THE OFFICIAL MAGAZINE OF THE NATIONAL ASSOCIATION OF PLAN ADVISORS

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FALL
2024

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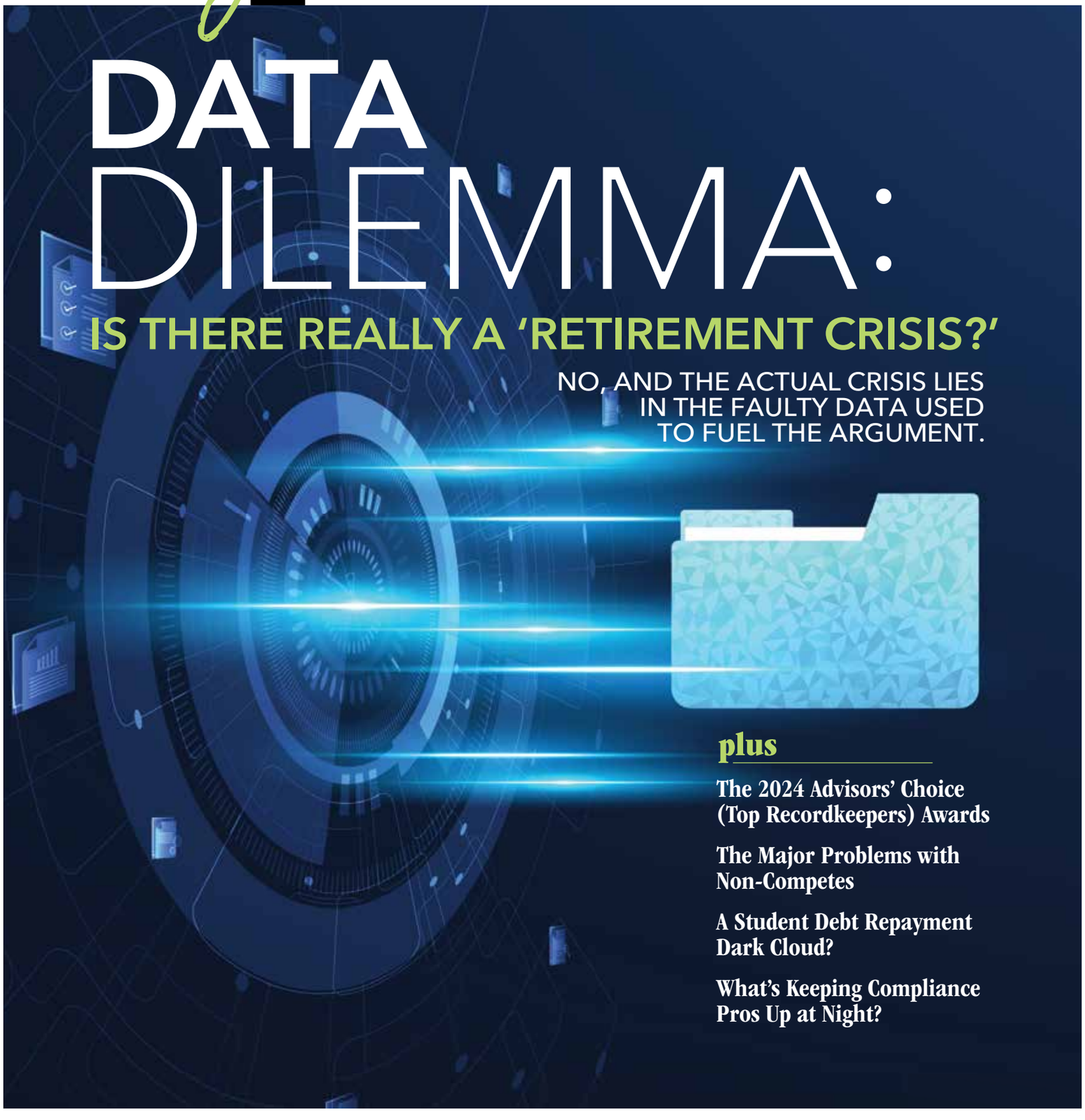
DATA DILEMMA:

IS THERE REALLY A 'RETIREMENT CRISIS?'

NO, AND THE ACTUAL CRISIS LIES IN THE FAULTY DATA USED TO FUEL THE ARGUMENT.



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The Major Problems with Non-Competes

A Student Debt Repayment Dark Cloud?

What's Keeping Compliance Pros Up at Night?

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*2024 NAPA Advisors' Choice surveys conducted on September 6, 2024.

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*The *2024 NAPA Advisors' Choice* surveys NAPA members on recordkeeping services in five market segments across 13 different service categories. On September 6, 2024, NAPA included *Fidelity Investments* in the Mega, Large, Mid-Market and Small Plans segments in forty-eight total service categories. No fees were paid for the recognition. NAPA began the Advisors' Choice survey in 2021.

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Cover Story

Data Dilemma: Is There Really a 'Retirement Crisis?'

Critics of the term say no, and that the actual crisis lies in the country's faulty retirement income and savings data—which vastly overstates the issue—and a misunderstanding about the private retirement system's role. We take a comprehensive look.

By Paul Mulholland

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Departments

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Nevin E.
Adams, JD

Former Chief Content Officer
American Retirement Association

Former Chief Content Officer of the American Retirement Association, Nevin now claims to be "retired." One of the industry's most prolific writers, during his more than four decades in the retirement industry, he's served as the Employee Benefits Research Institute's (EBRI) Director of Education and External Relations, spent a dozen years as Global Editor-in-Chief of PLANSPONSOR/PLANADVISER, and after two decades working with retirement plans, entered journalism as the originator, creator, writer and publisher of PLANSPONSORcom's NewsDash.

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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.

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

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

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Triechel

Chief Solutions Officer
Endeavor Retirement

Bonnie Treichel, the Founder of Endeavor Retirement and Endeavor Law, is an ERISA attorney that works with advisors, plan sponsors and others in the retirement plan ecosystem. She is a regular contributor to NAPA's publications and enjoys working with advisors as a subject matter expert to NAPA and ARA training programs such as the ESG(k) program, 401(k) Rollover Specialist (k)RS™ program, and others to come.

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ERISA and Innovative Attitudes About How We Work

The increasing rate of demographic and workplace change, a kind of Moore's Law for the American workforce, is both exhilarating and exhausting to consider, but it will happen, and ERISA will continue to play a major part.

"Stop asking your children, 'What do you want to be when you grow up?'" MIT AgeLab Director Joe Coughlin implored ERISA 50th Symposium attendees in Washington, D.C. recently (see NNTM summer cover story). "The question should be, 'How many things will you be when you grow up?'"

It was one of many points made by a panel of futurists and thought leaders in a session that explored potential challenges and opportunities for ERISA in adapting to future workforce dynamics—one of constant reinvention and change.

It was especially fascinating to consider the landmark law's impact 50 years on, and what it will look like going forward with AI, innovative attitudes about how we work, and their effects on retirement benefits.

Karen Andres, Director of Impact Strategy and Partnerships with the Aspen Institute, moderated the panel, which also featured Jennifer Yarrish, Director of Enterprise Strategy with AARP, and Richard Jackson, President and Founder of the Global Aging Institute.

Yarrish began by predicting the impact artificial intelligence (AI) will have on the workforce, arguing that just as we couldn't imagine a social media influencer in 2004, we can't begin to imagine the new jobs and titles AI will create.

"Think about a large swath of jobs going away and how AI and automation are delivering against this promise to make us more efficient," she said. "We really need to think about what it means to have a 9-to-5 job and a 40-hour work week. Are we going to continue to work 40 hours? I don't think so. It's going to be 15 hours or 20 hours because we'll be so much more efficient. But with that, we need to evaluate and reconsider our social contract and what that means for benefits."

Noting that he's "really looking forward to that 15-hour work week," Jackson added that retirement is a relatively new concept.

"Essentially, it dates to the early postwar decades, which was the point, really, in the 1950s, '60s, '70s, and '80s, retirement, for the first time, became a universal aspiration and then a universal expectation," he said. "We'll move beyond this three-box life cycle of, first, education, then work, then retirement into a world in which we alternate periods of work, study, and leisure across the life cycle. So, more of that leisure front end and maybe a little more work backing it. And benefit systems are going to need to evolve in order to facilitate that."

Coughlin described a three-part trendline that he's seeing related to longevity.

"It's TSA, but not the homeland security people; it's time, speed, and agility," he explained. "These are the three things that we see moving the workforce. The first, time, means we're living longer."

The second is the speed of change, of which AI is a part.

"AI, combined with the knowledge that we have in our professions, are changing at such a rapid rate," Coughlin said. "This rate of change is going to drive people to change careers. And then, finally, agility. Workers will have to be more agile, not simply to compete with AI, but with each other."

At one point, Coughlin asked the audience if it had heard of "emerging adulthood?"

"Adulthood used to be 18 years old," he said. "What is it today? Thirty-six years old. Over half of people between 18 and 34 have no significant other, no friends with benefits, no partner, no nothing. Your son, particularly, is still in the basement playing video games while young women are buying homes at twice the rate of young men. You need 2.1 kids per female just to keep it even. In the United States, it's at about 1.6 or thereabouts. So, we're not starting our lives early. We do not have a significant other. We're not having children, but we are having pets. If the benefits we're talking about are to protect workers, they're about my pets and my parents. The kids? Not so much."

The increasing rate of demographic and workplace change, a kind of Moore's Law for the American workforce, is both exhilarating and exhausting to consider, but it will happen, and ERISA will continue to play a major part. NNTM

John Sullivan
Editor-in-Chief

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From Fax to 401(k), We've Come a Long Way

As we celebrate 50 years of ERISA and its role in the 401(k)s creation, we're reminded of the work still to do, and why we must remain vigilant and engaged.

By Keith Gredys

In 2024, ERISA celebrated its 50th Anniversary. Most don't recall the "why" of ERISA. Most do not understand that when ERISA was passed, politicians and experts did not imagine a 401(k) plan would evolve from its passage, or that the creation of Individual Retirement Accounts (IRAs) would become a significant part of retirement savings.

ERISA designers originally intended it to protect participants' benefits and provide guidance and regulations for company retirement plans. In 1974, Defined Benefit and Profit-Sharing plans dominated the space.

With ERISA and subsequent tax law changes, the retirement industry evolved and was driven by technological advances. This evolution eventually led to the creation of the 401(k) system, with employees deferring part of their compensation on a tax-advantaged basis, and the growth of the mutual fund industry, with its ability to daily value funds and account balances. This led to the need for more legislation and regulations to keep pace with these changes.

Personally, it's been an exciting journey. In fact, in the early 1980s, at the first bank trust department that I was lucky enough to manage, we obtained IRS approval for our own 401(k) plan document (back then, it wasn't called a 401(k) plan. It was called a "Cash or Deferred Salary Arrangement" or "CODA"). Our IRS-approved plan document was only 14 pages long. How times have changed …

For plan administration and compliance, we had to manually track deposits and distributions and do all calculations on Green Columnar Ruled Ledger Paper because computers weren't yet common.

We used basic nine-key calculators and a lot of pencils and erasers because plan administration software was not available for our Bank's mainframe computer systems. We finally purchased an Apple II computer and were amazed at how fast it could speed up calculations and print output on a dot matrix printer.

Finally, administrative and compliance reports were prepared manually using IBM Selectric typewriters. In our situation, participants' investments were either pooled in one of our quarterly valued collective investment trusts or created in separate trust brokerage accounts. We were not large enough to spend funds on developing technology for a new idea called daily valuation. Still, some insurance companies could and were early innovators in 401(k) services.

To communicate with our investment custodian, we were lucky to have one of the area's only "facsimile" machines. We actually promoted our fax machine capabilities to prospects because—wow!—you take a document, and it magically prints at another location across the country. That's how we operated and served our clients at that time.

The purpose of outlining my personal history is that I have lived to see it all happen, and it will continue to change. Advances in technology will continue to allow for more and more services to produce better outcomes for participants. Back then we had no idea what that future would look like. But we accepted the challenges and adapted.

Keith J. Gredys JD, CPFA, AIF®, BCF is Chairman & CEO of The Kidder Company. This is his inaugural column as NAPA's 2024/2025 president.

Fortunately, due to organizations like the National Association of Plan Advisors, the American Retirement Association (ARA), and the other ARA sister organizations, we can have an important say in what part of that future change for our industry will look like—if we accept the challenge.

The bottom line is that no matter what Congress or regulatory bodies throw at us or the changing needs and demands of Americans to achieve a successful and fulfilling retirement, we can evolve. While the 50th Anniversary of ERISA is a milestone, it doesn't mean ERISA is nearing retirement.

I view it as an adolescent trying to decide what it wants to be when it grows up. It has a long way to go, but it demonstrates how our industry and each of us have adapted and succeeded in growing Americans' retirement assets, which are now over $30 trillion.

It's also why we must be vigilant in ensuring that Americans' retirement assets are protected and continue to grow. Many politicians see this tax-deferred accumulation as a piggy bank. Our job is to do our best to keep those assets in the hands of the participants and the beneficiaries who worked for them.

2025 tax legislation will probably have an impact on the retirement planning aspects of Americans. Retirement Plan Advisors will be needed even more over the next few years to guide and serve our plan sponsors and plan participants and increasingly engage as vocal advocates to protect and preserve the retirement assets for hard-working Americans.

You may have noticed that I love what I do and how it can benefit others, and I hope you do, too. NNTM

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A Crisis in Data Confidence

The call to action is clear—consistently correct the record to defend the private retirement system and its participants from dishonest and damaging attacks.

By Brian H. Graff

Defined contribution critics are kicking it up a notch, increasingly using faulty data to feed equally faulty arguments about the extent of the country's retirement "crisis." Any effective communicator will say success is in the storytelling, and we, as an industry, must do a better job telling our story.

It requires a comprehensive deconstruction of what critics are saying and why, and how NAPA members can better inform plan sponsors and participants.

They base their attacks on selective statistics. The most egregious is reliance on the Current Population Survey (CPS) from the Census Bureau, which incorrectly inflates the retirement savings gap by a large margin. The CPS only counts *regular income*, capturing roughly 60 percent of what individuals typically receive from various retirement funding sources. As former Social Security Administration senior executive Andrew Biggs recently noted, income retirees receive from 401(k)s and IRAs is *irregular* and can vary from year to year—so CPS data is skewed. It's also a voluntary survey.

IRS data is more accurate and shows actual retirement income figures that tend to be much higher. Rather than a voluntary survey that risks self-selection bias, tax filers have a legal obligation to be complete and accurate in their reporting. Simply put, any argument that relies on CPS, rather than IRS, data will overstate the savings gap.

The attacks also stem from a misunderstanding of the private retirement plan system's primary role as a complement to Social Security, pensions, and other retirement income and savings, not the only source of retiree income.

Additionally, critics blame 401(k)s for failing to effectively address income inequality and poverty in retirement. Yet, as our cover story notes, the retirement system mirrors a person's working income and was never meant to address poverty reduction, something Social Security and other federal programs have been specifically designed to do.

Moreover, critics also overlook the fact nearly 90 percent of 401(k) participants are middle- and moderate-income workers, and over half of these savers report that they are saving for retirement solely because they have access to an employer-sponsored retirement plan.

Research finds that Social Security benefits will replace almost 80 percent of the average career earnings for households in the lowest income strata after adjusting for inflation. It's why addressing Social Security solvency issues—rather than baselessly attacking the 401(k)—is so critical.

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

Unfortunately, we're compounding the problem with faulty data of our own. It's usually in the form of oversimplified corporate surveys that call for ridiculously high income multiples and asset levels that discourage workers from thinking a successful retirement is possible. Fear over hope may generate headlines and increase clicks to help market solutions, but it's a Faustian bargain destined to bite us.

Complicating matters further, lawmakers are also relying on this incomplete—and sometimes wildly inaccurate—data when making policy decisions. These decisions have the potential to upend the retirement system and devastatingly impact tens of millions of retirement savers across the country.

This is particularly concerning because the *Tax Cuts and Jobs Act* is set to expire at the end of the year, meaning that Congress will be negotiating a comprehensive tax package based on flawed data when they return.

So, the message going forward is clear—there is no retirement crisis, as research routinely demonstrates, but rather a "retirement data crisis." Our call to action is equally clear—consistently correct the record to defend the private retirement system and its participants from dishonest and damaging attacks. NNTM

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Trends 'Setting'

For three years in a row, complying with the Securities and Exchange Commission's marketing rule was the No.1 worry for investment adviser compliance officers, but that's no longer the case. Also, a fee decline leads to a better participant outcome, and Transamerica makes a bold financial wellness prediction.

Compliance Concerns

What's keeping the pros up at night?

Concerns about off-channel communications eclipsed the marketing rule as the top compliance concern, according to the 2024 Investment Management Compliance Testing Survey.

Electronic communications surveillance/off-channel communications was identified by roughly 6 in 10 (59%) survey respondents as the "hottest" compliance topic. And even though it fell out of the top spot, advertising/marketing was not far behind, with 57% of respondents agreeing that it was a hot topic.

Meanwhile, AI/predictive analytics debuted in third place, with 46% of respondents including this on their list of hot topics. Other hot topics generally aligned with the SEC's exam, enforcement, and rulemaking priorities. These key focus areas included:

- Cybersecurity (37%)
- Private funds (16%)
- Conflicts of interest (10%)
- Vendor due diligence (8%)
- Environmental, social, and governance (8%)
- Anti-money laundering (6%)
- Books and records (6%)

Not surprisingly, the industry also remains focused on SEC exams, with 83% of respondents reporting that they are undergoing an exam or have been examined in the past five years.

The top examiner focus areas on recent SEC exams were reported as: #1 books and records (58%), #2 advertising and marketing (57%), and #3 conflicts of interest (50%).

Investment advisers apparently are also enhancing their compliance programs, with 65% having conducted or intending to conduct a mock SEC exam, for example, as well as increased testing. A large majority of respondents (85%) reported that a mock exam prepared them for an actual SEC exam and identified issues and best-practice enhancements.

The top areas of increased testing include:

- Electronic communication surveillance/off-channel communications (73%),
- Advertising/marketing (65%),
- Cybersecurity (57%),
- Vendor due diligence (44%), and
- Books and records (36%).

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The findings also revealed that most respondents did not decrease testing in any area.

"The increasing focus on off-channel communications underscores the need for robust electronic surveillance strategies to mitigate risks and safeguard client data," observed ACA Global Advisory Leader Carlo di Florio.

"Marketing, artificial intelligence (AI), cyber, and vendor oversight are other key hot topics investment advisers are testing and grappling with. Investment advisers who prioritize compliance, conduct mock exams, and embrace industry best practices are better positioned to navigate the complexities of today's regulatory environment," he added.

The findings are based on the participation of compliance professionals at 595 investment adviser firms. All firm sizes were represented—with 26% of respondents managing less than $1 billion in assets, 41% managing $1 billion to $10 billion, and 34% managing more than $10 billion.

In addition, 42% of responding firms reported having between 11 and 50 employees, which the researchers note is consistent with industry data showing that most investment advisers are small- to mid-sized businesses. This year's survey also revealed that the majority of CCOs (58%) continue to wear more than one hat (with 18% also serving in some legal capacity).

Services provided by responding firms spanned the range of client types, including retail individuals with a typical account size of $1 million or less (35% of respondents), private funds (60%), ERISA assets/pension consultants (45%), institutional clients (58%), and high net worth individuals (56%).

- Ted Godbout

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Predict 'Well'

Nearly half of employers to offer financial wellness by 2026.

It's happening. Driven by the increasing need for financial wellness support among employees, a panel of retirement industry experts predict that nearly half (47%) of employers will offer a comprehensive financial wellness program by the end of 2026.

Perhaps not surprisingly, factors influencing employer decisions to implement financial wellness programs include employee benefit costs (83%), employee retention (77%) and employee engagement (70%).

This is according to Transamerica's latest installment in its Prescience 2026 series.

When asked about program costs and delivery, opinions about who will pay for the program varied. Panelists suggested that 34% of employers will cover the full cost of financial wellness programs, while 17% believe employees will bear all the costs and 24% say that costs will be shared.

As to service delivery, respondents leaned toward virtual assistance as the primary mode of providing services. Among employers with a program, they anticipate that nearly 4 in 10 (37%) will offer an automated assistant, chatbot, or avatar with which employees can interact as they build their personalized financial wellness plan or monitor their progress. Respondents also believe that 31% are likely to offer a personal coach alongside automated assistance.

The expectations of reliance on automated assistance may be related to program costs, the report observes. The panel foresees about 23% providing only a personal coach (in-person or on the phone), and that 9% will not use either option.

Meanwhile, utilization of financial wellness programs is unlikely to significantly vary regardless of how the service is delivered—with live coaching expected to drive marginally higher utilization (24%) compared to chatbots (23%), the report further suggests. On the other hand, utilization among employers that offer both options is expected to reach 30%.

That said, the survey shows that the industry experts believe employees—especially those who are stressed by debt and other financial issues—appreciate the availability of these programs.

> **“Our study shows that retirement savers continue to see high value investing in mutual funds, which are diversified, professionally managed, and cost-effective.”** — Sarah Holden, Investment Company Institute (ICI)

As to privacy and confidentiality, despite discussion to the contrary, panelists generally believe that participants are not overly concerned about data confidentiality in financial wellness programs. To be clear, data confidentiality concerns were an issue for the panelists, but they were not viewed as a significant barrier to program utilization, with only 37% of panelists indicating that it could be an obstacle.

And while there apparently was some disagreement on whether participants with access to financial wellness programs will use them to make choices about their workplace benefits, the report notes that there was consensus that those who do use the programs will follow the recommendations provided.

When asked whether most employers that pay a fee for a financial wellness program will expect a financial return on investment (ROI), more than two-thirds (67%) of panelists agreed or strongly agreed that this would be the case.

The experts were split, however, when asked if most employers that offer a financial wellness program with no identifiable fee will expect a financial return on their investment, with the highest number of respondents, 47%, disagreeing or strongly disagreeing with that statement. Transamerica notes that this is likely due to the difficulty of calculating an ROI when there is no investment.

When asked to weigh in on financial wellness success metrics, 60% agree or strongly agree that the impact of financial wellness program utilization on retirement plan outcomes will have been demonstrated by the end of 2026.

- Ted Godbout

The ‘Decline’ Continues

Lower mutual fund fees helped boost 401(k) nest eggs.

It’s a very good trend that continues to help retirement savers. 401(k) plan participants have incurred substantially lower fees for holding mutual funds over the past two decades, offering them higher returns and higher balances in retirement, research from the Investment Company Institute (ICI) shows.

In “The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2023,” the ICI’s study reveals that from 2000 to 2023, the average equity mutual fund expense ratio paid by 401(k) investors dropped by more than half.

In fact, during that time, the average equity mutual fund expense ratio paid by 401(k) investors dropped by 60%, and their average bond mutual fund expense ratio by 63%. ICI notes that the long-running decline in average mutual fund expense ratios paid by 401(k) investors primarily reflects a shift toward lower-cost funds, which includes movement to no-load fund share classes.

Additional key findings from the study include the following:

- 401(k) plan participants investing in mutual funds tend to hold lower-cost funds. At year-end 2023, 401(k) plan assets totaled $7.4 trillion, with 38% invested in equity mutual funds. In 2023, 401(k) plan participants who invested in equity mutual funds paid an average expense ratio of 0.31%, somewhat less compared with the expense ratio of 0.42% for all assets in equity mutual funds. All told, at year-end 2023, 65% of the $7.4 trillion in 401(k) plan assets were invested in mutual funds, the report shows.
- The expense ratios of target date mutual funds have fallen steadily since 2008. The average expense ratio of target date mutual funds, also experiencing a long-running downward trend, dropped 55% from 2008 to 2023. Most recently, the average asset-weighted expense ratio for target date mutual funds declined from 0.32% in 2022 to 0.30% in 2023.

“This is great news for American workers looking to invest for the long-term and drive growth in their 401(k) plan nest eggs,” stated Sarah Holden, the ICI’s Senior Director for Retirement and Investor Research. “Our study shows that retirement savers continue to see high value investing in mutual funds, which are diversified, professionally managed, and cost-effective. Competition, clear disclosure, the rising role of index funds, and plan participants’ investment choices continue to reduce the costs of saving for retirement through 401(k) plans.”

That said, the ICI further observes that the decrease in mutual fund fees should be contrasted against the fact that Americans are paying more for almost everything else. For example, over the same period, the costs of tuition and tax preparation services rose about 45% more than overall price inflation, and car insurance and rent by about 20%.

- Ted Godbout

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The Education You Need to Ensure Rollover Compliance

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Top 10 Lead Producing Campaigns for 401(k) Advisors in 2025

With a clear plan and the right tools, this year can be your best yet.

By Rebecca Hourihan AIF, PPC

With new competitors and a rapidly changing labor market, it's crucial to stay ahead of the game with innovation and connection. Let's dive into a treasure trove of strategies to help you shine brighter than ever. Here are the top 10 lead campaigns to elevate your practice and make this year your most prosperous yet.

1. Content Marketing: Education is Your Superpower

One of the most powerful tools in your arsenal—content marketing. In a world where information is at everyone's fingertips, being the go-to expert is invaluable. Position yourself as a trusted advisor by delivering high-quality, insightful content on 401(k) topics, advanced tax planning ideas and retirement income strategies.

Action Step: Identify key topics that resonate with your audience and allocate resources to create compelling articles, guides, and case studies. Remember, content is king, and education sells.

2. AI Integration: Embrace the Future

Artificial Intelligence is not just a buzzword; it's a game-changer. AI tools like ChatGPT can streamline your workflow, making your communications more precise and impactful. If AI seems daunting, don't worry. Seek guidance from a colleague who's already reaping its benefits.

Action Step: Explore AI tools that align with your needs and budget for their integration. The future is AI, and it›s here to help you succeed.

3. Video Marketing: Lights, Camera, Action!

Video is a dynamic and engaging way to communicate with your audience. Short, informative videos on topics like "Roth vs. Pre-tax" or "How Much Do I Need to Retire?" can capture attention and build trust. Videos bring your expertise to life and foster a personal connection with your clients.

Action Step: Start small. With a smartphone and a decent mic, or by using simple video services, you can begin creating content that showcases your personality and expertise.

4. Email Marketing: Stay Top-of-Mind

Despite the rise of social media, email remains a cornerstone of client communication. Regular, value-packed communications can keep you front and center in your clients' minds, reinforcing your role as their trusted financial guide.

Action Step: Develop a content calendar and utilize digital tools to automate your email campaigns. Consistency is key.

5. Social Media Presence: Your Digital Business Card

In today's digital-first world, your social media profile—especially LinkedIn—serves as your business card. Regularly updating your profile with fresh content helps maintain visibility and credibility.

Action Step: Conduct a thorough review of your social media profile. Strategize content that aligns with your brand and engage actively with your audience.

6. SEO Optimization: Be Found, Be Chosen

Optimizing your website for search engines is essential for attracting new clients. Collaborate with your website provider to ensure your site is primed for relevant keywords, boosting your visibility and attracting potential clients.

Action Step: Schedule a meeting with your web team to dive into SEO strategies. A little optimization can go a long way in enhancing your online presence.

7. Client Events

Whether virtual or in-person, hosting client events can deepen relationships and foster loyalty. Think small, meaningful gatherings rather than grand affairs. The goal is to make every attendee feel valued and appreciated.

Action Step: Plan a budget-friendly event and identify key clients to invite. Connection is the heart of client retention.

8. Leverage Partnerships: Amplify Your Reach

Collaborating with influential industry partners can significantly broaden your audience and build credibility. Whether through webinars or joint content pieces, these partnerships can introduce you to new prospects eager for your insights.

Action Step: Identify potential partners within your niche and initiate conversations about collaboration opportunities.

9. Podcasts or Vodcasts: Voice of Authority

Podcasts are a wonderful way to share your expertise with an audience hungry for guidance. Topics like "Financial Education/ Wellness" or "Interest Rates Impact" can captivate listeners and establish you as a thought leader.

Action Step: Launch a podcast series. Invest in essential recording equipment and plan engaging topics that showcase your expertise.

10. Sales Material Refresh: Make a Lasting Impression

Never underestimate the power of fresh, compelling sales materials. A well-crafted pitch deck or brochure can significantly influence your sales outcomes. Use a critical eye to determine what needs updating or replacing.

Action Step: Review your existing materials and consider getting feedback from a third party. A refreshed approach can open new doors.

Crafting Content That Resonates

In your journey to becoming a standout 401(k) advisor, understanding the interests and concerns of plan sponsors and decision-makers is pivotal. As you embark on crafting engaging content, consider hot topics poised to capture attention in 2025. Remember, there's no particular order here—each topic offers a unique opportunity to engage and inform your audience:

- **Plan-Related Topics**
  Provide valuable insights that directly address the unique challenges faced by plan sponsor clients and prospects. By discussing relevant strategies, you establish yourself as a knowledgeable partner who helps them navigate complex decisions and optimize their retirement plans.
  - Advanced tax planning strategies
  - Creative plan design solutions
  - Roth vs. Pre-tax vs. After-tax
  - SECURE Act impacts on plan
  - Auto-Features
  - Vesting schedules
  - Financial literacy programs

- **Targeting Diverse Employee Needs**
  By offering personalized solutions that cater to various life stages and financial goals, advisors can help employees feel supported and understood. This approach not only strengthens connections with employees but also enhances client relationships by addressing the broader challenges their workforce encounters.
  - Social Security & Medicare
  - Retirement income
  - Student loan matching
  - ESG investing
  - Interest rates
  - Budgeting basics
  - Parental burnout
  - Sandwich generation hurdles

Each of these topics opens the door to meaningful conversations and positions you as a thought leader. By aligning your content with these interests, you not only engage your audience but also cement your role as a trusted advisor in the field.

Seize the Year Ahead

As you chart your course for 2025, remember that strategic investment in marketing is key to growth. The average advisor invests around $15,000 annually in marketing, but the return can be priceless. Take an hour today to outline your action plan, identifying partners and budgets for each campaign.

Now is your moment to seize these strategies and transform them into tangible results. With a clear plan and the right tools, this year can be your best yet. So go forth, shine brighter, and make 2025 your year of success!

Thanks for reading & Happy Marketing! NNTM

Use 'Spaced Repetition' and Social Media to Supercharge Your 401(k) Business

We forget things fast. Like, really fast. This phenomenon is known as the "Forgetting Curve," and it's given salespeople and marketers severe headaches. Here's what to do.

By Spencer X Smith

Ever feel like your brilliant pitch to a prospect went in one ear and out the other? Or maybe you've posted what you thought was fantastic content on LinkedIn, only to hear crickets?

You're not alone, and there's a scientific reason behind it. Let's talk about how you can use a little-known memory hack, combined with smart social media strategies, to keep your value proposition fresh in your clients' minds.

The Science of Forgetting (and Remembering)

In 1885, a German psychologist named Hermann Ebbinghaus discovered something pretty wild about how our brains work. He found that we forget things fast. Like, really fast. This phenomenon is known as the "Forgetting Curve," and it's given salespeople and marketers headaches ever since.

Picture this: You've just had an amazing meeting with a potential client. You explained your services, showcased your expertise, and even shared a few jokes. They seemed interested and engaged. But here's the kicker—within 24 hours, they'll likely forget 50% to 80% of what you said.

Yet, Ebbinghaus also stumbled upon a solution: spaced repetition. It's a fancy term for a simple idea—remind people of something at increasing intervals, and they're more likely to remember it long-term.

Spaced Repetition: Your New Secret Weapon

Now, I know what you're thinking. "I don't want to be that annoying person constantly bugging my clients." Spaced repetition isn't about pestering; it's about strategically reinforcing your message. And in today's digital age, social media gives us the perfect tools to do this effectively and unobtrusively.

So, how can you use this in your 401(k) business? Let's break it down:

1. The initial meeting: You've just had a great chat with a potential client. They seemed interested, but remember that Forgetting Curve is working against you.

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2. The next day follow-up (email and LinkedIn Connection): Send a quick, personalized email recapping the key points. "Hey Sarah, great chat yesterday! Just wanted to remind you how our plan can boost employee engagement by 30%." Then, connect with them on LinkedIn with a personalized message referencing your meeting.
3. One week later (LinkedIn Message): Share an article or infographic related to your discussion. "I came across this piece on retirement planning trends. I thought you'd find it interesting, given our conversation last week."
4. Two weeks later (LinkedIn Post): Create a post addressing a common question or concern that came up in a recent meeting, omitting personal details, of course. While you're not directly targeting your prospect, you're reinforcing your expertise in an area they care about.
5. One-month check-in (email and social engagement): It's time for a gentle nudge. "Hi Sarah, I hope you're doing well! I was wondering if you've had a chance to discuss our proposal with your team?" Couple this with strategic likes and comments on their recent social media activity.
6. Ongoing value-adds (various platforms): Keep providing value even if they haven't signed on yet. Share industry insights and create short video tips for LinkedIn, invite them to webinars, or email them relevant case studies.

We're not just randomly popping up in their inbox or feed. We're strategically reinforcing our value proposition over time, making it more likely to stick in their memory. And by using a mix of platforms, we're increasing our chances of catching their attention without being overbearing.

Spaced Repetition in the Social Media Age

You might be wondering, "Spencer, how do I make sure I'm not overdoing it?" Great question! The key is to vary your content and your platforms. Here are some ideas:

1. Educational content: Share blog posts, infographics, or short videos explaining complex 401(k) concepts in simple terms.
2. Industry news: Be the first to break down important regulatory changes or market trends affecting 401(k) plans.
3. Client success stories: With permission, share anonymized case studies of how you've helped businesses improve their retirement plans.
4. Behind-the-scenes: Give followers a peek into your day-to-day work. This humanizes your brand and builds trust.
5. Interactive content: Host Q&A sessions, polls, or live webinars to engage your audience directly.
6. Personal updates: Share your involvement in community events or professional development activities. This adds a personal touch to your professional profile.

By mixing up your content, you're catering to different learning styles and ensuring that your repetition doesn't feel repetitive.

Putting It All Together: Your Spaced Repetition Social Media Strategy

So, how do you implement this in your own business? Here's a simple plan to get you started:

1. Audit your current approach: Look at your last five prospect interactions. How many touchpoints did you have? On what platforms?
2. Create a follow-up template: Design a spaced repetition plan like the one we outlined earlier. Customize it for your business and clients.
3. Develop a content calendar: Plan out your social media content at least a month in advance. This ensures you're consistently providing value.
4. Use technology: Leverage CRM tools and social media management platforms to help you stay organized and consistent.
5. Analyze and adjust: Track which types of content and platforms get the best engagement and adjust your strategy accordingly.
6. Stay authentic: Remember, the goal isn't to spam your prospects but to genuinely add value. Always ask yourself, "Is this something my clients would find useful?"

The 401(k) Challenge

Here's my challenge: Look at your last five prospect interactions and recent social media activity. Could you have used spaced repetition to keep the conversation going? It's not too late! Why not reach out to them now with valuable content or insight?

Remember, being forgotten is not an option in the world of qualified plan advising. So, use the power of spaced repetition and social media to your advantage. Your future self (and your future clients) will thank you!

And hey, if you implement this strategy, I'd love to hear about it. Drop me a line on LinkedIn and let me know how it goes. Who knows, maybe you'll be my next success story. NNTM

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DATA DILEMMA:

IS THERE REALLY A 'RETIREMENT CRISIS?'

CRITICS OF THE TERM SAY NO, AND THAT THE ACTUAL CRISIS LIES IN THE COUNTRY'S FAULTY RETIREMENT INCOME AND SAVINGS DATA–WHICH VASTLY OVERSTATES THE ISSUE–AND A MISUNDERSTANDING ABOUT THE PRIVATE RETIREMENT SYSTEM'S ROLE. WE TAKE A COMPREHENSIVE LOOK.

BY PAUL MULHOLLAND

Few would say the American retirement system is perfect. Whether the previous sentence is a laughable understatement or a polite prod for modest reforms is where much of the debate over a "retirement crisis" resides.

The debate largely centers on the extent of the retirement savings gap, the quality of the data used to measure it, and whether there should be wholesale changes or tweaks to the current system.

In fact, some members of Congress are proposing what would essentially be a government takeover of the retirement system. Others, including the American Retirement Association (ARA), argue we should allow for changes under SECURE 1.0 and 2.0, as well as state-based auto-IRA plans, to take effect.

But one misconception about whether there truly is a "retirement crisis" is based on the data used to make those arguments.

Some, such as Andrew Biggs, a senior fellow at the American Enterprise Institute, argue that the word "crisis" grossly overstates the alleged problem,

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and is irresponsibly hyped by the consumer press.

Others, such as Teresa Ghilarducci, director of the Schwartz Center for Economic Policy Analysis (SCEPA) and The New School's Retirement Equity Lab, claim America's retirement situation is indeed in a crisis.

American workers and retirees are suffering from a profound shortage of retirement income and financial security, and "more than 10 percent of Americans aged 65 and up are in poverty," she recently wrote.

Ghilarducci's critics respond that retirement income is higher when one looks at IRS-provided tax data instead of census data, and Social Security replaces income almost entirely for the poorest Americans.

Notably, Biggs explained that those who believe there is a retirement crisis cite data from the *Current Population Survey* (CPS) from the Census Bureau to arrive at their poverty figures, which only counts regular income. Much of the income retirees receive from 401(k)s and IRAs is irregular and can vary from year to year—so the Census data, therefore, is skewed.

Additionally, data reported to the IRS is based on a legal obligation to be complete and accurate, whereas CPS data is based on a voluntary survey.

Biggs recently wrote in a responsive paper that "the CPS captured only around 60 percent of all income seniors received from private retirement plans, including traditional defined benefit (DB) plans."

According to Biggs, a "massive gap" exists between the IRS and CPS data regarding retiree income. The CPS tracks what respondents report as regular income, whereas the IRS data shows the true income figures and tends to be much higher.

Since the tax data shows higher income levels than CPS data, arguments that rely on CPS data are liable to overstate the savings gap.

Biggs also argued that "Households in the bottom fifth of the lifetime earnings distribution will receive Social Security benefits sufficient to replace 78 percent of their career-average preretirement earnings, adjusted for inflation," and that they're likely to benefit from means-tested programs.

Ghilarducci acknowledged the point, noting that "accumulated assets are being undercounted" and that "the current generation has more money on average than previously reported" in Census surveys. However, she insisted that this misses income inequality among retired people and ignores future generations.

Ghilarducci added that although Social Security may provide near income replacement for the lowest earners, "the fact that there are people who are desperate, that live with a need for food, housing, and transportation and that Social Security replaces 90% of that is not an endorsement of our retirement system."

Perception Versus Reality

Yet, defined contribution (DC) proponents counter that economic issues that exist outside the retirement system are clouding the perception of that system.

"The problem is far bigger than the retirement system," said Mark Iwry, a non-resident senior fellow at the Brookings Institution and former senior adviser to the Secretary of the Treasury during the Obama Administration. "There are substantial racial and gender gaps in wealth and income as well as in savings and plan participation, in addition to age discrimination and other inequities. The retirement system by itself can't fix all these problems, including that too many workers are not earning the decent living wage they deserve."

"It's hard to expect that those who are poor before retirement can be made better off after retirement," he added.

Biggs captured the issue more bluntly: "Their problem was not that they failed to save enough for retirement; it was that they were poor throughout their lives." He added that "most people poor in retirement were poor before retirement."

It's an important point echoed by American Retirement Association (ARA) CEO Brian Graff, in that the retirement system mirrors a person's working income and was never meant to address poverty reduction, something Social Security and other federal programs were designed to do.

Graff added that the country's private defined contribution system was also never designed to be the *only source* of retirement income or even the majority; rather, it was meant to complement Social Security, pensions, and other sources of retirement income and savings.

Automatic Enrollment and Auto-IRAs

The DC plan system has also benefitted from several recent reforms that have greatly expanded access and are expected to continue to do so. Supporters argue that these reforms should be given time to take effect and expanded further.

Of particular interest here are the automatic enrollment and escalation mandates in the SECURE 2.0 Act of 2022, as well as voluntary adoption of automatic features, and the state-level auto-IRA programs. It should be little wonder that mandates for private saving are key, since Social Security itself also has automatic enrollment and lacks an opt-out provision.

Indeed, recent research from the Morningstar Center for Retirement & Policy Studies published in September found that transitioning from voluntary to automatic enrollment in DC plans, coupled with auto-escalation of up to 15% of salary, could increase average wealth ratios by over 28%.

Additionally, eight state-level auto-IRA programs are up and running, and nine more are in varying stages of development. Though average account balances are small, mainly because the programs are relatively new, there is reason for optimism that they will help narrow the access and savings gap.

According to Georgetown University's Center for Retirement Initiatives data, existing programs have high participation rates, and most savers do not opt out. As of July 2024, the highest opt-out rate is 38.7% in Illinois, and the lowest is 18.69% in Connecticut. Average contribution rates vary from 3.38% in Connecticut to 6.8% in Oregon.

Further, a working paper published in August by the National Bureau of Economic Research estimated that "at least 30,000 firms have been induced to offer an [employer-sponsored retirement plan] by these policies."

The paper argued that this is primarily due to a forced choice for employers and increased plan provider marketing: "In the presence of inertia, for instance, removing the default option of offering no plan may induce employers

“This anxiety over Social Security appears to be among the key drivers of general retirement anxiety: Those confident in retirement are more likely to be confident in Social Security. Those not confident in retirement are more likely to be not confident in Social Security.”

to revisit their ESRP decision and choose to offer a plan. Furthermore, employers may be responding to marketing that ESRP administrators have undertaken in response to the auto-IRA policies.”

David Certner, AARP’s legislative director, said that AARP endorsed the concept of auto-IRAs “when it was first released.”

“Expanding coverage is a top priority for AARP,” he explained, and auto-IRAs “take advantage of the payroll deduction mechanism.”

“It would be great to take the best of what we have learned at the state level and take it to the federal level to be sure everyone has a retirement savings plan,” Certner said.

The Employee Benefit Research Institute (EBRI) estimated that automatic enrollment and escalation, along with the Saver’s Match, will be the most impactful provisions in SECURE 2.0 and particularly helpful to younger savers whose benefits from these policies will compound over time. The average retirement savings shortfall will decrease by an estimated 14.4% for those ages 35 to 44 from these two policies, according to EBRI’s *July Changes in Retirement Security from SECURE 1.0 and 2.0: Evidence from EBRI’s Retirement Security Projection Model*.

Sen. Bernie Sanders (I-Vt.), who also believes that America’s retirement situation is in crisis, released a staff report in February 2024 that said, “Employees that were automatically enrolled in retirement plans saved roughly 40 percent more than those workers who had to opt into a retirement plan,” and encouraged auto-enrollment’s implementation.

Sanders noted that “state action on access to retirement plans has had quantifiable positive outcomes. As of December 2023, there are six state-facilitated automatic individual retirement accounts (IRA) programs up and running with more than $1.1 billion in assets under management.”

The conclusion is that automatic programs, which are no longer hypothetical, present a road map for greater DC plan coverage and savings.

Retirement Anxiety and the Importance of Social Security

Compounding the issue is the anxiety many Americans feel about their ability to retire comfortably, as Ghilarducci and others noted. However, the essential role that Social Security plays in preventing senior poverty and its impending insolvency, absent any reforms, is critical to understanding this anxiety.

According to EBRI’s 2024 Retirement Confidence Survey, 68% of workers and 74% of retirees are confident they will have enough income to last through their retirement.

Craig Copeland, the director of Wealth Benefits Research with EBRI, said these figures are “on a historical basis, pretty good” and are not much lower than the highest levels recorded by EBRI.

Yet, Copeland explains that “confidence in Social Security does seem to play a role in retirement confidence.”

About 70% of retirees are confident Social Security will pay them benefits equal to or greater value than it does now, whereas only 50% of workers say the same.

This anxiety over Social Security appears to be among the key drivers of general retirement anxiety: “Those confident in retirement are more likely to be confident in Social Security. Those not confident in retirement are more likely to be not confident in Social Security,” Copeland says.

In addition, 62% of retirees report Social Security as a major source of income, whereas only 35% of workers expect it to be.

On the other hand, 84% of workers say they expect a workplace retirement plan to be a major source of income.

The risk of Social Security’s insolvency is especially acute in this hyper-partisan era, in which rival politicians could simply blame each other for Social Security’s failure to pay full benefits.

On a recent episode of his DC Pension Geeks podcast, Graff said as much, arguing, “Social Security has probably brought more people out of poverty than any other federal program in existence. Bar none.”

But when fully half of American workers believe America’s most effective anti-poverty program will more likely than not offer less generous benefits in the future, it’s easy to see where the leading cause of retirement anxiety and the intuition of a broader crisis might be coming from.

Improvements

Aside from the proposals for a government takeover of the retirement system, some proposed solutions to improve retirement security are strikingly similar, despite the gap in rhetorical urgency. They include expanding automatic enrollment in personal savings accounts and improving the generosity of Social Security to low-income Americans.

Iwry said it’s crucial to “make Social Security more generous at the bottom” and to expand plan coverage through the use of state auto-IRAs nationwide, whether through state or federal legislation.

Biggs said that Social Security should be expanded to provide more security to those with low incomes and that "there should be a better safety net."

In his report, Sen. Sanders also endorsed improving Social Security benefits to the poorest Americans (and caretakers), as well as expanding automatic enrollment and mandatory plan creation for employers as his preferred solutions, which also included increasing access to defined benefit plans.

DC Plans Benefit All Participants

One major problem, however, is that some proposals seek to curtail tax deferrals for employer-sponsored 401(k) plans and IRAs under the current system to help "pay" for their reforms, arguing that such incentives only benefit upper-income taxpayers.

That argument ignores a lot of nuance, however.

"The facts are that most workers accumulate resources from retirement plans at some point in their careers and eventually receive retirement income from these plans. And the benefits of tax deferral are not restricted to high earners," Peter Brady, Senior Economic Adviser at the Investment Company Institute (ICI), noted.

Brady made that comment in response to a recent paper published by Biggs and Alicia Munnell of the Center for Retirement Research that proposed to sharply curtail the tax incentives for employer-sponsored retirement plans and use the revenue raised to shore up the funding of the Social Security system.

One point made by Biggs in citing the Tax Policy Center is that 59% of the total tax expenditure is received by households in the highest two income quintiles.

Brady says that while it may be true that most tax measures, expressed in dollars, will be skewed to high earners, this is because both income and taxes paid are highly skewed.

What's more, ICI research illustrated that higher-income workers benefit more from retirement plans because a higher share of their wages are deferred for retirement—not because they benefit more on each dollar deferred. The facts are that most workers benefit from employer plans and IRAs.

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In fact, an analysis of tax data by ICI economists found that 75% of 72-year-olds receive income from retirement plans. For those who had middle- or upper-middle-income before retirement, income from retirement plans typically makes up one-third to one-half of their total income at age 72.

Another point that is almost completely forgotten is that tax deferrals are counted as "tax expenditures" according to the federal government's budgeting, which looks only at a 10-year budget window and that these pre-tax deferrals will eventually come back as tax revenues.

Consider also that when adjusted for inflation, average retirement assets per U.S. household are nearly 10 times what they were 50 years ago.

That surge in wealth has been propelled largely by IRAs, 401(k)s, and similar plans, which provide retirement security for families of all backgrounds and income levels, according to the ICI.

Parting Thoughts

Iwry concluded that "the term 'crisis' tends to generate a lot of heat, maybe more than is helpful."

He recommended less of a focus on "admiring the problem" and more on pursuing consensus on exactly what steps are needed to solve the retirement gap.

In his view, it is better and more productive to work with and reform the current system than to tear it down and start from scratch.

Defined contribution plans have plenty of room for growth through automatic policies, and a consensus seems to be emerging that Social Security should do more for the poorest Americans, especially in light of the decline of defined benefit plans and unionization. NNTM

FOOTNOTES

[1] Wealth ratios are defined as the ratio of projected wealth at retirement under a hypothetical scenario over projected wealth at retirement under Morningstar's baseline scenario (which assumes status quo).

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THE RETIREMENT PLAN ADVISOR TIES THAT BIND

WHAT WOULD A NATIONWIDE BAN ON NON-COMPETE AGREEMENTS MEAN FOR THE RETIREMENT PLAN ADVISORY INDUSTRY? WHILE CURRENTLY ON HOLD, IT COULD HAVE MAJOR IMPLICATIONS ON RECRUITMENT, RETAINMENT, AND–IMPORTANTLY–M&A ACTIVITY. HERE'S WHAT THE EXPERTS HAVE TO SAY.

BY JUDY WARD

For 401(k) and financial advisors,

transitioning to a new firm is often the single biggest move they make in their career,

and they typically only do it once, said Brian Hamburger, chief counsel at New York-based Hamburger Law Firm LLC.

His years of experience working with advisors switching firms has shown him that they shouldn't underestimate the ramifications of a non-compete or non-solicit agreement they previously signed at the employer they're leaving.

"What's important is that they understand the gravity of that situation, and they don't try to 'Web MD' it," Hamburger said of not seeking personalized, expert guidance on how to do a transition effectively. "In making that transition, we want to make sure that they don't step into a treacherous area and put themselves and their career in danger and that they optimize the chances of success at their new firm."

Non-compete agreements have been in the news lately. The Federal Trade Commission (FTC) issued a final rule in April that imposed a nationwide ban on employers enforcing non-competes with current and former employees who have left the employer.

Then, in August, the U.S. District Court for the Northern District of Texas issued a nationwide injunction to prevent the FTC from enforcing the rule, which it planned to do starting September 4.

The FTC said in late August that it might appeal the decision, and other lawsuits have been filed over the non-compete ban, so the ban's ultimate fate remained unclear. If the rule is upheld by the courts, it could make it simpler for some advisors to switch firms. Even if courts block its implementation, there's a larger, emerging trend away from allowing enforcement of a non-compete.

"I'm telling advisors I talk to, 'Don't jump for joy yet because we don't know what's going to happen,'" said Louis Diamond, president of Morristown, New Jersey-based Diamond Advisors, which works as a consultant to financial advisors making or contemplating a transition. "But even if this FTC decision doesn't survive the legal challenges, the decision may be a sign of things to come."

Drawing Attention

When asked about the reasoning behind the FTC's decision to issue a ban, Hamburger pointed to the general overuse of non-competes by American businesses. These days, someone who makes sandwiches at a sandwich chain may be required to sign a non-compete that prevents him or her from leaving to work for another sandwich chain. In the eyes of some, the overuse of non-competes adversely affected the U.S. labor market by limiting workers' mobility.

Diamond said that non-compete agreements have been a less widely used restrictive covenant by companies employing financial advisors.

But some firms employing advisors do require them to sign a non-compete as part of their employment contract, and private equity firms and RIAs commonly utilize non-competes when acquiring an advisory practice in which the business owner also serves as the underlying advisor to clients, he said.

Diamond said a client non-solicitation agreement has been the most common restrictive covenant for financial advisors. He added that a non-solicit often covers a 12-month period after an advisor departs an employer. The recent FTC ban did not prohibit non-solicitation agreements.

In some cases, advisors are also required to sign a "garden leave" agreement, which says that if they decide to leave their current firm for a stipulated timeframe (usually 30, 60, or 90 days) after they resign, they technically are still employees of the firm they're leaving, and they are paid to not work. That includes the advisor not working to attract existing clients to move with them to a new firm.

Some—but certainly not all—financial advisors are currently covered by The Protocol for Broker Recruiting, originally put together in 2004 by Merrill Lynch, Citigroup Global Markets (Smith Barney), and UBS Financial Services. The Broker Protocol governs how registered representatives can utilize client information when they move between firms that have signed it.

Before that, there had been a lot of litigation over registered reps switching firms, said Laurence Landsman, a partner at law firm Landsman Saldinger Carroll, PLLC in Chicago.

More than 2,000 firms have signed

on and are current members of the Broker Protocol, which allows registered reps more ability to move from one firm to another as long as they follow the protocol's standards.

They can leave and take certain specific, limited information about customers with them, and they're required to tell the firm they're departing what information they've taken.

Landsman said the protocol has significantly reduced the amount of non-compete litigation, although registered reps covered by the protocol can still be sued by their former employer if they fail to follow it when switching firms.

"The protocol is far from perfect, but at least it was a step in the right direction," Landsman said. "It really has helped ease the way for people to move from one firm to another." If the FTC ban ultimately gets upheld by the courts, it could make it easier for financial advisors not covered by the Broker Protocol to move from one firm to another, he added.

There is a lot of tension between employers who want to protect confidential information and their client relationships, versus someone's ability to change employers as they progress in their career, Landsman said. It seems like the balance tilted too much toward employers' concerns, and some rebalancing would be appropriate, he added.

Even if the FTC's non-compete ban holds up in court, it includes a carve-out allowing the use of non-competes as part of a business sale. Hamburger said that it makes sense still to allow non-competes for the sale of a business. It would drastically lower the market value of an advisory practice being acquired, for example, if the acquirer couldn't get assurances about the potential future competition that the principal advisors pose.

In Peter Campagna's experience, buyers always require owners selling an advisory practice to sign a non-compete as part of their new employment agreement. Often, other producers on staff also are required to sign as part of their new employment agreement, said Campagna, Incline Village, Nevada-based managing partner of Wise Rhino Group, an M&A advisory firm focused on the wealth and retirement industry. The non-competes typically run for three to five years, and he added that the employment agreements usually also include a client non-solicitation agreement that often runs for two years.

Hamburger discouraged advisors from seeing a client's non-solicitation agreement as falling into a gray area that would be hard to enforce if an advisor who came over as part of an acquisition then departed the acquirer company and tried to take clients with him or her.

"Even if an advisor goes door to door to speak with clients, so there's no electronic footprint, the firm impacted will interview those clients about what happened. If you start to get enough clients that have transitioned to the advisor who has left, the circumstantial evidence can become strong."

"In the world we live in, it is not a gray area at all because everything we do leaves behind an electronic footprint," Hamburger said. "Advisors often proceed in these cases with an idea of, 'How am I going to get caught?' But then they find out it's a lot easier than anticipated to follow their tracks.

Even if an advisor goes door to door to speak with clients, so there's no electronic footprint, the firm impacted will interview those clients about what happened. If you start to get enough clients that have transitioned to the advisor who has left, the circumstantial evidence can become strong."

Still, Campagna said it's not the legal ties of a non-compete and non-solicitation agreement that primarily keep advisors at acquirer firms. He said that the economics of the acquisition deal really bind advisors tighter to an acquirer.

Part of what holds advisors who sell their practice to an acquiring company has been the earn-out structure typically included in these deals, Campagna said. For a time period that usually ranges from two to four years after they sell, if the advisor's practice grows at certain specified rates—perhaps average annual growth of anywhere from 5% to 25% of revenues or EBITDA (earnings before interest, taxes, depreciation, and amortization)—then the advisor gets a substantial payout that could exceed the advisor's base compensation, he added.

For example, an advisor with $250,000 in base pay might make millions more with the earn-out.

Campagna said advisors who've sold to a private equity-backed acquirer often receive private equity stock as part of their deal. That stock's initial value to the advisor may range from perhaps 15% to 50% of the deal's overall financial value, but its value may then grow rapidly.

And advisors have to keep working for the acquirer company to continue holding the private equity stock, so they usually have a strong financial incentive to stay.

"That stock has been 'gold' in recent years: The expectation is that it triples in value every three to five years, and that has been a key factor with people staying," Campagna said. "The challenge is that some of these firms have now gone public, or they have been purchased by publicly held companies. In those cases, all of a sudden, the private equity stock is not a reason for the advisors to stay. So, the question is, what will emerge now to get those advisors to stay?"

Moving the Needle

Hamburger explained that the legal challenges filed against the non-compete ban argue that the FTC overstepped its authority by essentially enacting a new law that it was not entitled to enact. If the new rule is ultimately challenged successfully in the courts, that would be consistent with a broader trend emerging.

"There is a real push by the courts right now, to limit the options for federal agencies to take action to those that have been enumerated by Congress, and not use their judgement to expand their options," Hamburger said. "It's certainly a trend we're seeing to limit agencies' ability to unilaterally come up with new policies that may be outside the scope of what Congress intended. The courts recently have been pretty reticent to allow agencies to act on their own."

It's widely expected that the FTC's non-compete ban ultimately will not survive judicial scrutiny, said Matthew Prewitt, a partner at law firm ArentFox Schiff LLP in Chicago. That has less to do with the ban itself than with broader legal developments involving the powers of federal government regulators. Most notably, in June the U.S. Supreme Court overturned the so-called Chevron doctrine, named after the lawsuit *Chevron U.S.A., Inc. vs. Natural Resources Defense Council*. The 1984 precedent said that courts should defer to a federal agency's reasonable interpretation of federal law in cases when aspects of the law are unclear. The Supreme Court's decision was seen as shifting power away from the federal government's executive branch agencies and potentially resulting in significant changes in how agencies such as the FTC work.

"The long-term trend with the current Supreme Court is to curtail the power of executive branch agencies to enact the type of rulemaking that is happening with the FTC's decision," Prewitt said. "This is a very bold step that the FTC took with its ban, and it is hard to take seriously the idea that the FTC thought this would actually survive judicial challenges in the courts. It was more, 'Hey, isn't this an interesting thought exercise?' I think it's really an effort by the FTC to draw attention to this issue and use their 'bully pulpit' to make a policy statement. I think this is the most significant development in non-competes in the past 20 or 30 years."

Prewitt said the FTC's decision does move the needle and prompt more discussion about whether non-compete agreements should be enforceable or not. Whether it moves the needle with state legislatures enough to pass their own non-compete bans covering employers operating in their state or impacts how state supreme courts or federal courts interpret state and federal laws addressing non-competes remains to be seen.

"The FTC's decision puts the issue front and center for state regulators, and maybe it will focus some state regulators to define where they stand on this issue," Diamond said. "This might embolden other states to follow suit, and that's where we may see a potential impact of the FTC's decision, for states to issue new regulations or rules to curtail the ability of employers to have restrictive covenants."

California already mostly prohibited the enforcement of anti-compete agreements for employers operating in that state, but effective January 1 of this year, Senate Bill 699 and Assembly Bill 1076 became law and strengthened the state's anti-compete stance. The legislation adds new requirements for employers, imposes penalties for those who don't follow the new rules, and makes it easier for employees to challenge anti-compete provisions.

Diamond said that California has long been very employee-friendly, and this new law extends that. He hasn't seen data on the mobility rates for financial advisors working in California, but in Diamond Advisors' experience, advisors there believe they have less to worry about in making a change, and they feel much freer to move to another firm.

There's an emerging state-level trend to place a greater value on employee mobility as a stimulus to the economy, as opposed to allowing employers to enforce restrictive covenants such as a non-compete agreement, Prewitt said.

In January 2022, the Illinois Freedom to Work Act took effect, limiting the ability of employers operating in that state to utilize restrictive covenants with employees, including non-compete and non-solicit provisions.

Then, in July 2023, Minnesota's SF 3035 bill took effect, mostly prohibiting non-compete agreements.

And New York State got very close to enacting similar legislation. In June 2023, The New York State Legislature passed a very broad prohibition on non-compete agreements, but New York Governor Kathy Hochul vetoed the legislation in December 2023. Hochul indicated her willingness to sign a narrower bill, but the discussions broke down, Prewitt said.

"In some states, I think we will see bans, and in some states, you won't," Landsman said. "It would be hard to do in some states, because it's very political. There is a lot of money and a lot of interest among employers."

Landsman said that if the FTC's federal ban is ultimately upheld in the courts, it would presumably take legal precedence over less-inclusive state bans. He added that it's hard to imagine more-inclusive state bans than the FTC's federal ban. And if the FTC ban is struck down in court, he expects to see legal challenges in any state that has passed its own ban.

In anticipation of the possibility that non-compete bans could survive legal challenges, Prewitt suggested that employers review their current steps to preserve their client base and protect their business's confidential information when employees leave.

It means that employers need to have a robust non-solicitation agreement that applies to former employees potentially taking customers with them, and possibly even taking other important commercial relationships that can include vendors. Additionally, employers need a strong employee confidentiality agreement and data security agreement that will also apply if employees depart.

"What we're advising our clients to do is to imagine a world where non-compete agreements are going to be struck down," Prewitt said. "Whatever happens with the FTC's new rule, I think we still have to assume that employers are going to have significant headwinds enforcing non-competes in the years ahead." NNTM

Judy Ward is a freelance writer specializing in retirement plan-related subjects.

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A Student Debt DARK CLOUD?

ONE YEAR IN, THE RESUMPTION OF STUDENT DEBT REPAYMENTS IS CHALLENGING MANY AMERICANS' FINANCES, INCLUDING SAVING FOR RETIREMENT. HERE'S HOW TO HELP YOU PLAN SPONSOR AND PARTICIPANT CLIENTS.

BY JUDY WARD

Joe DeBello, a vice president at CAPTRUST in Tampa, Florida, said many retirement plan participants have been very aware of the resumption of student debt payments late last year.

"That created a dark cloud over a lot of people's financial situation," DeBello said. "We're hearing about student debt more frequently and louder from participants, but we're also hearing more interest from plan sponsors and committees about trying to help."

Outstanding student loan debt stood at $1.74 trillion in the second quarter of 2024, according to a Federal Reserve's Center for Microeconomic Data report.

Student debt continues to compound on itself, and it's becoming a bigger (and bigger) problem, said Alex Sylvester, executive partner and president-institutional advising at Shepherd Financial in Carmel, Indiana.

"I don't see this going away as a problem anytime soon, and I think there are some creative student loan benefits that are going to become more and more part of the desired benefits package for employees," Sylvester added. "A lot of momentum is starting to pick up for that, so we're seeing a major uptick in conversations with committees."

One or the Other

Seventy-five percent of federal student loan borrowers surveyed said that resuming student debt repayments would impact their ability to save for retirement, according to an August 2023 survey done by Morning Consult on behalf of Corebridge Financial.

"For many of these people, instead of putting $300 a month into a retirement plan, they are now going to put it into their student debt repayment," said Terri Fiedler, Houston-based president of retirement services at Corebridge. "To them, it's a tradeoff: saving for retirement or paying down their student debt. I think that oftentimes, they think they only have money to do one or the other."

She added that this is where a plan sponsor can help employees balance saving for retirement with meeting their short-term financial needs.

The resumption of student debt repayment appears to impact women in the workforce more than men, according to Corebridge's survey. Sixty percent of females with student loan debt said they did not expect to be able to afford to make payments, Corebridge's survey found. Fiedler said that the pay gap that still exists between men and women in the workforce likely plays a significant role here.

Fiedler added that it's important to put the resumption of student debt repayments into a broader context of the multiple financial stressors many people now juggle. Corebridge works with many public-sector plans, and its November 2023 survey of public-sector employees found that inflation ranked as their top financial stressor (with 83% citing it as a stressor), followed by student loan debt (78% citing it). Retirement savings came in as the fourth-most-frequent source of financial stress, with 62% citing it.

The impact of student debt repayments returning doesn't just affect younger employees, as a Nationwide Retirement Institute survey of employees aged 45 and older illustrated. Twelve percent of the 45-and-older employees surveyed by Columbus, Ohio-based Nationwide said they currently had student loan debt. Among that group, 66% agreed that the resumption of repayments would significantly affect their ability to save for retirement.

Among employees aged 45 and up surveyed who have student debt, 18% said they had already adjusted their retirement plan contribution in response to the resumption of repayments, and another 29% said they plan to adjust their retirement plan contributions so that they can keep up with their student loan payments.

Asked why so many people intend to turn to their planned retirement-savings contribution and put that money toward student debt repayment instead, Nationwide Retirement Solutions President Eric Stevenson said that surprised him, too.

"I think it's just the first place people go to," Stevenson said. "A lot of Americans don't have any other sources of savings." He has talked to others in the retirement plan business who've also seen a clear impact of the resumption of student debt repayments, including participants stopping or reducing their contribution or taking a withdrawal.

"Those numbers are way up over the past several months," Stevenson said in the spring. Looking at the resumption of student debt repayments in light of the

ongoing inflationary environment, he said, the reality is that many Americans who now must make these repayments are struggling to pay all their bills.

Recent history offers some sense of trends that may develop in the near future, as repayments continue. Making student loan repayments has a negative impact on both average 401(k) account balances and deferrals, concluded a research report released earlier this year by Employee Benefit Research Institute (EBRI) and J.P. Morgan Asset Management.

The report "Student Loans and Retirement Preparedness" found that one-fifth of participants had student loan payments in at least one of the three years studied (2017 to 2019), and 12.1% had payments in all three years.

According to EBRI's research, participants making student loan repayments had a lower average balance than those not making repayments. For instance, among participants making $55,000 or more and who had a tenure of more than five years to 12 years, the average balance for those who made repayments totaled $86,109. That compares to $107,687 for those not making student loan repayments during that timeframe.

Among participants with income of less than $55,000 a year, the average contribution rate among those making a student loan payment during the period studied was 5.3%, compared with 5.7% for those not making student loan payments.

Interestingly, the differential grew among those making $55,000 or more, with an average deferral of 6.1% for those with loan repayments and 7.3% for those without repayments. The impact of student loan repayment on contributions likely was muted somewhat using automatic enrollment and the relatively small number of people who lower their contributions once they're auto-enrolled, said Craig Copeland, director of wealth benefits research at Washington, D.C.-based EBRI.

But what explains the larger contribution differential for higher-income participants? Lower-income participants, regardless of whether they have a student loan repayment or not, are more likely to contribute just to the level needed to get the full employer match, Copeland said.

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They may hesitate to reduce their contribution because it would then fall below the level needed to get the full match. He said that higher-income participants are more likely to contribute beyond the level needed to get the full match, so they have more room to reduce their contribution while still maximizing the match.

Three Options to Help

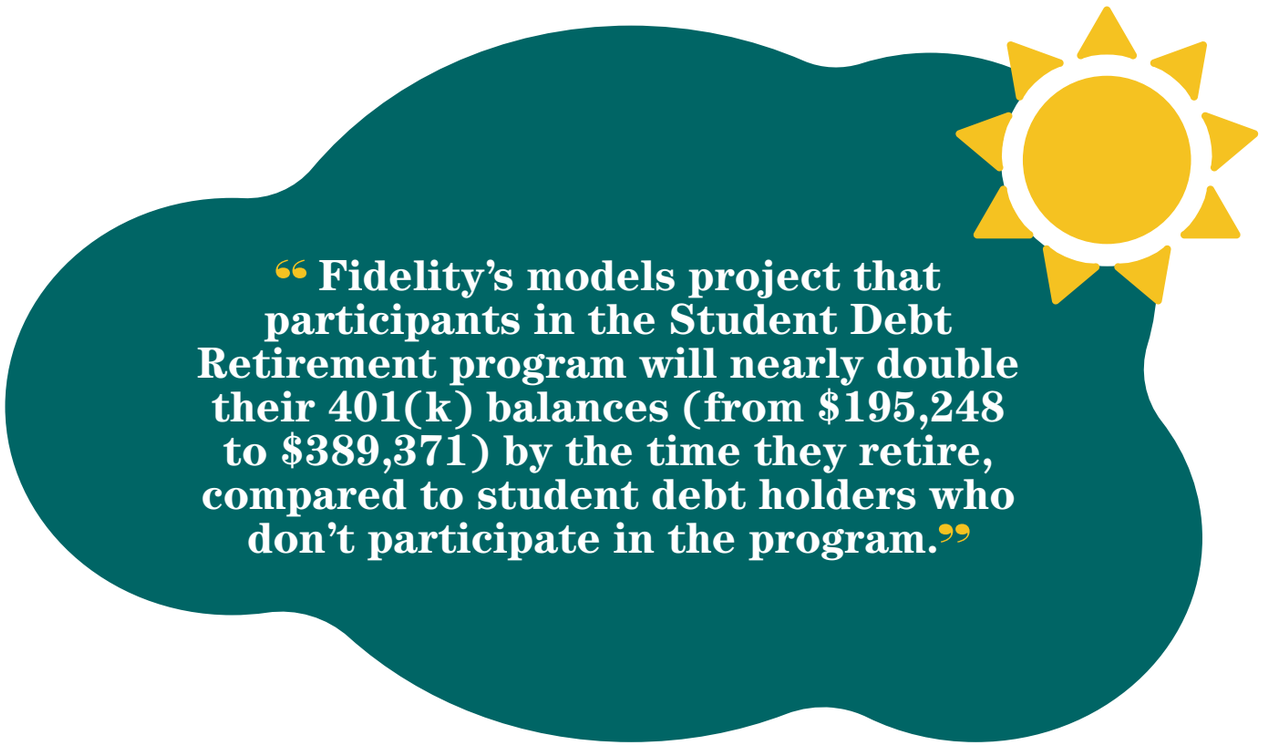
For employers interested in helping their employees with student debt, it makes sense first to survey employees to understand the extent of their challenges. Sylvester has mostly seen employers do this as part of an annual benefits survey that asks employees to individually rate the value they see in specific benefits, including student debt repayment.

Incorporating this issue into a broader benefits survey allows an employer to understand how much employees would value a student loan repayment benefit relative to other potential benefits enhancements, he explained.

DeBello now sees some employers doing an employee survey focused specifically on student debt.

"By and large, after the employers see the survey results, their response is, 'Wow, this is a lot bigger and wider issue than we realized,'" DeBello said. He offered three tips for how to do the survey effectively. First, tell employees why the employer is asking about its employees' student debt: Explain that the employer cares about employees and is exploring various ways to help employees with their student debt. Second, the employer itself should send the survey, not have a third party do it. And third, ask employees about more than just the amount of their student debt—ask them how it has impacted them.

"What's interesting is for committees to see some of the narratives from employees in a comments section of one of these surveys," DeBello said. "It puts



real-life stories in front of the committee, some of whom may not have any personal experience with student debt.”

Employers have several options for implementing a program to help employees with student debt. Stevenson sees real potential in a SECURE 2.0-style program in which employers contribute to an employee’s retirement account in response to student debt repayment.

SECURE 2.0 allows employees’ student debt repayments to be counted as if they are retirement plan contributions in calculating an employer matching contribution, utilizing the plan’s match formula.

An employee reaps the benefits of taking another step each payment toward paying off their student loans and gets the benefit of accumulating savings for retirement at the same time.

Seeing their retirement account balance grow every month will reinforce to younger employees especially that starting to save early makes a big difference, Stevenson believes. Nationwide Retirement Solutions is testing a couple of options for offering one of these matching programs to its recordkeeping clients and aims to introduce a student debt repayment program in 2025.

Last January, Fidelity Investments rolled out Student Debt Retirement, a SECURE 2.0-style matching program. Employers including LVMH, News Corp., Sephora, and Walt Disney Co. have added the benefit.

Fidelity’s research indicates that three in 10 employees who are eligible to participate in their employer’s plan and who have outstanding student debt do not contribute. Fidelity’s models project that participants in the Student Debt Retirement program will nearly double their 401(k) balances (from $195,248 to $389,371) by the time they retire, compared to student debt holders who don’t participate in the program, said Amanda Hahnel, a vice president at Boston-based Fidelity.

“It helps make the retirement benefit more accessible to all employees,” Hahnel said of a SECURE 2.0-style match program. “And because many of these employees are starting to get retirement plan contributions so early in their employee life, that will have dividends for those employees for decades to come.”

Additionally, some employers considering adding Student Debt Retirement don’t see the retirement plan matching contribution as an additional expense because they’ve already budgeted for an employer match, she said.

“A lot of employers look at this and say, ‘This doesn’t look like new dollars to me,’” Hahnel added. Using data from Fidelity’s separate, direct student debt repayment program it offers, Fidelity can project for an employer the savings it could experience from reduced turnover if the employer adds the Student Debt Retirement program.

As the SECURE 2.0-style matching approach illustrates, the workplace retirement plan is evolving to become not just a tool for retirement but also to address other financial concerns employees have, DeBello said. But with that comes challenges, such as the role that inertia plays in saving for retirement.

“My concern around doing a match for student loan repayments is that it will create an incentive for some employees to not save for retirement,” DeBello said. “My concern is that it’s going to be perceived as the employer saying, ‘Hey, you can forget about saving for retirement, we’ll take care of it.’ That could give people a false sense of security.” It will be crucial for employers adopting a SECURE 2.0-style program to make it crystal clear that the employer contribution alone will likely not be enough to get an employee to a sufficient ultimate accumulation, he added.

Copeland said a potential negative incentive could lower average deferrals, particularly for plans that already have relatively high contribution rates. He thinks employers’ motivation for adding

the student debt repayment program will determine whether that concerns them.

"It seems like the employers that are doing it are really trying to attract new workers. Their focus in doing this is on attraction and retention, to show, 'This is something we have that other employers don't,'" Copeland said, "They want to show that they can help employees to save for retirement, regardless of what the employees themselves are doing for their contribution."

An employer that wants to offer tangible help but doesn't want to integrate that with the retirement plan can do a stand-alone student debt repayment program.

Sylvester said most of Shepherd Financial's conversations with clients about student debt involve the employer making a direct contribution or matching their employees' repayments. In part, he added, that's because this approach offers more flexibility in how it's implemented than a student debt repayment program integrated with a qualified retirement plan.

"With this type of program, the employer will have the opportunity to say, 'Do we want to make a set contribution for all employees?' Or, if there is a certain position that the employer is having trouble filling, the employer can just offer the program to employees in that position," Sylvester said. "Half of the employers we've worked with to implement this type of program offered it across all employees, and half focused on a certain job category or on certain management/leadership positions. And the contribution can be a flat-dollar amount or a match, whichever the employer prefers."

A stand-alone program has gained traction especially among employers in industries where employees' student debt tends to be significant, such as health care, accounting, and engineering, DeBello said. The challenge is that it's a new–and substantial–budget item for employers, but he also sees important upsides.

"In my mind, the 'silver bullet' for student debt repayment is a direct reimbursement program. If an employer truly wants to make an impact on employees' student loan debt, and if it has the budget and the willingness to do it," DeBello said. "That's really meaningful money to people because it's helping them with *today's* money issues. A program like this is a huge competitive benefit in fighting turnover. It's an expensive benefit, but it's an effective one."

Even if an employer doesn't feel comfortable getting directly involved in student debt repayment, DeBello encouraged offering education and coaching to help those employees struggling to manage their student debt. Of the options employers have to help, he said, the downside is that this will likely have the least direct impact on employees' student debt levels and have the least influence on employee attraction and retention.

DeBello said the upside of offering education and coaching is that it's often integral to helping people deal with their student debt issues.

In a lot of cases, people who feel they can't make their student loan repayments actually do have enough income to make those payments, but they need to work with an adviser who can help them see how to cut back spending in other areas to afford the student loan repayments. The need to reduce some spending isn't a message that many people enjoy receiving, he acknowledged.

"It's very much an issue of today; a lot of people are living outside their means and spending more than they should," DeBello continued. "It's almost the American way of life: We are a nation of spenders. Getting this help with budgeting is not an enjoyable conversation. It's like going to the dentist: You know it's a good thing for you to do, but you're going to do everything you can to avoid it. However, this kind of education, for those people who are willing to sit down with us and receive it, can make a big difference in people's lives." NNTM

Judy Ward is a freelance writer specializing in retirement plan-related subjects.

You're the Tops: 2024 ADVISORS' CHOICE

IT'S TIME ONCE AGAIN TO ASK, "WHO DOES IT BEST?"

BY JOHN SULLIVAN

Which recordkeepers—and the services, support, products, and processes they provide—truly stand out?

Few are in a better position to evaluate the numerous offerings now available from recordkeepers large and small, those digitally focused and those deemed "more traditional," than advisors.

For the third year, we called on advisors to rate 13 different service categories in five distinct market segments.

Advisors are "in the trenches," dealing day in and day out with recordkeeper partners, and are therefore most qualified to evaluate the strengths and weaknesses of the companies that occupy this critical industry space.

We asked advisors to vote only on the services in their target markets—and to evaluate the services on a five-point scale, ranging from "world-class" to "functional" to "needs work."

We highlighted the top five in five distinct target markets based on size:

- Micro: under $1 million in plan assets
- Small: between $1 million and $10 million in plan assets
- Mid-Market: between $10 million and $100 million in plan assets
- Large Market: between $100 million and $250 million in plan assets
- Mega Market: over $250 million in plan assets

The following pages reveal the results of that assessment—the top five in each service category (sorted alphabetically).

They are, quite literally, the Advisors' Choice. NNTM

MICRO MARKET PLANS

Participant Tools

- 401GO, Inc.
- John Hancock Retirement Plan Services
- July Business Services
- Principal Financial Group
- Voya Financial Inc.

Calculators

- 401GO, Inc.
- Empower
- John Hancock Retirement Plan Services
- July Business Services
- Voya Financial Inc.

Plan Sponsor Website

- 401GO, Inc.
- Empower
- July Business Services
- T. Rowe Price
- Principal

Mobile App

- 401GO, Inc.
- Empower
- Fidelity Investments
- T. Rowe Price
- Transamerica

Regulatory Support

- 401GO, Inc.
- BPAS
- John Hancock Retirement Plan Services
- July Business Services
- Pentegra Retirement Services

Staff Credentials

- 401GO, Inc.
- Alerus Retirement and Benefits
- July Business Services
- North American KTRADE Alliance
- The Standard

Advisor Support

- Alerus Retirement and Benefits
- TruStage
- July Business Services
- The Standard
- Transamerica

Participant Statement

- TruStage
- Empower
- John Hancock Retirement Plan Services
- July Business Services
- The Standard

Education Materials

- BPAS
- John Hancock Retirement Plan Services
- July Business Services
- T. Rowe Price
- Transamerica

Multi-Lingual Capabilities

- BPAS
- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Voya Financial Inc.

Plan Health

- 401GO, Inc.
- BPAS
- Empower
- John Hancock Retirement Plan Services
- T. Rowe Price

Financial Wellness

- BPAS
- July Business Services
- Principal Financial Group
- T. Rowe Price
- The Standard

Retirement Income

- Alerus Retirement and Benefits
- John Hancock Retirement Plan Services
- July Business Services
- Lincoln Financial Group
- TIAA-CREF

SMALL MARKET PLANS

Participant Tools

- American Funds
- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Principal Financial Group

Calculators

- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Principal Financial Group
- Voya Financial Inc.

Plan Sponsor Website

- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Principal Financial Group
- Voya Financial Inc.

Mobile App

- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Principal Financial Group
- Voya Financial Inc.

Regulatory Support

- Ascensus
- Fidelity Investments
- John Hancock Retirement Plan Services
- July Business Services
- Principal Financial Group

Staff Credentials

- Fidelity Investments
- John Hancock Retirement Plan Services
- July Business Services
- The Standard
- Transamerica

Advisor Support

- John Hancock Retirement Plan Services
- Principal Financial Group
- The Standard
- Transamerica
- Voya Financial Inc.

Participant Statement

- Ascensus
- Fidelity Investments
- John Hancock Retirement Plan Services
- July Business Services
- Principal Financial Group
- Voya Financial Inc.

Education Materials

- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Principal Financial Group
- Rowe Price

Multi-Lingual Capabilities
- Fidelity Investments
- John Hancock Retirement Plan Services
- July Business Services
- Principal Financial Group
- Transamerica

Plan Health
- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Lincoln Financial Group
- Principal Financial Group

Financial Wellness
- Ascensus
- Empower
- John Hancock Retirement Plan Services
- Lincoln Financial Group
- Transamerica

Retirement Income
- John Hancock Retirement Plan Services
- July Business Services
- Lincoln Financial Group
- Nationwide Financial
- Transamerica

MID-MARKET PLANS

Participant Tools
- Empower
- Fidelity Investments
- J.P. Morgan Asset Management
- Principal Financial Group
- Schwab Retirement Plan Services

Calculators
- Empower
- Fidelity Investments
- J.P. Morgan Asset Management
- Principal Financial Group
- Voya Financial Inc.

Plan Sponsor Website
- Empower
- Fidelity Investments
- J.P. Morgan Asset Management
- Principal Financial Group
- Voya Financial Inc.

Mobile App
- Fidelity Investments
- J.P. Morgan Asset Management
- Principal Financial Group
- Schwab Retirement Plan Services
- Voya Financial Inc.

Regulatory Support
- Fidelity Investments
- John Hancock Retirement Plan Services
- NWPS
- Pentegra Retirement Services
- Principal Financial Group

Staff Credentials
- Fidelity Investments
- J.P. Morgan Asset Management
- NWPS
- Principal Financial Group
- Voya Financial Inc.

Advisor Support
- Fidelity Investments
- OneAmerica
- NWPS
- Principal Financial Group
- Voya Financial Inc.

Participant Statement
- Alerus Retirement and Benefits
- Empower
- Fidelity Investments
- J.P. Morgan Asset Management
- Principal Financial Group

Education Materials
- Alerus Retirement and Benefits
- TruStage
- Empower
- Fidelity Investments
- Principal Financial Group

Multi-Lingual Capabilities
- Empower
- Fidelity Investments
- NWPS
- Principal Financial Group
- Transamerica

Plan Health
- Empower
- Fidelity Investments
- J.P. Morgan Asset Management
- NWPS
- Schwab Retirement Plan Services

Financial Wellness
- Alerus Retirement and Benefits
- Empower
- Fidelity Investments
- NWPS
- Schwab Retirement Plan Services

Retirement Income
- Alerus Retirement and Benefits
- Fidelity Investments
- J.P. Morgan Asset Management
- NWPS
- TIAA-CREF

LARGE MARKET PLANS

Participant Tools
- Empower
- Fidelity Investments
- Principal Financial Group
- Schwab Retirement Plan Services
- TIAA-CREF

Calculators
- Empower
- Fidelity Investments
- Principal Financial Group
- Schwab Retirement Plan Services
- TIAA-CREF

Plan Sponsor Website
- TruStage
- Empower
- Fidelity Investments
- Principal Financial Group
- Schwab Retirement Plan Services

Mobile App
- Empower
- Fidelity Investments
- Principal Financial Group
- Schwab Retirement Plan Services
- TIAA-CREF

Regulatory Support
- Empower
- Fidelity Investments
- John Hancock Retirement Plan Services
- Milliman, Inc.
- Principal Financial Group

Staff Credentials
- BPAS
- TruStage
- Lincoln Financial Group
- Milliman, Inc.
- Principal Financial Group

Advisor Support
- Empower
- Fidelity Investments
- Principal Financial Group
- TIAA-CREF
- Voya Financial Inc.

Participant Statement
- Empower
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- John Hancock Retirement Plan Services
- Principal Financial Group
- Schwab Retirement Plan Services

Education Materials
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- Fidelity Investments
- Principal Financial Group
- TIAA-CREF
- Lincoln Financial Group

Multi-Lingual Capabilities
- Empower
- Fidelity Investments
- Lincoln Financial Group
- TIAA-CREF

Plan Health
- Empower
- Fidelity Investments
- Milliman, Inc.
- Principal Financial Group
- Transamerica
- Voya Financial Inc.

Financial Wellness
- Empower
- Fidelity Investments
- Principal Financial Group
- TIAA-CREF
- Transamerica

Retirement Income
- ADP Retirement Services
- Corebridge Financial
- Empower
- Fidelity Investments
- TIAA-CREF

MEGA MARKET PLANS

Participant Tools
- Empower
- Fidelity Investments
- Principal Financial Group
- Schwab Retirement Plan Services
- TIAA-CREF

Calculators
- Empower
- Fidelity Investments
- Principal Financial Group
- Schwab Retirement Plan Services
- TIAA-CREF

Plan Sponsor Website
- Empower
- Fidelity Investments
- Principal Financial Group
- Schwab Retirement Plan Services
- T. Rowe Price

Mobile App
- Empower
- Fidelity Investments
- Principal Financial Group
- Schwab Retirement Plan Services
- T. Rowe Price

Regulatory Support
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- Fidelity Investments
- Milliman, Inc.
- Principal Financial Group
- Schwab Retirement Plan Services

Staff Credentials
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- Principal Financial Group
- Schwab Retirement Plan Services
- T. Rowe Price

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- Principal Financial Group
- Schwab Retirement Plan Services
- TIAA-CREF

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- Transamerica

Education Materials
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- Fidelity Investments
- Milliman, Inc.
- Principal Financial Group
- Schwab Retirement Plan Services

Multi-Lingual Capabilities
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- Fidelity Investments
- Principal Financial Group
- Schwab Retirement Plan Services
- T. Rowe Price

Plan Health
- Empower
- Fidelity Investments
- Milliman, Inc.
- Principal Financial Group
- T. Rowe Price

Financial Wellness
- Empower
- Fidelity Investments
- Principal Financial Group
- Rowe Price
- TIAA-CREF

Retirement Income
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- Fidelity Investments
- TIAA-CREF
- Transamerica
- Voya Financial Inc.


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AI in Retirement Advisory: Fact, Fiction, or Both?

The road to efficiency using AI can be one of two steps forward and one step back.

By David N. Levine

For the last two years, talk about artificial intelligence has been everywhere. The retirement plan community is not immune.

Most of us have seen articles and interviews about using AI to customize plan participants at scale, serve as customer interaction portals, and even create virtual advisors. Many of these services are "fact."

At the same time, discussing whether AI is a complete replacement for humans—especially in the human-centered retirement market—is "fiction" for the foreseeable future. So, in the end, AI likely sits in the middle—as a highly evolutionary change but not a complete revolution in who serves and how the retirement plan community works.

As I sit in meetings with clients, AI inevitably comes up. So, how does an advisor fit into this evolving world?

- **Understanding AI.** A core starting point for any advisor

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should be understanding how AI "works." There is a tendency to simply refer to AI with humanlike characteristics—such as "it thinks"—but despite hopes by some that AI will achieve consciousness, we're not at that point. AI is still a computer program, albeit an advanced one, that uses logic after "training" on large sets of information. Because AI systems digest large volumes of information (not all of which may be accurate) to "learn," AI can be prone to "hallucinate," which means that the AI can, at times, come up with incorrect answers. In the retirement context, wrong answers can have significant consequences.

- **Use of AI for Advisor Services.** Several advisors have recently been talking about using AI solutions (often based on the widely known ChatGPT AI solution) for their services to clients. One area that has been suggested has been that AI notetakers should be used to prepare meeting minutes. As a lawyer, I see the value of AI notetakers. Still, it's important to remember the records created by AI can be permanent (even if inaccurate), so having a process for advisors and/or their counsel to vet AI-created minutes can be very important. Similarly, some advisors have been talking about using AI for another purpose—digesting and analyzing investment information. Similar to the situation with AI-taken minutes, it is important to ensure that AI-created investment analysis is vetted by humans to ensure the AI has not hallucinated or introduced erroneous items. This human value add is a key value add of an advisor, given their broad knowledge of the market.

- **Use of Information Fed into AI Systems.** In recent years, the Department of Labor, with its cybersecurity "best practices," state regulators with broad-based privacy law, and plaintiffs' attorneys in lawsuits, have significantly focused on the privacy and security of plan-related data—especially personally identifiable information. AI systems are trained on data, so a critical question is, "What happens to the data?" I put my plan into an AI system. Some data may be widely available, but other data—especially participant-level data—may be highly confidential. In working with clients looking at AI solutions, I regularly focus on what happens and who gets to use their data. Advisors can play a vital role in this process.

- **Errors and Mistakes.** Virtually no AI system is going to be 100% accurate. Recent news headlines about some of the largest players in tech and their own AI systems highlight this point. So, a key question becomes—who is responsible if and when the AI makes a mistake? Advisors and counsel can play a crucial role in making sure that AI solutions are validated and that responsibility for AI errors is assigned.

- **Client Contract Requirements.** Ten years ago, it was mainly the largest of the large companies that ran their contracts through an information technology review. Now, these reviews happen regularly at small and midsize businesses. More and more of these reviews involve checking for corporate policies restricting AI solutions and/or requiring robust disclosure about how AI may be used. For both an advisor's own contracting and guiding clients, advisors can help their clients by proactively understanding their clients' perspectives and rules regarding AI.

AI already has proven and holds even more potential to increase the efficiency and quality of retirement services. However, the road to efficiency using AI can be one of two steps forward and one step back.

Advisors are in a prime position to help their clients navigate the rapidly evolving AI landscape and, using their human knowledge, to balance the facts and fiction to continue innovating in providing retirement solutions to plan sponsors and their participants. NNTM

A Forfeiture Suit 'Flurry', New Focus for Fiduciary Litigation, and SCOTUS Expands Litigation Windows

Here's what you really need to know about emerging trends in ERISA litigation in the most recent quarter

By Nevin E. Adams, JD & Bonnie Triechel

Litigation is not slowing down. Here are five key points you need to know from the past quarter:

- A United States Supreme Court decision could open the door wider for more litigation.
- The Department of Labor (DOL) filed suit challenging the stay of the new fiduciary rule.
- Federal courts remain split on which party bears the burden of proof in ERISA litigation.
- Forfeiture reallocation suits are growing—and expanding.
- Courts remain split—though most (including the DOL) support ERISA claims over arbitration clause requirements.

Let's dive in.

A (New) Door Opener for Litigation?

Largely overshadowed by the recent U.S. Supreme Court decision rejecting the *Chevrondoctrine's* judicial deference to federal agencies, another 6-3 decision (*Corner Post v. Bd. of Gov. of the Federal Reserve System*) has thrown the door open for more litigation. In that case, the majority held that litigation under the Administrative Procedures Act did not start "until the plaintiff is injured by final agency action," significantly expanding the window in which a party could bring suit.

Speaking of the decision eliminating the *Chevron* doctrine, a federal appeals court—based on the Supreme Court's determination that deference to government agency interpretation of regulations is no longer required—now wants the district court to reconsider its recent decision supporting the DOL's regulation related to environmental, social and governance (ESG) investing. The U.S. Court of Appeals for the Fifth Circuit has remanded that case to the district court following the United States Supreme Court's recent decision to set aside the so-called *Chevron* doctrine.

Fiduciary Rule—Not Dead Yet

The day before the Retirement Security Rule had been set to become effective, the DOL appealed to the Fifth Circuit Court on Friday to reverse a ruling from the District Court for Eastern Texas that had suspended the implementation of the 2024 Retirement Security Rule, also known as the fiduciary rule. The rule's Sept. 23 implementation was put on hold in late July as the result of a lawsuit filed by the insurance industry-backed Federation of Americans for Consumer Choice (FACC), as well as several others, naming the DOL and Acting Secretary Julie Su as defendants.

In ordering the stay, United States District Judge Jeremy D. Kernodle explained that "the 2024 Fiduciary Rule suffers from many of the same problems" found in the version vacated by the Fifth Circuit in 2018. Although many financial professionals are already acting as a fiduciary and, thus, not impacted by this rule, the outcome of this regulation may greatly affect the rollover process to an IRA and the insurance industry.

Participants or Plan Fiduciaries—Who Bears the Burden of Proof?

A federal appellate court in the Eleventh Circuit recently backed the district court's decision to reject claims made in an excessive fee suit. That court not only found

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evidence of a prudent process but also ruled that those suing had to prove that any losses to the plan were the result of imprudent actions.

However, the First, Fourth, Fifth, and Eighth circuits—and the DOL—have held that once an ERISA plaintiff has proven a breach of fiduciary duty and a related loss to the plan, the burden shifts to the fiduciary. In 2020, the United States Supreme Court had an opportunity to weigh in on the issue but declined to do so. It seems likely that they'll have another chance in the future.

A New 'Focus' for Excessive Fee Suits

A second suit has now been filed against plan fiduciaries regarding their actions concerning healthcare benefits—this one against Wells Fargo (the other against Johnson & Johnson). The Consolidated Appropriations Act of 2021 (CAA)—said by some to be "the most significant compliance challenge employers have faced since the Affordable Care Act"—has extended the provisions on fee disclosure previously applied to retirement plan providers under ERISA Section 408(b)(2) to healthcare providers as well. And plan sponsor fiduciaries are on the hook to ensure that those fees/services rendered are reasonable, as they have long been required to do for retirement plans. While the litigation regarding these programs is just emerging, there's plenty to suggest there will be more, including an active social media campaign by none other than Schlichter Bogard, LLC, who effectively created the current excessive fee genre of litigation for retirement plans.

Plausible 'Enough'

A federal judge has rejected a motion to dismiss one of those fiduciary breach suits involving the BlackRock Lifepath target date funds. The suit—one of about a dozen alleging a breach of fiduciary duty in "chasing low fees" and ignoring the allegedly poor performance of the target date funds—had targeted Stanley Black & Decker, Inc. However, unlike the rest in this grouping, this suit also alleged excessive recordkeeping fees.

While the allegations made were found to be sufficiently "plausible" to move past the motion to dismiss, the judge took pains to acknowledge several times that they might not be enough later in the proceedings. That said, it's worth acknowledging that he looked at similar, if not identical, allegations

> "While we don't yet have any full adjudication on those suits, we are now beginning to see some "traditional" excessive fee suits with allegations about the misuse of forfeitures cited as another fiduciary breach."

and data at a similar point in the proceedings and found that they presented a plausible case—though other federal courts have not, reminding us once again that even identical facts can be viewed differently by different courts at the same or different points in litigation.

A similar suit filed against Wintrust Financial was (also) dismissed for a second time, with the judge concluding that none of the benchmarks provided by the plaintiffs were "adequate" points of comparison (they were either active rather than passively managed, or with a "through" rather than "to" retirement glide path). However, the judge commented that even if the benchmarks were sufficient, the performance differential was "not severe enough to plausibly suggest that the Committee breached its duty of prudence." Once again, though, the plaintiffs were given time to correct their arguments.

That 'Flurry' of Forfeiture Reallocation Suits

During the quarter, several cases challenging the use of forfeitures to offset employer contributions (rather than choosing to reallocate those to the remaining participants) moved. Three cases have now been dismissed, two were allowed to proceed to discovery and trial, and another was sent to arbitration.

- **Arbitration**: Of the roughly dozen suits originally filed, a federal judge has now ruled in one case involving Tetra Tech. This case was sent to arbitration based on a provision in the plan document and a judge's determination that doing so did not preclude the plaintiff's recovery of the damages he sought.

- **Dismissal**: Another case involving the use of forfeitures by HP was dismissed by a federal judge who found those allegations "implausible because it relies on a false premise that HP receives a windfall from forfeited amounts, and it would require that plan expenses are always paid before reducing employer contributions."

- **The case proceeds past Motion to Dismiss**: In a suit involving Qualcomm Inc., the judge found a "plausible" case that has been made sufficient to reject the motion to dismiss by the plan sponsor defendants, keeping the suit active.

- **Expansion of claims**: While we don't yet have any full adjudication on those suits, we are now beginning to see some "traditional" excessive fee suits with allegations about the misuse of forfeitures cited as another fiduciary breach. Among those, one involving a $2.4 billion LifePoint Health, Inc. Retirement 403(b) plan cast a wide net of claims, including excessive fees and the alleged misuse of forfeitures in applying them against the employer match. Similarly, a recent suit targeted Nordstrom—with a new suit combining allegations of excessive 401(k) fees, unpersonalized (and overpriced) managed accounts, and misuse of forfeitures, not that the law firms representing the plaintiffs here are new to the arena.

Meanwhile, Bank of America and Home Depot have now been added to the list of firms like Tetra Tech Inc., Honeywell, Thermo Fisher Scientific Inc. 401(k) Retirement Plan, Clorox, Intel, Qualcomm, Intuit and HP in the crosshairs of participant-plaintiffs represented by Hayes Pawlenko LLP, a South Pasadena, Calif.-based firm that launched this genre of litigation. Oh, and as the quarter came to a close, the fiduciary defendants in two forfeiture suits—BAE and Thermo Fisher Scientific—prevailed in their motions to dismiss the suits (the latter relied heavily on the decision *in Hutchens v. HP, Inc.*). However, the judges gave both 30 days to remedy the shortfalls in their arguments.

Arbitration 'Pause?'

Another case has supported the right to pursue claims under ERISA rather than sending them to arbitration. In a case involving an employee of Capital Group, the court determined that the arbitration agreement at issue was a "prospective waiver of the substantive rights and remedies" under ERISA and, therefore, unenforceable under the "effective vindication" doctrine.

The issue of arbitration clauses—and particularly those incorporated in the plan document—remain uncertain waters, with cases in the Second, Sixth, and Seventh circuits that have set aside

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arbitration agreements in these contexts, while the Ninth Circuit has previously granted Charles Schwab Corporation's bid for arbitration over its retirement plan investments. More recently, the Labor Department has weighed in, supporting a case where an arbitration agreement was set aside to pursue an ERISA class action. All in all, the trend seems to disfavor arbitration clauses in these types of cases—but the split in the circuits remains.

More Pension Risk Transfer Suits

You can add two more plan sponsors—GE and Bristol-Myers—to the roster of those sued for a fiduciary breach when choosing to select Athene Annuity and Life as a pension-risk transfer provider. Suits have also been filed against Alcoa, Lockheed Martin, and AT&T; Lockheed Martin and AT&T have filed motions to dismiss these suits. Similar to other such suits filed recently, the suits argue that the plan fiduciaries transferred their pension obligations to Athene, which the suits assert is "a highly risky private equity-controlled insurance company with a complex and opaque structure" at a time when the interest rate environment has led to a surge in these transactions.

The suit acknowledges that "[a]lthough ERISA does not prohibit an employer from transferring pension obligations to an insurance company, ERISA does require that a fiduciary obtain the 'safest annuity available,'" but "[d]efendants did not select the safest annuity available to ensure long-term financial security for GE retirees and beneficiaries. Instead, Defendants selected Athene, which is substantially riskier than numerous traditional annuity providers."

Thus far, the litigation targets only those transfers involving Athene.

Action Items for Plan Sponsors

Plan sponsors should consider these action items and best practices as lessons learned from recent litigation:

1. Be aware that arbitration clauses—particularly those included in plan documents—may provide a less onerous path to resolution than litigation, but the majority of federal courts—and the DOL—aren't supportive.
2. If forfeitures are used to offset employer contributions, ensure that specific language is in the plan document. Consider changing language that allows discretion in applying forfeitures to language that simply directs how they will be used.
3. Note that recent legislation has applied 408(b)2 fee disclosure requirements—and fiduciary responsibility for overseeing those fees—to healthcare plans and retirement programs. Litigation is already emerging as it did—and continues to—for 401(k) plans. Make sure you are getting those disclosures and that they are reviewed.
4. While litigation regarding the new fiduciary rule remains on-going, know that most retirement plan advisors were already operating well within those guidelines. Be aware that other financial services providers were not and will not likely be for some time.
5. Make sure you have a prudent process to review the plan investment menu and fees by having an investment committee that is qualified and engaged, supported by experts, and guided by an investment policy statement. NNTM

Regulatory Radar

Everyone ALWAYS wants to know what regulators have planned and retirement plan advisors are no exception. The DOL recently filed an appeal to unblock the Retirement Security Rule's implementation date. And speaking of the rule, the SEC level sets as to where we are—fiducially speaking. And the House approves legislation to block so-called 'woke' ESG investing.

By Nevin E. Adams, JD

DOL Clapback

The department filed a last-minute appeal of the Fiduciary Rule's stay.

The Department of Labor (DOL) appealed to the Fifth Circuit Court on Sept. 20 to reverse a ruling from the District Court for Eastern Texas that temporarily suspended the implementation of the 2024 Retirement Security Rule, also known as the fiduciary rule. The move comes three days before its original effective date.

The rule's Sept. 23 implementation was put on hold in late July as the result of a lawsuit filed by the insurance industry-backed Federation of Americans for Consumer Choice (FACC), as well as James Holloway, James Johnson, TX Titan Group, ProVision Brokerage, and V. Eric Couch. It named the DOL and Acting Secretary Julie Su as defendants.

In ordering the stay, United States District Judge Jeremy D. Kernodle explained that "the 2024 Fiduciary Rule suffers from many of the same problems" found in the version vacated by the Fifth Circuit in 2018.

"In July, plaintiffs argued that the new rule violated the Fifth Circuit's 2018 decision and that it's too broad," American Retirement Association Chief Legal Officer Allison Wielobob explained, referring to the case's various moving parts as "legal jujitsu." "The DOL replied to the complaint, refuting the Federation, and many of us presumed the court would deal

with the substance of the case sometime down the road. But the plaintiffs then filed a separate motion that asked the court to freeze the effective date of September 23 - Monday. The judge issued a lengthy opinion, saying they met the legal standard for doing that. The DOL is now appealing that ruling on the freeze to the Fifth Circuit."

Despite the curious timing, Wagner Law Group Partner and COO Tom Clark isn't reading much into it. There was a prescribed 60-day period to appeal, and the deadline was approaching.

"It's put up or shut up on whether they're going to appeal this order," Clark said. "That's my take on it. I don't think there's too much to read into what their next move is at this point. They want to appeal to preserve their rights, but they haven't given the community any real insight as to their thoughts about how to move forward."

All the DOL's options "are still on the table," and they might be waiting for the election to decide their next move.

"A notice of appeal is three lines long," he added. "The real work begins when the docket entry gets created by the Fifth Circuit, the case management memo gets opened, and the court issues a set of deadlines. That's when the real work starts."

Clark claimed there are hints that the two sides are talking to each other but won't say what about, making it hard for observers to read the "tea leaves."

"If I'm an advisor working with plan sponsors, the story is, 'Okay, the DOL is not giving up.' They filed their notice of appeal as a placeholder. We really still don't know what their thoughts are other than preserving their rights. What that tells me is I need to keep paying attention in the future, but this thing could go on for another year and a half. I need to pay attention, but it's on my back burner, not front burner attention."

— John Sullivan

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More Fiduciary 'Fun'

An SEC advisory panel examines the current fiduciary landscape.

Amid recent court decisions and differences between fiduciary obligations under various federal and state laws, a Securities and Exchange Commission (SEC) advisory panel examined the current state of affairs and whether there are changes that could improve the system.

"Gatekeeper provisions provide an essential function," said SEC Chair Gary Gensler, setting the table for the Sept. 19 morning panel discussion, which was titled "Investment Advice: A History and Update on Who is Required to Serve in Your Best Interest."

Commissioner Hester Peirce elaborated, saying that a "principles-based approach is at the heart" of the matter. "As the Commission has explained, when the fiduciary standard applies, we are able to take a principles-based approach to regulation that allows an investment adviser latitude to use her own judgment in meeting the standard."

Panelists included Jason Berkowitz, Chief Legal & Regulatory Affairs Officer, Insured Retirement Institute; Dr. Edwin Hu, Associate Professor, University of Virginia School of Law; Allison Itami, Partner, Lathrop GPM; Erin Koeppel, Managing Director, Government Relations and Public Policy Counsel, CFP Board; and Brian J. Tiemann, Partner, Employee Benefits, McDermott, Will & Emery.

Past Is Prologue

Tiemann noted that since the U.S. District Court for the Northern District of Texas issued a second decision halting the scheduled Sept. 23, 2024, implementation of the Retirement Security Rule, the initial regulations governing advice put in place in 1975 are still in place.

At the same time, Tiemann observed, we are in a "much different world today" than when ERISA was enacted – then, defined benefit plans predominated as retirement saving vehicles, whereas now there are many more, such as 401(k)s, 403(b)s, and IRAs. The Department of Labor (DOL) has been "rethinking"

what fiduciary duty and investment advice are, he added.

In 2016, Tiemann noted, the DOL proposed a rule that would have significantly expanded the definition of "fiduciary" to include investment advisers of ERISA plans, subject to certain carve outs, and to formalize the provisions governing rollover recommendations. He observed that the U.S. 5th Circuit Court of Appeals said that the DOL exceeded its authority in setting the regulation and had expanded the definition of what constitutes a fiduciary in a way that was not a reasonable interpretation of the statute and was too broad.

And on Nov. 3, 2023, the DOL "again proposed" replacing the 1975 fiduciary rule with a broader definition of fiduciary investment advice.

Current Developments

There is "weak oversight" of state insurance sales, said Hu, noting that insurance professionals have received less attention by federal law, and that they have largely been regulated under state suitability and best interest regulations and standards.

Hu argued that there are some "megatrends" that are relevant, including:

- the rapid growth in the number of financial professionals who are providing retirement advice under state-regulated insurance regimes;
- sales of fixed annuities, which he said, "have taken off" and that post-Regulation Best Interest (Reg BI) there has been "a significant surge in sales"; and
- the increase in IRA assets, which he said now have overtaken those held collectively in 401(k)s, a state of affairs he said, "arguably makes the IRA market the most important for investment advice."

Looking Deeper

Whether the DOL should act turns on the potential consequences of being an ERISA fiduciary, Itami said. Those consequences include considering the ERISA standard of care, namely exercising prudence and loyalty; private right of action; Section 409 damages, which provide for personal liability; and Section 502 penalties.

"ERISA is really a statute of prohibitions," said Itami, adding, "ERISA is a statute of 'no' unless you meet the standard for an exemption." She remarked that the DOL has "a lot of discretion" in promulgating administrative exemptions, but "has created some instability in the marketplace" in exercising it.

"The landscape has shifted a bit," Itami remarked.

The 2024 proposals, said Berkowitz, are "functionally equivalent" to the 2016 rule and in his view would result in millions of workers losing access to advice, products and services. To comply, he said, many providers would have to convert to a fee-based model.

The stakes of discussions about fiduciary regulation are high, asserted Koeppel, arguing that "we should be matching investor expectations," adding, "consumers want and expect financial advice that will be in their best interest."

"There is market value in being a fiduciary," Koeppel said.

Recommendations

"Regulation of financial advice is quite fragmented," said Hu.

Recent regulatory efforts "have closed important gaps," Hu noted; however, some potential challenges remain:

- investors, regulators and academics have limited insight into the full range of advisor conduct;
- NAIC Best Interest does not treat compensation as a source of conflicts; and
- investors lack protection for IRAs invested in annuities.

Berkowitz suggested that gaps in the regulatory framework "should be appropriately addressed through targeted regulations."

Hu cited further recommendations that could improve the situation, including:

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- improving coordination and accountability, including greater attention from insurance regulators to registration of former brokers;
- creating a single, unified database for licensed advisory professionals; and encouraging insurance firms to monitor and discipline agents.

"The key is to make sure investors are educated so they can ask the right questions," suggested Tiemann.

— John Lekel

Making Woke Go Broke

House approves legislation to block so-called 'woke' ESG investing.

In what may be a final push before the elections, the Republican-led House of Representatives on Sept. 18 approved legislation to prevent the use of environmental, social and governance (ESG) factors when making investment decisions for retirement plans.

In this latest salvo, the House on a near party-line vote of 217-206 (with three Democrats voting in favor) approved H.R 5339, the Protecting Americans' Investments from Woke Policies Act. The bill was originally introduced by Rep. Rick Allen (R-Ga.) on Sept. 5, 2023, as the Roll Back ESG to Increase Retirement Earnings (RETIRE) Act but was amended to include three additional bills prior to going to the House floor (more on that below).

"As families continue to struggle to afford basic necessities like gas and groceries due to record inflation, the last thing hardworking taxpayers need is for their retirement savings to be depleted due to politically motivated mismanagement," Rep. Allen stated during the House's consideration. "This bill rolls back this overreaching rule and ensures ERISA retirement plan sponsors prioritize financial returns over ESG factors when making investment

decisions on behalf of their clients," he added.

In general, the legislation seeks to codify a Trump administration rule that was later overturned by the Biden administration's Department of Labor. The Biden White House contended that the rule issued in 2020 under the Trump administration had a "chilling effect" on retirement investment advisers otherwise inclined to consider ESG factors when making investment decisions, even if the advisor determined that these factors were material to investment decisions.

H.R 5339 generally requires fiduciaries of employer-sponsored retirement plans to make investment decisions based only on pecuniary factors (i.e., factors that a fiduciary prudently determines are expected to have a material effect on the risk or return of an investment based on appropriate investment horizons consistent with the plan's policies and objectives).

The legislation, however, does include some leeway, stating that if a fiduciary is unable to distinguish between investment alternatives on the basis of pecuniary factors alone, the fiduciary may use non-pecuniary factors as the deciding factor, provided they document, among other things, why pecuniary factors were not sufficient to select a plan investment.

Prior to considering H.R 5339, Republican lawmakers added three additional bills to the legislation that are loosely tied to ESG investing. They include the following:

H.R 5337, the Retirement Proxy Protection Act. Sponsored by Rep. Erin Houchin (R-Ind.), the legislation clarifies that the decision to exercise a shareholder's right is subject to the prudence and loyalty duties under ERISA. It also states that proxies held by ERISA plans must be voted in the economic interest of the plan, and not used to advance "radical policies."

H.R 5338, the No Discrimination in My Benefits Act. Sponsored by Rep. Bob Good (R-Va.), the bill declares that race, color, religion, sex, or national origin may not be taken into consideration when selecting a fiduciary, counsel, employee, or service provider of an ERISA plan.

H.R 5340, Providing Complete Information to Retirement Investors Act. Sponsored by Rep. Jim Banks (R-Ind.), the legislation would implement a notice requirement on defined contribution plans to explain the difference between choosing from investments selected by ERISA fiduciaries and choosing from investments through a brokerage window.

The legislation will now go to the U.S. Senate, where it faces an uncertain future.

The Biden Rule

As to what prompted this legislation, in December 2022, the DOL under the Biden administration issued a final rule rescinding the Trump rule, and instead, finalized a rule allowing fiduciaries to consider collateral benefits when choosing among or between investment alternatives.

That rule – officially titled Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights – took effect on Jan. 30, 2023. The regulation permits – but does not require – plan fiduciaries to consider the potential financial impact of ESG factors alongside other financial considerations when they select investments to offer within a retirement plan and exercise shareholder rights, such as proxy voting.

When the Biden administration's rule was finalized, Congress attempted to block it under the Congressional Review Act by passing a resolution stating that it could not go into effect, but President Biden vetoed the resolution. The Republican-led House attempted to override the veto but fell well short of the votes needed.

Not surprisingly, the Biden administration has already issued a statement opposing H.R 5339, noting that it would "severely restrict the ability of fiduciaries of job-based retirement plans to make informed investments on behalf of plan participants and beneficiaries."

In noting that ERISA already requires fiduciaries to act solely in the interest of plan participants and beneficiaries, the statement argues that "this bill undermines that longstanding framework by preventing fiduciaries from considering certain material factors that may affect the best financial interests of ERISA plan participants and beneficiaries. Artificially limiting fiduciaries' ability to consider material information in making sound investments will reduce savings and retirement security for Americans and runs contrary to the purpose of ERISA."

Pending Litigation

In the meantime, the DOL's rule continues to be the subject of (at least) two legal challenges (in addition to a suit brought against American Airlines). Among those are a suit brought in January 2023 by a coalition of 25 State Attorneys General (along with a plan sponsor and an unrelated plan participant) before the U.S. District Court for the Northern District of Texas, along with a suit filed by DC plan participants in February 2023 before the U.S. District Court for the Eastern District of Wisconsin.

The AG suit in Texas was dismissed last fall, but after the U.S. Supreme Court's decision setting aside the so-called Chevron doctrine, the U.S. Court of Appeals for the Fifth Circuit remanded the case back to the district court to reconsider its decision. As last checked, the participant suit in Wisconsin is still pending; that case is Braun and Luehrs v. Walsh.

Both suits make similar arguments, contending, among other things, that the ESG rule violates the Administrative Procedure Act and ERISA, and is arbitrary and capricious.

— Ted Godbout

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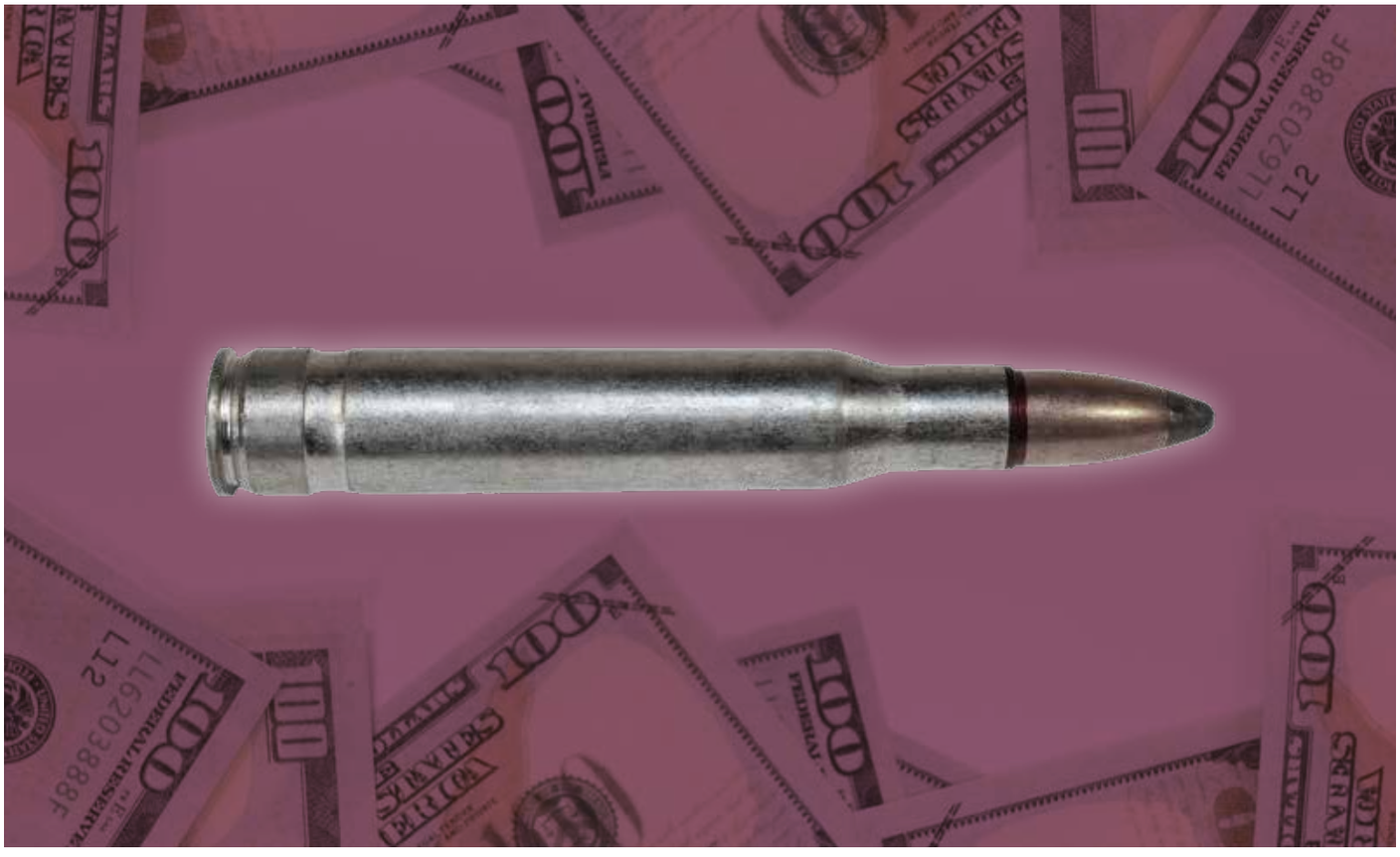

A 'Silver Bullet' That Could Kill Your 401(k)

Such proposals should be willing to be honest about their actual cost, rather than disingenuously pretending that it's basically a 'free' trade-off with no implications for retirement security or government finances.

By Nevin E. Adams, JD

A new academic paper claims to have a solution to the problem of low-income retirement savings, oh, and they'd like you to pay for it.

The proposal –put forth by folks at the Wharton School of the University of Pennsylvania is airily described as follows: "a new illustrative plan designed by the Penn Wharton Budget Model (PWBM) in response to policymaker questions may well be their silver bullet to have a decent-sized nest egg without actually having to save more than what they already do. Employers are also not burdened with higher administrative costs or contributions. The plan does not increase the federal deficit."

It will, however, cost you your pre-tax savings incentive.

That admission isn't buried in the fine print, though you DO have to scroll down several paragraphs to find it. Even so, it's couched in phrases that make it sound as though the same individuals giving up that pre-tax incentive are the ones getting the benefit of this program. See what you think:

"In its design, the retirement pool will grow with the federal government making annual contributions to the individual retirement savings accounts; households or employers are not required to make any contributions. In exchange, ***those individuals*** *would give up the tax breaks they receive for investing in 401(k) retirement accounts."*

However, "those" individuals– the ones "giving up those tax breaks"–well, that's ***everybody*** who is currently saving on a pre-tax basis–which, it seems fair to

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“This seems to be just an arithmetic exercise—one done by academics that have chosen to run some hypothetical numbers, completely ignore human behaviors, disregard factual information about the income composition of current retirement plan participants—and most particularly the impact on middle income savers who most assuredly DO enjoy and appreciate the tax deferral as an incentive to save...”

say is a whole lot of people who WON’T be eligible for this new government program. For that group, and based on whichever assumption you want to apply for the government contribution, this proposal would purportedly wind up providing **them** with account balances of $100,000 to $200,000, depending on some assumptions.

Ironically, this proposal–“funded exclusively by the federal government” (seriously? Let’s face it, funded by taxpayers)–isn’t, unlike the current tax preferences they are proposing to eliminate, a DEFERRAL of tax obligations–it is a flat out forbearance. And the researchers are apparently familiar with the way the federal government does its accounting, as it focuses strictly on a 10-year budget window in its assertion that it’s an even “trade”–ignoring the tax revenues that will be returned to the federal government–with interest–from the current pre-tax deferrals.

Interestingly enough, an additional rationale for the “solution” is because the programs currently designed to provide that low-income support–Medicare and Social Security–are, in the words of the authors of this “new” idea–“severely underfunded.” So, we might as well double down, right?

Not that the folks at Wharton are claiming ownership for the idea. “We’re not proposing anything, saying Congress should do this,” Kent Smetters, Wharton professor of business economics and public policy and faculty director at PWBM said. “We’re just simply showing how it could be done.”

Honestly, this seems to be just an arithmetic exercise–one done by academics that have chosen to run some hypothetical numbers, completely ignore human behaviors, disregard factual information about the income composition of current retirement plan participants–and most particularly the impact on middle income savers who most assuredly DO enjoy and appreciate the tax deferral as an incentive to save, equate the temporary deferral of taxes in a 10-year budget window with the fiscal reality of simply handing out government contributions–and then effectively shrug at the notion that they are actually proposing an approach that they have spent time, energy and money developing, publishing, and–it seems fair to say–promoting.

That said, it seems to me that such proposals should be willing to be honest about the actual cost of such a proposal, rather than disingenuously pretending that it’s basically a “free” trade-off with no implications for retirement security or government finances. Like most so-called “silver bullets,” this one is overly simplistic–myopically focused on solving one issue, while completely discounting the long-term costs and implications of its application.

Those looking for a silver bullet–should keep looking. NNTM

FOOTNOTES

1. https://knowledge.wharton.upenn.edu/article/how-low-income-households-can-secure-their-retirement-finances/
2. As discussed later, it makes that claim looking only at a 10-year federal government budget window—outside that, the results would be quite different.
3. Emphasis mine.
4. More specifically, the individuals they are directing these benefits to are simply described as “low-income Americans”—but winding your way through the proposal you can discover that eligibility defined as being “…based on the criteria used by existing Earned Income Tax Credit program: Individuals must be between ages 25 and 64, and they must have investment income below $10,000 (based on 2020 dollars, indexed to inflation over time.”
5. The proposal says that the government would make contributions of 10% of earned income that reach a maximum of $2,000, $2,250, and $2,500 under those three scenarios, respectively; contributions are phased out at a rate of 30% starting at $50,000 of earned income.

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