualifed plan, and to help them put together the (provider) team that will work on the plan." To develop his knowledge, Sauerman earned the NAPA Nonqualified Plan Advisor (NQPA™) credential, and he's also learned a lot from collaborating with colleagues in NFP's large executive benefits group.

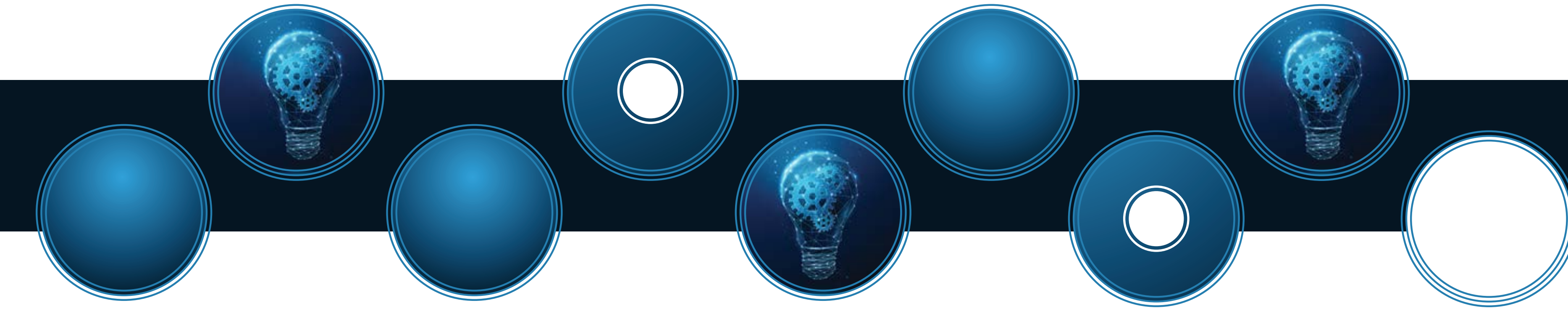
For an advisory practice in the early days of trying to work with nonqualified plans, Dall suggests considering partnering with an outside advisor who specializes in nonqualified plans. His practice did that with a lot of success, and the specialized advisor has since joined his OneDigital team. "A lot of advisors just try to partner with the nonqualified plan recordkeeping wholesalers," he says. "But there already has been an evolution toward specialist advisors in the qualified plan space, and that same thing is happening now in the nonqualified plan space. So I suggest that you don't just rely on the recordkeeper: Figure out what you can do to add value, and that may mean partnering with a specialist advisor outside your firm. If you do that, you will sell a lot more business, even if you have to split the revenues in the beginning." NNTM

Judy Ward is a freelancer specializing in retirement plans.

ACES

2023

NAPA'S TOP PLAN ADVISORS UNDER 40



'40' ACTS

WE ARE PLEASED AND PROUD TO SHARE OUR 2023 TOP RETIREMENT PLAN ADVISORS UNDER 40—NAPA'S "ACES.".

BY NEVIN E. ADAMS, JD

IT WAS ONE OF THE FIRST OF NAPA'S STANDARD-SETTING INDUSTRY LISTS. SINCE ITS LAUNCH, MANY OF THE INDIVIDUALS WHO HAVE BEEN RECOGNIZED HERE HAVE GONE ON TO BECOME THE VERY INDUSTRY LEADERS THE RECOGNITION WAS DESIGNED TO HELP IDENTIFY—INCLUDING LEADERS OF THE NATIONAL ASSOCIATION OF PLAN ADVISORS.

The list, established in 2014, is drawn from nominations (more than 500 this year) provided by NAPA Broker-Dealer/RIA Firm Partners, subsequently vetted by a blue-ribbon panel of senior advisor industry experts based on a combination of quantitative and qualitative data submitted by the nominees, as well as a broker-check review.

Just over half were on last year's list—but that also means there were a lot of new faces to acknowledge in a field of truly outstanding individuals. Half on this list had been working with retirement plans for 10-15 years, and 13% more than that. But nearly four in 10 less than that time frame.

Half work with plans totaling between $250 million and $1 billion in assets, and another quarter (27%) help guide plans with more than $1 billion in assets. And they're operating from more than half the states in the United States (and that's not considering the states they are operating IN).

We thank 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 for all you have done, and will continue to do, for the many plans, plan sponsors, and plan participants you support.

You can find the list of Top Retirement Plan Advisors Under 40 at napa-net.org/2023-aces-top-100-retirement-plan-advisors-under-40.

RICHARD **ADAMS**
CG Financial Services

GARRETT **ANDERSON**
Anderson Financial

TJ **ARCURI**
SageView Advisory Group

LUKA **ARNERICH**
SageView Advisory Group

ALEXANDER **G.** ASSALEY, III
AFS 401(k) Retirement Services, LLC

ERIC **BLOFSKY**
HUB International, LLC

ERICA **BLOMGREN**
CAPTRUST

JON **BRATINCEVIC**
Morgan Stanley

JEFF **BROADDUS**
MMA Retirement Services - Southwest Region

ERIC **BRUNTON**
Merrill Lynch

BRANDON **BUDD**
intellicents

CHRIS **BURKE**
LoVasco Consulting Group

JASON **BURRISS**
Morgan Stanley

FORREST **BUTLER**
FSRP

MEGAN **CARROLL**
Assurance, a Marsh McLennan Agency LLC Company

RACHEL **CARTER**
Merrill Lynch

MATT **CELLINI**
Greenspring Advisors

JOSEPH **CONZELMAN**
HUB Retirement & Wealth Management - Houston

BRADY **DALL**
OneDigital

JAKE **DALY**
Newfront Retirement Services

TAYLOR **DANCE**
GBS Retire

MORGAN **DAVIS**
NFP

JOE **DEBELLO**
OneDigital

MICHAEL **DUCKETT**
Creative Planning

BLAKE **FAUST**
Abbey Street

DEREK **FIORENZA**
Summit Group Retirement Planners, Inc.

MATT **FLECK**
ProCourse Fiduciary Advisors

JACK **FLETCHER**
Mariner Wealth Advisors

PATRICK **FLINT**
CAPTRUST

THOMAS **FORD**
Morgan Stanley

JOSEPH **GALBRAITH**
UBS Financial Services Inc.

STEVEN **GIBSON**
Rehmann Financial

CHRIS **GIOVINAZZO**
Accelerate Retirement

MATT **GIST**
HUB Retirement & Wealth Management

TREVOR **GLASGOW**
Merrill Lynch

BENJAMIN **GOTTLIEB**
Merrill Lynch

EUGENE **GUREVICH**
BayBridge Capital Group, LLC

QUINT **HALL**
Creative Planning LLC

THOMAS **HARDY**
Mariner Wealth Advisors

MATT **HEDLEY**
Lowe, Brockenbrough & Company

BLAKE **HIETT**
HUB International

SARAH **HODIAN**
NFP

KEITH **HUBER**
OneDigital

TREY **JAMISON**
Chase Dominion Advisors

LIAM **JOHNSON**
Financial Directions Group

DOUG **JOHNSON**
HUB Retirement & Wealth Management

KAMERON **JONES**
NFP

WHITNEY **JONES**
Premier Wealth Management

TRAVIS **LABRIE**
Financial Strategies Retirement Partners

DANIEL **LAHIFF**
Axial Benefits Group

MARK **LAUGHTON**
HUB International - Quintes Financial Services

JUSTIN**LEVONYAK**
Wintrust Investments, LLC

BENJAMIN**LIENER**
Merrill Lynch

DEAN**LYSENKO**
Marshall & Sterling Wealth Advisors, Inc.

KEVIN**MAJOR**
OneDigital

ALICIA**MALCOLM**
UBS Financial Services

ANTHONY**MCCRACKEN, JR.**
Newcleus

CASEY**MCKILLIP**
Aldrich Wealth LP

ERIC**MCMURDIE**
MG Retirement Advisors

SIMON**MICAKAJ**
Rehmann

MITCH**MILLESS**
MMA Retirement Services - Upper Midwest Region

SARAH**MONTOYA**
Morgan Stanley - Graystone Consulting

NATE**MOODY**
Lebel & Harriman Retirement Advisors

BRENNAN**MOORE**
NFP

MASON**MOORE**
Hub International

DAVID**MOREHEAD**
OneDigital Retirement

JOSHUA**MOTT**
Morgan Stanley - Graystone Consulting

STEPHEN**MUMFORD, JR.**
Valley Forge Investment Consultants, Inc.

KYLE**NELSON**
BerganKDV Wealth Management, LLC

CHAD**NOORANI**
BFSG, LLC

SCOTT**ONDEK**
SageView Advisory Group

JASON**COLIN**PATRICK
Fiduciary Advisors, LLC

BRYAN**PEEBLES**
Strategic Retirement Partners

NEIL**PLEIN**
Aldrich Wealth

DUNCAN**PURVIS**
BHS Financial Services

CULLEN**REIF**
SageView Advisory Group

RACHEL**RIEDER**
Valley Forge Investment Consultants, Inc.

ALLIE**RIVERA**
OneDigital

ADAM**RIVETT**
OneDigital

MATTHEW**RYBA**
Oakbourne Advisors

CALEB**SANDERSON**
Curi Capital

RICHARD**SAUERMAN**
NFP

SARAH**SCHWARTZ**
Newfront Retirement Services

MICHAELA**SCOTT**
Borislow Employer Retirement Consulting

BRENT**SHEPPARD**
Cadence Financial Management

CHRISTOPHER**SOTO**
Legacy Planning

BRENDAN**SPEERS**
Legacy Planning

MATTHEW**STEWART**
NFP

JEANNE**SUTTON**
Strategic Retirement Partner

ALEX**SYLVESTER**
Shepherd Financial

GREGORY**TEDONE**
Strategic Financial Services

TOM**TIELBUR**
Gallagher

JEREMY**TOLLAS**
CAPTRUST

DANIEL**URBAN**
CAPTRUST

DANIEL**VALENZUELA**
Merrill Lynch

BENJAMIN**VERHILLE**
TrueNorth

JEREMY**WEITH**
Sheridan Road, a Division of HUB International

JENNA**WITHERBEE**
401(k) Plan Professionals

RYAN**ZELASKI**
NFP

BLADE**ZYCH**
OneDigital

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WHAT TO LOVE (& FEAR) ABOUT SECURE 2.0 NOW

IT'S COMPLEX, CONFUSING, AND FILLED WITH OPPORTUNITIES FOR ADVISORS, PLAN SPONSORS, AND—IMPORTANTLY—PARTICIPANTS. WHAT SHOULD RETIREMENT PLAN PROFESSIONALS WATCH, AND WATCH OUT FOR, IN THE LANDMARK LEGISLATION? OUR EXPERTS WEIGH IN. **BY JOHN SULLIVAN**

"HOW DO YOU EAT AN ELEPHANT?" ONEDIGITAL RETIREMENT + WEALTH'S PHIL TROYER RHETORICALLY ASKED WHEN DESCRIBING SECURE 2.0'S SIZE AND COMPLEXITY. "A BITE AT A TIME."

It's an attitude emblematic of the industry as a whole in the wake of the passage of the SECURE 2.0 Act of 2022. While excited for the potential benefits of the latest retirement plan legislation, its numerous provisions, effective dates, grandfather clauses, and—yes—technical errors make for a heavy lift. With 92 provisions with 358 pages of legislative text, there's a lot to absorb and assimilate, and its integration into advisor, recordkeeper and plan sponsor daily processes has the potential to be rewarding—yet challenging.

According to the lawyers, aggregators, recordkeepers, and plan professionals we spoke with, the first step is to focus on the here and now (and in some cases, "then"); the mandatory and optional pieces with either retroactive or fast-approaching implementation dates.

"The act is so large, I think it's overwhelming to plan sponsors and, to some extent, advisors," Troyer said. "What I'm trying to get them to do is just focus on what's going into effect immediately."

"My biggest concerns are all the moving pieces," Renee Scherzer, Principal and Retirement Plan Consultant at 401K Resources, added. "Trying to determine optional versus mandated, the pockets of years, pre-tax, Roth and the $145,000 income cap and what determines that, the current year, previous year, all these little nuances."

The Wagner Law Group's Tom Clark compared it to the frenzy and stress of a Disney classic.

"It's like 'One Hundred and One Dalmatians,'" he said. "There are a hundred different things in this legislation to figure out. Every advisor I've spoken with is super-concerned that [all but the largest] recordkeepers will not be able to build out the technology and workflows fast enough to keep up with the legislative changes."

Because recordkeepers are often "brought to the table" by the advisor, any hiccups reflect poorly on both.

"It's an uncontrollable factor for advisors," Clark warned. "In light of the next two-year schedule, I would be out ahead of it and having conversations with my recordkeeping partners early and often."

ADVISOR ADVANTAGES

While undeniably complex, the concerns don't detract from SECURE 2.0's opportunities. There's much to like in the new law, including its timeline. "I do like the fact that it's rolled out over the next five years, so we have time to absorb it and prepare for some of the provisions," Scherzer said.

"We're certainly seeing interest and understanding with respect to catch-up Roth's and self-certification of hardships," Amy Vaillancourt, Voya's Senior Vice President of Workplace Architecture, added. "We see primary interest in the provisions in that 'mandatory column. We're now seeing more conversations come from employers wanting to understand more about student loans and emergency savings. As we get into 2024, I really expect more appetite and conversations around some of those bigger provisions that help with that broader saving picture."

From the perspective of increasing coverage and enhancing retirement benefits, it's a win, according to Pension Institute and Retirement Law Group's Jason Roberts. Even when asked for negatives within the act, he remained positive about the prospects. While there's complexity for tax professionals, recordkeepers, and other industry stakeholders, "they'll sort it all out."

"All things considered, it's a good law," Roberts said. "I see more opportunities for advisors than struggles once they're educated on the nuances so that they can go out and convey that to their institutional and individual clients. I don't see anything other than just the technical nature of the tax code as being an impediment."

"Any new legislation creates exciting opportunities to learn and advise people," Faegre Drinker Biddle & Reath's Fred Reish added. "So, overall, that's good."

Reish and others interviewed mentioned the incentives and requirements to encourage small businesses to offer 401(k) plans as the most beneficial provisions—including tax credits, the Starter 401(k), and mandatory auto-enrollment—as well as the newly enhanced (and "branded") saver's match.

They're especially critical as tools to close both the savings and coverage gap(s), which refers to both a shortfall in needed funds to secure an affordable quality of life in retirement, and the difference in average savings amount among various demographic groups.

"We're focused on the Starter 401(k), because I work with organizations on the savings gap, especially for minority groups, women, and so on," Lisa Garcia, Retirement Plan Consultant with SageView Advisory Group., explained. "The provision would help a lot in that area, but it will take a lot of education …I also like the impact and the intention of the Saver's Match, but it will take a few years for it to be effective."

The following discussion of some (but not all) of SECURE 2.0's major provisions note their effective date and whether they are mandatory (M) or optional (O).

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"IT'S LIKE 'ONE HUNDRED AND ONE DALMATIANS.' THERE ARE A HUNDRED DIFFERENT THINGS IN THIS LEGISLATION TO FIGURE OUT."

MICRO PLAN BOOST

(Tax Credits, Starter 401(k), Auto-Enrollment)

Tax Credits (2023)—O

Secure 2.0 establishes a new tax credit and significantly expands an existing credit. The startup credit is increased to 100% for companies with 50 or fewer employees. The current cap of $5,000 per employer is retained. The new credit offsets up to $1,000 of employer contributions per employee in the first year, phased down gradually over five years.

The credit applies to companies with 100 or fewer employees. However, it is phased out for those with more than 50 employees. There is no credit for contributions to any employee making more than $100,000 annually (indexed after 2023). Also, there is no deduction for employer contributions that qualify for the credit.

"I like the fact it expands opportunities for small businesses and participants because of the tax credits for starting a new plan," Scherzer said. "They are really beneficial to so many companies."

Reish agreed, marveling at the tax credits' size, a level not seen in the retirement plan space until now.

"I almost think I would set up a new plan and contribute $1,000 for every employee," he explained. "If I had 20 employees, that'd be a $20,000 contribution as almost a profit-sharing contribution. Not as a percentage of pay, just $1,000 per employee. Why not? The government will give me that money back. For the first two years, I get all of it back. The third year I get 75% back. At least for the first three years, I would just structure it that way."

Starter 401(k) (2024)—O

The Starter 401(k) plan is a new wage deferral-only safe harbor 401(k) plan. According to the American Retirement Association's Andrew Remo, Director of Federal and State Legislative Affairs, employees can save up to $6,000 per year (with a $1,000 catch-up contribution) without the administrative burdens or expense of a traditional 401(k) plan. For example, the Starter 401(k) plan does not require employer contributions or complicated non-discrimination testing.

"The primary purpose of the Starter 401(k) plan is to create a 401(k) product similar to the auto-IRA products now being put forward by over a dozen states," he explained. "It will allow employers that adopt a plan in those states to choose a private sector 401(k) provider to meet the retirement plan coverage requirement embedded in these laws.

All employees must be defaulted into the plan at a 3% to 15% deferral rate. No employer contributions are permitted. However, there will likely be a future technical correction, as the section's text does not match the summary and intent. The summary says its limits will match IRA limits, but the text limits deferrals to $6,000 rather than including the increased IRA limits for future years.

"I like the new Starter (k) plan because, compared to state-mandated IRA plans, which I do like, they allow the assets to be aggregated," Reish said. "More services can therefore be provided, along with lower cost investments."

Auto-Enrollment, Escalation (2025)—M

All new 401(k) and 403(b) plans adopted after December 29, 2022 (the effective date of the legislation) —except businesses with fewer than 10 employees, new businesses less than three years old, and churches and governments—must, though not beginning until 2025, automatically enroll participants between 3% and 10%. They must also automatically increase the rate by 1% per year to at least 10%, but no more than 15%.

Employees would have at least 90 days to opt out and take a distribution of any automatic deferrals, and the plan must have an Eligible Automatic Contribution Arrangements (EACAs) withdrawal provision. It does not apply to SIMPLE plans (since they're IRAs) but applies to adopting a MEP after the enactment date (based on the employer's adoption, not the effective date of the MEP).

"I think auto-enrollment and having those kinds of paternalistic conversations with plan sponsors is a good thing for advisors who are super-concerned with enrollment and getting the numbers up, which is really the whole reason we do this," Clark said. "I think that's very positive."

Reish agreed, noting, "Of the mandatory provisions, I think the new automatic enrollment provision is head and shoulders above the rest in terms of the long-term impact it will have."

Believing it signals not only a legal change but a cultural change, "If you look out five years from now, we'll begin to view automatically enrolled and automatic [escalation] plans as the norm. It'll be the odd plan that doesn't automatically enroll."

403(b) Plan Provisions (2023, 2024)—O

There's an opportunity to bring 401(k)-like pricing and investments to 403(b) plans using MEPs and PEPs, which the bill now allows (other than church plans). It provides unified plan relief if a MEP satisfies requirements similar to 413(e) PEP rules. A governmental plan gets relief even if commonality requirements are not met. The bill also

Unfinished Business

SECURE 2.0's Unintended Consequences, Quirks and Glitches

By Ted Godbout

As with drafting any major legislation and its corresponding statutory language, things can get missed, and "wires" can get crossed. And the SECURE 2.0 Act of 2022 was no exception.

Some things were identified immediately, and some were known about in advance, while others weren't apparent until the ARA's legal counsel and government affairs team dug into the fine print of the legislation. In several cases, it's simply that the legislative language doesn't appear to match the presumed intent according to the Committee explanation(s) of the provision(s).

Below is a brief description of *some* of those provisions identified for rework.

Catch-up Contributions (Section 603 of SECURE 2.0): One of the biggest potential issues was a technical drafting error that could jeopardize future catch-up contributions. The original intent of the provision was to require that all catch-up contributions for those earning over $145,000 in compensation be treated as Roth beginning in 2024, but according to the current wording of the legislation, no participants will be able to make catch-up contributions—pre-tax or Roth.

The error came because of the elimination of a subparagraph in the body of the legislation to allow for a conforming amendment—but in the process, inadvertently eliminated the ability to make any pre-tax catch-up contributions. The ARA alerted congressional and regulatory officials and anticipate that the provision would be fixed before 2024.

Higher Catch-up Limits for Ages 60 – 63 (Section 109 of SECURE 2.0): This provision contains a typographical error. The Senate Finance Committee's explanation indicates the catch-up limit will be no less than 150% of the 2025 regular catch-up limit. The provision for SIMPLE Plans correctly references the 2025 limit. However, the provision for qualified plans references the 2024 regular catch-up limit. As a result, the higher catch-up limit for these eligible taxpayers would be based on the 2024 limit but for the 2025 tax year. Note also that after 2025, these amounts are to be indexed for inflation, which could create further confusion if the reference to 2024 is not fixed. The reference to "2024" in the legislation should be revised to "2025."

Starter 401(k) (Section 121 of SECURE 2.0): A summary by the Senate Finance Committee reflects an intent for the contribution limits of the Starter 401(k)/403(b) plans to be the same as the contribution limit for IRAs. However, the provision limits contributions to $6,000 (indexed), which is the 2022 limit and is lower than what the IRA limit will be in 2024 when the provision is intended to be effective (it is $6,500 for 2023).

Mandatory Auto Escalation and Starter 401(k)/403(b) Plans (Section 101 and 121 of SECURE 2.0): The Senate Finance Committee summary also reflects an intent for Starter 401(k)/403(b) plans to be on a similar footing to state-run payroll-deduction IRAs, which are not subject to Section 101's auto-escalation feature. In this case, the ARA has recommended that the plans be exempted from the automatic escalation requirement to reduce barriers to employers adopting starter plans.

Required Minimum Distributions (Section 107 of SECURE 2.0): This provision contains a typographical error, which could impact the timing of RMDs. The RMD age is 73 for someone who turns 73 in 2023-2032 and is age 75 for someone who turns 74 in 2033 or later. If someone attains the age of 73 in 2032, they also will turn age 74 in 2033. Therefore, they have two RMD ages and an apparent one-year RMD holiday. The ARA has suggested that the reference to "age 74" in the legislation should be revised to "age 73," but the issue will need to be addressed either way.

403(b)s and CITs (Section 128 of SECURE 2.0): While Congress had intended for the legislation to allow 403(b) plans to invest in collective investment trusts (CITs), a late-breaking jurisdictional conflict between lawmakers apparently left that intent only partially realized. The SECURE 2.0 did amend the Internal Revenue Code to allow 403(b)s to invest in CITs, but corresponding changes to the securities law were not included in the final legislation. Because existing Securities and Exchange Commission rules prohibit such investing, lawmakers would need to update the relevant securities law to endorse these changes. Until then, 403(b) plan investments will remain limited to annuity contracts and publicly traded mutual funds.

Replace SIMPLE IRA Mid-Year with a Safe Harbor Plan (Section 332 of SECURE 2.0): This provision currently conflicts with the Section 121 Starter 401(k) provisions. The provision permits the SIMPLE IRA to be replaced with a Starter 401(k)/403(b) plan. However, the employer would not be allowed to adopt a Starter 401(k) because the SIMPLE IRA disqualifies the employer from eligibility to sponsor the Starter 401(k)/403(b) plan. The ARA is advocating for the provision to be revised to eliminate the conflict by permitting the employer to adopt a Starter 401(k) in this circumstance or by removing the reference to 401(k) in the legislation.

Optional Treatment of Employer Matching or Nonelective Contributions as Roth Contributions (Section 604 of SECURE 2.0): Under current law, plan sponsors are not permitted to provide employer matching contributions in their 401(k), 403(b), and governmental 457(b) plans on a Roth basis. Section 604 of SECURE 2.0 now allows DC plans to provide participants with the option of receiving matching contributions on a Roth basis, effective on the date of enactment.

However, for those employer contributions to be treated as Roth, the employee would first have to be fully vested. If a plan has a vesting schedule, then it can only comply with the provision if the plan is changed. As this is an optional provision (both for the employer to allow and the employee to elect)—and one complicated from an administrative standpoint, it may not be an immediate issue—but it's one on which advisors may well need to educate plan sponsors. NNTM establishes that, in consultation with the DOL, the Treasury must provide education and outreach on fiduciary duties to plan sponsors.

Another provision aligns the 403(b) plan hardship distribution rules with 401(k) plans. In addition to elective deferrals, these plans may now distribute, on account of an employee's hardship, qualified nonelective contributions, qualified matching contributions, and earnings on any of these contributions (including on elective deferrals).

Lastly, while it was widely reported that 403(b) plans could now offer low-cost collective investment trusts (CITs), an investment option popular in 401(k)s, that news was a bit premature. As it turns out, 401(k)s currently enjoy certain securities law exemptions 403(b) s do not. While the legislation developed in the House addressed the issue, those in the Senate did not – could not, in fact, without including the Senate Banking Committee, which has jurisdiction over such matters. Despite some intense last minute negotiations, that piece didn't come together in time. From a practical standpoint, they are not yet available.

Emergency Savings Accounts (2024)—O

Employers may offer non-highly compensated employees (NHCE) what were called "pension-linked" emergency savings accounts and may automatically opt employees into these accounts at no more than 3% of their salary (despite the pension-linked label, this applies to defined contribution plans). These "sidecar" emergency savings accounts are capped at $2,500 (or lower, as set by the employer). Contributions are made post-tax and but are treated as elective deferrals for retirement matching contributions.

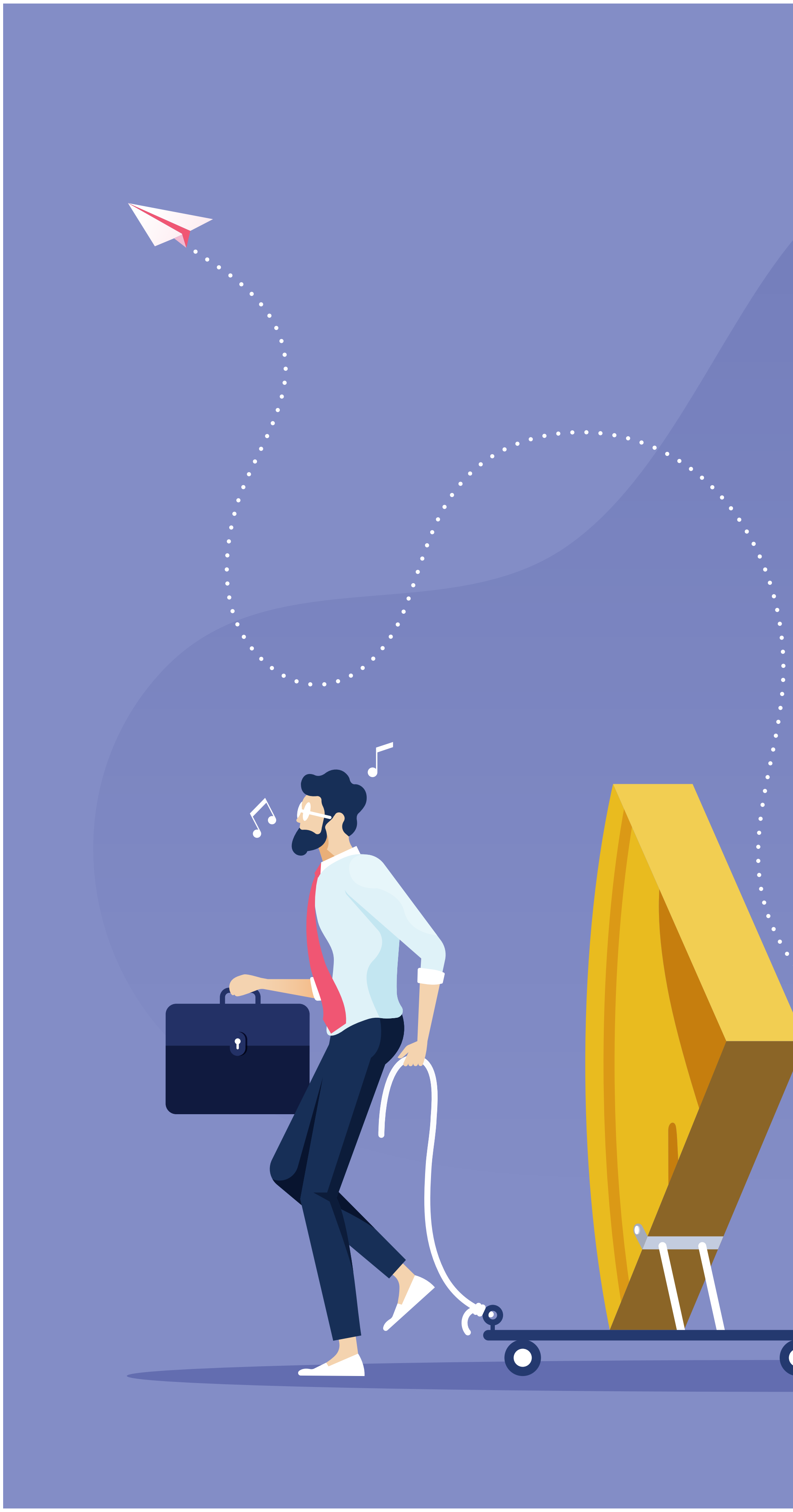
Once the cap is reached, the contributions may be stopped or continue as Roth deferrals. The first four withdrawals from these accounts are not subject to fees or taxes.

If a plan matches these deferrals, it must count contributions to the emergency savings account in the same way for the purposes of the match. Upon termination or separation of service, the account balance may be taken as a distribution, rolled into a Roth, or rolled into an IRA.

"While scheduled for 2024, this is a big, complex, high-impact provision that will have lengthy Treasury and DOL regulations, so implementation will be tricky," Group Plan Systems Managing Partner Pete Swisher said. "2024 is therefore probably optimistic."

Student Loan Matching Contributions (2024)—O

Acknowledgiing the enormity of the country's $1.75 trillion in outstanding student loan debt and its likely impact on retirement savings,



SECURE 2.0 permits employers to match student loan repayments under 401(k), 403(b), SIMPLE, and 457(b) plans as if those payments were elective deferrals to the plan. It's intended to help employees who may not be able to save for retirement because they are overwhelmed with student debt and missing out on available matching contributions for retirement plans.

Reish explained that a plan must treat the Qualified Student Loan Payment (QSLP) matches the same as matches on participant deferrals, and an employer can rely on employee certification of payment.

Additionally, a plan may test the matching contributions as a part of its general discrimination testing or as a separate group consisting solely of those receiving matches as a result of payments on QSLPs. Other than for qualification testing, student loan repayments are not treated as contributions to the plan.

While many applauded the provision's inclusion in SECURE 2.0, OneDigital Senior Vice President of the Retirement + Wealth Jania Stout is less enthusiastic.

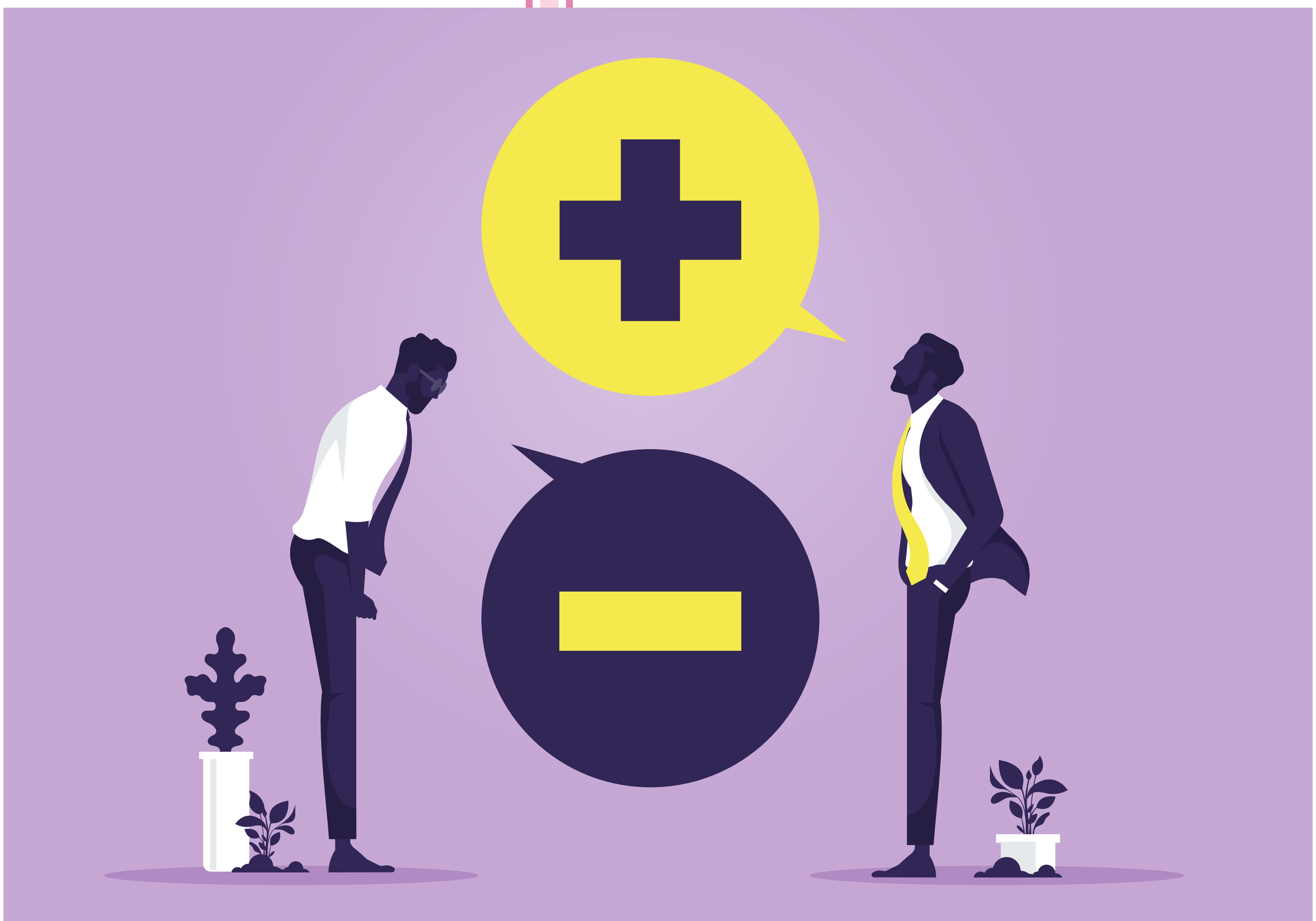
"I'm not excited about the student loan match part just because I'm a fan of a student loan program being a standalone plan, not being commingled into the 401(k)," she said. "If you're going to do a student loan program, do it right. I don't think the matching inside the 401(k) is the right way to do it."

Easier Access to Funds (2024)—O

The law allows one penalty-free distribution per year up to $1,000, with the option to repay the distribution within three years. No further emergency distribution would be permissible during the three-year repayment period unless a re-contribution is made. An exemption from the 10% penalty applies, and the plan may rely on participant self-certification of the hardship.

Plans may also permit a withdrawal in the case of an eligible distribution to a domestic abuse victim. The amount available is the lesser of $10,000 (indexed to inflation) or 50% of the account balance. It applies to plans that are not subject to IRC Section 417. The qualified withdrawal is exempt from the 10% penalty. Subject to certain conditions, the funds may be re-contributed to the applicable eligible retirement plan.

"What I'm most excited about is the emergency savings/sidecar along with the $1,000 penalty-free access to savings," Clark said. "I've been working with clients that are going to combine that, along with the student loan [matching contributions], and really design an aggressive approach to helping Main Street avoid the financial pitfalls and fees that come with average daily working-class living. How many tens and hundreds of billions of dollars



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are wasted on unnecessary fees, interest, and stuff like that?"

Auto Portability (2024)—M

Most advisors agree that rolling over a retirement plan account should be much easier when a worker changes jobs. The Employee Benefit Research Institute (EBRI) finds that job-switching Americans lose $92 billion in retirement savings yearly to from premature cash-outs. It's mainly seen in workers with less than $5,000 in their accounts.

EBRI further notes widespread auto-portability adoption could save 67 million Black and minority workers $619 billion, and 42 million female workers of all ethnicities could save $365 billion.

It's why portability is the next piece in the auto-revolution (enrollment, deferral, escalation), a concept (process) that Retirement Clearinghouse has advocated for some time. Under current law, an employer is permitted to distribute a participant's account balance without participant consent if the balance is under $5,000 (an amount increased to $7,000 in 2024 under SECURE 2.0) and the balance is immediately distributable (e.g., after termination of employment). Current law also requires an employer to roll this distribution into a default IRA if the account balance is at least $1,000 and the participant does not elect otherwise.

SECURE 2.0 permits a retirement plan service provider to provide employer plans with automatic portability services. Such services involve automatically transferring a participant's default IRA (established in connection with a distribution from a former employer's plan) into the participant's new employer's retirement plan unless the participant elects otherwise.

Roth Provisions (2024)—M, O

Catch-up contributions under a 401(k), 403(b), or governmental 457(b) plan must be designated Roth contributions for participants with wages greater than $$145,000 (indexed to inflation) in the prior year that the contribution is made. For participants with wages less than, or equal to, $145,000, plans must have a Roth option for the catch-up contribution.

It's important to note that the American Retirement Association recently identified a significant technical error in this section that will likely need a technical correction. Specifically, according to wording in the legislation, beginning in 2024, no participant can make catch-up contributions (pre-tax or Roth).

"IF YOU LOOK OUT FIVE YEARS FROM NOW, WE'LL BEGIN TO VIEW AUTOMATICALLY ENROLLED AND AUTOMATIC [ESCALATION] PLANS AS THE NORM. IT'LL BE THE ODD PLAN THAT DOESN'T AUTOMATICALLY ENROLL."

An additional Roth provision in the legislation allows for tax and penalty-free rollovers from 529 college savings accounts to Roth IRAs, under certain conditions. Beneficiaries of 529 accounts can roll over up to $35,000 as a lifetime limit. Subject to Roth IRA annual contribution limits, the 529 accounts must have been open for over 15 years.

Long-Term Part-Time Workers (2025)—M

The 2019 SECURE Act required retirement plan eligibility for long-term, part-time workers. SECURE 2.0 builds upon it by requiring that part-time employees who work at least 500 hours a year for two years be eligible to make employee contributions to an employer's defined contribution retirement plan.

It also provides that pre-2021 service is disregarded for vesting purposes. While effective in plan year 2025, the vesting change and top-heavy exemption fix are effective as if included in the enactment of section 112 of the SECURE Act.

It also extends the long-term part-time coverage rules to 403(b) plans subject to ERISA.

Saver's Match (2027)—O

The saver match is now a match of 50% of up to $2,000 in IRA or retirement plan contributions (less the distributions to a participant or spouse if married, filing jointly in the past three years, plus the period before the return is filed), irrespective of tax liability. The match phases out between $41,000 and $71,000 in the case of joint returns ($20,500 to $35,500 for single and married filing separately; $30,750 to $53,250 for head of household).

Under SECURE 2.0, thresholds are indexed to inflation after 2027. The Saver's Match must go into a retirement vehicle (workplace retirement plan or IRA) unless the match is less than $100. The contribution and match are treated as elective deferral (but don't count toward contribution limits). It's subject to distribution restrictions applicable to deferrals, except that it cannot be withdrawn for hardships.

Detailed rules exist on recapturing early distributions (within the prior two years). They involve separate accounting within the plan because it is not included in top-heavy and special distribution rules.

"What's interesting and gives me a little bit of pause [about the Saver's Match] is how it will be implemented because, essentially, the government is expected to deposit this money into employee accounts," Garcia said. "That will be interesting, but they have a few years to figure it out. It also helps those with lower income and those who don't generally save as much."

Retirement Distributions (2022, 2023)—M

Finally, SECURE 2.0 includes several retirement income provisions, mainly related to required minimum distributions (RMD) that are either retroactively enacted or implemented this year.

The required beginning date for RMDs is age 73, beginning in 2023, and age 75, beginning in 2033. The hard cut-off is based on birthday (age 72 before 2023 equals age 72; if the participant turns 73 before 2033, the RMD age is 73; if they turn 74 after 2032, the RMD age is 75).

Another distribution provision – and one largely overlooked by many – is that individuals can now buy Qualifying Longevity Annuity Contracts (QLAC) to satisfy their RMD requirements up to $200,000 (indexed to inflation after 2024).

There is also a modification in the calculation for partial RMD annuitization. Suppose a tax-preferred retirement account also holds an annuity. In that case, current law requires that the account be bifurcated between the portion of the account holding the annuity and the rest of the account for purposes of applying the RMD rules. This treatment may result in higher minimum distributions than would have been required if the account did not hold an annuity. The provision permits the account owner to elect to aggregate distributions from both portions of the account to determine minimum distributions.

SECURE 2.0 also removes RMD requirements for certain life annuities and reduces the excise tax for failure to take a required minimum distribution (RMD) to 25% from 50%, and further reduces the excise tax to 10% for taxpayers who take the required RMD before an IRS audit or (if earlier) the second year after the year in which the excise tax is imposed.

Despite the changes, Reish is unimpressed with the law's retirement income features overall.

"Still unresolved by Congress is what happens when the money comes out of the plan, and people live for another 20 or 30 years," he concluded. "They addressed how we can increase deferrals and encourage plan sponsorship, but I don't think they addressed the biggest unanswered question: what happens when somebody retires? There's a little bit about annuities, but nothing that says, 'Hey, annuities got it covered.' SECURE 1.0 was more significant in that regard because of the insurance-company safe harbor." NNTM

THE WHAT'S AND WHEN'S OF SECURE 2.0

There are a LOT of retirement provisions in the SECURE 2.0 Act of 2022 - and we've got a new resource - a list of which ones will take effect when.

The Government Affairs team here has developed this table providing descriptions and effective dates for the key provisions contained in the SECURE 2.0 Act of 2022, which was enacted Dec. 29, 2022, as part of the Consolidated Appropriations Act, 2023 (P.L. 117-328).

Dec. 29, 2022, will now serve as the date of enactment (DOE), which matters as several provisions become effective immediately, while others become effective in 2023 or later years.

Our chart is organized in the order the provisions become effective, starting with those already in effect or that have retroactive effective dates. In addition, PYB stands for "plan years beginning," and TYB stands for "taxable years beginning." Note that this table is not all the law's provisions, but it does include the most significant ones related to retirement.

SECURE 2.0 Section	Provision	Description	General Effective Date
501	SECURE Act Technical Corrections	Amends SECURE section 103 (adds notice requirement to 401(m) for a QACA with matching contributions); SECURE section 112 (can exclude LTPT from ACP test and this adds SH and QACA); in LTPT changes "arrangement" to "plan" (no effect); in LTPT minor correction to EE going to full-time); SECURE 116 (modifies 4973(b) excise tax to exclude from tax nondeductible difficulty of care payments); Clerical amendments fix QBADs and incorrect reference for 403(b), adjust references for requirements for plans that put safe harbor in other plan.	2020
111	Tax Credit: Small Employer Pension Plan Start-up Credit for Adopting MEP	Clarifies that the start-up credit is available if an employer is adoping its first plan by joining an existing MEP.	2020, TYB
331	Natural Disasters	Provides permanent rules relating to the use of retirement funds in the case of qualified disaster. Distributions are limited to $22,000 per disaster (rather than the usual $100K). May be repaid in 3-year period after distributions. Income inclusion spread over 3 years. Additionally, amounts distributed prior to the disaster to purchase a home would be permitted to be recontributed, and an employer would be permitted to provide for a larger amount be borrowed from a plan by affected individuals and for additional time for repayment of plan loans owed by affected individuals.	2021

Provisions Starting in 2022			
122	Unclaimed Savers Bond	Amend USC Title 31 to require Treasury to share certain information relating to the registered owners of matured and unredeemed savings bonds with the States to enable the States to locate the owners in accordance with the States' standards for recovery of abandoned property.	2022
128	403(b): Allowed to Invest in CITs	Allows employers with 403(b) plans, including public schools and tax-exempt organizations, to structure their retirement plans as collective investment trusts. **NOTE:** the proposal is applicable to amounts invested after enactment-but practically not (yet) available under legislation to address securities law.	2022
202	RMDs: Qualifying Longevity Annuity Contracts (QLACs) Modifications	Allows individuals to buy QLACs to satisfy all of their RMD requirement up to $200,000 (indexed after 2024). The current cap applicable to QLACs is the lesser of 25% of the account balance or $125,000. Clarifies that survivor benefits may be paid in the case of divorce and permits up to 90-day free-look period. Good faith reliance prior to regulations.	2022
204	RMDs: Modification in Calculation for Partial Annuitiziation	If a tax-preferred retirement account also holds an annuity, present law requires that the account be bifurcated between the portion of the account holding the annuity and the rest of the account for purposes of applying the RMD rules. This treatment may result in higher minimum distributions than would have been required if the account did not hold an annuity. The provision would permit the account owner to elect to aggregate distributions from both portions of the account for purposes of determining minimum distributions. Good faith reliance until regulations issued.	2022
301	EPCRS: Recovery of Retirement Plan Overpayments	Restricts plan sponsors from recovering certain excess payments from a participant after a three-year period when the individual did not cause the overpayment.	2022
305	EPCRS: Expansion	Expands EPCRS to allow self-correction of inadvertent significant plan errors without deadline (as long as before examination and within a reasonable period after discovery). Self-corrected loans treated as meeting requirements of VFCP. DOL may impose reporting. Waiver of 60-day rollover for reasons beyond control of account owner. It also allows the IRS to waive the excise tax for RMDs when an IRA owner self-corrects the error within 180 days.	2022
308	Public Safety/ Military: Firefighter Distributions	Expands the age-50 exception for qualified public safety employees to apply to distributions from a qualified retirement plan or section 403(b) plan to an employee who provides firefighting services.	2022
311	Distributions: Repayment of QBAD Limited to 3 years	Limits recontribution of qualified birth or adoption distribution (QBAD) to the three-year period beginning on the day after the distribution date. For QBAD already made, deadline is 12-31-2025.	2022
313	IRAs: Tax Penalties Statute of Limitations Clarification	Starts the statute of limitations on assessments on IRA penalties when the taxpayer files his or her individual tax return.	2022
326	Distributions: Terminally Ill Exemption	Provides an exception to the 10% early distribution tax for distribution to a terminally ill individual. Must provide evidence required by plan administrator. May be repaid.	2022
329	Public Safety/ Military: PS Officers with 25 years of Service Eligible for 10% Penalty Exemption	Extend the exception from 10% penalty to public safety officers with at least 25 years of service with the employer sponsoring the plan (current exemption is age 50 regardless of service).	2022

330	Public SafetyMilitary: Corrections Officers Eligible for 10% Penalty Exemption	Extends the public safety officer exception to the 10% early distribution tax to corrections officers who are employees of state and local governments. Effective after date of enactment.	2022
333	IRAs: Elimination of Penalty	Exempts excess contributions to IRA (and earnings) that are timely returned from the 10% tax on early distributions.	2022
335	DB: Mortality Tables	Generally requires that for purposes of the minimum funding rules, a pension plan is not required to assume mortality improvements at any age greater than 0.78%. Effective after date of enactment.	2022
345	Group of Plans (GoPs)	Any 103(a)(3)(C) audit applies only to large plans.	2022
604	Optional Treatment of ER Contributions as Roth contributions	401(a) plan, 403(b) plan, or a governmental 457(b) plan may permit an employee to designate matching or nonelective contributions as designated Roth contributions.	2022
606	DB: 401(h) Accounts	Extends the sunset for using assets from an overfunded pension plan to pay retiree health and life insurance benefits. The sunset would be 2025 and this extends it to 2032; and it permits transfers to pay retiree health and life insurance benefits provided the transfer is no more than 1.75% of plan assets and the plan is at least 110% funded. Effective after date of enactment.	2022
Provisions Starting in 2023			
107	RMDs: New Required Beginning Dates	The required beginning date for RMDs is age 73 beginning in 2023, and age 75 beginning in 2033. Hard cut-off; based on birthday (age 72 before 2023 = age 72; turn age 73 before 2033 = age 73; age 74 after 2032 = age 75).	2023
201	RMDs: Remove RMD Requirements for Certain Life Annuities	Allows individuals to satisfy the RMD requirements by purchasing a fixed annuity with a circumscribed set of features, such as increasing no more than 5% per year or providing for a death benefit equal to the amounts paid for the annuity minus prior payments.	2023
302	RMDs: Reduction in Retirement Plan Excise Taxes	Reduces the excise tax for failure to take an RMD to 25% from 50%, and further reduces the excise tax to 10% for taxpayers who take the required RMD before an IRS audit or (if earlier) the second year after the year in which the excise tax is imposed.	2023
105	PEP: Pooled Employer Plans (PEP) Modification	Permits PEP to designate a named fiduciary (other than an employer in the plan) to be responsible for collecting contributions. Other fiduciary required to implement written contribution collection procedures that are reasonable, diligent, and systematic. Prior to change, duty to collect and hold assets had to be a trustee approved under 408(a)(2).	2023, PYB
106	403(b): MEPs	403(b) plans, other than church plans, may form MEPs. No inference for church plans. Provides unified plan relief if MEP satisfies requirements similar to 413(e) (the PEP rules). Governmental plan gets relief even if commonality requirements are not met. Treasury in consultation with DOL must provide education and outreach on fiduciary duties.	2023, PYB
113	401(k)s: Small Immediate Financial Incentives for Contributing to a Retirement Plan	Allows de minimis financial incentives in 401(k)s and 403(b)s for employees "who elect to have [deferrals made]." Cannot be paid for by the plan. De mimimis not defined.	2023, PYB
312	Distributions: EE Certification of Deemed Hardship Conditions	In determining whether a distribution is due to an employee hardship, plan administrator of a 401(k), 403(b), or 457(b) plan may rely on the employee's certification that the distribution is on account of an eligible hardship/emergency, not in excess of amount needed, and no alternative means to satisfy need. Treasury may restrict in regs for actual knowledge.	2023, PYB

317	401(k): Retroactive First-year Elective Deferrals for Sole Proprietors	Sole owner of an unincorporated trade or business, who is the only employee of such trade or business, may treat any elective deferral to a 401(k) plan made before the tax return due date (determined without regard to any extensions) as having been made before the end of the plan's first plan year. Applies only to the first plan year in which the section 401(k) plan is established.	2023, PYB
320	R&D: Eliminate Plan Requirements for Unenrolled Participants	Allows plans to provide much more limited information to employees who are not contributing to a plan and that have no balance in the plan. Must have provided an SPD, any required eligibility notices, and an annual notice.	2023, PYB
348	DB: Cash Balance Testing	For 411(b) accrual rule tests, may use a reasonable projection of interest crediting rates; capped at 6%.	2023, PYB
102	Tax Credit: Small Employer Pension Plan Start-up Credit Modification	Establishes a new credit and expands an existing credit. Startup credit increased to 100% for companies with 50 or fewer employees. The existing cap of $5,000 per employer is retained. The new credit offsets up to $1,000 of employer contributions per employee in the first year, phased down gradually over 5 years. Applies to companies with 100 or fewer employees, however, it is phased out for those with more than 50 employees. No credit for contributions to any employee making more than $100k (indexed after 2023). NOTE: no deduction for employer contributions qualifying for credit.	2023, TYB
112	Public Safety/ Military: Small Employer Retirement Plan Eligibility Credit for Military Spouses	Tax credit to small employers (using SEP definition of under 100 EEs) who offer nonhighly compensated employee (NHCE) military spouses a retirement plan with enhanced eligibility rules and an accelerated vesting schedule. The credit of up to $500 per military spouse would apply for first 3 years of participation ($200 for eligibility; $300 for ER contributions).	2023, TYB
306	457(b): Eliminate "First Day of the Month" Requirement for Governmental Plans	Plan may permit participants in 457(b) plans to change their contribution election at any time.	2023, TYB
307	Distributions: Qualified Charitable Distribution Rule Modifications	Indexes the annual $100,000 exclusion limit after 2022. Allows a one-time $50,000 distribution from an IRA to a split-interest entity.	2023, TYB
322	IRAs: Limiting Cessation of IRA Treatment to Portion of Account Involved in a PT	The provision modifies the disqualification rule that applies when an IRA owner or beneficiary engages in a prohibited transaction so that only the IRA that is used in the prohibited transaction is treated as distributed to the individual.	2023, TYB
601	SIMPLE and SEP: Roth Permitted	Under the provision, a SEP and a SIMPLE IRA are permitted to be designated as Roth IRAs.	2023, TYB

You can find the complete table online at https://www.napa-net.org/news-info/key-secure-20-act-provisions-and-effective-dates.

GAME ON!

THE GAMIFICATION PUZZLE, SOLVED?

BY
Bruce Ashton
Alice Palmer
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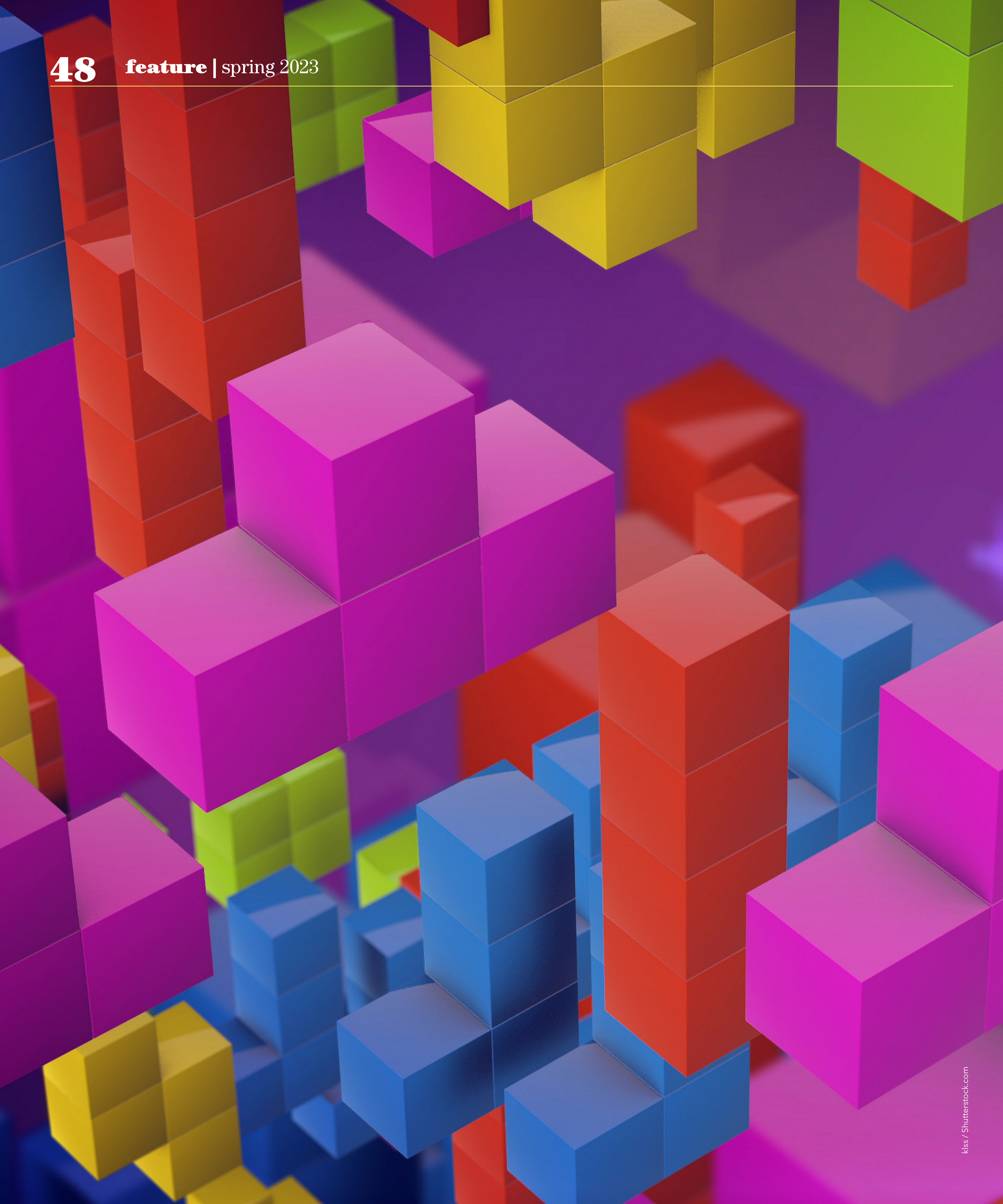

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The SECURE 2.0 Act of 2022 (SECURE 2.0),

ENACTED ON DEC. 29, 2022, CONTAINS MORE THAN 90 PROVISIONS FOCUSED ON IMPROVING RETIREMENT OUTCOMES FOR AMERICANS. HOWEVER, ONLY ONE INTRODUCED THE POSSIBILITY OF IMMEDIATE GRATIFICATION FOR PARTICIPANTS INTO THE CALCULUS OF WHETHER AND HOW MUCH TO CONTRIBUTE TO AN EMPLOYER-SPONSORED PLAN.

In 2021, we suggested that one way to enhance participation in 401(k) plans, and thus help workers achieve a more secure retirement, was through the use of elements of game playing or what's been termed "gamification" (pronounced "game-a-fication"). (*See* "Solving the Gamification Puzzle," *NAPA Net the Magazine*, Winter 2021). The concept we described then was to make the sometimes complex decision to participate in or defer to an employer plan into a kind of game that creates the possibility for both immediate and long-term wins for employees.

While we felt that the use of this approach would be beneficial to participants, we pointed out three legal considerations that need to be considered before embarking on this approach:

- the Code's non-discrimination rules;
- ERISA's fiduciary considerations; and
- the Code's contingent benefit rule.

The non-discrimination rules generally prohibit employers from providing benefits that disproportionately favor their highly compensated employees. This non-discrimination requirement extends to a plan's "benefits, rights and features" (BRFs), which means that the BRFs must be both currently and effectively available on a non-discriminatory basis. (See Treas. Reg. §§1.401(a)(4)-1(b)(3) and -4(a).) Raffles that involve the awarding of a prize tied to making contributions to the plan or the provision of gift cards tied to the percentage of salary deferred could be structured in a way to avoid running afoul of the referenced non-discrimination requirements. As suggested in our 2021 article, however, a simpler way to avoid having to test these types of incentives might be to limit their availability to non-highly compensated employees.

We also discussed certain fiduciary considerations in our 2021 article, cautioning that an argument might be made that the fiduciary obligation to act solely in the interest of participants and beneficiaries, for the exclusive purpose of providing benefits, could be applied to present an obstacle to offering financial incentives tied to making contributions to ERISA covered benefit plans. While we concluded that, properly designed, an incentive program based on participation and deferral increases would not create fiduciary issues, we also noted that an incentive program could be designed to avoid that tenuous argument by positioning the incentives as plan design decisions—which have historically been viewed as settlor decisions and not fiduciary decisions. Note, though, that the implementation of plan provisions is subject to the fiduciary standard.

Lastly, the contingent benefit rule limited the ability of employers to provide a monetary incentive to participate in a 401(k) plan to a matching contribution. We noted that the SECURE 2.0 legislation, if enacted, would eliminate that restriction, at least for small financial incentives; but we also pointed out that it was uncertain when—or if—the Act would become law.

However, SECURE 2.0 did become law in late December 2022. Section 113 of the Act amends the Internal Revenue Code to permit small immediate financial incentives for deferring to a plan. In our view, this clears the way for employers to use gamification to enhance both participation and deferrals.

Background on Gamification

Before getting into the details of how the new incentive could work, we need to revisit the concept of gamification. As we explained in the 2021 article, it refers to the use of elements of game playing to encourage or increase retirement savings engagement. We noted

EMPLOYERS COULD OFFER PRIZES AND SPONSOR RAFFLES FOR SMALL BUT INTEREST-GENERATING PRIZES TIED TO RETIREMENT SAVINGS LEVELS, PLAN ENGAGEMENT AND MANY OTHER DECISIONS THAT ARE PROVEN TO DRIVE BETTER RETIREMENT OUTCOMES.

that these could include point scoring, competition with others, rules of play and a prize or benefit for the "winner." We provided the following example:

> "a company might sponsor a contest to get employees to adopt more healthy lifestyles by offering a gift card to those who record the highest number of steps over a two-week period. This 'game' provides a short-term challenge, peer recognition (i.e., the 'winners' are announced to the entire workforce) and a modest reward for those who participate."

These types of games are common components of wellness programs of larger employers and there are services that provide low-cost gifts for the programs.

In the context of retirement savings, employers could offer prizes and sponsor raffles for small but interest-generating prizes tied to retirement savings levels, plan engagement and many other decisions that are proven to drive better retirement outcomes.

Leveraging the strategies summarized above would, in our view, manage any discrimination and fiduciary risks. The only remaining consideration was the contingent benefit rule. However, that is now addressed by Section 113 of SECURE 2.0, which amended Code Section 401(k)(4) and Section 408(b)(21) of ERISA.

The New Rule

SECURE 2.0 amended the provisions of the Code and ERISA, with respect to contingent benefits such as small financial incentives used to encourage deferrals into 401(k) and 403(b) plans, as well as the restriction of the prohibited transaction rules. While prior to SECURE 2.0, the Code indicated that a matching contribution was a permissible financial benefit to tie to deferrals, §401(k)(4)(A) provided that a plan could not condition the receipt of any other benefit on an employee's election to defer. The regulations under this section indicated that the impermissible "other benefits" include benefits under other plans offered by the employer or items such as "increases in salary, bonuses or *other cash remuneration*…" [Emphasis added.] (*See* Treasury Regulation §1.401(k)-1(e)(6)(i) and (ii).)

Section 113 of SECURE 2.0 amended this section to add an exception for other benefits. The exception now allows "…a *de minimis* financial incentive (not paid for with plan assets) provided to employees who elect to have the employer make contributions" to the plan. In other words, the plan sponsor, in its capacity as the plan's settlor, would need to pay for the gamification benefits. In that vein, it would not be appropriate to use the money in a plan's expense recapture account to cover the costs of the awards or other benefits.

A similar provision has been added to make it clear this is also permissible in 403(b) plans.

The amendment is effective for years after the enactment of SECURE 2.0 (Dec. 29, 2022); thus, the new financial incentive is effective in 2023 and thereafter.

The Senate Finance Committee provided the following explanation of the new provision:

> "Section 113 enables employers to offer *de minimis* financial incentives, not paid for with plan assets, such as low-dollar gift cards, to boost employee participation in workplace retirement plans by exempting *de minimis* financial incentives from section 401(k)(4)(A) and from the corresponding rule under section 403(b)."

Unfortunately, there is no explanation in the law or the Committee descriptions of how much a *de minimis* financial incentive might be. Hopefully, the IRS will provide guidance on this question. However, during the interim, plan sponsors can make reasonable decisions about the dollar value of awards or other benefits.

Plan sponsors that are already using gamification in other areas, like wellness programs, have experience with those programs and the cost of the gifts typically awarded. That is a good starting point for designing a gamification program for 401(k) and 403(b) plans. In other cases, plan sponsors may want to take a more conservative approach and limit the value of the awards or other benefits to $25 or $50. While there isn't any guidance supporting those specific amounts, gamification gifts for other programs are often equal to or even greater than those amounts.

Conclusion

In our view, the adoption of the new *de minimis* financial incentive under SECURE 2.0 makes it possible for employers to come up with new ways through gamification to encourage plan participation and increases of deferrals to their plans. And while gamification can be fun in the short term, it can also help provide financial security for employees in the long run. NNTM

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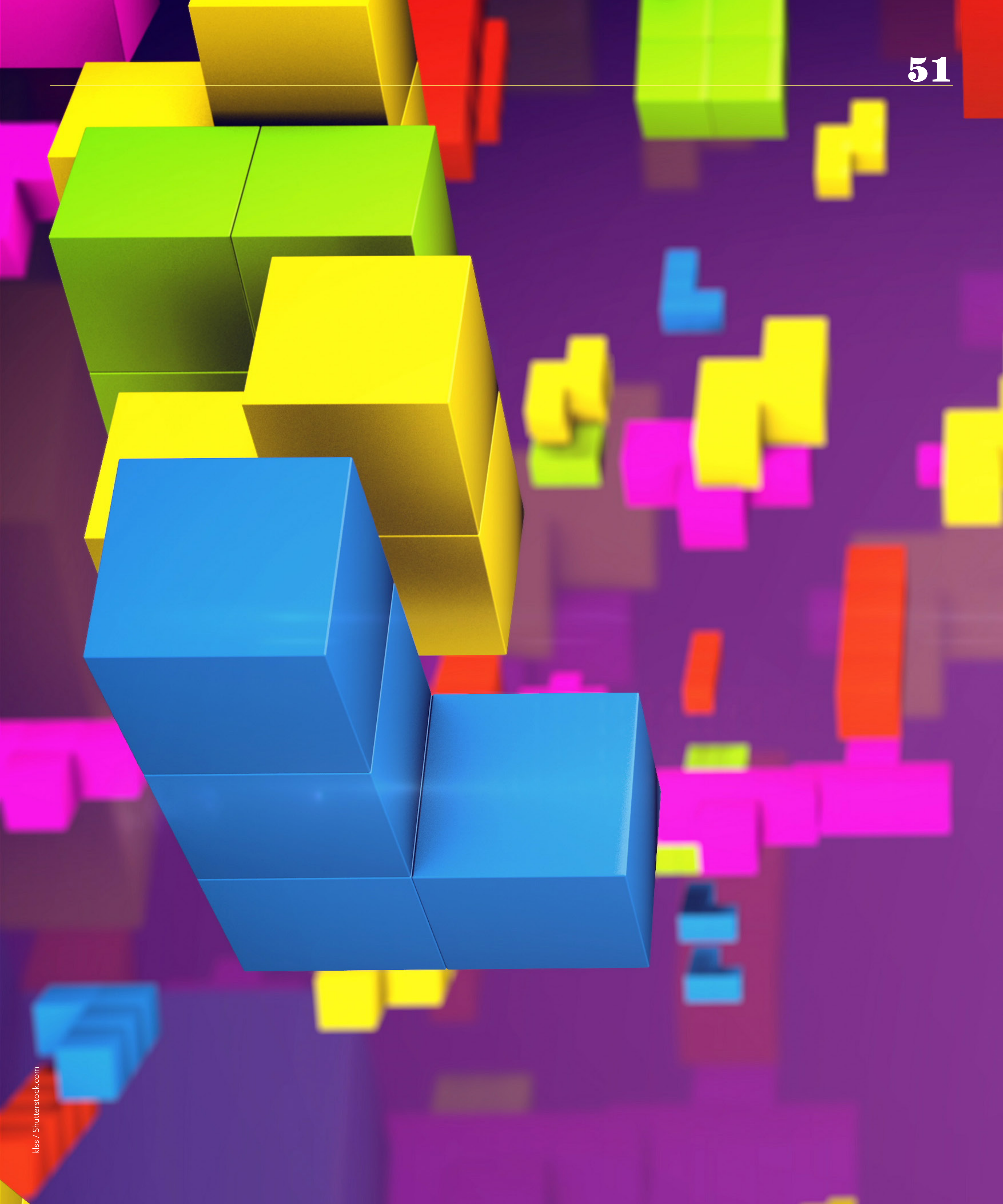

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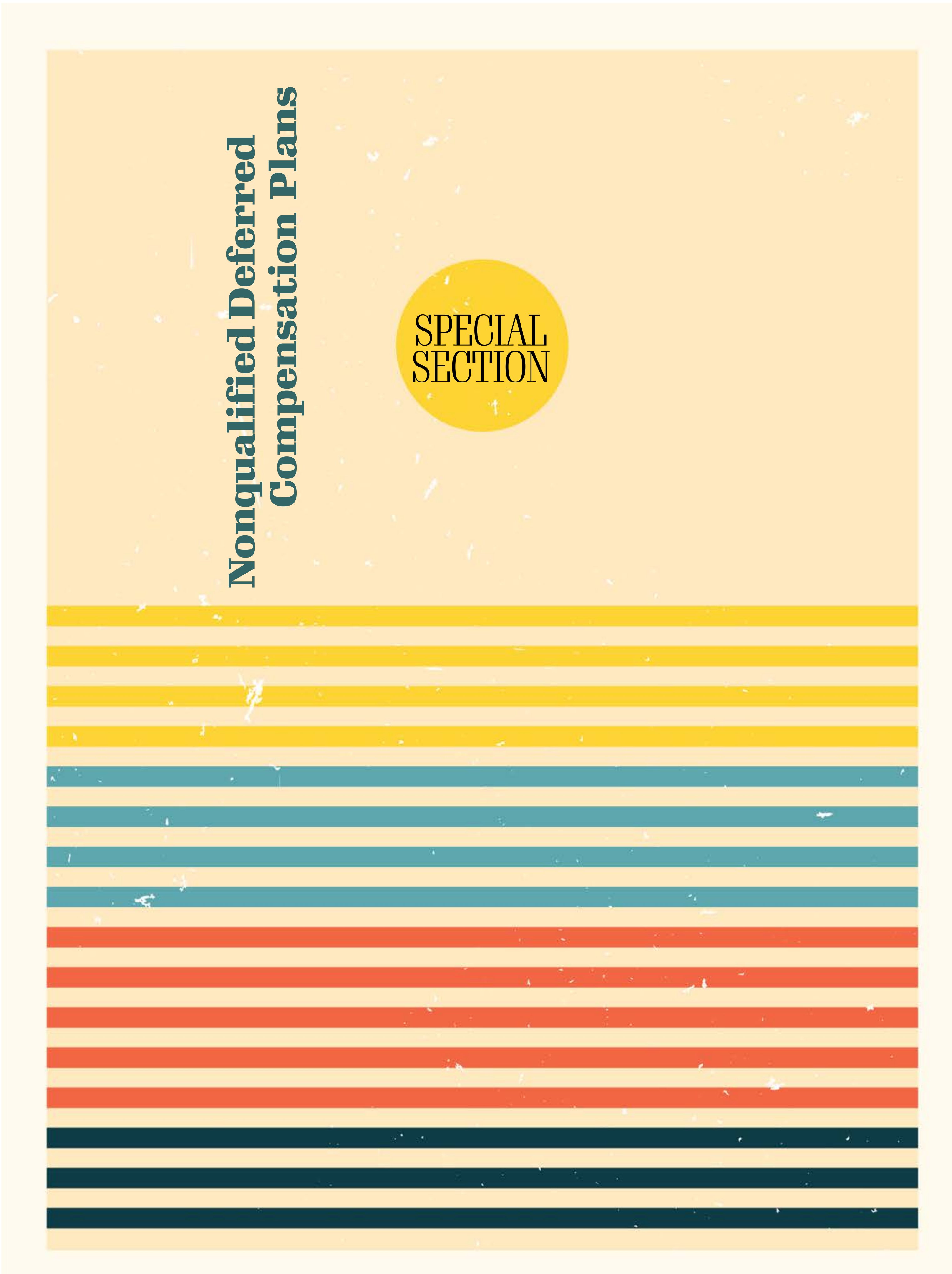

Nonqualified Deferred Compensation Plans

SPECIAL SECTION

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NQDC

TOP NQDC PLAN 'MISS' PERCEPTIONS

What advisors often get wrong about non-qualified deferred compensation (NQDC) plans.

Non-qualified plans have been around for many years and are frequently offered by large companies.

They have long been used to recruit, retain, and reward mission-critical employees. Indeed, nearly all the Fortune 1500 offers at least one non-qualified plan.

NQDC plan designs may vary significantly regarding objectives, eligibility, and provisions. Some are designed to offer a comparable level of value where the tax code limits tax-qualified plans, whereas others are primarily focused on providing access to unique tax preferences and wealth accumulation opportunities. But above all, NQDC plans provide employers flexibility in focus and funding not typically found with programs subject to ERISA.

That said, there remain a lot of misperceptions about these programs—and to air some of those out, we turned to an advisor-expert in the field—Jeff Acheson.

Acheson not only runs his own practice, but he's also a Past President of the National Association of Plan Advisors and the current President-Elect of the American Retirement Association. He is a co-author of NAPA's Non-qualified Plan Advisor (NQPA) designation program curriculum and serves as the Chairperson of the planning committee for the annual NQPA conference.

Here's his misperception list:

Non-qualified plans are just a niche offering, and they only make sense for mid-to-mega-size companies.

Deferred compensation plans are just for highly compensated C Suite executives.

Non-qualified plan service providers are basically the same.

Non-qualified plans are just a way to sell COLI (Corporate Owned Life Insurance).

You should be an expert before bringing up non-qualified planning and plans to an employer.

If I don't bring up non-qualified plans to my plan sponsor clients, nobody else will.

Qualified plan recordkeeping platforms and non-qualified plan recordkeeping platforms are basically the same.

My qualified plan TPA can administer a non-qualified plan.

Non-qualified plans provide no planning opportunities for pass-through entities.

Working with non-qualified plans will conflict with my ERISA fiduciary status because COLI commissions will be involved.

Non-qualified plans are just installed for highly compensated employees who want to defer additional salary and bonus for retirement beyond what they can do in their 401(k).

How many of these have YOU heard/embraced? NNTM

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Principal®

NONQUALIFIED PLANS CAN BE CRITICAL IN KEY EMPLOYEE RECRUITMENT AND RETENTION

As the workforce becomes more mobile, nonqualified deferred compensations plans cited as critical offering

As employers look for ways to attract and retain the most qualified candidates, employee benefits are becoming more critical to securing top talent who play important roles in their organization[1]. According to the U.S. Bureau of Labor Statistics, employees change jobs for better pay, improved benefits, opportunities for growth, or a different career altogether. New research conducted by Principal® (principal.com/nqresearch) indicates that nonqualified deferred compensation plans – employer-sponsored plans that enable key employees to save more of their earnings for retirement – remain valuable in helping employers recruit and retain key talent, and important in helping participants reach retirement savings goals.

There's no shortage of openings for employees to consider as there are now 1.9 job openings for every unemployed worker[2]. In fact, employers (88%) and employees (91%) agree that most key employees are actively looking for a new job, according to the Principal research. While employers say they're increasing pay to help retain existing key talent, employees state employers could do more.

"Labor has been incredibly mobile this year, as employees have changed jobs or career paths in search of better pay, benefits, and growth opportunities. Our research clearly indicates that a nonqualified deferred compensation plan serves as a valuable benefit to the retention of key employees, and attractive to prospective candidates," said Nate Schelhaas, senior vice president and head of life protection solutions at Principal®.

Some of the key takeaways from plan participants include:

- For participants, deferred comp plan availability plays an important role in the decision to stay with an employer (53%) or take a new job (60%)
- Eight in ten participants say a deferred comp plan is important in reaching their retirement goals
- Of the 27% of participants with a deferred comp match from their employer, nearly all (93%) contribute enough to get the maximum match

From a plan sponsor point of view:

- The top two reasons plan sponsors provide deferred comp plans is to provide a competitive benefits package (89%) and to help participants save for retirement (88%)
- 59% of plan sponsors are concerned with attracting key employees, and 55% are concerned about losing key employees to competitors
- The majority say offering a deferred comp plan is valuable for recruiting (59%), and retention (66%)

What does this mean for you?

If you have employer clients, they're likely facing the same difficulties recruiting and retaining top talent as many of their peers. You could help employers meet these challenges by informing them about the benefits of deferred comp for their organization and key employees.

ABOUT THE RESEARCH

Between June 6-27 and September 6-26, 2022, Principal conducted two online surveys with employers and employees who have nonqualified deferred compensation plans with Principal®. A total of 159 completed surveys were received from employers and 758 from key employees. This marks the 15th consecutive year Principal has conducted this research and the results provide statistics and trends to help employers benchmark their key employee benefit offering against their peers.

NQDC

FOOTNOTES

[1] According to the 2022 Principal Financial Group Business Owner Check-in

[2] According to the November 1, 2022 jobs report by the U.S. Bureau of Labor Statistics

'LAUNCH' PATHS

Five Aces talk about how they work with sponsors and participants on a NQDC plan launch

By Judy Ward

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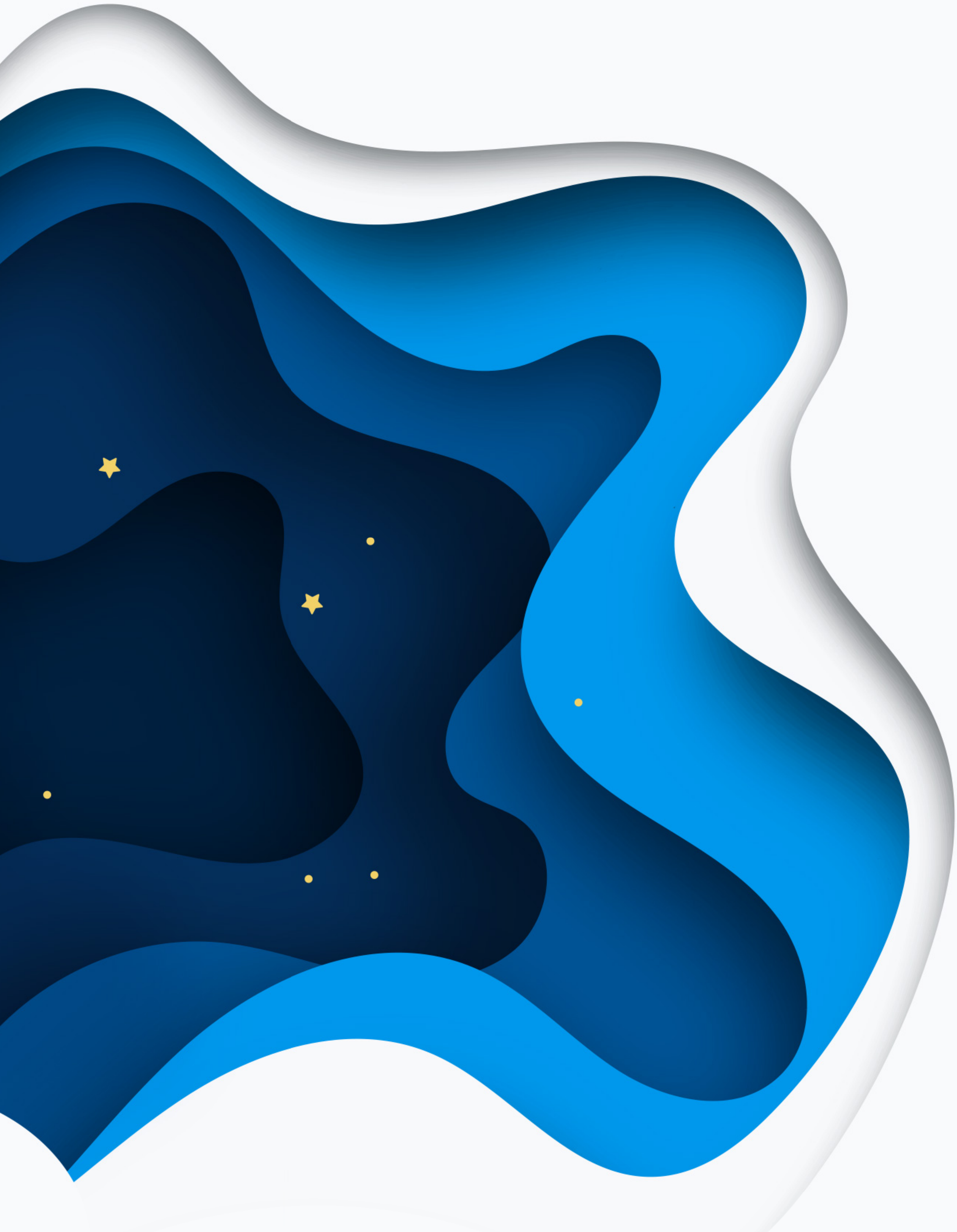


What resonates with employers as a good reason to start a deferred compensation plan? The advisors interviewed for this article had a pretty consistent answer.

"The primary reason, particularly in the recent environment, is the focus on recruiting and retaining key employees," says Daniel Urban, a Warren, New Jersey-based senior vice president at CAPTRUST. A nonqualified plan appeals to highly compensated employees because many can't save as much as they want to in their employer's qualified plan, he says, and it appeals to employers because they can utilize nonqualified plans' design flexibility to both help attract pivotal staff and motivate them to stay. "The amount of resources and time that human resources and management spend on hiring and retaining key employees continues to be a big focus," he adds. "So these plans have gotten a lot of focus in the past year."

Here, five of this year's Top 100 Retirement Plan Advisors Under 40 talk about how they work with employers starting a deferred compensation plan.

WEIGHING ELIGIBILITY BOUNDARIES

There's a trend toward expansion of eligibility beyond the C-suite, to middle management and other employees who play a key role operationally, notes Brendan Speers, partner and director of retirement plan services at Legacy Planning Partners in Allentown, Pennsylvania. "For these key employees, this could be a great retention strategy or way of saving, 'We value you, and we want to keep you in this organization,'" he says. That's particularly true if the employer makes a contribution to the nonqualified plan, he adds.

WindNoise / Shutterstock.com

> “ELIGIBILITY IS THE HARDEST THING TO PIGEONHOLE WITH A SPONSOR. YOU CAN BE CREATIVE WITH THE ELIGIBILITY IN THESE PLANS, BUT AS AN EMPLOYER, YOU DON’T WANT TO BITE OFF MORE THAN YOU CAN CHEW.” — BRENDAN SPEERS, *LEGACY PLANNING PARTNERS*

An employer setting up a nonqualified plan can name specific employees eligible to participate, or entire classes of employees. “Eligibility is the hardest thing to pigeonhole with a sponsor,” Urban says. “You can be creative with the eligibility in these plans, but as an employer, you don’t want to bite off more than you can chew. For a startup plan, I’ve seen some clients initially keep eligibility narrow, to just management. If an organization is growing, and it becomes a more important benefit over time, it can evolve in the future and more employees can be eligible.”

STRATEGIZING ON AN EMPLOYER CONTRIBUTION

In Urban’s experience, when the employer makes a contribution, it clearly helps motivate employees eligible for the nonqualified plan. But not all employers can go that route. “We see that larger employers and employers in a particularly competitive industry are more prone to make an employer contribution from the start,” he says. “A lot of smaller startup plans begin with just allowing eligible employees to contribute.”

More often than not, plan sponsors that Speers works with on startup plans do decide to offer an employer match or discretionary contribution. “Then it’s really just deciding if they want the plan design to utilize a feature where employees can make deferrals,” he adds.

Blade Zych, an Orlando-based retirement plan consultant at OneDigital Retirement Plan Services, sees sponsors increasingly looking at a nonqualified plan and an employer contribution in the larger context of total rewards for top talent. “The main focus has always been around addressing the retirement-savings gap for highly compensated employees,” he says. Over the past year or two, because of the tight hiring market, he’s witnessed a big shift.

“I like to refer to a nonqualified plan as being like a Swiss army knife,” Zych says. “Employers increasingly realize that they can use it for other things beyond retirement savings, like a sign-on bonus with (vesting) strings attached, or a performance bonus. The pandemic changed how we work a lot, and now we have a lot of new talent in the marketplace.” Many employers are competing for remote-work talent they wouldn’t have been able to attract before, he says. “Now those walls have been brought down, and there are a lot of employers competing for that same talent pool,” he adds.

TALKING THROUGH DISTRIBUTION FLEXIBILITY

An employer that views its nonqualified plan as part of its long-term retention strategy for key employees may feel tempted to set strict distribution rules that prohibit in-service distributions. But that could make it more likely that participants will see the plan as less valuable for them.

A startup sponsor needs to figure out whether to offer in-service distributions, or just allow a distribution at termination, says Trey Jamison, a partner and retirement plan consultant at Glen Allen, Virginia-based Chase Dominion Advisors. “If the sponsor decides to allow in-service distributions, then it needs to decide whether to let participants choose the timing of their distribution every year, or just when they enroll. The flexibility of allowing in-service distributions can be especially good for younger employees,” he adds.

NQDC


DANIEL URBAN
CAPTRUST

"WE RARELY DO GROUP MEETINGS FOR A NONQUALIFIED PLAN. WE APPROACH IT IN MUCH MORE OF A 'BACK OF THE NAPKIN' KIND OF WAY. IT'S ALL ONE-ON-ONE MEETINGS."

— MICHAELA SCOTT, *BORISLOW EMPLOYER RETIREMENT CONSULTING*

NQDC

Jamison himself illustrates how a younger participant might choose to utilize a nonqualified plan. He participates in LPL Financial's deferred compensation plan, and that plan's design flexibility allows a participant to make an annual decision about whether or not to take a distribution of deferrals made five years earlier. "I have chosen to create an in-service distribution 'ladder,' where every year I have a decision to make about whether I want to take out my deferral from five years ago, or defer it for another five years," he says. "So every year, I can have a distribution coming to me, if I so choose."

FACILITATING A REALITY CHECK

When an employer starts a nonqualified plan, sometimes plan design decisions get made that aren't sustainable, notes Michaela Scott, the director of Borislow Employer Retirement Consulting in Methuen, Massachusetts. "They need to slow down a bit, and if they have to make the design more conservative to start, they can always expand it later," she says.

Before the employer starts making plan design decisions, Scott suggests that the advisor set up a brainstorming session to talk through the options—and try to ensure that at least one pragmatic, skeptical person (or as she jokingly says, the "buzzkill" person) attends. Most of the people making plan design decisions are probably the same people who will participate in the nonqualified plan, she says. And in their enthusiasm, they may make participant-friendly decisions without fully considering organizational realities like budget limitations. "You're asking people to design a plan who are going to personally benefit if the design is lenient," she says. "When you bring in the 'buzzkill' person, they're going to want to make decisions that are more sustainable."

HELPING A SPONSOR MAKE FUNDING DECISIONS

An employer starting a nonqualified plan needs to make an important decision about whether the plan is going to be funded or unfunded, Jamison says, adding that it's rare for Chase Dominion's nonqualified plan clients to opt for unfunded status. "If an employer does an unfunded deferred compensation plan, then it's essentially just a promise to pay someone in the future, so the employer has to be confident that it is going to have the money to fulfill that promise many years down the road," he says. "In addition, if the plan is unfunded, there isn't the potential for the asset growth in the value of the investments over the years."

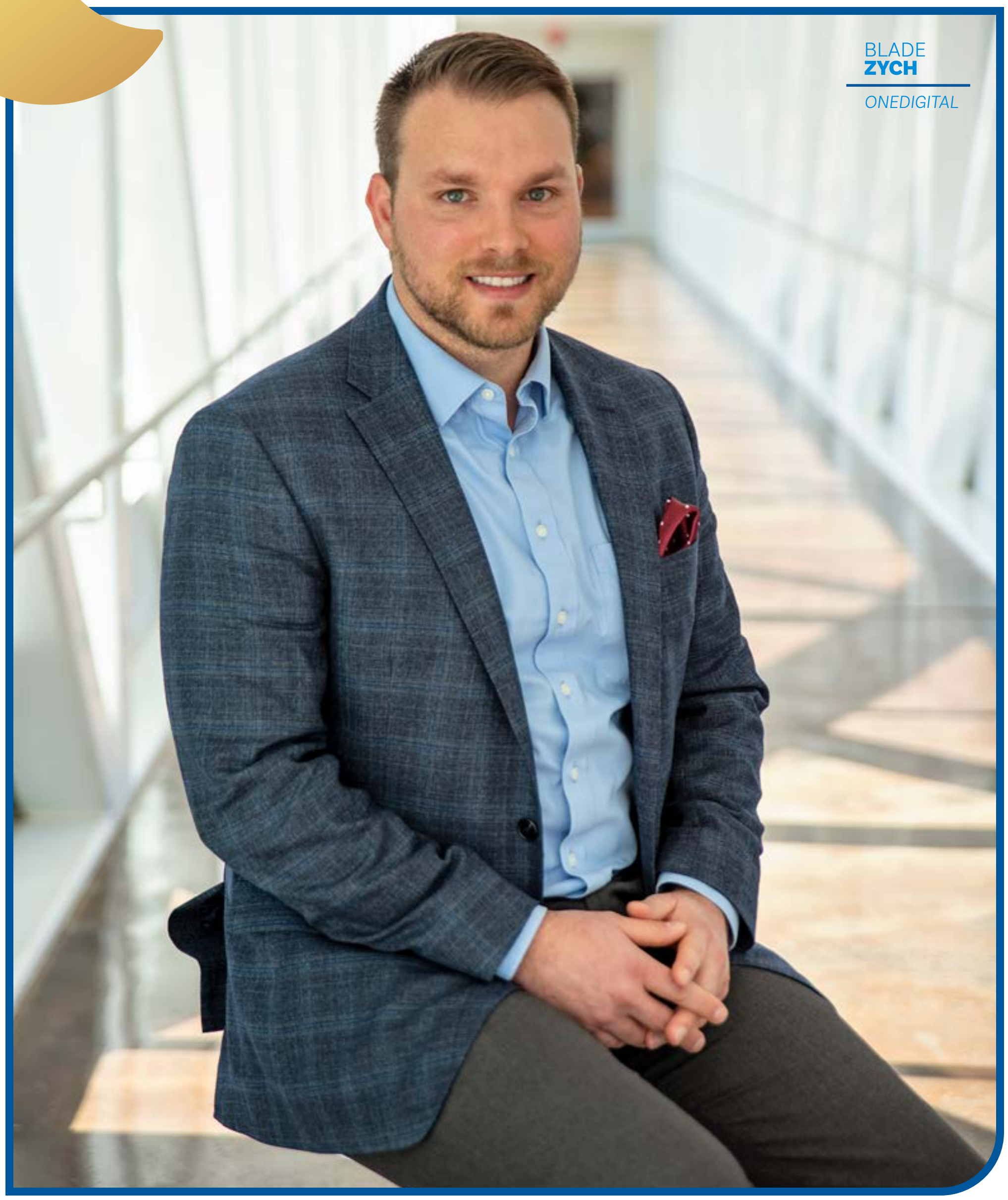
For sponsors that decide to fund their plan, Jamison says the next key decision is how to fund it: whether with corporate owned life insurance (COLI) or by putting the money into a provider's mutual fund platform. "In the past, it was the norm for sponsors to decide to use a life-insurance platform," he adds. "The recordkeepers that could handle nonqualified plans on their platform were few and far between. Now, putting the assets in a mutual fund platform is easier to do, and it's essentially the same price."

ADVISING ON THE INVESTMENT LINEUP

Plan sponsors that choose to fund the nonqualified plan via investing the money in mutual funds need to decide whether to "mirror" their qualified plan

TREY **JAMISON**

CHASE DOMINION ADVISORS



investment lineup or pick different investments. "We usually see sponsors choose a 'mirror' approach," Speers says. "A lot of sponsors don't want the nonqualified plan participants to have to go through this whole analysis process of, 'Okay, now I have a whole other investment menu to think about.'"

Urban also often sees nonqualified plan sponsors go for the mirror approach with a startup plan. "It's the 'path of least resistance,' and it creates a familiarity quotient for participants," he says. "But over time, there can be an interest from the nonqualified plan sponsor to get more creative with the investment menu: Options like sector funds, real estate, or emerging markets may be offered more readily in these plans than in qualified plans, because they're seen as being better understood and more accepted by participants."

EXPLAINING THE PLAN'S DETAILS TO PARTICIPANTS

Education for eligible employees is key to a startup nonqualified plan's success, the Aces believe. "It's such a different type of plan than a 401(k) plan," says Zych. "It is vitally important that participants understand how the plan works, because they may never have had exposure to this type of plan before." They need to learn the parameters around crucial plan aspects like vesting and distributions. They need to know that they won't have as much near-term flexibility to change their deferral, because a participant has to make an irrevocable election annually on the deferral amount for the next year. They also need to understand that they can't get a loan from the nonqualified plan.

Jamison says the one hypothetically significant downside of nonqualified plan participation is the risk of asset forfeiture for participants if the employer goes bankrupt sometime in the future, and it's imperative for advisors to explain that risk thoroughly. "But it's also important to explain that the downsides are significantly offset by the benefits for eligible employees," he says. "The main advantage for participants is that there is no limit on how much an employee can contribute to the plan annually, and a participant also has the flexibility of creating a future income ladder (if plan design allows it). That is a huge advantage, especially for younger employees."

ANSWERING 'IF-THEN' QUESTIONS

"Most of the education conversations we have with qualified plan participants are very methodical: I can tell you what I'm going to say on slide number five of my presentation to a group meeting," Scott says. "With nonqualified plan participants, we approach it in much more of a 'back of the napkin' kind of way. It's all one-on-one meetings. We rarely do group meetings for a nonqualified plan."

Scott generally doesn't have to persuade an eligible employee to engage with the nonqualified plan, since they're usually already motivated to save more pre-tax than they can in the qualified plan. "Often the participant has talked to their financial advisor or attorney about the nonqualified plan ahead of time, and so they come to me with their pointed questions," she says. "They don't come to me to get motivated and incentivized to put money in: They're already motivated and incentivized. They come to me with 'If-then' types of questions: 'If this happens, then what happens?' So they ask things like, 'What if I change my mind about my contribution amount: What happens?' Or 'What if I leave this employer earlier than I'm planning?' Or 'Can I negotiate in my severance agreement that the company will pay my taxes on the nonqualified plan distribution?' It's almost like they want to stress-test the benefit." NNTM

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

NQDC

PACIFIC LIFE
Pacific Life Insurance Company

KEAP SUCCESS STORY –
CONSTRUCTION COMPANY CREATES RETENTION STRATEGY WITHOUT DILUTING OWNERSHIP

NQDC

KEY EXECUTIVE ADVANTAGE PROGRAM (KEAP)

- **Financial Professional:*** Wealth management company providing investments and life insurance
- **Client/Plan Sponsor:** Construction company organized as a closely held S corporation
- **The Challenge:** Client needs an effective executive-retention strategy that will not dilute ownership
- **Client's Goals:** Build an effective recruitment and retention plan for their top management and executive team without sharing ownership
- **Plan Participants:** Thirteen executives, ranging from age 35 to 60

WHAT'S A 401(k) MIRROR PLAN?

A 401(k) mirror plan is a type of voluntary nonqualified deferred compensation (NQDC) plan that allows highly compensated executives and employees to save more money towards their retirement than is allowed under a qualified 401(k) plan.

This type of NQDC plan often mirrors as closely as possible the investment options and features of the employer's 401(k) plan. Many companies include discretionary contributions with a vesting schedule to incentivize retention further.

KEAP
A strategy that may include life insurance

* In order to sell life insurance, a financial professional must be a properly licensed and contracted life insurance producer.

PLAN DESIGN: 401(k) MIRROR

- **Employer-defined contributions:** $201,000 annually (total for all 13 participants). Each participant receives a specific dollar amount.
- **Vesting schedule:** Employer contributions vest over 10 years: 0% after 4 years, 20% after 5 years, 40% after 6 years, 60% after 7 years, 80% after 8 years, 90% after 9 years, 100% after 10 years
- **Accelerated vesting:** Allows for full vesting after 5 years in the event of retirement, death, disability, or change of control based on date of contribution
- **Investment menu:** Participant directs notional investment choices, which mimic options available in 401(k)
- **Normal retirement age:** 65
- **Retirement distributions:** Choice of lump sum or up to ten annual installments
- **In-service distributions:** Allows for participants to receive in-service distributions of up to 50% of contributions with a minimum deferral of 5 years and subject to vesting schedule. Choice of lump sum or up to five annual installments
- **Funding:** Informal funding of aggregate liability through corporate-owned life insurance (COLI)
- **Supplemental death benefit protection:** Additional $100,000 of death benefit for each participant

RESULT:

The client now has a cost-effective strategy to retain its talented executives without diluting its ownership!

SUMMARY:

NQDC plans have long been recognized as useful tools for recruiting, rewarding and retaining top executives at large firms. But there is a growth opportunity in the NQDC market you may not have considered: midsize companies looking to compete for talent.

Introducing Pacific Life Insurance Company's Key Executive Advantage Program (KEAP), a turnkey NQDC program designed form the ground up to help midsize businesses implement flexible, cost-effective benefit solutions more quickly.

Our team of dedicated executive benefits specialists are here to guide you.
To learn more email us at PLKEAPTeam@PacificLife.com.

KEAP Executive Benefits Specialists

NQDC

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The primary purpose of life insurance is financial protection against the premature death of the insured.

Plan administration provided by independent third-party administrators not affiliated with Pacific Life Insurance Company.

Pacific Life Insurance Company does not provide nonqualified plan administrative services or investment advice and does not act in a fiduciary capacity for any plan.

Life insurance is subject to underwriting and approval of the application and will incur monthly policy charges.

Pacific Life Insurance Company's individual life insurance products are marketed exclusively through independent third-party life insurance producers, which may include bank affiliated entities. Some selling entities may limit availability of some optional riders based on their client's age and other factors.

Your broker-dealer or firm can help you determine which optional riders are available and appropriate for your clients.

Investment and Insurance Products: Not a Deposit	Not Insured by any Federal Government Agency	
Not FDIC Insured	No Bank Guarantee	May Lose Value

'CHARTING' A NQDC COURSE

Insights from the 2022 NQDC Plan Survey

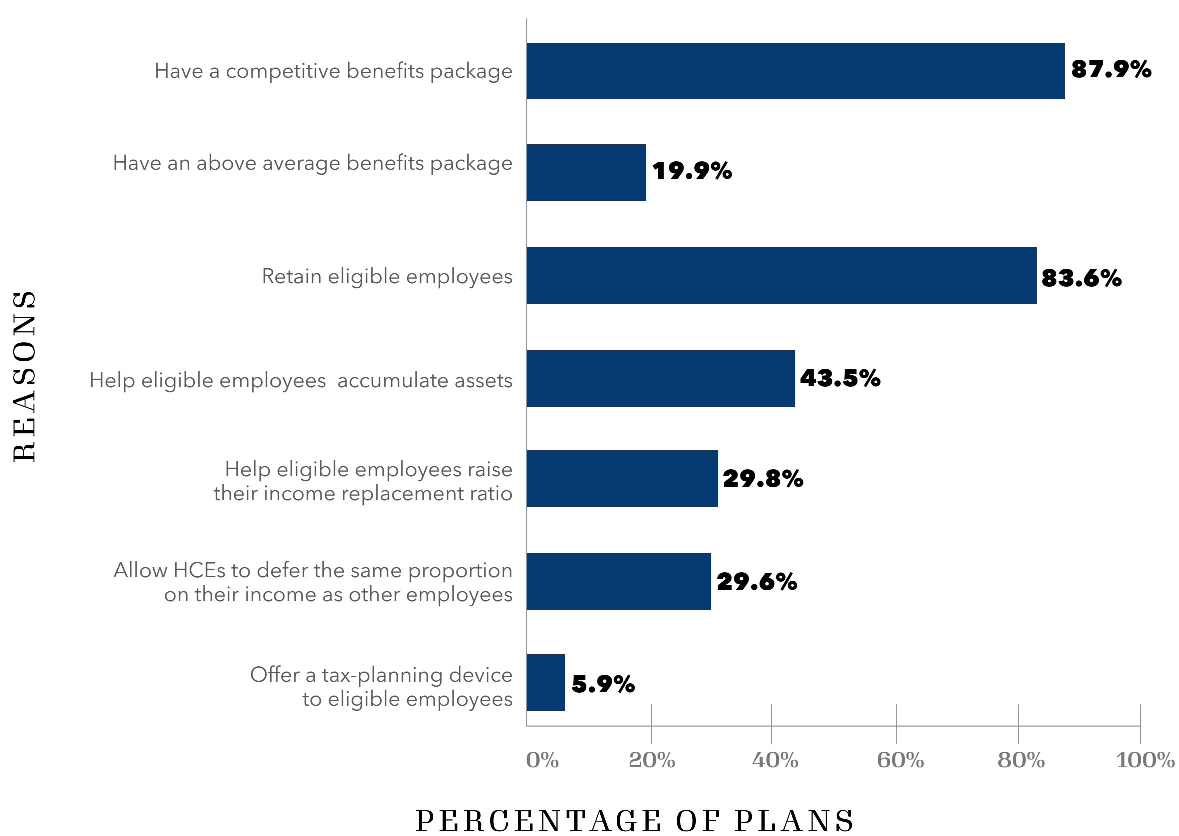
Employers looking to differentiate themselves and their benefit offerings—particularly in a tight labor market—continue to rely on nonqualified deferred compensation (NQDC) plans to make their benefits package more competitive, according to the latest survey of nonqualified plans by the Plan Sponsor Council of America.

The 2022 NQDC Plan Survey, sponsored by Lincoln Financial and Principal Financial Group, found both a commonality of priorities and a striking degree of diversity behind the utilization of these programs. While a desire to have a competitive benefits package (87.9% of respondents) and to retain eligible employees (83.6% of respondents) remain the top motivations underlying these programs, 30% of respondents offer an NQDC plan to help eligible employees raise their income replacement ratio, and 30% did so to allow highly compensated employees to defer the same portion of income as other workers—both of which support those primary motivations.

In addition to leveraging the NQDC plan to attract talent, the program designs also have ways to emphasize the retention of key workers. Nearly 40% of plans have a bad actor forfeiture clause, and almost 30% have a non-compete provision that forfeits the NQDC benefit if the employee leaves to work for a competitor.

NQDC

REASONS FOR OFFERING A NQDC PLAN



Source: 2022 Plan Sponsor Council of America Non-Qualified Plan Survey

RANKED REASONS FOR OFFERING NQDC PLAN

REASON	RANK PRIMARY	SECONDARY	TERTIARY
Have a Competitive Benefits Package	39.7%	29.6%	18.6%
Have an Above Average Benefits Package	5.9%	9.3%	4.7%
Increase Employee Stock Ownership of the Company	0.0%	0.0%	0.0%
Retain Eligible Employee	10.3%	40.7%	32.6%
Help Eligible Employees Accumulate Assets	22.1%	7.4%	14.0%
Help Eligible Employees Raise their Income Replacement Ratio	1.5%	7.4%	20.9%
Allow HCEs to Defer the Same Proportion of their Income as Other Employees	14.7%	5.6%	9.3%
Offer a Tax-Planning Device to Eligible Employees	5.9%	0.0%	0.0%
Overall Objective of the Plan	0.0%	0.0%	0.0%
	100.1%	100.0%	100.1%

NQDC

Source: 2022 Plan Sponsor Council of America Non-Qualified Plan Survey

The survey—which reflects the plan design of 135 NQDC plans—also found an increase in the percentage of employers making contributions to their NQDC plans this year, as well as a shift in the formulas used. In fact, more than three-fourths of employers make contributions (77.3%), most commonly a "restoration match" that makes up for the missed match due to qualified plan contributions limits (42.2% of plans, up from 27.5% in 2020).

EMPLOYER CONTRIBUTION TYPES

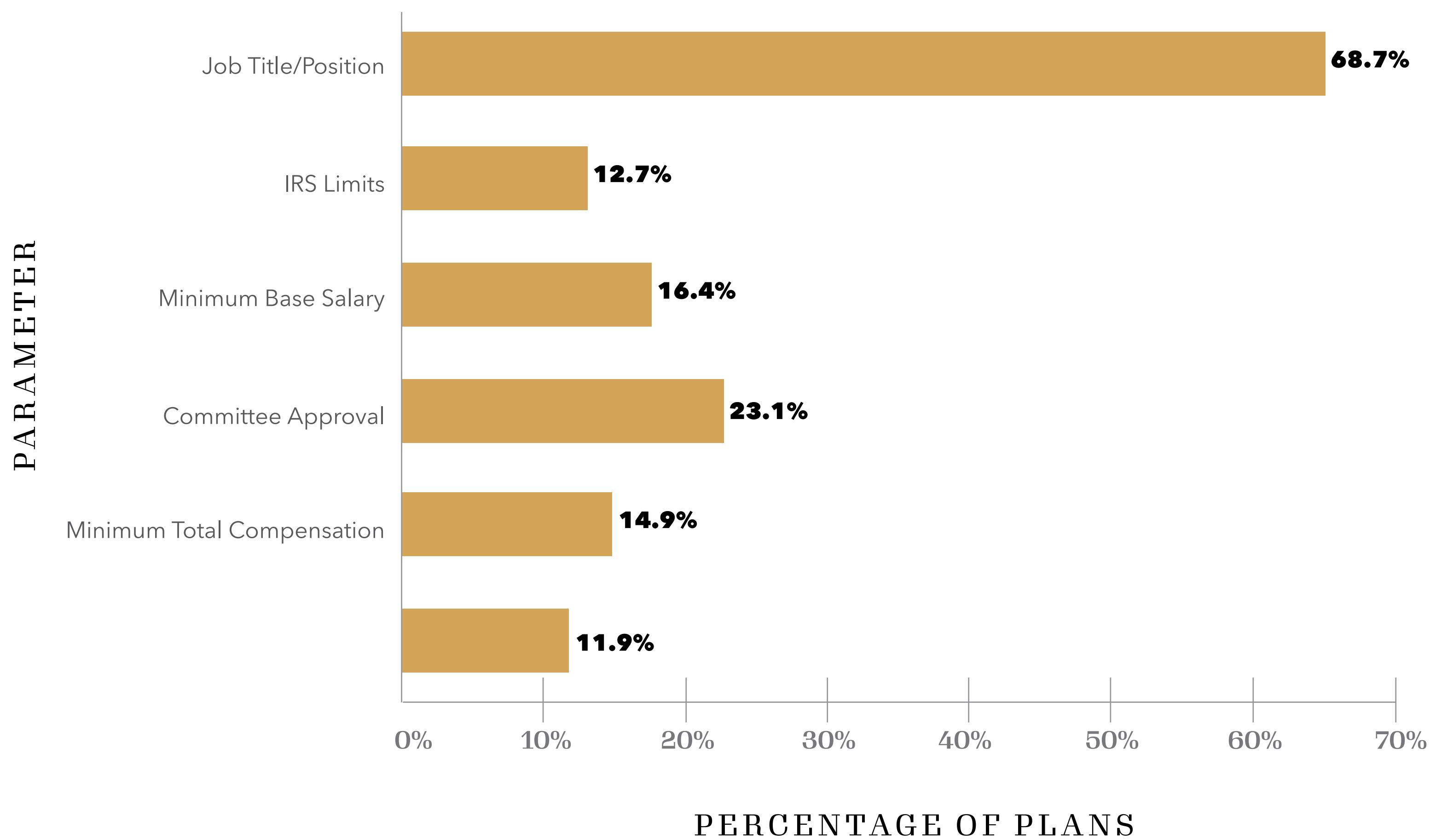
	NUMBER OF TOTAL EMPLOYEES			
CONTRIBUTION TYPE	**1-999**	**1,000-4,999**	**5,000+**	**ALL PLANS**
Fixed Match	25.0%	0.0%	13.3%	13.2%
Resotration Match	31.3%	62.1%	53.3%	49.1%
Graded / Tiered Match	3.1%	3.4%	6.7%	4.7%
Age or Service Based Non-Matching Contribution	18.8%	10.3%	22.2%	17.9%
Fixed Non-Matching Contribution to All Eligible Employees	12.5%	10.3%	15.6%	13.2%
Discretionary Non-Matching Contribution	34.4%	34.5%	8.9%	23.6%
Other	6.3%	0.0%	6.7%	4.7%
None	9.4%	3.4%	8.9%	7.5%

NQDC

Source: 2022 Plan Sponsor Council of America Non-Qualified Plan Survey

On average, 5.6% of total employees are eligible to participate in an NQDC plan. More than two-thirds of employers use job position/title as the main criteria for NQDC plan eligibility. On average, more than sixty percent of eligible employees participate in the NQDC plan (have an account balance). Nearly half of the eligible participants make contributions to their own accounts.

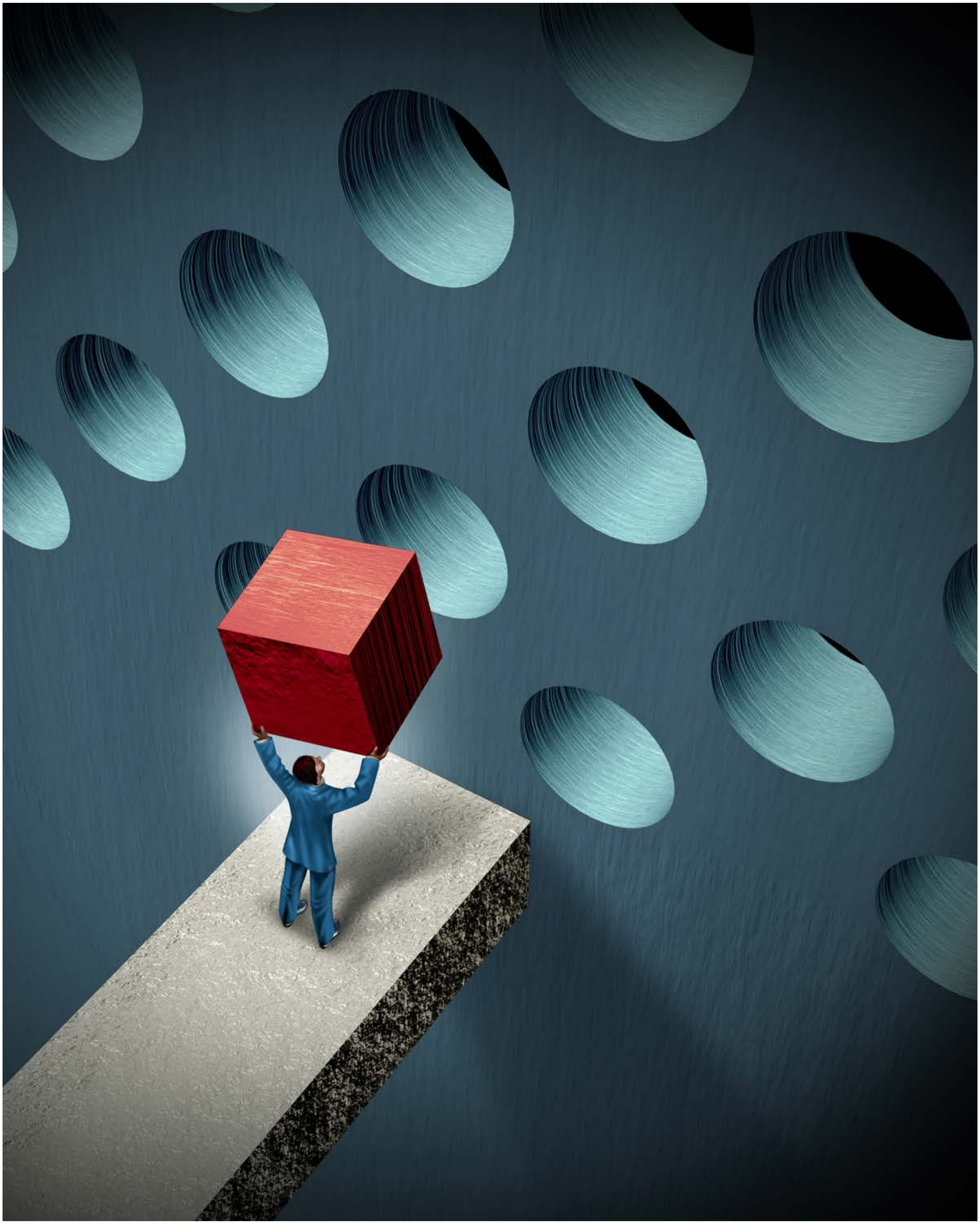
ELIGIBILITY CRITERIA FOR NQDC PROGRAM



The survey reflects responses from 135 plan sponsors representing a wide variety of industries, including a significant number of large employers, those with more than 5,000 employees. The complete survey is available for purchase at psca.org/research/nqdc/2022AR. NNTM

For more information, contact Hattie Greenan at hgreenan@usaretirement.org

Source: 2022 Plan Sponsor Council of America Non-Qualified Plan Survey



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Challenges and Opportunities in 2023

Having engaged plan fiduciaries who are aware of their roles and responsibilities—and who want to serve in that capacity—is an important key to avoiding litigation and addressing today's staffing crisis.

By Steff Chalk

Retirement plan advisors and plan sponsor retirement committee members are currently either in the midst of annual evaluations of the company's qualified plan or addressing the aftermath of the investment carnage in 2022.

In either case there are probably changes that need to occur within the plan investment offerings or in the strategic positioning of the company's financial wellness, emergency savings support or student-loan debt repayment plans.

Despite that, there is some "good news" for everyone involved: the plan sponsors of 2023 are generally staffed with educated and motivated retirement committee members and trustees who choose to be in those positions of responsibility. Unlike plan fiduciaries of days gone by—say 5 or 10 years ago—today's plan fiduciaries are taking seriously and embracing the role of qualified plan fiduciary. They understand their role and the responsibility that has been bestowed upon them. And unlike fiduciaries of yesteryear, today's plan fiduciaries *want* to serve as a plan fiduciary. Many consider that role as being "of service" to everyone in the company.

Having engaged plan fiduciaries who are aware of their roles and responsibilities clearly makes the advisor interaction more productive and fulfilling.

Is it All a Bed of Roses?

Not by a longshot! Plaintiff's counsel is always lurking and never bashful about why they exist. As long as there are ignorant or sloppy fiduciaries, there will be law firms feeding at the trough of poorly managed plans. That is why every shred of any fiduciary decision, documentation and directive must prepared and maintained for an assumed audience of three: plaintiff's counsel, a presiding judge and the collective jury.

The role of defendant in a court case can spell doom and gloom, like it was for the *Tussey v. ABB* case and the Enron case before that. And for hundreds of other plan sponsors who failed to have their cases dismissed during the early stages of the defense. Even the most well-intentioned and educated plan fiduciaries can find themselves sitting across the table from a New York or St. Louis law firm serving as plaintiff's counsel. New 401(k)-related lawsuits ramped up during 2019 and 2020, with approximately 90 new suits being filed during 2020—although new suits tapered off during 2021 and 2022, as plaintiffs and their counsel have been held to a higher standard by some courts. This has not gone unnoticed by plan sponsors. Plan sponsors and their retirement committee members are more prudent in how they oversee plans today. In recent years that has been reflected in the number of defendants who are willing to take a case to court versus choosing to negotiate a settlement. This is welcome progress for industry service providers, plan sponsors and plan participants.

> "As long as there are ignorant or sloppy fiduciaries, there will be law firms feeding at the trough of poorly managed plans."

The New Challenges in Staffing

Staffing and retaining a productive workforce has always been difficult, but the arrival of the pandemic has taken the difficulty of that task to a new level. Today there are multiple challenges around staffing, and in some cases a qualified plan can help. A company that offers employees access to a qualified plan stands out from competitors that do not.

Today's plan sponsors are struggling to meet the retirement needs of four different generations. These various generations have unique motivators. Generation X workers are not motivated the same way as Baby Boomers. Millennials think much differently than the Generation Z cohort. One size does not fit all in this case. Certainly, one benefit package (or retirement plan) does not equally satisfy the needs of all workers. This translates to difficulties when attempting to make a single retirement plan work for everyone.

The challenges are many—but the work is rewarding and well worth the effort! NNTM

What Does Innovation Mean to You?

Innovative solutions hold the potential to improve outcomes for participants. But innovation can be scary in today's litigious environment.

David N. Levine

Concepts in the retirement industry come and go—and some stick around. Over the past few years, concepts like convergence, aggregation, decumulation and others have become a big part of the retirement industry lexicon. One word that never seems to go away is innovation.

Whether a new feature, program, option or service is "innovative" is in the eye of the beholder. Commonly these days, innovation can mean a new managed account solution, an investment option that integrates new asset classes or distribution features, or a new wellness solution.

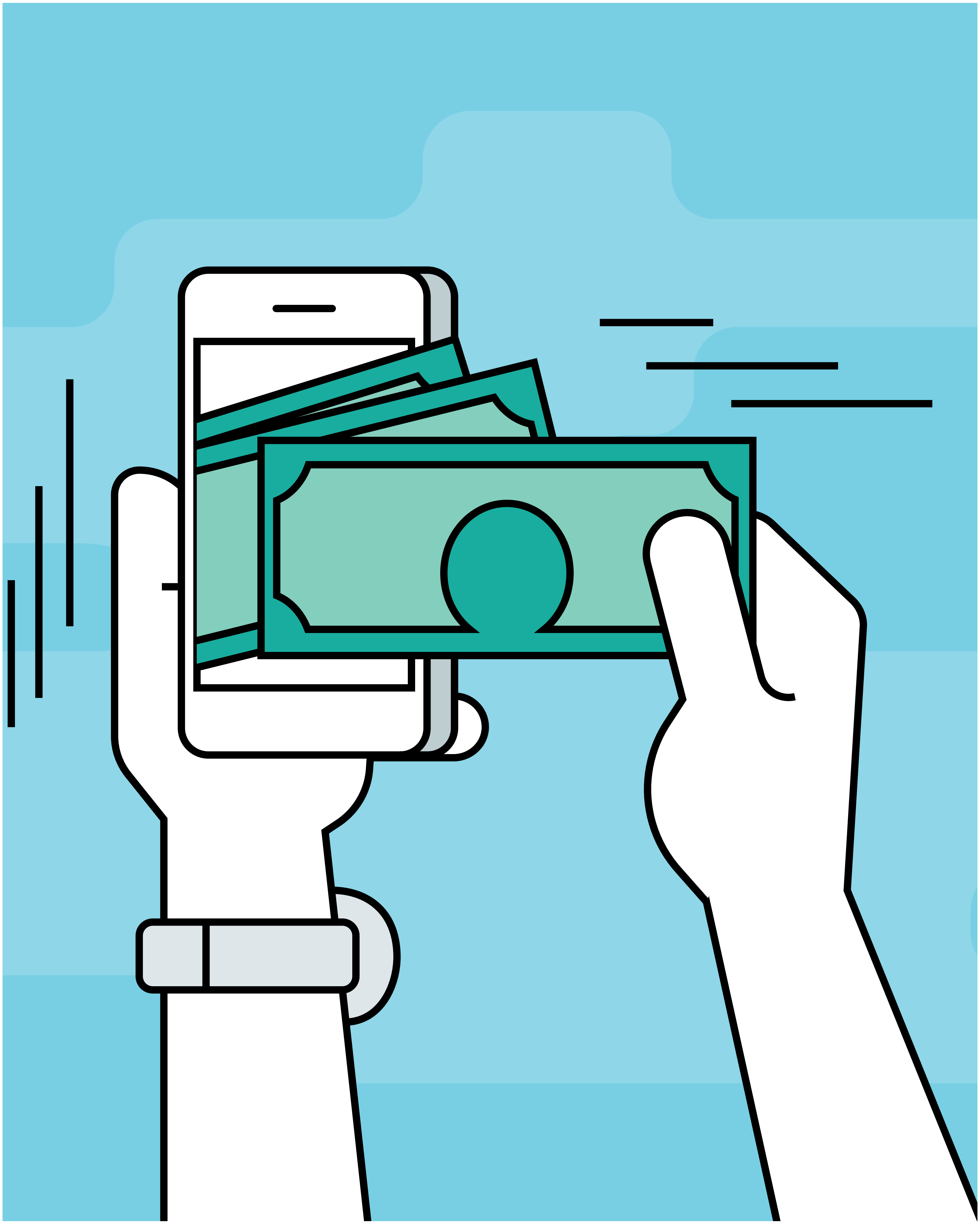
Prudent Concerns

However, as advisors encounter those and other innovative solutions, there a number of concerns they may want to keep in mind:

- *Litigation and Regulatory Enforcement.* Ideally, for a plan sponsor, its fiduciaries and its advisor, enforcement and litigation concerns would not be a concern in reviewing innovative solutions. But the practical reality is that the specter of enforcement and litigation hangs over any innovative product. Is the risk of enforcement or litigation a reason to not look at an innovative solution? No. However, advisors can support their clients by helping them approach decisions whether or not to use innovative solutions under ERISA's fiduciary standards. Despite what might be asserted in litigation, there is usually no one "right" way to make a decision, so an advisor can help each client chart their own individual path.
- *Prohibited Transactions.* For those trained in securities laws, disclosure is often viewed as a fundamental premise of conflict avoidance. However, ERISA's prohibited transaction rules may require more than simple disclosure to avoid legal compliance concerns. While there are many ways to comply with the prohibited transaction rules, an advisor, with the help of legal counsel, can help clients review innovative solutions to consider the risk of prohibited transaction concerns proactively.
- *Other Solutions.* The history of the modern retirement system is filled with solutions that have been adopted widely—such as target date funds, for example—as well as solutions that, while considered promising, have not been adopted widely. No provision of ERISA requires that a fiduciary scour the ends of the earth for every potential investment option, plan feature or other solution. As such, a plan sponsor, fiduciary or advisor is not required to consider—or not consider—a potentially innovative solution. In some cases, however, reviewing multiple potential options may be a beneficial approach.
- *Documentation.* ERISA is not a prescriptive law; plan sponsors, fiduciaries and advisors have wide latitude in their decisions. As recent litigation trends have illustrated, no type of feature or investment, from target date funds to low-cost solutions and other innovative products, appears to be "safe" from a legal challenge. As a result, regardless of whether a plan sponsor, fiduciary or advisor recommends or utilizes a widely adopted solution or a newer, more innovative solution, documentation in whatever form might be appropriate for the situation is key.

Conclusion

The retirement industry has long benefitted from innovative solutions. Nearly 25 years ago, automatic enrollment, a core of many 401(k) plans in 2023, was an innovation. As automatic enrollment highlights, innovative solutions hold the potential to improve the outcomes for participants in the modern retirement system. However, innovation can be scary in a litigious environment. But keeping in mind that ERISA is flexible can allow advisors and their clients to further improve the retirement services they offer plan participants and beneficiaries. NNTM



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Withdrawal Symptoms?

Two provisions in SECURE 2.0 will make it easier for workers to tap into their retirement savings for emergency expenses.

By Nevin E. Adams, JD

There's nothing like a global pandemic to fuel interest in, if not the need for, emergency savings. Indeed, there are a half dozen provisions[1] in the new SECURE 2.0 Act designed to make it easier for workers to tap into their retirement savings—two of which are aimed specifically at emergency savings.

Well before COVID-19, there were concerns about Americans' lack of emergency savings[2] and that they were using their retirement savings accounts as that resource. Behavioral finance types have counseled that a mental, if not physical, segregation of money by purpose is helpful, and at least one of the new SECURE 2.0 provisions seems designed to make that structure a reality by creating an emergency savings "sidecar" alongside a regular retirement savings account.

The first of these, found in Section 115 of SECURE 2.0, says that beginning in 2024, a participant may make a withdrawal of up to $1,000 per year from their retirement account for certain emergencies. The withdrawal may be taxable (unless drawn from a Roth) and *may* be repaid within three years, but it will not be subject to the 10% penalty for early withdrawals. Only one withdrawal is permitted per the three-year repayment period if the first withdrawal has not been repaid.

The other emergency savings provision, in Section 127, seems to be garnering most of the media attention. Confusingly labeled the "Pension Linked Emergency Savings Accounts," beginning in 2024, it will *allow* (not require) employers to create an Emergency Savings Account (ESA) as part of a defined contribution plan (401(k) or 403(b)). Only non-highly compensated employees may contribute to the account, although employers may auto-enroll such individuals in an EAS up to 3% of their compensation, and the EAS value cannot exceed $2,500[3] (indexed for inflation). All employee contributions to this emergency savings account *must* be made on an after-tax basis—and each month participants may take withdrawals from the account. (And just to further complicate administration, the first four withdrawals for a year cannot be subject to distribution fees.)

Speaking of complications, those employee contributions must be treated as elective deferrals for purposes of any matching contributions. The matching contributions are treated by a plan no differently than matching contributions made on account of elective deferrals.

This provision likely makes the behavioral science types happy—it provides a separate mental (and notational) accounting—and one that doesn't force the individual to choose between saving for retirement or saving for that "rainy day" emergency, at least in terms of forgoing a company match.

But aside from the obvious administrative complexities of this option (certainly for the plan sponsor/recordkeeper), it's by no means clear that this kind of setup won't create a kind of "Christmas club" account, with individuals withdrawing these contributions for just about any reason every year (just) long enough to get the match—and then the next year they could do it all over again. And again. The Treasury is authorized to issue regulations to prevent abuse, but there's no telling when that might happen or what those rules might be.

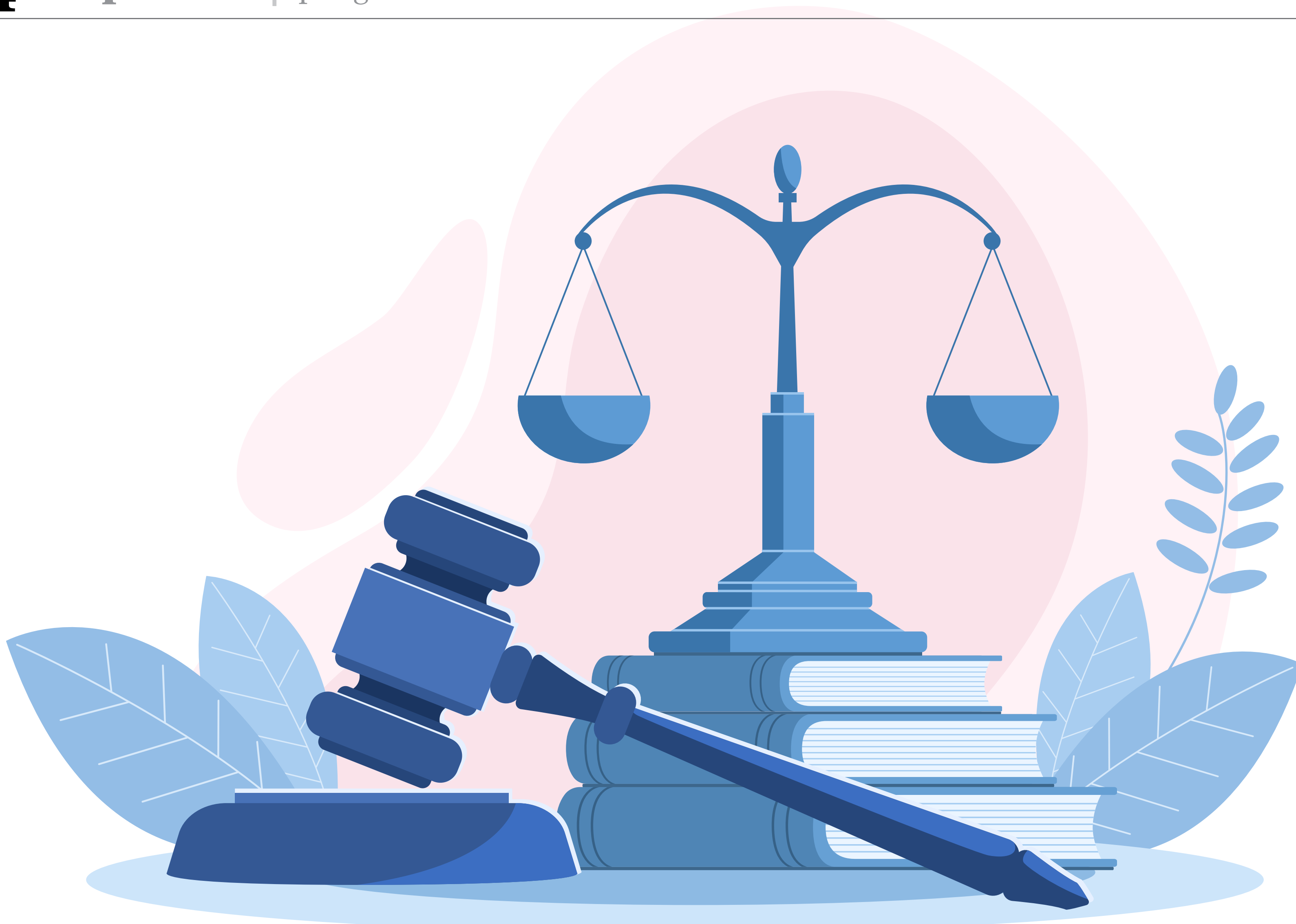
It might be good mental "accounting"—but I'm not sure that it will be good for retirement. NNTM

FOOTNOTES

[1] While I'm focusing on only two of those provisions here, the others are Section 314 (which allows for up to $10,000 of withdrawals from plans and IRAs in cases of domestic abuse, effective 2024), Section 326 (which exempts from the 10% excise tax withdrawals from plans and IRAs in cases of terminal illness, effective now), Section 331 (which allows for withdrawals from plans and IRAs of up to $22,000 in federally declared disasters, effective retroactively to Jan. 26, 2021), and Section 334 (which allows for up to $2,500 a year of withdrawals from workplace plans to pay for long-term care, effective three years after enactment, i.e., generally not until 2026).

[2] The most widely repeated of which was likely the Federal Reserve survey asking Americans if and how they'd handle a $400 emergency (approximately 1 in 9 said they couldn't, and while that's a minority, the headlines have tended to highlight the impact)—but see https://www.minneapolisfed.org/article/2021/what-a-400-dollar-emergency-expense-tells-us-about-the-economy.

[3] Though there's been some question as to whether $2,500 is "enough" (there's language in the bill calling for a study to see if it needs to be higher).



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Case(s) in Point

On the litigation front, the lawsuits against fiduciaries that included BlackRock's Lifepath target-date funds on their menus continue to be dismissed—although most have allowed a short time for those bringing those suits to correct the shortcomings in their suits. And most of the excessive fee suits that have gone to trial have been dismissed for failing to meet a standard of plausibility in their arguments, with the courts generally finding that more than a fee allegation based solely on the size of allegedly comparable plans is required.

But the big potential litigation news of the quarter came from a Florida court that overturned a key aspect of the Labor Department's fiduciary rule regarding rollovers. Details follow.

Rollover Rollback?

Court rolls back rollover rule in 401(k) fiduciary FAQ fight

A financial services trade group has prevailed in a key portion of its suit against the Department of Labor's fiduciary guidance involving rollovers.

The U.S. District Court's Middle District of Florida sided with the American Securities Association. It ruled that the DOL overstepped its authority with certain parts of its Frequently Asked Questions (FAQs) regarding Prohibited Transaction Exemption 2020-02.

As the court noted, the DOL issued a set of FAQs in April 2021, where, among other things, they addressed the point at which advice to roll over assets from an employee benefit plan to an IRA is considered to be on a "regular basis."

It also clarified when financial institutions and investment professionals must consider and document the "specific reasons" a rollover recommendation was thought to be in the client's best interest.

The suit focused on two FAQs in particular, FAQs 7 (regular basis) and 15 (specific reasons). Plaintiffs argued that FAQ 7 unlawfully enlarged "the circumstances in which an investment advisor is subject to fiduciary duties." It thus would subject ASA members to the increased and expensive documentation requirements detailed in FAQ 15, which plaintiffs claimed were undue and burdensome.

The court first determined that at least one wealth management member[1] of the association bringing the suit had suffered an injury as a result, and commented that, "The policy referenced in FAQ 7 deviates from past agency guidance by explaining that the one-time provision of advice to roll over assets from a plan to an IRA can, in certain circumstances, trigger fiduciary duties." The court then determined that "the policy referenced in FAQ 7 contradicts the plain language of the rule it purports to interpret."

More specifically, "Because the policy referenced in FAQ 7 abandons this plan-specific focus in the context of rollovers, it sweeps conduct into its purview that would not otherwise trigger fiduciary obligations."

The court agreed with the American Securities Association on FAQ 7 and declared it unlawful, noting, "Because the policy referenced in FAQ 7 conflicts with the Department's existing regulations, it is an arbitrary and capricious interpretation of the 1975 Regulation." It vacated the policy as a violation the Administrative Procedures Act (APA) and "remanded it to the Department of Labor for further proceedings consistent with this Order."

Yet it found that the policy referenced in FAQ 15 was not arbitrary and capricious and sided with the DOL.

"In short, the type of documentation that FAQ 15 requires is precisely of the nature that a prudent investment advisor would undertake," the court held. "Accordingly, it neither contradicts the 2020 Exemption nor goes beyond it. The Court finds that the policy referenced in FAQ 15 is not arbitrary and capricious."

In fact, while the plaintiffs had asked for summary judgment on four separate counts, they prevailed on only one—though it was a big one in terms of potential long-term implications.

What It Means for Fiduciaries

"While the DOL won on the question of whether the procedure outlined in FAQ 15 was appropriate, they lost on the bigger issue of the re-interpretation of the fiduciary rule for rollovers," noted ERISA attorney Fred Reish, a partner with Faegre Drinker Biddle & Reath LLP. "If an advisor or agent isn't a fiduciary, then a rollover recommendation won't be a prohibited transaction, and PTE 2020-02 and the FAQ 15 process won't be needed."

That said, Reish believes the decision will be appealed, and the final outcome will not be known for at least a year. As a result, "it would be risky to rely on the opinion until there is a final decision at a higher level than this trial court," he added.

Tom Clark, a partner with the Wagner Law Group, said advisors should contemplate staying the course until more is known.

"It's a blow to the Department of Labor, but if you're acting in people's best interest under PTE 2022-02 now, you should consider continuing to do so until the consequences of this decision become clearer," he explained. "This will almost certainly not be the DOL's last word on the issue."

As for the next steps, Brian Graff, CEO of the American Retirement Association, said the court's decision was based on its determination that the language of FAQ 7 went beyond that permitted by the Administrative Procedures Act.

"The DOL may well respond to this decision regarding the FAQs by modifying or eliminating the 'regular basis' prong of the five-part test in the regulation itself in its pending, proposed changes to the fiduciary rule," he concluded.

— John Sullivan/Nevin Adams

Venue View

Participants challenge ESG rule in different venue

"For Americans of all races, creeds, and political stripes, the American dream includes the prospect of a comfortable retirement." So begins a second lawsuit challenging the Labor Department's so-called ESG rule.[2]

However, while that one was brought by roughly half the Attorneys General in the country (along with a plan sponsor and an unrelated plan participant), this one was brought in a different federal court (the U.S. District Court for the Eastern District of Wisconsin) by participants Richard Braun (Operations Manager for SWAT Environmental, a soil, water, and air technologies company that provides radon mitigation and other services), and Frederick Luehrs III (a Maintenance Supervisor at Petron Corporation, a supplier of engineered lubricants, in New Berlin, WI)—both of whom participate in the respective defined contribution plans of their employers.[3]

Proposed 'Sell'?

But despite the differences in venue (Wisconsin rather than Texas), the arguments are much the same—and in many respects focus more on the more provocative positioning in the proposed regulation than on the final one.

"The fundamental principle that retirement investments are made for the benefit of retirees is now under attack via the guise of an investing fad often referred to as 'ESG,' which by its nature focuses on environmental, social, and governance goals rather than maximizing investment returns," the suit alleges. "Whatever euphemism one wishes to use—'people over profits,' 'standing for something more,' etc.—the ESG investment trend contemplates a focus on policy objectives rather

FOOTNOTES

[1] Specifically, the court noted that "as the regulated party, Baird no longer provides rollover recommendations because of this guidance. This is sufficient to demonstrate that at least one ASA member has suffered an injury-in-fact for standing purposes."

[2] It's actually called "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights."

[3] The Wisconsin Institute for Law & Liberty represents the plaintiffs.

than financial returns. This ERISA forbids."

Noting that the ESG rule "stems from a broader executive initiative," the suit (*Braun v. Walsh*, E.D. Wis., No. 2:23-cv-00234, complaint filed 2/21/23) goes on to state that," …Congress never granted President Biden the authority to override ERISA's text and its stated objective to protect retirees in favor of progressive policy dreams like social credit scores, reducing pay for CEOs, or instituting racial quotas for corporate boards." More precisely, the plaintiffs state that "the ESG Rule violates ERISA and exceeds the authority granted to the Secretary by statute. In addition, it unlawfully politicizes the retirement system and, in doing so, puts the retirement savings of millions of Americans at substantial risk in service of a policy choice not found in ERISA or otherwise enacted by Congress."

Exceeds Authority

In response, they claim to be "entitled to a declaration that the ESG Rule exceeds the authority conferred on the Secretary and the Department by Congress, and a preliminary and permanent injunction enjoining the ESG Rule."

The suit proceeds to outline the history of the "focus on financial return" that it notes "has been consistent in federal rules and regulations over the nearly three decades between 1994 and the present day, regardless of what party controlled the White House during that time," and then goes on (harkening back to the 2020 rule) to note that since that time "fiduciaries have been free to select investments that account for ESG factors, provided that the pecuniary factors underlying these investments and other investment options are equivalent and that fiduciaries document for the participants and beneficiaries the reasoning for their choices."

As did the previous suit by 25 state Attorneys General, these plaintiffs bemoan the removal of a specific documentation requirement contained in the Trump administration's version, commenting that that "documentation requirement provides protection for plan participants and beneficiaries and ensures that fiduciaries will only consider these non-economic factors when doing so will not put the economic returns of participants and beneficiaries at risk at the expensive of collateral objectives."

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> “The ESG Rule … will fundamentally alter the focus on investment returns for plan participants and beneficiaries, instead injecting consideration of ESG factors—but without requiring that fiduciaries quantify the benefits of any such factors, or even document the reasoning behind their consideration.”

The plaintiffs then turn their attention to the sequence of events following the Biden administration coming to power, beginning with their announcement that they would not enforce the 2020 Rule “despite that rule having gone through the complete rulemaking and public comment process.”

Provocative Positioning?

Again, most of the criticism here seems focused on the (admittedly) more political (and arguably provocative) positioning of the rule initially proposed by the Biden administration. The plaintiffs here caution that “a rule that endorses or provides cover for selecting investments based on factors other than financial returns necessarily disadvantages individual employees and participants,” glossing over the reality that the final regulation seems very much in concert with that position.

Indeed, they point out that “the ESG Rule, initially proposed in October 2021 to supersede the 2020 Rule and finalized on December 1, 2022, will fundamentally alter the focus on investment returns for plan participants and beneficiaries, instead injecting consideration of ESG factors—but without requiring that fiduciaries quantify the benefits of any such factors, or even document the reasoning behind their consideration.” The documentation requirement referenced is, of course, to be found in the Trump administration’s own ESG rule—which called for specific analysis and documentation in “the rare circumstances when fiduciaries are choosing among truly economically ‘indistinguishable’ investments.”

The suit questions returns on ESG options, as well as alleging that those options carry higher fees.

In another “lookback” to the proposed rule, the plaintiffs point to text in the Biden administration’s proposed rule that said proper fund evaluation “may often require an evaluation of the economic effects of climate change and other ESG factors” that was specifically rejected in the final rule. It cited the elimination[4] of the aforementioned special documentation requirement (in favor of the standard review/process long applied to all plan investments) as a diminution of fiduciary protection—claiming that even with the removal of those special considerations, “the spirit of the proposed rule—to favor investments based on these non-pecuniary factors—remains.”

‘Required’ Removal

Indeed, the plaintiffs here claim that “the ESG Rule and its summary employs two primary vehicles to achieve these objectives: 1) language authorizing and encouraging consideration of ESG factors; and 2) elimination of documentation requirements for ‘tiebreaker’ inquiries.” They go on to state that “while this language, combined with the removal of the word ‘required,’ may appear to solve the problems associated with the Proposed Rule at first glance, the remainder of the regulation, along with the lengthy summary, makes clear that these ESG investments are favored under the new regulation despite a lack of evidence that they provide increased returns for investors.”

Also in the spirit of alleging less protections for participants, the plaintiffs viewed the Trump administration’s initial prohibition of ESG target-date funds as qualified default investment alternatives (QDIA) as a protection now removed.

The plaintiffs characterize the Labor Department’s rationalization of the need to issue a new regulation to counter confusion of terms like “pecuniary,” and the notion that the previous regulation had a “chilling effect” on consideration of ESG factors, as unnecessary at best—and at worst, exactly the opposite of what the final regulation claims to do: putting the financial interests of plan participants and beneficiaries above all other considerations.

The suit concludes: “Unless the Secretary is immediately restrained from implementing the ESG Rule, Plaintiffs and millions of American participants and beneficiaries like them face a substantial likelihood that their retirement contributions will be invested in a manner inconsistent with the statutory requirement that contributions be invested solely in their interest.”

We’ll see.

— Nevin E. Adams, JD

FOOTNOTES

[4] The plaintiffs here claim that there “are only two plausible reasons why the Department would eliminate a documentation requirement. One would be to eliminate any realistic chance of a participant proving a breach of the duty of prudence and loyalty if a fiduciary subverts the participants’ economic return to collateral considerations.” As for the second reason, the plaintiffs state that “it is difficult, if not impossible, to quantify the economic impact of the ESG factors the ESG Rule, whether in the short or the long term.”

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Breach Overreach?

DOL backs plaintiffs in fiduciary breach appeal

The Labor Department has weighed in on an excessive fee case on behalf of the participant-plaintiffs—asserting that the district court made a bad call on the burden of proof.

The case under appeal involves Home Depot, and a decision last fall by Judge Steven D. Grimberg in the U.S. District Court for the Northern District of Georgia regarding allegations that the fiduciaries of the $9 billion plan had breached their fiduciary duties under ERISA in two principal ways:

- failing to prudently monitor the investment advisory services offered to Plan participants by third-party professional managed account services providers (resulting in "excessive" fees charged to the Plan); and
- failing to prudently monitor and remove certain Plan investment options that performed poorly relative to other available investment options.

Lower Court Comments

Judge Grimberg noted that the plaintiffs had "failed to adduce evidence to show why the Plan's fees for Professional Management, expressed in basis points or per capita, were imprudent or imprudently bargained, let alone a result of anything other than the Plan's unique characteristics." He also found that the plaintiffs "failed to marshal any evidence that no prudent fiduciary in Home Depot Defendants' proverbial shoes would have selected FE or AFA[5] over other managed account providers," commenting that

FOOTNOTES

[5] Financial Engines Advisors, LLC (FEA) and Alight Financial Advisors, LLC (AFA).

"plaintiffs mistake competitors for comparators," finding differences in the services provided, not to mention the aforementioned integration of recordkeeping data with the managed account services.

More than that, he explained that "even if Plaintiffs adduced evidence to raise a disputed material fact as to whether these companies were appropriate comparators, a higher fee alone does not compel the conclusion that the fees charged to a plan are excessive; instead, fees must be evaluated 'relative to the services rendered.'" Judge Grimberg noted that the "undisputed record evidence shows that Plaintiffs' identified competitors were not apt for apples-to-apples comparison based on the services they provided…" Beyond that he found no evidence that the services offered were "both less expensive and satisfied the Plan's goals as well as or better" than the providers used by the plan.

The Amicus Brief

Enter the Department of Labor in an amicus brief[6] submitted to the U.S. Court of Appeals for the Eleventh Circuit (*Pizarro v. Home Depot, Inc.*, 11th Cir., No. 22-13643, amicus brief 2/10/23), which argued that the lower court applied the wrong standard in making its determination. "Despite largely finding disputes of material fact on whether the breaches occurred, the district court granted summary judgment in favor of the fiduciaries because it found that the participants—by failing to adduce sufficient evidence that 'no prudent fiduciary' would have taken the challenged actions—failed to raise a genuine dispute that the alleged breaches were the cause of the plan's losses," the Labor Department commented.

"In so holding, the district court incorrectly placed the burden of proof on the participants to show loss causation, when it should have applied a burden-shifting framework, adopted from trust law, that places the burden to disprove loss causation on the fiduciary after a plaintiff demonstrates a fiduciary breach and a related loss." The brief continued by stating that "the Secretary has a strong interest in ensuring that the Eleventh Circuit, which has not yet opined on the issue, articulates the proper standards of proof to show loss causation in ERISA fiduciary breach cases."

Trust Law

As for what the Labor Department considered the proper standard of review, they comment that, "As the Supreme Court and this Court have recognized, where ERISA is silent, principles of trust law—from which ERISA is derived—should guide the development of federal common law under ERISA. Trust law provides that once a beneficiary establishes a fiduciary breach and a related loss, the burden on causation shifts to the fiduciary to show that the loss was not caused by the breach."

The brief then notes that "that is why five[7] circuits have held that once an ERISA plaintiff proves a fiduciary breach and a related loss to the plan, the burden shifts to the fiduciary to prove the loss would have occurred even if it had acted prudently." The brief argues that the district court "deviated from the weight of circuit authority and the law of trusts and instead placed the burden to prove loss causation solely on Plaintiffs." Rather, the brief argues that "to the extent this Court's case law implicitly supported burden shifting in ERISA cases, the Court should now make it explicit. By adopting trust law's burden-shifting framework, the Eleventh Circuit would align itself with the vast majority of circuits that have considered how to allocate the burden to prove loss causation in ERISA fiduciary breach cases. This Court should correct the district court's error and vacate the grant of summary judgment…"

Burden 'Shifts'

"The district court's error infected its disposition of nearly every strand of Plaintiffs' claims," the brief continues. "Under the correct burden-shifting framework, where Home Depot (the movant) bears the burden to disprove loss causation, Home Depot could have prevailed at summary judgment on that element only if it presented evidence allowing a reasonable factfinder to conclude that the alleged breach did not cause the Plan's losses."

"But the district court did not hold Home Depot to that standard," the brief continues, "instead granting summary judgment to Home Depot because of Plaintiffs' failure to offer sufficient evidence that 'no prudent fiduciary' would have acted as Home Depot did—a ruling erroneously grounded on Plaintiffs having the burden to prove loss causation."

"The district court's formulation is fundamentally inconsistent with trust law's burden-shifting framework," the brief continues. "If a plaintiff succeeds in showing that 'no prudent fiduciary' would have taken the challenged action, they have conclusively established loss causation, and there is no burden left to 'shift' to the fiduciary defendant."

"The district court failed to apply trust law's burden-shifting framework on the issue of loss causation, instead placing on Plaintiffs the exclusive burden to prove loss causation. Because that error infected its decision to award summary judgment to Home Depot, the decision should be vacated," the brief concludes.

Will the court be persuaded? We shall see. NNTM

— Nevin E. Adams, JD

FOOTNOTES

[6] Amicus Curiae is Latin for "friend of the court"; the plural is "amici curiae." It generally refers to a person or group who is not a party to an action, but has a strong interest in the matter, and who in filing the brief is attempting to inform/influence the court's decision. Such briefs are called "amicus briefs."

[7] The amicus brief states that the "First, Second, Fourth, Fifth, and Eighth Circuits unequivocally hold that, once a plaintiff has proven a breach of fiduciary duty and a related loss to the plan, the burden shifts to the fiduciary to prove that the loss was not caused by the breach. *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 113 (2d Cir. 2021); *Brotherston v. Putnam Invs.*, LLC, 907 F.3d 17, 35 (1st Cir. 2018); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 363 (4th Cir. 2014); *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995); *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992)."

THOUGHT-PROVOKING CONTENT

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Actionable insights from Invesco's Retirement Income Research highlighting participant preferences for creating retirement income.
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Fixed income helps manage risk. Does your plan's glide path align with plan objectives?
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'Off' Putting

Tax credits soothe sting of SECURE 2.0's auto-enroll mandate

By Nevin E. Adams, JD

There are a lot of optional plan design enhancements to be found in the new SECURE 2.0 Act of 2022—but there's one mandatory feature that could have effects both positive—and negative. In late January we asked NAPA-Net readers to weigh in.

Specifically, beginning in 2025, all new 401(k) and 403(b) plans (which is to say all adopted after 12/29/22) except businesses with fewer than 10 employees, new businesses less than 3 years old, and churches and governments, must automatically enroll participants at 3%-10% and increase the rate by 1% per year to at least 10%, but no more than 15%. Of course, employees would have at least 90 days to opt out and take a distribution of any automatic deferrals. This also applies to adoption of a MEP after the enactment date (based on the employer's adoption, not the elective date of the MEP).

This is arguably a good thing for participants, and is consistent with the growing trend of employers to not only adopt automatic enrollment but also contribution acceleration. But might the *requirement* to do so (even though it doesn't have to be implemented until 2025) slow new plan adoption? Or might that (potential) hesitation be overcome by other provisions in SECURE 2.0 (notably the generous tax credits for new plans)?

Well, we asked readers, generally speaking, what impact they thought the new automatic enrollment requirement would have:

- **33%** - I think plans will adopt automatic enrollment before 2025.
- **23%** - It might produce hesitation, but the SECURE 2.0 tax credits will overcome that.
- **13%** - Don't expect it to have any real impact.
- **11%** - It doesn't take effect until 2025, so no impact.
- **11%** -Oh, it has already caused a pause.
- **9%** - No earthly idea.

And then we asked readers, generally speaking, what they thought of this idea—and feelings were, again, "mixed":

- **27%** - A great idea, overdue.
- **22%** - Something small plan sponsors probably won't want to deal with.
- **19%** - A great idea.
- **15%** - A no-brainer alongside the start-up tax credits in SECURE 2.0!

"I get why Congress and the industry is pushing automatic enrollment. My complaint is that the industry still has many kinks to work out with auto enrollment (participants missed/brought in too early, opt-outs & refunds, etc.) and this will either force solutions or cause a big mess."

9% - Unnecessary, and potentially problematic for new plan adoption.
5% - Problematic, considering the timing.
4% - Unnecessary.

Respondents also commented:

*"We **need** automatic features in order for the average American to have a chance at having sufficient retirement assets. We have all see how minimal opt out rates are with automatic enrollment, so it clearly is an accepted practice to incorporate into a plan design. Yes, there will always be some businesses that are just not a great fit but the positive impact this will have is far greater than the downside of some businesses not implementing a plan due to this requirement."*

"Creating more retirement security in this country is the right thing to do."

"A great idea but also will cause frustration for small plan sponsors initially."

"Even though philosophically I agree with it, it is difficult for small plan sponsors... payroll partners need to step up and help us... but not try to take the plans on (because we know we will just end up fixing the mistakes)!"

"I really hope this will force payroll providers and recordkeepers to streamline the enrollment and payroll process. The mandate may force this technological change."

"It defaults employees to making better decisions with the option to opt out. As long as administrative rules do not default plan sponsors to errors (which may be the case), it is a great idea."

"I wish the minimum amount was higher than 3% and that there were no limits (<10 employees should still be required... similar to state mandates)."

"It was probably inevitable."

"Auto enrollment is a great idea—yes, a no-brainer... and yet there are instances where it doesn't work well. One situation comes to mind... many of our non-U.S. clients have employees on the U.S. payroll that are not excluded from the plan per se, but have many very valid reasons for not joining the U.S. plan as it impacts their retirement plans in their home country to which they will generally return within 5 years or less (they work on rotation schedules)."

Other Reader Comments

"Sponsors are uncomfortable right now with auto enroll and escalation. They'd rather not deal with the payroll side."

"I think it takes away the hesitation of plan sponsors that feel making a change would be seen as a negative. Since these would be new plans with no predecessor provisions, it should be no big deal at all."

"The tax credits are the biggest deal for newer plans."

"Tax credits are a great incentive and eases the pain a bit."

"Movement in the right direction—we mandate health insurance, retirement savings should be looked at the same way in my opinion. We do not need millions more people solely dependent on government benefits to live when they stop working."

"Again, behavioral science shows that auto features work. We have mounds of data that show it and as industry professionals, we should rely on that data and advocate for it. Employees can always opt-out so it's not a mandate for them."

"I think the industry is struggling with the execution, but I also think it just got a lot better at creating secure retirement."

"The biggest issue with this is who is making those changes and tracking those changes. If a company changes payroll companies, who is tracking those who are automatic elections and those that aren't. It doesn't affect companies with less than 10 employees, but those with 20 employees don't have an HR department either. I think it will slow down SH Match plans for sure but don't see that impact yet."

"I think the ER contribution tax credits are a great win for small businesses. Often the biggest employer cost to offering a plan is the match and the tax credits could make a big difference on that front."

"It wasn't well thought out. Auto enrollment doesn't make sense for every business. It will cause many businesses to have a longer eligibility waiting period, which only hurts those who do want to

> **"While I love auto enrollment for most plans, there are some industries that will find it very problematic to administer. Companies with lots of turnover like restaurants and retail—big issue for them! But most companies it's a very positive feature."**

save. What will happen to the small balances? If someone has $100 and the distribution fee is $100, how is that helping someone save for retirement? Who is tracking all of the addresses on employees with small balances?"

"Tax credits do not incent a small business owner to adopt a plan. They either want to maximize their contributions, or in some cases, provide a plan for their employees. Last Friday, I met with a client that wants to set up a 401(k) for their employees. When I mentioned increased tax credits, the client totally glossed over this benefit. I was disappointed in the reaction. I have yet to have a client get excited about tax credits."

"If the company does not have the right individuals in place to execute all these provisions, it will become more of a hassle then a benefit. Or if the technology is not in place to execute, the cost for corrections will outweigh the benefit of the tax credits."

"Tax credits won't overcome the administrative burden of requiring auto enrollments. Small businesses don't have HR departments or excess time. Farming this to TPAs and recordkeepers is also going to increase costs. Small business 401(k) plans are already burdens in many cases, this just exponentially increases that burden."

"My clients seem to be worried about requiring the auto-anything. I tend to agree with them that it will create some angst in their workplace."

"I know in general most participants don't opt out when automatically enrolled, so I'm hoping this turns out to be a boon for retirement savings. However, I anticipate some push-back from employers, especially about having to remember to do the auto-increase. I'm hoping most recordkeepers will be ready to help with this when the time comes."

"This is the next stop to forcing everyone into a plan. They refuse to fix social security properly so this is another way to divert attention."

"All the statistics show that automatic enrollment is key to overcoming the retirement crisis."

"Auto-enrollment is a bad idea. Auto-escalation is even worse. For many, there are better savings options. Look at these solutions through the eyes of a lower-income family struggling to put food on the table. Retirement savings isn't as high a financial priority for households as this industry would like to believe. 401(k) contributions can hurt participants financially, even when there's a match."

"I have a feeling that auto-enroll will have a similar effect on employers that it does on employees. It only affects the procrastinators. Some companies would add this without the mandate, and those who are against it might not offer a plan anyway, and this only reinforces that. Lots of employees allow the auto-enroll to happen because they are being told what to do. Employers will be no different, they will just go with it because they are being told what to do. It's not like they will have a choice now."

"While great, in theory as most things are, the implementation may not be. I work with plans today that cannot execute auto enrollment properly, and have had recordkeepers fumble with auto escalation. Payroll integration will be key and we have seen this process breakdown significantly over the past year. Companies without a solid HR team/person will likely see pain with this provision."

"Most small business owners would like to offer some type of retirement plan to their employees; however, most do not want to force employees to participate if they are not interested. Most small business owners will think twice about the headaches, upset employees and administrative hassle this will cause. Most small business owners will see this as additional government overreach and red tape which they resent."

"More employees will want to keep their money and use it now in light of inflation and potential recession looming. Forcing employees into a 'mandatory' participation rate (unless they opt out) could be problematic, especially for those who may not understand it, and puts additional burden on employers to explain such things."

"This is the next step to forcing everyone into a plan. They refuse to fix Social Security properly so this is another way to divert attention."

Thanks to everyone who participated in our NAPA-Net Reader Radar poll! NNTM

Regulatory Radar

The first quarter of the year included some big news on the regulatory front—an effective date (January 30) for the Labor Department's ESG Rule (more precisely the "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" rule), and Labor Secretary Marty Walsh's departure from his post (to join the NHL Players Association as its executive director).

But, as you'll read below, we also got some proposed regs on clarifying the time and use of forfeitures, a reopening of the comment period on plan corrections under the Voluntary Fiduciary Correction Program (VFCP)—and some looming impacts from the SEC that could affect the timing of trade processing for defined contribution recordkeepers. Details follow…

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Forfeit 'Sures'

IRS proposes regs to clarify timing and use of forfeitures

Recently released proposed regulations by the Internal Revenue Service would update rules relating to the use of forfeitures in qualified retirement plans, including a new deadline for the use of forfeitures in defined contribution (DC) plans.

The proposed regulations would clarify that forfeitures arising in any DC plan (including in a money purchase pension plan) may be used for one or more of the following purposes, as specified in the plan:

- to pay plan administrative expenses;
- to reduce employer contributions under the plan; or
- to increase benefits in other participants' accounts in accordance with plan terms.

In general, forfeitures occur when a terminated plan participant gives up his or her nonvested contributions to the

> “Meanwhile, although nothing in the proposed regulations would preclude a plan document from specifying only one use for forfeitures, the plan may fail operationally if forfeitures in a given year exceed the amount that may be used for that one purpose, the IRS warns.”

plan. For the use of forfeitures, the plan document will specify how the plan sponsor may use the forfeitures. Current permissible options include: (1) reducing future employer contribution obligations to the plan, including corrective contributions; (2) reallocating among the accounts of active plan participants; or (3) paying plan expenses.

The use of forfeitures to reduce employer contributions includes the restoration of inadvertent benefit overpayments and the restoration of conditionally forfeited participant accounts that might otherwise require additional employer contributions, for example, the restoration of accounts conditionally forfeited under § 1.411(a)-7(d) (relating to certain distributions and cash-outs of accrued benefits).

Timing for Use

Regarding when plan forfeitures should be used, the general rule has been that funds in a plan's forfeiture account should be used or allocated in the plan year incurred, and not be allowed to accumulate from plan year to plan year.

It appears that the proposed regulations provide some relief to the existing rules by generally requiring that plan administrators use forfeitures no later than 12 months after the close of the plan year in which the forfeitures are incurred.

The IRS explains that this deadline is intended to simplify administration by providing a single deadline for the use of forfeitures that applies for all types of DC plans and to alleviate administrative burdens that may arise in using or allocating forfeitures if forfeitures are incurred late in a plan year.

The proposed deadline is similar to the deadline under §1.401(k)-2(b)(2)(v) for a section 401(k) plan to correct excess contributions by making corrective distributions, which is 12 months after the close of the plan year in which the excess contributions arise.

The proposed regulations would not affect applicable deadlines related to the timing of contributions and allocations under a plan, such as the deadline for correcting excess contributions to avoid excise taxes under section 4979.

Applicability Date

The regulations are proposed to apply for plan years beginning on or after Jan. 1, 2024, but a transition rule related to the 12-month deadline would be provided. Under this rule, forfeitures incurred during any plan year that begins before Jan. 1, 2024, are treated as having been incurred in the first plan year that begins on or after Jan. 1, 2024. Accordingly, those forfeitures must be used no later than 12 months after the end of that first plan year.

Meanwhile, although nothing in the proposed regulations would preclude a plan document from specifying only one use for forfeitures, the plan may fail operationally if forfeitures in a given year exceed the amount that may be used for that one purpose, the IRS warns.

Comments on the proposed regulation must be received by May 30, 2023.

— Ted Godbout

Revival ‘Service’

Potential fallout from the SEC's late trading rule revival

In early November and without warning, the Securities and Exchange Commission (SEC) said it would repropose a nearly 20-year-old rule to eliminate the potential for late trading and repricing of mutual fund shares after the market's close.

The announcement sent retirement plan-related organizations scrambling to understand its potential impact and provide helpful information to the SEC about how it would affect retirement savers.

First proposed in 2003 to combat what the commission called “late trading, market timing, and related abuses,” critics point to prohibitive cost and logistical considerations, particularly for recordkeeping operations, where the issue isn't late trading, but cash transactions after the market close.

The proposal appeared to be flying under the radar in terms of its potential negative consequences. The SEC says the proposed amendments are “designed to improve liquidity risk management programs to better prepare funds for stressed conditions and improve transparency in liquidity classifications"—and to "mitigate dilution of shareholders' interests in a fund."

But under the proposed requirements, an order to purchase or redeem a fund's shares would be executed at the current day's price only if the fund, its designated transfer agent, or a registered securities clearing agency receives the order before the pricing time as of which the fund calculates its net asset value (NAV). That would be a significant change from current practices that permit that receipt by a qualifying intermediary—like a recordkeeper.

"The SEC acknowledged that the retirement plan industry is going to face particular challenges when complying with a 4:00 pm hard close and that recordkeepers may have to alter their processes to accommodate it," Allison Wielobob, General Counsel of the American Retirement Association (ARA), said. "The reason is the way in which retirement plans transact mutual funds trades."

The 2003 proposal received significant pushback for the potential harm to plan participants. The SEC admitted in its latest release that a hard close would require substantial processing changes.

Wielobob said the ARA is currently evaluating its impact and attempting to help the SEC understand the rule's ramifications before the public comment period's Feb. 14 deadline.

"We've gone in once to speak with them and expect to try again, though that hasn't been planned yet," she added. "So, that's where we are."

ERISA attorney Marcia Wagner agreed that difficulties associated with the hard close probably would require transaction processing changes, citing plan loans as an example. Yet, she was more optimistic about the impact on retirement savers.

The reintroduced proposal is part of a larger effort to better regulate liquidity risk, especially in times of market stress, with SEC

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> “The SEC argued that a 4:00 pm hard close would improve order processing and help to operationalize swing pricing, which allows managers to adjust the NAV when securities’ inflows or outflows exceed a predetermined threshold.”

Chair Gary Gensler pointing to problems with redemptions at the onset of the COVID-19 pandemic.

The SEC argued that a 4:00 pm hard close would improve order processing and help to operationalize swing pricing, which allows managers to adjust the NAV when securities’ inflows or outflows exceed a predetermined threshold. The Brookings Institution explained that the fund can then pass along the associated trading costs to those making the trades to better protect remaining shareholders from dilution.

Scandal Origins

In 2003 and 2004, the SEC and former New York state Attorney General Eliot Spitzer investigated allegations against dozens of banks and mutual fund companies that they favored large institutional investors over ordinary long-term shareholders.

The *Washington Post* reported that many admitted to after-hour trading deals with certain customers, with some executives profiting at smaller investors’ expense. The firms also made short-term trades that exploited timing differences, contradicting language in fund prospectuses that supposedly discouraged the practice.

— John Sullivan/Nevin Adams

(Re)opened Door

In the wake of SECURE 2.0, DOL reopens comment period on VFCP

The U.S. Department of Labor’s Employee Benefits Security Administration (EBSA) has resolicited comments on its Voluntary Fiduciary Correction Program (VFCP) for input on changes mandated by the SECURE 2.0 Act of 2022.

Also cited were comments to the proposed amendment to Prohibited Transaction Exemption 2002-51 (PTE 2002-51), which was published in the Federal Register on Nov. 21, 2022. EBSA published the modifications to the program and a proposed amendment to PTE 2002-51 to both simplify and expand the original VFCP and to solicit comments from interested persons by Jan. 20, 2023.

On Dec. 29, 2022, the Consolidated Appropriations Act of 2023, which includes a provision pertaining to the VFCP, was signed into law. The DOL says it is reopening the comment period to allow commenters to address any issues raised by the new statutory provision.

VFCP Scope

The program encourages plans to comply with ERISA and the Internal Revenue Code by self-correcting violations of the law. If plans voluntarily correct eligible transactions and meet the specified requirements, the program and exemption together allow the plans to avoid potential civil enforcement actions and penalties.

On Nov. 18, 2022, EBSA issued proposals and invited comments on the proposed program and exemption updates, including a self-correction component for employers who fail to send employee salary withholding contributions or participant loan repayments to retirement plans in a timely manner. The comment period for these proposals closed on Jan. 20, 2023.

Participant Loan Corrections Focus

After the proposals’ publication, the Consolidated Appropriations Act of 2023 was signed into law. The law includes a provision that requires the program to cover certain violations related to participant loans if self-corrected violations align with the IRS’ Employee Plans Compliance Resolution System (EPCRS). EBSA is reopening the comment period for 60 days to gather additional comments on any issues related to the amendment of the program to implement the act’s requirements.

“Reopening the comment period will allow the Employee Benefits Security Administration to obtain important public input on implementing the changes mandated by Congress in the SECURE 2.0 Act of 2022 that impact the department’s Voluntary Fiduciary Correction Program,” explained Assistant Secretary for Employee Benefits Security Lisa M. Gomez.

SECURE 2.0 Act of 2022 is, of course, the short title of Division T of the Consolidated Appropriations Act of 2023. It includes a number of provisions related to retirement and other types of plans.

Notice of comment period reopening was published in the Federal Register on Feb. 14.

And yes, the American Retirement Association expects to comment. NNTM

— Nevin E. Adams, JD

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