

THE OFFICIAL MAGAZINE OF THE NATIONAL ASSOCIATION OF PLAN ADVISORS

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the magazine

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SUMMER
2021
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THE COVID COME- BACK

ADVISOR
PRACTICES PIVOT
IN RESPONSE TO
THE STRICTURES
OF THE PANDEMIC
AND LAY THE
GROUNDWORK
FOR A RETURN
TO A NEW AND
BETTER "NORMAL."



**OPEN
BUSINESS AS
NEW NORMAL**

plus

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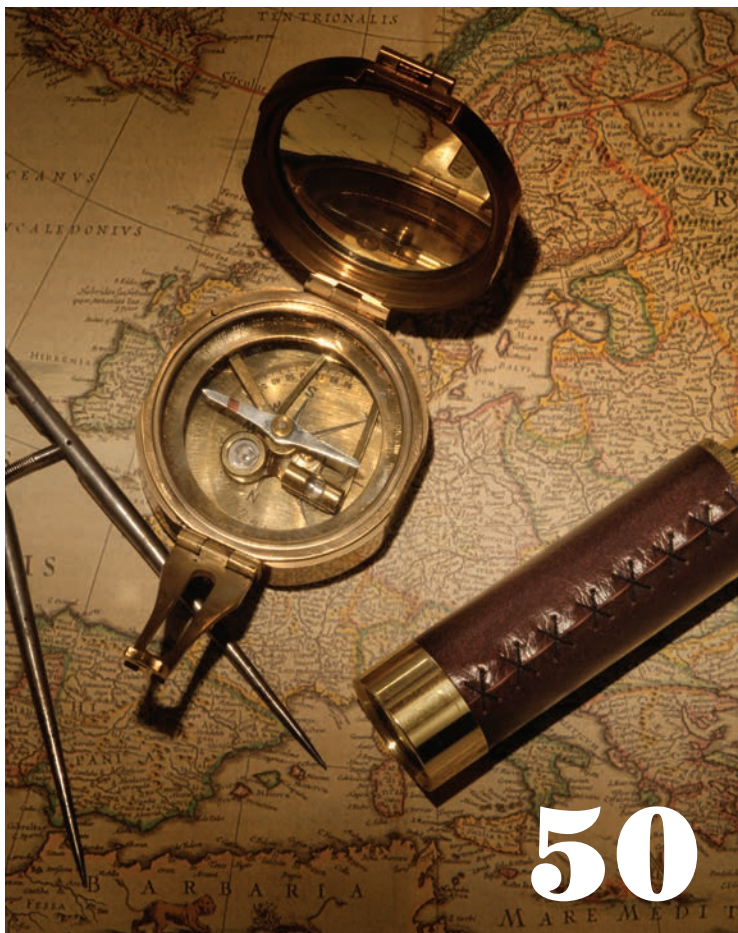
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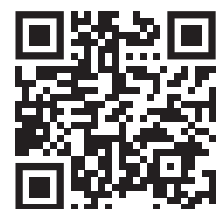
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**Steff
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Executive Director
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Prior to his current leadership roles at TRAU, TPSU and 401kTV, Steff was the founder and past CEO of Fiduciary Consulting,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



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



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



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



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Better Together

While the memories linger and the pain of separation remains, hope and optimism are just over the horizon.

On March 16, 2020, as I packed up the things I needed to work from home, I, like probably most of you, approached it with a sense not unlike that that once accompanied an unexpected snow day. Having lived through a couple of pandemic scares that didn't actually amount to the "billing," I had little reason at the time to think this time would be any different.

Had I only known.

The reality is, I have long been more "productive" working from home, and so the prospect of doing so, even for an extended period of time, was no big deal. Quite the contrary. Indeed, all other considerations notwithstanding, the three hours a day I wouldn't have to spend commuting was, all by itself, reason for considerable enthusiasm.

But as the reality of the pandemic set in, more amazing to me was just how quickly and (apparently) efficiently our entire industry "pivoted" to remote work. Oh, sure, some had already migrated to that model, and many, if not most, had embraced models that allowed that flexibility, at least for some positions, at least occasionally. But many had to scramble, to arrange for equipment deliveries, expanded VPN access, deal with external office configurations, all the while remaining attentive to security protocols and privacy concerns. In no time at all, Zoom became somewhat ubiquitous, as did Teams video—and in no time at all the traditional conference call became passé... even for situations where that had been the pre-pandemic "norm."

However, somewhere along the line those amazing tools became tiresome and exhausting. Turns out, there's an art (and a science) to video conferencing, and most of us—well, let's just say most



apparently hadn't learned that. Many of us had to juggle new home-schooling responsibilities alongside work, the work that once followed us home now never stopped, our pets demanded what seemed to be constant attention, and our wireless internet connections that had always been sufficient were now strained to the point of breaking. And in the midst of this chaos, many of us were forced to watch our loved ones in far-off places suffer, and some pass... alone.

That said, the resiliency of the retirement community throughout has been inspiring, and remains a vital element in our economic recovery, and—for many—in restoring the impact on retirement savings and security. Indeed, our nation's COVID experience has been about as varied as the locations and individuals involved, and as you'll find in this month's cover story, the pace and details of a return to "normal" are as well. And yet while the memories linger and the pain of separation remains, hope and optimism are just over the horizon.

Yes, we've been through a lot over the past 15 months—not just COVID, but a host of legislative and regulatory changes—SECURE, CARES, record waves of litigation, and Labor Department proposals and regulation on ESG and fiduciary capacity—all of which now seem destined for significant repositioning by the new administration. With all that's been going on—this year, more than most, you really can't afford to be without the kinds of insights and information that have long been a mainstay of this nation's retirement plan advisor convention—the NAPA 401(k) Summit, likely to be the first, and perhaps the only in-person national advisor conference in 2021 (September 12-14 in Las Vegas)!

Among all the things that really set the NAPA 401(k) Summit apart—one thing stands out, this year more than most. Quite simply, it is that—and unlike every other advisor conference out there—your NAPA 401(k) Summit registration helps support the activities of NAPA—your advocacy, information and education organization—not the bottom line of some corporate media organization or some private equity firm. Yes, it's an investment in yourself and your practice. But in addition to that—and to the insights, and information that you might be able to scrap together from some other events, your attendance at the NAPA 401(k) Summit is a unique investment in your future—and the future of your profession.

It is, quite simply, a great way—perhaps the best way—to not only put your money where your mouth is—but where your mind is—and where your practice needs to be.

And this year, more than most, won't it be good to come together—to acknowledge what's been lost, but more importantly to acknowledge what's been gained—a new appreciation for life, and for being part of a profession that has such a profound impact on people's lives.

After all—we are #bettertogether.

Join us. It's going to be special. <https://napasummit.org>.

Nevin E. Adams, JD
Editor-in-Chief

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Make a Difference

Through the private retirement system, we can lower the barrier to financial security and success, if not eliminate it altogether.

By Alexander G. Assaley, III

It is difficult to put into words how thrilled and honored I am to serve as the President of NAPA. Over the last 20 years, I have been incredibly fortunate to learn from the 401(k) pioneers who have shaped the work we do. I have enjoyed participating alongside the great leadership team that preceded my term, working on numerous initiatives and priorities as part of the NAPA Leadership Council.

During the last year or so, we have experienced an extraordinary and challenging period. While many individuals, families and organizations have

more people than ever before get on track for their financial future."

I was born and raised in often-neglected West Virginia. You may smirk at that sentence, but there are plenty of examples of a sports commentator on a top 10 football game giving the score as "Texas 10 and Virginia 13" (leaving out "West"). Still, nearly everyone "knows someone" from West Virginia, including many greats like Jerry West, Don Knotts, John Chambers and Booker T. Washington.

I tend to think my upbringing in West Virginia was like those of many of us who grew up in small towns scattered across the

"We know that the defined contribution plan is *the retirement plan* for America's workers."

faced tremendous difficulties, our industry, as a whole, has evolved, risen to the challenge, pivoted—whatever you choose to call it—to help serve and deliver for our friends, neighbors and clients in need.

We still have significant work to do! The landscape is maturing rapidly, which is why I am excited to be serving NAPA and the American Retirement Association at this time. When I came into the retirement plan industry nearly 16 years ago, I wanted to help people improve their financial lives. I felt so strongly about this that we developed our firm's central mission and values on "helping

country. I had a great and (mostly) financially secure childhood—but was able to see and understand the disparity in both financial knowledge and means. When I was 17, my father passed away unexpectedly. This experience was obviously traumatic and life-altering for my siblings and family, and it magnified the gaps in financial know-how, the importance of financial planning, and the lack of assistance and resources most have when it comes to their money. It challenged me to grow up quickly and, in my opinion, has been a major driver in both my belief system and the trajectory of my life.



Alexander G. Assaley, III, AIF®, is the Managing Principal at AFS 401(k) Retirement Services, LLC in Bethesda, MD. He serves as NAPA's 2021-2022 President.

Whether you grew up in a small town like me or a major metropolitan area, we know that the 401(k) (and 403(b)) defined contribution plan is *the retirement plan* for America's workers. Most individuals and families will never have their own personal financial advisor, but, through their employer's retirement plan, they can gain access to the financial tools, education and people to help them build and develop their own financial security and success, making an inalienable difference in their lives. This is why I am so drawn to our work and to NAPA. Each day, we are making a difference in the lives of individuals and families in our community and around the country—regardless of their age, income, gender, ethnicity or educational background. Through the private retirement system, we can lower the barrier to entry, if not eliminate it altogether. My focus as President is to further promote and deliver on key initiatives that NAPA has launched and worked toward in recent years, including:

- Acting in the best interest of employers and employees, as fiduciaries.
- Expanding coverage so that more of America's workers have access to a retirement plan, because that's how and where people save for retirement.
- Ensuring that minority, underserved and disadvantaged individuals and workers have tools, access and information to improve their financial know-how and financial security.
- Offering education and curriculum initiatives so plan advisors, practitioners and stakeholders can do more, deliver better, and continue to improve and expand the private retirement system.

I look forward the being a champion, a listener, and a leader—engaging all of you as members and important voices in our work, as we move toward continually fulfilling these initiatives and more. **NTM**

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Changing of the Guard

A change in administrations inevitably brings with it both new regulations and differences in how existing regulations are viewed.

We've all had to embrace change and "pivot" to new ways of doing things over the past year—and the work of retirement plan advocacy has been no exception.

While we all know that elections have consequences—over the last couple of election cycles, some outcomes have been unexpected, and thus while not entirely unanticipated, our advocacy efforts have had to pivot—literally overnight—as the balance of power in our nation's capital and state capitals across the nation have shifted.

Shifts in power following the 2016 election meant that late actions taken by the prior administration to clarify potential issues of ERISA preemption with regard to state-run IRA plans for private sector workers were wiped out almost overnight. It meant that a potential fight or change of venue in support of the Obama administration's fiduciary rule didn't happen—and, ultimately, that a new version would emerge. One that the Biden administration has left in place for now, though few expect it to prevail in its current form. It meant that previous sub-regulatory guidance on matters such as environmental, social and governance (ESG) investing would shift from an "all things equal" perspective—one widely viewed as supporting those considerations—to a rule that abruptly and unreasonably precluded them. One that the Biden administration has already announced it will not enforce, pending a review of its impact and consultations with stakeholders.

Of course, it's not just elections that impact advocacy. This past year we've all pivoted from understanding, adopting and implementing the positive, coverage expanding provisions

of the SECURE Act to the urgently needed pandemic-focused emergency relief of the CARES Act, as well as the Paycheck Protection Program—all of which involved significant involvement not only with those crafting the legislation, but intensive discussions with the various regulatory agencies to help ensure that the implementation and application would, in fact, be meaningful.

More recently we were successful in fending off an attempt to cap basic cost-of-living adjustments for retirement plans to "pay for" an assortment of unrelated items in the COVID relief package. Many of you will remember the last time that was done (1987)—the more than a decade-long struggle to restore rationality to those limits—and the impact that had on new plan formulation. Who might that change have impacted this time? Nearly two-thirds (64%) of workers who make the maximum allowable employee contribution to a DC plan are aged 45 to 64—and more than 4 in 10 (43%) had adjusted gross income of less than \$200,000. Yet, we—with your support—were the only retirement industry organization lobbying to have this provision removed.

We're still very much enmeshed in the fight to protect retirement savings from the sweeping impact of a financial transaction tax—not only in fighting to exempt retirement plan assets from its reach, but more recently in supporting legislation (The Protecting Retirement Savers and Everyday Investors Act) that would shield those savings from the impact of that brand of legislation. The ARA's advocacy helped ensure that the new state-run IRA program unveiled by the state of Virginia allows employers which offer automatic enrollment payroll deduction IRA programs to be excluded from the mandate, and



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

more recently we've championed protections for small business owners contained in the Family Attribution Modernization Act, backed legislation (the Retirement Parity for Student Loans Act) that would allow employers to match student loan repayments, and most recently worked on the Enhancing Emergency and Retirement Savings Act of 2021, which provides a "penalty free" emergency distribution option. And, of course, we are continuing to work with Chairman Richie Neal (D-MA) and Ranking Member Kevin Brady (R-TX) on the House Ways and Means Committee as the Securing a Strong Retirement Act of 2021, commonly referred to as "SECURE 2.0," develops.

Without question, the last several months have been a period of extraordinary challenge, both physically and financially for our nation, our industry—and you. The issues that confronted us prior to the pandemic remain—and many have, in fact, been exacerbated in the interim. It's said that desperate times call for desperate measures, and there's little doubt that, in the months ahead, well-intentioned efforts to solve one problem will, if not remedied, create others. We all know that Americans' retirement savings remain a tempting target for unrelated legislative initiatives—and that a change in administrations inevitably brings with it both new regulations and differences in how existing regulations are viewed.

Margaret Mead once commented, "Never doubt that a small group of thoughtful, committed, citizens can change the world. Indeed, it is the only thing that ever has."

Rest assured that, pandemic notwithstanding, your Government Affairs team continues to be actively engaged—and that with your involvement and support, we'll all continue to keep working for America's retirement. **NTM**

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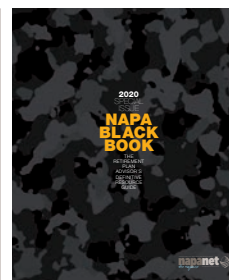
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Trends ‘Setting’

As the nation emerges from the constraints of the COVID-19 pandemic, there are new legislative impacts to assess, long-standing issues with participant communications, and what seems like the ever-present “urge to merge” to take into account. The trends that can shape—and speed—the future of your practice(s).

Language ‘Barriers’

*Plan participants to sponsors:
‘Watch Your Language’*

Many participants often find their DC plans confusing and wish for clearer language to help them understand their options and make more informed decisions, a new study reports.

In the survey of large plan sponsors and more than 1,600 corresponding plan participants, followed by focus group discussions, Invesco and communications firm Maslansky + Partners examine the impact that language can have on participants’ overall understanding of plan investment menus, the potential benefits of staying in the plan post-retirement and how best to communicate retirement income benefits.

One key suggestion, according to “Watch Your Language: Rethinking how we communicate with participants,” is to demystify the investment menu by using the right language. Invesco found that participants prefer to have more control (or the perception of it), rather than less, when it comes to their money. Language conveying that they have the ultimate decision-making authority over their retirement assets resonated consistently, both with participants who preferred to be highly involved with investments decisions and with those who did not.

Participants also preferred investment menu names that provided cues about the offerings. For example, while the retirement plan industry often uses a “tier” structure, the study notes that this language did not provide any context to participants. Instead, using clear and descriptive titles for the core menu, such as “do it for me” versus “tier 1” for target-



date funds; “do it with me” versus “tier 2” for risk-based funds; and “do it myself” versus “tier 3” resonated more strongly among participants.

Another problem the survey highlighted was how the term “investment risk” is used. When Invesco asked participants what they thought about investment risk, without context, to most the term “risk” was often associated with high risk. The “potential for loss” was often the first thought for 64% of participants across all age groups—with just 36% equating it with the “potential for gain.”

For Millennials this was especially concerning, the study observes, as their portfolios should be more growth-focused since they have the most time to make up any potential losses. However, with context, a majority (71%) of participants associated investment risk across a broader spectrum.

Target Date vs. Target Risk

Similar to findings from the firms’ 2019 study, there is clear interest for both TDFs and TRFs on the investment menu. When asked whether they would rather invest in a “target date” or “target risk” fund, participants were near evenly split, with 51% preferring a TDF and 49% preferring a TRF.

When asked which reason to invest in a TRF is most appealing, 50% of respondents selected “Unlike target date funds, target risk funds... allow me to choose a level of risk based on my goals, not on how close I am to retirement”; 28% selected “...let me customize my investments based on the potential for gain I want to aim for”; and 23% selected “... make it easy to know the financial objectives I’m working toward over the course of my career.”

Overall, the study notes, target risk funds appealed more to goal-oriented participants, and simple framing made it easier for participants to compare to target date funds.

Plan Options

When asked whether they can keep their money in their employer's retirement plan when they retire or must transfer it out of the plan, 39% of participants surveyed overall did not know what their plan allows them to do with their assets at retirement. The study notes that this lack of awareness was common across both corporate and public plan employees.

Additionally, 28% of pre-retiree participants—those who stated they were within five years of retirement—were unsure about what their plan allows.

To that end, participants apparently want their employers to communicate with them earlier about the transition from retirement savings to income generation, especially as it relates to their options within their current plan. In fact, both Millennials and Gen Xers believe their employer should start the retirement income conversation at age 45 or younger.

Participants also preferred a clear line to be drawn between working life and retired life when it comes to what they'll receive from their retirement savings. Terms like "income" (88%) were appealing, while "paycheck" (38%) was not.

"During the participant focus groups, we tested different versions of messages to uncover what works and why. Plan sponsors and the industry must rethink the approach to plan design, investment menu construction and communications strategy as participants shift their mindset from retirement savings to retirement income," explains Greg Jenkins, managing director at Invesco and head of Institutional Defined Contribution. "When we asked participants what goal they were looking to achieve, six in 10 would rather achieve 'retirement income' versus 'retirement savings.'"

— Ted Godbout

Grail, Hail?

Retirement income solutions and plan sponsor priorities

While most DC plans offer tools and advice on achieving retirement objectives, retirement income solutions are still not commonplace and are not even among the top priorities of plan sponsors.

When plan sponsors were asked in a recent survey about their top three priorities over the next 12 months, 38% included evaluating retirement income solutions, although only 7% included it as the No. 1 priority, according to the survey by PGIM, the global asset management business of Prudential Financial.

PGIM's The Holy Grail of DC: Income in Retirement study found that most sponsors (62%) did not rank retirement income solutions as a top priority. Instead, the top three priorities included evaluating compliance with regulations, increasing participation and deferral rates, and incorporating financial wellness programs, followed by reevaluating investment menus and reducing plan costs.

To better understand the current retirement income landscape within the DC space, PGIM surveyed more than 130 plan sponsors that have at least one 401(k) plan and a minimum of \$100 million in 401(k) assets.

On the Menu

Not surprisingly, plan sponsors indicate stable value funds are the most common retirement income solution, with 54% offering them in their 401(k) plan, followed closely by income funds in a target-date fund series (50%). Other investment solutions offered include long-duration fixed income funds, managed accounts, in-plan and out-of-plan annuity products and managed payout funds.

About a quarter (23%) of survey respondents indicated they don't offer any retirement income solutions as part of their investment menu. But due to the SECURE Act's increased protections to offer annuities as an investment solution within a DC

plan, the survey shows, a quarter of DC plan sponsors indicate they have greater interest in doing so. Plans with \$250 million to \$499 million showed the most appetite, with 36% either strongly agreeing or somewhat agreeing, followed by those with \$1 billion to \$5 billion (31%) in AUM.

Notably, larger plan sponsors (more than \$5 billion) appear to be undecided (71%), while 33% of the smallest plan sponsors disagree that the SECURE Act has increased their desire to offer annuities in their 401(k) plans.

Plan Design and Communication

The findings show that the No. 1 step plan sponsors have taken to increase employee understanding of retirement readiness continues to be tools and advice on how to spend down in retirement, with 89% of total respondents saying that was their primary mechanism. The next highest response was communicating account balances to participants in terms of projected retirement income, with 66% of overall respondents choosing this option.

While nearly all plan sponsor respondents offer tools and advice on how to meet retirement readiness goals, PGIM suggests there is an opportunity for sponsors to review their plans' available distribution types. For example, fewer than 50% of plans with assets between \$100 million and \$1 billion allow systematic withdrawals, while about a third of plans over \$1 billion still do not allow systematic withdrawals.

The Future of Retirement Income

According to PGIM, the next generation of retirement income solutions should deliver guaranteed lifetime income in addition to non-guaranteed components that leverage asset allocation and asset-structure best practices, liability-driven investing concepts and institutional investments.

And in noting that enhancements are likely to come in small steps, the report emphasizes that one way

sponsors can further the process of providing opportunities for income in retirement is leveraging the power of technology to provide more customized, tailored advice and investment solutions for pre-retirees and retirees. “The passage of the 2019 SECURE Act had positive implications for plan sponsors and their participants as it relates to retirement income,” said Josh Cohen, PGIM’s head of institutional defined contribution. “But our research indicates that we must continue to evolve these offerings, particularly with the help of technology, to ultimately meet the decumulation needs of American workers.”

In fact, 72% of respondents said they strongly agree or somewhat agree that there will be a need for such solutions, while just 2% strongly disagreed. PGIM notes that the most support came from plans with \$1 billion to \$5 billion in assets, followed by plans with more than \$5 billion.

— Ted Godbout

‘Mixed’ Messages?

Mixed reactions to SECURE Act 2.0 among plan sponsors

A recent survey of plan sponsors—mainly small employers—finds broad-based support for several provisions, but only lukewarm support for others.

The latest quarterly Principal Retirement Security Survey asked the plan sponsors for their initial reaction to several provisions contained in the bipartisan SECURE Act 2.0 legislation introduced by House Ways and Means Committee Chairman Richard Neal (D-MA) and Ranking Republican Kevin Brady (R-TX).

Principal surveyed 160 plan sponsors representing more than 11 industries; most of the respondents (76%) employed fewer than 250 employees. Following are a few of the changes proposed in the SECURE Act 2.0 legislation, along with the respective percentages in relation to employers’ reactions:

- Increasing catch-up contribution limits to \$10,000 and \$5,000 (for SIMPLE plan participants) for those age 60 or over (82% positive reaction).

- Offering a new credit to businesses with 100 or fewer employees to offset up to \$1,000 of employer contributions for each employee, which gradually phases out over five years (54% positive reaction, with 13% negative).
- Raising the RMD age from 72 (set by the SECURE Act) to 75 for DC plans and traditional IRAs (54% positive reaction, with 14% negative).
- Requiring new DC plans to enroll participants automatically with at least a 3% contribution rate and increase the rate through auto-escalation by 1% per year until it reaches 10% (36% positive reaction, but 35% negative).
- Allowing individuals to pay down their student debt instead of contributing to a 401(k) plan and still receive an employer-matching contribution to the employer-sponsored retirement plan (31% positive reaction, but 41% negative).
- Allowing employers to offer small, immediate financial incentives, such as gift cards, to encourage plan

participation; currently, only matching contributions can be used as an incentive to make elective contributions (29% positive reaction, 41% neutral and 29% negative).

Retirement Readiness Looms Large

One year into the COVID-19 pandemic, many plan sponsors are concerned about their employees’ retirement readiness and remain focused on helping, the study also finds. While more than 75% of employers say they are doing their part to help employees by providing the education and resources needed to plan for retirement, half of them also say they are concerned about the overall low preparation for retirement on the part of their employees.

Nearly 60% of employers expressed a desire to make retirement income options available to plan participants. Moreover, roughly 40% want to actively encourage plan participants to elect retirement income solutions, and more than 35% encourage retirement income solution utilization by as many plan participants as possible.



“Among the fastest-growing firms in the study, acquisition accounted for 20% of new client households and 30% of AUM growth.”

When it comes to employees boosting their retirement readiness, employers highlight several opportunities for improvement, such as:

- reviewing expected health care costs in retirement (nearly 70%);
- creating a retirement income plan (nearly 70%);
- determining how to manage multiple retirement accounts (65%); and
- identifying if they will have enough income in retirement from guaranteed sources (57%).

Employers report that if they could encourage their employees to take action in 2021 to improve their financial health, they would focus on increasing employee savings rates or deferral percentages within the retirement plan (37%) and help employees start saving in the plan offered, if eligible (31%).

— Ted Godbout

Merger Urgers?

Advisors' interest in M&A high, but strategy needs focus

Financial advisors and RIAs apparently have strong interests in pursuing M&A deals, yet need to focus on developing their strategies around M&A, succession and post-transaction integration, a new study finds.

Data from Dimensional Fund Advisors' 2020 Global Advisor Study reveals that nearly half of the surveyed firms indicate they would like to execute a merger or acquisition over the next 24 months, with most of those firms indicating interests in acquiring. The study also found, however, that more than 80% of firms lack a defined M&A strategy.

The findings are based on aggregated 2020 data from nearly 1,000 independent advisory firms globally with \$368

billion in combined assets under management (AUM). Among the firms that are actively considering M&A, the top four responses indicated that:

- 31% want to acquire a firm;
- 21% want to acquire a team;
- 9% want to merge; and
- 7% want to be acquired.

Dimensional also found that 62% of respondents have been contacted by firms interested in a merger or acquisition, but only 3% of this subset moved forward with a deal.

A majority (60%) of the reported transactions occurred among firms with less than \$50 million in AUM, reflecting an ongoing focus on partnering with larger, more mature firms to pursue continued growth and solve for succession, the study notes.

M&A Breakdown

The most common reasons participants cited for their interests in M&A activity include:

- increasing the value of their businesses;
- improving economies of scale; improving cashflows/profits; and
- acquiring human capital.

The most common deal-breakers reported in a sale or acquisition were lack of investment philosophy alignment (83%) and firm culture fit (82%), Dimensional notes.

When a deal is ready to finalize, however, the average timeframe from signing a letter of intent to executing the deal agreement is less than three months. This may reflect acquirers becoming more precise with their offerings and sellers having a clearer set of goals and deal-breakers, the study observes.

Among the fastest-growing firms in the study, acquisition accounted for 20% of new client

households and 30% of AUM growth.

“As we heard from industry experts and seasoned acquirers in attendance at Dimensional's recent Deals & Succession Conference, buyers are looking for evidence of strong organic growth in the firms they are targeting for acquisition,” notes Catherine Williams, Dimensional's Head of Practice Management. “Likewise, sellers want to understand how the acquiring firm will enhance services to clients and further their growth objectives.”

Succession Planning

The recent conference and study results also indicated advisors' and RIAs' ongoing focus on finding an internal succession solution, Dimensional further notes. According to the study, the biggest challenges that firms face when implementing a succession plan are identifying a successor (49%) followed by agreeing on a time frame for implementation of the plan (28%).

With talent acquisition among the top five reasons for buying another advisory business, some firms are turning to an acquisition strategy to find potential next-generation talent who may provide a succession solution, notes Dimensional.

The study found that only 44% of firms have a succession strategy in place—which the firm notes is an improved percentage over prior annual studies, but indicative that many firms are still grappling with developing a comprehensive plan.

Of the firms that have a documented succession plan, 46% are looking to execute their plans within the next 10 years. When looking specifically at the succession timelines of sole practitioners, the study indicated that 43% plan to exit in five years or less. **NTM**

— Ted Godbout

Your Marketing ROI



Here are 3 simple steps to calculating your return on investment.

By Spencer X. Smith

How much money should you spend on marketing? Is there a good rule of thumb? Is it 2% of revenue? 5%? Should it vary based on your industry specialties? Digital marketing further complicates the equation since we have data available on everything we do online. What's important and what's not? Instead of simply choosing a percentage based on conventional wisdom, this article will show you three simple calculations to use when

you're trying to determine how much money your company should spend on marketing.

Calculating the Average Close Rate

Look at your last four quarters of lead conversion. Said another way, how many of your prospects became clients over the past year? As this article is being written, it's the beginning of April, so if you're like most businesses, your 1st quarter just ended on March 31. Regardless, start with the most recent data available from the most recent quarter. Here's a sample of what you should write down:

1st Quarter (March 31): 4 clients and
23 total prospects = 17.4% closing rate

"Wait a minute," you might be thinking, "During that quarter, some prospects were added the last week of the quarter, while some were there

“Client lifetime value is the most important number that most companies don’t consider.”

for months.” *Don’t worry about the timing of the clients and the prospects right now.* It’s important, in using these calculations, that you *just consider the 1st quarter numbers all on their own.* If you get too complicated with these calculations, they’ll get overwhelming. We’re not doing a full analysis of your company’s sales cycle. Just ask yourself, “During this period of time, how many prospects became clients, and how many additional prospects did we add to our list?” For purposes of determining our marketing budget, we use our average closing rate. Here’s a sample of what this could look like over four quarters:

Q1 (March 31): 4 clients and 23 total prospects = 17.4% closing rate

Q2 (June 30): 3 clients and 32 total prospects = 9.4% closing rate

Q3 (Sept. 30): 2 clients and 27 total prospects = 11.1% closing rate

Q4 (Dec. 31): 8 clients and 19 total prospects = 42.1% closing rate

Average closing rate over one year (four quarters) = 16.8% (17 clients from 101 total prospects)

Notice how the closing rate was dramatically higher in the 4th quarter? This is indicative of a typical retirement plan-focused advisory/consultancy, so it’s important we have at least four quarters of data to accommodate this fact.

Now that we know how many of our prospects become clients (16.8% of them), how much revenue did these 17 new clients from the past year generate?

Calculating Client Current Value

For purposes of this example, let’s say the 17 new clients spent a total of \$94,308. This means that each client’s current value to your company is \$5,547.53. Each prospect, then, is worth \$933.74 of revenue. Since we *don’t know which of our prospects will become clients*, it’s important to pay attention to both numbers.

Now we just need to determine the profit per client and prospect. In this sample, we’ll say your company’s profit margin is 38%. The profit per client, then, is \$2,108.06 ($\$5,547.53 \times .38$), and the profit per prospect is \$354.82 ($\$933.74 \times .38$). A lot of companies—if they get this far at all—stop at this point. They say, “If we’re making a profit from each prospect, then we’re okay.” They then estimate that they can spend anywhere between \$0 and \$354.81 (literally one penny of profit) on marketing to each prospect.

This is fine if you’re running a one-and-done business. If you’re going door to door selling candy bars as part of a fundraiser or renting umbrellas on the beach to tourists on a sunny day, this might be a good approach. However, I’m guessing you’re not in that situation. *You want to earn the business of clients that stay clients.* This next calculation will help you dramatically outperform your competition.

Calculating Client Lifetime Value

Client lifetime value is the most important number that most companies don’t consider. Look back over your historical records. How long do clients typically stay clients? Three years? Eleven years? Let’s say for this sample company, the typical time period is seven years. If we look back over this period and build a profile, here’s what we find:

Average client duration: seven years

Spends \$38,832.71 with our company

Based on current profit margins, this client is worth \$14,756.43 of profit

Why is this so important? Have you ever looked at a company and said to yourself, “How are they spending this much money on marketing?” Amazon famously did this when founder Jeff Bezos told his sales staff they could spend \$33 per new customer, even if that person only bought something for \$1. Starbucks spends enormous amounts of money on each new location, based on their calculated customer lifetime value. *You can use the same strategy these famous brands do.*

How Much Should You Spend on Marketing?

The answer is: it depends. Using these calculations will give you much, much more confidence when it comes to your budget, instead of simply allocating 2% or 5% of gross revenue to marketing. Based on the sample company numbers we’re using, if each client is not just worth \$5,547.53 (the current amount) but worth \$38,832.71 (the lifetime value), do you see why the sample company can justify *spending more money on marketing using the lifetime value approach*? What about in your case? What is the lifetime value of your clients?

I’ve seen many companies—after doing these calculations—say, “We realize now we don’t need to generate a profit the first year of a client relationship. Since our clients stay with us seven years on average, the profit will come.” *Without this pressure of first-year profits, you can be more selective when choosing new clients.* If you do this homework, you can confidently spend more marketing money (and time) attracting the clients you really want. Instead of looking at current value alone, be sure you *determine the value of that relationship in its entirety.* **NNM**

Warm Prospect > Cold Lead

Why quality follow-up content can be more important than new introductions.

By Rebecca Hourihan



How many sales are won on the first meeting? Not many, right? As an advisor, you put in the work to earn new business, and that could take 4, 5, 6 or 14 meetings. Retirement plan sales are not transactions at Starbucks; they are well thought out, long-term commitments. Deep down, we all know this, so why isn't every retirement plan advisor implementing a multi-touchpoint prospect nurturing campaign?

There is no better time than now to start. Here are four tips to help you follow up like a pro.

Don't Waste Time

Your plan sponsor prospects are busy. They lead companies,

manage hard-working Americans and are forced to be continual learners. With each business cycle, they must read, understand and implement endless new rules, regulations, systems and processes. At the same time, they must continuously guide their company towards profitability and sustainability.

As such, you need to be direct and intentional with your follow-up efforts. Spammy or fluffy advertisements will not work on this demographic. However, follow-up content that speaks to the problems (and solutions) your prospects are dealing with today can immediately boost your relevancy to busy plan sponsors.

(Relevant) Content is King

The goal is to relate to their problem, present helpful information and guide them toward solutions (which includes hiring you). In our increasingly digital world, top-performing follow-up content includes:

- Articles
- Case studies
- Infographics
- Newsletters
- Plan sponsor guides
- Podcasts
- Webinars
- Videos

To get started, take out a piece of paper and write down the top three questions you get from new prospects. Chances are, other plan sponsors in your target market

“Follow-up content that speaks to the problems (and solutions) your prospects are dealing with today can immediately boost your relevancy to busy plan sponsors.”

are wondering about the same topics. Take the time to answer these questions thoughtfully and then put them in a designed format using examples from the list above. Obtain compliance approval and you have yourself distributable follow-up content that answers the questions on your prospects' minds.

Now it's time to share these materials. Start with your existing clients, prospects and centers of influence. Send them one topic at a time via email and explain why they are receiving this information—something like: “Our Top 3 Employer Questions about 401(k) Plans Answered—Part 1.”

As you answer their burning questions, your contact list will be delighted by the new knowledge and insights. Plus, they will begin to view you as a trusted expert. Continue with each of the three topics and soon you will experience a flurry of new conversations and a spark of opportunities to deepen relationships with follow-up activities. Good work!

Don't Stop When It Starts Working

Often, after a successful follow-up campaign, we hear from advisors, “It worked so well, we stopped.” While this is normal, it doesn't set you up for long-lasting success. This is why you need to adopt an ongoing process. Something easy, repeatable and actionable.

We all know that sales rarely close on the first meeting; 80% of sales happen between the 5th and 12th contact.¹ Which means consistency is key. By adopting a consistent follow-up process, you

stay in front of prospects, building trust over time as they gain the confidence to say yes and hire you as their retirement plan advisor.

Make a Plan

On average, prospects report reading 13 pieces of content before making a buying decision.² This is a huge opportunity for advisors to publish digital content. If you are the source of relevant and interesting plan sponsor content, you will stand out and be the only retirement plan advisor worthy of hiring!

Whether you create it in-house, curate it through quality news sources, use Home Office campaigns or partner with an agency, you need quality content. Information that is specific and useful for your plan sponsor audience.

Pro Tip: Quality over quantity.

Always make sure to send quality value-add content. Never send an email just to send an email because that will hurt your credibility, and your contact list will unsubscribe.

As you gather a robust library of quality content, use the power of automation to make marketing easier. Schedule your emails and segment your lists through automated campaigns to strengthen your sales pipeline. Try to make the process of marketing simple so that it's fun for you, your team and your business.

Another best practice is to have an editorial calendar. This powerful organizational tool will help ensure that the materials you send are timely and relevant. Think about when your clients and prospects need

specific information and develop your digital content strategy accordingly. Remember the goal is to deliver valuable content that helps your clients and prospects become better fiduciaries and enhances your reputation as a trusted partner. Popular topics include:

- Fiduciary plan governance
- Rules and regulations
- Plan design education
- Financial wellness resources
- Executive benefits
- Health and wealth

Put It Into Action

As we enter the dog days of summer, take the lull as an opportunity to supercharge your marketing. Start small by working to gather an accurate contact list, then connect with your list via social media. After that, write down the types of retirement plan topics you believe your audience should be informed about. Then work to create content that answers these burning questions.

Keeping your prospects warm long after the initial introduction is challenging. However, it is easier to convert a warm prospect than it is to identify a cold lead. Nurture busy plan sponsors by educating them about important retirement plan topics.

By staying top of mind, you will demonstrate your mastery of the retirement plan industry and be their trusted expert. So that way, when they are ready to take the next step, you have demonstrated that you are their solution.

Thanks for reading and Happy Marketing! **NTM**

FOOTNOTES

¹ Clay, Robert. “Why you must follow up leads,” Marketing Donut. Sourced April 2021.

² Marketing Charts. “B2B Buyers Rely on Vendor Websites for Content.” April 2020.



OUR TOP 100 RETIREMENT PLAN ADVISORS UNDER 40

BY NEVIN E. ADAMS, JD

THAT FIRST LIST CONTAINED JUST 50 NAMES—AND TODAY, SOME EIGHT YEARS AFTER ITS LAUNCH, THOSE ON THIS PRESTIGIOUS LIST HAVE INDEED LIVED UP TO THEIR BILLING AS THE “FUTURE” LEADERS OF THE RETIREMENT PLAN ADVISORY INDUSTRY.

Indeed, Alex Assaley, one of the individuals on that inaugural list (as well as this year’s), now serves as NAPA’s President!

The list—and the process that establishes it—has grown over the years.

This list of NAPA Top Retirement Plan Advisors Under 40—now nicknamed “Aces”—is based on applications received from nominees designated by NAPA Broker-Dealer/RIA Firm Partners. Those applications are then 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. This year’s list was culled from a pool of nearly 700 nominations.

They are based in 28 of the nation’s 50 states and Puerto Rico, though their reach extends much further. More than a quarter have lead responsibility for \$100-\$250 million in plan assets, and nearly half have that for \$250 million to \$1 billion. Incredibly, more than a quarter carry that load for more than \$1 billion in plan assets. Though they are “young” (under 40), roughly one in five have worked with retirement plans for more than 15 years, though another third has been doing so for less than a decade. Half are 100% focused on retirement plans, though all spend at least 80% of their time supporting those programs.

It has been both personally and professionally gratifying over the years to have opportunities to know and work with many of the individuals on this list, watching their careers flourish and their contributions impact the retirement security of hundreds of thousands of individuals, to have them participate not only in industry conferences, but also in leadership roles in the development of NAPA’s events and advocacy.

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

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



GARRETT ANDERSON

Plan Sponsor Consultants
Olney, MD

TJ ARCURI

SageView Advisory Group
Scottsdale, AZ

ALEXANDER G. ASSALEY

AFS 401(k) Retirement
Services, LLC
Bethesda, MD

LUCAS BARTON

SageView Advisory Group
Southlake, TX

MARK BEATON

Bukaty Companies
Financial Services
Greenwood Village, CO

JARED BENSON

NFP
Lehi, UT

TONY BLACK

SevenHills Cleveland Benefit
Partners (Pensionmark)
Bloomington, MN

NATASHA BONELLI

Merrill Lynch
Woodland Hills, CA

JON BRATINCEVIC

Morgan Stanley
Pasadena, CA

JULIE BRAUN

Morgan Stanley
Colchester, VT

JASON BURRISS

Merrill Lynch
Chicago, IL

FORREST BUTLER

Financial Strategies Retirement
Partners
Bedford, NH

DAVID CACCIABEVE

CAPTRUST
Allentown, PA

KEVIN CHANG

Genovese Burford & Brothers
Sacramento, CA

TYLER COX

RetireRight Pittsburgh
Pittsburgh, PA

MICHAEL CURRY

UBS Financial Services
Beverly Hills, CA

BRADY DALL

401k Advisors Intermountain
Sandy, UT

TAYLOR DANCE

GBS Retire
Salt Lake City, UT

BRETT DANKOWSKI

Vertical Financial Group
Chicago, IL

MORGAN A. DAVIS

NFP
Aliso Viejo, CA

PAMELA DE SENA

Kornerstone, Inc.
Chico, CA

JOE DEBELLO

OneDigital Retirement
Orlando, FL

JOE DILLON

Curi Capital
Raleigh, NC

MICHAEL DUCKETT

Lockton Retirement Services
Washington, DC

ERIC ENDRESS

CBIZ Investment Advisory
Services / CBIZ Retirement
Plan Services
Cleveland, OH

SHAUN ESKAMANI

CAPTRUST
Raleigh, NC

JESSICA ESPINOZA

NFP
Bethesda, MD

MICHAEL J. FINE

Monarch Plan Advisors
Simi Valley, CA

DEREK CHRISTOPHER

Fiorenza Summit Group
Retirement Planners, Inc.
Exton, PA

JESSICA FITZGERALD

Morgan Stanley
Rochester, MI

PATRICK FLINT

CAPTRUST
Raleigh, NC

THOMAS FORD

Morgan Stanley
Houston, TX

ANTHONY GARGANO

CBIZ Investment Advisory
Services / CBIZ Retirement
Plan Services
Independence, OH

NATHANIEL GAVITT

Everest Consultants LLC
Syracuse, NY

RYAN GENSICKE

ClearView 401(k) Consultants,
a member of Pensionmark
Huntington Beach, CA

STEVEN GIBSON

Rehmann Financial
Troy, MI

CHRIS GIOVINAZZO

Fiduciary 401(k) Advisors
Aliso Viejo, CA

MATTHEW GIOVINAZZO

flexPATH Strategies
Aliso Viejo, CA

MATT GIST

Peak Financial Group,
a division of HUB International
Northlake, TX

ZACHARY GOLEN

Broad Street Financial LLC
Bala Cynwyd, PA

BENJAMIN GOTTLIEB

Merrill Lynch
Schaumburg, IL

MATTHEW GREENE

Summit Financial,
a division of HUB International
Wilmington, MA

BRAD GRIST

Legacy 401k Partners
Grapevine, TX

EUGENE GUREVICH

BayBridge Capital Group, LLC
Pleasanton, CA

JACOB HAAS

Merrill Lynch
Cary, NC

THOMAS HARDY

Mariner Wealth Advisors
Tulsa, OK

MATT HEDLEY

Lowe, Brockenbrough & Co.
Richmond, VA

EVAN HOLMES

CAPTRUST
Minneapolis, MN

EMILY HOPKINS

NFP
Aliso Viejo, CA

ZACH HULL

Compass Financial Partners
Charlotte, NC

TREY J. AMISON

Chase Dominion Advisors
Glen Allen, VA





DOUGLAS JOHNSON

Summit Financial,
a division of HUB International
Wilmington, MA

KAMERON JONES

NFP
Aliso Viejo, CA

JOSEPH JULIANO

Merrill Lynch
Fairfield CT

JONATHAN KARELITZ

Morgan Stanley
Wellesley, MA

JIM KEENEHAN

AFS 401(k) Retirement Services
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THE COVID COME- BACK

ADVISOR PRACTICES
PIVOT IN RESPONSE
TO THE STRICTURES
OF THE PANDEMIC AND
LAY THE GROUND-
WORK FOR A RETURN
TO A NEW AND BETTER
"NORMAL."

BY NEVIN E. ADAMS, JD

IN MID-MARCH 2020, PRESIDENT TRUMP DECLARED A NATIONAL EMERGENCY, AND MUCH OF THE RETIREMENT INDUSTRY PACKED UP AND HEADED HOME. FEW EXPECTED TO BE WORKING FROM THERE FOR MORE THAN A COUPLE OF WEEKS, A MONTH AT MOST.

Boy, were we wrong. Indeed, even in hindsight the speed and efficiency with which the industry “pivoted” overnight was remarkable by any measure. That we’d do so while still assimilating the impact of the Setting Every Community Up For Retirement Enhancement (SECURE) Act—and then mere weeks later have to ramp up to respond to a wide-ranging series of COVID relief measures found in the Coronavirus Aid, Relief and Economic Security (CARES) Act—well, it seems fair to say that nobody saw that (all) coming.

Complicating matters was the divergent timing and impact of the pandemic—not to mention the uncertainty regarding the conditions underlying spread of the virus, identification of groups most vulnerable to its ravages—oh, and the diversity of local, state and federal response(s) which produced a crazy patchwork quilt of issues for advisory firms—and their clients—to deal with.

Here’s how some of NAPA’s Top DC Advisor Teams dealt with those issues, where things stand today—and what lies ahead.

FIRST WESTERN has 15 office locations throughout Colorado, Arizona, Wyoming and California. Kristin Jacobson, VP, Relationship Manager II, who leads the retirement services team there, explains that they are currently using distancing, barriers, sanitizing stations and other measures to keep everyone safe, thought they expect to continue a shift toward returning to a more “normal” feel with regard to the physical environment. “Masks are no longer required for those that are fully vaccinated,” she says.

She notes that since late May more clients have requested in-person meetings going forward. “We’re happy to be able to see them again!” Earlier in-person meetings were set up in public, outdoor spaces; lunch or coffee on a patio or sidewalk, masks were mandatory, and handshakes



Kristin Jacobson, First Western

avoided—and since tables or seating was more spread out, “everyone had to speak up to hear each other.”

Andy Bush, Financial Advisor at **HORIZON FINANCIAL GROUP** in Baton Rouge, Louisiana, actually contracted—and survived—COVID-19. They’ve been back in their offices starting in May of 2020. “We have a big enough office to allow us to spread out,” he explains. Last summer they exercised adequate distancing and handwashing protocols upon entering the building but did not require staff to wear masks. “We had no meetings at the office,” he explains, though they did use Zoom, Microsoft Teams or met outside the office. “By mid-June, we started allowing in-office meetings. Masks were optional... if the client wanted, we would wear them.” He says they continue to wear masks, if the client prefers—but most have not.

Atlanta-based **PLAN SPONSOR CONSULTANTS** also returned to their offices around May 2020, replete with masks, sanitizing stations, and distancing spots marked in the lobby reception area. That said, they haven’t yet had, nor set any in-person meetings, relying instead on Zoom or Teams to do so “virtually.” The masks were shed right after the MIT study was released earlier this year.



The Twelve Points Wealth Management Team (left to right): Manny Frangiadakis, Greg Phillips, Francesca Federico and Dave Clayman

"WE HAD DAYS WITH A MEETING IN FLORIDA, ONE IN ILLINOIS AND ONE IN CALIFORNIA AND CONDUCTED ALL THREE IN LESS THAN 6 HOURS. PREVIOUSLY, THAT WOULD HAVE TAKEN DAYS AT SIGNIFICANT EXPENSE."

– DAN SCHROEDER, ADVANCED CAPITAL GROUP

In Concord, Massachusetts, **TWELVE POINTS WEALTH MANAGEMENT** had been rotating members for 60 days but returned full-time as of June 1. In-person meetings began in May, according to CEO and Wealth Advisor David Clayman. "Although most of the clients appear to want to keep meetings virtual, we are definitely seeing about 25% of scheduled meetings moving to in-person," he says. Clayman expects a general return to normal, but that 25%-50% more meetings will be held virtually "in order to reduce travel stress."

The offices of Cleveland, Ohio's **OSWALD FINANCIAL** have been open with COVID screen procedures in place for those who wanted to return to the office—but beginning June 15 began requiring employees to be in the office for a minimum of two days a week, according to Deena M. Rini, Vice President, Practice Leader Retirement Plan Services. In-person meetings have already been taking place, and the firm plans to continue those at client request. "We expect to leverage technology more for our client meetings, but not eliminate in person or conduct exclusively



Sandy Gehler,
Gehler Luedke Group

virtual," she says. "Based on the client's expectations, we will conduct both in person and virtual meetings."

For the **GEHLER LUEDKE GROUP**, based in Madison, Wisconsin, their office just opened 100% to staff on June 1, following the lifting of the county's mask mandate. Up until that point, they had two to three client service associates in the office every week with most advisors working remotely. Their first in-person meeting was scheduled for June 10, according to Financial Advisor and Senior Qualified Plan Consultant Sandy Gehler. She anticipates getting back on the road as people are vaccinated and comfortable with that experience.

In Salinas, California, Mark Laughton, Vice President at **QUINTES**, said he's not going back to the office—opting for permanent virtual status by the end of this year. He's had in-person meetings—at clients' offices, as well as on the golf course and other outdoor activities.

In Blue Bell, Pennsylvania (just north of Philadelphia), Noel Wolfe of **MORGAN STANLEY'S BEACON GROUP** explains that while their building still requires masking in common areas, within their office they can unmask if fully vaccinated, which their team now is. He notes that they had two in-person meetings during the COVID shutdown, though most meetings were conducted virtually—a shift he thinks may be a somewhat permanent adjustment. "I think the workforce has been permanently affected," he continues. "I anticipate much more virtual interactions with sponsors and participants. Now that we all know how easy it can be, a lot more will be done online."

In nearby Philadelphia, Ben Hall notes that **JOHNSON KENDALL & JOHNSON** has had "several" in-person client meetings, though only by team members who are fully vaccinated, as clients have been given the choice of virtual vs in-person. "We have found perhaps a third going live versus two thirds virtual—although that trend is shifting increasingly to 50-50," he says.

At Syracuse, New York-based **ONEGROUP RETIREMENT ADVISORS**, Vice President Chuck Baracco says they've had someone in the office at least two days a week since the beginning of the pandemic. "Our building, an open floor plan that we share with our sister company, normally houses 120+ employees," he says, but during the pandemic there may have been 5 to 10 people in the office on a given day. That said, as vaccinations have picked, Chuck says they have had a number of in person meetings, though "Most of these meetings were on our personal wealth side while our retirement plans have mostly chosen to conduct virtual meetings where and whenever possible," he explains. "Most of the meetings not currently in person are relationships that required travel in some capacity by either us or the client and virtual just seems to be the way these meetings may be going forward."

In Westfield, New Jersey, **GATEWAY ADVISORY LLC** returned to their office in early June 2020, once the Garden State's governor allowed 25% occupancy in office buildings. That said, they did so with doors closed to any visitors, clients, and family members, had their whole team COVID tested (often)—needing a negative result to enter the office, and required that the team self-



Morgan Stanley's Beacon Group (left to right): Jack Rheiner, Scott Myers, Noel J. Wolfe, Mark Doknovitch and Andrew Feldgus

quarantine if they interacted with anyone outside of their family unit and provide a negative COVID test. However, Steven Puckett, Vice President - Retirement Plans, notes that the entire team is now fully vaccinated, and is starting to meet with clients and vendors. He comments that it's important to "Embrace technology. Embrace an enhanced client service experience. Talk to your client frequently," while also taking advantage of technology platforms to make contact virtually.

Gallagher's corporate headquarters reopened in June at a limited capacity (NAPA Top DC Teams are located in Houston, Chicago, Boston, Seattle and Philadelphia), though each office across the country is, of course, following state and local laws. They've shut down common areas (i.e., kitchen), restricted the number of persons in meeting rooms, alternated attendance from employees by rotating cubicles on certain days of the week, required masks, and added sanitizing stations. About 25% of their meetings have been conducted in person thus far—a percentage that is growing, according to John Jurik, National Practice Leader,

Investment Advisor Representative, Retirement Plan Consulting at **GALLAGHER BENEFIT SERVICES**.

The Transition

Looking back, most teams saw the relatively smooth transition as a payoff for the investment in technology that had been made—and the prior embrace of remote working, at least for certain positions. **STRATEGIC RETIREMENT PARTNERS'** back office has always worked remotely, according to Chief Operating Officer Deane Mayerhofer. "Luckily when COVID came, it was business as usual from that perspective. Our regional offices are starting to open back up to allow for in-person meetings."

Certainly, with a nationwide footprint, there were—and still are—a lot of variables to consider. "We have started to begin in-person meetings," she explains, noting that when they do happen, they continue to follow local guidelines and ask clients their preference for distancing and masks to ensure their comfort. That said, and even though they operated virtually before the pandemic, "We checked in on each other and made sure that

nobody felt alone even at the most difficult of times."

Baracco says his team was in the process of adopting a more virtual presence literally weeks before the pandemic struck, but that the firm saw this as the perfect time to push forward with those plans and identify the efficiencies. "We will continue to offer clients the virtual engagement, group meetings, or whenever desired while bringing the onsite visits back," he explains. "Our move to a virtual presence/approach was pulled forward at least 2 years due to the pandemic."

"Where we ended in December, having grown, versus how things looked in early- to mid-March, was night and day," Clayman echoes.

"We saw the pandemic as an opportunity to be proactive and add value to our clients," FinDec's Mahoney says. "Many appreciated we were willing to come out and visit. Being an independent firm allowed us to set our own rules and not be subject to larger corporate mandates. We also learned a lot about our team and their willingness to contribute and help our clients even in tough times."

ONEDIGITAL'S Mark Beaton has already had two plan reviews and three in-person prospect meetings this year—and three more scheduled. Operating out of Denver, Colorado, he explains that those meetings were different only in that masks were worn until all were seated and able to confirm their vaccination status. That said, he acknowledged that,

CONTINUED ON PAGE 30



Deane Mayerhofer, Strategic Retirement Partners

'After' Match

Even before the global pandemic set in, many Americans were struggling with burnout—and, if anything, the abrupt shift to WFH (which, sadly, has become yet another acronym), alongside additional stresses about health and financial well-being, have only served to magnify the pressure points of our daily lives, and those who depend upon our support. As we—and those who rely upon our expertise—return to our workplaces, those stress points remain and, left unaddressed, could be stumbling blocks both to the success of your practice and your practices.

Jennifer Moss, globally recognized as an expert in burnout and author of the upcoming book, *The Burnout Epidemic* (and a keynote speaker at the 2021 NAPA 401(k) Summit), offers insights on a healthy return to the workplace.

NNTM: What do you think will be the hardest part(s) of readjusting our lives to a post-pandemic environment?

For many of us, it will be 18 months to two years of existing in a new paradigm before we return to work. By now, our brains will have generated new behaviors and patterns that aren't easily switched off. Change is already challenging for some, but now we all have a frame of reference from which to compare. Before, we could accept the commute or the lack of flexibility because we had no comparisons—now we do. And for many, they don't want to go back to the old way of working.

It's a challenging time for employers who will soon face a war on talent. With flexibility a major driver of attraction and retention, some organizations will be facing a big increase in attrition. The pandemic generated a new future of work and there is no going back.

NNTM: Even before the pandemic you had been tracking trends in workplace burnout—has this time of WFH exacerbated or abated those trends?

I feel like it's difficult to compare WFH in a pandemic to WFH in "normal" times. However, there were existing issues—both external and internal—that were highlighted during COVID-19 lockdown.

Overwork, one of the biggest predictors for burnout, increased

exponentially during the pandemic. Overwork has already been a legacy issue but in 2020 we added 48 minutes to the workday, number of meetings increased by 24% and we had to work roughly 30% more each day to reach our pre-COVID goals. In a time where we'd be battling chronic stress every single day and it shouldn't be business-as-usual, we sure made people work hard.

We also saw the disproportionate impact of overwork and lack of fairness on women and marginalized groups. Women's number of unpaid labor hours increased from roughly five hours extra per week to 20. The fact that women are the primary caregivers for their families was a major cause of burnout during lockdown. Some were juggling kids and homeschooling while others in the most vulnerable groups worked on the front lines. For so many women, they were simply pushed out of the labor force. These gaps were felt long before the pandemic but became glaringly obvious during this timeframe.

Another root cause of burnout is lack of community (loneliness at work) which was exacerbated during lockdown. Already a major impact on our health, it became clear that the increase in people living alone would escalate our disconnection from each other. Technology had already become a replacement versus an augmenting of relationships. For anyone starting their job in the pandemic—they would not get a chance to form bonds with their boss or teammates.

NNTM: I'm sensing that many advisors are, in fact, "burned out"—from the hours, the travel, the stress—but they may not know that. Are there some common symptoms that we need to look out for as part of a self-evaluation, to stave off potential health/mental issues?

We want to get better at knowing when we are burning out. We can achieve that by identifying the frequency of these symptoms:

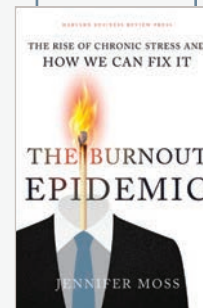
- Extreme fatigue by the end of the day.
- Feeling demotivated at the start of your day.
- A mental distance from your job (feeling disengaged, no longer connected to the work).
- Feeling shame or self-doubt.
- A sense of hopelessness and/or feeling trapped in your job.
- Overwhelming negative or cynical feelings about work.
- Lack of satisfaction and sense of accomplishment.

NNTM: If you are feeling burned out—what can you do to alleviate those feelings?

If we are our own boss, we have to be responsible for preventing burnout. If



Jennifer Moss



we work in an organization, it becomes a "we" problem to solve. Burnout for an employee is often the result of poor organizational hygiene. For example, chronic overwork or lack of diversity and fair policies, or reduced psychological safety—all of these systemic issues can't be solved with self-care. Unless our leadership is also committed to preventing burnout, it will be a challenge for individuals to overcome it.

If we are looking for some quick tips to manage psychological fitness, I suggest that we need to ensure more time away from our digital devices and get more sensory rest. We should also try and bifurcate between work and home. Try to get up, change your clothes, do not turn on your phone/laptop, and go on a fake commute. Put on your favorite music or podcast and take a 20-minute walk. Come in the house, head to your office and start the day. Repeat at the end of the day. Shut down your office. Go for a walk. Come home and change clothes and be at home. These demarcations in the day help us to decrease that feeling of "living at work."

Managers must model the behaviors. Employees can't be what they can't see. So, emphasize that you are working on these self-care skills and celebrate others who are also taking care of their well-being.

NNTM: What do you think the biggest lesson we'll take away from this pandemic in terms of work/work-life?

The pandemic has forever changed us. And despite how emotionally and mentally challenging this experience was, it gave us an opportunity to reset our priorities. When you're faced with your own mortality daily for an extended period, you start to evaluate what really matters.

Our deathbed regrets will never include, "I feel so badly that I didn't answer that call from my client at 5:00 a.m.," or "I wish I'd handed in that project on Tuesday instead of Wednesday." In the moment, these false urgencies completely overwhelm us. We need to take the learnings from this year and apply them to the future of work.

Many of us realized that we enjoyed the reduction in travel, the lack of commuting, less disruptions in the office. But, we also realized how much we miss our colleagues, the sharing of ideas in the workplace, the ability to lead people by seeing them face-to-face. In a world that can now have both, it will be a major priority for employees to see that realized by their employers. It will no longer be an all-or-nothing approach to how we work. I see the hybrid model as being the biggest shift to the post-pandemic workforce. And, in my opinion, one of the better lessons to come out of the crisis. **NNTM**

FROM PAGE 28



The Oswald Financial Team (from left to right): Front: Jess Hurley, Deena Rini, Liana Lopez, Kayla Huff; Back: Joe Frajter, Cliff Cowles, Brad Marzano, Dave Kulchar, Doug Stalter and Jason Day

"For the time being, remote will be the new normal but eventually it will get back to normal."

"Productivity increased and expenses decreased because we weren't wasting time in airports and on planes," observes Dan Schroeder, Principal & Director of Retirement Plan Consulting at Minneapolis, Minnesota-based **ADVANCED CAPITAL GROUP**.

"We had days with a meeting in Florida, one in Illinois and one in California and conducted all three in less than 6 hours. Previously, that would have taken days at significant expense," he notes.

Indeed, while there's no question that the pandemic accelerated the pace of adoption of virtual platforms like Zoom, Microsoft Teams and WebEx, the larger impact may be with plan sponsor clients—and advisors that could broach the subject without concern of being viewed as stand-offish. More than one advisor commented that the new "normal" might involve fee pressure as a result of the shift to a greater reliance on virtual interaction.

Lessons Learned

But while the "new" normal is fast upon us—and while for many it has been for a while now, nobody is

emerging from this extraordinary period unaffected—advisors and those they serve, as well.

"The experience reinforced for us just how powerful and important maintaining close relationships is with our clients," Jacobson says. "For many of our clients, face-to-face meetings are more personal and productive, but for others a phone call or video discussion can also work really well. We will continue to keep the health and safety of everyone in mind as we move forward, and we would expect the number of in-person meetings with our clients to grow as we move beyond the pandemic."

Mayerhofer notes that, "one of the main things that we learned is that there are some things you simply can't plan for. As the world starts to open up, we look forward to our team coming together again, but it is something that we will not take for granted." Amber Leach Selway, Partner at **FRS ADVISORS** in Wayne, Pennsylvania, says she's learned "To try to roll with things a bit more. Not everything can go according to plan."

As for looking ahead, Overland Park, Kansas-based **ONEDIGITAL** adopted a "do what you are

comfortable with" posture June 1, 2020 and have maintained that since. A few people chose to work full time from the office now (15%-20%), and the rest are free to work from home or the office based on their preference and the needs of their schedule. "Last June 2020 as we allowed work from the office, we started providing hand sanitizer, wipes and masks and did not allow visitors (even the mailman) into the office," explains President Vince Morris. Visitor restrictions were eased in March, though staff was required to wear masks in the common areas of the office until the CDC changed their policy. "Now, based on the local culture, we assume folks will not wear a mask, but we've instructed the staff to match whatever they see the client doing and to ask the client's preference if unsure."

Gallagher Benefit Services expects to continue to hold some virtual committee meetings with clients as their 2021 Retirement Survey Report revealed that most employers plan to keep using this meeting format indefinitely. Eighty-two percent favor a mix of virtual and in-person meetings after the pandemic, while 12% plan to connect entirely through digital channels. Just 7% will hold only in-person meetings. While there is the expectation for routine meetings (i.e., quarterly investment reviews) to be held more often in a virtual capacity, "listening to our clients and their preferences is more important than ever," Jurik says.

A portent of future change: For **JOHNSON KENDALL & JOHNSON**, in in-person meetings, hardcopy printed materials were nonexistent. "Simply put: An adjustment we realized during the pandemic was how much time we had been spending printing, collating, dividing, binding etc. our review booklets," Hall explains, noting that "going forward a permanent change will be only plugging in to client technology screens (or bringing our own)," though he takes pains to note that that would always occur with PDF copies of the materials sent to clients for their records. In fact, he comments that the improvements in productivity were largely due

"THE TIME OF OPERATING BASED ON ASSUMPTIONS IS OVER, AND THE TIME OF HAVING BETTER CONVERSATIONS AND DEEPER RELATIONSHIPS HAS ARRIVED."

— JOHN JURIK, GALLAGHER BENEFIT SERVICES

to elimination of commuting time and the time saved by no longer printing/collating/packaging review materials.

"We envision both of these changes to be permanent," he says—including giving team members the flexibility to work from home on a discretionary basis as long as quantity and quality of work keeps up—which he notes has certainly been the case thus far. That said, Hall anticipates that while some meetings will continue to be done remotely, he anticipates things will *mostly* go back to in-person.

"Flexibility and collaboration are more important than ever," comments Gallagher's Jurik. "Having thoughtful conversations with clients on how or where they like to meet, who should be included in the meeting, and knowing the meeting's purpose, is more important than ever. This pandemic experience has made us more empathic to the needs of the individual and organizations, which in turn has led to more thoughtful meeting preparation and execution. The time of operating based on assumptions is over, and the time of having better conversations and deeper relationships has arrived."



Vince Morris, OneDigital

Michael D. Ciesemier, Corporate Retirement Director & Senior Vice President at the **BEARING GROUP** Morgan Stanley Wealth Management in Chicago explains, "As a team, we have communicated better than pre-pandemic. A positive development that we will not reverse!"

"The new norm is more flexibility," says OneDigital's Morris. "Clients and employees are driving the environment. Both want a better experience, personalized to meet their own unique needs. As an employer our challenge and response should be to incorporate this flexible environment into our culture while still maintaining an office platform where people can collaborate, innovate, and come together to share ideas, culture and vision in person or virtually."

At **PRECEPT ADVISORY GROUP** in Irvine, California, cites as important lessons the following: (1) do not take health for granted; (2) be mindful of personal space; (3) choose words wisely (facial expressions and tones can be misunderstood while wearing a mask and distancing); and (4) never underestimate the power of a good "thank you."

Bush says he does expect a little less travel—maybe 20% less. "There is a convenience of not having to jump in a car or on a plane for a meeting that can be done virtually," he says. "I love in-person meetings and, perhaps equally, love saving time! If in-person is important enough, I'd do it in a heartbeat."

There's been a real divergence in personal and professional resiliency for many. Wolfe notes that "professionally, we found out how efficient we can be from home offices and our business grew significantly." On the other

hand, he cautions that personally many had to deal with depression, isolation, and what has been generally tagged as "COVID fatigue." He comments that "it became very easy to be working around the clock and somewhat expected among clients and peers. I know I need to work on making sure that I separate time for family as part of a work/life balance. It's out of whack right now."

"I think it's been a learning curve for everyone," observes Selway. "The time with family was a silver lining in it all, even though it didn't always feel that way."

Jonathan St. Clair, J.D., Chief Fiduciary Officer and Managing Director at **SAGEVIEW ADVISORY GROUP**, says the pandemic "really put a focus on work/life balance and mental health.

For the team, we were hyperaware that not everyone has an ideal WFH situation, and we wanted to do whatever we could to accommodate. Additionally, making sure people set proper boundaries between work and personal life to avoid burning out."

"Personally, we learned that self-care isn't selfish," says Oswald's Rini. "It's important to take time for yourself—you can't take of others if you don't take care of yourself. And professionally, we learned that 'necessity is the mother of reinvention.' We were forced to work remotely, leverage technology and find new ways to connect with our clients, prospects, and teammates. We have learned new ways to connect and collaborate that will carry on well past the pandemic." **NNM**

THOUGHT-PROVOKING CONTENT

As the economy heats up – and health care concerns linger, this month's content marketing posts focused on the impact of inflation, the value of a health savings account, and the importance of language in conveying complex – and simple – subjects.

We encourage you to check these out at the links below.

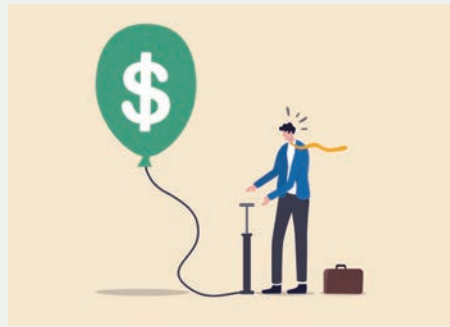


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INFLATION & RISING RATES

With U.S. inflation on the rise, should investors be concerned? Here's what our managers think.

More at <https://bit.ly/35MgdRE>



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WATCH YOUR LANGUAGE

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ENVIRONMENTAL 'Assessment'

EIGHT OF NAPA'S TOP YOUNG RETIREMENT PLAN ADVISORS TALK ABOUT THE ESG "ENVIRONMENT" AND WHAT THEY'RE HEARING FROM SPONSORS AND PARTICIPANTS.



By
Judy
Ward



GARRETT
ANDERSON
Anderson
Financial



“I have seen more interest in ESG investing, and in ESG analysis, within the past 24 months than in the past 15 years that I’ve been in this business,” says Jessica Fitzgerald, a Rochester, Michigan-based senior vice president at The Fitzgerald Group at Morgan Stanley. “It’s a conversation I find myself bringing up more often, with existing clients and new clients, and clients are bringing it up with me in numbers that I’ve never seen before. In the past nine months alone, I’ve onboarded two new clients that both said,

‘We really appreciate your commitment to ESG investing, and the fact that Morgan Stanley can deliver investment analysis that aligns with the values we have as an organization.’”

It’s a shift brought about by all the recent talk about climate change, social justice issues and corporate governance responsibilities, Fitzgerald thinks. She started learning more about ESG funds and ESG investment screening a few years ago, after she asked her college intern how she felt personally about ESG investing. The intern

replied that she wants to invest her money only in socially and environmentally responsible companies, and that most of her friends feel the same way. “I thought, ‘Wow, I better brush up on this a lot more, because this is where things are going,’” she says. “This is the future.”

And who better to weigh in on the future than the voices of NAPA’s 2021 Top Young Retirement Plan Advisors—our “Aces”?

‘MISSION’ CRITICAL

Adding an ESG overlay to a plan’s investment analysis tends to interest corporate clients that have spent a lot of time recently taking a fresh look at their organizational values, says Michael Duckett, a retirement consultant at Lockton Companies in Washington, D.C. “Now, many of our clients, even if we have not brought this idea to them, are bringing it to us,” he says. “They’re saying, ‘Hey, these are things that are important to us as an organization. Can we take that organizational philosophy and apply it to the investments that we have in our 401(k) plan?’”

Duckett predicts that more companies will follow suit. “If you’re a company that has more than 5,000 employees and if you’re publicly traded, this is



JESSICA
FITZGERALD
The
Fitzgerald
Group

"IT'S BECOMING MORE POPULAR AMONG ASSET MANAGERS THAT THIS ESG LENS ON SCREENING AT THE ASSET LEVEL IS APPLIED UNILATERALLY, AND THAT IS SOMETHING THAT PLAN SPONSORS SHOULD AT LEAST BE AWARE OF." —Michael Duckett, Lockton



100% something that is already on your radar now," he says. "And I think we'll see companies start 'drawing a line in the sand' more often around this."

Garrett Anderson, a Brookeville, Maryland-based advisor at Anderson Financial, also has seen a recent jump in sponsors' interest in ESG. "Sometimes we bring it up, and they say, 'Thank you for bringing that up, we've been thinking about it.' We've also had new clients reach out and ask us to help them find a way to make ESG investments more available in their retirement plan. Usually that's because the mission or



PATRICK
FLINT
CAPTRUST

culture of those organizations tends to attract employees who care a lot about ESG issues. Being in the Washington, D.C. area, we have a lot of very mission-driven organizations as clients. So in addition to plan sponsors asking for ESG, we have participants asking for ways to screen funds for ESG themselves."

ESG investing has been more common in nonprofit organizations' retirement plans for years. Across CAPTRUST's book of business, about 7% of its defined contribution plan clients currently offer an ESG fund option. "The uptake in the 403(b) space is much higher: 23% of our 403(b) clients offer an ESG fund," says Patrick Flint, a vice president at CAPTRUST in Raleigh, North Carolina.

"We do see it a lot of interest in ESG in the nonprofit community and in their 403(b) plans. And outside of retirement plans, in investing by endowments and foundations, it's almost a mandate now," Flint says. He's asked why 403(b) plans incorporate ESG funds more. "You don't have ERISA, for one, and that helps," he says. "Also, a nonprofit can seek out ESG investments that address whatever its particular mission is. Everybody has a different version of what ESG is, and different ideas about what's really important when considering those factors. So it's hard for a 401(k) plan committee to say, 'Let's pick one or two ESG funds for the menu,' because what's important for the committee may not be

what's important for participants. Nonprofits have a specific focus, so it's easier for them to align their investments with that."

How much interest a plan's participants express in ESG investing typically drives whether a sponsor pursues it, says Mark Beaton, a Denver-based vice president at OneDigital. "I see interest from younger investors, Millennials and younger," he says. "I'm right on the cusp of that. Younger investors are going to the plan sponsors, who are typically older people, and saying, 'I want ESG funds.' The younger generation is pushing plan sponsors to do it."

Matt Voecks, a retirement plan advisor at SevenHills Benefits Partners in Bloomington, Minnesota, works with several employers that have a lot of employees who want their investing to be consistent with their values. The Twin Cities metro area has a sizable Somali community, he says, adding that many of these community members practice Islam and follow its Sharia law. He explains that Sharia law prohibits not just investing in companies that make products like alcohol, firearms, or tobacco, but also companies with traditional banking operations or that have sizable dividends or sizable cash reserves.

"So, for our clients that have a lot of Somali employees, there's a lot of need for 'Sharia' investments," Voecks continues. For those plans, SevenHills has recommended both Sharia-





"YOUNGER INVESTORS ARE GOING TO THE PLAN SPONSORS, WHO ARE TYPICALLY OLDER PEOPLE, AND SAYING, 'I WANT ESG FUNDS.' THE YOUNGER GENERATION IS PUSHING PLAN SPONSORS TO DO IT." —Mark Beaton, OneDigital



compliant equity funds and sukuk (Islamic bond) funds. "From our perspective, it's not just a 'nice to have' for these plans to offer Sharia investments," he says. "In those cases, we view it as a critical for plan utilization to offer some of those options, so that people who practice Islam can feel comfortable investing their money in that plan. The only way to effectively let these people save in the plan is to offer options like that."

Oswald Financial, Inc. started building an ESG overlay into some of its quarterly investment reporting for first-quarter 2021, says Sarah Majeski, business development specialist at Cleveland-based Oswald. Oswald worked with a DCIO partner to access The Morningstar Sustainability Rating, which rates companies on how they're managing their ESG risks relative to their peers. Oswald's reporting gave the sponsors Morningstar's rating for each of their menu's options. "We have not done this for all of our clients, but for the ones that we knew would be eager to get this information," she says. "A lot of our clients that have a younger employee demographic are much more receptive and open to this conversation than those clients with a more mature workforce."

Majeski is asked how she starts the conversation with a client about doing ESG analysis. "I explain that it isn't something that is going to drive the decision-

making process, but it's more of an overlay to the investment analysis," she says. "I tell them that as a fiduciary, you still have to use your full prudent process."

'KNOW' LEDGE?

The Aces talked about five reasons why sponsors most commonly aren't currently incorporating ESG into their plan:

Low awareness or understanding: Rehmann Financial is bringing the overarching concept of ESG to its sponsor clients as part of its ongoing conversations about best practices. "For the vast majority of our clients, when we proactively bring ESG to their attention, their knowledge level is low," says Steven Gibson, an Ann Arbor, Michigan-based principal at Rehmann. "While ESG investing is popular in the industry, that hasn't really permeated through to sponsors yet. When we talk to sponsors about ESG, we don't get feedback as good as the industry's surveys might suggest. A lot of surveys ask the questions very simply, something like, 'Would you like to offer a socially responsible fund?' If you ask the question that way, a lot of sponsors will say 'Yes.' But if you start talking to sponsors about the complexities of actually doing it, the answer quickly becomes, 'Well, we haven't really had any participant interest, so let's wait and see.'"

Lack of clarity and tools: Even if a committee picks an

investment labeled as an "ESG fund," some plan participants may think it invests in ways that merit that label, while others don't—and may get upset about it. "Trying to determine what qualifies as 'environmentally responsible' or 'socially responsible' is difficult, because the definition differs from one person to the next," Gibson says. "It's incredibly hard for a fiduciary to gauge what's best for all participants."

Beaton says he's not opposed in principle to incorporating ESG funds or analysis into his clients' menus. "But I think there needs to be more clarification on what funds labeled as 'ESG funds' invest



MATT VOEKS
SevenHills
Benefits
Partners

in, more due diligence, and better screening methodology,” he says. For example, just as investment analytics looks at funds’ style drift, he thinks that analytical tools will need to effectively monitor funds’ drift in meeting ESG criteria. “It’s going to be very difficult,” he says. “Take a large-cap equities fund: How many hundreds of companies is it invested in? They (the analytics tool provider) will have to regularly go to each company the fund invests in, and check for ESG ‘drift.’ Somewhere along the line, there is going to be an issue.”

Majeski doubts that all of the industry’s investment-analytics technology has been adapted enough to support these tools’ effective use in ESG overlay screening. “The biggest hurdle is going to be institutionalizing the metric,” she says. For an ESG overlay to become commonplace, she says, both enhancement of investment-evaluation tools and more advisor conversations with wary sponsors will need to happen. “I think they’ll have to go hand-in-hand,” she says.

Concern about fiduciary

risk: Because of the fiduciary risk uncertainties, Gibson says it’s hard for him to rationalize giving a strong recommendation to add an ESG fund to a client’s menu. He cites replacement of underperforming funds as an example of his concerns: What happens if a plan adds an ESG fund to the lineup, and then it doesn’t perform well? “How does that decision on a replacement fund fall, from a participant perspective?” he asks. “Are you only going to look at other ESG funds, and if you are, is the committee then meeting its fiduciary duty? Or are you going to look at other, non-ESG funds? If you are, maybe the replacement fund invests in things that some participants no longer consider environmentally or socially responsible. What happens then?”

Perception of sacrificing

performance: When Voecks talks to sponsors about incorporating ESG elements, they often have reservations about the performance implications. “There



SARAH
MAJESKI
Oswald



is a concern that anytime you limit the universe of investments you’re considering, ultimately you’re putting shackles around managers that will hurt the returns they might have otherwise had, without the shackles,” he says. “Though I think that ESG funds are needed overall for investors, for the most part, I’m pretty lukewarm on adding them to our clients’ menus.”

Fitzgerald also has heard sponsors’ concerns about performance implications. “I

think that a lot of people on committees who ‘shoo’ ESG away do it because they think that if they incorporate ESG into their plan, they are going to sacrifice performance to do it,” she says. She responds to these concerns by talking about Morgan Stanley’s investment analysis process, and about how all investments—including those with a strong ESG element—must pass its full screening criteria. “We want them to feel comfortable that if we recommend an investment,



"WHILE ESG INVESTING IS POPULAR IN THE INDUSTRY, THAT HASN'T REALLY PERMEATED THROUGH TO SPONSORS YET. WHEN WE TALK TO SPONSORS ABOUT ESG, WE DON'T GET FEEDBACK AS GOOD AS THE INDUSTRY'S SURVEYS MIGHT SUGGEST." —Steven Gibson, Rehmann



that investment has met all of our stringent performance screens, and it also happens to meet the additional criteria for an ESG screen," she says.

Lack of participant demand and clarity: In the 7% of CAPTRUST's defined contribution plan clients that offer an ESG option, the ESG funds hold an average of just 1.7% of total assets, Flint says. That doesn't surprise him, given the prevalence of automatic enrollment and the massive amount of assets flowing into plans' qualified default investment alternatives (QDIAs.) "As an industry, we've spent the past 10 or 12 years trying to almost disengage the participants: We're telling them, 'You don't have to do anything, we can put you in the plan and in a default investment,'" he says. "So a lot of people are not paying enough attention to their retirement plan to notice if ESG funds are even on the investment menu."

SevenHills works with some faith-based organizations that see more participant interest in values-based investing, Voecks says. "But for participants in most plans, there is pretty light usage of ESG," he says. "We know that 80% to 90% of participants in retirement plans don't want to pick their own funds. The lion's share of participants now utilize some form of 'do it for me' investment option, either a custom portfolio or a target date fund. If specialty ESG funds are included in their plans, it would be for the very small

minority of participants who take an active interest in picking their own funds."

The possibility of 401(k) participants investing in ESG funds in their plan based on very little information concerns Beaton. "The biggest issue with participants investing in ESG funds is that there is no clarification on what they're investing in, unless you read the prospectus—and participants don't read prospectuses," he says. "The underlying goals of an ESG fund are not clear to participants, just based on the fund name. We've got to be sure that we have a better way for participants to understand what an ESG fund is utilizing as its underlying investments. Until we get more clarification, I'm not comfortable recommending ESG funds as a menu option."

THE OUTLOOK

Anderson—one of the Aces who's seen growing sponsor interest in their 401(k) investment menu reflecting their organizational values—has learned some lessons in the past few years about participants' actual ESG uptake. "The first organization that we brought this up with several years ago, they are conservationists at their core," he recalls. So he worked with the plan sponsor to introduce a parallel set of ESG target date funds, included in the menu along with the plan's target date fund family of default investments. "But most do-it-

yourself investors aren't going to pick a target date fund to be in, because they want to select their investments themselves," he says. "There are now millions of dollars in that plan's target date fund default investments, and less than \$100,000 in the ESG target date funds."

He tried the same thing with a few other enthusiastic sponsor clients, and saw similar results. "My approach to ESG has evolved since then, because we didn't have the adoption we expected," Anderson says. "So what I've now moved to is, if the organization knows that it has employees who want ESG investments, we can add them as core menu ESG options, such as Large Blend, Intermediate Core Bond, and Foreign Large Blend." Do-it-yourself participants can then build a portfolio with the degree of ESG they want. "When we do it this way, we find that these funds get more utilization," he says. "Specifically, we find that the more participant education we do at an employer, the more the employees are able to make use of the ESG funds."

And whether or not sponsors evolve toward asking for an ESG overlay in analysis of their plan's fund menu, the impact of broader ESG analysis will be felt in plans, CAPTRUST's Flint believes. "I think the asset management community is going to force the use of ESG criteria, for them to invest in a company's stock," he says. "So, Corporate America is going to have to get better in their



environmental friendliness and social responsibility, and they're going to have to get stricter with their internal governance structure," he says. "Then, as we go in and review the mutual fund universe, some of that screening is going to be baked into the investments they've chosen to make, whether we're looking for that or not."

To Lockton's Duckett, it still feels very much like early days for sponsor interest in broader use of ESG screening. But he thinks that plan advisors need to understand how asset managers already are utilizing it. "It's becoming more popular among asset managers

that this ESG lens on screening at the asset level is applied unilaterally, and that is something that plan sponsors should at least be aware of," he says. "So it's incumbent on us as advisors to understand, how is each manager actually using ESG analysis in its decision-making?"

Lockton's team is proactively bringing up broader use of ESG screening with asset managers, Duckett says. "We're asking each and every asset manager we work with: 'Is your ESG scoring system proprietary, or did you purchase it from a third party? And how does your scoring system work? What are the criteria for passing

the screen? How does the screen balance the weighting of the environmental score versus the social responsibility score, and versus the governance score? Does the screen eliminate certain industries, and if it does, which ones?' We want to understand, is this manager's ESG screening going to lead to better opportunities for alpha? The more information we have about how and why this screening is being applied by asset managers, the better we can understand that." **NNTM**

DOL 'PECUNIARY RULE': WHAT IT MEANS FOR PLAN FIDUCIARIES

SPONSORED BY



ESG IN RETIREMENT PLANS: NEW REGULATION EFFECTIVE JANUARY 12, 2021

The U.S. Department of Labor's final regulation related to investment selection in retirement plans is also known as the "Pecuniary Rule." True to its nickname, the rule directs retirement plan fiduciaries to evaluate all potential ERISA plan investment options *solely on their financial benefit to participants* ("pecuniary factors").

However, unlike previous DOL rulings, it no longer singles out ESG-related investments for special consideration. Under the new rule, material ESG factors intended to improve returns or reduce risks consistent with the plan's investment goals and objectives are considered prudent

and appropriate for ERISA plans. This includes investments used as QDIAs (qualified default investment alternatives).

Additional highlights:

- **The new rule clarifies the ERISA duty of loyalty**, specifying that fiduciaries *may not sacrifice investment return or take on additional investment risk to further non-pecuniary goals*.
- **A factor is considered pecuniary** if a fiduciary determines it would have a material effect on an investment's risk or return, based on the plan's objectives, goals and time frame. DOL suggests that fiduciaries review the prospectus or similar document to understand the role of any non-pecuniary factors.
- **ESG-related investments that seek to improve investment outcomes for participants** are considered prudent for ERISA fiduciaries and can be used in ERISA plans.
- **ESG-related investments may also be considered suitable as a QDIA**. However, plan fiduciaries and their advisors will need to modify their investment review processes to ensure compliance with the new rule.

- **The rule does not prohibit plan investments from possessing any non-pecuniary attributes**, but it does prohibit those factors from being considered by the plan fiduciary in selecting the investment. This is an important point. The core investments on the plan menu must be selected based solely on their pecuniary factors, ignoring any non-pecuniary factors. The only time a non-pecuniary factor can be directly considered is when breaking a tie.
- **The rule, effective 1/12/21, does not apply** to pre-existing investment decisions until the next scheduled plan review. For existing QDIA investments, the rule does not apply until April 2022.

THE BOTTOM LINE

The Pecuniary Final Rule is a significant improvement over the original proposal. It treats all investments the same, focusing on how a fiduciary considers investment factors rather than which type of investment product is being reviewed.

For more information, read the full paper at <https://bit.ly/34jHALL> **NNTM**

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ESG MOVES INTO THE SPOTLIGHT

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AS A LEADING RETIREMENT AND WORKPLACE BENEFITS PROVIDER,

Voya is advancing its Environmental, Social, Governance (ESG) practices and initiatives. In this Q&A, Christine Hurtsellers, CEO, Voya Investment Management, and Charlie Nelson, Vice Chairman and Chief Growth Officer, Voya Financial, share insights and perspectives on the dynamic ESG landscape.

Q: With increased focus on ESG broadly, what is the ESG landscape at Voya?

A: Christine Hurtsellers

Voya has a long-standing culture of conducting business responsibly and ethically. In fact, we have differentiated ourselves from our peers in areas such as environmental stewardship, gender parity at the board level, transparent governance practices, a focus on client solutions and rigorous attention to corporate risks and opportunities. Our commitment to generating and leveraging ESG ideas isn't just incorporated into our corporate identity – it's embedded into our DNA. It represents the holistic approach in which we strive to serve our key stakeholders – colleagues, clients, communities and investors alike – with excellence every day.

And we are proud of the many accomplishments and recognitions Voya Financial has earned since establishing our ESG goals back in 2016; to see our ESG awards, I encourage you to visit our website at [Voya.com](https://www.voya.com). By focusing on E, S and G across our organization, we're positioned to harness the tremendous growth potential of this emerging market.



CHARLIE NELSON
Vice Chairman & Chief Growth Officer
Voya Financial

Q: How is Voya keeping pace with the rapidly-changing ESG market momentum?

A: Charlie Nelson

Our commitment to ESG is woven throughout our enterprise and guides many of our decisions, with both a top-down and bottom-up approach. While we have made strides, the market continues to mature and companies are being held more accountable – further raising the bar. As such, we are harnessing our Diversity, Equity & Inclusion (DEI) efforts along with our continuous improvement DNA and long-standing culture of conducting business responsibly and ethically, as we evolve our ESG philosophy. We continually build on these successes across our organization to meet the growing demand and align with customer values.

Q: What are the growth prospects for the ESG market?

A: Christine Hurtsellers

Today, it's estimated that one in four dollars invested in the United States takes ESG issues into account.¹ Simultaneously, the U.S. is experiencing a \$48 trillion intergenerational wealth

transfer from baby boomers to their children.² These younger, more socially and environmentally conscious investors want their actions to bring about a positive change in the world and desire a more transparent connection to these changes. And how this generation opts to invest their money is a key part of the growth equation for ESG.

Fully, 95% of Millennial respondents are interested in sustainable investing – up 9% from 2017.³ According to a February 2020 report from Deloitte, ESG-mandated assets in the U.S. could grow almost three times as fast as non-ESG-mandated assets and represent half of all professionally managed investments by 2025. In addition, an estimated 200 new funds in the United States with an ESG investment mandate are expected to launch over the next three years, more than doubling the activity from the previous three years.⁴ To make sure we maximize value for our stakeholders, we're strategically evolving our organization to keep pace with ESG market momentum.



CHRISTINE HURTSELLERS
CEO
Voya Investment Management



Q: How are you focusing on ESG within Voya Investment Management?

A: Christine Hurtsellers

We are exploring how to maximize the economic benefits of ESG investing to help clients meet all their investment objectives. To advance the integration of ESG factors into our investment processes, we are strengthening our governance structure and enhancing our firm-wide ESG investment philosophy. While our main focus is on integration, we have a select range of new ESG solutions and capabilities that enable clients to align their portfolios based on ESG values and investment goals. Our intent is to be authentic, comprehensive and innovative with our ESG integration and overall program to position us to differentiate and lead in this space.

Q: As consumer interest in ESG grows, how do you foresee this trend impacting benefits plans?

A: Charlie Nelson

Voya's research tells us participants are more than interested in ESG reflected within their workplace benefits. Specifically, 76% of individuals feel it is important for their employer to apply ESG principles to workplace benefits.⁵ As more companies embrace ESG values in their business models, it seems inconsistent to not also do so within their benefit plans to support employees. We see this ultimately becoming more of the standard than the outlier,

particularly with ESG-certified retirement plans.

Q: How can ESG-certified retirement plans benefit employers and employees?

A: Charlie Nelson

Businesses that embrace ESG in their business practices should also embrace ESG in their benefit plan design. One of the latest advancements in the industry has been the emergence of DALBAR's ESG-Certified Retirement Plan⁶ – an annual process to evaluate a plan's success in achieving retirement plan stewardship by actively applying the principles of ESG more broadly to their retirement plan. Voya provided assistance to DALBAR in developing this certification, but has no role in the evaluation process. This third-party certification ensures the retirement plan operates according to a defined set of ESG principles, including a review of environmental factors such as paper suppression, automatic enrollment and online capabilities; social factors from matching contributions to phone center capabilities; and governance measuring things like reasonable plan fees, regulation compliance and a sound investment policy. We're proud to be the first publicly traded company to attain the ESG retirement plan certification and to earn five out of five stars for Voya's retirement plan offering to its own employees.

However, this certification is more than five shiny gold stars –



it can serve as a true win-win for employers and participants. For instance, 60% of Americans say they are likely to contribute **more** to an ESG-certified retirement plan, while 73% of Americans find the idea of ESG investing appealing through a retirement plan.⁵ In addition to the potential for higher participation rates, higher contribution rates and enhanced retirement outcomes for employees, ESG-certified retirement plans can help employers with plan economies and increase appeal for employees. **NNM**

All investing involves risks of fluctuating prices and the uncertainties of rates of return and yield inherent in investing. All security transactions involve substantial risk of loss. Environmental, Social and Governance (ESG) Risk has factors that may cause the portfolio to forgo certain investment opportunities and/or exposures to certain industries, sectors or regions. Products and services are offered through the Voya® family of companies.



FOOTNOTES:

¹ Global Sustainable Investment Review, Global Sustainable Investment Alliance, 2018

² Cerulli Associates, The great wealth transfer, March 2019

³ Morgan Stanley Institute for Sustainable Investing, Sustainable signals July, 2020

⁴ Deloitte, Advancing environmental, social, and governance investing: A holistic approach for investment management firms, February 2020

⁵ Consumer Sentiment during COVID-19, Voya Consumer Insights and Research, July, 2020

⁶ DALBAR, Inc. is a leading financial services market research firm that performs a variety of ratings and evaluations of practices and communications, committed to raising the standards of excellence in the financial services and healthcare industries. DALBAR is a separate entity and not a corporate affiliate of Voya Financial®. The DALBAR ESG Certification criteria fall into 3 categories: Environmental (Paper Suppression, Automatic Enrollment, Online Capabilities), Social (Premature Withdrawal Options, Matching Contributions, Phone Center Capabilities, Pre/Post Retirement Support) and Governance (Reasonable Plan Fees, Compliance with Applicable Regulations, Sound Investment Policy, Investment Review, 3rd Party Requirements). There is an annual fee for ESG Plan Certification which is uniform for all participants in the program and based on the number of participants in the plan (<1,000 participants is \$500, 1,000 - 10,000 participants is \$2,500, >10,000 participants is \$5,000). The DALBAR ESG Certification does not reflect actual client experiences or outcomes and is not indicative of future performance. While Voya provided assistance to DALBAR in developing the ESG certification, Voya plays no role in the evaluation process. This fact has been disclosed to the extent it may be perceived as a possible conflict of interest.

ESG INVESTING: A PLAN SPONSOR VIEW

ESG investing is a hot topic, yet plan sponsors remain hesitant to include it in their lineups.

BY TOBI DAVIS



There is a lot of discussion in the industry about the inclusion of Environmental, Social, Governance (ESG) investments in 401(k) plan lineups, yet the uptake by plan sponsors remains very low. For this issue of Plan Sponsor Perspectives, we asked plan sponsors the following: Do you offer any ESG investments in your retirement plans and if not, have you considered offering them? Why or why not? Do you have specific concerns about including them in your lineup?

The responses overwhelmingly show that plan sponsors are not offering ESG investments, which mirrors the findings from PSCA's Annual Survey of Profit Sharing and 401(k) Plans showing that about three percent of plans offer one—and this has been relatively consistent the last five years. See *Exhibit 1*.

REASONS WHY (NOT)

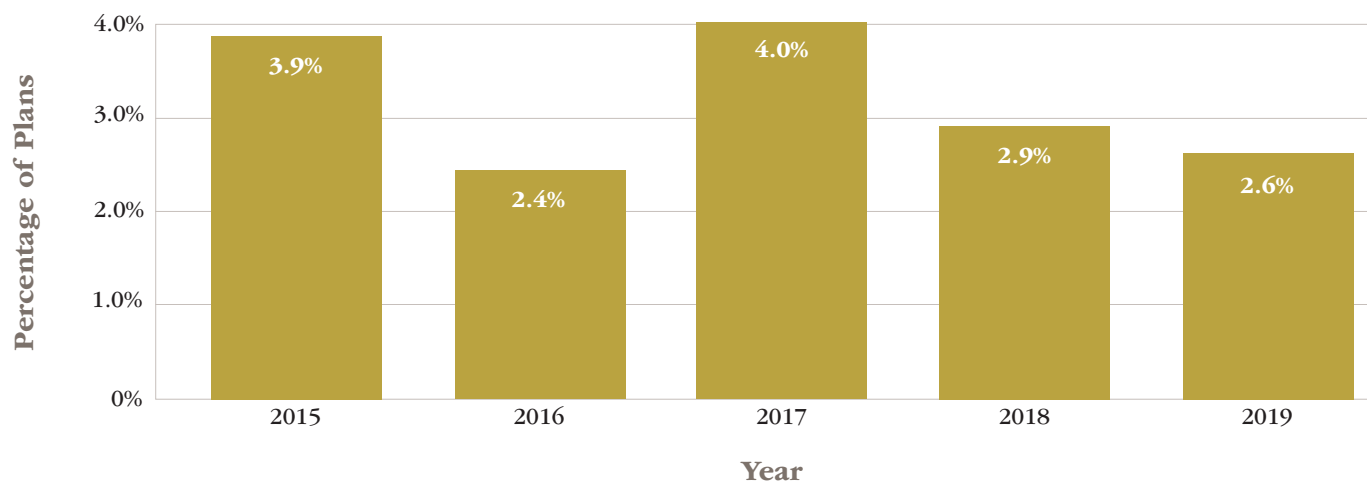
The reasons why sponsors do not offer an ESG investment in their lineup ranged from those that haven't discussed it to those that looked into it and decided not to offer them. One plan sponsor noted, "We currently do not offer any ESG investment options. At this time, it's not an option that is under consideration. We have not had an interest from our participants in this option. We are focused on increasing enrollment in the plan and that will continue to be our focus throughout 2021."

Another shared, "We do not offer ESG in our lineup and although the Committee is aware of the changing regulations, given our mostly manufacturing population, as well as the additional fiduciary oversight of those funds, it does not make sense for our plans or fit into our IPS."

A mid-size employer explained their reasoning for not including one as due to a lack of standardized evaluation metrics: "We do not currently offer any ESG investments in our retirement plan nor has there been any discussion to add them right now. The primary reason that this is the case for our organization is due to the fact that there currently is not a standardized approach to the types and calculation of different ESG metrics. Without a set of standardized metrics, it becomes very challenging to understand complete risks and opportunities of various ESG investments."

However, there are plan sponsors whose participants are asking for ESG investments, but the concern over fiduciary risk prevents them from being added to the lineup. "We do not currently have ESG investments in our retirement plans. We are interested in ESG investments

Exhibit 1: Availability of ESG Funds in 401(k) Plan Lineups Over Time



Source: PSCA's Annual Survey of Profit Sharing and 401(k) Plans



because our employees are asking for them. The latest regulations don't specifically prohibit the inclusion of ESG investments, but they make it extremely hard to actually include an ESG investment and still demonstrate solid fiduciary practices. That is a risk we are not willing to take on, so that effectively eliminates ESG investments for us, until the regulations change."

NEITHER YES NOR NO

Some plan sponsors don't specifically include or exclude ESG investments. One noted, "The Retirement Committee has determined that the fund selection criteria should be based on obtaining the best returns in a diversified portfolio, while taking volatility into account. ESG funds are not excluded; if an ESG fund ranks No. 1 based upon the selection criteria, it will be added to the fund lineup." Another offered this

approach: "We have had ESG discussions in our Investment Committee meetings. We have chosen not to have a specific ESG investment option. Rather, we ensure our investment lineup includes large asset managers who integrate ESG factors but do not sacrifice investment returns or increase risk in order to meet ESG goals unrelated to the participant's financial interests."

REASONS FOR

Finally, there are a few plans that do include ESG investments, and one plan sponsor shared, "We do offer an ESG fund that was added to our plan approximately 10 years ago. Like all of our investments, it is subject to meeting the performance and other criteria of our IPS. As guidance began to be issued, we reviewed and decided it would be imprudent to remove it considering it was/is meeting IPS criteria."

WHAT'S NEXT?

We had expected guidance from the DOL regarding ESG investments last summer, but the final rule fell short and removed references to ESG, asserting a lack of a precise or generally accepted definition of ESG. The DOL stated that the purpose of the rule was to set forth a regulatory structure to assist ERISA fiduciaries in navigating ESG investment trends and to "separate the legitimate use of risk-return factors from inappropriate investments that sacrifice investment return, increase costs, or assume additional investment risk to promote non-pecuniary benefits or objectives." One of President Biden's early executive orders included an order to review this rule. Then on March 10, the DOL stated that until it publishes further guidance, it will not enforce compliance with the rule; subsequently, on May 20, President Biden issued an Executive Order that, among other things, directs the Labor Secretary to reconsider rules that would have barred consideration of ESG factors in investment decisions.

In that environment, it is not surprising that most plan sponsors are hesitant to add them to their lineups. Perhaps with some clarity in the regulations and some fiduciary protection for plan sponsors, ESG investments will become more common in defined contribution plans. For now, plan sponsors will have to decide for themselves whether the risks are worth the possible good will with their participants who want to embrace ESG investing. **NTM**

Tobi Davis is PSCA's Director of Operations.





Coining a New Phrase

How should plan advisors and fiduciaries approach the idea of adding a cryptocurrency option to their qualified plans?

By Steff Chalk

A large insurance company recently allocated \$100 million to Bitcoin.¹ In a 2020 survey of nearly 800 institutional investors from the United States and Europe, 36% of respondents confirmed that they are positioned with digital asset exposure; among U.S. respondents, 27% had long digital asset positions.² And institutional investment portfolio optimizers now encourage portfolio managers to allocate 0.5% to 1.3% to digital currency.³

Plan sponsor fiduciaries are being approached by plan participants clamoring for access to cryptocurrency or a direct Bitcoin investment option within the retirement plan. How should a Retirement Committee member address such a request?

From the Top

The Securities and Exchange Commission (SEC), which oversees U.S. investment directives, has communicated that they do not oversee currency—and cryptocurrency is currency, not a

security. (Although the SEC has initiated multiple actions orbiting “Initial Coin-related Offerings” and digital asset fraud.) Its Division of Examinations has publicly warned that “digital assets create unique risks for investors.”

Would Bitcoin and cryptocurrency investors benefit if the SEC installed trading curbs, or somehow oversaw the non-registered cryptocurrency markets? Has the lack of SEC regulation stifled the cryptocurrency markets, or does it contribute to the allure and current valuations of cryptocurrency?

Amid the turmoil of the 2008 financial crisis, 12 U.S. banks enjoyed the moniker “too big to fail.” At that time, their assets and liabilities were large enough to be considered a threat to the U.S. financial system. Is cryptocurrency now “too big to regulate”? Restrictions and limits by the SEC could be instituted, but they would not apply outside the United States. Is regulation even possible?



The Scope

Cryptocurrency functions as a currency, but it offers investors significantly more. Pandering to the cerebral experience, participating in electronic digital assets provides the user/investor:

- a high-profile trending investment;
- participation in a counter-movement;
- a casino-type gambling rush,
- access to the custodian's continuous compounding screen;
- 24-hour trading (with beeps, bells and blinking notifications); and
- instantaneous valuations.

The investor experience is an endless buffet of endorphin releases.

But benefits are deeper and broader than what occurs in the brain during Mr. Toad's wild ride! Cryptocurrency offers additional characteristics to the investment world, many of which are recognized in Modern Portfolio Theory (MPT). But looking at how cryptocurrency "behaves" relative to MPT tells a different story. Through the end of the first quarter of 2021, the volatility was not off the charts, but only because the charts were recalibrated—more than once!

When seeking a reliable diversification tool, there are no known financial assets that provide the level of diversification that cryptocurrency delivers. Since cryptocurrency does not correlate with any present-day or historical financial assets, the diversification

“The investor experience is an endless buffet of endorphin releases.”

it brings to a portfolio is unparalleled. As an inflation hedge, cryptocurrency again receives exceptionally high marks. Volatility is present; however, a strong argument can be made that the reward is relative—perhaps, even understated—to the commensurate risk associated with the asset.

Not for Every Retirement Committee

Prior to adding a cryptocurrency option to qualified plans, advisors and fiduciaries need a comfort level with the forms and documentation involved, as well as the restrictions around passwords—all frequently referred to as “friction.” (“Consternation” is a more accurate description.) The magnitude of friction becomes a stopping point for many investors and fiduciaries. Nonexistent regulation combined with the decentralized nature of the cryptocurrency have made due diligence close to impossible. The cryptocurrency world is built on anonymity. Scarcity, liquidity and control are major factors, since the supply is difficult to comprehend.

The known risks of cryptocurrency are significant. For the time being, that will keep many plan fiduciaries from adding cryptocurrency to their plans. And the unknown risks remain just that. **NTM**

FOOTNOTES

¹ Vigna, Paul. “MassMutual Joins the Bitcoin Club with \$100 Million Purchase,” *The Wall Street Journal* (Dec. 10, 2020), at <https://www.wsj.com/articles/massmutual-joins-the-bitcoin-club-with-100-million-purchase-11607626800>

² June 2020 Fidelity Digital AssetsSM survey, at <https://bwnews.pr/3bE0700>.

³ Liew, Jim Kyung-Soo and Hewlett, Levar. *The Case for Bitcoin for Institutional Investors: Bubble Investing or Fundamentally Sound?* (Dec. 5, 2017). Available at SSRN: <https://ssrn.com/abstract=3082808>



Convergence

Three basic ERISA concepts can help chart a course to legal compliance in today's converging world.

By David N. Levine

The merger of health, wealth, and retirement. Accumulation and decumulation. Recordkeeper roll-ups. Advisor and consultant aggregator roll-ups. There is so much news in the benefit industry these days,

but what is the common trend? Convergence.

To some, there is great value in bringing solutions, services and economies of scale together. To others, convergence is seen as a threat. So what does it mean from a legal perspective?

ERISA itself does not encourage or reject consolidation of services and service providers. In fact, whether you as an advisor are part of convergence with your own business or evaluating converged businesses for your clients, focusing on three basic



ERISA concepts can help chart a course to legal compliance in today's converging world.

Duty of Loyalty

If you are a fiduciary to your clients, you have a duty of loyalty to them with respect to your actions as a fiduciary. Whether or not a converged service provider is an ERISA fiduciary with respect to a particular action often depends on their contracts and the services they are offering. Furthermore, even if an offering is not in an ERISA capacity, loyalty can have many meanings beyond ERISA, whether as a registered investment advisor

“Starting with a simple evaluation process and expanding outwards—whether with respect to your own business or in evaluating others’—can help chart a path to positive outcomes for your clients in an ERISA-compliant manner.”

or under other applicable law. If you evaluate your or someone else's converged service offerings through this lens, it may help provide a legal grounding for your evaluation and service development process.

Concept of Prudence

Is a service offering or your own service a prudent use of plan resources? While every offering varies, prudence is often viewed through a procedural lens. While some might make blanket statements of what is and is not prudent, ERISA is truly about process, and the number of crystal-clear prudent and imprudent decisions is limited. When overlaid with the concept of the duty of loyalty, proactively evaluating how your or some other converged service could be considered prudent and documented as prudent—either by you or an independent party—can help with legal compliance in a converged world.

Prohibited Transactions

ERISA's prohibited transaction rules default to making many transactions—such as certain payments to service providers and certain transactions between a plan fiduciary or party related to a plan—impermissible transactions that expose the parties involved to potential significant liability. However,

there is a wide range of exemptions to these prohibited transaction rules, including:

- statutory exemptions, with ERISA section 408(b)(2)'s exemption for reasonable compensation for service providers;
- Department of Labor “class” exemptions providing relief for classes of activities and transactions; and
- individual exemptions obtained by specific people from the Department of Labor.

Importantly, in the land of prohibited transactions, disclosure does not always set you free. In a converged world, keeping these rules in mind can help avoid inadvertent foot faults and protect an advisor and its clients from future challenges stemming from more and more convergence.

Does this all seem basic? In some ways it is. At its core, ERISA can be boiled down to a few basic concepts. But the devil is always in the details. In a converged world, the details can often matter more than ever, but starting with a simple evaluation process and expanding outwards—whether with respect to your own business or in evaluating others’—can help chart a path to positive outcomes for your clients in an ERISA-compliant manner. **NTM**



Confidence ‘Mien’

Should we care about retirement confidence?

Nevin E. Adams, JD

Earlier this year the Employee Benefit Research Institute (EBRI) and Greenwald Research unveiled the findings of the nation’s longest-running survey of its kind—offering a perspective on the nation’s confidence in attaining a satisfying retirement. But what does that tell us, really?

Well, for starters this year’s Retirement Confidence Survey—the 31st iteration of this particular survey—found that, at least generally, people seemed to be feeling pretty good about their prospects; nearly three-quarters of respondents were either somewhat or very confident in their ability to retire comfortably—and retirees were even more confident—and both were more confident, in the aggregate, than a year ago. The survey’s authors characterized the overall sentiment as “resilient.”

In point of fact, the RCS has provided a remarkably optimistic view of retirement—which, more often than not, has stood in some contrast to the wailing and gnashing of teeth of the headline writers of most stories about retirement readiness. There is, at least, some basis for some of that confidence; once again the report found that those who have a plan are more confident than those who don’t, similarly that those who have made some attempt to determine what they’ll need in retirement, as were those who aren’t overloaded with debt. Previous forays have also found that those who work with an advisor are more confident, and indeed, one suspects that there are some overlapping connections—that those with a

plan are also more likely to have an advisor, and thus to have made some determination as to their financial needs.

And, particularly in this year of COVID, there was a distinct difference in the perspectives of those whose employment had been affected and those who were spared such impacts. Half of workers who had a negative change in work said that they were either somewhat or significantly less confident as a result of the pandemic, compared with just 24% of those who did not have a negative change.

All in all, I take as a good and positive sign that so many are at least somewhat confident, that most like and appreciate their workplace plans, and that, overall, their future prospects (and, in the case of retirees, their reality) seem good. Particularly in the midst of a global pandemic (though, in fairness, many escaped financial impact, and the markets were certainly, to coin a phrase, “resilient”).

Of course, even in the RCS, there is a real tale of two retirements. For those with a retirement plan, only 12% report less than \$10,000 in savings and investments and 39% have \$250,000 or more. On the other hand, two-thirds of those without a retirement plan have less than \$10,000 in savings and investments, and only 2% have \$250,000 or more. Clearly, having access to a plan at work makes a big difference, not only in confidence—but in the rational underpinning of that sentiment.

I’m now close enough in time for the reality of “retirement” to be more than a mental playground. I’ve done the math

(several times), and feel that I have more than a “middling” notion of the factors that need to be considered. And yet, were I to be on the polling outreach, I suspect I’d put myself in the “somewhat” confident category. Not because I don’t know where I stand, or for how long I’d likely need to, but mostly because the future is a very uncertain place. Indeed, the RCS has traditionally found that those actually living in retirement are more confident about their financial status, if only because they are actually experiencing retirement. And there’s surely some comfort in knowing that individuals who are currently contending with the financial realities of retirement are confident in their ability to do so.

Despite my earlier caveats, I’m probably 95% confident in my result—but, in my case, that 5% of uncertainty means that I’m attentive to my savings, my investments, and my eligibility for things like Social Security, Medicare and pensions. I’m comfortable with the pieces, but cognizant of the need to pull them all together at some point—and conscious of the vulnerabilities in certain elements (notably Social Security, not so much the funding, though there’s that, but the diminution due to means testing).

Should we care about retirement confidence? Well, perhaps not in isolation. Here’s hoping the report of improved confidence doesn’t lure folks into a sense of complacency, but rather encourages them to make sure that their confidence is grounded in reality—and that those who currently lack that assurance take steps to do something about it. **NNM**

Case(s) in Point

2020 was a “banner” year for retirement plan litigation, and shows no signs of slowing in 2021. CalSavers—a state-run IRA program for private sector workers prevailed in a case that had alleged the program was preempted by ERISA (though the plaintiffs have already petitioned for a rehearing by the full Ninth Circuit of Appeals). Moreover, a recent appeal is building on a type of “no harm, no foul” argument with regard to whether (or not) a participant can sue—if the plaintiffs had no money invested fund(s) in question. And finally this issue, the United States Supreme Court has (again) decided that a case involving a stock drop incident didn’t require its review—again.



‘Harm’ Full?

Could a quick appeal signal a shift in ERISA litigation?

A class action involving a \$1.6 billion 401(k) plan has been fast-tracked to the U.S. Court of Appeals for the Third Circuit for a ruling on an issue of emerging concern in ERISA excessive fee litigation.

The case involves three participant-plaintiffs—Mary K. Boley, Kandie Sutter and Phyllis Johns—of the King of Prussia, Pennsylvania-based Universal Health Services, Inc., Retirement Savings Plan. With some \$1.9 billion in assets (and

nearly 42,000 participants), the plaintiffs argue that the plan “had substantial bargaining power regarding the fees and expenses that were charged against participants’ investments. Defendants, however, did not try to reduce the Plan’s expenses or exercise appropriate judgment to scrutinize each investment option that was offered in the Plan to ensure it was prudent.” The issues raised here were hardly unique—and the law firm representing the plaintiffs, Capozzi Adler PC, has been increasingly active in 401(k) litigation.

However, the issue under consideration—(*Boley v. Universal*

Health Servs., Inc., 3d Cir., No. 21-8014, order 5/18/21) and one that might produce a shift in litigation strategy, if not results—is the issue of whether a plaintiff who was not actually invested in the funds under scrutiny can bring suit. In this case the Universal Health Services defendants have argued that this “sweeping” class (60,000 participants) should never have been certified because the three named plaintiffs were only invested in seven of the 37 plan investment options referenced in their suit.

Thole ‘Mien’

That question has taken on new relevance in the wake of a U.S. Supreme Court ruling last year (*James J. Thole et al. v. U.S. Bank NA et al.*) that dealt not with a 401(k) plan and excessive fees, but with a defined benefit plan, and allegations that the fiduciaries of U.S. Bank’s pension plan mismanaged their responsibilities, resulting in plan losses of \$750 million in losses. While those losses were recovered prior to the suit, the narrow 5-4 decision by the nation’s highest court turned on what Justice Kavanaugh, writing for the court, said: “[T]he plaintiffs lack Article III standing for a simple, commonsense reason: They have received all of their vested pension benefits so far, and they are legally entitled to receive the same monthly payments for the rest of their lives. Winning or losing this suit would not change the plaintiffs’ monthly pension benefits.”

So, what does one have to do with the other? Well, the

Supreme Court took on the *Thole* case because it had been alleged that there was a split in federal courts—that the Eighth Circuit’s decision (where the case originated) veered from decisions in the Second, Third and Sixth Circuits in holding that violation of ERISA rights alone was sufficient to have standing to bring suit, without establishing loss. Meanwhile the Fourth, Fifth, and Ninth circuits had gone another way, denying standing to bring suit to participants in similar contexts, though they did so on Constitutional grounds—as has the Supreme Court—unlike the Eighth Circuit, which cited ERISA.

‘Stake’ Holders

The Universal Health defendants have pressed the issue, noting that the named plaintiffs “have no stake in proving claims arising from the 30 options in which they never invested because they will receive ‘not a penny more’ in benefits” if they’re successful. As you might imagine, the plaintiffs disagreed, arguing that Universal Health’s argument was “based largely on a faulty construct,” specifically the distinction between DC and DB plans. Indeed, in the majority opinion, Justice Kavanaugh pointed out that distinction, explaining that, “... participants in a defined-benefit plan are not similarly situated to the beneficiaries of a private trust or to participants in a defined-contribution plan, and they possess no equitable or property interest in the plan.” In fact, he noted that it was “of decisive importance to this case” that the plan in question was a DB plan, rather than a DC plan.

The Supreme Court’s decision, though a narrow one, seemed likely to forestall any number of potential fiduciary breach suits, if only because it limits the circumstances under which workers and retirees can sue. This would, of course, be the first attempt to apply that reasoning to a 401(k) plan—and the quick acceptance of the case by the Third Circuit suggests it’s a case worth keeping an eye on.

And we will...

—Nevin E. Adams, JD



Stock, ‘Dropped’

*SCOTUS Scuttles Another
Stock Drop Review*

Yet another stock drop case has made its way to the doors of the U.S. Supreme Court—but no further.

The defendants in this case (*Allen v. Wells Fargo & Co.*) were the fiduciaries of the Wells Fargo 401(k) plan—and the plaintiff filed on behalf of Wells Fargo 401(k) plan participants whose individual accounts were invested primarily in Wells Fargo stock from Jan. 1, 2014 through the filing of the original suit back in 2016. Echoing themes common to these so-called “stock drop” suits, the Wells Fargo defendants were charged with intentionally withholding “material non-public information” from plan participants invested in Wells Fargo stock—specifically the impact of cross-selling activities on the firm’s stock price.

Case History

The district court granted Wells Fargo’s motion to dismiss the first amended complaint, finding that the allegations made failed to meet the criteria required by the U.S. Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), in that they “failed to plausibly allege that a prudent

fiduciary in Appellees’ position could not have concluded that Appellants’ proposed alternative actions would do more harm than good to the Wells Fargo Stock Funds.” Thus, the court dismissed that claim with prejudice, and also found that Appellants had not pled a “freestanding claim of breach of the duty of loyalty” and also dismissed that claim, but without prejudice (allowing for another shot). The plaintiffs filed an amended complaint—but that one fared no better.

A subsequent appeal to the U.S. Court of Appeals for the Eighth Circuit similarly feel short, despite its review premised upon “assuming all factual allegations as true and construing all reasonable inferences in the light most favorable to Appellants, the nonmoving party.”

The Supreme Court had been asked to consider issues raised in this case, specifically: “(1) Whether, under *Fifth Third Bancorp v. Dudenhoeffer*, fiduciaries of an employee stock ownership fund are effectively immune from duty-of-prudence liability for the failure to publicly disclose inside information; and (2) whether *Dudenhoeffer*’s framework extends beyond prudence-based claims and applies to duty-of-loyalty claims against ESOP fiduciaries.”



'Harm' Full?

In 2014 the Supreme Court seemed truly concerned that the "presumption of prudence" standard basically established a standard that was effectively unassailable by plaintiffs—and in fact, until that point the vast majority of these cases (including BP and Delta Air Lines, Lehman and GM) failed to get past the summary judgment phase. Indeed, the plaintiff in another stock drop case (*Jander v. IBM*) had argued that no duty-of-prudence claim against an ESOP fiduciary has passed the motion-to-dismiss stage since the 2010 *Harris v. Amgen* decision. They had also noted that "imposing such a heavy burden at the motion-to-dismiss stage runs contrary to the Supreme Court's stated desire in *Fifth Third* to lower the barrier set by the presumption of prudence."

Enter the "more harm than good" standard that emerged with the case of *Fifth Third Bancorp v. Dudenhoeffer*, which in essence states that the plaintiff must plausibly allege: (1) an alternative action that the defendant fiduciary

could have taken that would have been consistent with the securities laws; and (2) that a prudent fiduciary in the same circumstances "could not have concluded" that such alternative action would do "more harm than good" to plan participants.

However, on May 3, the Supreme Court denied certiorari—and that basically leaves the Eighth Circuit's decision in place—not to mention the "more harm than good" standard.

—Nevin E. Adams, JD

Data 'Driven'

Fidelity fends off participant data claims

Another federal court has weighed in on the status of participant data as a plan asset.

The issue arose most recently last January in an excessive fee suit brought by the St. Louis-based law firm of Schlichter, Bogard & Denton on behalf of four participant-plaintiffs in Shell Oil Co.'s \$10.5 billion 401(k) plan. Most of the allegations were typical for this type of suit: use of funds that were too expensive

and underperforming (and that happened to be those of Fidelity's, the plan's recordkeeper), lack of monitoring of those options, and layering of fees with the managed account option.

But the issue that stood out here—one that the Schlichter firm had previously broached in its 403(b) university plan targets—was the use of participant data by the recordkeeper to solicit non-plan related services. More specifically, the suit alleged that "...Shell Defendants caused the Plan to engage in transactions that constituted a direct or indirect transfer to, or use by or for the benefit of a party in interest, a valuable asset of the Plan, Confidential Plan Participant Data, in violation of 29 U.S.C. §1106(a) (1)(D)."

The Judgment

Now U.S. District Judge Jeffery Vincent Brown of the District Court for the Southern District of Texas, Galveston Division, has granted Fidelity's motion to dismiss those claims.

First acknowledging that at the motion-to-dismiss stage, a court

“The issue of participant data as a plan asset is relatively new in retirement plan litigation ... it’s worth noting that in recent months, settlements have been negotiated in cases where this was raised as an issue that called for restrictions on data usage.”

“must accept all well pleaded facts alleged in the complaint as true and must construe the allegations in the light that is most favorable to the plaintiff”—which would, of course, meant giving the benefit of the doubt to the litigating party—Judge Brown wrote that while the plaintiffs here sought to hold Fidelity liable for “breaching its alleged fiduciary duty by sharing participant data with other Fidelity entities which would then market their products to Plan members.” He then noted, “But for this to hold true, the court would first have to rule that participant data are ‘plan assets’ under ERISA.”

In a nine-page opinion, Judge Brown explained that “ERISA provides that the term ‘plan assets’ means plan assets as defined by such regulations as the Secretary [of Labor] may prescribe,” going on to point out that “Two such regulations have been prescribed.”

The first—in 29 CFR § 2510.3-101-Definition of “plan assets”—plan investments, which Judge Brown notes “...expressly defines ‘plan assets,’ provides that ‘the plan’s assets include its investment,’ but makes no mention of any ‘data.’”

The second regulation, focusing on “participant contributions” to the plan, “likewise fails to mention ‘data,’” he writes. Indeed, Judge Brown comments that “neither of the promulgated regulations either expressly or by any plain-language interpretation includes participant data as plan assets under ERISA.”

Other Courts

Moreover, he comments that this view “that participant data does

not amount to ‘plan assets’ under ERISA—comports with how other courts have ruled on this question,” specifically citing the case of *Divane v. Northwestern University*, where, he noted, “the court rejected claims almost identical to those here—that the plan sponsor violated ERISA by permitting the record keeper to market products using participant data.”

“As in this case,” he wrote, “the *Divane* plaintiffs failed to cite any court that has ever held that releasing or allowing someone to use confidential information constitutes a breach of fiduciary duty under ERISA.” And while that court acknowledged that confidential participant information “has some value,” Judge Brown noted that “it could not “conclude that it is a plan asset under ordinary notions of property rights.”

He went on to note that at least two other cases support the same conclusion: participant data are not plan assets under ERISA, and that “the court finds no reason to depart from those holdings.”

Down for ‘the Counts’

He then proceeded to dismiss:

- Count IV (that Fidelity was a fiduciary because of its control over participant data (for failure to state a claim);
- Count VII (that Shell transferred plan assets—the participant data—to Fidelity, that Fidelity used that data to market retail products and services, and that together this conduct constitutes a prohibited transaction), because, like Count IV, that depended upon a determination that participant data was “plan assets,” and thus it also failed to state a claim; and

- Count IX—Injunctive Relief (plaintiffs wanted to stop Fidelity from using participant data to market retail products to Plan participants going forward) since granting that relief would require the plaintiffs to prevail in either of the foregoing claims. “As both of those counts have been dismissed, Count IX is, too,” Judge Brown wrote.

Not surprisingly, a Fidelity spokesperson noted in an email that the firm was “pleased with the court’s decision, which clearly reached the correct result. As the court recognized, the claims against Fidelity were entirely unsupported in the law. The plaintiffs’ complaint also mischaracterized the nature of Fidelity’s business, and how Fidelity interacts with retirement plan sponsors and plan participants. Fidelity is pleased to have been vindicated by the Court’s decision.”

What This Means

As noted above, the issue of participant data as a plan asset is relatively new in retirement plan litigation, certainly in this recent wave. While most ERISA attorneys of my acquaintance would agree with Judge Brown’s assessment (and the prior judgments of the courts he references), it’s worth noting that in recent months have been negotiated in cases where this was raised as an issue, that called for restrictions on data usage.

This particular resolution notwithstanding, the issue will likely remain a potential concern for the immediate future—and perhaps a litigation factor. **NTM**

—Nevin E. Adams, JD

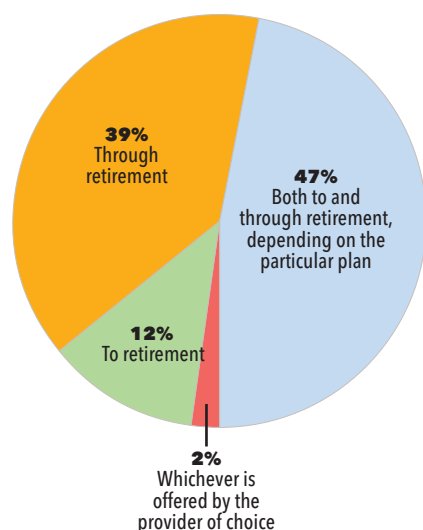
Targeting Target-Date Funds

Our reader poll reveals a wide diversity of opinion on the efficacy of TDFs.

By Nevin E. Adams, JD

The chairpersons of two of the leading retirement plan committees in Congress called for a review of target-date funds, questioning both the asset allocation of those funds at retirement and the composition of asset classes in the funds overall. So, in mid-May we asked NAPA-Net Readers what they thought?

We started by asking readers whether they, generally speaking, recommended target-date funds with a “to” or “through” retirement date glidepath:



“I believe we’re going to see new solutions that address lifetime income, therefore we might see a shift to more of a “to” approach.”

“People still retire at or before age 65, & having unnecessary equity risk when they are about to retire makes no sense. especially since there is not enough outperformance in through glidepaths to justify that huge risk.”

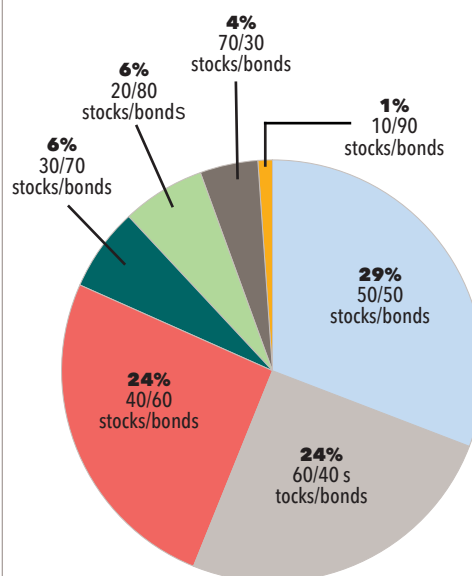
“Since most beneficiaries withdraw at retirement, they’re all de facto “to” funds.”

“The date should be there for a reason. This aligns with most participant’s expectations.”

“I prefer use “to” glidepaths as I would prefer an individual reaching retirement age elect higher equity exposure at retirement age.”

Equity ‘Able’

The chairpersons in question (Sen. Patty Murray (D-WA), Chair of the Senate Committee on Health, Education, Labor & Pensions, and Rep. Robert Scott (D-VA), Chairman of the House Committee on Education & Labor) expressed concerns about the amount of equity investment in 2020 target-date funds—and so I asked readers about the asset allocations (generally speaking) in the 2020 fund(s) of the fund families with which they generally work:



About 6% weren’t sure.

Alternative Aspects?

The letter also called out moves made by the Department of Labor under the Trump administration which they say “paved the way for the use of potentially higher

risk and more lightly-regulated ‘alternative’ assets, such as private equity”—I asked readers to what extent the target-date funds they recommended include alternative assets, such as hedge funds or private equity?

- 57% - None do
- 22% - A few do
- 11% - I’m not really sure
- 7% - Some of them do
- 3% - Many of them do

GAO Outcomes?

And then, because the GAO was asked to look into these matters, I asked readers what they thought come from that report—and multiple responses were permitted:

- 32% - Condemnation that participants don’t really understand target-date funds, even though most participants really don’t WANT to understand target-date funds
- 22% - Nothing good
- 21% - A discussion about the difference in philosophy between “to” and “through” target date glidepath philosophies
- 20% - A greater appreciation for the complexity and contribution of target-date funds
- 18% - A greater awareness of the importance and prevalence of target-date funds
- 18% - No earthly idea

Reader Comments

I am optimistic that lawmakers will try to understand “how things work” and be pragmatic as to their solutions. Too often do companies and people looking to protect their profit get involved in the discussion creating a bias that degrades the “spirit of the law.”

What will not be shown is the lack of knowledge by our elected officials about these investments. While some oversight is necessary,

overreaching governance will not help to build trust in advisors and better management by providers. Government is not suited to take care of people from adulthood to grave, people need to take some responsibility themselves.

The GAO report worries me as i do not think they have a clue about participant behavior.

God I hope this doesn't result in yet another wordy notice that participants aren't going to read, but if their final assessment is that we aren't doing enough to help participants understand TDFs, then I'm afraid the solution is going to be another dang notice.

Aside from keeping our paper industry in business this and most all government agency reports are a waste of time and tax money and generally only make things worse. Focus should be on stressing need for individual accountability to save for a secure retirement.

I think they'll conclude that glide paths and asset classes shouldn't be legislated and any results will be about disclosures.

A lot more work for advisors. And a lot more doubt cast in the minds of savers. Neither of which is good.

Seems that this study is nothing more than a way to further push a government run retirement program and further expand government reach. Asset managers in our opinion are proving to be much more wise stewards of helping build products that can truly help participants save and grow assets that they can rely on for a dignified retirement. We would help advocate as strongly as we possibly can that expanding government into this role would be detrimental at best to participants to what they have today.

Participants like target date funds. They generally are not interested in knowing what's under the hood. Fund managers in this space know that full well, and should be especially careful to not abuse that trust.

The financial professionals and companies providing advice and consulting services should be the ones to inform the plan sponsors and be required through the existing 408(b)(2) and 404(a)(5) disclosure requirements as to the cost and construct of these funds. Disclosures do little for the participant unless it is presented in "lay" terms. Legalese jargon has no resonance with everyday people and so the "good" of those documents were not as impactful as perhaps the original intent of regulation was targeting.

TDFs have provided a solution for the unengaged and hands-off employees. TDF are not the perfect solution for all participants but they do solve the investment decision making barriers that have proved to be a major hurdle for plan participants. I still believe TDF have a major role in retirement plan investing.

I applaud this focus as my concern is the proliferation of proprietary/"managed"/custom—whatever you want to call them—TDFs that seem to keep coming... and my cynical side says, as a way to monetize a relationship, not because it's a better mousetrap. Thus far, our independent research has shown that many of these "custom" TDFs have worse risk adjusted returns and oftentimes, higher fees. I think this is what the GAO is getting at. More power to them.

When a large percentage of the population chooses not to utilize the tools, resources, and people available to help them, the answer cannot be "bury them in more paper!" Why does this have to be so darn complicated?! :)

In general TDFs are a significant improvement because most people do not have the time, expertise or desire to manage an investment portfolio. Problem is most TDFs are too conservatively managed. I usually advise people to go out 5-10 years beyond their target date.

Seemingly that the glidepath & asset allocation appears to be the most important piece of a TDF, and that the focus on alt investment strategies might detract from that.

“TDFs do a great job helping participants have an appropriate asset allocation and stay the course during periods of volatility.”

Congress is not suited to evaluate. There is enough competition in the marketplace and plenty of choice.

The very essence of TDFs were to help employees who don't want to know. And it's not the "not knowing" of employers but the lack of due diligence on the part of advisors to help their clients with the required due diligence of these complex investment vehicles.

I'll be curious to see what the GAO has to say about proprietary usage and how that impacts plan pricing and participant outcomes. I'm also curious about their take on the upswing in TDF CIT usage, especially the pseudo-custom CITs being offered now by so many record keepers.

Most participants who choose to invest in target date funds (or don't elect because they allowed themselves to be auto enrolled) are not interested in managing the investments in their accounts. They want their accounts to be on auto pilot with the investment manager making decisions regarding the asset allocation and glide path. TDFs generally work very well for those participants.

Target Date funds have done so much good for so many workers. It is a shame to see the government sticking its nose into something unnecessarily in an area where I believe private industry has done a good job.

Thanks to everyone who participated in this NAPA-Net Reader Poll! **NTM**

Regulatory Review

In early May an Executive Order from President Biden, while widely expected, seems likely to produce a modification in the Labor Department's current stance on ESG investments. Also, we do have a new fiduciary rule. Well, technically, it's not a "rule"—but after years of debate, hearings, comments, litigation and preparation, there are some new rules regarding investment advice—and some help for retirement plan advisors.

Dividing Lines

Two former DOL officials speak out

Participants in the recent Plan Sponsor Council of America's National Conference recently got an opportunity few do—two former Assistant Secretaries of Labor from different administrations on the same stage.

The session, moderated by former congressman Harold Ford, Jr. (now with PNC), provided an opportunity to hear from Phyllis Borzi and Preston Rutledge on a variety of regulatory issues and proposals, including a new prohibited transaction exemption on offering investment advice, as well as ESG rule.

Ford acknowledged that both took over from administrations of different political parties—and with the Biden administration representing yet another of those leadership changes, asked the former secretaries what advice they might off the new Biden administration, and what new things that they might have on their minds.

Borzi noted that it's common for those who come into those roles to have some specific issues in mind, a relatively short list. She noted that on her list when she was confirmed to the post in 2009 was making sure that people understood the growing importance of health and welfare plans.

As for her advice to the Biden administration, Borzi said they should start by trying to build on what was done before—"not that everything that was done is bad." She noted that her tenure began with a focus on fee disclosure, which has been started by her predecessor in the Bush administration. She stated that one thing that people might be

surprised about is how "incredibly prepared" the Biden team was, and that they had a good sense of what needs to be done, with key areas of expanding coverage and ensuring adequacy.

Rutledge commented that when he came into office at the end of 2017, the Trump administration had already issued a series of executive orders. "Everybody thinks of what we do as retirement, but health care looms large" he noted, going on to state that the agency's highest priority will be the one(s) from White House if they are sent out. "Climate change is a big deal for this administration," he explained, acknowledging that environmental, social and governance (ESG) and proxy voting rules are affected by that focus, and that he expects that they will work on those issues. With regard to that focus, he noted that the comment period on new rules/regulations was "so important," explaining that every time the agency had one during his term, they made at least one significant change to rulemaking based on public comments.

ESG

Speaking of ESG, Ford asked the panel how plan sponsors should be thinking about it.

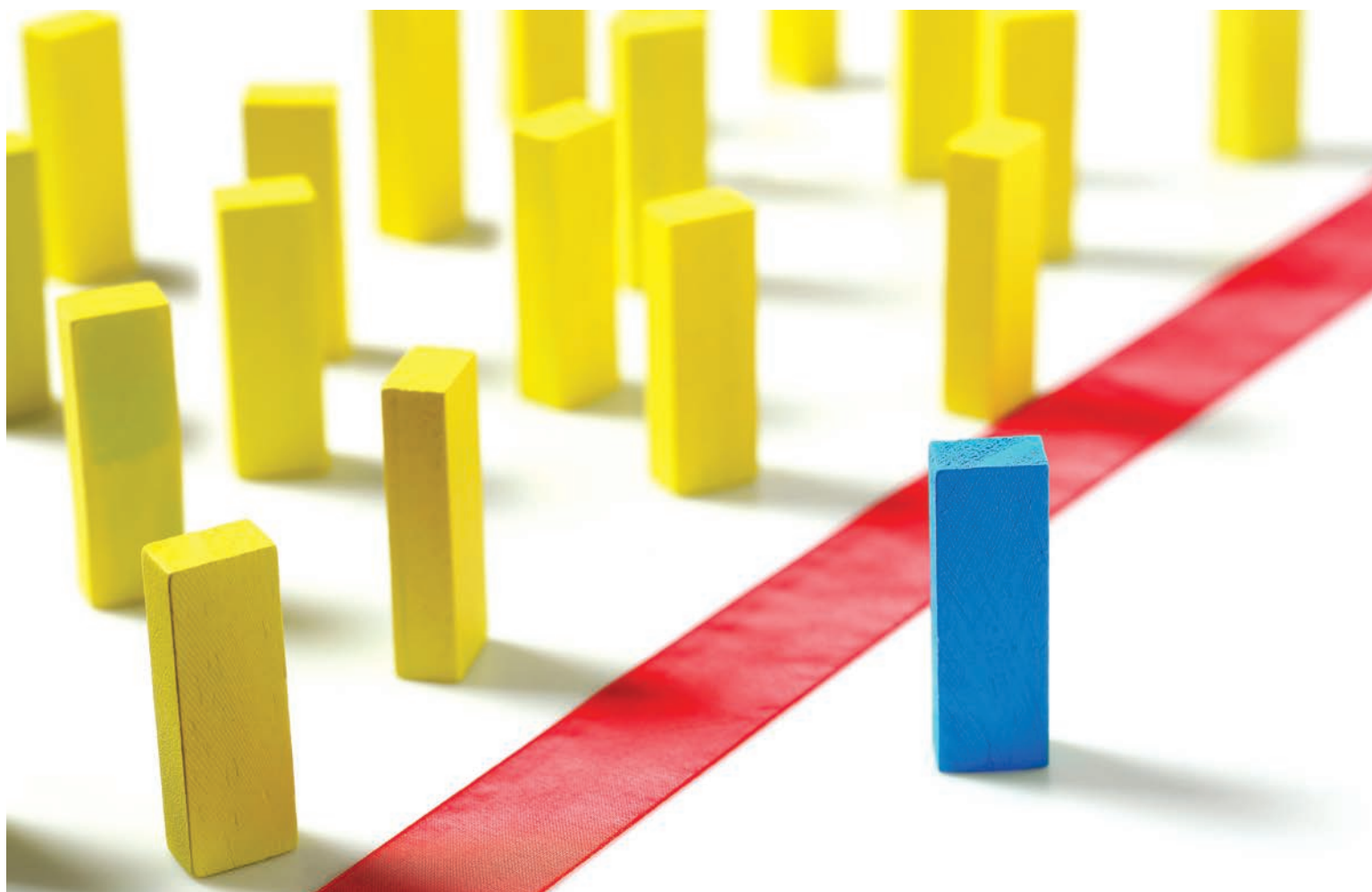
Rutledge noted that while the Biden administration has put a "pause" on the rule, his expectation is that in the institutional investing world things that are invested in ERISA plans—some \$10 trillion, he pointed out—are governed by the exclusive purpose rule, including investment decisions. Clarifying the point for those who might have wondered at the focus on "pecuniary" interests in the ESG rulemaking, he explained that it came from the U.S. Supreme

Court, which coined the term as it relates to those decisions. "When I think of ESG, it is becoming financially material," he noted, going on to comment that he thought it was the tone in the preamble to the initial proposal that was the most controversial, rather than the actual rule itself.

"That last comment is really on point," said Borzi, "the tone was how it was framed." She noted that the way of looking at ESG investments "hasn't really changed from a legal view because the statute hasn't changed" and went on to comment that, "the question is, should we put our finger on the scale, and if so, which way." Borzi explained that during her tenure the agency "tried to be more neutral in tone," a focus that she said was informed by two years of taking comments and looking at the international experience—though their focus was, of necessity, different because of ERISA.

The challenges, she said, were how to differentiate between pecuniary and non-pecuniary, as well as the shifting definitions. Not only has the name changed (from socially responsible investing), "but the substance has also evolved," she noted. Borzi cited two "missing links": a consensus definition of the term, and "most importantly any kind of benchmark or way to measure."

Consequently, Borzi explained, during her tenure the agency "first tried to recognize that times have changed, and these investments in some cases had also changed." Citing the "all things equal" standard that emerged—which allowed consideration of ESG factors if all other considerations were deemed to be equal—"What we discovered is that these tools had begun to emerge that showed that before you got to the



measurement, there were financial factors that entered into the decision," she explained. However the final result might have been viewed by the industry, Borzi said, they "tried not to put our finger on the scale"—"You could always do it, but you had to be careful," she explained. "The bad thing," she acknowledged, "is flip-flopping. There's no reason for the rules to be changed."

Rutledge concurred on the impact of flip-flopping, but commented that prior to the Trump administration's recent forays, nothing had been done in the view of notice and comment rulemaking—"this was the first time EBSA had ever taken formal comments," he noted. He added that there was a significant statement made in the preamble that pointed out there is "already an important social goal of these investments"—that is, the provision of adequate retirement income and the retirement security of participants. "That is an important

social goal, and has been since the passage of ERISA," he pointed out. "Maximizing risk-adjusted return is how we do that."

The Fiduciary Rule

With regard to the controversial path of the so-called fiduciary rule, Borzi commented that they started with the notion that making these financial decisions is hard, and that, despite an expansive focus on financial literacy and education, "we're bad at it." Acknowledging that many individuals are either not interested in it or are incapable of dealing with it, she said the agency under her leadership "started with the premise that everyone needs advice," but research showed it was hard for individuals to know whom to trust. "We wanted to level the playing field, but the line between sales pitch and investment advice was impossible to draw," she explained.

While most of the debate on the fiduciary rule has focused

on individuals, Borzi noted that following her years in private practice she came from the point of view of plan sponsors, particularly small ones. "We get them interested in offering a plan, and then 'throw them to the wolves, because they don't know how to do the plans,'" she explained. As a result, plan sponsors being victimized, were in many cases connecting with individuals with who held themselves out as experts.

She explained that EBSA enforcement data bore this sense out in lots of cases where there were breaches of fiduciary duty, where losses had occurred, "but when you tried to hold them accountable, the only person who was the fiduciary was that small plan sponsor, who had relied on those experts," she noted. "We had to choose between leaving them unaccountable, or going after the small plan sponsors," she explained, ultimately concluding that the major problem from a

“As for her advice to the Biden administration, Borzi said they should start by trying to build on what was done before—“not that everything that was done is bad.””

policy perspective was that the “financial incentives were not aligned with the financial interests of the recipients of the advice.”

Two ways were determined to fix this problem: either clearly delineate the lines between recommendations, or have another group who was simply salespeople. “We tried that in 2010, but didn’t do a good job” she commented, going on to note that the agency was “trashed” for that—and perhaps rightly so.

The other solution the agency determined was to establish a baseline of fiduciary responsibility so that those who do it are accountable. “That’s what we tried to do—to make it easier for people to rely” on the recommendations. “We didn’t do it perfectly, but it was the best we could do at the time.”

Rutledge picked up the narrative at that point, explaining that the fiduciary rule was put on pause, and that shortly after his arrival, the Fifth Circuit vacated the rule. “Our focus from that point on was that there were three regulatory bodies involved—SEC, state insurance regulators and the DOL.” EBSA’s desire—“recognizing that all operate under different rules and structures”—was to “mitigate confusion,” he explained, commenting that they “wanted the SEC to go first, and then align our focus with theirs.”

That said, and with the new version not slated to go into effect until after the change in administrations, Rutledge commented that the Biden administration’s decision to let the rule go into effect “has laid a good groundwork to calm markets,” while providing an opportunity for them to “methodically and thoughtfully” explore the issue. “The issue won’t go away,

because the core goal—protecting participants—won’t go away.”

Coverage and Adequacy

Ford then circled back to one of the issues cited earlier in the discussion—coverage and retirement security. “How do we help ensure that all Americans can achieve a secure retirement?”, he asked.

Borzi said that tackling the issue was “ripe” for a public/private partnership. “The issue is broader than retirement savings,” she explained, noting that income inequality plays a big part in it, and that the issue needs to be tackled holistically. Those efforts were “just beginning” during her tenure, she commented, explaining that they were working with community leaders to reach out to those with lower savings rates, to “go where people are.” People have to have income before we can spend a lot of time getting them to save, because people don’t believe they can, she commented.

Rutledge noted that there are now tools in place for plan sponsors that can help them set up a plan, or they can join one of the new pooled employer plans (PEPs) authorized by Congress in 2019 as part of the SECURE Act. He commented that Congress was probably going to provide some kind of governmental encouragement/subsidy for saving, specifically the Saver’s Credit, but made into a refundable credit. While the Saver’s Credit has been around for a while, “it needs to be expanded to more people and liberalized to be direct deposited to an account,” he noted. “I agree that lots more education needs to be done, but people need the capacity to save.”

—Nevin E. Adams, JD

Fiduciary ‘Advice’

Rollovers, regular basis focus of DOL guidance

The Labor Department’s guidance on fiduciary investment advice provides important insights on the agency’s perspective on the new rule, particularly as it relates to rollover advice—and a reminder that other changes may well lie ahead.

The guidance, released April 13, relates to the department’s “Improving Investment Advice for Workers & Retirees” exemption and follows its Feb. 12, 2021 announcement that that exemption would go into effect as scheduled on Feb. 16, 2021. Of most immediate interest to advisors is likely the second of two documents—a set of compliance-focused frequently asked questions—with guidance for investment advice providers who are relying, or planning to rely, on the exemption.

Rollover Roles

Significantly, the very first FAQ concludes by noting reference in PTE 2020-02’s preamble regarding when recommendations to roll over assets from an employee benefit plan to an IRA will be considered fiduciary investment advice. The DOL notes that not only are rollover recommendations are a “primary concern of the Department”—commenting that “financial services providers often have a strong economic incentive to recommend that retirement investors roll assets out of ERISA-protected plans into one of their institution’s IRAs”—but that “the decision to roll over assets from a plan to an IRA is often the single most important financial decision a plan participant makes, involving

a lifetime of retirement savings.”

That said, the FAQ continues by reminding the reader that in that PTE, it “reiterated the conclusion it had reached in its 2016 rulemaking that the Deseret Letter, Advisory Opinion 2005-23A, was incorrect in its conclusion that the 1975 fiduciary rule did not extend to rollover advice,” and states clearly that “advice to roll assets out of a plan is advice as to the sale, withdrawal, or transfer of plan assets and, therefore, is covered as fiduciary advice to the extent that the other conditions of the 1975 fiduciary advice definition are satisfied.”

Deseret ‘Disavowed’

As for its previous interpretation related to those rollover recommendations, the guidance confirms that DOL will not pursue claims for breaches of fiduciary duty or prohibited transactions for the period between 2005 (when the Deseret Letter was issued) and Feb. 16, 2021, “or treat parties as violating the prohibited transaction rules, based on rollover recommendations that would have been considered non-fiduciary conduct under the reasoning of the Deseret Letter.” However, it also states quite clearly that this grace period has ended: “Having disavowed the Deseret Letter both in its 2016 rulemaking and its 2020 exemption, the Department does not believe additional extensions are warranted or protective of plan participants’ interests in sound advice.”

FAQ-7 speaks to the “regular basis” aspect of the five-part test, noting that “a single, discrete instance of advice to roll over assets from an employee benefit plan to an IRA would not meet the regular basis prong of the 1975 test.” However, the guidance goes on to point out that “advice to roll over plan assets can also occur as part of an ongoing relationship or as the beginning of an intended future ongoing relationship that an individual has with an investment advice provider,” and that when the investment advice provider has been giving advice to the individual about investing in, purchasing, or selling securities or other financial instruments



through tax-advantaged retirement vehicles subject to ERISA or the Code, the advice to roll assets out of the employee benefit plan is part of an ongoing advice relationship that satisfies the regular basis prong.

‘Regular’ Basics

Similarly, when the investment advice provider has not previously provided advice but expects to regularly make investment recommendations regarding the IRA as part of an ongoing relationship, the advice to roll assets out of an employee benefit plan into an IRA would be the start of an advice relationship that satisfies the regular basis requirement. Oh, and the guidance notes that the 1975 test extends to the entire advice relationship and does not exclude the first instance of advice, such as a recommendation to roll plan assets to an IRA, in an ongoing advice relationship.

While—as previously explained—PTE 2020-02 became effective on Feb. 16, FAQ-2 leaves no doubt that this is hardly the

last word on the subject. While affirming that it “believes that core components of PTE 2020-02, including the Impartial Conduct Standards and the requirement for strong policies and procedures, are fundamental investor protections which should not be delayed while the Department considers additional protections or clarifications,” in FAQ-5, the DOL states that it is “reviewing issues of fact, law, and policy related to PTE 2020-02, and more generally, its regulation of fiduciary investment advice,” and that it “...anticipates taking further regulatory and sub-regulatory actions, as appropriate, including amending the investment advice fiduciary regulation, amending PTE 2020-02, and amending or revoking some of the other existing class exemptions available to investment advice fiduciaries.”

That said, the DOL goes on to clarify that those regulatory actions “will be preceded by notice and an opportunity for public comment.” **NTM**

—Nevin E. Adams, JD

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