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*the magazine*

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WINTER  
**2021**  
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## ADVISOR EVOLUTION: THE ROAD AHEAD

plus

2021 NAPA  
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BeFi 2.0

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**Steff  
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*Executive Director*  
The Retirement Advisor University, The Plan  
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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  
Hourihan**

*Founder and  
Chief Marketing Officer*  
401(k) Marketing, Inc.

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.



**David N.  
Levine**

*Principal*  
Groom Law Group,  
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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.



**Spencer X.  
Smith**

*Founder*  
AmpliPhi Social  
Media Strategies

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.



**NAPA**

National Association  
of Plan Advisors

**Editor-in-Chief**

Nevin E. Adams, JD

**Copy Editor**

John Ortman  
jortman@usaretirement.org

**Senior Writers**

Ted Godbout  
tgodbout@usaretirement.org

John Ikel

jikel@usaretirement.org

**Art Director / Designer**

Ethan Duran  
eduran@usaretirement.org

**Ad Sales**

Erik Vanderkolk  
evanderkolk@usaretirement.org

**Digital Sales**

Tony DeScipio  
tdescipio@usaretirement.org

**NAPA OFFICERS**

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Alex Assaley

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**Cover**

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# Here We Go... Again

*The NAPA 401(k) Summit: an investment in yourself and your practice.*

**B**y the time you get (and, hopefully, read) this, we'll have opened registration for the 2022 NAPA 401(k) Summit, while the Women in Retirement Conference (January 12-14) is just around the corner. The former is, of course, (finally) back to its normal placement in April.

We've had that date/location on our radar for some time now—you can't conduct an event the size of "Summit" without making those arrangements years in advance—and yet so much of what goes into the planning can only come into full focus once the previous year's event is in the rear-view mirror.

To that end, and particularly as we head toward the end of 2021, want to send a special "shout out" to the members



advisors, but by the reader polling that provides insights from you (the validation of that approach can be found in the workshop agenda itself, and by the reality that attendees often "complain" that they want to attend two or three "competing" sessions).

That said, the reality is, there's not been a lot of glamor associated with the hard work and time commitment these individuals dedicate to our events—in the case of the Summit, they literally "own" a session (and often more than one), carrying responsibility not only for panel/speaker selection, but for ensuring that those chosen fulfill their responsibilities—up to and including making sure that the session delivery itself—live up to the high standards of the nation's retirement plan

Without question it's an investment in yourself and your practice. Your engagement and involvement in this event, contributing to the interactivity of the sessions, the quality of the networking, and your engagement with industry leaders and peers creates an energy and enthusiasm that we all carry home to our various focus and practices.

Of course, there's a *lot* going on, and the months ahead look to be chock full of regulatory and legislative developments to challenge, adapt, absorb and eventually adopt and assimilate. 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 remains a unique investment in your future—and the future of your profession.

I look forward to seeing you—again—in Tampa.

**Nevin E. Adams, JD**  
Editor-in-Chief

**“Your attendance at the NAPA 401(k) Summit remains a unique investment in your future—and the future of your profession.”**

of our various event steering committees. For a lot of industry events, a steering committee is a relatively passive obligation—a group to whom the folks doing the "real" work of planning, structuring and implementing the event keep updated, mostly for a sense of validation and the occasional course correct. Oh, and so that the event can "show off" the luminaries that have agreed to lend their name (and face) to promote its bona fides.

We've long eschewed that approach—they are, after all, informed not only by their own experience and perspective as some of the industry's leading

advisor convention. So here, and hopefully with some regularity at the event itself, I want to thank and commend these folks for their generous contributions to the impact of this event.

Speaking of impact—It's worth remembering that among all the (other) things that set the NAPA 401(k) Summit apart—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.

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# The Coming 401(k) Transformation

*More employees are asking for help with their full financial picture—and retirement plan advisors, vendors and service providers are delivering.*

By Alexander G. Assaley, III

**A**s American Retirement Association CEO Brian Graff likes to say, “The 401(k) is a savings plan!” Through the end of 2021, NAPA and our parent association, the ARA, has worked continuously with retirement industry stakeholders and policymakers on ideas and proposals to further expand and enhance workplace savings and retirement programs to provide the opportunity for more individuals and workers to have access to a retirement savings plan.

With advice and counsel delivered by ARA, significant legislation was drafted to expand retirement plan coverage, incentivize companies to create plans, and reduce the hurdles and barriers to plan creation and ongoing plan compliance and management. Those proposals were included in the “Build Back Better Act” reconciliation package. Unfortunately, however, they were stripped from the package in late October. The proposals represented a significant opportunity for both America’s workers and our industry, creating an estimated 51 million new retirement savers. While disappointed, we remain optimistic that this major initiative is a “when” not “if” proposition, given the education ARA and its members have provided to policymakers.

*In the meantime, there is still a tremendous amount of value that we can collectively deliver to our clients, their employees, and our country’s workforce.* One of my primary goals as a retirement-focused advisor and President of NAPA is to help more people

get down-to-earth, meaningful guidance and advice to improve their financial know-how and achieve financial security.

As an industry, we know that the workplace is a native environment for individuals to get access to this type of financial education, or “financial wellness”—whatever term you prefer to use. While there is plenty of room to debate the *definition* of financial wellness or the “right” service model to deliver these services, the fact remains that most people will only get access to financial education, wellness, and/or advice through their employer’s workplace retirement plan.

**“Most people will only get access to financial education, wellness and/or advice through their employer’s workplace retirement plan.”**

That’s where the quote about “the 401(k) is a savings plan” becomes so relevant. Today, employees are asking for help with their full financial picture—and retirement plan advisors, vendors and service providers are delivering. In the last 5-plus years, services have expanded beyond the retirement plan’s investment mix and deferral elections to a much broader scope of personal finance—and I believe that this has been a tremendous benefit to everyday savers. In fact, we should be delivering more of



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.

these financial wellness and advice services—providing independent and objective (and, as possible, fiduciary) advice to help employees with the biggest and toughest money decisions in their life.

With this philosophy, the 401(k) expands from just a savings vehicle for retirement to a savings vehicle (either directly or indirectly) for life’s other financial milestones—such as building emergency savings, paying down debt, saving for health care expenses, etc. Not all of these services will be built directly into the 401(k) (or 403(b)), but retirement plans will serve as the chassis to help employees make wise financial decisions across their entire financial picture.

The last two years have been a transformative period in many ways. Among all the things that changed in 2020 and 2021, one revelation we have witnessed is a larger number of planned and anticipated retirements across our clients. As advisors who specialize in delivering individual financial coaching, we realize that a large portion of our clients/401(k) savers who have done well saving for retirement are now in significant need of help turning their 401(k) into retirement income for the rest of their life. Most of these 401(k) savers don’t, and won’t, have access to their own financial planner or advisor, for a lot of reasons. *But they need help!*

I expect that the next major initiative for our industry to tackle is how to provide for this need. Of course, this isn’t new. There are products that already provide guaranteed income, such as guaranteed withdrawal solutions, annuities and other income-oriented products. However, I anticipate that the interest and utilization of these products will increase in the future. Therefore, the transparency, complexity, disparity in offerings and portability will all be analyzed and debated heavily, and ultimately addressed—as we see the 401(k) evolve into: (1) a savings program, (2) a financial wellness platform, and (3) an income program for America’s workers. **NNTM**





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# Wait 'Til Next Year

*Remarkably, even in this year of partisan bickering, retirement issues remain an area in which potential solutions retain bipartisan support.*

By Brian H. Graff

**“W**ait ‘til next year” is something that disappointed fans often say when their team has come close, but fallen short of that championship trophy.

But as NAPA commemorates its first decade of existence, there’s a lot to celebrate and acknowledge with a year of movement and accomplishment the likes of which we’ve not seen in those 10 years.

Most of us were still catching our breath from 2020, when we had to go right from the passage of the SECURE Act to the extensive COVID relief contained in the CARES Act—with our industry (and the world) all working from home. Only to be confronted with a series of proposed and final regulations from the Trump administration—including a fiduciary standard that was ultimately allowed to take effect—and regulations on considerations regarding environmental, social & governance factors that the Biden administration said it would not enforce while it considered an alternative approach.

On the former we got some much needed interim clarity on rollovers at the NAPA DC Fly-In Forum from Tim Hauser, Deputy Assistant Secretary for National Office Operations. As for the latter, we expressed our concerns about the Trump administration’s ESG regulation, then worked with the Biden administration to provide a level playing field for this investment class—only to see a new proposal that seems to overcorrect. So we still have some work to do—and likely a new regulation to absorb... next year.

This year we’ve also been highly engaged in the crafting of several significant pieces of legislation, notably the Automatic Retirement Plan Act, a bill introduced by House Ways and Means Committee Chairman Rep. Richard Neal (D-MA). This made it all the way to the “Build Back Better” budget reconciliation bill before it, along with other elements, was dropped during negotiations.

This, along with a proposal from Sen. Ron Wyden (D-OR) to expand and enhance the current Saver’s Credit to a refundable Saver’s Match, could create some 63 million new retirement savers and add more than \$7 trillion in new savings over the next decade, according to projections we developed in partnership with Jack Vanderhei of the non-partisan Employee Benefit Research Institute and Judy Xanthopoulos of Quantria Strategies. Those potential outcomes were highlighted by Sen. Wyden as “jaw-dropping” in testimony we presented at a hearing before the Senate Finance Committee in last July—and indeed they are, including the potential expansion of more than 600,000 new plan sponsors.

Remarkably, even in this year of partisan bickering, retirement issues remain an area in which potential solutions retain bipartisan support. That was evident not only in the full turnout for the Senate Finance Committee hearing noted above, but also in the Retirement Security and Savings Act legislation introduced by Sens. Rob Portman (R-OH) and Ben Cardin (D-MD) and the



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

Securing a Strong Retirement Act of 2021 (often referred to as SECURE 2.0), introduced by Rep. Neal and Ways and Means Committee Ranking Member Kevin Brady (R-TX). Both are sweeping pieces of legislation that could help remedy current issues in retirement saving by expanding eligibility, matching student debt repayments, expanding catch-up contribution limits, and helping more small businesses offer these programs. With both Portman and Brady announcing their retirement from Congress at the end of next year, the prospects for consideration and passage seem likely in 2022.

More recently, the Retirement Improvement and Savings Enhancement (RISE) Act was introduced by the House Education and Labor Committee’s Chairman Bobby Scott (D-VA) and Ranking Member Virginia Foxx (R-NC), along with Rep. Mark DeSaulnier (D-CA), Chairman of the House Subcommittee on Health, Employment, Labor and Pensions, and Rep. Rick Allen (R-GA), that Subcommittee’s ranking Republican. That legislation, which is supported by the American Retirement Association, contains many of the provisions included in the Securing a Strong Retirement Act of 2021, and in fact, will be merged with that bill—next year.

Of course, we’re still working on, and advocating for, continued regulatory clarity on legislation regarding retirement income and pooled employer plans, and continue to work with Congress, the Biden administration and regulatory agencies on a host of initiatives to help improve and expand the nation’s retirement system.

And if you think we’ve been busy in 2021... just wait ‘til next year! **NNTM**



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# Trends ‘Setting’

*As we send 2021 into the history books and look ahead to 2022, there are several key trends to keep in mind—but in this issue we highlight three: ESG, financial wellness, and the often disparate participation—and thus outcomes of participation by different racial groups.*

*With regard to the former, while institutional investors continue to embrace investments with an environmental, governance and social focus, DC plans—even in a survey heavily weighted toward larger programs—are apparently still taking a wait-and-see approach. Ditto financial wellness, which though much on the minds of plan sponsors, and increasingly on their “take action” plans, still seems in “just getting started” mode. Our final section examines the factors—and potential solutions—to help mend those gaps for Hispanic workers.*

## ‘Fence’ Post

*Who’s incorporating ESG and who’s still on the fence?*

While a record number of institutional investors are incorporating ESG factors into their investment decision-making, there apparently still are a number of ongoing disparities, according to a new survey.

The results of Callan’s ninth annual *ESG Survey* reveal that a record 49% of institutional investors incorporated environmental, social and governance (ESG) factors into investment decisions, which represents a 123% increase since the survey’s inception in 2013.

In addition, 40% of respondents not yet incorporating ESG factors into investment decisions are considering it, which is the highest rate in the survey’s history. This figure had fluctuated in the 10%-20% range prior to 2020, suggesting that interest in ESG incorporation is rising significantly. The survey also found that 55% of those incorporating ESG did so in the past five years.

### Ongoing Disparities

For those incorporating ESG, the most frequently cited reasons among respondents for doing so were to align the portfolio with the organization’s values (55%) and to meet fiduciary responsibilities (54%). Aligning with their organization’s values was a particularly relevant reason for foundations (90%) and public funds (75%).

For those not incorporating ESG, the most frequently stated responses were that they are considering it or that its value was unproven. According to the findings, 40% of investors that were not incorporating ESG were considering it and had not decided. Roughly 38% of investors indicated they did not incorporate ESG because the benefits to their plan were unproven or unclear.

Similarly, 31% of respondents said they were not convinced that ESG contributes to performance. Moreover, lack of regulatory clarity was cited by 29% of those not incorporating ESG. Callan notes that its interaction with clients, particularly with ERISA plans, is consistent with this finding.

In the overall fiduciary decision-making process, the most common forms of ESG incorporation were pursuing education, indicative of the rising interest in the topic, and incorporating language in the IPS.

In the manager selection process, more than 60% of investors that integrated ESG considered those factors in every investment manager selection they made, and also communicated to investment managers the importance of ESG to their organization. Callan notes that investment managers are being asked increasingly to address their approach to ESG in client and prospect meetings, regardless of whether it’s a dedicated ESG mandate.

## Adoption by Type

Regarding the ongoing disparities, the results show that 63% of public plans, 57% of foundations and 50% of endowments incorporated ESG factors into their investment decisions, while only 20% of corporate plans did the same. Callan suggests that this low level of adoption for corporate plans reflects a lack of regulatory clarity, as the Trump and Biden administrations adopted contrasting positions on the topic of ESG.

Despite the growth in interest in ESG within the institutional investing community, data from the Callan DC Index further shows that adoption of dedicated ESG options among DC plans is still relatively low. The firm suggests that this lack of dedicated ESG fund adoption “masks” the growing interest in assessing all DC plan managers’ ESG integration.

According to Callan’s DC Index, about 13% of DC plans offered a dedicated ESG option. But this topline number overshadows a large divide among plan types: only 5% of corporate DC plans offered a standalone option, compared with 43% of public and nonprofit plans.

What’s more, utilization for all plan sponsor types remained low—allocations ranged from 0.2% to 3.1% of total plan assets, with an average allocation of 1.2%. Callan notes that these utilization and prevalence numbers are on par with the figures for emerging market equity, REITs and global/global ex-U.S. fixed income.





Meanwhile, according to Callan's DC Trends Survey, there has been a slow but steady increase in the percentage of plan sponsors that added an ESG option to the investment menu in the previous year—up from 1.5% in the 2018 survey to 5.3% in the 2020 edition.

The survey was conducted from May to June 2021, and reflects input from 114 U.S. institutional investors with assets under management ranging from small (under \$500 million) to large (more than \$20 billion). Note, however, that while respondents included both public and corporate DB and DC plans, as well as from endowments and foundations, the sample size for corporate plans was 22%, with only 5% of that representing corporate DC plans. The largest share of respondents was from endowments and foundations (38%), followed by the government sector (35%).

—Ted Godbout

### **'Focus' Groups**

*Financial wellness focus shifts—some*

**W**hile the challenges of, and interest in, financial well-being programs remain strong, there has been some shuffling of program priorities, though advisors remain key.

According to the fourth annual Employee Benefit Research Institute (EBRI) *Financial Wellbeing Employer Survey*, costs continue to be cited as the top challenge<sup>1</sup> in offering financial wellbeing programs—and as no surprise, employers are (still) looking for ways to measure their impact, with employee retention and productivity being at the top—and with productivity notoriously hard to measure, EBRI says retention and satisfaction are more likely measures to be tracked. Beyond costs, EBRI found that data and privacy concerns—and complexity surrounding the programs—are

the top challenges employers say they face. More on that shortly.

Now, less than half (46%) of the employers surveyed that were (at least) interested in implementing financial wellbeing benefits were, in fact, offering a program in 2021—pretty much unchanged from previous surveys (2018–2020). EBRI commented, however, that there was a shift—that increasingly, employers that do not currently offer financial wellness initiatives say they are actively implementing a program (12% in 2018 and 34% now), rather than just being “interested” in doing so (that had been 34%, slipping now to 20%).

Unsurprisingly, the largest firms (10,000 or more employees) were more likely to be currently offering a program than the small employers (72% compared with 44% for employers with 2,500–9,999 employees and 41% for employers with 500–2,499 employees), but EBRI found no significant difference in the

proportion currently offering when it came to the two smaller employer sizes.

#### Access to Advisors

Nearly two-thirds (64%) reported their employees have access to retirement plan representatives and financial advisors either in person, through the phone, or via video calls, though access to financial coaches (30%) and debt counselors (20%) was much less likely available. Seventy percent of employers agree that it is necessary that financial wellbeing benefits are offered by retirement plan providers.

#### Utilization

Of the companies currently offering financial wellbeing programs:

- 31% said that more than half of eligible employees were using the benefits they offer; and
- 28% said between a quarter and half of eligible

employees were using the benefits.

However, nearly a third (30%) said that only somewhere between 11% and 25% were, and another 8% put that number at less than 10%.

#### Expectations

Forty-one percent of firms offering these benefits said that the share using them was higher than expected, and 43% said the use matched expectations. Firms with fewer than 10,000 employees, with a strategy, who have created a financial wellbeing score or metric, or who held employee interviews or focus groups, were more likely to have had their employee use exceed their expectations, according to the EBRI report.

#### Barriers

The top reasons that were cited by benefit decision makers for workers not being more engaged in their financial wellness benefits were:

- lack of understanding on how the benefits work (42%);
- costs/fees of benefits to employees (30%); and
- not wanting to disclose finances/financial issues to employer (28%).

However, workers from the Workplace Wellness Survey who were not participating in financial wellness benefits were less likely to cite these as reasons for not participating. Instead, they cited all the reasons offered almost equally likely, according to EBRI. Which, of course, suggests that there is a misalignment in perspective that might undermine attempts to resolve those issues.

#### Goals

Companies' top issues to address with their financial wellness initiatives were:

- retirement preparedness (36%);
- health care costs (33%); and
- financial-related stress (30%).





### Costs

As noted above, cost remains a focus, but costs per employee being paid for these initiatives varied significantly from firm to firm, with most having said they spend between \$5 and \$250 per employee, though most commonly, employers cited costs of \$50.01 to \$100 per employee (24%) for these efforts. Costs appear to be climbing—as just over half (52%) of the companies reported the costs being more than \$50 per employee.

The focus of these programs has shifted some as well—initiatives that are a top priority of employers, deal with immediate financial help—emergency fund<sup>2</sup>/employee hardship assistance and short-term loans through payroll deduction. Roughly half of these emergency fund/hardship assistance features currently offered were added in response to the COVID-19 pandemic, according to the report. Some benefits such as student loan debt assistance have lost importance, whereas emergency savings/hardship assistance has grown in interest.

### Shifts

Only two benefits showed a significant change in being offered from 2020—employee discount programs and payroll advance loans. The percentage of companies currently offering payroll advance loans increased to 26% in 2021 from 20% in 2020, while the percentage currently offering employee discount programs decreased to 51% in 2021 from 60% in 2020.

Interestingly enough, when benefit decision makers were asked about the impact of offering an emergency fund or employee hardship assistance, EBRI reports that half (51%) reported that they have seen increased employee contributions to their employees' retirement plans, while 49% saw increased employee contributions to their employees' health savings accounts (HSAs) or flexible spending accounts (FSAs), and 36% saw reduced loans/hardship distributions.

—Nevin E. Adams, JD

**“42% of participants are leaving balances in their DC account in the three years following retirement. This is up significantly from 28% in 2018 and more than double the percentage in 2009 (20%).”**

### ‘After’ Words

*More participants keep assets in DC plans after retiring*

A new study on DC plan participant activity found a sharp jump in the number of participants staying in their plans after they retire.

Findings from J.P. Morgan Asset Management's *Retirement by the Numbers* research reveal that 42% of participants are leaving balances in their DC account in the three years following retirement. This is up significantly from 28% in 2018 and more than double the percentage in 2009 (20%).

Further supporting the view of staying in a plan, the firm's 2021 participant survey found that as many as 85% of respondents said they were at least “somewhat likely” to stay in their plans after retiring if there was an in-plan retirement income option. In contrast, the firm's earliest studies showed that most participants withdrew all their plan assets within three years of retiring.

At the same time, retirees' income needs as they transition into retirement are higher than conventional wisdom suggests and do not remain constant but decline with age, the study notes. J.P. Morgan found that retirees are spending at higher-than-expected levels in the early years of retirement, and suggests that retirees should plan on needing to replace more than 90% of their working income at retirement. The firm notes that this is a significant increase from the widely accepted 70% to 80% standard. This number decreases

gradually in retirement, to 70% at age 85.

This new report combines the firm's “Ready! Fire! Aim?” research with insights into household spending patterns to provide a comprehensive view of how individuals are using their DC plans as a savings vehicle and how they are also spending as they move through retirement.

### Contribution Rates and Withdrawals

Meanwhile, most people are still not contributing enough to reach safe funding levels, with average starting contribution rates beginning at 5% and never reaching 10% before retirement, according to the report.

“We can see from the first *Retirement by the Numbers* report that retirees need much more in savings to accommodate higher-than-expected spending needs in retirement,” says Katherine Roy, J.P. Morgan Asset Management's Chief Retirement Strategist. “In light of these findings, it's critical that plan sponsors consider incorporating features such as automatic contribution and escalation to increase lagging contribution rates.”

Roy further notes that as more participants keep assets in plans post-retirement, tools to help participants spend down in retirement will prove increasingly valuable.

The research also found that modestly fewer working participants over the age of 59½ are taking pre-retirement withdrawals, though the number is still notable and the size of the average withdrawal amount remains large. A range of 6%-10%

of participants over the age of 59½ withdrew, on average, 55% of assets, the study notes.

### Implications

J.P. Morgan notes that the findings have several implications for DC plan and target date fund glide path design. For instance, the firm suggests that plans can help participants help themselves through the broader use of automatic contribution and escalation programs at much higher starting levels and increase rates than typically used today. In fact, the firm's biennial participant survey published earlier this year revealed that participants largely think they should be saving more than they are. Moreover, almost all of those who were auto-enrolled with auto-escalation reported being satisfied with that approach.

Plan sponsors should also consider how these behavioral trends are likely to interact with their TDF selections to better understand the type of glide path designs that may best position participants for retirement funding success. The firm suggests that the average participant needs a much higher savings balance to realistically reach at least a minimum level of adequate replacement income.

Based on its understanding of the saving and spending patterns of plan participants, the firm notes that it plans to evolve the glide path across its SmartRetirement suite of target date funds, increasing equity allocations while maintaining broad diversification and de-risking in the years leading up to retirement.

Additionally, as more participants use their plans as investment vehicles post-retirement, it is important to consider how the distinct accumulation and decumulation phases work together, to help enhance the participant experience.

The research draws upon actual saving and withdrawal patterns from approximately 4,500 DC plans with more than 1.4 million participants. Retiree spending data comes from more than five million de-identified J.P. Morgan Chase Bank households.

— Ted Godbout

## Filling the Gap

*What's leading to low Hispanic retirement savings rates?*

When it comes to identifying the drivers of the savings and wealth gap of Hispanic Americans compared to white households, income is seen as a major factor, but a new study suggests there's more to the story.

In *A Closer Look Into the Finances of Hispanic American Households*, Morningstar set out to gain a better understanding of the extent of the U.S. racial wealth gap and its underlying causes, looking specifically at the current state of savings for Hispanic households based on data from the *Panel Study of Income Dynamics*.

At the median level, Hispanic households were found to have substantially lower assets, as well as lower savings rates than white households. For instance, the researchers found, among other things, that only 31% of Hispanic households with income (of at least a part-time job) report that they are currently participating in a workplace retirement plan—compared with 51% of white income-generating households. In addition, research based on the Federal Reserve's 2019 *Survey of Consumer Finances* shows that the median Hispanic household has only \$36,100 in wealth, which is less than 20% of the median white household.

Hispanic households are also 17% less likely than white households to have access to a retirement plan through their employer, and private retirement plans do not fill the gap, as only 8% of Hispanic households report having an individual retirement account or similar private plan.

Differences in participation may be due to a range of factors, from varying access to workplace retirement vehicles, to the choice to participate for those given access, to the financial capability to participate. "Given that retirement savings make up a significant portion of overall savings for everyday individuals, this lack in accessibility can have a large impact on the overall savings rates of Hispanic households,"

write Samantha Lamas and Michael Thompson, behavioral researchers at Morningstar and co-authors of the report.

Overall, however, the lower savings rates of Hispanic households appear to be the result of a combination of accessibility issues, income disparities, educational and geographical differences, differences in how families allocate savings, and, based on existing research, a history of discrimination, the report further observes.

### Income Factors

Not surprisingly, income is a major factor that drives savings rates across all households, yet its impact can be different based on ethnicity and nativity. For instance, the research found that every 10% increase in income is associated with a 0.48-percentage-point increase in the savings rate for white households. However, this results in only a 0.30-percentage-point increase for Hispanic households and only a 0.23-percentage-point increase for Hispanic households with adults born or raised outside the United States.

Moreover, even when accounting for a range of factors that may affect saving, Morningstar found that the median Hispanic household's active savings rate is still 1.3 percentage points lower than white households. The researchers estimated this through regression models that simultaneously account for multiple factors including race, geographic region, urban versus rural location, income, household structure, as well as the age, nativity and education of the head of household.

Even when comparing those who have access to retirement accounts, the researchers found that Hispanic households' retirement savings rate is lower than white households—this time by 0.21 percentage points—and income remains a key factor affecting retirement savings rates.

### Low-Yield Assets

Hispanic households are also more likely to own wealth through





low-yield assets and are not using other high-return vehicles to offset lower retirement savings. Compared with white households, Hispanic households hold more of their wealth in homes (48% versus 30%) and automobiles (11% versus 5%) and less wealth in nonretirement investment accounts (5% versus 11%) or businesses (4% versus 7%), the report shows.

"Existing research suggests that there is a progression of assets in relation to income, where individuals start with homes and vehicles then move on to higher-return assets as their income grows. So, consistently lower income may be a factor for why Hispanic household wealth may

concentrate on lower-yield assets," the Morningstar researchers observe.

#### ***Solutions to Boost Savings***

To address persistent low retirement savings rates among Hispanic households, the researchers propose a few solutions. Noting that Hispanic households are more likely to borrow from retirement accounts compared with white households, one strategy to avoid this problem is having separate emergency savings accounts, which can be offered along with traditional retirement savings accounts, the report suggests.

Hispanic households would also benefit from employers that

do more to simplify the savings process and set up automatic enrollment in workplace retirement plans. For workers who do not currently have access to plans, innovations, such as pooled-employer plans, may allow smaller employers to offer this benefit, as well as state-run IRAs.

Also, because of the broad diversity of Hispanic American households, the report suggests that educational initiatives to promote saving activity and trust in public and private wealth accumulation vehicles could benefit from targeted communications and multilingual outreach. **NNTM**

— Ted Godbout

#### **FOOTNOTES**

<sup>1</sup> Forty percent of employers said that they fully pay for financial wellness benefits and another 46% shared the costs with employees. Only 14% said the benefits were fully paid for by employees.

<sup>2</sup> According to EBRI, the most common emergency fund program offered was withdrawals from after-tax retirement funds (52%), while employee relief/compassion funds (39%) and paid-time-off donations or leave sharing (38%) were the next most likely currently offered features. The least likely emergency fund or employee hardship assistance programs being offered were sidecar or rainy day accounts (15%) and low-interest or no-interest loans (22%). In other words, emergency savings vehicles most commonly come in the form of money/funds that are already available.

# Painting Your 2022 Strategic Marketing Plan

*“All you need to paint is a few tools, a little instruction and a vision in your mind.”—Bob Ross*

By Rebecca Hourihan

**I**n a recent survey, 77% of advisors admitted that they do not have a marketing plan.<sup>1</sup> If you are without a vision in mind and looking to create one, this column will give you the outline, color and perspective to get started. So, pick up a brush and let's get to work!

## 2022 Big Picture Planning

First, answer these questions:

- What is your 2022 revenue goal for your retirement plan business?
- How many plans do you hope to acquire?

- What percentage of your plan business do you expect to retain?
- What is your target market? (Geographic location, plan size, number of participants, niche industries, employer characteristics, employee demographics and other unique identifiers)

## Sketching Your Outline

Did you know that one in three plan sponsors is looking to change advisors? The top two reasons why are that they want increased retirement plan

expertise and guidance on financial wellness programs.<sup>2</sup>

As plan sponsors go through the prospect-to-client journey, they enter four distinct phases:

- 1. Awareness:** when the plan sponsor realizes that something within their company's retirement plan needs attention.
- 2. Interest:** when they begin researching for more information, asking questions and gathering knowledge.
- 3. Decision:** when finalist meetings occur to discuss capabilities and learn how





services will align with plan goals.

- 4. Action:** where the plan sponsor decides to hire you as their plan advisor.

In each stage, marketing essentials are necessary to advance your prospect forward. As a professional retirement plan advisor, you should have these resources readily available to present and demonstrate your abilities.

### Primary Colors

Here is a list of marketing essentials that most retirement plan advisors have at their fingertips. Place a checkmark next to each item you have available and, more importantly, that you feel represents your company and services in a professional capacity. In other words, you like these marketing essentials.

- ☐ Website
- ☐ Company overview
- ☐ Factfinder
- ☐ Service brochure
- ☐ Pitch deck
- ☐ Business cards

If the checkboxes are blank or you lack conviction, these are opportunities for improvement. Decide which items are most important, then seek out partnerships that help strengthen your essentials to increase your brand authority and recognition.

### Mixing the Paints

In the interest stage of the sales pipeline, your plan sponsor prospects are researching for more information. This can include something as simple as looking you up on Google, clicking on your LinkedIn profile or conducting a deep dive into a specific retirement plan topic.

Check the box next to all of the digital marketing resources you use to promote and capture new business growth opportunities.

- ☐ Blog articles
- ☐ Digital advertisements
- ☐ Email campaigns

- ☐ Infographics
- ☐ Landing pages
- ☐ Newsletters
- ☐ Podcasts
- ☐ Search engine optimization
- ☐ Social media posts
- ☐ Videos
- ☐ Webinars

Due to the pandemic, more and more plan sponsors are conducting their new advisory relationship research online, so if your digital image is muted, it's time to add bold definition so you can stand out in the digital world.

**Pro tip:** Make sure you enjoy doing each of these marketing activities. If you're not excited about completing them, then don't. If an idea puts a smile on your face, prioritize it. Always remember that marketing should be fun.

### It's Not Blue, It's Cerulean

Bring consistency and scalability to your business with a marketing calendar. An easy way to create a calendar is to simply open an Excel spreadsheet and fill in the months. Then add in your retirement plan topics, type of content, distribution frequency and distribution channels.

Some hot topics for 2022 include post-pandemic recovery; Diversity, Equity and Inclusion (DEI); financial wellness; inflation; Cycle 3 restatements; ESG investments; unemployment; talent wars; remote work; work/life balance; company culture; cryptocurrency; SECURE Act 2.0; lawsuits and a lot more. Select the topics you are interested in and then find/create content that appeals to your audience.

Your marketing calendar should include the details necessary to bring your vision to life and help you achieve your business goals.

### Bold Definition

Now that you've laid out the essential marketing materials, distribution channels and plan sponsor topics, it's time to put

your vision into action. To do this, you need to define your budget and timeline.

Average advisory firms invest 1.6% of their annual revenue in their marketing budget.<sup>3</sup> However, top performing advisory offices invest 2.1%, and they experienced a 20% growth in AUM. So, is increasing your marketing budget by 0.5% of your revenue a worthwhile investment?

2.1% of your 2021 revenue  
= \_\_\_\_\_ = your 2022  
marketing budget

Interestingly, in most other industries, the recommended annual marketing investment is 7%-10%. If you're wondering if you should invest more in marketing, imagine the vivid results you could achieve.

Next, list the top five marketing priorities you would like to accomplish within the next 12 months.

In 2022, I want to:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_

Find opportunities for improvement. When you have a defined marketing plan, it's easy to achieve success. Know that if you believe you can do it, you can.

Now put down your pen and take a look at your 2022 business marketing plan. Congratulations on great work—excited to hear about all your success in the new year!

*Thanks for reading and happy marketing!* **NTM**

#### FOOTNOTES

<sup>1</sup> "Only 23% of Financial Advisors Have a Defined Marketing Strategy, According to Broadridge Study." Broadridge, Nov. 18, 2020.

<sup>2</sup> "Plan Sponsor Attitudes." Fidelity Institutional, July 20, 2021, at [https://institutional.fidelity.com/app/item/RD\\_13569\\_26306.html](https://institutional.fidelity.com/app/item/RD_13569_26306.html).

<sup>3</sup> "2021 RIA Benchmarking Study." Charles Schwab Advisor Services, July 2021, at [https://content.schwab.com/web/retail/public/about-schwab/schwab\\_ria\\_benchmarking\\_study\\_2021\\_0721-1KN1.pdf](https://content.schwab.com/web/retail/public/about-schwab/schwab_ria_benchmarking_study_2021_0721-1KN1.pdf).



# The STEM Test

*Which social media personality would you like to be?*

By Spencer X Smith

**W**ho would you like to be online? How can you find your social media personality type to intentionally engage within digital communities?

Social media success is based on connecting with others and interacting with them on a regular basis. Finding a way to express your passions and interests through an account can be challenging when you're not sure where to begin. You may have a calling to create content that inspires people, makes people laugh, challenges their beliefs, or simply supports them.

This process of identifying your social media personality type will lead you to curating an account that works with your strengths and

ambitions. To find this personality type, you can start with the three core elements of what you can share. Based on these elements, we can establish which facet of the STEM (Smart, Thoughtful, Entertaining or Motivating) methodology you embody.

## What You Share is Fulfilling to You

Think of this as the old adage in sales: "Things work so well that you stop doing them." After the novelty of trying something new subsides, do you stick with it? From the start, you should feel excitement in sharing your posts with your followers with hopes of eliciting some response from them, which leads to the next core element.

## What You Share Helps Your Audience Feel the Way You'd Like Them to Feel

Imagine you share something in-person at a party or a networking event. Ask yourself which one of these reactions makes you feel the happiest.

- "That's interesting."
- "I feel better knowing that."
- "That was fun."
- "I need to do that."

The reaction that affects you most positively will help you determine your target audience for your social media themes, as well as the audience's collective needs. The four main types of audience needs are discovery, desire, escapism and inspiration.



Social media audiences can be explained with the “1% rule” of the internet: 90% of people online are spectators, 9% of people online like, share and comment and 1% are creators. These 1% are the people who *create content* and by default become the voice of their network.

### Which Personality Are You?

We find the needs of our audience based on how we want them to react, and then we can categorize ourselves into one of the four STEM personalities: Smart, Thoughtful, Entertaining or Motivational.

Reaction	Audience Needs	Your Type
“That’s interesting.”	Discovery	Smart
“I feel better knowing that”	Desire	Thoughtful
“That was fun.”	Escapism	Entertaining
“I need to do that.”	Inspiration	Motivational

**Smart** personalities are our teachers, innovators and thought leaders. They encourage people to open their eyes to see things in a different light or discover something new. Think of someone historical like Ben Franklin—people who stimulate your curiosity about the world and encourage you to ask questions. These thought leaders use their platforms to help their audience expand their worldview, encourage conversations and challenge perspectives.

Despite the difference in their methods or platforms, those who identify as Smart want their audience members to feel the same way: intrigued. Smart types want their audience members to feel as though their knowledge has expanded just by interacting with the content.

**Thoughtful** personalities are excited, enthusiastic and often extroverted individuals, and they use social media to promote other people, companies or causes. Their audience members have an overt need or desire for something. These personalities like to focus on efficiency—whether that’s making hard things easy, or simply by doing things better.

People emerge on social media with these personalities in different ways. Oprah Winfrey, for example, has used her various platforms for decades to promote causes, elevate others and encourage change. Or someone

like Marie Kondo, who uses her unique skill of decluttering to help people simplify their lives. Both share similar desires to help people but approach it in ways that suit them.

Shifting to people that center around fun, **Entertaining** personalities want people to be happy they invested their time with them. Their audience needs an escape, and these entertainers use their funny, engaging traits to provide that. One personality that dominates YouTube is “Ninja” ([youtube.com/user/NinjasHyper](https://www.youtube.com/user/NinjasHyper)), who delivers his funny remarks while streaming videogames. Another personality with a loud presence is Kevin Hart, who uses Twitter and Instagram to bring out belly laughs.

Lastly, we have **Motivational** personalities. These personalities

draw on people’s need for inspiration; they want to help people find the courage to pursue something. Through their enthusiastic and excited nature, audience members feel motivated to do something. Examples of motivational personalities are Brene Brown ([twitter.com/BreneBrown](https://twitter.com/BreneBrown)) and Tony Robbins ([twitter.com/TonyRobbins](https://twitter.com/TonyRobbins)), both of whom have a strong presence on Twitter and focus on self-growth and development.

Now that we’ve helped you discover a personality type with which you most closely align, let’s choose the social media platforms that best suit that personality. Each type of personality benefits from a different combination of social media platforms:

- **Smart** personality types should use LinkedIn, YouTube, Facebook and Twitter.
- **Thoughtful** personality types should use LinkedIn, YouTube, Facebook and Pinterest.
- **Entertaining** personality types should use YouTube, Facebook, Instagram and Twitter.
- **Motivational** personality types should use Facebook, Instagram, YouTube and Twitter.

There isn’t one perfect way to reach the right audience. Focus your efforts on creating content that fulfills you, and then find a context (platform) appropriate for your audience to consume that content. The social media platforms can then easily feed each other, so to speak, as you encourage your audience to follow you on myriad channels.

The STEM method for social media personalities is a tool you can use to guide your content creation. You can use it to help identify topics or ideas that consistently make you feel good sharing. Having content that you believe in first, and tailoring your process based on your personality and platforms, can help you become the voice of your network. Become part of the 1%—a user who creates content. **NTM**





# BEHAVIORAL FINANCE

Where finance and economics meet psychology  
and sociology. By Judy Ward

# 20





“**T**

he first generation of behavioral finance is very focused on finance and economics,” says Joshua Dietch, Boston-based vice president and group manager-retirement thought leadership at T. Rowe Price. “The second generation extends the lens to include both psychology and sociology.”

Impactful as “BeFi” was to plan design, the emerging second generation of behavioral-finance thinking encompasses more than utilitarian factors in peoples’ decision making about what they do with their money.

And in adopting what is arguably a more real-world view, this school of thought may challenge long-standing maxims such as the idea that everyone needs to save at least 15% of their pre-tax income for retirement.

“We all talk about ‘save more, save more, save more,’” says Meir Statman, the Glenn Klimek Professor of Finance at Santa Clara University, whose research focuses on behavioral finance. It’s worthwhile to help people understand more about both saving and spending their money smartly, he says. “But the



**CATHERINE COLLINSON**  
Transamerica Center for  
Retirement Studies (TCRS)

notion that the good people are the people who always save their money is just stupid," he says. "There is more to life than doing well in retirement—there is doing well throughout my life. We need to keep things in balance."

## FIRST-GENERATION THINKING

Catherine Collinson, Los Angeles-based CEO and president of the nonprofit Transamerica Center for Retirement Studies (TCRS), has seen the progression of behavioral finance thinking over several decades. "Behavioral economics is an evolving area of study," she says. "Over time, as things change and evolve, and the experts study more and more, we are learning more. So the overall framework is getting better."

First-generation thinking sees a definite right and a definite wrong in the decisions people make about what to do with their money. It is, after all, the underlying essence of "choice architecture"—that there is a right, or at least a preferable, rational choice. "The first generation of behavioral finance divided the world into rational and irrational decisions, based on a utilitarian perspective," Dietch says. "I think there's a more complete way of looking at it: People have different ideas on the utility of different decisions."

Statman thinks that the insights of the first generation of behavioral finance have led to some very helpful shifts, such as automatically enrolling people in their employer's retirement plan. But he also offers a simple example of the limitations of first-generation behavioral finance thinking. "There are things we

do that we, even I—a member of the first generation of behavioral finance—consider an error, and we tend to consider that decision as 'irrational,'" he says. "People buy lottery tickets, by the logic of the first generation of behavioral finance, because they are ignorant, and don't understand the math and the probabilities involved. But anyone who has bought a lottery ticket knows that there is something special that buying a lottery ticket gives us: a sense of hope. There are emotional benefits of having hope, and the sense that we're 'in the game' and have a chance of winning."

"There are a zillion examples of these kind of things," Statman adds. "What the second generation of behavioral finance says is that all (financial) behavior is normal, instead of talking about 'rational' or 'irrational.'"

Saving money doesn't boil down to a purely rational versus irrational decision, Dietch thinks. "After paying their living expenses, some people may decide to save all their remaining money, while others may decide to spend it. If I save it or I spend it, those are both rational decisions," he says. "If I choose one, that's where I see the greatest utility for my money. What that gets to is the importance of personal preferences. The 'rational or irrational' debate centers on an almost predetermined idea of what is right or wrong. But that 'line' (on what's right to do with money) is not homogeneous, it's heterogeneous."

"Take retirees as an example," Dietch continues. "Some people who retire seek to preserve their wealth. They don't know how long they're going to live and want to make sure they won't run out of money for their living expenses, or they may want to do a bequest for their family, or they may be concerned about what their health care expenses are going to be later in life," he says. "On the other hand, there are some people who want to 'bounce their last check,'" meaning they don't want to die without enjoying all the money they've saved. The latter group may spend all their money to travel or buy a vacation home. "Ultimately, the decision is a function of the utility that these people see in how they use their wealth," he says. "But none of those options is irrational."

"IT'S ABOUT PEOPLES' CONFIDENCE ABOUT THEIR RETIREMENT. AND THAT'S ABOUT A LOT MORE THAN A MATHEMATICAL EQUATION."

— Joshua Dietch, T. Rowe Price







“SO I UNDERSTAND THE ‘RATIONAL VERSUS IRRATIONAL’ PERSPECTIVE. BUT I’VE NEVER THOUGHT ABOUT DECISION-MAKING IN SUCH A BINARY WAY.”

— Laura Varas, Hearts & Wallets

Laura Varas, founder and CEO of Rye, New York-based market research and benchmarking company Hearts & Wallets, LLC, trained as an economist. “So I understand the ‘rational versus irrational’ perspective. But I’ve never thought about decision-making in such a binary way,” she says.

“People often make rational decisions that may seem irrational to outsiders, because they don’t know that person’s ‘utility curve.’”

In general, Varas believes people making decisions about what to do with their money behave rationally—whether they choose to maximize their retirement savings, or not. For example, one person may decide to concentrate on building up emergency savings instead, while another may focus on putting extra income toward buying a home. “They know their own utility curve better than we think they do,” she says. “It’s rather arrogant for us to think that we can guess their utility curve, without knowing how they tick. So much of the advice given pushes people into saving for retirement, to the detriment of their short-term needs and medium-term needs.”

### EXPRESSIVE AND EMOTIONAL BENEFITS

Second-generation thinking doesn’t see it as irrational when people make decisions about saving and spending money based on more than utilitarian thinking. “People want three types of benefits—utilitarian, expressive, and emotional—from every activity, product, and service, including financial ones,” Statman writes in his book *Behavioral Finance: The Second Generation*, published in 2019.<sup>1</sup> “Utilitarian benefits answer the question, ‘What does something do for me and my wallet?’ Expressive benefits answer the question, ‘What does something say about me to others and to myself?’ Emotional benefits answer the question, ‘How does something make me feel?’”

The expressive benefits can play a significant—and normal—role in the decisions people make about spending and saving, Statman says in an interview. “The question really is, who is it that you are, and how is it that you present yourself?” he says. “If I’m a father of young children, I want to present myself as a responsible father, so I put some of

my money in a 529 (college education savings) account for my children. It’s an expressive statement of, ‘Who am I? Am I one who lives for today, who does not save for the future? Or do I consider that type of person irresponsible, and I do save for the future?’”

The first generation of behavioral finance would argue that it’s always an irrational decision to buy a luxury car, for example. But the second generation recognizes that expressive benefits can motivate a normal person to do it. “When you buy a car, you don’t just think about whether it can take you from home to work and back, and the reliability of the car running,” Statman says. “A car has expressive benefits for the owner: It tells people about who you are. I myself drive a 27-year-old Toyota. But if I were a real estate agent or a financial advisor, it would be different: There would be expressive benefits to me driving a luxury car. In that case, if I drove a 27-year-old Toyota to meet with clients, I would be expressing about myself to clients that I am not very competent and successful in my career.”

Likewise, second-generation thinking also recognizes that it’s normal for the emotional benefits that money can bring to sometimes take priority over the utilitarian benefits. Statman cites home ownership, and the decision to use part of one’s savings to pay off a mortgage early, as an example. “There are utilitarian benefits to renting a home, or to paying a mortgage off on schedule and using the additional money I have for saving and investing,” he says. “But I like to be a homeowner, so I paid off my mortgage early. Is it a good idea, from a utilitarian perspective? Maybe not. But emotionally, I like the feeling of being mortgage-free.”

### RAMIFICATIONS TO CONSIDER

Here are three ramifications of second-generation thinking for advisors to consider.

#### *An Employer Decision*

Advisors can help employers decide how much they want to get involved in facilitating personalized help for their employees’ holistic financial lives, including coaching on keeping a budget and managing debt as well as post-retirement plans for spending down their savings. “Some employers want nothing to do with it. Others—and it’s an increasing number of employers—feel



that they need to do something,” Dietch says. “Once a sponsor has decided what role they want to play, then they need to think through what structures and services they need to put in place to support that. They also need to put in place a plan to communicate well in advance of employees’ retirement about what services are available to help them make decisions.”

### **The Need for Accessible Financial Coaching**

“As we look at where we are today, I think that financial wellness is where it’s at,” Collinson says. “The question is, how do we integrate broader financial wellness issues and saving for retirement? How do we help people create a framework for ‘mental accounting,’ so that they will understand how they can save for their health care expenses versus emergencies versus retirement?”

“It’s important the extent to which there are resources for individuals to understand their own financial picture: what is within reach for them, and where there might need to be ‘guardrails,’” Collinson continues. “And over the course of their lives, things get even more complicated. But relatively few people nearing retirement have an employer that offers them resources for that transition to retirement, such as how to manage the drawdown of their savings.”



Consumers often make decisions about their money while working with imperfect information, Varas says. “They don’t know enough about the options they have to get advice. And the language of finance is so complicated, it’s almost as if it was designed to intimidate people,” she says. “There needs to be more (understandable) information about what the options are—which advice experience do I pick? People need information to decide, ‘Do I want to go with something pretty simple, or complex? Do I want simple, digital-only advice, or do I want someone to help me personally with all the decisions I need to make?’”

### **A Recognition of ‘Utility’ as Subjective**

“How one uses one’s wealth is personal. The first-generational behavioral finance thinking was that it was just right or wrong. In reality, the idea of happiness, or utility, is subjective,” Dietch says.

“That means no longer trying to scare people into taking specific actions. It means developing a more-holistic way of looking at people’s financial lives. It’s not just about saving for retirement: It’s about peoples’ confidence about their retirement. And that’s about a lot more than a mathematical equation.”

It’s useful to try to help people understand the ramifications of the choices they have to make about their money, Dietch says. But one size doesn’t fit all for issues like how much income someone really will need in retirement. “Our traditional way of looking at these problems is insufficient,” he says. “The reality is that just because people don’t have enough money to live a life in retirement that’s exactly the same as the one they had prior to retirement, that doesn’t mean that they will be living life miserably.” **NTM**

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



**MEIR STATMAN**  
Glenn Klimek Professor of Finance  
at Santa Clara University

### **FOOTNOTES**

<sup>1</sup> The book is available to download, free of charge, on the CFA Institute website at <https://bit.ly/3F3TkbZ>.





# THE ROAD AHEAD

TOP  
WOMEN  
ADVISORS  
TALK  
ABOUT  
THE  
EVOLUTION(S)  
THEY  
SEE  
IN THE  
NEXT  
10  
YEARS

BY  
JUDY  
WARD



"YEARS AGO, WE WERE SEEN AS JUST AN INVESTMENT EXPERT, AND OUR ROLE AS ADVISORS HAS ONLY INCREASED OVER TIME," SAYS RENEE SCHERZER, A PRINCIPAL OF 401K RESOURCES IN SCOTTSDALE, ARIZONA. "AS WE MOVE FORWARD, I THINK WE WILL BE REINVENTING WHAT A PLAN ADVISOR IS, AND WHAT SERVICES WE PROVIDE."

Nine of this year's Top Women Advisors shared how they see the retirement business, and the role of plan advisors, evolving in the next 10 years. "I think there is the potential for us to see the most seismic shift that we've ever had," says Jeanne Fisher, managing director, Nashville at Strategic Retirement Partners. Only the

transition from pension plans to defined contribution plans in the 1980s and 1990s compares, she thinks. "So many things are going to change in the next decade," she adds.

#### CHANGING DYNAMICS

Sponsors, advisors, and participants face changing dynamics these days. Plan sponsors increasingly want their advisor to play a key role in both directly and indirectly helping participants to retire on time, with enough savings. "Imagine a pyramid of services," says Jean Duffy, senior vice president at CAPTRUST in West Des Moines, Iowa. "At the base level are the basics, such as having all the plan documents and keeping up with compliance requirements. The second level is procedural prudence, things like monitoring vendors and funds, and benchmarking them. Now, we are really at the top level of the pyramid, and it is about participant success and outcomes."

"At the top of the pyramid, the real value-add is, what are you doing to move every individual employee closer to having a successful and rewarding retirement?" Duffy continues. She mentions five main areas of work

that advisors do: plan design, participant education, fiduciary processes, vendor management, and investment management. "I think we have to look at each of those five areas and say, 'What can I do in that area to help get participants closer to the end goal?'" she says.

At the same time sponsors' demand for services from their advisor has increased, fee compression set in, and will keep having a big impact on advisors in the years ahead, believes Julie Braun, corporate retirement director at The Dubie Group at Morgan Stanley in Colchester, Vermont. "As advisors, we're all trying to do more with less," she says. "Plan advisors are going to need a well-thought-out, efficient process, to do more with less. And they'll need to really think about the clients they are bringing on, and whether they make sense for their practice."

The services that made up a plan advisor's core value-adds in the past won't be enough in the future, predicts Erin Hall, managing director, Los Angeles at Strategic Retirement Partners. "We've seen it before: The advisors who held their services out as 'My funds are better than your funds' have seen their services become commoditized," she says. "Now



RENEE SCHERZER  
401K Resources



**ERIN HALL**  
*Strategic Retirement Partners*

we are seeing some next-step services be commoditized, like fee benchmarking. I think that the 'funds, fees, and fiduciaries' type of services will become more commoditized in the future. The thing that clients value more now is, what resources do we have for participants?"

Meanwhile, the pandemic has led to shifts in how some participants in the pre-retiree age range think about their future. "The pandemic has changed the landscape of the retirement horizon, as employees are being asked to return to their offices here in New York," says Eva Kalivas, senior vice president, retirement & wealth management at EPIC Retirement Services Consulting, LLC, a division of HUB International. "Employees within 10 years of retirement may be more inclined to consider the option of early or partial

retirement, as they reevaluate their work/life balance. I think we're going to see a lot of people retire sooner than anticipated."

### **PRACTICE-LEVEL SHIFTS**

"I think that we will not just be specializing in working on retirement plans," Hall says. "We need to be resources for the other struggles and challenges that the employers we work with are having. Right now, it's the 'Great Resignation.' That's the kind of thing we need to be talking with our clients about now."

"We need to become a trusted advisor to their business, not just for the 401(k). If we're meeting people where they are, with the challenges they have today, there is a better shot they will turn to us the next time they have a challenge," Hall continues. "I want

to be the first person they call when that happens."

For example, Hall sees a lot of potential for plan advisors to utilize their fiduciary knowhow to also help their clients navigate their roles as health insurance plan fiduciaries. "Helping health insurance plan sponsors be true fiduciaries is a big opportunity for us," she says. "There's a gap, and we are very well-positioned to fill it. There's a learning curve there that we've already been through as plan advisors, so who is better to help them through that than us?"

Allison Kaylor-Flink, senior vice president at NFP in Austin, Texas, thinks that advisors' consulting in the years ahead will become more holistic. "We will work alongside the human resources team to build a total rewards package that brings all benefits together," she says. "Years ago, we 'siloed' all benefits, looking at them individually. Now, we realize that it's not good to silo them: Employees need to be educated about these benefits together, for their total wellness."

At the same time, Kaylor-Flink says it's important for retirement plan specialists to know the limits of their expertise in other areas. "I live in my space," she says. "When clients ask me for something that isn't in my space, I will find them someone who is an expert to work



**EVA KALIVAS**  
*EPIC Retirement  
Services Consulting, LLC,*



**JEANNE FISHER**  
*Strategic Retirement Partners*

with us. Who is an expert about everything? If a client says to me, 'We trust you, and you did a great job on our retirement plan. Can you help us with something else, like health care or insurance?' if I don't feel I can truly help, I will find them an expert who can."

Over the next decade, these advisors also foresee much more emphasis on one-on-one work with participants. "Our work has shifted a lot from just the traditional '3 F's: I feel like that's commoditized already," says Lisa Garcia, an Orlando, Florida-based retirement plan consultant at SageView Advisory Group. "The new 'F's' are financial wellness and financial literacy, and the opportunity to educate people

about how to become smarter savers. The pandemic is waking employers up to the point that they're now saying, 'I have to do this.'"

At the participant level, Kaylor-Flink sees advisors coaching participants on all aspects of their benefits needs, today and in the future. The transition from employers asking for group employee meetings to preferring one-on-one employee meetings has taken hold, she says. "Employees are more comfortable asking questions when in a more-private setting. The participants are much more relaxed and eager to really ask about what is challenging them," she says. "This can open up the Pandora's box of everything, which is a good thing. Now, people are asking us, 'What should I do about saving for my child's college education?' 'What should I do about saving in an HSA?' 'Do I have enough life insurance?' These meetings are a lot more customized to meet participants where they are in their lifecycle."

For participant-level work to be impactful, Duffy thinks it will be important to offer custom advice versus just education. "I've been doing this for 30 years, and I've done a lot of participant education sessions," she says. "But I've seen that having the opportunity to move from education to independent, objective advice is what really moves the needle."

"We know how much financial stress is on employees today, and they're looking to their employer to find solutions," Duffy continues. "If we as advisors can't help them solve for that, we're missing an opportunity. I think what is going to really drive the industry forward in terms of participant outcomes is individualized, customized advice."

Braun sees the need for individualized participant-level work also having implications for advisory teams. "It's going to have to be more customized, because participants want more customization," she says. "And advisors are going to want to have a diverse team of advisors to work with participants, because

people like talking to someone who is like them. So we'll need teams with different generations and different genders. And that's honestly going to have to come from the current plan advisors, to realize that they need a diverse team."

## INDUSTRY SHIFTS

These Top Women Advisors also talked about potential industry-wide shifts during the next decade. Here are six key ones:

### 1. FEDERAL LAW EXPANDS ACCESS TO RETIREMENT SAVINGS

The Automatic Retirement Plan Act, or similar federal legislation requiring employers above a certain size to offer their employees access to a retirement savings opportunity, would be a game-changer, Garcia says. "It would definitely change our industry, but more importantly, it would give a lot more people the opportunity to save for their retirement," she says.

If legislation passes, it will have important implications for advisory firms, especially those firms that have tended to shy away from



**JULIE BRAUN**  
*The Dubie Group  
at Morgan Stanley*





"THE NEW 'F'S' ARE **FINANCIAL WELLNESS AND FINANCIAL LITERACY**, AND THE OPPORTUNITY TO **EDUCATE PEOPLE ABOUT HOW TO BECOME SMARTER SAVERS.**" – LISA GARCIA, SAGEVIEW

the small-plan market, Garcia says. "This would accelerate the opportunities in the small-plan market, and I would definitely want to help the small-business owners in my community to offer a retirement plan for their employees," she says. "I'm very focused on diversity, equity, and inclusion, and it's a big component of legislation like that. To me, it's important, and if that means we work with a lot of smaller businesses, I'm happy to do that—because it's going to have a long-term impact on retirement plan access for under-represented communities."

## **2. GOVERNMENT-FACILITATED RETIREMENT SAVINGS PROGRAMS INCREASE**

"If I had to project 10 years from now, I think that the government is going to play a much larger role in our retirement system than most of us anticipate," Fisher says. She's thinking of something similar to the retirement savings programs up and running in several states, but on a national scale. "I'm not saying that the federal

government is going to take control of retirement plans, but I do think that the government is going to offer portals and avenues for individual accounts to go into a centralized program," she adds. This program likely would be for people who don't have an employer-sponsored plan, or who don't want to participate in their employer's plan, she thinks.

More states likely also will start a program. In Colorado, where Kristen Deevy is based, the Colorado Secure Savings Program is in the works, after the state legislature approved it and the governor signed it into law. Deevy, managing director of retirement plans at Pensionmark Financial Group in Denver, says she doesn't see state-facilitated plans as a threat. "But I think that as advisors, we are going to have to really rethink and adjust our practices," she says. "While everyone loves working with large plans, we have got to find ways to make it easier administratively for smaller employers to have their own plan. Otherwise, they are going to go into their state plan."

At the same time, the experience surrounding the states that have already put such programs in place is that the mandate often opens the door to discussions with employers who otherwise might not have seen that discussion as a priority.

## **3. PEPS CREATE OPPORTUNITY**

The SECURE Act gave unrelated employers a new way to band together, in a single pooled employer plan (PEP). "I think we will see a lot more companies offering PEP arrangements, and because of that, I think we will see more organizations have the ability to offer a retirement plan to their employees," Scherzer says. She also expects some employers that currently have their own plan to opt for a PEP instead, if it will save them time or the expense of the annual audit requirement. "I think there has to be an easier way for employers, in terms of what's expected of them. The 401(k) plan can create a burden of maintenance and compliance for small human resources and payroll teams," she explains.



# "HAVING THE OPPORTUNITY TO MOVE FROM EDUCATION TO INDEPENDENT, OBJECTIVE ADVICE IS WHAT REALLY MOVES THE NEEDLE."

— JEAN DUFFY, CAPTRUST

Scherzer says she doesn't see PEPs as a threat to her practice, but that advisors will need to include them as part of their business model. "I think that every advisory firm is going to have to have a PEP solution, or partner with someone who does," she says. "And most small employer organizations looking to establish a retirement plan should include a PEP solution in their due diligence process."

PEPs could be a pretty big game-changer, Deevy thinks, probably for the smaller end of the market. "The question [for advisors and recordkeepers] will be, are you going to be in the startup 401(k) plan business, or not? And if you are, how are you going to be profitable at it? I think that pooled employer plans are going to be a big part of advisory work."

Deevy sees a consulting role for advisors in helping employers choose among their options: a state-run plan, a pooled employer plan, or a standalone plan that an employer sponsors. "I also think there will be a role for plan

advisors within PEPs," she says. "Maybe we won't work as much on plan design and investments with these plans, but there still is going to be a need to educate employees. That financial wellness piece, to me, is going to be a critical part of it."

#### 4. WORKPLACE SAVINGS PROGRAMS BECOME MULTIFACETED

"I think that the walls between different types of accounts for employees—their retirement account, their savings for their child's education, their student loan repayment program—will start to fall," Fisher says. "It's what the market is demanding. While saving for retirement is important, and we like to talk about it all the time, it's becoming clear that employees have much more urgent financial needs."

With many employers competing intensely to hire and retain employees, they'll be motivated to offer a workplace savings program that meets a broader set of employee needs than retirement savings alone, Fisher thinks. "The way you do

that is by letting the employees choose where the employer-contribution dollar best serves them," she says. "In the years ahead, I think employers are going to say, 'We're offering you this many dollars for your X, Y, and Z financial needs, and you choose where you want to use the money.'"

This means that advisors have to "stretch" beyond being only retirement plan specialists, Fisher says. "If you are going to stay competitive, relevant, and compelling to your clients, you need to be prepared to talk to them about far more than the retirement plan," she says. She's also talking to her clients about things like student loan debt repayment programs, creative ways to utilize a paid time off program, savings programs for a child's college education, and emergency savings programs.

#### 5. RETIREMENT INCOME PRODUCTS GAIN GROUND

"At a plan level, we're starting to see more talk by sponsors about having guaranteed income

options in their plan," Braun says. "There's been so much focus on the accumulation stage, and sponsors are finally talking about helping people with decumulation."

How many sponsors get comfortable with having these products in their plans could be advisor-driven, Garcia thinks. "I'll proactively bring it to a committee's attention when it's a good fit, based on the plan demographics, and when there are viable, good products available," she says, adding that she also thinks portability issues need to improve. "It's not at a point where I can actually recommend a lifetime-income product to my clients, because there are kinks that need to be worked out. But I think we're getting close to the point where we can have that conversation with clients, and make a suitable recommendation."

#### **6. RETIREMENT ADVICE AND WEALTH MANAGEMENT ADVICE CONVERGE**

"They're very much overlapping and integrated now, and I think that trend will continue," Garcia says. She thinks the ability to

do one-on-one participant meetings virtually will make these services more scalable for advisors. "Before, if I wanted to do participant meetings online, I almost felt like the client would say, 'Well, this other advisor will do the meetings in person.' But now, it's a lot more accepted, and it means I don't have to travel for the meetings. It's a more efficient use of my time, and it allows me to speak with more people and help them."

Scherzer believes that the convergence will be driven in part by more people retiring and staying in their former employer's plan. "Our role, at the participant level, is going to be a longer-term role," she says. "I think that our practices are going to be offering more services for the retired participants in a plan, such as estate planning and wills. They're looking to us for so much beyond the 401(k)."

Kalivas also sees advisory firms offering individualized advice to retired participants. "If there's going to be anything that's a game-changer, it might be how monies are set up to come out of a plan, as opposed to going



**ALLISON KAYLOR-FLINK**  
NFP

into a plan," she says. "What are the options for participants? There needs to be some type of integration of wealth management for retirees. That integration is something the 401(k) advisor needs to take a look at, and build into your practice."

Retired participants need help with more than advice on whether to keep their money in a plan or do a rollover, Kalivas says. "As an advisor, you will have to be able to address all the needs of retirees. And somebody who retires with a \$50,000 balance has very different needs than somebody who retires with a \$2 million balance," she says. Retirees will need advice such as how to take out money from their retirement accounts in the most tax-advantageous way. "The RIAs and broker-dealers who are working on a more comprehensive advice offering are going to reap the rewards of that in the decade ahead," she says. **NTM**

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



**KRISTEN DEEVY**  
Pensionmark Financial Group





# NAPA TOP WOMEN ADVISORS 2021

## CAPTAINS

**Karin Alvarado**  
New Aspect Financial Services

**Terry Anderson**  
Anderson Financial

**Kristi Baker**  
CSI Advisory Services, LLC

**Jessica Ballin**  
401k Plan Professionals

**Kathleen Branconier**  
Pensionmark

**Jennifer Breton**  
Lebel & Harriman, LLP

**Linda K. Bright**  
Precept Advisory Group

**Mary Caballero**  
One Digital

**Deana Calvelli**  
Lockton Investment Advisors, LLC

**Michelle Cannan**  
Beltz Ianni & Associates

**Sara Carvalho**  
Marsh McLennan Agency

**Nicole Corning**  
Buckman & Corning Financial  
Strategies Group

**Sandra Cunningham**  
UBS Financial Services Inc.

**Brea Dantin**  
ProCourse Fiduciary Advisors, LLC

**Barbara Delaney**  
SS/RBA, a division of HUB International

**Dori Drayton**  
CAPTRUST

**Devyn Duex**  
CAPTRUST

**Jessica Espinoza**  
NFP

**L. Rita Fiumara**  
UBS Financial Services Inc.

**Janet Ganong**  
LPL Financial

**Jamie Greenleaf**  
OneDigital

**Erin Hall**  
Strategic Retirement Partners

**Jamie Hayes**  
NFP

**Paula Hendrickson**  
NFP

**Shelly Horwitz**  
Pensionmark

**Eva Kalivas**  
EPIC Retirement Services Consulting,  
a division of HUB International  
Northeast Limited

**Kristina Keck**  
Woodruff Sawyer

**Kathleen Kelly**  
Marsh McLennan Agency

**Molly Knapp**  
Pensionmark Financial Group, LLC

**Nichole Labott**  
SageView Advisory Group

**Ellen R. Lander**  
Renaissance Benefit  
Advisors Group, LLC

**Shannon Main**  
Pensionmark

**Shannon Maloney**  
Strategic Retirement Partners

**Debbie Matustik**  
Pensionmark Austin

**Dawn McPherson**  
Mariner Wealth Advisors

**Janine Moore**  
HUB Retirement and  
Wealth Management

**Cindy Orr**  
CBIZ Investment Advisor Services

**Jennifer Pearson**  
OneDigital

**Lisa Petronio**  
Strategic Retirement Partners/  
Walsh Duffield Retirement  
Plan Solutions

**Renee Scherzer**  
401K Resources

**Susan Shoemaker**  
CAPTRUST

**Heidi Sidley**  
StoneStreet Equity, LLC

**Jania Stout**  
OneDigital

**Marcy Supovitz**  
Boulay Donnelly &  
Supovitz Financial Services

**Virginia Sutton**  
Johnson & Dugan/GRP

**Kathleen Waland**  
Wayland Financial Group

**Vanessa Watkins**  
NFP

**Patricia Wenzel**  
Merrill Lynch

**Allison Winge**  
Plexus Financial Services, LLC

**Heather Wonderly**  
Aldrich Wealth LP

**Emily Wrightson**  
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## ALL-STARS

**Taria Agbelusi**  
CAPTRUST

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Willis Towers Watson

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CAPTRUST

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SageView Advisory Group

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CAPTRUST

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**Kristen Deevy**  
Pensionmark Financial Group

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CAPTRUST

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OneDigital

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Strategic Retirement Partners

**Jessica Fitzgerald**  
Morgan Stanley

**Allison Kaylor-Flink**  
NFP

**Jennifer Gage**  
CBIZ

**Lisa Garcia**  
SageView Advisory Group

**Moir Hagy**  
Marsh McLennan Agency

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IMA Wealth

**Amy Hanophy**  
NFP

**Jennifer Hocking**  
UBS

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NFP

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NFP

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OneDigital

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Lockton Investment Advisors, LLC

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Baystate Fiduciary Advisors

**Alicia Malcolm**  
UBS Financial Services Inc.

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NFP

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NFP

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Mariner Wealth Advisors

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CAPTRUST

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First Interstate Wealth Management

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NFP

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Abbey Street

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AssuredPartners

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Spectrum Investment Advisors

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SageView Advisory Group

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Morgan Stanley

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HORAN

**Karen Yasukawa**  
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**Rachel Zachary**  
SageView Advisory Group

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**Nicole Bryson**  
Deschutes Investment Consulting

**Kristen Buchanan**  
Cincinnati Investment Advisors

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401k Plan Professionals

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Marsh McLennan Agency

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Master Plan Investment Group

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Towne Wealth Management,  
Raymond James

**Kim Cochrane**  
Raffa Retirement Services

**Morgan Davis**  
NFP

**Pamela de Sena**  
Kornerstone, Inc.

**Macy Dunegan**  
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a division of HUB International

**Erin Eliason**  
RiversEdge Advisors

**Catherine Ellis**  
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**Brandy Goodnow**  
PWM Retirement Plan Solutions

**Ava Carnevale Heaslet**  
Statherós Financial Solutions

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CSi Advisory Services

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Mariner Wealth Advisors

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Multnomah Group

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NFP

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Paradigm Consulting, Inc.

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Argent Retirement Plan Advisors

**Kathleen Persak**  
SEIA

**Apryl M. Pope**  
Retirement Plan Partners, LLP

**Alyssa Potter**  
MCF Advisors, LLC

**Rachel Rieder**  
Valley Forge Investment  
Consultants, Inc.

**Miki Sakata**  
Three Bell Capital

**Michaela Scott**  
Borislow Employer  
Retirement Consulting

**Deanna P. Spivey**  
SageView Advisory Group

**Julie Staehr**  
Merrill Lynch

**Sara Strasser**  
Strategic Retirement Partners

**Larkin Walsh**  
SageView Advisory Group

**Stacy Walters**  
SageView Advisory Group





# Solving the Gamification PUZZLE

A look at some ways to meet the challenges inherent in implementing gamification.

By Alice Palmer, Fred Reish, Bruce Ashton & Brad Campbell

## 401(k) plans have enabled tens of millions of American workers to accumulate meaningful retirement savings. However, the country's

retirement savings system still has challenges. Two of the biggest are how to get more people to participate in plans, and how to help them to save more than they do. The growing popularity of automatically enrolled plans has put many on the right track. That said, we also see an opportunity to help even more people participate and save at more optimal rates—and at the same time to make it “fun”—through the use of elements of game playing or what’s been termed “gamification” (pronounced “game-a-fication”).

### What is Gamification?

Gamification refers to the use of elements of game playing, such as point scoring, competition with others, rules of play and ultimately a prize or benefit, to encourage or increase engagement. In the plan context, we propose using gamification as a technique for improving outcomes—specifically, for encouraging participation and saving in deferral-based retirement plans (e.g., 401(k) or 403(b) plans).

Gamification is effective because it puts a decision normally associated with

sacrifice or effort into a fun context that provides an immediate reward, such as a contest that provides a chance to win something of value (a tangible gift or recognition) if people participate in specified behaviors. For example, a company might sponsor a contest to get employees to adopt more healthy lifestyles by offering a gift card to those who record the highest number of steps over a two-week period. This “game” provides a short-term challenge, peer recognition (i.e., the “winners” are announced to the entire workforce) and a modest reward for those who participate.

In the context of participant-deferral plans, this may seem like a good idea—turn the sometimes complex decision to participate or defer into a game. Before employers use this approach, there are some legal considerations that need to be addressed (see “Potential Legal Barriers” below).

These include:

- the contingent benefit rule (applicable to 401(k) but not 403(b) or 457 plans)

### CHANGING THE LAW

While contingent benefits (other than matching contributions) are currently prohibited under the Code, the bipartisan “SECURE Act 2.0” legislation is widely expected to be voted on by the full House of Representatives next year. That bill, if enacted, would exempt a “de minimis financial incentive” from the contingent benefit restriction. A similar provision is included in a bill pending in the Senate. This indicates a level of recognition by legislators that the use of gamification to encourage retirement savings could make a difference in retirement readiness for American workers. While it’s not clear when these provisions will be enacted, it is reasonable to expect that gamification prizes may be permissible in the near future.

## Gamification is effective because it puts a decision normally associated with sacrifice or effort into a fun context that provides an immediate reward.

- nondiscrimination concerns (applicable to both 401(k) and 403(b) plans, but not 457 plans); and
- fiduciary issues (applicable to nongovernmental 401(k) and ERISA 403(b) plans, but not non-ERISA 403(b) or 457 plans).

None of these are insurmountable, plus Congress is considering new, bipartisan pension reform legislation (the so-called SECURE Act 2.0 and the Portman-Cardin bill in the Senate) that would remove the first of these barriers to gamification. For a variety of reasons, we urge Congress to pass that legislation in the future. But even if we don't see these reforms, gamification can be used under current law.

### What Can Be Done Now

Despite the legal concerns, there are rewards that could incentivize behavior

and approaches to structuring the "game" that would not violate the rules. Here are some examples (this is not an exhaustive list):

- An incentive that does not fall under the "other benefits" definition of the regulations might take the form of public or private recognition of participants for participation or for specified increases in their deferral rates. Employees who elect to participate in the 401(k) plan or those who join the plan or increase their deferral rate could be recognized in an employee newsletter.
- An employer might provide a contribution to a charity if an employee begins participating or increases his or her deferral rate level by a specified amount or to a specified level.
- An award, including a financial one, could be structured around

a participant's use of a financial wellness tool. This would not violate the contingent benefit rule restriction because it would not be an incentive to defer into the plan, only an incentive to make use of a tool that would demonstrate the importance of participating and saving for retirement, as well as other financial wellness steps (such as budgeting or opening a savings account).

- A common approach in gamification, and one that might be permissible under the contingent benefit rules but falls into a grey area, is an award that could only be redeemed from a list of gifts of relatively nominal value.

While there may not be discrimination issues for gamification programs, one way to avoid any issue is to limit the gamification incentives to

## POTENTIAL LEGAL BARRIERS

### The Contingent Benefit Rule

The Internal Revenue Code says that it is permissible for an employer to provide a match to incentivize participants to defer into the 401(k) plan. (This rule doesn't apply to 403(b) or 457 plans.) On the other hand, the Code specifies that a plan cannot condition the receipt of any other benefit on an employee's election to defer. (Code §401(k)(4)(A)) "Other benefits" are defined very broadly in the tax regulations, and include benefits under other plans offered by the employer or items such as "increases in salary, bonuses or *other cash remuneration*..." [Emphasis added.] (Treas. Reg. §1.401(k)-1(e)(6)(i) and (ii)) A cash gamification award might run afoul of this prohibition.

### Nondiscrimination Considerations

Another potential barrier is the nondiscrimination rules of the Code that apply to 401(k) plans. Under Code §401(a)(4), a plan will only be qualified if "the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees...." This non-discrimination requirement extends to "benefits, rights and features," which means that they must be currently and effectively available on a non-discriminatory basis. (Treas. Reg. §1.401(a)(4)-1(b)(3) and -4(a)) Though it's important to be aware of this restriction, in the gamification context, there may be an easy way to avoid this concern, as discussed later in this article.

### Fiduciary Considerations

The third potential hurdle is that the fiduciary rules under ERISA—applicable to non-governmental 401(k) and ERISA 403(b) plans, but not to 457 plans—require an employer to operate the plan in the interest of the participants for the exclusive purpose of providing them with benefits. (For the sake of simplicity, we use the term "employer" to refer to the fiduciaries of a plan.) However, ERISA doesn't regulate the "settlor" decisions of employers, such as the decision to have a plan, to amend the plan to provide features such as participant loans—in other words, business decisions that are not related to the operation or investments of the plan. We think that the offer of gamification rewards by a plan sponsor could well be seen as a settlor function and not a fiduciary one at all. But even if this is not the case, and the fiduciary rules apply, there are still ways to manage this issue.



non-highly compensated employees, since discrimination against them is not a violation of those rules. As a practical matter, this would likely have little impact, since higher-paid employees tend to have higher participation levels and deferral rates.

Finally, regarding the fiduciary concern, we think that establishing a gamification incentive could—and should—be viewed as a “settlor” function rather than a fiduciary one, though there is no guidance that specifically addresses this issue. Even if it were viewed as a fiduciary decision, however, offering a gamification prize to encourage employees to defer into a plan or to increase their deferrals is in their interest and furthers the purpose of providing retirement benefits. Thus, the program would accomplish the fiduciary objective of providing retirement

benefits to participants. (See “Changing the Law” for other possibilities.)

## Conclusion

401(k), 403(b) and 457 plans are popular retirement savings vehicles for good reasons, but “you can’t win if you don’t play.” Traditionally, most Americans have had to make the decision to participate and to contribute enough on their own. Auto enrollment and auto escalation work by effectively making these decisions for participants. Gamification could be an important part of enhancing not only engagement, but in broadening awareness of financial wellness by rewarding desired behaviors like greater participation and contribution levels at very little cost.

Today this can be done through recognition and celebrations of achievement and with certain properly

structured incentives. But with additional relief related to the provision of financial incentives and regulatory and legislative support for the other risk mitigation strategies outlined above, these programs could do more to catch the attention of workers who are not currently participating or not contributing to their fullest potential, spurring them to take action they know is for their own benefit. Even without changes in the law, though, gamification can be used now with recognition and incentives that don’t have monetary value to a participant. **NTM**

*Alice Palmer is a VP and Chief Counsel at Lincoln Financial Group. Fred Reish (Partner), Bruce Ashton (Senior Counsel) and Brad Campbell (Partner) are attorneys with the FaegreDrinker law firm.*





# Solving the Shortfall

*Automatic features in pending legislation in Congress could be a retirement readiness game-changer.*

**I**n September of this year, the House Ways and Means Committee approved and inserted into the administration's Build Back Better Act language requiring certain employers to offer and utilize an automatic enrollment feature within the plans they offer to employees. Chairman Richard Neal (D-MA) strongly supports this specific provision of the legislation, which would be a major boost for increasing participation within 401(k) plans.

While this change would have sweeping positive ramifications for plan sponsors that offer 401(k) plans, it is the plan participants who would be the ultimate benefactors of the proposed legislation—as drafted, this provision would deliver life-long benefits to American workers. That is, if the auto enrollment feature provision can survive in the House of Representatives without hitting the cutting-room floor! Is there room in a multitrillion-dollar reconciliation bill for securing a self-funded retirement incentive that benefits every American who has ever pondered living 'to and through' retirement?

After all, requiring employers to provide employees access to a retirement plan or an IRA account and subsequently funding it with automatic deferrals is not a brand-new concept. Just think Social Security.

## What Might Be a Stumbling Block?

What could possibly derail this effort to help more Americans prepare for retirement? Who among us feels that providing more access to retirement plan coverage is a bad idea? Astoundingly, politicians seem to be grumbling and grouching about:

- unknown costs associated with requiring certain

employers to offer a retirement plan;

- the negative connotation that might accompany a mandate; and
- concerns about the automatic deferral provision, which may compete with provisions of the bipartisan SECURE Act 2.0.

The unknown-costs argument, as it pertains to tax-qualified retirement plans, has thwarted many good ideas in Washington,

savers and add \$7 trillion in retirement savings over the first 10 years.

The automatic enrollment retirement plan is not the be-all, end-all panacea for the retirement savings shortfall of our nation. However, it is unquestionably a move in the right direction. Plan sponsors that have adopted auto-enrollment have rarely regretted or reversed that decision. Similarly, data and conversations with plan sponsors indicate that

**“Rallying against increased retirement plan coverage appears to be a hollow argument when so many Americans are needing the financial safety that a retirement plan provides.”**

DC, over the years. However, this seems an unlikely area for making such an argument—particularly when the government, in concert with all Americans, is in line to pick up the tab for any retirement funding shortfall.

Rallying against increased retirement plan coverage appears to be a hollow argument when so many Americans are needing the financial safety that a retirement plan provides. Another way to look at coverage is to consider the direct and indirect costs associated with having an aged workforce that cannot afford to retire.

## Reasons to Support the Provision

The American Retirement Association has supported this bill, estimating that the automatic retirement plan features would create 62 million new retirement

most auto-deferred participants do not choose to stop deferrals.

Plan sponsors are fully aware of the benefits that accrue to plan participants when their plan employs an auto-enrollment feature. A conversation among plan sponsors that use auto-enrollment and those who don't often end up with the users attempting to “convert” the non-users. It happens quite frequently, and is ever-so-predictable.

Unfortunately, the required auto-enrollment feature in the pending legislation may fail to survive. Yet, it is the same optional feature that the McDonalds restaurant chain identified as “the right thing to do” for all of their employees in the early 1990s. The company continues the practice today. Auto-enrollment has been working for forward-thinking plan sponsors ever since. **NTM**

# Where's My DeLorean?

*We're going back to 2016.*

By David N. Levine

**L**ike Marty McFly in *Back to the Future*, our industry is on the cusp of going back in time—not to 1955 but to 2016.

Why 2016? Because, regardless of the Department of Labor's October 2021 transition relief, we're headed back into the world of the "fiduciary rule" that is similar to what we had in 2016.

For those who know the movie's time travel history, you know that events in the past can change the future, so, to be fair, 2022 will not be identical to 2016. For example, there's no required "best interest contract" coming in 2022—but the rules that are coming down the rails in *Back to the Future: Fiduciary Rule Part III* get you to the same place: the risk of compliance "foot faults," regulatory enforcement and more claims in litigation.

So after all these movie references, why should you care? Here are three reasons.

## Consolidation

First, the retirement industry is far different than it was in 2016. Even as I write this column, another major merger among industry providers (pick your advisor, recordkeeper, TPA or fund company merger as part of retirement industry merger bingo) was announced today. Why does that make a difference? Simply put, with fewer and larger industry players today, the risks that ancillary services and products could cause a trip-up under the Department of Labor's updated fiduciary guidance in Prohibited Transaction Exemption 2020-02 is higher than ever. So if you're part of an integrated organization—even with the extension in Field

Assistance Bulletin 2020-02—now is a good time to make sure your business aligns with the Department of Labor's position.

## New Business Models

Second, business models themselves have changed. We have all seen the swings from bundled solutions, to completely unbundled solutions, and then rinsing and repeating the same cycle again and again. Many modern service provider structures are designed on providing a suite of services.

At the same time, class action lawsuits regularly focus on the provision of multiple services by related entities. The majority of the retirement service provider universe is compliance-focused and has given significant thought on how to build these suites of solutions and products. As product offerings have evolved, however, the Department of Labor's new position may provide

a good opportunity for that double-check on your processes and procedures under the fiduciary rule.

## Enforcement

Third, the retirement universe continues to feel the full effects—and burdens—of rigorous enforcement by the Department of Labor. From abandoned plans to missing participants and now cybersecurity, the Department of Labor regularly digs deeply into plan and provider operations.

With the Department of Labor's position on the definition and scope of ERISA's fiduciary rule further crystalized in the 2020 guidance, it is likely a matter of when, not if, investigations dive deeper into a wide range of topics—from IRA rollovers and investment offerings, to other services and solutions. Making sure your solutions are buttoned up holds the potential to pay benefits for you and your clients in the event of enforcement activities.

Those are just three reasons to care about *Back to the Future: Fiduciary Rule Part III*. Will there be more chapters in this saga or is it just a trilogy? Who knows! But sometimes it is best to focus on the newest sequel before wondering, will there be another *Back to the Future* that brings us the *Fiduciary Rule Part IV: A New Hope*? **NNTM**







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# Headline ‘Hype’?

*Study finds harm in headlines hyping social security shortfalls.*

By Nevin E. Adams, JD

**I**t’s often said that “if it bleeds, it leads”—and, according to a new report, it may also mislead.

The study—by folks at the Center for Retirement Research at Boston College—looked at coverage of Social Security’s finances, noting that while the 2020 Trustees Report projects that the Social Security Old-Age and Survivors Insurance (OASI) program faces a long-term financing shortfall and that the trust fund will deplete its reserves in 2034 (after which payroll tax revenues will cover only about three-quarters of scheduled benefits), news coverage<sup>1</sup> of the Trustees Report “often emphasizes the trust fund depletion date and de-emphasizes the ability of ongoing revenue to support three-quarters of scheduled benefits.” The researchers note that this “half-empty” emphasis “could lead the public to believe that all future benefits are insecure” (as opposed to a quarter, apparently).

More specifically, the study used an online experiment in which participants<sup>2</sup> were shown identical articles with different headlines. The headline for the control group reported that Social Security had a “long-term financing shortfall,” but did not directly



reference the trust fund, while the headlines for the three “treatment groups” highlighted the depletion of the trust fund. Two treatment groups were shown a headline emphasizing the trust fund’s 2034 reserve depletion date—“using increasingly sensationalist language,” while a third treatment group saw a headline explaining that ongoing program revenues will cover three-quarters of scheduled benefits after 2034.

Now, bearing in mind that these results measure what people say they would do, rather than what they actually did, the paper found that “treated respondents”:

- plan to claim around one year earlier than the control group; and
- shifted their expectations about the level of future benefits away from extreme

positions and toward a more realistic assessment.

In particular, they note, the headline<sup>3</sup> emphasizing ongoing revenues yielded the most accurate beliefs about the level of future benefits.

They conclude that shifting the media narrative around the trust fund to highlight ongoing revenues could improve the public’s understanding of actuarial projections, though workers still may respond to news coverage of the trust fund by claiming earlier. And, of course, if workers do, in fact, claim earlier, that might result in their locking in lower monthly benefits.

Anybody think this report will change the reporting?

Not as long as journalists are paying attention to clicks... **NNTM**

## FOOTNOTES

<sup>1</sup> The study cites the headline of a 2019 New York Times article that reads, “Social Security and Medicare Funds Face Insolvency, Report Finds,” while the implications of reserve depletion are described in vague terms only in the body of the text: “the program’s reserve fund is projected to be depleted in 16 years, at which time recipients will get smaller payments than they are scheduled to receive if Congress does not act.” Similarly, a 2019 FOXBusiness article ran the headline, “Social Security shortfall: Trust fund to run dry in 2035, trustees predict.” The caveat that tax revenues are sufficient to pay three-quarters of scheduled benefits appears in the third paragraph, according to the study.

<sup>2</sup> To participate in the study, panelists needed to be ages 21 to 61 in 2021, be in the labor force, or have accumulated 40 quarters to qualify for future Social Security retirement benefits. Interestingly enough, the study also notes that “recognizing that workers cannot be expected to think calmly about Social Security in the midst of an unprecedented public health emergency, the experiment was fielded in June 2021 when the COVID-19 crisis was (at least temporarily) receding.”

<sup>3</sup> FWIW, our post on NAPA Net was “Social Security Trust Funds Take a Step Backward.”

# THOUGHT-PROVOKING CONTENT

As the economy (and inflation) heats up—and health care concerns linger, the past quarter’s content marketing posts focused on the active versus passive debate, lifetime income options, participant concerns (and optimism), the importance of language in conveying complex—and simple—subjects—oh, and how retirement is evolving!



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New research reveals even younger participants are focused on retirement income, not just savings.

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# Case(s) in Point

*Litigation continued at a frantic pace in 2021, with one of the excessive fee suits filed in 2016 currently under review by the U.S. Supreme Court—one that has been said to have a “chilling effect” on this legislation, and which could squarely establish—or reset—which party bears the burden of proof in these cases (see “Chilling’ Affects”, NAPA Net the Magazine, Winter 2020).*

*That said, settlements continued to outpace actual trials, but when these cases actually made it to trial, the fiduciary defendants often prevailed. This issue we focus on a case in which the investment consultant won at trial, while the plan sponsor client earlier decided to settle—and one of a series in cases that were short in length and detail of assertion—so much so that at least one district court found it to be without merit, though the general arguments made were quite familiar to this genre. Finally, the nation’s highest court seems to be considering scrutiny of the CalSavers state-run IRA for private sector workers—to determine if, in fact, it might be preempted by ERISA. Let’s dig in.*

## Preemption ‘Redemption’?

*Is SCOTUS considering CalSavers challenge?*

The nation’s highest court appears to be considering a review of a challenge to the CalSavers program.

At least that’s implied by the request (*Howard Jarvis Taxpayers Ass’n v. Cal. Secure Choice Ret. Savings Program*, U.S., No. 21-558, request for response 11/2/21) by the U.S. Supreme Court that the CalSavers program itself—and California Treasurer Fiona Ma (“in her Official Capacity as Chair of the California Secure Choice Retirement Savings Investment Board”)—defendants in a suit brought by the Howard Jarvis Taxpayers Association last month—to respond to the latter’s Oct. 12 petition for a writ of certiorari.

In what it has acknowledged was a “case of first impression,” the Howard Jarvis Taxpayers Association (HJTA) brought this action “...to stop California from arrogantly proceeding with a state-run private retirement system that Congress disapproved when it vetoed the only Safe Harbor that would have allowed such programs.”

### Preemption Position

CalSavers happens to be one of a handful of state-run IRA programs for private sector workers now in operation (with

others currently under planning and/or consideration). It applies to eligible employees of certain private employers in California that do not provide their employees with a tax-qualified retirement savings plan. Eligible employees are automatically enrolled in the program, but may opt out. Those who don’t opt out have a designated amount remitted to CalSavers, which funds the employees’ IRAs. The State of California manages and administers the IRAs and acts as the program fiduciary. While it’s one of a handful of state auto-IRA programs currently in operation, in considering an appeal of a district court decision dismissing the case,<sup>1</sup> Ninth Circuit Judge Daniel A. Bress noted, “to our knowledge, this is the first case challenging such a program on ERISA preemption grounds.”

In raising the issue with the Supreme Court, the plaintiffs cautioned that:

- an employee’s money will not have the security that Congress intended through ERISA;
- the funds will not be segregated in a separate account for safekeeping but will be commingled with other funds;
- it will not be invested at the employee’s direction, but will be subject to California’s “maze of divestment rules focusing more on political

correctness than return on investment”; and

- it will “not be protected by any fiduciary duty or contractual liability, but will be at risk under a statute that expressly disclaims any responsibility for loss.”

### Employer Impact

The petition also raised the specter of an impact(s) to employers, notably that “Employers too will be stripped of ERISA’s protections,” specifically that “...hundreds of thousands of small businesses whose staff fluctuates above and below five employees based on things like summer tourism, holiday shopping, and contractual demands” would “...be thrown in and out of CalSavers’ mandate, repeatedly exposing them to potential liability to the State and to their own employees.” Moreover, the petitioners argued that “if individual states are allowed to intrude into this field of private retirement regulation that Congress expressly preempted through ERISA, then multi-state employers will face a labyrinth of different rules, contrary to the nationwide uniformity that ERISA was designed to guarantee.”

Or perhaps most succinctly, “Here, California is inserting itself into this federally preempted field and imposing its own mandates and rules that conflict with ERISA’s structure. This strips both



employers and employees of their rights under federal law.

"Unless this Court grants certiorari and reverses the Ninth Circuit, the precedent will be set and, before long, there will be a smorgasbord containing each state's version of CalSavers, throwing into confusion whether employees' earned wages will ever get returned if, for example, they move from one state to another, or if they temporarily work in a state but are not domiciled there, or if their employer filled out the wrong paperwork for that state 20 years ago, or if they never retire, or if the state's program becomes insolvent, etc.," they write.

So, the plaintiffs seem to have gotten the Supreme Court's attention—indeed, Bloomberg Law notes that this type of move

increases the chances that the case will be heard from 1% to 5%, citing a Bloomberg Law analysis published in 2018.

We shall see.

—Nevin E. Adams, JD

### Winning Ways

*Aon wins big in excessive fee decision*

**W**hile the plan fiduciaries in the case chose to settle, the investment consultant for the plan took the case to trial—and won.

The former participant/plaintiff here (one Benjamin Reetz) claimed that the defendants here (Lowe's, the Administrative Committee of Lowe's Companies, Inc. and investment advisor Aon Hewitt Investment Consulting) violated ERISA by limiting the menu of investment choices

available to Plan participants and moving over \$1 billion in Plan assets<sup>2</sup> to one of Aon's own investment funds, "resulting in a substantial loss of investment gains (\$100 million, according to the suit) in the retirement accounts of the current and former Lowe's employees in the class."

More specifically, the suit charged that the fund retained was a new and largely untested fund at the time it was added to the plan, that it underperformed its benchmark, that it was not utilized by fiduciaries of any similarly sized plans and was "generally unpopular" in the marketplace.

After three years of hard-fought litigation, roughly 18 months ago, the plaintiff and Lowe's Companies, Inc. settled for a cash settlement of \$12.5 million





("a fair and reasonable settlement amount considering the nature of Plaintiff's claims, which focus on Aon's self-interested conduct, and Aon's ultimate role as a 'delegated' investment manager with unilateral decision-making authority over Plan investments")—and "one thing Aon can't provide: prospective relief," and some procedural changes.

Which brings us to the current case.

In a massive 120-page opinion (*Reetz v. Lowe's Cos. Inc. et al.*, case number 5:18-cv-00075, in the U.S. District Court for the Western District of North Carolina), U.S. District Judge Kenneth Bell determined that "Aon acted loyally and prudently with respect to its recommendations to change the plan's investment choices—which were consistent with its industry research and the thinking of other

financial consultants—as well as its selection and retention of the Aon Growth Fund in the plan, which was similarly reasonable based on Aon's investment expertise and legitimate strategic choices."

Importantly, Judge Bell acknowledged that "...although the Aon Growth Fund that Aon selected as the Plan's delegated fiduciary investment manager did not generate as much investment gains as other investment options that, in hindsight, would have fared better, it did not breach its fiduciary duty to the Plan in selecting and maintaining the Aon Growth Fund as the primary actively managed 'equity' investment option in the Plan."

The decision amounts to being largely a blow-by-blow recitation of the events that led up to the decisions that, arguably, led to the suit in

this case. At its core, the plan committee was trying to increase engagement/participation, and were (eventually) persuaded that part of the solution lay in simplifying the fund menu and providing an option that would provide participants with a more diversified choice than they would likely be able/willing to do so for themselves.

#### *Delegated DC*

At the heart of the issue in the case was Aon's role in recommending its delegated investment management service ("Delegated DC") specifically in this case to Lowe's as one of its large clients. However, Judge Bell determined that "Aon did not breach its fiduciary duty as an investment advisor to the plan in proposing and encouraging Lowe's to change the plan's



**“While the plaintiff claimed that a breach of fiduciary duty was evident in Aon’s selection of the Aon Growth Fund, more specifically that that Aon did not consider any option other than the use of its own Collective Trust funds prior to making its investment decision.”**

investment structure and menu of investment options nor did it violate ERISA in its efforts to ‘cross-sell’ its delegated fiduciary services, which Lowe’s—a large, sophisticated corporation—independently decided to engage.”

Indeed, Judge Bell concurred with the testimony of witnesses that, in fact, the plan fiduciaries did understand and appreciate that distinction.

Moreover, “While Aon had limited experience as a delegated services manager for defined contribution plans, it had extensive experience and resources as an investment advisor, so it was not imprudent for Aon to suggest that Lowe’s consider using Aon’s delegated services,” Judge Bell wrote.

#### ***Growth Fund Challenge***

Judge Bell also rejected the argument that Aon breached its fiduciary duty to the plan based on the fact that the Aon Growth Fund did not generate as much growth as other investment options, explaining that the “Plaintiff’s hindsight attacks on the fund based on historical results are unpersuasive and, as noted, the dynamics of the market could have changed at any time making the Aon Growth Fund not only reasonable but likely more profitable for plan participants.”

He also noted that neither Lowe’s nor its “well-qualified” fiduciary consultant, Arthur J. Gallagher & Co., ever suggested that Aon should remove the fund. “If an independent investment

consulting fiduciary (with its own fiduciary obligations which have not been challenged) did not view the inclusion of the Growth Fund in the Lowe’s plan’s during the relevant period as improper, then it is difficult for the court to conclude that Aon should, as a matter of law, have removed the Growth Fund from the plan lineup,” Bell wrote.

“There can be little doubt that Aon was pleased to see a billion dollars of Lowe’s assets going into the Aon Growth Fund, which in turn allowed Aon sales employees and others to promote the fund more effectively to potential clients,” he said. “However, the court must be careful to distinguish the reason for selection of the fund with the inherent effects of that selection, including the facts that putting Lowe’s plan assets in the fund would likely make it more attractive to other plans and reduce Aon’s required ‘subsidy’ of the fund’s expenses.”

While the plaintiff claimed that a breach of fiduciary duty was evident in Aon’s selection of the Aon Growth Fund, more specifically that that Aon did not consider any option other than the use of its own Collective Trust funds prior to making its investment decision. “While it is true that Aon never specifically considered any funds other than the Aon Growth Fund for the ‘Growth’ equity option in the Lowe’s Plan, and in fact selected the Aon Growth Fund (or a custom version of the Aon Growth Fund) for every client that used

Aon’s ‘Emerging’<sup>3</sup> plan structure, the full story (which must be considered) is more nuanced,” Judge Bell wrote, going on to explain that Aon did compare the Aon Growth Fund (and the other funds in the Collective Trust) to other potential investment funds and strategies, including those that Plaintiff argues should have been considered when the Lowe’s investment was approved—but did so earlier, when Aon first created the funds. “In sum,” he wrote, “the Court finds that Aon did not need to again compare the Aon Growth Fund to specific off-the-shelf offerings such as the T. Rowe Price Spectrum Moderate Growth Allocation Fund and Vanguard LifeStrategy Growth Fund to appreciate the claimed structural advantages provided by the Collective Trust, where the Collective Trust strategies aligned with a client’s desired investment mandates. Also, although Aon was aware of other providers in the ‘manager of managers’ business, such as Russell and SEI, that could have constructed a custom multi-manager growth vehicle for the Plan, Aon’s use of its discretion to hire such a provider would have added another layer of fees to the Plan’s expenses.”

#### ***IPS Language***

Judge Bell also determined that the use of the Aon Growth Plan reasonably complied with the Plan’s IPS, and that the plan fiduciaries understood the IPS’ language calling for a diversified, objective-based growth strategy “utiliz[ing] a broad range of

**“While the facts here are relatively unique, Judge Bell’s reading suggests that the plan committee had in place a prudent and thoughtful process, one that was not only deliberate, but documented.”**

asset classes and periodic rebalancing process” to provide an appropriate mix.

Bell also commented that “while the differences between the actual performance of these asset classes and consensus expectations for these asset classes explain why the T. Rowe Price and Vanguard funds delivered higher returns than the Growth Fund over the relevant period, they do not nullify the reasonableness of Aon’s choice of asset allocation for the Growth Fund before the fact.” Moreover, he noted, “neither plaintiff nor his experts identified any basis, before the fact, for questioning the reasonableness of the Growth Fund’s asset allocation or the capital market assumptions on which Aon’s asset allocation decisions were based.”

Not that there weren’t issues. “To be clear, the Court acknowledges that at the time it was selected for the Plan, the Aon Growth Fund itself had very little performance history, and the history that it had was poor relative to its benchmarks and peers. At the time Aon added the Aon Growth Fund to the Plan (October 2015), the fund (i) had only two years of performance history, (ii) was in the bottom 10% of its peers over all periods, (iii) was included in only two other retirement plans in the country, and (iv) was not included in any similarly-sized retirement plans.” Moreover that the fund had relatively few assets under management, and was not performing well even in comparison to its custom benchmark.

“However, considering the totality of the circumstances and weighing the evidence, the Court finds that Aon’s forward-looking process for developing the Aon Growth Fund and selecting it for the Lowe’s Plan was reasonable for a longer term investment and in line with industry standards, properly understood and not affected by an analysis dependent on a hindsight comparison of historical fund results or a small sample of results during a period in which the Aon Growth Fund (with relatively fewer domestic equity investments) would be expected to lag its peers.”

#### *Peer ‘Review’*

Judge Bell was dismissive of ongoing “peer group” comparisons, stating that the “bottom line regarding the performance of the Growth Fund appears to be that its performance admittedly lagged the returns of comparable growth funds and benchmarks, but that underperformance was the result of the relative mix of equity and non-equity assets (rather than incompetent investment managers)... In ‘up’ markets, the Growth Fund was expected to and did do less well, but in ‘down’ markets it was expected to do better. The difficult circumstance pervading this action is that over the class period there has not been a ‘down’ market of any significant duration to really test the Growth Fund over a ‘full’ market cycle.”

Court disagrees and finds that Aon acted loyally and prudently with respect to its recommendations to change the

Plan’s investment choices—which were consistent with its industry research and the thinking of other financial consultants—as well as its selection and retention of the Aon Growth Fund in the Plan, which was similarly reasonable based on Aon’s investment expertise and legitimate strategic choices.

Ultimately he wrote that “the evidence established that Aon’s ‘operative motive,’ as reflected in the thinking and conduct of consultant Abshire, was to benefit Plan participants through a consolidated menu of investment choices that was easier to understand and led participants to more broadly diversified investments.”

Moreover, Bell concluded that “Aon’s advice that the Committee consider simplifying the Plan’s investment lineup was developed from its extensive experience as an investment consultant to defined contribution plans and was consistent with Aon’s May 2013 white paper, which presented a proposed approach for structuring plan investment lineups based in part on Aon’s study of 10,000 defined-contribution-plan participant portfolios.”

Said more succinctly, Bell wrote that “Aon provided the Committee reasoned advice based on substantial research into investor behavior and decades of experience as an investment consultant to retirement plans. That advice fully satisfied ERISA’s duty of prudence.”

#### *Suitable Choices*

“Here, the Court easily concludes that Aon did not breach any

fiduciary duty in offering its delegated services to Lowe's," Bell wrote. He explained that while "Lowe's and Aon enjoyed a longstanding and trusting fiduciary relationship, which could have allowed Aon to take advantage of its position, but Aon did not use its role as a fiduciary advisor to make any recommendation on who Lowe's should select as a delegated fiduciary."

Additionally, he reiterated that Lowe's was "a very large and sophisticated company with tremendous resources which allowed it—if it had chosen to do so—to fully evaluate Aon's delegated services offering and compare it to competitive options." And Judge Bell found that "delegated fiduciary services were clearly suitable for Lowe's, particularly after Lowe's decided to change its Plan investment menu to the 'Emerging' structure with objective-based investment options, which encompassed underlying multi-fund investments." Finally, and while Bell acknowledge that Aon had "limited experience as a delegated services manager for defined contribution plans, it had extensive experience and resources as an investment advisor, so it was not imprudent for Aon to suggest that Lowe's consider using Aon's delegated services."

Moreover, Bell felt that "it would be wrong to conclude that Aon breached its fiduciary duty in not removing the Growth Fund from the Plan when Lowe's and Gallagher, its well-qualified fiduciary consultant, never suggested that Aon should remove the Growth Fund. Instead, with full knowledge of the fund's results relative to the same benchmarks and peers that Plaintiff points to as reasons the fund should have been abandoned, Gallagher appears to have judged the Growth Fund to be an appropriate investment to maintain in the Plan or at least believed that the fund should be given more time to prove itself."

Significantly, Bell noted that, "according to the Committee's meeting minutes, the Lowe's

Committee 'discussed vigorously' the information presented by Punnoose and Abshire, "posing probing questions ... about the proposed 'Alternative' and 'Emerging' structures."

#### **Fees**

Judge Bell not only concluded that "the fees charged by the Aon Growth Fund were reasonable and, indeed, beneficial to the Plan, but that "the Plan saved roughly eight to ten basis points per year in investment management fees by moving to the Growth Fund, or approximately \$800,000 to \$1 million per year."

#### **Attorney's Fees**

There was also the issue of recovering attorneys' fees—and Aon had moved for their expenses to be paid by the plaintiffs—on this issue the judge determined that there were "several good reasons why Aon should not recover any fees or costs in this action." Judge Bell determined that the plaintiff had not acted in bad faith in pursuing the action, that the plaintiff "a former Lowe's non-executive hourly employee" likely lacked the means to satisfy a significant award of attorneys' fees or costs—and that "an award of fees or costs against Plaintiff might well deter others from filing or participating in appropriate yet uncertain litigation; so, in light of the remedial purpose of ERISA this factor favors not making an award to Aon." Oh, and finally while finding that "on balance the facts and law amply support the Court's decision to enter judgment in Aon's favor on all of Plaintiff's claims, there was also support for Plaintiff's positions..."

#### **What This Means**

While the facts here are relatively unique, Judge Bell's reading suggests that the plan committee had in place a prudent and thoughtful process, one that was not only deliberate, but documented. That's what ERISA requires of plan fiduciaries—and here they appear to have fulfilled that obligation. And therefore prevailed.

—Nevin E. Adams, JD

## **'Short' Comings**

*A(nother) excessive fee suit tossed for insufficient allegations*

**A**nother excessive fee suit has been tossed by a federal judge for failing to "assert sufficient allegations to support their claim..."

This time the defendants are the fiduciaries of Cincinnati-based TriHealth, Inc.'s retirement plan—a relatively small plan (\$457 million)—and the suit filed on behalf of participant-plaintiffs by a law firm relatively new to these type actions (Greg Coleman Law and Jordan Lewis PA), who have nonetheless filed several other suits against smaller plans (smaller than the multibillion-dollar plans that customarily draw the attention of the plaintiffs' bar, anyway) on behalf of plaintiffs Danielle Forman, Nichole Georg and Cindy Haney, individually and as representatives of a Class of Participants and Beneficiaries (some 12,168 members, according to the filing).

#### **The Allegations**

The specific allegations here are familiar—all about the fees paid, with the inference being that the only explanation for the higher fees is imprudence. The suit claims that, for every year between 2013 and 2017, the administrative fees charged to plan participants was "greater than 90 percent of its comparator fees when fees are calculated as cost per participant or when fees are calculated as a percent of total assets," and that "the total difference from 2013 to 2017 between TriHealth's fees and the average of its comparators based on total number of participants is \$7,001,443."

Moreover, they claimed that the total difference from 2013 to 2017 between TriHealth's fees and the average of its comparators based on plan asset size is \$7,210,002, and that the TriHealth plan charged 401(k) fees of \$328 per person in 2017, when similarly sized plans—those with between \$250 million and \$500 million in assets—charged an average of only \$166 per person that year.





### The Analysis

That said, Judge Matthew W. McFarland of the U.S. District Court for the Southern District of Ohio here (*Forman v. TriHealth, Inc.*, 2021 BL 363942, S.D. Ohio, No. 1:19-cv-00613, 9/24/21) noted that, at least in his estimation, “plaintiffs have failed to assert sufficient allegations to support their claim that Defendants breached their duty of prudence by permitting the Plan to incur allegedly excessive administrative fees. They have simply not provided the Court with sufficient factual allegations to permit an inference of imprudence.”

More specifically, Judge McFarland said (that it wasn’t enough to allege that fees were high, there needed to be proof that there were “unjustifiably (or imprudently) high. Plaintiffs did not describe what services the Plan received in exchange for these administrative fees or what services the ‘comparable 401(k)

plans’ received in exchange for their less costly fees. The fact that the 401(k) plans are ‘comparable’ is not sufficient.”

He went on to note that the “plaintiff has the burden to plead facts that create more than a ‘sheer possibility that [the Plan’s fiduciaries] halve] (sic) acted unlawfully’ such that Plaintiffs’ claim is plausible and thus survives a motion to dismiss,” and that the plaintiffs here “have failed to allege facts that permit this Court to “infer more than the mere possibility of misconduct.”

### ‘Allegedly Underperforming Funds with High Fees’

As for allegations regarding “allegedly underperforming funds with high fees,” Judge MacFarland explained that “when evaluating an alleged breach of an ERISA fiduciary, while ‘plaintiffs need not plead facts ‘relating directly to the methods employed by the ERISA fiduciary,

they must ‘allege[] (sic) facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident.” But Judge MacFarland went on to explain that “when raising a challenge ‘investment-by-investment,’ a plaintiff cannot merely allege underperformance or high fees,” but that the complaint “must provide a sound basis for comparison—a meaningful benchmark.” To that end, he noted not only that “simply alleging that a fund underperformed is insufficient,” but that “while ‘allegations of consistent, ten-year underperformance may support a duty of prudence claim,’ such underperformance must be substantial.”

More specifically, he noted that courts have previously held that less than 1% or just over 2% differences in performance between the challenged fund

and the alleged benchmark “...was not sufficient to create a plausible inference of imprudence.” He concluded that here the plaintiffs “failed to assert sufficient facts to plausibly allege that Defendants breached their fiduciary duties because they failed to (1) sufficiently describe a comparable benchmark<sup>4</sup> and (2) sufficiently allege actionable underperformance.”

#### *Even If*

But then, Judge MacFarland noted that even if they had “provided sufficient factual allegations to describe a meaningful benchmark, Plaintiffs have failed to plausibly allege that Defendants acted imprudently because the variances identified by Plaintiffs are simply too small.” In his estimation, the underperformance claimed was, in every case, “less than 1%, with every fund except one being less than 1/2% difference in performance between funds.” He also found the fee variances to be “similarly small, ranging from .01%–.74%, with all but one fund having a variance of less than .5%.”

He concluded that “while the fact that other courts have previously approved such fee ranges as reasonable does not per se insulate the fee range in this case from challenge, in the absence of a meaningful benchmark demonstrating the unreasonableness of the fees, these cases bolster the Court’s conclusion that Plaintiffs’ allegations do not plausibly state a claim for imprudence.”

“Thus,” Judge MacFarland concludes, “these variances

alleged by Plaintiffs are simply too small to raise a plausible breach of the fiduciary duty claim against Defendants, as there can be no inference that Defendants’ process was flawed.” Oh, and as if that weren’t enough, he also had issues with the reliance on three-year annualized returns, rather than yearly performance and “because the Court cannot review the yearly figures, which is how the data would presumably be presented to and considered by Defendants, it cannot infer that Defendants’ process is flawed from the perspective of the ‘prudent man’ standard.” Not that three years was too long a period, mind you—Judge MacFarland opined that “...even assuming consistent underperformance in all three years, several courts have recognized that a three-year period is too short to support a breach of fiduciary duty claim.”

#### *‘Plausible Inference’*

“In sum,” he wrote, “Plaintiffs’ allegations that the identified funds underperformed alleged ‘comparator’ funds by such a slim margin do not raise a plausible inference that a prudent fiduciary would have found [the Plan] to be so plainly risky as to render the investments in them imprudent.”

That said, he refrained from “...the invitation to wholesale bless the Plan or Defendants’ processes,” going on to state that his ruling was “...premised on Plaintiffs’ failure to plead allegations that permit the Court to plausibly infer that Defendants have breached their fiduciary duty of prudence.”

The plaintiffs fared no better on their allegations of a breach of loyalty. “They do not assert any allegations of self-dealing, nor do they sufficiently allege facts to show that Defendants’ actions were for their own benefit, or for the benefit of someone else other than the beneficiaries. Indeed, their allegations pertaining to the breach of the duty of loyalty primarily reincorporate their breach of the duty of prudence allegations. This is plainly insufficient,” Judge MacFarland wrote—going on to grant the defendants’ motion to dismiss as “the facts as pled do not raise a plausible inference that Defendants breached their fiduciary duties.”

#### *What This Means*

This is the third case in nearly as many weeks where the allegations made regarding fees as excessive and processes alleged to be imprudent have been rejected by federal judges as...insufficient. This judge, in particular, “gets” the reality of prudence and process—and that what determines a reasonable fee is more than just an amount or a comparable size plan, but the service(s) for which that fee is paid.

Will more courts take notice? We shall see. **NTM**

—Nevin E. Adams, JD

#### FOOTNOTES

<sup>1</sup> The original suit, filed in the U.S. District Court for the Eastern District of California in 2018 by the Howard Jarvis Taxpayers Association, claimed that the California Secure Choice Retirement Savings Trust Act “violates the Supremacy Clause of the United States Constitution because it is expressly preempted by the Employee Retirement Income Security Act of 1974...” Without this preemption, the suit claims that “...such non-governmental employees’ funds will have none of the ERISA protections intended for them by the federal government since 1974.” Consequently, the plaintiffs had asserted that CalSavers is ultra vires (beyond the powers), and seek a declaration that CalSavers is “void.” That suit had been dismissed with a leave to amend—amended and refiled, the plaintiffs’ argument that ERISA preempted CalSavers was supported by the Department of Justice, but when the district court reconsidered the refiled arguments that it had already heard—well, nothing changed. So, the plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit—and that appeal was joined with a “friend of the court” brief by the Labor Department in June 2020, with the agency—which stated, among other things, that it had an interest in “whether state laws are preempted, properly interpreting the extent of preemption to delineate the roles of federal and state authority over the establishment or maintenance of employment-based retirement plans, and maintaining uniform national standards for plan administration”—and interest in the brief described as “heightened” in this case “because the Act is among the first of several similar state laws.” Or that was the Department’s stance until February of this year, when the Labor Department, citing the “change in administration,” said that the Acting Secretary of Labor had “reconsidered the matter and hereby notifies the Court that he no longer wishes to participate as amicus in this case and that he does not support either side.” That was followed in a decision earlier this year by the Ninth Circuit that CalSavers was not preempted by ERISA—leaving the plaintiffs to seek review by the nation’s highest court.

<sup>2</sup> From 2009 through Oct. 1, 2015, the Plan’s investment menu consisted of 12 investment options, which included Lowe’s company stock, a series of target date funds, a stable value fund, a fixed income fund, and eight equity options. As discussed below, the Plan’s eight equity options were later replaced by the Aon Growth Fund as part of a Plan investment menu restructuring that was recommended and ultimately implemented by Aon.

<sup>3</sup> The Alternative structure reduced the number of investment options and used fund naming conventions that were easier to understand, but not to the same degree as the Emerging structure. For example, the Alternative structure presented to the Committee included active and passive U.S. and non-U.S. equity options, but it eliminated distinctions between “value” and “growth” styles within those asset classes.

<sup>4</sup> Plaintiffs have not actually identified a meaningful benchmark. Sure, they identified several funds that they characterize as “the lower-cost share classes” and state that the only difference was the fees—but they offer no further information to permit the Court to conclude that the funds were, in fact, similar enough to permit an “apples-to-apples” comparison.

# Shifting Signs

*How practice(s) might shift in 2022*

By Nevin E. Adams, JD

**T**here are mere weeks left in 2021—and as we look back—and peer forward—for this week's reader radar, we asked about the impact—and response to—some key retirement industry trends and portents.

## Recordkeeping Consolidation

First—something that's getting a lot of attention of late—recordkeeper consolidation. We asked readers if they considered that an opportunity—or a threat—for their practice... well, as it turns out, nearly half (47%) saw it as an opportunity, and while just about a quarter (23%) acknowledged that "it depends on who is considering." That said, just 6% saw it as a threat, a few more (7%) weren't sure, and the rest (16%) saw it as... neither.

*I feel like at this point the "let us benchmark your plan because your provider was purchased" line is getting tired. Unless it's a non-specialist advisor I don't feel there is an opportunity. Same theory applies, specialist advisors shouldn't be threatened by consolidation.*

*Recordkeeper consolidations create a LOT of work for us, often for no money. They also, at times, push clients to conduct RFPs, which we can and do bill for. They can also trigger plans that do not have an advisor/consultant to seek. In short, disruption in the marketplace is both good and bad.*

Or, as another commented, "I deal with 22 different Service Providers, websites, passwords, Emails, Communications, Etc. so

Somewhat harshly, one commented that, *"At this point record-keepers are commoditized and more or less a website/app and an 800#."*

*"Plan Sponsors need help conducting due diligence to see if their pricing will be in line with the marketplace and optimum plan design and investments are being utilized."*

Or—as another astutely pointed out, *"Try transitioning from one recordkeeper to another without an advisor..."*

## Financial Wellness

We then asked how/will financial wellness fit with their practice. Here a whopping 84% said they were expecting a bigger focus, and another 3% said they thought there were already at capacity. Roughly 10% "hadn't really thought about it," while the rest were in the "not our thing" category. About 1% said they were actually planning to pull back some.

*"We are short staffed, more business coming in than we*

**“Any disruption whether positive or negative just opens up the conversation with prospects and clients.”**

*"Disruption allows advisors to demonstrate their value," explained one reader. "Worse service, more important to have a full service model," acknowledged another.*

*"Some consolidations are definitely a positive," commented one reader, who cautioned that they also had clients on the acquiring side concerned "... about whether there is such a thing as 'too big' and whether they will matter anymore if they're a small plan. So, I view consolidation on a case by case basis."*

*some degree of consolidation would be welcomed!! :)"*

*"Sucks for pricing"*

*"Hopefully it creates opportunity but scale matters in a big way in a technological world," observed another. "The bigger you are, the more you can spend \$-wise as it's a smaller %. Keeping my eye on the growth and how it's happening... While scale gives the ability to spend to improve, if people overpay, then their purse strings might be tight."*

*can handle," noted one reader. "Expecting that 2022 will pretty much be The Year of Financial Wellness," observed another.*

*"We've had good response from sponsors and participants and I expect that to continue," said another.*

However, another commented: *"Financial wellness is so 'yesterday.' It's financial planning as an employee benefit."*

*"Financial wellness is kind of a conference buzzword without any*





real or consistent definition," said another. "And it often attracts more attention than it deserves, or at least more attention than funding from sponsors. That's partly based on branding—who can be against wellness, and financial wellness is closely correlated to health wellness, so it makes sense to pursue. But how to pursue it, and whether sponsors are willing to make the investments necessary to attain true financial wellness is a much tougher question. Too many sponsors seem to think educational lip service is all that's needed, and many advisors are complicit in this misunderstanding, hoping that their willingness to deliver inexpensive educational programs that purport to address financial wellness will win them more business. We play that game less than most, which is perhaps why I don't see financial wellness as central to our practice."

*"We have been fully offering financial wellness services for several years and the uptake has been minimal. Clients want it but are not willing to pay for it," observed another.*

*"Major developments on our end."*

*"Already have a robust wellness program, just need to focus more employer awareness and endorsement of utilizing the tools for greater engagement."*

*"The largest hurdle we have seen is getting employee engagement. Until the employers start to require it or become more supportive of it will remain difficult to get employee engagement."*

#### **Retirement Income**

We next asked readers if, in 2022 they'd be talking about in-plan

retirement income options. Nearly half (48%) cautiously noted "possibly—curious to see what the SECURE Act changes may yield. Beyond that, there was a mixed message:

- 18%** - Probably—I already am, after all.
- 17%** - Not likely.
- 11%** - Too soon to say.
- 7%** - This is the year!

There was, however, a fair amount of skepticism in the verbatim comments, however:

*Don't understand why this is such a focus when such products can typically be purchased by clients (with many more features and flexibility and at less cost) outside the plan in the retail environment.*

*Solution in search of a problem*

*My clients don't seem overly interested in this quite yet. There need to be more products that are easy to understand and communicate. And, recordkeepers need to confirm if they are ready to account for different solutions. Portability is still an issue in my mind.*

*Waiting for more viable products.*

*I don't like them*

*Waiting for real guidance*

*Needs to be made Clear & PORTABLE*

*Early innings of this one, the game is just getting started.*

*The main issue with this is that until the income options with in plans equal or exceed outside products it makes it tough to comply with Reg BI to "promote" the in-plan options.*

*Since we work with 403(b) plans, we've been talking about them for decades without much participant interest. Will be interesting to see if the next generation of such products (re annuities inside tdfs, non-annuity options) will be more popular in 403(b) plans and ultimately lead to 401(k) sponsors adoption such features.*

*Most of our clients want terminated participants out of their plans.*

### **Managed Accounts Versus TDFs**

The next area of focus—whether in 2022 they were more likely to advocate for managed accounts or target-date funds. Here the clear favorite was:

- 47%** - Target-date funds
- 21%** - Probably split 50/50
- 18%** - Not sure
- 14%** - Managed accounts

*People, especially engineers, want to look up the ticker symbol and load it into their fin tech. Hard or impossible with portfolios.*

*Depends on the client and the makeup of their employee base*

*No different than this. Depends too on the provider.*

*Fees on managed accounts + lack of engagement = negates personalization. TDFs win.*

*Managed accounts have a role to play but are still—generally—far too expensive, and are a new target for excess fee litigation. I see managed accounts taking off when standard pricing gets to or below 25 bps. And I see that price target coming relatively soon.*

*Both are needed to provide the investment solution needs of plan participants*

### **Custom TDFs**

*Managed accounts are nothing more than an opportunity to greatly increase fees*

*If Managed Accounts move to a more formalized deliverable (aka third party managers similar across platforms OR standardized ability for advisor driven managed portfolios) then perhaps would consider using more often. Target dates are what they are but they're consistent across providers.*

*TDFs, and it's not close. One has revolutionized the industry, the other is about as popular as annuities. Will take further evolution of manager account for them to be firmly on plan sponsors' radar, imo.*

*Managed funds are code speak for "higher fees" in my opinion. And, you must be extremely hands on with education or participants won't understand what they mean, how they integrate with other investments, and how much they cost them in extra fees.*

### **Fees**

And for the final focus area, we asked readers if, in 2022, how, if at all, they expected what they charged for their services to change.

**68%** - Be about the same compared with 2021

**17%** - Be higher compared with 2021

**11%** - It's going to depend on the client

**4%** - Be lower compared with 2021

*Price has gone up everywhere on everything including our labor*

*Clients who want more services will hopefully be comfortable paying more!*

*Fees the same, amount higher due to assets*

*Lower base fee with add-ons for custom services*

*We right price every opportunity and evaluate / benchmark consistently*

*We have consistently been increasing fees when moving over Clients from BOR to RIA—3(21) or 3(38). While at the same time saving the Client \$\$'s*

*We have gone to flat fee versus bps and also lowered fees on plans w/ higher AUM but lower parts.*

*Probably be about the same, but the trend is to offer more services (e.g. participant advice, financial wellness, etc.), which means we'll be paid more...*

### **Other Factors**

Finally, we asked readers if they had additional "key factors" that could be a significant factor in their practice for 2022. Sure, regulation and legislation showed up, as did ESG (or more precisely the new proposal), PEPs, and—encouragingly enough, handling business growth and attracting new talent also came up repeatedly. Here's a sampling:

*Increased regulatory scrutiny*

*Rollovers, IRA and Roth discussions. Retirement Options for Beauty Salons, Barber Shops, Small Restaurants & Similar Businesses in Communities of Color and Underserved*

**“Talent. We have a not-so-great RM who is untouchable at the corporate level. We need real talent who is effective. Not many out there focused solely in retirement.”**

Communities. Really a missing Target Base.

Advisor consolidation

Finding good talent to join our growing team.

3(16) Services [and the differences between vendors/ service types] and Cash Balance Plans.

Labor shortage

Getting the PTE on IRA rollovers nailed down

Market performance will be more volatile. Rising interest rates will impact market value adjustments for fixed accounts.

PEPs

Changes to law and IRS and DOL activity.

Reg BI and working with retiring participants.

Staffing, competition, overall sales/marketing

Low interest rate environment on cost of annuities and fixed income investment options.

Legislation and inflation issues

Adjusting back to going to in-person

Recruiting more talent for our team

Nonqualified deferred compensation!

Biden Admin

Inflation

Rollovers and Wealth Management

Interest rates and plan funded status.

Regulation

Non-retirement savings accounts

Design needs to retain employees in small businesses

Student loan programs

COVID

More tech/ remote solutions

ESG

Final DOL rule on ESG

Pooled products

State and or Federally mandated Programs and the growth of PEP type programs to help accommodate the growth.

Technology integration with advisor resources and tools

Cybersecurity discussions, ESG

Increased Compliance & Administrative stuff always bogs us down. Example for 2021: now we have 4 of the 22 providers we deal with (I'm sure all eventually) asking us to set up a special shared drive to get reports, enrollment material, basically anything!! Our Firm grants access for only 90 days—and the process to acquire is a nightmare

Growth of new clients.

Cyber security

Capacity to onboard new clients. Internal growth.

Market movements. I think everyone is sleeping right now lulled there by constantly increasing market valuations... Not calling for doom and gloom but people are moving up the risk spectrum at a rapid pace and it is starting to feel eerily similar to previous experiences.

I think WFH (even if we remain 30-50% of time WFH) allowed us to scale and take on more plans with adding additional staff.

Keeping up with rapid growth

Sales concept strategies

Cultivating In house referrals

The continued trend of improved retirement readiness scores among younger employees due to autoenrollment/ autoescalation. More concern about retirement plan asset retention as more Baby Boomers retire...

Finding a “mini-me” to clone and help with plan service.

Large advisory companies getting bigger and more aggressive as competition.

Thanks to everyone who participated in our weekly NAPA Reader Radar poll! **NNTM**

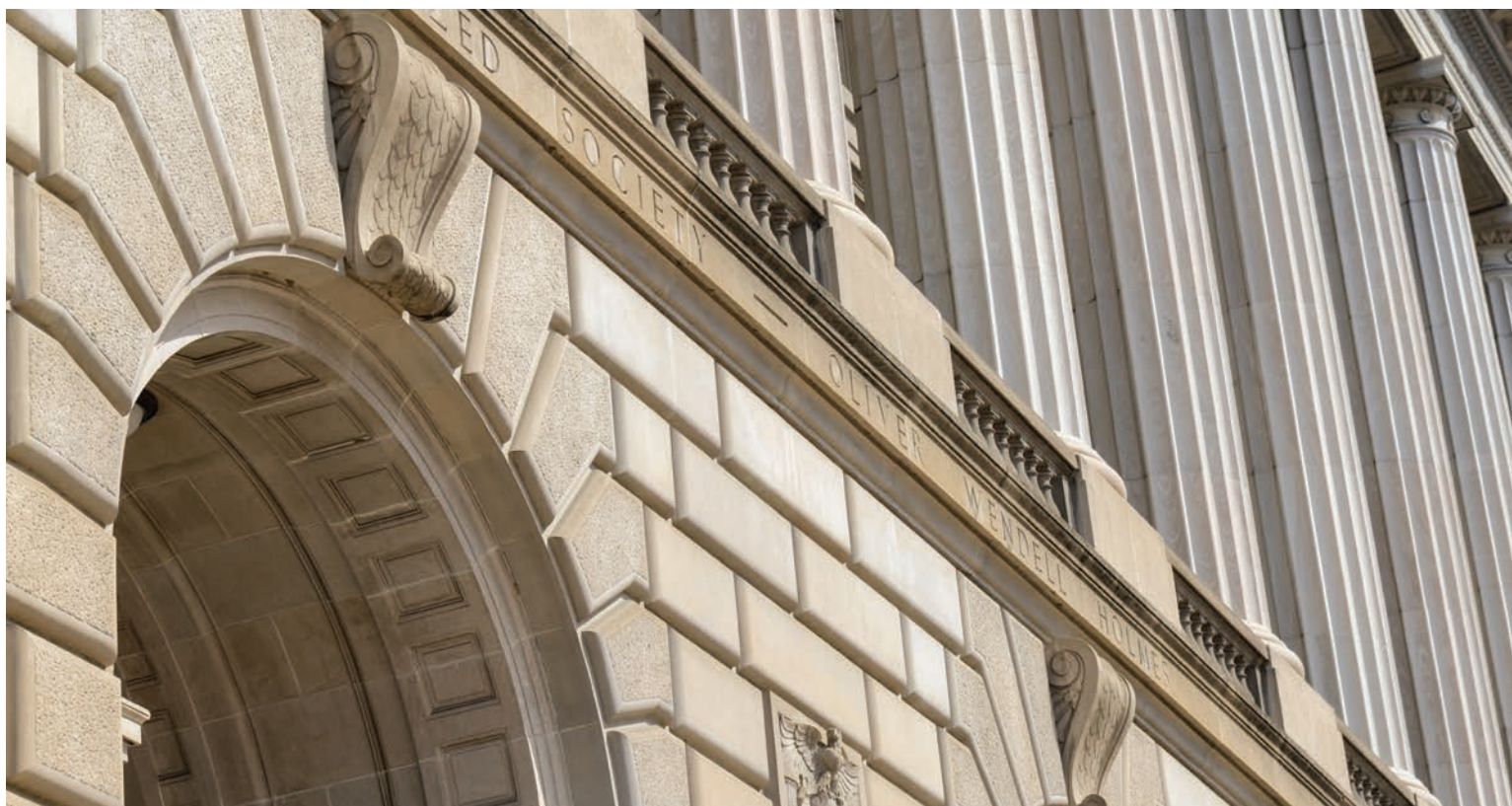


# Regulatory Review

*Things were hopping on the regulatory front in Q4—and we're not done yet. For one thing, the much-anticipated contribution and benefit limit announcement (finally) came out from the IRS—most were higher (except the catch-up contribution limit, which remained static).*

*We also (finally) got an official proposal on ESG investments and proxy voting from the Biden administration—not surprisingly, it reversed the emphasis in the rule published by the Trump administration (that the Biden administration had already said it wouldn't enforce). Finally, we got some breathing room on enforcement of the so-called fiduciary rule (issued by the Trump administration, and, at least for the moment, embraced by the Biden administration).*

*However, by the time you read this, who knows what will have changed...*



## Limit Less

*IRS announces 2022 contribution, benefit limits*

**T**he IRS (finally) announced cost-of-living adjustments affecting dollar limitations for pension plans and other retirement-related items for tax year 2022. The 2022 limits are contained in Notice 2021-61, released Nov. 4. Most rates have increased; a few are unchanged.

The limits for 2022 are as follows.

The limitation under Code Section 402(g)(1) on the exclusion

for elective deferrals described in Code Section 402(g)(3) is \$20,500. The 2021 and 2020 levels were \$19,500; the 2019 level was \$19,000. The limitation on deferrals under Code Section 457(e)(15) concerning deferred compensation plans of state and local governments and tax-exempt organizations is also \$20,500 for 2022, the 2021 and 2020 levels were \$19,500.

For an IRA contributor who is not covered by a workplace retirement plan and is married to someone who is covered, the deduction in 2022 is phased

out if the couple's income is between \$204,000 and \$214,000; the 2021 levels were \$198,000 and \$208,000; the 2020 levels were \$196,000 and \$206,000, respectively; those for 2019 levels were \$193,000 and \$203,000.

The AGI phase-out range for taxpayers making contributions to a Roth IRA in 2022 is \$204,000 to \$214,000 for married couples filing jointly; the 2021 range was \$198,000 to \$208,000. For singles and heads of household, the income phase-out range is \$129,000 to \$144,000; the 2021 range was \$125,000 to \$140,000;

the 2020 range was \$124,000 to \$139,000.

The AGI limit for the Saver's Credit (also known as the retirement savings contribution credit) under Code Sections 25B(b)(1)(C) and 25B(b)(1)(D) is as follows:

- \$68,000 for married couples filing jointly; the 2021 level was \$66,000; the 2020 level was \$65,000, and that of 2019 was \$64,000;
- \$51,000 for heads of household; the 2021 level was \$49,500; the 2020 level was \$48,750, and that of 2019 was \$48,000; and
- \$34,000 for married individuals filing separately and for singles; the 2021 level was \$33,000; the 2020 level was \$32,500, and that for 2019 was \$32,000.

The limitation on the annual benefit under a defined benefit plan under Code Section 415(b)(1)(A) is \$245,000, the level for 2021 and 2020 was \$230,000. For a participant who separated from service before Jan. 1, 2022, the limitation for defined benefit plans under Code Section 415(b)(1)(B) is computed by multiplying the participant's compensation limitation, as adjusted through 2021, by 1.0534.

The limitation for defined contribution plans under Code Section 415(c)(1)(A) is \$61,000; the 2021 limit was \$58,000.

The dollar limitation under Code Section 416(i)(1)(A)(i) concerning the definition of key employee in a top-heavy plan is \$200,000; the level for 2021 and 2020 was \$185,000.

The dollar limitation under Code Section 414(v)(2)(B)(i) for catch-up contributions to an applicable employer plan for 2022 is \$6,500, the same level as 2021 and 2020.

The limitation under Code Section 408(p)(2)(E) regarding SIMPLE retirement accounts for 2022 is \$14,000, the level for 2021 and 2020 was \$13,500; the 2019 level had been \$13,000.

#### Compensation Limits

The annual compensation limit under Code Sections 401(a)(17),

404(l), 408(k)(3)(C), and 408(k)(6)(D)(ii) is \$305,000; the level for 2021 was \$290,000.

The limitation used in the definition of a highly compensated employee under Code Section 414(q)(1)(B) for 2022 is \$135,000; the level for 2021 and 2020 had been \$130,000.

— NAPA Net Staff

#### 'Wait' Gain?

*DOL delays enforcement of fiduciary investment advice exemption*

The Department of Labor has issued a temporary delay of the enforcement effective date for Prohibited Transaction Exemption 2020-02.

In Field Assistance Bulletin 2021-02, released Oct. 25, the DOL's Employee Benefits Security Administration (EBSA) announced that from Dec. 21, 2021, through Jan. 31, 2022, the department will not pursue prohibited transaction claims against investment advice fiduciaries who are "working diligently, and in good faith, to comply with the Impartial Conduct Standards for transactions exempted in PTE 2020-02."

EBSA also says it will not treat such fiduciaries as if they were violating the applicable prohibited transaction rules. Additionally, the FAB advises that the DOL will not enforce the specific documentation and disclosure requirements for rollovers in PTE 2020-02 through June 30, 2022. However, all other requirements of the exemption will be subject to full enforcement on Feb. 1, 2022.

#### Background

In December 2020, the DOL under the Trump administration issued PTE 2020-02, which, among other things, permits investment advice fiduciaries to receive compensation in relation to providing fiduciary investment advice, including with respect to advice to rollover a participant's account in a workplace retirement plan to an IRA and other similar types of rollover recommendations.

This exemption became effective Feb. 16, 2021, but

the DOL provided transitional relief through Dec. 20, 2021, which relieved fiduciaries of the obligation to comply fully with many of the exemption's conditions during that period.

Now, in FAB 2021-02, the DOL says that it understands the Dec. 20 expiration date of the current transitional relief poses practical difficulties for financial institutions. While some believe they will be ready by the deadline with fully operational systems, others believe more time is necessary and have requested additional time to build the required systems and make the transition to full compliance with the exemption, the DOL notes.

The DOL explains that these institutions have expressed specific concern that they would incur significant additional costs to distribute disclosures because Dec. 20 does not align with their regular distribution cycle for disclosures.

These institutions also have asserted that the expiration date would make it difficult to conduct the required retrospective review on a calendar-year basis. Moreover, they maintain that they face significant challenges in implementing the rollover documentation and disclosure requirements in a sufficiently automated and systematic manner by the Dec. 20 deadline. As such, these challenges and concerns may delay their ability to rely on the exemption as the department intended, the DOL explains.

"The class exemption provides meaningful protections for individual investors and we continue to emphasize the importance of compliance," EBSA Acting Director Ali Khawar said in a statement. "Based on concerns raised, we've concluded that providing additional transition relief for financial institutions that are working in good faith to build systems to comply with the exemption conditions is appropriate."

The FAB also notes that the department continues to review issues of fact, law and policy related to the exemption, and more generally, its regulation of fiduciary investment advice.



The DOL's Spring 2021 regulatory agenda advises that the department is considering whether to revisit the fiduciary rule and whether to address the 1975 five-part test and other preexisting exemptions that were not amended by the Trump administration when it implemented PTE 2020-02. The agenda item shows that EBSA plans to issue a Notice of Proposed Rulemaking by December 2021.

— Ted Godbout

## 'Back' Words

*DOL proposal would reverse Trump ESG, proxy voting rules*

The Department of Labor has now released a new proposal that would set aside the previous administration's final rules on the use of ESG factors in selecting plan investments and fiduciary duties regarding proxy voting for one that explicitly allows a consideration of those factors.

The Oct. 13 proposed rule seeks to remove barriers to plan fiduciaries' ability to consider climate change and other environmental, social and governance (ESG) factors when they select investments and exercise shareholder rights.

The proposed rule, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," follows Executive Order 14030, signed by President Biden on May 20, 2021. That order called for the implementation of policies to "help safeguard the financial security of America's families, businesses and workers from climate-related financial risk that may threaten the life savings and pensions of U.S. workers and families."

"The proposed rule announced today will bolster the resilience of workers' retirement savings and pensions by removing the artificial impediments—and chilling effect on environmental, social and governance investments—caused by the prior administration's rules," Acting Assistant Secretary for the Employee Benefits Security Administration Ali Khawar said in a statement. "A principal idea

underlying the proposal is that climate change and other ESG factors can be financially material and when they are, considering them will inevitably lead to better long-term risk-adjusted returns, protecting the retirement savings of America's workers."

Among other things, the new proposal would clarify the application of ERISA's fiduciary duties of prudence and loyalty in selecting investments and investment courses of action, including selecting qualified default investment alternatives and the use of written proxy voting policies and guidelines.

### Permissibility of Consideration of ESG Factors

According to a fact sheet, the proposed rule addresses the DOL's concern that the 2020 rules have created uncertainty and are having the undesirable effect of discouraging ERISA fiduciaries' consideration of climate change and other ESG factors in investment decisions, even in cases when it is in the financial interest of plans to take such considerations into account.

This uncertainty may deter fiduciaries from taking steps that other marketplace investors take in enhancing investment value and performance, or improving investment portfolio resilience against the potential financial risks and impacts associated with climate change and other ESG factors, the DOL notes.

Among the proposed changes is the addition of regulatory text that makes it clear that, when considering projected returns, a fiduciary's duty of prudence may often require an evaluation of the economic effects of climate change and other ESG factors on the particular investment or investment course of action. The proposed change is accompanied by three sets of examples that, depending on the facts and circumstances, may be material to the risk-return analysis.

### QDIA Provisions

The proposal would also remove the special rules for QDIAs that apply under the current rule. The NPRM would instead apply

the same standards to QDIAs as apply to other investments. Thus, when selecting a QDIA, a plan fiduciary must focus on, among other things, material risk-return factors and not subordinate the interests of participants and beneficiaries (such as by sacrificing investment returns or taking on additional investment risk) to objectives unrelated to the provision of benefits under the plan. The preamble to the NPRM reaffirms that, in addition to the requirements under the "Investment Duties" regulation, other standards apply to qualified default investment alternatives.

### Changes to the Tie-Breaker Test

The proposal seeks to change to the "tie-breaker" standard that permits fiduciaries to consider collateral benefits as tie-breakers in some circumstances. The DOL notes that the existing rule imposes a requirement that the competing investments be economically indistinguishable before fiduciaries can turn to collateral factors as tie-breakers, and imposes a special documentation requirement on the use of such factors.

The proposed rule would replace those provisions with a standard that requires the fiduciary to conclude prudently that competing investments, or competing investment courses of







action, equally serve the financial interests of the plan over the appropriate time horizon. In such cases, the fiduciary is not prohibited from selecting the investment or investment course of action based on economic or non-economic benefits other than investment returns.

The proposed change also would remove the special documentation requirements that create burdens for application of the tie-breaker provision, and that have “erroneously suggested to some fiduciaries that they should be wary of considering ESG factors, even when those factors are financially material to the investment decision.” To the extent individual account plans use a tie-breaker in the selection of a designated investment alternative, the plans must prominently disclose the collateral considerations that were used as tie-breakers to the plans’ participants.

#### **Shareholder Rights/ Proxy Voting Provisions**

Finally, the proposal would also make three changes to the current rule’s provision on exercises of

shareholder rights, including proxy voting:

- It would eliminate the statement in paragraph (e)(2)(ii) of the current regulation that “the fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right.”
- The proposal would remove the two “safe harbor” examples for proxy voting policies permissible under paragraphs (e)(3)(i)(A) and (B) of the current regulation. One of these safe harbors permits a policy to limit voting resources to particular types of proposals that the fiduciary has prudently determined are substantially related to the issuer’s business activities or are expected to have a material effect on the value of the investment. The other safe harbor permits a policy of refraining from voting on proposals or particular types of proposals when the plan’s holding in a single issuer relative to the plan’s total

investment assets is below a quantitative threshold.

- The NPRM would eliminate the requirement in paragraph (e)(2)(ii)(E) of the current regulation that, when deciding whether to exercise shareholder rights and when exercising shareholder rights, plan fiduciaries must maintain records on proxy voting activities and other exercises of shareholder rights. The proposed rule instead directs fiduciaries to the generally applicable statutory duties of prudence and loyalty set forth in ERISA section 404 for the governing standards in these areas.

Comments were requested from all interested stakeholders on the proposed rule within 60 days after publication in the Federal Register—not only on the provisions of the proposal but also on any issues germane to the subject matter of the proposal. **NTM**

— Ted Godbout

*Don’t forget to check out the ESG investing resource center on [napa-net.org](http://napa-net.org)*

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