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THE OFFICIAL MAGAZINE OF THE NATIONAL ASSOCIATION OF PLAN ADVISORS

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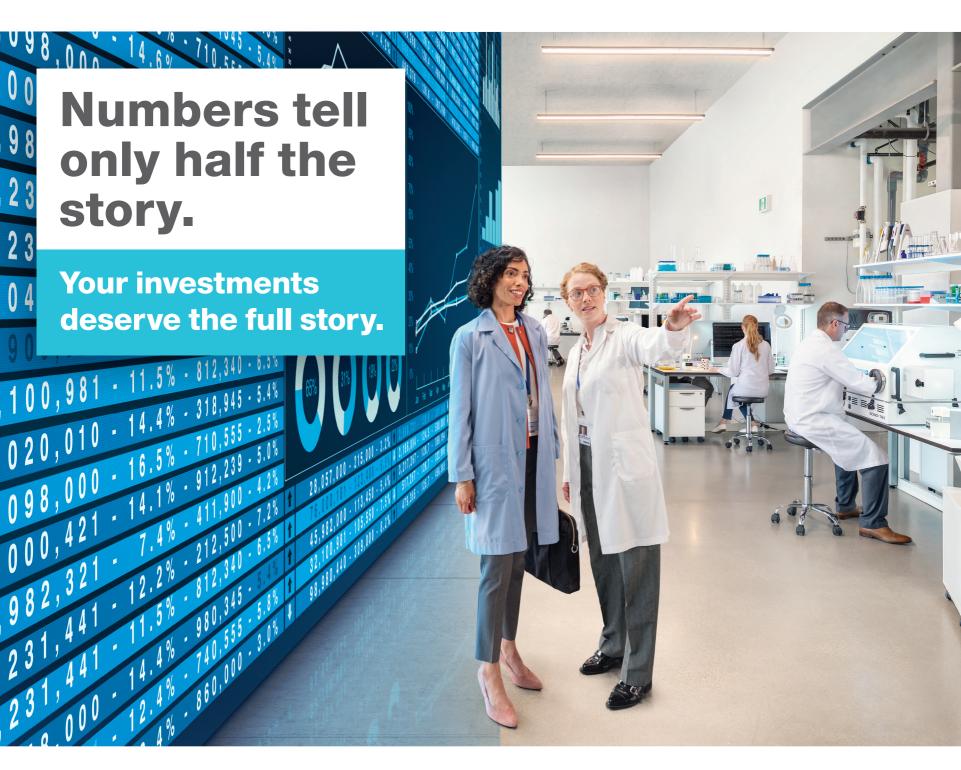
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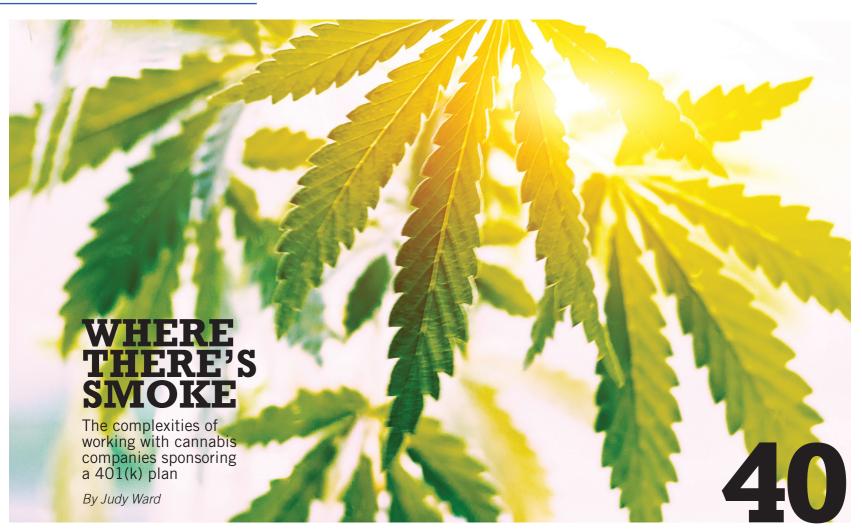
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**FALL 2019** 

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#### EDITOR-IN-CHIEF

Nevin E. Adams, JD

#### **COPY EDITOR**

John Ortman jortman@usaretirement.org

#### **SENIOR WRITERS**

Ted Godbout tgodbout@usaretirement.org

John lekel jiekel@USARetirement.org

#### ART DIRECTOR / DESIGNER

Ethan Duran eduran@usaretirement.org

#### PRODUCTION / ADVERTISING MANAGER

Steve Fox sfox@usaretirement.org

#### AD SALES

Erik Vanderkolk evanderkolk@usaretirement.org

#### NAPA OFFICERS

#### PRESIDENT

Jania Stout

#### PRESIDENT-ELECT

Pat Wenzel

#### VICE PRESIDENT

Alex Assaley

#### IMMEDIATE PAST PRESIDENT

Jeff Acheson

#### EXECUTIVE DIRECTOR

Brian H. Graff, Esq., APM

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Postmaster: Please send change-of-address notices for *NAPA Net the Magazine* to NAPA, 4401 N. Fairfax Dr., Ste 600, Arlington, VA 22203.

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You're special because you are a member of the National Association of Plan Advisors.

Most of you know that – know that you are a member of this association, and know why that matters. But there are some of you who don't know, or aren't sure of that connection. And that's a shame.

NAPA is more than just a sponsor of the nation's most outstanding events for retirement plan advisors – even though that includes everything from one-of-a-kind gatherings like our D.C. Fly-In Forum to innovative concepts like the Women in Retirement Conference (WiRC) and the new Nonqualified Plan Advisor Conference to the nation's premier retirement advisor event – the only national conference developed by retirement plan advisors for retirement plan advisors – the NAPA 401(k) Summit.

We're more than the purveyor of impactful industry credentials like the NAPA Certified Plan Fiduciary Advisor and Nonqualified Plan Advisor Certificate... more than the developer and publisher of the nation's most widely read retirement advisor publications to guide, inform and enhance your business and business practices – and yes, we're even more than the nation's only advocacy group focused exclusively on the issues that matter to retirement plan advisors.

In fact, we are all of that – and, as a

member of NAPA (and if you're receiving this magazine, you most likely are one) you are part of all of that – and more.

Many of you enjoy that membership through the generous support of our NAPA Firm Partners. And while that may mean you aren't as aware of the benefits of that membership, because of that membership you get discounts to all those marvelous

We're more than the nation's only advocacy group focused exclusively on the issues that matter to retirement plan advisors."

NAPA events, including ones – like the NAPA DC Fly-In Forum – that are open only to NAPA members. Only NAPA members have the opportunity to be acknowledged in our Top Young Advisor and Top Women Advisors lists – and only NAPA members get a subscription to NAPA Net the Magazine, like the one you're holding in your hands.

But the real value of NAPA membership – and it's what brought me to join the organization some five years ago – is the

impact this organization, and our sister organizations in the American Retirement Association – have on retirement policy and regulation – not just on Capitol Hill, but increasingly in state capitals across the country.

You don't have to be a member to benefit from that impact, of course. But as an advisor working with retirement plans these days, why would you want to miss out on being part of that – on having a voice, on making an impact – on being an active member of the fastest-growing member association in the retirement planning industry – and the only advocacy group exclusively focused on the issues that matter to retirement plan advisors.

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## The Butterfly Effect?

Corporate America is changing.



BY JANIA STOUT



don't know if you have noticed the shift, but everywhere I turn, I see it. I feel that nearly every article I read or discussion I have with a client is about helping employees find purpose and feel less stress. It's refreshing that employers are more concerned about their employees' wellbeing than ever before. And I like to think that our industry had a lot to do with it.

Have you ever heard about the "butterfly effect"? It's the idea that small changes or causes can have a big impact on something else. There are lots of examples that support the butterfly effect, but I can't help but think that our industry was the butterfly that started a movement. Our shift in helping employees was a slight change that led to significant, different outcomes.

Nearly a decade ago, our industry's top advisors started to be vocal about helping participants not only with saving in their retirement plan, but also with financial stress. Articles were written, speeches were made and LinkedIn posts were shared about helping employees feel more confident about their financial situation.

Fast forward to today and financial wellness is top-of-mind for most employers.

It continues to be listed as one of the top three initiatives that employers consider when they evaluate their benefit programs. Not only are we hearing employers wanting more around financial wellness, they are wanting to talk about all their benefits in a more holistic manner.

Take health savings accounts, for example. I look at HSAs as the bridge that connects the health and wealth discussions. I am confident that our industry led the charge with talking to our clients about HSAs, as well as student loan programs and other benefits that nobody was really talking about until recently. This is an exciting time for advisors who are willing to take a step back and look at how all the benefits are related.

NAPA has provided so much content and opportunities to learn more about ways to add value to our clients. I think about September's Nonqualified Plan Advisor Conference, which helped the hundreds of advisors in attendance learn about more ways to help their clients.

We are not just retirement plan advisors anymore. We are in a great position to be consultative to our clients – and they are now more open than ever to having these conversations!

It was a busy summer, and it was great seeing so many NAPA members at two of my favorite events. We had the NAPA D.C. Fly-In Forum and a few weeks prior, the Women in Retirement Conference (WiRC) in Chicago.

The NAPA Fly-In just keeps getting better every year. I see repeat attendees really starting to embrace our lobbying efforts, and I have seen the delivery of our messages on Capitol Hill get stronger and stronger. I have enjoyed getting to know my Maryland peers as we walk over to meet with our senators. We all join arms together and during those moments we are no longer competitors but peers working on the same mission. Also, one of the highlights for me was seeing the junior advisors who were sponsored to attend. If you have a junior advisor on your team, bring them! They will get so much out of it.

Last but definitely not least is the Women in Retirement Conference. This year nearly 200 attendees gathered in Chicago. Trust me, this is an event that every woman should put on her list of "go to" conferences for the year. The conference committee recruited speakers who helped us be better at our jobs - and be better people. WiRC is a gathering of like-minded women getting together to help each other grow. This year we also kicked off our new women's mentorship program, called Thrive. I am happy to report we have already linked up mentors and mentees, and hope to continue to see more apply. (Check out our website to apply.)

As we head into the fall and the end of the year, this is a perfect time to set goals for 2020. If you want to get more involved with NAPA, please don't hesitate to reach out. We have a lot of programs and ways to get involved. In my first President's message in the summer issue, I mentioned my goal of trying to spur involvement from a broader base of advisors. I hope you raise your hand and reach out. It could have a big impact on your career! I know it has for me. §

» Jania Stout is the co-founder and managing director of Fiduciary Plan Advisors at HighTower in Owings Mills, MD. She serves as NAPA's 2019-2020 President.

# LEVELING THE PLAYING FIELD FOR PUBLIC WORKERS





ANGELA MONTEZ SENIOR VICE PRESIDENT

ICMA-RC Senior Vice President, General Counsel and Chief Legal Officer Angela Montez advocates lower costs and greater participation in defined contribution plans

public employees are the backbone of local communities, serving as teachers, fire fighters, police, EMTs, park employees and in many other roles to benefit all of us. Without them, no town, city or county can function, but when it comes to retirement security, the playing field is not level for public employees.

As one of the leading providers of public sector defined contribution plans, ICMA-RC has long sought to ease the burdens of local and state governments by helping their employees build retirement security. ICMA-RC's Angela Montez is advocating for changes at both the federal and state level that will make it easier for public employees to save for retirement—and bring them into parity with employees at private sector companies. We asked her to tell us more about this advocacy initiative.

#### How did ICMA-RC's advocacy get started?

Montez: ICMA-RC has always engaged in advocacy through participation in, and partnerships with, other organizations. We've found, however, that public sector retirement plan issues often get drowned out, because the private sector plan community is much larger and more vocal. We want to bring public sector issues into the conversation, providing the public plan perspective as members of Congress draft legislation and agencies develop regulations.

Our focus is on retirement and retiree health in the public sector where we can help to further our mission. We also support issues pertinent to the larger retirement community to provide greater coverage and greater savings opportunities to all Americans.

### You're working to make collective investment trusts, or CITs, eligible as 403(b) plan investments. Why is that important?

**Montez:** Historically, 403(b) plans, which are defined contribution (DC) retirement plans for employees of public schools and certain other tax-exempt organizations, were almost entirely invested in annuities to provide a guaranteed income stream similar to a defined benefit (DB) plan. These plans couldn't even include mutual funds until 1974.

Because of this history, you see significantly higher fee structures in 403(b) plans than in 401(k)s and 457 plans. CITs can help reduce expenses. They provide the same investment strategies as mutual funds with greater flexibility and at a significantly lower cost. It has been estimated that incorporating these vehicles into 403(b) plans could save teachers and other public employees as much as \$10 billion per year<sup>1</sup> — a meaningful contribution to public employee retirement security.

#### What are you doing to advocate for this change?

**Montez:** Earlier this year, we asked the IRS for a private letter ruling to permit 403(b) plans to invest in CITs on a limited basis.

We've also met with officials of leading legislators, including Senators Rob Portman (R-OH) and Ben Cardin (D-MD), to advocate that the CIT provision be included along with a broad package of retirement savings reforms, in the Retirement Security and Savings Act.

#### You've also been working to allow governmental plans to implement auto-enrollment and auto-escalation.

Montez: Auto-enrollment changes the dynamic of plan participation to allow easy, automated enrollment at the start of a new job with the goal of increasing retirement security. While this plan feature is not mandated, and participants can opt out at any time, it has substantially increased participation and retirement savings in the plans that have used it.

Governmental 457 and 403(b) plans are governed by state law. The issue is that many states have laws against garnishment or wage deduction that have nothing to do with retirement, but they can effectively prohibit autoenrollment, where employees have to actively opt out of, rather than opt into, a plan.

Only a small number of states have amended their laws to permit or require auto-enrollment. In most cases, there's been no real opposition to the change. It's just a matter of making state legislators aware of what's needed to make this feature available to public plans.

This is a state-by-state process, where we have partnered with a number of organizations. We intend to focus on approximately five states per year, starting with ones where legislation has already been introduced or where we have a strong presence.

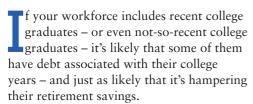
#### It sounds like you have a lot of exciting initiatives in the works.

**Montez:** Yes, it certainly would be exciting and beneficial to public employees if these changes are enacted.

Aon-Hewitt, "How 403(b) Plans are Wasting Nearly \$10 Billion Annually, and What Can Be Done to Fix It", January 2016.

#### Starting 'Blocks'

The impact of student loan debt on retirement savings has emerged as one of the most significant challenges of our time.



Any number of studies have chronicled the impact of this debt on retirement savings. A recent study by TIAA found that an estimated 84% of Americans say that outstanding student debt is hurting their ability to sock away money for their golden years, and roughly three-quarters (73%) say that they're putting off maximizing their retirement plan contributions, or don't plan to contribute to a retirement account at all, until their student debt is gone. Among those who haven't yet started, more than a quarter cite student debt as the

The non-partisan Employee Benefit Research Institute (EBRI) has found that though those with college degrees are more likely to have access to a defined contribution plan at work, and to participate at higher levels, they have smaller balances. For families with heads younger than 35 with a college degree, the median DC balance was \$20,000 and the average balance was \$53,638 for the families without a student loan, compared with \$13,000 and \$32,987, respectively, for the families with a student loan. Said another way, those without student loans had more than 50% more in their DC plan than those with student loans.

Now, it's always been a challenge encouraging younger workers to save for retirement - but the breadth and depth of the impact of student debt on retirement savings has emerged as one of the most significant challenges of our time. And it's keeping the next generation of retirement savers from enjoying one of the most significant benefits of a long investment horizon – the magic of compounding!

This has been a significant and growing concern for our members, both as employers and among the employers they

support. In fact, calls to do something to mitigate its impact have only strengthened in the months since the 2018 IRS private letter ruling (PLR 131066-17) which permitted a specific 401(k) plan sponsor to contribute to the plan on behalf of plan participants who pay down student loan debt but do not necessarily contribute to the employer's 401(k) plan. Since then there have been calls for a revenue ruling that broadens the reach of this guidance.

A number of legislative proposals would go even further - bills have been introduced by Sens. Rob Portman (R-OH) and Ben Cardin (D-MD), as well as Senate Republican Whip John Thune (R-SD), along with Sen. Mark Warner (D-VA).



student loan debt that was incurred by a worker for higher education expenses, supported by evidence of their student loan debt payments. The legislation stipulates that the rate of matching for student loans and for salary reduction contributions must be the same, and special rules would apply if a worker makes both salary reduction contributions and student loan repayments, such that student loan repayments would only be taken into account to the extent a worker has not made the maximum annual contribution to the retirement plan.

Significantly, the legislation also provides clarification on certain nondiscrimination rules that apply to 401(k) plans, as well as safe harbors



The Rolling Stones once told another generation that "time was on their side." But without a retirement plan solution to the student debt issue, that won't be the case for millions."

Perhaps the most notable – and one that we've been actively engaged on – is one by Sen. Ron Wyden (D-OR), Ranking Member of the Senate Finance Committee. Wyden's Retirement Parity for Student Loans Act co-sponsored by Senate Finance Committee members Maria Cantwell (D-WA), Ben Cardin (D-MD), Sheldon Whitehouse (D-RI), Maggie Hassan (D-NH) and Sherrod Brown (D-OH) – would provide a voluntary option for plan sponsors, a benefit that must be made available to all workers eligible to make salary reduction contributions and receive matching contributions on those salary reduction contributions, applied to repayments of

that deem the nondiscrimination rules to be satisfied if certain matching or other employer contributions are made to the plan. And how will potential errors in administration of these programs be addressed? These are important considerations for plan sponsors (and recordkeepers) alike.

The Rolling Stones once told another generation that "time was on their side." But without a retirement plan solution to the student debt issue, that won't be the case for millions.

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



The Women in Retirement Conference (WiRC) is a unique conference developed by and for women who work in the retirement plan industry.

The event will focus on **leadership**, **marketing**, **practice management** and **personal growth**.

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#### Trends 'Setting'

This issue we explore a sudden spike in hardship withdrawals (at least with one provider), the continued (but slow) uptick with CITs, an interesting shift in focus for non-qualified deferred compensation plans, trends in mobile access — and some issues with provider websites.

#### HARD SHIFTS?

What's behind an uptick in 401(k) hardship withdrawals?

Act (BBA) of 2018 have led to a noticeable jump in withdrawals.

The white paper from Fidelity Investments – "Hardship Withdrawals: Improving the well-being of those who take them" – explains that since passage of the BBA the firm has seen a shift in participant behavior.

The BBA eliminated the requirement that a participant must first request all available loans before taking a hardship withdrawal. It also called for eliminating the six-month suspension period for making 401(k) contributions following a safe harbor hardship distribution, as well as expanding the types of funds that can be distributed under a hardship withdrawal to include QMACs, QNECs, 401(k) safe harbor plan contributions and earnings.

Fidelity's report notes that while the percentage of participants taking loans and hardships overall has not increased, of

those withdrawing money from their plan, fewer are taking loans and more are taking hardships. Based on Fidelity data from more than 33,000 plans with 23 million participants as of June 30, the firm projects that the annual loan rate for 2019 will dip slightly to 9.2%, while the annual hardship rate will rise to 4.4% – up from about 3% in 2018 and an average rate of 2.2% since 2009. The firm projects that its current findings for 2019 will likely hold true for the remainder of the year.

Sean Dungan, Director of Data
Analytics and Insights at Fidelity, explains
that the trend toward more hardship
withdrawals and less loan activity since the
BBA was enacted is clear and accelerating
slightly. Dungan notes that Fidelity "saw
the increase in week one of this year
and over the summer it has not slacked
off." Dungan adds that the firm is "not
seeing a perfect shift" between hardship
withdrawals and loans, but maintains that
there has been a clear inverse relationship.

While Fidelity's data does show an uptick in hardship withdrawal activity for 2019, it's also important to remember that these changes under the BBA only just became effective (for plan years beginning after 2018) and only for plans that actually permit hardship distributions.

Longer term, those changes may be further aided by proposed regulations issued by the IRS in November 2018 addressing changes in the BBA that modified the safe harbor list of expenses for which distributions are deemed to be made on account of an immediate and heavy financial need, including:

- clarifying that the home casualty reason for hardship does not have to be in a federally declared disaster area (an unintended consequence of the Tax Cuts and Jobs Act of 2017); and
- adding expenses incurred as a result of certain disasters for which the IRS and Congress have traditionally, but separately, provided relief in the past,



such as hurricanes, tornadoes, floods and wildfires – including, for example, Hurricanes Michael and Florence in 2018. The IRS explained that this was intended to eliminate any delay or uncertainty concerning access to plan funds following a disaster that occurs in an area designated by FEMA.

#### Hardship Reasons?

Fidelity's paper emphasizes that although the overall rate of hardship withdrawals remains low historically, of those who do take them, 73% do so for one of two main reasons: to prevent eviction or foreclosure or to pay uninsured and unreimbursed medical expenses. For both hardship reasons, the average amount is \$2,900 and the average number of withdrawals taken

per participant is 1.5 per year, according to the firm's data.

The percentage breakdown for hardship withdrawal reasons for 2019 includes:

- foreclosure/eviction (42%);
- medical (31%);
- education (13%);
- home purchase/repair (12%); and
- funeral (1%)

The report does not break down, for example, how much of these withdrawals were related specifically to disaster-related spending or perhaps someone tapping their 401(k) to pay for a first home.

But to that point, Dungan notes that hardship withdrawals in essence "become fungible" for someone who is struggling, such that they may be able to pay their mortgage but then can't pay their medical bills. Dungan notes that Nevada has seen the highest rate of hardship withdrawals, but adds that states such Texas, Florida and Alabama have also seen high rates.

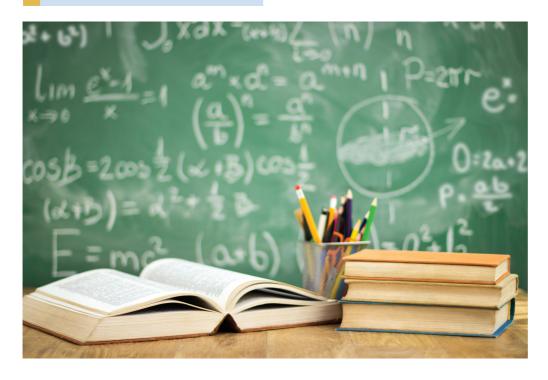
The good news, according to Fidelity, is that since enactment of the BBA, plan sponsors are no longer required to suspend participant contributions to the plan after a hardship withdrawal. As a result, the firm's data shows that only 3% of participants taking hardship withdrawals have actively lowered or stopped their deferrals by choice.

All in all, there seems to be an ongoing question as to whether the uptick in hardship withdrawals is tied directly to not having to take loans first, or whether disaster relief has had a bigger impact.

— Ted Godbout

#### **HOLDING PATTERNS**

#### Education, transparency seen as essential to wider CIT adoption



A ssets in collective investment trusts (CITs) have grown significantly in recent years, but providers will need to address certain shortcomings to maintain that growth, says a new report.

Generally priced lower than other retirement plan vehicles – such as mutual funds – costs continue to be the primary growth driver of CITs, according to the 2019 CIT provider survey by Cerulli Associates conducted in partnership with the Coalition of Collective Investment Trusts. However, broader penetration will depend upon CIT providers' ability to address potential headwinds to growth and secure opportunities to improve advisor education, the organizations note.

Data was collected from 27 firms, representing \$2.3 trillion in CIT assets (over 80% of the entire CIT market) in March, April and May of 2019, with participation including 12 of the top-15 largest CIT providers as of year-end 2018.

According to the survey data and Cerulli's proprietary modeling, CIT assets stood at \$3 trillion as of year-end 2018. The vehicle exhibited a compound annual growth rate (CAGR) of 7.25% over the

five-year period ended 2018. If it wasn't for a temporary dip in market performance at the end of 2018, the CAGR would have been even higher, the organizations observe.

With DC plans in recent years accounting for the majority of flows to CIT products, providers increasingly have been forced to question strategies for tapping the channel, the report explains.

When asked how important various considerations have been in the development and distribution of CITs, nearly all (96%) providers cited demand from DC plans as "very important," while a similar amount (89%) cited lower costs and fees. In addition, increased demand for target-date funds and serving as an additional vehicle offering for existing investment strategies were both cited by nearly two-thirds of respondents as very important.

#### **Ongoing Challenges**

Education appears to be an ongoing issue, however. "More than 40% of CIT providers identify financial advisors' lack of CIT knowledge as a top challenge to adoption in DC plans," notes James

Tamposi, senior analyst at Cerulli. "This highlights that one of the biggest initiatives has been to increase education and awareness of the vehicle among plan sponsors, financial advisors and other industry participants," Tamposi says.

CIT providers also face the challenge of addressing investors' expectations for transparency. "The lack of consistent, public reporting factors in to DC plan sponsors' reluctance to adopt the vehicle," observes Anna Fang, research analyst at Cerulli. "Almost half of providers surveyed noted that CITs' lack of transparency relative to mutual funds threatens the vehicle's adoption."

An additional challenge to CIT adoption in DC plans, according to respondents, is that CITs require a contract, whereas mutual funds do not, with 44% citing this as a top-three challenge. Respondents also cite issues with plan sponsors and financial advisors being able to access clean and comparable data on CITs within databases.

When asked to select the degree to which various investment vehicles pose a threat to the potential growth of CIT assets, mutual fund clean shares, not surprisingly, was cited by 30% of respondents as a "significant threat," while 67% said the vehicle poses "somewhat of a threat." Mutual fund I-shares and institutional separate accounts were nearly even as posing the next greatest threats, the findings further show.

Consequently, Cerulli suggests that CIT providers should continue to offer advisors as much information and transparency as possible (e.g., reporting, commentary). "The industry will be pressed to educate the advisor world, dispelling any long-standing myths that are preventing otherwise valuable vehicle recommendations," the firm observes.

These findings appear consistent with a recent NAPA Net Reader Poll, which found, among other things, that interest in CITs seems to be increasing, but greater transparency and educational efforts may help make inroads to greater adoption.

— Ted Godbout

#### A shift in focus for non-qualified deferred compensation plans?

#### **FOCUS GROUP?**

A n industry-leading benchmark study of non-qualified deferred compensation (NQDC) plans finds a shift in emphasis for what has become an increasingly critical benefit for key employees.

Employers have long provided access to NQDC plans to their management team and certain highly-compensated employees. Participants value the unique tax preferences and wealth accumulation opportunities available through a NQDC plan. However, the survey – conducted by the Plan Sponsor Council of America – found that the goal of offering a plan to employees seems to have shifted from attraction and retention of top talent to helping employees save more for retirement.

That was among the key findings of the Plan Sponsor Council of America (PSCA) 2019 Non-Qualified Deferred Compensation Plan Survey, a follow-up to its 2018 study. The survey facilitates dialogue within the industry while providing insight into common and best practices of deferred compensation plans. PSCA is part of the American Retirement Association (ARA).

The survey of NQDC plan sponsors – the only independent source of plan benchmarking data on NQDC plans for sponsors

and advisors – generated 162 responses from a diverse group of employers, including 127 organizations that currently sponsor an account-balance NQDC plan for executives. The respondents represent a wide variety of industries, including a significant number of large employers, those with more than 5,000 employees.

The survey found that on average, 5% of employees are eligible to participate in the NQDC plan, and about half of those that are eligible to participate do so. Perhaps not surprisingly, organizations that provide a non-matching contribution experience much higher rates of participation – approximately 63% – compared with organizations with no employer contribution, where participation rates fall below 30%.

Despite the value of NQDC plans in change-of-control situations, 40% of survey respondents say they do not have a prudent process in place in the event of a merger or acquisition.

The full survey is available for purchase at https://www.psca.org/2019NQDC\_report. For more information, contact Hattie Greenan at hattie@psca.org.

- NAPA Net staff



#### All investments involve risks, including possible loss of principal.

Investors should carefully consider a fund's investment goals, risks, charges and expenses before investing. To obtain a Franklin Templeton fund summary prospectus and/or prospectus that contains this and other information, call 1-800-342-5236. Investors should read the prospectus carefully before investing.

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Desktop vs. mobile: How are 401(k) investors engaging?

#### **MOBILE 'HONED'?**

In "Financial attention through multiple digital channels," Vanguard studied their clients' use of digital channels – desktop or laptop computers, mobile phone and mobile apps – over a three-year period (January 2015 to December 2017) to gain insight on the strategic questions facing designers of digital experiences at financial institutions. The sample consisted of 18,360 tenured investors – both retail and DC investors – with a median age of 53, median Vanguard assets of \$84,000 and median tenure of 14 years as Vanguard investors.

Not surprisingly, the desktop browser was still the most popular digital channel, but mobile usage is growing rapidly. And while mobile usage currently appears to complement desktop usage, it could emerge in the future as a substitute for the desktop channel, the study notes.

Among so-called "attentive investors" who logged in at least once over the study period, more than 95% used a desktop browser, while only 4 in 10 used a mobile device. An app was even less popular, with only 2 in 10 investors logging on through the app.

Vanguard notes that usage patterns in general were similar for both retail and DC-only subsamples, but DC-only investors were more likely to have accessed their account through a mobile browser. Among retail investors, 87% of total time was spent on the desktop channel versus 78% for DC-only investors; they spent the remaining 22% of time on either a mobile app or mobile browser.

Meanwhile, only 1 in 10 investors accessed their accounts through all three channels, while only a fraction of investors (less than 5%) relied on mobile access exclusively.

#### A Move to Mobile

Vanguard notes that the growth rates of mobile were even more striking among the DC-only investors, where the fraction of attentive days with mobile access increased from 18 in 2015 to 30 by the end of the study in 2017.

The growth rates of both the app and mobile browser usage were more than 12% yearly. During that same period, desktop usage declined by 5% yearly among DC-only investors, the study notes.

Over the long term, the authors anticipate that investors will be drawn increasingly to the convenience of mobile devices, as consumers generally have in shopping, news gathering and social media. In addition, while the preference for mobile

access typically has been associated with younger users, this "will become more pervasive among all investors with the simple passage of time."

Clickstream data for DC-only accounts suggest that most of those logging on had similar intentions regardless of channel choice. Vanguard explains that a ranking of the five most popular activities by channel among DC-only clients shows great consistency across the three channels, although rankings differed slightly. For example, "evaluate my progress" and "get the details of a specific transaction" were the top two out of five entries for a desktop browser but they were in the bottom two for a mobile app. For DC participants using a mobile browser, "viewing loan details and outstanding balance" was uniquely popular among the channels.

Gender differences also were more pronounced, particularly in terms of the likelihood of mobile use. Among both retail and DC-only investors, men were 6% more likely to have logged on via a mobile device than women. Moreover, men spent nearly 40% more time on mobile devices than women each year.

— Ted Godbout

Then it comes to managing 401(k) investment allocation transactions, a new study suggests that the usability of key website features represents one of the most persistent problems across provider interfaces.

Two seemingly tangential features that came up continually during Corporate Insight's examination of the processes that allow participants to manually build their portfolios include prepopulating new allocation fields with current elections (35%) and dynamically calculating the percentage of the account allocated (88%).

The report, "The UX of Managing Future Investments," reviews the investment election management transactions that a group of firms provide online through in-person user experience tests. (It does not cover interfaces where participants select model portfolios or TDFs, nor does it discuss online advice platforms that let users change their future elections.)

According to the firm's 2017 DC plan participant survey, the ability to manage future investment allocations received the highest rating in terms of web-based transaction types, with 69% of respondents deeming it to be "very or extremely important." In the new study, however, Corporate Insight found that the differences between the investment transactions available on participant websites can be difficult to understand, even for savvy retirement planners.

In its user test, the firm identified some best practices and things to avoid when it comes to investment transactions. First, it notes that participants appreciated pages that listed the investment transactions available with clear descriptions for each option. When these transaction-overview screens had action-oriented names, like "Manage Investments," the study's UX test respondents were confused when the pages linked to investment information rather than transactional screens.



#### **Performance Data**

User-test respondents also consistently expressed a desire to view investment performance data in a manner that does not interfere with their ability to use the transactional interface. They also preferred that information be available statically, which makes it easier to compare funds, according to the study.

Multiple respondents also mentioned that the funds opening within separate browser windows or tabs was beneficial, allowing them to refer to the fund data while maintaining ready access to the transactional interface. Across the coverage group, linking to full fund profiles is one of the most common features, available on 76% of websites.

And while participants want to see fund performance data, the study notes that only 29% of firms offer the rate of return for any timeframe and they struggle to present data in an unobtrusive manner. Outside of links to full fund profiles, the firms in the report do not consistently provide fund information and the only common piece of data is the asset class.

#### **Asset Allocation Advice**

Asset allocation advice is a welcome, though rare, feature (18%), but the firms that offer advice make it difficult to enact, the study found.

One respondent said, "Your 401(k) is not something you make changes to every day, it's a long-term kind of deal, so if I am making changes then I am interested in advice, more than for other financial accounts." The study emphasizes that this quote underscores that when it comes to retirement planning, most people log in to their retirement plan websites less often and perform fewer tasks than they do on other finance-related sites. Consequently, they may need more guidance in order to feel confident when making investment decisions.

Respondents also raised the issue that in some cases, pie charts depicting suggested allocations are not viewable throughout the transactional interface. Users also appreciate having the ability to specify allocations by source and the option to apply changes to current balances, in cases where both features were found to be fairly common (41% each).

#### **Organizational Features**

Organizational features are "particularly important when it comes to future investment transactional interfaces, as many plans offer a litany of fund options," the study observes. Participants in the user test consistently expressed frustration when investment lists were especially long, often making it harder to find key interface features. To help participants locate and browse funds, they should be organized by asset class, which 76% of firms in this report do. And although incorporating expandable sections can shorten potentially long fund lists, only 18% of firms use that approach, the study notes.

— Ted Godbout



#### Putting in the Work

Content marketing is a powerful strategy that will nurture prospects through your pipeline.

But it takes work, effort and curiosity.

BY REBECCA HOURIHAN

t one of my first jobs, I had to cold call – and to be honest, I hated it.

Nervous ring after nervous ring, I hoped the person on the other end didn't pick up. It was time consuming, anxiety ridden and sometimes embarrassing.

But I did it. However, I didn't do it well. Our managing partner said, "You need to make 40 dials per day," so I did exactly that – 40 dials per day. If no one answered, I breathed a sigh of relief.

However, the hitch in this story is that I was at a commission-only job. So if no one

answered, I wouldn't get the opportunity to schedule an appointment. No appointments meant no chance of gaining clients. I think you know where I'm going here: no chance of earning a paycheck. Needless to say, I wasn't at that job very long – especially if I wanted to eat!

Fast forward to my next job. I still had to cold call, but something had changed.

#### **Work and Effort**

I wasn't as terrified. Each dial got easier. I started working on a script. I'd tweak

it, refine it and practice it until I had curated the right balance. It had a polite introduction, specific opening questions that evoked curiosity, and then an intentionally worded sales pitch. It took months to find the right combination to the conversation lock.

But once I had figured it out, it almost became exciting to speak with prospects. Then I didn't shy away from the 80 required dials, and I wanted them to answer. It became thrilling to spark a conversation. I had begun to put in the work and effort.

## DESIGNED BY FREEPIK

#### Work, Effort and Curiosity

Once the dials and conversations didn't petrify me, it was time to get curious.

What were we selling? Retirement plans. Why? To help people save for retirement. How? Through awesome retirement plan advisors.

Once the foundation was in place, the next series of questions arrived: How are we doing it? What kind of marketing helps our clients? How do we communicate our clients' value propositions to prospects? Each answered question supplied nourishment for my curiosity.

After the work, effort and curiosity, the next challenge arose: Could we do more?

#### **Enter the Advent of Content Marketing**

Content marketing is a way to amplify your voice. It is a way to do more. You can share your message with thousands of contacts with the click of a button. That makes it highly efficient and when done properly, it is incredibly effective.

It is important to call out that we are still in a relationship-based business. Approximately 70% of new client introductions come from a client referral or center of influence. However, implementing a content marketing strategy is a new age opportunity for you to stand out, efficiently nurture your prospects through your pipeline, and, ultimately, win more business.

When a plan sponsor goes through the buying decision-making process, they go through four distinct stages:

- Awareness. "I know our retirement plan needs attention."
- Interest. "Who do we know that works with retirement plans? Can I get an introduction?"
- Decision. "I'm asking for RFPs. I'm interviewing advisors. I'm gathering information."
- Action. "I want to hire you as our company's retirement plan advisor."

As the plan sponsor goes through each stage, content marketing becomes a strategy

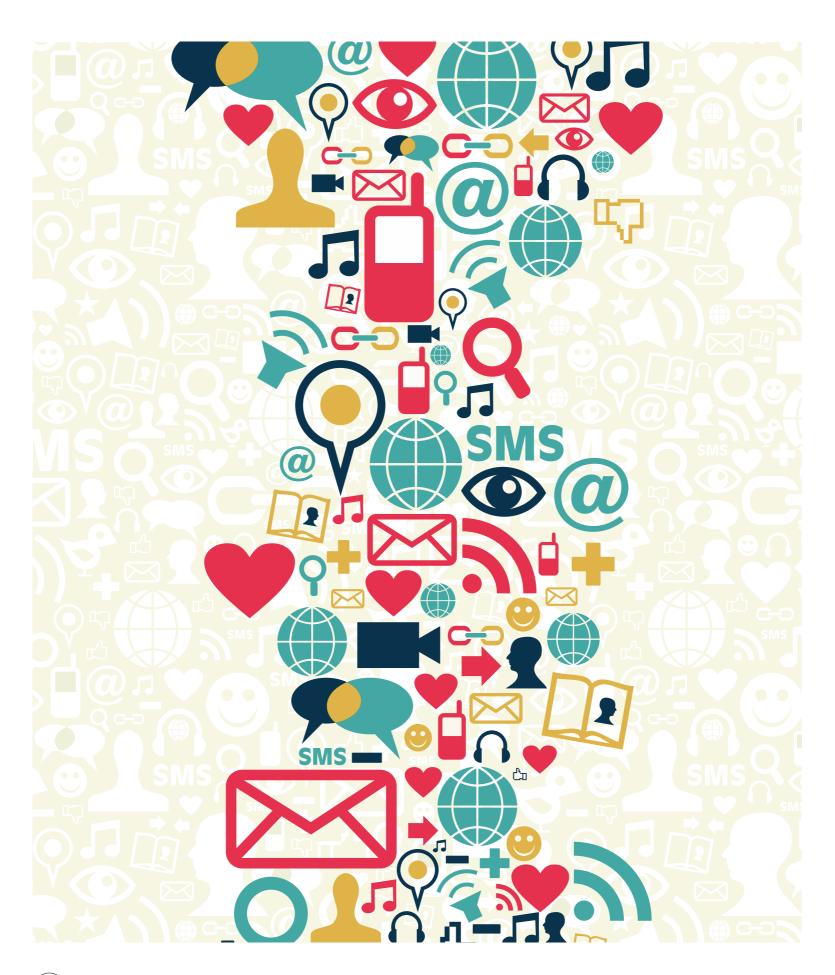
that will nurture prospects through your pipeline. With your content, try to educate, inform and entertain them. Through your materials, share your experiences and how you help your clients so that when it's time for the plan sponsor to make a decision, it's a hands-down, without a doubt, easy decision that you are the right advisor, and they need to immediately hire you!

Remember, it wasn't until I had put in the work, effort and curiosity that I was ready to begin a content marketing strategy. Start small and build up your marketing capabilities over time. Content marketing takes work, effort and insatiable curiosity, which we know you have in spades.

Thanks for reading and Happy Marketing! **(M)** 

» Rebecca Hourihan, AIF, PPC, is the founder and CMO of 401(k) Marketing, which she founded to assist qualified experts operate a professional business with professional marketing materials and ongoing awareness campaigns.

# Goal: generate buzz and create brand awareness. Examples of content to promote you: blog articles, curated lists, email campaigns, social media posts and webinars. INTEREST: Middle Stage Goal: prospect introductions. Examples of content to promote you: Website, social media profile, newsletters, best practice guides, gated materials, case studies, infographics, events. DECISION: Late Stage Goal: meet with prospects, wow them, and convert them to clients. Examples of content to promote you: pitch decks, brochures, reports, service calendar and RPF response. ACTION: Client Stage Goal: service happy clients, have them become raving fans, and then they refer you to more retirement plan prospects. Examples of content to promote you: case studies, client appreciation events, newsletters, email campaigns, social media, webinars, educational resources, thank you notes.



# Maximize the Impact of Your Corporate Sponsorships

Use social media to showcase the good work you and your favorite nonprofit organizations are doing.

BY SPENCER X SMITH

inancial services companies are some of the most generous entities in existence. Here's how to ensure both you and the charities, nonprofits, etc. you're supporting gain the maximum amount of exposure and awareness for their causes.

Utilizing social media before, during and after corporate sponsorships events will help to gain the attention of the audiences that both you and the nonprofit organizations would like to reach. You can easily highlight your involvement by showcasing the work you and the nonprofit organization are doing through the systematic process detailed below. The organization will benefit from the added publicity that you are creating on their behalf, while you demonstrate your generosity and engagement.

Amplify your efforts by following these tips for before the event, during it and afterwards.

#### Before the Event

In advance of the event, compile a list of the social media account handles of:

- the host organization;
- speakers or dignitaries;
- other sponsors; and
- the venue (where the event is being held).

These social media account handles will be used during the event to engage with both individuals who are attending the event and people who can't but are passionate about the cause. Additionally, they will be used to showcase highlights from the speakers as well as the event organizers. Both groups will feel appreciated and will most likely share your posts with their networks as well.

Following the event, the social media account handles can be used to provide key takeaways from the speakers and thank everyone involved for attending and/or speaking.

#### Create or Utilize the Event Hashtag

A hashtag can create great public awareness of an event and the people involved by boosting engagement with social media posts. The hashtag should be creative and should represent the event positively.

A hashtag should be utilized during and after the event. It also has the ability to connect you as an individual to the event for future inquiries.

#### Post on Social Media Using This Template

Here's a sample post: "We're thrilled to join @sponsor A and @ sponsor B in supporting @event with @guestspeaker. Looking

forward to seeing you there! #eventhashtag". Be sure to include a link to the URL of the event itself.

#### Promote

Instead of simply hoping people will see your sponsorship, let's make sure they do. Using social media ad platforms, advertise your posts to audiences interested in the organization, cause, team, etc.

Platforms for posting can include Twitter, Instagram, Facebook, LinkedIn, etc. When posting, make sure you include the date of the event and scheduled timeframe. Also, before posting, consider creating an advertising budget and analyzing your audience. By gaining a deeper understanding of who should see your post, you can set an audience in the social media ad manager programs.

#### **During the Event**

Take photos and videos of your staff, clients and business partners attending the event. While the event is happening, post the content on social media while tagging the handles from the sample above.

Tagging people who are at the event increases the probability that your social media posts will be viewed by others because they are likely to share your posts with their audiences.

#### After the Event

Using the script from the sample above, post facts about the event (attendance, money raised, significant news, etc.) Consider adding an advertising component to promote this post to the target audience as well.

Share "thank you" posts on social media to help ensure that the people responsible for organizing and running the event feel appreciated. Engaging with those who were also at the event is a good way to reach new audiences, and liking, retweeting and other engagement with posts (utilizing the hashtags) associates you with the event.

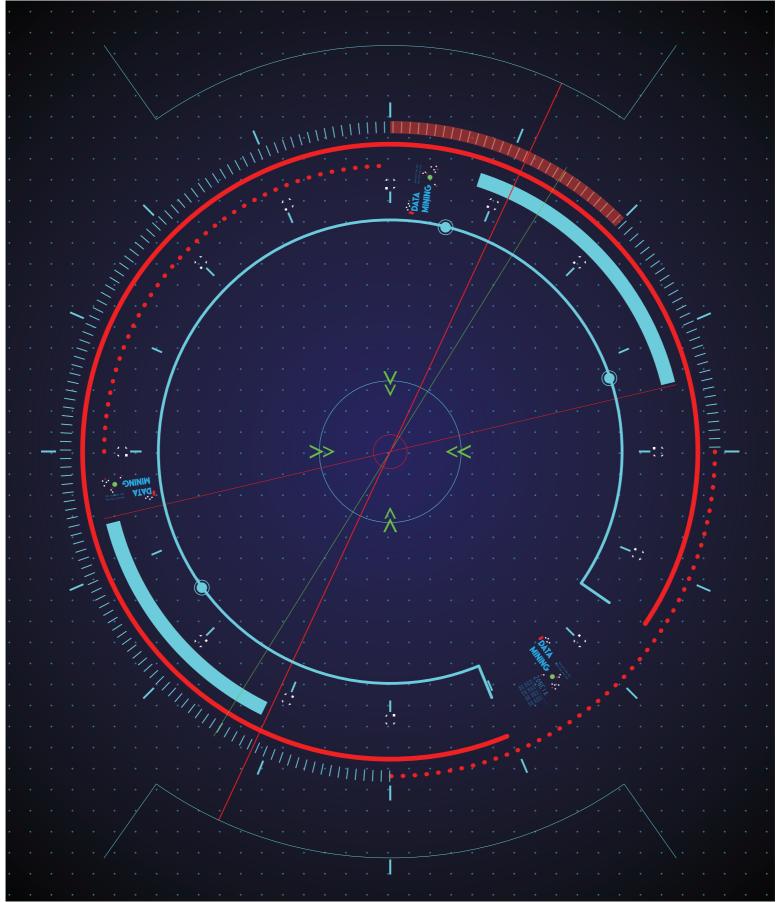
Both you and your company spend significant time and money participating in and promoting your involvement in sponsorship events. Social media is a fantastic means to amplify that message with a small investment of time, and if you choose to advertise, with a nominal promotion budget. Start taking advantage of the power of social media to promote worthwhile causes today.

» Spencer X Smith is the founder of spencerXsmith.com. He's a former 401(k) wholesaler, and now teaches financial professionals how to use social media for business development. He may be reached at spencerXsmith.com.

# The 'Win' Beneath Your Wings

How wholesalers
can help you
ranigate the can hely you navigate the advisory thanginess. By Judy Ward









Gary Tankersley, John Hancock Retirement Plan Services

John Ludwig worked as a wholesaler for 20 years before setting up his plan advisory practice. "Because of my experience, I probably hold wholesalers more accountable than the average advisor," says Ludwig, a partner and the founder of Indianapolis-based LHD Retirement.

"If they come in and start talking product, product, product, I am turned off, and I probably won't see that wholesaler again," says Ludwig, who left wholesaling because of both the intense travel schedule and his desire to own his own business. "I am looking for wholesalers who add more value to my practice; who help me get things done, and in a way that helps my clients."

Joe Mrozek has been in the business long enough to see changes in what plan advisors want from wholesalers. "When you look at retirement plan specialists, it's now ultimately, 'How can you add value to my business? How can you help make me bigger and better?'" says Mrozek,

national sales manager for the Intermediary Retirement Plan Services division of Radnor, Pennsylvania-based Lincoln Financial Distributors, Inc. "The days of the wholesaler just pitching a product are over. Now, we want to be an advisor to the advisor, and be consultative."

Wholesalers who want to build an ongoing working relationship, more than sell a product, impress Keith Gredys. "You don't try to sell a salesperson," says Gredys, chairman and CEO of West Des Moines, Iowa-based Kidder Advisers, Inc. "You need to develop a relationship with us, because this is still a relationship business. If you're going to just stop in once a year to say hi, you're not going to impress me."

The past few years, Gredys has seen changes that challenge some wholesalers' ability to build a substantive relationship with advisors. "A big part of what we want from wholesalers is that whoever comes here has done their homework and knows who we are, and what markets we are targeting," he says. "With the consolidation in the mutual fund industry and on the platform side, a lot of these folks have bigger territories, so sometimes their contact with us is not as frequent. So instead of talking face to face, we might get a call. Being in the middle of Iowa, we tend to be 'flyover country."

Ludwig also sees wholesalers' territories getting bigger. "Wholesalers, I think their breed is slowly going away," he says. With consolidation also sweeping through the advisory business, a shift has begun. "In the retirement plan space they'll be focusing on the bigger teams, so they are not calling on the 'onesies and twosies,'" he says. "Now, they can spend a day or two here in Indianapolis and see all the main advisory teams."

Advisory consolidation has helped Baltimore-based Legg Mason, Inc. focus more in its wholesaler work, Head of Retirement Strategy Gary Kleinschmidt



John Ludwig, LDH Retirement

says. "As we see the aggregation happening, it's building efficiencies for us," he says. "We work really hard on segmentation and focusing on the top advisors. As the top advisors consolidate and get bigger, we can help the top advisors more."

For plan advisors, think about the following opportunities to get help from wholesalers.

#### **Data Analytics**

Asked about the biggest challenges for plan advisors today, Nuveen LLC's Brendan McCarthy points to the rapid changes in the retirement plan business. "Advisors need to stay in front of those changes, so they can help sponsors navigate them," says McCarthy, national sales director, DCIO at Chicago-based Nuveen. "On the technology front, the biggest thing out there is 'big data,' and the amount of participant information now available that goes beyond just 401(k) data. Advisors are wondering, how do they integrate themselves into that process?"

Adding automated design features for their plan clients was an important mountain to climb for advisors, says Gary Tankersley, head of sales and distribution at Boston-based John Hancock Retirement Plan Services. "Once you do that – once you set people on the right path for retirement – you have to start using data to understand, 'Now what opportunities do I have to generate a better outcome?""

After an advisor helps a sponsor define its goals for the plan and what measures it wants to use to track progress, Tankersley says, John Hancock can utilize that to do an ongoing evaluation of which employees are and aren't on track to achieve that outcome. For a sponsor trying to maximize participation, an analysis could break out the auto-enroll stick rate at each of an employer's sites. "Maybe we'll find that the employees at the Baytown (Texas) plant have an opt-out rate that is twice the rate of the Dallas location," he says. That can lead to a targeted communications campaign, and possibly a reenrollment. "We can use predictive analytics to model, 'This is what would happen if you make this plan-design change," he says. "For us, it's about being able to capture the data, then analyze it and display it in a way that's easy, understandable, and actionable."



Joe Mrozek, Lincoln Financial Distributors, Inc.

# "The days of the wholesaler just pitching a product are over. Now, we want to be an advisor to the advisor, and be consultative."

– Joe Mrozek, Lincoln Financial Distributors

#### **Financial Wellness**

McCarthy sees a big shift to plan advisors providing a more-holistic solution for clients' employees. "Advisors are going from just working at the plan sponsor level to incorporating overall employee financial wellness programs that go beyond the 401(k) plan," he says. "Participating in a 401(k) plan has been made very easy for employees. That's not the case with other parts of their financial lives, like picking a 529 college savings plan, saving in an HSA, and repaying student loans. People need a lot of assistance there. We like to say that there's a convergence of health, wealth, and retirement plans."

Lincoln Financial Group introduced its WellnessPATH program in 2018, as the latest tool to help get people engaged easily and start improving their financial situation.

"There are three ways for advisors to provide those tools to their clients: We can do it for you, we can do it with you, or we'll let you do it yourself, and we'll be there to help you behind the scenes," Mrozek explains. "Very few advisors today are 'Do it for me' advisors. Those are the bygone days of the generalist advisor."

Today, most specialist advisors want the "Do it with me" approach to financial wellness, Mrozek finds. "It's about, how do you want to tailor our program for your specific client?" he says. "First, the advisor sits with the sponsor and talks through, what is the sponsor looking for in a financial wellness program? Too often, people use the term 'financial wellness' loosely: It's important to define the goals of each sponsor. What are the key performance indicators a sponsor hopes to see? Then it's about, 'Let's map out a strategy for this program, and set goals and objectives. And most importantly, let's monitor the program's progress and course-correct as needed.'"

#### **Pre-Retiree Education**

With an estimated 10,000 Baby Boomers now retiring daily, doing pre-retiree targeted education has become a key value-add for many plan advisors. So MFS Investment Management offers participants and advisors its Heritage Planning resources, a suite of content that helps them prioritize and customize participants' unique planning needs. DC advisors find the tool's "What Keeps Your Clients Up At Night?" interactive questionnaire particularly helpful. "It's true that most folks spend more time planning their next vacation than they spend planning their retirement," says Todd Leszczynski, managing director of the DCIO business at Boston-based MFS. "But people are going to realize that the retirement plan they are in is not a pension plan, and they're going to need help when they understand that the onus for their retirement income has shifted from the employer to them."

Plan advisors need broader expertise to educate pre-retirees on the complex decisions they face. "The specialist advisor is spending more time helping educate participants to understand their retirement planning more holistically – meaning, "What will your needs be in retirement, and what are your expenses going to be?"



Keith Gredys, Kidder Advisers, Inc.



Brendan McCarthy, Nuveen

says Kevin Devine, national sales director, advisor partnerships at Columbus, Ohiobased Nationwide Retirement Plans.

The Nationwide Retirement Institute educates advisors themselves on topics like optimizing Social Security benefits and planning for retirement income in a taxefficient way. "Timing is everything with retirement planning," Devine says. "The Institute helps educate advisors about that, so that they can have better conversations with participants."

To really help pre-retirees, advisors need to connect with them about more than their financial bottom line, says Cheri Belski, head of retirement, U.S. intermediaries at Baltimore-based T. Rowe Price Investment Services, Inc. "Advisors are talking with us about, 'How can I bring more than just numbers to them? How can I talk about the emotional preparedness that they have to do for their retirement?" T. Rowe's "Visualize Retirement" tools aim to help advisors talk with pre-retirees about both numbers and emotions. "You have to bring both together if you want to have a fully informed approach to a retirement strategy," she says. "This provides advisors a set of materials to do workshops with pre-retirees that give them a more holistic

view. We see wealth advising and retirement advising morphing together in so many ways."

#### Thought Leadership

As a long-time plan advisor, Gredys doesn't need to hear from wholesalers about their basic tools for advisory work such as investment due diligence. "If you knew us, you'd know that we already have an extensive due-diligence process that we've developed – and it's probably better than yours," he says. "It's very much appreciated when they come to us with a new idea."

Time is money, as Gredys says. "So we want somebody who comes to us with something different than what we already have. We're interested in the leading edge, and thought leadership," he says. He likes new ideas in areas like plan benchmarking and investment analytics that could add to what Kidder Advisers already does.

Legg Mason collaborates with advisory firms on thought leadership like white papers. It also has developed an "Anatomy of a Recession" toolset that helps advisors talk with plan sponsors about the current U.S. economic and market outlook, and the possibility of a recession in the next 6 to 18 months. It includes a "Recession Risk Dashboard" chart that uses simple visuals to compare the state of 12 key business and market indicators in the current month versus the previous month. "Think of it as a scorecard that helps advisors explain where we are in the market cycle right now," Kleinschmidt says. "The dashboard allows an advisor to make a complex market overview really simple to explain to plan sponsors during quarterly investment reviews. There's a lot of noise in the marketplace, and sponsors need their advisor's help and guidance to understand."

Ludwig enjoys providing his own thought leadership to wholesalers when he hears about new tools and services, before they go live. "I like it when they tell me, 'Here's the new products and services we're planning on introducing in the next year: What's your input?" he says. That could include things like new financial wellness tools or alterations to the participant website experience. "Once it goes live, it's hard to change," he says. "But if you get to give your input before then, you feel like you're a part of helping them build it."



Gary Kleinschmidt, Legg Mason, Inc.

#### **Business Development**

With many of their plan clients now using automated design features and a lot of participant assets staying in default investments, advisors' needs from wholesalers have shifted more to getting help on broader business development, McCarthy says. "In the past, wholesalers helped plan advisors with their work purely on 401(k) plans," he says. "Now they are wondering, should we expand into advising on other areas? Advisors are looking at their business more as a CEO now, and their wholesalers can help them with that."

Some independent plan advisory practices, responding to the big retirement wave starting, now want to have a division that works with individual clients. "Over the past 10 years, so many advisory firms have focused on the idea of, 'The plan is my client,' "Leszczynski says. "Now, we are at the intersection where a lot of participants are getting ready to make the transition to retirement, and that is changing. More advisory firms are taking a 'hub and spoke' approach to meet or exceed the long-term needs of their clients."

Mrozek started in the industry at Merrill Lynch more than 20 years ago, and he remembers sponsors setting



Todd Leszczynski, MFS

strict boundaries then to require that advisors only discuss the 401(k) plan with employees. "That has turned 180 degrees, and now employers want advisors to talk with participants about their full financial picture," he says. "You always had traditional broker/dealers that, in addition to valuing retirement plan work, have been entrenched on the wealth management side. If you look at what the legacy institutional consulting firms are doing now, they are moving beyond being only '3F' plan advisors that focus on funds, fees, and fiduciary governance. They still focus on those things, but now they're looking at also doing the same holistic work with individual clients that broker/dealers have been doing for decades."

#### **Internal Efficiency**

Because of the consolidation happening around them, plan advisors need more support from wholesalers now, Belski believes. "The challenge is that if they are not part of these large advisory firms, that's where they need a sales consultant's help to tap into that wholesaler's resources, to stay competitive." For example, T. Rowe Price helps advisors with resources like third-party benchmarking tools.

The current fee compression means plan advisors need the internal mechanics of their business to run as smoothly as possible. "It's a race to the bottom on fees, so everybody has to build in efficiencies," Kleinschmidt says. "And a good DCIO is trying to be almost a back office for the advisor." For example, Legg Mason shares with its advisor partners the access it has to MPI Stylus investment analytics software, Fi360 software, and the Advisoryworld technology platform for investment analytics.

A lot of plan advisors have now been in business for 10 or 20 years and have built a significant book of business, but haven't analyzed the profitability of their clients, McCarthy says. "So at Nuveen, we offer our 'Plan Profit (k)alculator' tool: Advisors can plug in data on a specific plan or their whole book of business, and it will analyze the profitability. It will identify where they have a plan that is efficient to service, and a plan that is inefficient to service: And when it's inefficient, the analysis will offer suggestions on how to change that,"



Kevin Devine, Nationwide Retirement Plans

he says. Some advisors also use the tool to analyze a potential new plan client, to figure out how to bid on the business, he

MFS works with advisors to help grow and scale their businesses as well, which even includes topics such as optimizing their team structure for efficiency, Leszczynski says. "We are helping them ask questions like: What is working about the team structure they have in place, and what is not? How are the different personalities in their practice working together?" he says. MFS partners with a third-party business consultant that can give advisors better insight into the personality types and communication styles of their team members, he adds.

#### **Value Proposition Positioning**

The advisory practice consolidation that has started means advisors need to think more deeply about their competitive positioning, Leszczynski says. "A lot of the talks we're having with advisors are based on helping them think through, 'How can I differentiate what this advisory firm does for our clients?'" he says. "We are working with them to help them better articulate their 'advisor alpha,' their value proposition."

These days, MFS also talks a lot with advisors about their advisory practice's fees,







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– Keith Gredys, Kidder Advisers

Leszczynski says. "A lot of plan advisors are going to market and finding opportunities, and then their competitors undercut their fees," he says. "So they are wondering, 'How can I effectively articulate what I do, so I can be compensated fairly?' Developing a very transparent 'fee philosophy' that you can take to your clients and prospects is critically important."

For an advisory practice that wants a wholesaler's help on improving its value proposition, it's important to spend time together to build a relationship and share enough information so the wholesaler can understand that practice's key business needs, Nationwide's Devine says. "On a regular basis, we want to have a strategic business discussion with advisors," he says. For instance, does the practice want to deepen its relationship with participants, or focus more on plan-level work and outsource most education to a plan's recordkeeper? "It's all about what they want to leverage from us as a provider, and what they want to do themselves," he says.



Wholesalers know a lot about how other plan advisory practices approach their work. "Quite often we get the question from advisors, 'What are the best practices you see at other top advisory groups?""

Devine says.

Product still matters, but the days of showing up in an advisor's office to just talk about a product and give the advisor a fact sheet are gone, T. Rowe Price's Belski says. "Because so much is going on around advisors, and everything is changing, that can bring competitive pressures," she says. "We find everyone is interested in competitive insights, to learn about trends happening in their advisory peer group. Everybody wants to know what the Joneses are doing."

As the business changes, wholesalers have evolved to become a business consultant to advisors, Tankersley says. "With our broad perspective, we can 'compare and contrast' and help you understand other advisory firms' approaches," he says. "That helps an advisory team build their own 'moat' around their business." He likens it to how John Hancock identifies for participants a personalized "best next step" they can take to improve their outcome. "It is almost like we're helping advisors with their best next step," he says.

The consulting can include talking about consolidation options for advisory practices. "On our end, we're plugging into the consultants working on mergers and acquisitions in this area," Tankersley says. "We're asking these consultants: What kind of strategies are they seeing advisory firms deploy? And what do they think the business is going to look like in 3 years, or 5 years, or 10 years? That way, we can have a little 'inside baseball' to help advisors think about their options."

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



Cheri Belski, T. Rowe Price Investment Services, Inc.



#### CUNA MUTUAL RETIREMENT SOLUTIONS' "TOP DC WINGMEN" RECOGNIZED BY NAPA NET\*



Sean Mayo Regional V.P. Orange, Imperial and San Diego counties; Southern NV



Michael Moschetta Regional V.P. OH, KY, WV and Western PA



Greg Schonauer
CRPS, AIF
Regional V.P.
NC, SC and VA



Troy Testa CRPS Regional V.P. MI and IN

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<sup>\*</sup> https://www.napa-net.org/industry-lists/top-wholesalers/

## Flight 'Paths'

#### The NAPA Top DC Wholesalers of 2019

By Nevin E. Adams, JD

nly retirement plan advisors fully appreciate just how important their DC wholesaler can be in building, managing and growing an advisor's practice. We call them "DC Wingmen" because if they are doing their job, they have your back.

And only advisors know which Wingmen are best qualified for that recognition.

That's why we set out to identify the top wholesalers who serve the DC market – the truly elite Wingmen. Our first annual Top DC Wholesalers list, published in March 2014, quickly became an industry staple.

This year's list – our sixth annual – is destined to be another.

The wholesalers who made the cut as Wingmen this year cover a lot of ground – literally. Most are covering large "swaths" of territory – in terms of geography, number of advisors, or both, though many acknowledged having shorter, targeted "focus" lists that received higher levels of attention ("a true partnership level" was how one described it).

The vast majority of nominees for this year's award were experienced (more than 85% had been working with retirement plans for at least a decade, and 60% for 15 years or longer), and more than a third (35%) had been serving as a wholesaler for more than 15 years. Indeed, it's striking just how varied their pre-wholesaler experiences had been – as one explained, "I've worn all the hats: TPA, Document Specialist, Relationship Manager, Advisor, Wholesaler." And, for many – but not all – of the respondents, they've worn those hats at different places, picking up insights, expertise, and relationships along the way.

And while nearly all provided an array of support services to the advisors they

support, those looking for a differentiator might take note that prospect introductions were, however, cited by just 70%. However, asked to identify what type of support the advisors they support prized most, the Wingmen nominees noted:

41% - market intel

28% - client support

16% - prospect introductions

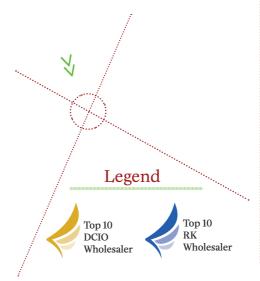
8% - product insights

5% - ERISA insights & technical support

2% - marketing materials

Asked to identify the most important thing they had learned in their career – well, responses were varied, and yet remarkably consistent. Partnering, relationships, understanding, and listening all came through loud and clear – as did working hard – but most important of all perhaps was... trust.

Our congratulations to those who made this year's list of Top DC Wholesalers – and our thanks to all the men and women in those roles who are helping us all make a difference – every day.





#### The Process

How the Wingmen are selected

One of the things that sets the Wingmen list apart is that it is based on a nominating/voting/selection process that taps the experience and perspective of NAPA's plan advisor members. Here's how the three-part process works:

- I. Nominations: The process starts with NAPA's DCIO and record keeper Firm Partners submitting their wholesalers for nomination. Wholesalers who work directly in the field with plan advisors are eligible for nomination; internal relationship managers are not eligible.
- **2. Voting:** NAPA members and other advisors vote for their favorites using our online voting tool. Only votes from advisors submitted from a corporate/business email account are tallied.
- **3. Selection:** The final vote tallies are reviewed by the NAPA Top Wholesalers Blue Ribbon Committee, which selects the top wholesalers.

Jeffrey Abelli

**DCIO** 

Amundi Pioneer

**Doug Allen** 

RK

Nationwide

**Bobby Allen** 

**DCIO** 

**American Century** 

**Derrick Amey** 

**DCIO** 

John Hancock Investments

Staci Baker

**DCIO** 

J.P. Morgan Asset Management

**Dennis Beaudet** 

RK

John Hancock RPS

#### **Chris Bilello**

**DCIO** 

Amundi Pioneer

**Keith Blackmon** 

**DCIO** 

T. Rowe Price

**Bradford Boney** 

RK

John Hancock RPS

**Travis Campbell** 

RK

Fidelity Workplace Investing

**Jerry Cicalese** 

RK

Sentinel Benefits & Financial Group

**Murray Cleaner** 

**DCIO** 

Lord, Abbett & Company

**Bruce Cobey** 

RK

John Hancock RPS

**Clayton Collins** 

**DCIO** 

American Century

**Marty Courage** 

**DCIO** 

Columbia Threadneedle

**Kevin Crotsley** 

**DCIO** 

Victory Capital

Tim Curran

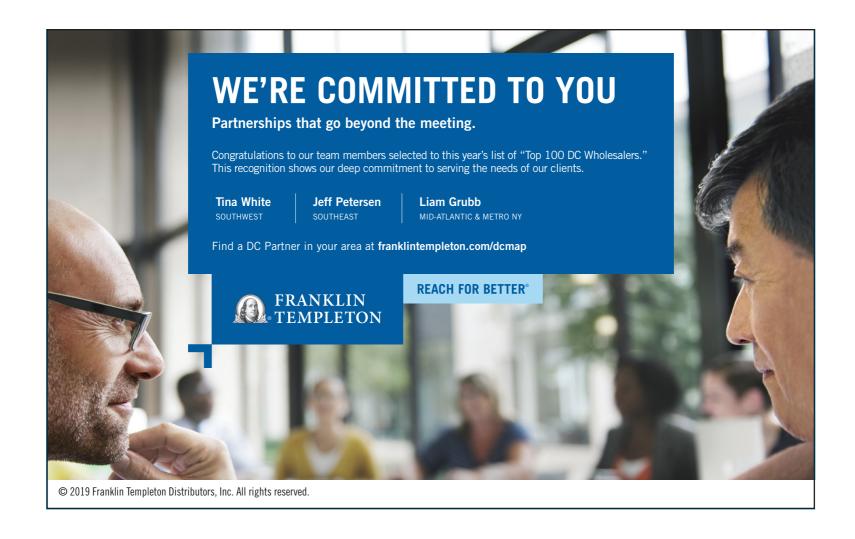
RK

Lincoln Financial Group

**Jesse Daniels** 

**DCIO** 

**American Century** 





#### **Michael Deferro**

**DCIO** 

AllianceBernstein

#### **Matt DeMarco**

**DCIO** 

**PIMCO** 

#### **Matt Deno**

**RK** 

John Hancock RPS

#### **Matthew Digan**

**DCIO** 

Legg Mason

#### **Chris Donnager**

MFS Investment Management, Inc.

#### Mike Dullaghan

**DCIO** 

Putnam

#### Ryan Fay

John Hancock Investments



#### Bill Feldmaier

**DCIO** 

Lord, Abbett & Company

#### **Matt Fessler**

Lincoln Financial Group

#### **Tim Gannon**

DCIO

J.P. Morgan Asset Management

#### Travis Gavinski

Lincoln Financial Group



#### **Brody Geist**



#### Michele Giangrande

**DCIO** 

T. Rowe Price

#### Glenn Godin

**DCIO** 

**American Century** 

#### **Josh Gomez**

RK

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#### **John Gonsior**

Fidelity Workplace Investing

#### **Matthew Grandonico**

Prudential

#### Liam Grubb

**DCIO** 

Franklin Templeton

#### Olivia Hails

**DCIO** 

Janus Henderson

#### **Tim Harkleroad**

**DCIO** 

Amundi Pioneer

#### **Aaron Hassinger**

**DCIO** 

**PIMCO** 

#### **Ami Hindia**

**DCIO** 

Fidelity Investments

#### **Bryson Hopkins**

Lincoln Financial Group

#### **Howard Joelson**

John Hancock RPS

#### **Adam Johnson**

John Hancock RPS

#### **Matt Kasa**

**DCIO** 

Nuveen



#### Jae Kim

Neuberger Berman

#### **Danny Kling**

Transamerica

#### **Greg Koleno**

**DCIO** 

Nuveen

#### Kris Krikorian

Pentegra

#### **Kyle Kunde**

**DCIO** 

Nuveen

#### John Kutz

**DCIO** 

Legg Mason

#### **Benjamin Leger**

**DCIO** 

Fidelity Investments

#### **Jack Levis**

Fidelity Workplace Investing

#### **Aylmer Magill**

**DCIO** 

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#### Mike Manosh

Fidelity Investments

#### **Seth Marsters**

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The Standard

#### **Todd Matlack**

**DCIO** 

Invesco



#### Sean Mayo

**CUNA Mutual** 

#### **Kevin McCarthy**

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Ameritas

#### **Eric Milano**

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#### **Michael Moschetta**

**CUNA Mutual** 





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insight for better investment and business decisions. We call this ethos Knowledge. Shared.

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**Jeff Simes** 

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**Chris Sleggs** 

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**PIMCO** 

**Jay Slusher** 

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**Matt Spicer** 

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Barry Newman

Northern and Central California, Nevada

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#### Top 10 DCIO Wholesalers



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Matt Kasa Nuveen



**Mike Manosh**Fidelity Investments



Todd Matlack Invesco



Eric Milano T. Rowe Price



**Brian Munn** American Century



**Keith Neal**MFS Investment
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Nancy Tassiello Legg Mason



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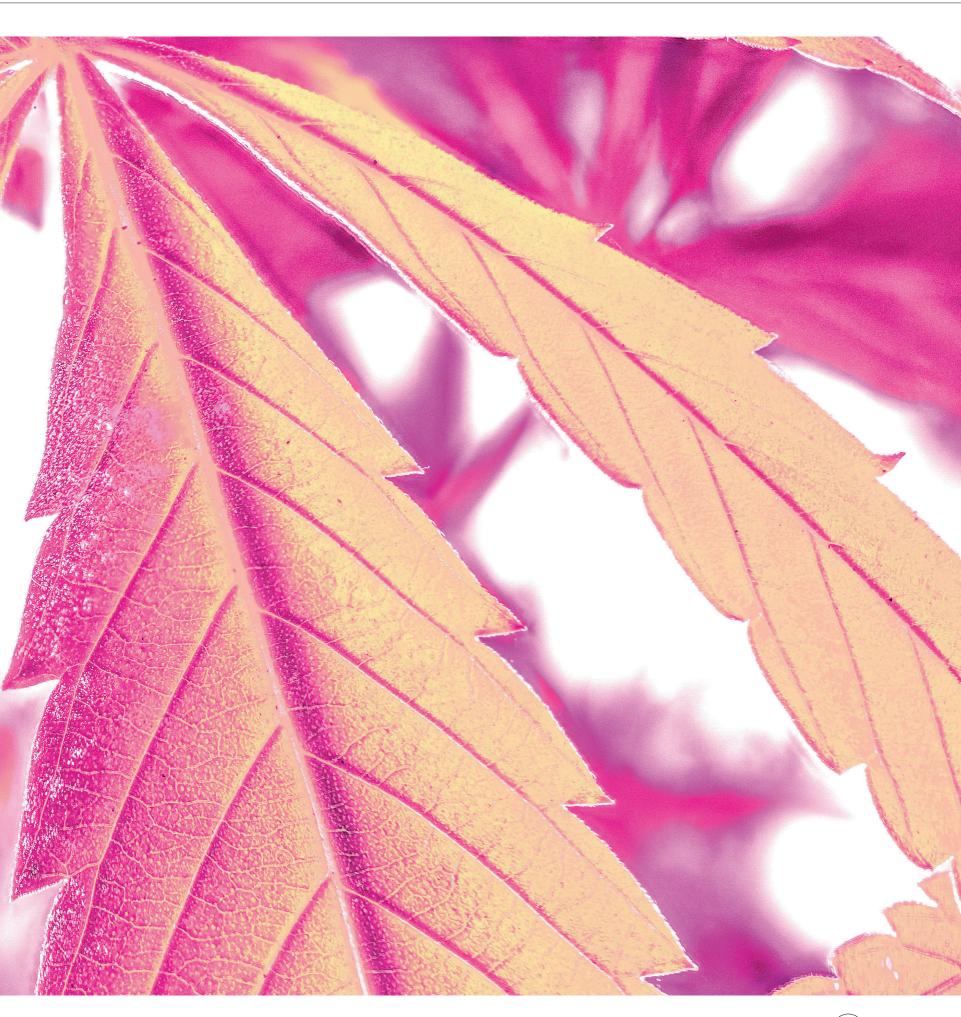
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WHEN A FORMER CLIENT WHO'D TAKEN A NEW JOB AS A HUMAN RESOURCES DIRECTOR AT A LARGE CANNABIS COMPANY TOLD ADVISOR KRISTEN DEEVY ABOUT HER EMPLOYER'S INTEREST IN SETTING UP A 401(K) PLAN, THE LITTLETON, COLORADO-BASED MANAGING DIRECTOR AT PENSIONMARK FINANCIAL GROUP, LLC AGREED TO LOOK INTO IT.

Deevy found out that it's a complicated issue. "The more we looked at it, the more we realized that there would be hurdles," she says. As more states legalize marijuana, some fast-growing cannabis companies want to start

a 401(k) plan to help them hire and keep good employees. But marijuana remains illegal under federal law, so most financial institutions won't work with cannabis companies on retirement plans, which also fall under

federal law. She and Pensionmark's compliance department feel that the federal government hasn't yet put something in writing that gives providers and advisors a clear okay to work with cannabis companies operating legally under state law.

Until that happens, Deevy doesn't feel comfortable working with cannabis company plans. "I can see that there are two sides to this story. On the one hand, as an advisor, I feel like everyone should be able to save for their retirement," she says. "But these are federally regulated plans, because they fall under ERISA. And I

will not be an advisor who works with these plans until we can get clarity to address the concerns. We want to do things right: I'm all about providing retirement plan advisory services within the rules."

The ongoing uncertainty impacts cannabis companies' ability to have a 401(k) plan. Jewell Lim Esposito, an employee benefits attorney for 26 years, has spent the past two years educating cannabis executives, accountants, plan advisors, banks, in-house counsel, TPAs and others on how the industry can serve these employers. "I know there are some providers and advisors that don't want to be involved in the cannabis space, and that's an acceptable business decision," says Esposito, a Washington, D.C.-based partner at law firm FisherBroyles, LLP. "But if you do want to be involved in the space, it's important to learn how cannabis companies can participate in 401(k) plans legitimately under ERISA and the tax code."

#### COMPANIES GROWING EXPONENTIALLY

A report released in March 2019 by Seattle-based Leafly, which bills itself as the world's largest cannabis information resource, gives a sense of the current U.S. industry. With 34 states having legalized use of medical cannabis and 10 states and Washington, D.C. legalizing adult use of cannabis (as of the report's compilation), legal cannabis sales increased 34% nationwide in 2018, to \$10.8 billion. The industry added 64,389 full-time legal cannabis jobs in 2018, and the legal American cannabis industry now accounts for more than 211,000 full-time jobs, according to Leafly's "Special Report: Cannabis Jobs Count."

"It's not that some of them are getting to the point of wanting to start a 401(k) plan: Some of them have been wanting to do it for a couple of years," says Kirsten Curry, founder and CEO of Seattle-based Leading Retirement Solutions, an unbundled third party administrator.

"The industry started out with a lot of startups and moms and pops, and there are still plenty of them today. But in the past year and a half, we have seen a lot of growth in the industry, and more merger and acquisition activity. Now, we often see cannabis companies that have 100 employees, 500 employees and more. I've talked to one company that has over 2,000 employees."

Cannabis company owners' interest in a 401(k) plan stems much more from workforce issues than their personal interest in getting the tax benefits, Curry has found. "These companies are growing exponentially, so they're desperate to get employee benefits in place that will help them to attract and retain good employees," she says.

Attorney Joshua Horn now does 90% of his legal work with cannabis companies, and he's seen these companies grow very quickly. "We started working with one company four years ago that had about 20 employees, and now it has a few hundred employees," says Horn, a partner at law firm Fox Rothschild LLP in Philadelphia.

Most financial institutions don't want to handle any money on behalf of cannabis companies, Horn says, so they often have no banking relationship. "Here's the big picture issue. Cannabis-focused companies are technically not acting in conformity with the federal Controlled Substances Act," he explains. "So any business they do runs into federal money-laundering laws, which is why a lot of cannabis businesses are operated as cash-only businesses."

But the cannabis industry's burgeoning consolidation could lead to more 401(k) plans and get providers' attention, Horn says. "There are a lot of mergers and acquisitions now. As these companies get bigger, maybe we'll get a better sense of how many want to sponsor a 401(k) plan," he says. "And maybe, as they get larger, custodians and other financial institutions won't be as reluctant to deal with these companies."



KRISTEN DEEVY, MANAGING DIRECTOR AT PENSIONMARK FINANCIAL GROUP, LLC

#### THE LEGAL UNCERTAINTIES

When Deevy looked into cannabis company 401(k) plans, she found very little interest among retirement plan service providers in working with them. "The federal government has not legalized cannabis, so most vendors say 'No can do,'" she says. "Basically, if you've got cannabiscompany employees deferring their money and the cannabis company is transmitting that money or the company match, the money is being transferred electronically from a bank account to a custodian. As that happens, the money is crossing state lines. Because you're talking about plans that are federally regulated by ERISA, and the dispensaries are looked at by the federal government as engaging in illegal activity, the transfer of that money could be seen by the federal government as money laundering."

Deevy contacted numerous vendors to see if they'd be willing to bid on a

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cannabis company's 401(k) business. Only one vendor wanted to quote it, she recalls. She asked that provider how the 401(k) contributions would get transferred in a way that doesn't potentially violate federal money-laundering laws, but the provider declined to discuss specifics. "If I can't get comfortable with how you are running a 401(k) plan legally, then there is no way that my compliance department is going to get comfortable with it," she says.

Attorney Esposito talks to financial institutions often, and notes their concern boils down to the U.S. Department of Justice (DOJ) potentially targeting them for money laundering or even drug trafficking. "The big names that you would recognize are very scared of what the DOJ might do with them," she says. "All the providers think it's taboo still. Some professionals tell me they will be fired for even touching cannabis companies."

Esposito feels frustration with that stance. Attorney General William Barr said during his congressional confirmation hearing that he doesn't



JEWELL LIM ESPOSITO, PARTNER AT LAW FIRM FISHERBROYLES, LLP

intend to federally prosecute cannabis companies operating in compliance with state laws. "The Justice Department takes a non-enforcement policy with cannabis companies operating legally. Moreover, IRS rules explicitly allow cannabis companies to have a 401(k) plan," she explains. "Even with that coupling of non-enforcement and tax code legitimacy, the big banks, the big RIAs, the big broker/dealers and the big custodians have said, 'That's not enough for us."

On top of the legal uncertainty about money laundering, the growth of cannabis company 401(k) plans also has been held back by a lack of clarity on whether the IRS will allow these companies to deduct their employer contribution to the 401(k). "It's not a settled area of the law," says Matthew Abel, founder and senior partner at law firm Cannabis Counsel, P.L.C. in Detroit. "There is certainly an issue about deductibility under Section 280E of the tax code, because it apparently doesn't fit into the 'cost of goods sold' that can be







deducted. It's likely to get a cannabis company audited by the IRS if they're taking the deduction on their 401(k) contributions."

The IRS addressed these companies' deductions for cost of goods sold in a memorandum (Number 201504011) released in January 2015. "My understanding is that if something is qualified as a cost of goods sold, you can deduct it. If it isn't, you can't," Abel says. "It's pretty well established legally that expenses related to a dispensary salesperson are not included in the cost of goods sold. There's a better chance that the IRS will end up allowing a grower to get the deduction for its contribution to the 401(k) accounts of its employees."

If they can't deduct the contribution, cannabis companies have to absorb the entire cost of offering a 401(k) match. "It's legal for cannabis companies to offer a 401(k) plan, but whether its

expenses for the plan are deductible is an issue," Abel says. "A company can certainly have a 401(k) and make a contribution now, if they're willing to bear the cost without taking a deduction."

#### TWO POTENTIAL APPROACHES

Esposito describes ways she sees for cannabis companies to legally give their employees a 401(k) plan now: controlled groups and multiple-employer plans (MEPs).

#### Controlled Group

The 2018 federal Farm Bill enabled this by reclassifying hemp, the low-THC cannabis plant, and hemp-derived CBD as "industrial hemp," Esposito says. The federal government now treats industrial hemp as an agricultural commodity instead of a Schedule 1 drug subject to the

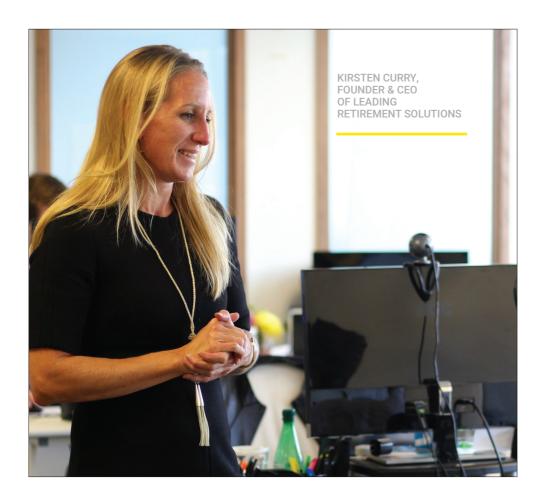
Controlled Substances Act. "The Farm Bill made industrial hemp legal," she explains.

Esposito says the Internal Revenue Code has long had a concept of a "controlled group," an entity that consists of two or more businesses under enough common control and ownership. "Let's say that there are two subsidiaries owned by a common parent: One is a legal hemp provider that makes CBD, and the other a straight grower of cannabis," she says. The hemp subsidiary could sponsor a 401(k), and both sides of the company could participate legally as part of the one controlled group, she says. "The IRS has its own tax code to support that there's just a single employer under that setup," she says.

"I'm a mother of twins, so think of it as a parent/twin family: If you give the opportunity to save in a 401(k) plan to employees of the hemp twin, then it is not fair or legal for the parent not to give the same 401(k) opportunity to employees of the cannabis-production twin," Esposito says. "If you deny employees in one subsidiary of the parent company the opportunity to save, that typically results in tax discrimination under federal regulations. Legally, the hemp employees and the cannabisproduction employees are considered employees of the same organization."

#### Multiple Employer Plan

A Professional Employer Organization (PEO) can legally sponsor a MEP, operating as a single plan in which employees of two or more unrelated employers participate, Esposito says.



he says. AdaptiveHR also works with a recordkeeper, TPA and custodian to ensure that all the necessary reporting and operational work gets done, he says. "We're the machine that's making sure all the parts are moving," he says. He declines to name the advisory firm and providers involved, citing competitive reasons, but says he'd definitely identify them to a cannabis company interested in joining the PEO.

The MEP's providers and advisor work directly with AdaptiveHR, not the cannabis companies, Wall says. "We don't have to introduce the cannabis companies to all these third parties that they then have to work with, because we're quarterbacking it. Everything goes through us," he says. "The financial institutions are dealing directly with us. These companies are partners with other PEOs, and they like the PEO model. So they have a comfort level about dealing with a PEO, versus dealing with the cannabis companies directly."

The PEO acts like a professional association or union in providing an umbrella retirement plan for others, she adds.

A cannabis MEP could solve for the challenge that most financial institutions will not accept contributions or any other money directly from cannabis companies, Curry says. "We're seeing some providers establish solutions for cannabis companies where the providers are directing the activities of the plan," she says. "So financial institutions are dealing with the service provider, not the cannabis companies."

Last April, AdaptiveHR, a Boston-based cannabis PEO, launched what it calls the first comprehensive platform of human capital services tailored to cannabis companies, and it includes a MEP. "We thought, there has to be a way to bring a 401(k) and group benefits to cannabis companies," CEO and Founder Brian Wall says. "If you looked around, it's what was missing

in the cannabis business. We see the convergence of health and wealth coming together in the marketplace, and feel that the ability to save is a right that all employees should have in all industries."

To participate in the plan, a cannabis company must be part of the PEO. And the cannabis company has to be based in one of the states where AdaptiveHR is licensed. In late July that included 22 states, and Wall says the company has licensing in the works in other states that it expects to complete over the next several months.

AdaptiveHR serves as a 3(16) administrative fiduciary in the multiple-employer plan, Wall says. "We coordinate with the cannabis companies. And we work with an RIA that selects the investment funds and monitors them to make sure they are meeting the benchmarking standards we've laid out in the plan documents,"

MATTHEW ABEL, FOUNDER & SENIOR PARTNER AT LAW FIRM CANNABIS COUNSEL, P.L.C.





#### THE FEDERAL OUTLOOK

Most financial institutions await a definitive okay from the federal government to work with cannabis companies. In February 2014, the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) issued guidance for financial institutions seeking to provide services to marijuana businesses. The guidance (FIN-2014-G001) didn't change most financial institutions' comfort level, Horn says. "That's just guidance, not the rule of law," he adds.

Some people see the banking issue as "low-hanging fruit" to start on federal cannabis-law reform, Horn says, but not much progress has been made. In March, the House Financial Services Committee voted to pass the Secure and Fair Enforcement (SAFE) Banking Act of 2019 (H.R. 1595). The bill, authored by U.S. Reps. Ed Perlmutter (D-CO) and Denny Heck (D-WA), would protect banks that service state-legal cannabis businesses from being penalized by federal regulators, according to a press release from Perlmutter's office.

The idea of banking legislation "has been kicking around DC for a few years," Abel says. The SAFE banking

bill "would allow banks criminal immunity for handling the banking of licensed marijuana companies that are operating legally under their state's laws," he says. "It's a safe harbor. The banks don't want to get prosecuted for money laundering." The bill now appears stalled in Congress, he says.

Ultimately, Horn sees the resolution in federal legislation that goes further than the SAFE bill. "What's needed is changes by Congress in the Controlled Substances Act to say that cannabis companies that are in full compliance with robust state regulations on a medical cannabis program are operating legally on a federal level, too," he says. "Then the banks would no longer see doing business with these companies as being in the business of money laundering. That's the simplest way to resolve this issue. I think we need real legislative change before many financial companies are going to be willing to work with them. Once that happens, we'll see more cannabis companies sponsoring 401(k) plans." N

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

## F YOU DO WANT TO BE

IN THE

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 Jewell Lim Esposito, FisherBroyles, LLP

CODE."

## TAKING THE STAGE

A new generation of ARA leaders takes the stage at the WiRC conference in Chicago.

BY NEVIN E. ADAMS, JD

PHOTOS BY KRYSTYN JOHNSON & BEKING JOASSAINT



## For the first time

in its history, earlier this summer leadership from all five of the American Retirement Association's sister organizations were together on a single stage – but that wasn't the most extraordinary aspect of this event.

The event was the Women in Retirement Conference (WiRC) – the combination of two unique events: the ASPPA Women's Leadership Business Conference and NAPA Connect. And there, for the first time in its history, not only were leaders of all five member associations on stage – those leaders were all women.

Those leaders – Kris Coffey, President of the National Tax-deferred Savings Association (NTSA); Marjorie Mann, President-Elect of the Plan Sponsor Council of America; Miriam (Missy) Matrangola, President-Elect of the American Society of Pension Professionals & Actuaries (ASPPA); Lauren Okum, President-Elect of the ASPPA College of Pension Actuaries (ACOPA); and Jania Stout, President of the National Association of Plan Advisors (NAPA) – each long-time volunteer members of their respective associations – brought decades of experience and a unique perspective to the attendees, who alternated between rapt attention and enthusiastic applause throughout the discussion.

#### 'UP' BEAT

Moderator of the panel – and Co-chair of WiRC Janine Moore, Retirement Practice Leader – HUB Texas, asked the panel what kept them up at night, and while one generally assumes that sentiment with fears, this group had a positive perspective.

For Coffey it's that "tsunami" of retirement money rolling out of plans – one that to her presents an enormous opportunity, one that she thinks will produce new careers for advisors. Acknowledging that the flow to individual accounts might present a challenge for recordkeepers, she pointed to the emerging popularity of health savings accounts (HSAs) – and a potential future combination (visually, if not legally) with traditional retirement balances as yet another opportunity.

She also envisions the opportunity to develop a specialization aligned with specific professions: serving as an advisor to attorneys, or to accountants, or perhaps nurses, perhaps in the way that NTSA focuses on teachers as a way to signal a more personalized connection to those professions and their focus. This would allow you to partner with them before and during their distribution cycle, she explains, as well as new hires just entering the profession(s).

NAPA's Stout said those movements are why advisors should "look really hard" at how they partner with recordkeepers, and consider what additional services – and how much more efficiently – they might be able to offer those services if the money stays in the plan, such as managed accounts, or "virtual" advice. Thinking outside the traditional box could allow advisors to create value with terminated participants in the plans today. To be truly successful, she counsels that advisors should partner with recordkeepers. "It can't be us versus them." she stressed.

#### LISTEN AND EARN

Working together was a theme echoed by Matrangola, who emphasized the need to work together to show value with regard to emerging products like HSAs. "As a TPA you have to understand what your value proposition is, and what you can do for your plan sponsor clients and advisors," she noted. "Nobody likes doing notices, and cash-out distributions – the HR staff is stretched thin. It's important to look at your book of business, and find things your clients will let you do for them," she explained. "The key is listening." Practice tip: She notes that could include putting a "Do you know we do \_\_\_\_?" notice on invoices.

Opposite page (Clockwise from top right): Kris Coffey, President of the National Tax-deferred Savings Association (NTSA); Marjorie Mann, President-Elect of the Plan Sponsor Council of America: Jania Stout, President of the National Association of Plan Advisors (NAPA); Lauren Okum, President-Elect of the ASPPA College of Pension Actuaries (ACOPA); and Miriam (Missy) Matrangola, President-Elect of the American Society of Pension Professionals & Actuaries (ASPPA)













As a plan sponsor herself, Mann said it was important to anticipate what the needs are – that "sometimes the job description doesn't include everything you might worry about." This can actually help plan sponsors better understand their responsibilities.

"You have to talk about things holistically," Stout explained. "HSAs are a savings vehicle," she said, reminding the audience that it was an attributed that some plan sponsors hadn't yet focused on. Particularly at a time like today when fees are being squeezed. She points out that at her firm they used to bundle everything in under a flat fee arrangement – education oversight, investment advisory, etc.

That's now changing, going to an a la carte approach, she said, noting that the emphasis tends to be cyclical, from bundling to unbundled, and back again. Today that a la carte approach helps Stout not only differentiate her firm's services, but to add value by being consultative. The process forces her to place – and justify – a value for those services. She also told the group that she was a "big believer" in what she referred

to as stewardship reports, rather than a cost of living adjustment. The stewardship report recounts what's been done over the two years of their service contract: key components, participation, deferrals. "It's risky," she acknowledged. "You're asking for a raise."

The bottom line, she recommended; "Tell them what you're going to do, do it, tell them what you've done."

#### COVERAGE CONCERNS

For larger plans, the traditional goal of benefit designed to "attract and retain," hoping to encourage valued workers to stay until retirement holds true. Smaller plans are often more focused on providing benefits for the business owner. However, Okum notes that even though many small plans maximize the benefits for owners, they are also required to provide larger benefits for employees, who are therefore much better off than those without such a plan.



## "IT'S IMPORTANT TO LOOK AT YOUR BOOK OF BUSINESS, AND FIND THINGS YOUR CLIENTS WILL LET YOU DO FOR THEM. THE KEY IS LISTENING.." - MIRIAM (MISSY) MALTRANGOLA, ASPPA

Mann noted that retirement finances are the "basis of our economic system in this country." She noted that plan sponsors are concerned about the financial wellness of their workforce, and as a result there are plans that are starting to auto enroll at rates as high as 7% and even 10%. "They don't want folks to think that 3% is enough," she emphasized. The reasons are as much here and now as retirement's "then and there." Employers "want to help workers," Mann said, citing increasing stress levels among current employees, as well as debt management issues, and that means that these programs "have to be more than retirement focused."

What else keeps these leaders up at night? Legislation – and the impact, both good and potentially not so good, it might have on those benefit programs. "The thing to remember with any law is that there are always opportunities," Matrangola explained. "Not as bad as we think, and maybe good." What's important, she noted, is to read the laws and talk to your representatives – look at how it might impact your business – and what, if necessary, you can do to pivot.

As an example, Okum reminded the group about concerns that recent tax cuts would reduce incentives to contribute to retirement plans. "Turns out," she explained, "especially with S Corps, there are new ways to maximize benefits."

#### CYBER 'SPACE'?

Also keeping these leaders awake – cybersecurity. Stout acknowledged that it's a big deal – one that concerns her more than fiduciary issues, in fact – and one that is beginning to effect advisors. "We rely on recordkeepers to provide data and there's a lot of data," she acknowledged. Her firm has not only required every recordkeeper they work with to do a "cyber audit," but documented that they went through that process.

Mann confirmed that, certainly from a plan sponsor perspective, this was a top risk concern. She noted that the increased emphasis on privacy protection – citing specifically recent developments in California – presents challenges for employers overall. She explained that while there may not be a current, or at least not explicit, fiduciary requirement on this, since all fiduciary actions



must be in the best interests of participants, there is an argument to be made that that duty extends to being careful about their data – and in the hiring of firms to which that data is entrusted.

While this extraordinary group came from different places, with different backgrounds, and got involved with this industry at different points in time, the inevitable question for this remarkable group was, "How did you get to this position of leadership?"

Ironically, certainly in view of their divergent starting points, a thread of commonality emerged. Nearly all found themselves at an event sponsored by one of the ARA associations, where they connected with someone who (eventually) connected them with the planning for that event, that (eventually) produced an invitation to participate in leadership.

As Mann explained it, the goal wasn't to be in leadership, it evolved from their involvement – and, for most, it began with a connection at an event – such as the Women in Retirement Conference. Closing out the panel, Coffey challenged the attendees – but it holds true for everyone, but especially to those who have been part of one of the ARA associations – to find just one new person at that next event you attend to whom you can "pay it forward."

You may have a hand in creating tomorrow's leaders!

Opposite page: WiRC steering committee.



## 

PHOTOGRAPHY: MARTIN H. SIMON & FLY-IN ATTENDEES

pproximately 200 elite advisor delegates to the seventh annual NAPA D.C. Fly-In Forum convened in the nation's capital July 24-25 to listen to and brief top congressional leaders about the impact and importance of the nation's workplace retirement plans, and, as advocates for the employers and participants they work with, shared how proposed laws and regulations might impact American workers' retirement security.

Now in its seventh year, delegates to this year's forum heard from House Ways & Means Chairman Richie Neal (D-Massachusetts) and long-time pension advocate Sen. Rob Portman (R-Ohio), both of whom have recently introduced legislation that could dramatically impact retirement plans.

Delegates also heard from Jeanne Wilson, Principal Deputy Assistant Secretary with the Department of Labor's Employee Benefits Security Administration, on the prospects for new developments on electronic disclosure, multiple employer plans and guidance on missing participants, as well as the prospects for a new federal fiduciary standard for retirement advisors. Delegates also heard from industry experts on critical issues involving litigation trends, student debt impact on retirement savings and the "gig" economy.

On the second day of the forum – and as you can see in the pictures on the following pages – delegates met one-on-one with their respective congressional representatives on Capitol Hill to share insights from the experiences they have daily with business owners and plan participants, and to provide perspectives on proposed and current legislation.

In order to participate in the NAPA D.C. Fly-In Forum, delegates were required to be a NAPA member; be responsible for \$100M+ in plan assets, 10+ plans and 2,000+ participants; and have at least five years of experience servicing retirement plans. Qualified delegates were permitted to bring an "emerging" advisor along with them for this unique advocacy experience.



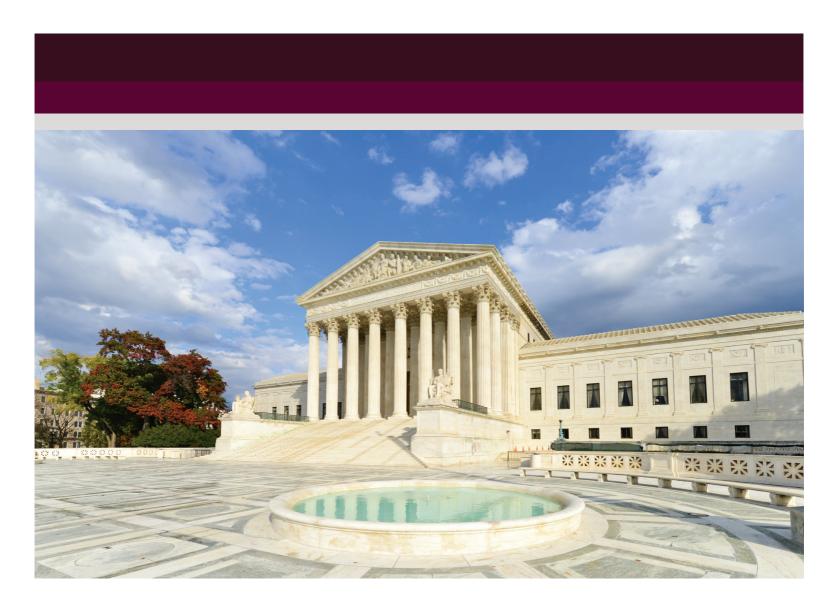






The cases, the issues, and the perspectives of some of the nation's leading ERISA attorneys on what the outcomes of three ERISA cases now before the United States Supreme Court might mean for plan fiduciaries.

By Nevin E. Adams, JD



It's not every day that issues presented by ERISA cases make it to the U.S. Supreme Court – but after more than two years without one, we'll see three ERISA cases come before the nation's highest court this term.

#### Is No (Actual) Harm a Foul? (Thole v. U.S. Bank, N.A.)

The first of the cases (*Thole v. U.S. Bank*, N.A., U.S., No. 17-1712, certiorari granted 6/28/19) involves a suit by participants in U.S. Bank's pension plan who, after the plan fiduciaries alleged mismanagement resulted in \$750 million in losses to the plan, brought suit – even though the benefits promised by the pension plan are not yet threatened, and – significantly – when the participant-plaintiffs have not yet suffered any individual harm. Indeed, it was on that basis that the plaintiffs here allege that the Eighth Circuit inappropriately affirmed the district court's earlier dismissal of their claims.

At issue here was U. S. Bank's decision to invest all \$2.8 billion of the pension fund's assets (in 2007) in what was described as "high-risk" equities, including more than 40% in their own proprietary mutual funds "even though they were more expensive than similar alternatives," which the plaintiffs allege not only "flouted" ERISA's prohibited-transaction rules, but also "violated basis fiduciary principles of prudence and loyalty." Ultimately, when the markets crashed in 2008, the plan lost \$1.1 billion, which the plaintiffs claim was \$748 million more than an "adequately diversified plan would have." That loss "left the plan reeling," they claim, and "virtually overnight the plan went from significantly overfunded to 84% underfunded," according to the plaintiffs.

However, the U.S. Court of Appeals for the Eighth Circuit, in rejecting those claims, noted that the bank's pension plan had recovered (thanks in no small part to

a substantial contribution to the plan by the employer) and was now in a healthy financial condition (more precisely, it was overfunded), which meant the participants hadn't suffered any actual losses.

#### Why It Matters

The plaintiffs allege that not only did that decision veer from decisions in other districts – specifically the Second, Third and Sixth Circuits, which held that violation of ERISA rights alone was sufficient to have standing to bring suit, without establishing loss – but with the administration's sense of things as well. However, the Fourth, Fifth, and Ninth circuits have gone another way – denying standing to bring suit to participants in similar contexts, though they have done so on Constitutional grounds, unlike the Eighth Circuit, which cited ERISA.

Nancy Ross, partner at Mayer Brown LLP in Chicago, explains that the *Thole* case raises an important standing question regarding DB plans. "If participants can challenge plan funding without showing an actual risk of harm, the litigation floodgates

#### THOLE V. U.S. BANK, N.A., U.S.

CASE: Pension plan lost \$750 million after investment in "high risk" equities, including > 40% in proprietary funds during 2008 crisis.

**ISSUE:** Can participant sue when they haven't incurred injury/loss (plan recovered, no impact on benefits)?

REASON: 2nd, 3rd, 6th (and now) 8th – don't need to establish loss to have standing. 4th, 5th & 9th deny standing (but on Constitutional, not ERISA grounds).

will open every time plan funding takes a dip," she says. "That upsets the fundamental balance at the core of ERISA in protecting promised benefits while limiting a plan sponsor's risk of liability if it pays what it commits to."

In fact, as one litigator comments, "Thole has the greatest potential to be most devastating to DB fiduciaries," and, while it has been pretty well settled, except in unusual circumstances, that DB participants cannot sue for claimed breaches if the plan is fully funded, he acknowledged that "allowing claims of fiduciary breach in a fully funded DB plan really opens the floodgates to what some might perceive as second-guessing litigation." On the other hand, he noted that the Supreme Court asked for the parties to address standing, which he saw as signaling an end to that specific threat.

"If the issue is looked at as a still photograph, it is reasonable to say that there aren't any damages," noted Drinker Biddle & Reath LLP's Fred Reish. That said – and affirming that there are always (at least) two perspectives to each legal situation – he cautioned that "if viewed as a moving picture, the market could tank next year and part of the reason that the plan is underfunded is the bad investments in prior years." Though, as he also noted, by then, the statute of limitations may have run.

#### Would Have vs. Should Have (Ret. Plans Comm. of IBM v. Jander)

In *Ret. Plans Comm. of IBM v. Jander* (U.S., No. 18-1165, certiorari granted 6/3/19), the Supreme Court agreed to consider "Whether *Fifth Third Bancorp v. Dudenhoeffer*'s 'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time."

Here the plaintiffs alleged that the IBM defendants (IBM itself, along with the Retirement Plans Committee of IBM; Richard Carroll, IBM's Chief Accounting Officer; Martin Schroeter, IBM's CFO; and Richard Weber, IBM's general counsel) failed to prudently and loyally manage the plan's assets and adequately monitor the plan's fiduciaries. Specifically, they argued that once the defendants learned that IBM's stock price was artificially inflated, they should have either disclosed the truth about Microelectronics' value or issued new investment guidelines temporarily freezing further investments in IBM stock by the plan.

Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. \_\_\_\_, 134 S.Ct. 2459 (2014) had been the law of the land in such matters since – well, 2014. Under the new "Fifth Third" standard, plaintiffs now must "plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."

#### Why It Matters

The presence of employer stock in an employee stock ownership plan had been entwitled to a "presumption of prudence" going back to the 1995 Moench v. Robertson case, where a plan participant sued a plan committee for breaching its fiduciary duty based on its continued investment in employer stock after the employer's financial condition "deteriorated." In that case the Third Circuit affirmed the duty of prudence, but looked to ERISA's diversification requirement and the allowances made for employer stock holdings in an employee stock ownership plan (ESOP), and found a rebuttable presumption that an ESOP fiduciary that invested plan assets in employer stock acted consistently with ERISA.

#### RET. PLANS COMM. OF IBM V. JANDER

**CASE:** IBM stock price artificially inflated, defendants continued to allow participant investments without disclosing.

**ISSUE:** Where, and how, to draw the line between the obligations of corporate officials and ERISA plan fiduciaries.

**REASON:** Split in the circuits on the "more harm than good" standard of *Dudenhoeffer v. Fifth Third.* 

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

However, when the "more harm than good" standard emerged with *Fifth Third Bancorp v. Dudenhoeffer*, it didn't just establish a new standard, it also led to a refiling of claims of many of the so-called "stock drop" suits. Ironically, up until the IBM decision, those too had generally come up short of the new standard – though they did at least get past the summary judgment stage.

Goodwin Proctor's Jamie Fleckner acknowledges that following the

Dudenhoeffer decision, there had been a decline in this type of litigation, but now the Second Circuit's *Jander* decision appears to allow a loophole, that if allowed to stand may mark a return to the rapid pace of litigation involving company stock, particularly if there is a market downturn and more stocks held in DC plans decline in value.

In fact, as Ross notes, the *Dudenhoeffer* "more harm than good" standard "leaves a lot of discretion for the courts, and places them in the role of judging business decisions as much as fiduciary conduct." She notes that even the Second Circuit itself (the court whose decision produced the case on which the Supreme Court will weigh in) has applied the same standard with inconsistent results. "The revised standard collides head on with the responsibility of a fiduciary to be prudent, not prescient," she explains, going on to note that it has not produced "clarity as to what this standard requires of fiduciaries in real world circumstances."

While it's been just five years since *Dudenhoeffer* was decided, there's been some significant turnover in the panel of justices that will hear this case – though, as Fleckner reminds us, that case was decided by a 9-0 vote. However, he notes that one element that applies now what was not present in 2014 is that the Securities and Exchange Commission has now presented its views to the Supreme Court by signing onto the government's amicus (friend of the court) brief. "When the Court previously decided *Dudenhoeffer*, Justice Breyer, who wrote that decision, thought that the SEC's views could have been helpful to the Court," he comments. "Now the SEC has signed on to the government's brief – which was also signed by the Department of Labor – so the SEC's views are now being presented to the Supreme Court. That could be meaningful this time around."

Ultimately, it seems at least possible that the Supreme Court might clarify *Dudenhoeffer*, particularly as to whether a plaintiff must plausibly allege that no prudent fiduciary "would have," rather than "could have," viewed action as more likely to cause harm than not. As Matthew Russell of Morgan Lewis & Bockius LLP writes, "'Would' suggests what an average, prudent fiduciary would do, while 'could' suggests the realm of possibility, making the latter standard more difficult for plaintiffs."

#### 'Know' Way, Know How? (*Intel Corp. Inv. Policy Comm. v. Sulyma*)

While each of the cases under review have the potential for a dramatic impact on advisors, this case (*Intel Corp. Inv. Policy Comm. v. Sulyma*, U.S., No. 18-1116, cert. granted 6/10/19) is perhaps the one most ripe with potential. As the Wagner Law Group's Tom Clark explains, "This case is ripe for the Supreme Court to go beyond the questions asked and create new law." Or, as Mayer Brown's Ross puts it: "The consequences are monumental, as a plan sponsor is still at risk notwithstanding accurate ERISA disclosures."

Those potential consequences could come from this review of a decision by the U.S. Court of Appeals for the Ninth Circuit that said that "... 'actual knowledge' means something between bare knowledge of the underlying transaction, which would trigger the limitations period before a plaintiff was aware he or she had reason to sue, and actual legal knowledge, which only a lawyer would normally possess." More precisely, the issue under consideration is "[w]hether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act, which runs from 'the earliest date on which the plaintiff had actual knowledge of the breach or violation,' bars suit when all the relevant information was disclosed to the plaintiff by the defendants more

## "If participants can challenge plan funding without showing an actual risk of harm, the litigation floodgates will open every time plan funding takes a dip." - Nancy Ross, Mayer Brown LLP

than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information."

The original lawsuit was filed in November 2015 in the U.S. District Court for the Northern District of California by former Intel employee Christopher Sulyma (who turns out to be an engineer with a doctorate in experimental physics). It charged that Intel's investment committee boosted the \$6.66 billion profit-sharing plan's allocation for hedge funds in the firm's target-date portfolios from \$50 million to \$680 million, while at the same time the allocation for hedge funds in the diversified global fund rose from \$582 million to \$1.665 billion, and to private equity investments from \$83 million to \$810 million, between 2009 and 2014.

The suit claimed that participants were not made fully aware of the risks, fees and expenses associated with the hedge fund and private equity investments, or of the underperformance of the company's targetdate and global diversified funds compared

#### SULYMA V. INTEL CORP.

**CASE:** Custom TDFs with large alternative investment exposure lost a lot of \$\$.

**ISSUE:** SOL - When does a participant have "actual knowledge"?

**REASON:** 6th says "failure to read" is no shield, 9th says document receipt is constructive, not actual knowledge.

to their peers, and that as a result participants "suffered hundreds of millions of dollars in losses during the six years preceding the filing of this Complaint as compared to what they would have earned if invested in asset allocation models consistent with prevailing standards for investment experts and prudent fiduciaries."

So, the plaintiffs said they were not fully aware – and yet, in their petition to the Supreme Court, Intel noted that "during his brief tenure with Intel, respondent regularly accessed the website for those materials," clicking on more than 1,000 web pages within that site; it was undisputed that respondent "accessed some of th[e] information" that disclosed the disputed investment decisions "on the websites."

Ultimately, the Ninth Circuit reversed and remanded the decision of the lower court, noting that if (as claimed) "Sulyma in fact never looked at the documents Intel provided, he cannot have had 'actual knowledge of the breach."

#### Why It Matters

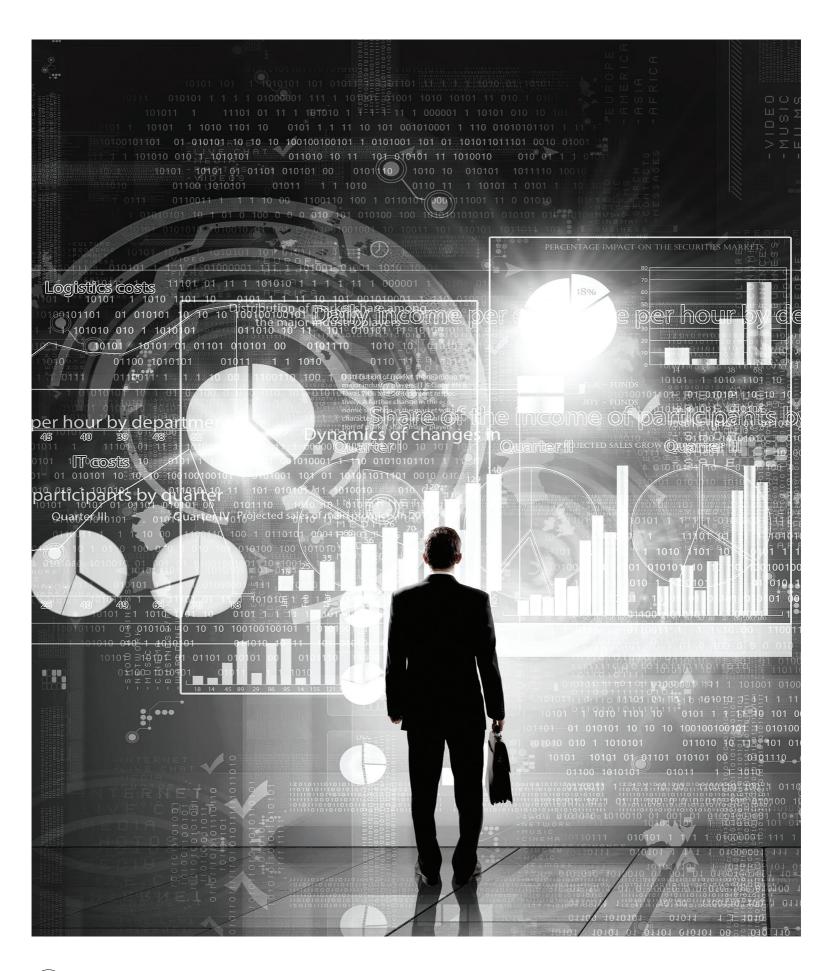
ERISA Section 413 requires that a plaintiff file suit in the six years following an alleged breach or violation, but that shrinks to three years if a plaintiff has "actual knowledge" of that breach. The essence of the defendants' claim here is that the plaintiff can't bring suit because the plan disclosures gave the plaintiff "actual knowledge" of all information necessary to challenge the Intel plans' investments and fees – even though the plaintiff claimed not to have read them or remember whether he had read them. In fact, "actual knowledge" is not defined in ERISA, and though courts have attempted to define its meaning, they have arrived at differing interpretations. In this case, the Ninth Circuit determined that it required a showing that the plaintiff was "actually aware of the nature of the alleged breach more than three years before the plaintiff's action was filed."

Ross notes that the Intel case "essentially eviscerates the more limited time period for challenging fiduciary conduct, as it is very difficult to show even with discovery that a plaintiff actually read the plan disclosures."

Russell writes, "A ruling in Intel's favor could have a widespread impact on the potential exposure of plan sponsors and fiduciaries in similar lawsuits. Holding that plan participants have 'actual knowledge' of plan disclosures sent to them in compliance with ERISA's regulations could extinguish some claims altogether, and halve the defendants' potential exposure in others."

A representative of the plaintiffs' bar acknowledges, "Literally read, a plaintiff could avoid triggering the limitations period by not reading any plan communications. While that presents issues, it is hard to interpret 'actual knowledge' in a way that excludes those participants but not participants who failed to look up the 5500 and read to page 250. While that is an interesting issue, it does not seem to apply to many cases. That would be unless the Court construed 'actual knowledge' to apply to participants who failed to read materials mailed (or emailed) to them. Then, all of a sudden, participants will find their inboxes very full, flooded by haystacks of words concealing liability-avoiding needles."

Should make for an interesting fall.



## Plan Technology Starts with Plan Design

Who will be the next big disruptor in the retirement space?

BY STEFF CHALK

hen compared with other fields – for example, the development of self-driving cars or human-brain mapping – the technological advancements in the retirement plan field over the last three decades seem remarkably insignificant. Significant advances in the retirement plan industry did occur in the '70s and '80s, but since then, there have been only incremental advances by a handful of industry stalwarts. As an industry, the United States' self-funded retirement system seems firmly entrenched in the Dark Ages of mid-'80s technology.

Appropriate plan design is the starting point for qualified plans regardless of a plan sponsor's intent, capabilities or intended outcomes. Plan sponsors rely on their plan advisor to provide guidance and assistance. Appropriate services for a retirement plan advisor include designing a prudent investment structure; establishing a solid process for measuring, monitoring and evaluating investment performance; and clearly communicating investment results to plan participants and plan sponsors.

Unfortunately, in many plan sponsor/advisor relationships there can emerge a disconnect between the plan sponsor's expectations and the contractual obligations that outline and restrict the actions of the advisor. This disconnect can surface around either the plan's design or service level expectations. Plan sponsors want more from their qualified retirement plan as they simultaneously desire to outsource a greater share of the fiduciary responsibility – all at lower cost.

#### **Advisor Perspective**

The conundrum for innovative retirement advisors is that they are rarely rewarded for making groundbreaking advances. In many cases advisors have put forth an innovative, forward-thinking strategy that could help companies, plan sponsors or plan participants. However, the all-too-predictable behavior of internal compliance, paired with the erratic views and sanctions of self-regulatory organizations, force innovative solutions to remain on the shelf. This ensures that broad-based acceptance and usage of groundbreaking retirement technology will not be originating from

the individual who is closest to the client and so in the best position to implement change: the plan advisor.

If history from the last 30 years repeats itself, technology-based innovation will not emanate from either the legislative or regulatory arm of government in the forseeable future. The question then becomes: Where will tomorrow's "leap frog" advancements in 401(k) plan technology come from?

#### **Disruption Assumption**

Though the next big, disruptive change in the retirement industry is likely to surpass technology alone, many plan sponsors feel that the next big disruptor in the retirement space will be a new entrant with an old name.

Plan sponsors that espouse large financial service companies today seem to be ignoring customers who just want a simple, low-cost alternative. So, the changes are likely to surface through a company like Amazon, Walmart, Apple or eBay. These companies can develop a basic yet solid retirement offering for those plan sponsors seeking simplicity.

Such an offering would find favor with today's increasingly tech-savvy workforce. Everywhere one looks, people are clutching smartphones and staring into tiny illuminated screens... for hours on end... every day. Most of those people are Gen-Xers or Millennials – the Millennials being the first "digital native" generation, having grown up with smartphones. Plan sponsors are fully aware that today, most of their employees have had technology at their fingertips since birth.

The retirement structure of the '80s remains functional for a large percentage of the approximately 150 million-plus American workers who are saving for a better tomorrow. However, not everyone is ready and willing to trek into the future with the same architecture and piping that touts internet access as its latest major accomplishment.

»Steff Chalk is the Executive Director of The Retirement Advisor University (TRAU), The Plan Sponsor University (TPSU) and 401kTV.



#### Impact of the 2020 Presidential Election

If there is a new President in 2021, what timeline would regulators face today to avoid having their regulatory guidance frozen, delayed or modified in 2021?

BY DAVID N. LEVINE & KEVIN L. WALSH

ho will be inaugurated as President of the United States on Jan. 21, 2021, directly impacts Americans' lives in many ways, including guidance from the Department of Labor and the Internal Revenue Service affecting retirement plans. If President Trump is reelected, he and his administration will have four more years to issue guidance consistent with their regulatory and deregulatory objectives. If he is not reelected, however, the clock on Trump administration guidance has already begun to run.

Why is the clock already running? Those of us who went through the long regulatory process on the now-vacated Department of Labor fiduciary rule will recall the proposed regulation, the reproposed regulation, the final regulation,

the effective date, the applicability date, and all those wonky twists and turns that ensued. Notably, soon after President Trump was inaugurated, he issued an Executive Order directing the DOL to revisit the fiduciary rule.

If a new President is inaugurated in 2021, based on recent changes in administrations, readers can expect that a freeze on regulations not in effect will be issued very soon after the inauguration. So, if there is a new President in 2021, what timeline would regulators face today to avoid having their regulatory guidance frozen, delayed or modified in 2021?

First, for a major rule (which could encompass many key initiatives – an update to the DOL's fiduciary regulation, electronic disclosure, etc.), agencies typically allow at least a six-month delay

from when a final rule is issued to when it becomes effective for those affected to update their compliance processes. Thus, a major final rule would need to be published by July 20, 2020 – less than a year from now – if an agency is to give those impacted by guidance time to come into compliance.

Second, in order to publish a final rule – especially in light of recent Supreme Court and judicial guidance that reduces deference to agency guidance - a proposed rule would have to be issued first. While the timeframe for proposed guidance can vary, it would be expected that an agency would give at least 60 days from when a proposed guidance is published for comment. The agency would need to review those comments, finalize the proposed guidance, and then have it approved for final publication. Even in an expedited form, this process could take six to nine months. Tracking backwards from the July 20, 2020, date, we wind up expecting DOL to issue any proposals it hopes to finalize by July 2020 by... October 2019.

Separately, under a different federal law - the Congressional Review Act - regulatory guidance can be nullified by Congress, subject to veto by the President, by a majority vote within 60 days of a regulator issuing a final rule and providing notice of that rule to Congress. However, because this "60 day" rule is "60 legislative days," not actual calendar days, given the many breaks in Congress' schedule, this date could easily be as early as May 2020. As a result, final guidance would need to be issued in May 2020 to avoid potential nullification by a new Congress and President, thus putting further pressure on regulatory agencies.

The 2020 election is more than a year away, but its impact on regulatory guidance is already being felt. If President Trump is reelected, this pressure becomes moot, but, given past practice, it is reasonable to assume that the next few months will be a busy time for benefit plan regulators as President Trump's first term begins to wind down.

» David N. Levine and Kevin L. Walsh are principals with Groom Law Group, Chartered, in Washington, DC.





# Reach New Heights this coming January at the NTSA Summit!

innovators come together to make a difference for their clients, the industry and themselves. It is the only national gathering of professionals in the 403(b) and 457(b) marketplaces. The NTSA Summit provides opportunities for attendees to gather as an industry to gain insight from top industry thought leaders. Attendees also can network with both exhibitors and peers to expand their business as well as to gain new ideas and insight.

#### Plan Sponsors Are From... Mars?

Do plan sponsors really know what participants want?

BY NEVIN E. ADAMS, JD

ack in the early 1990s, there was a very popular "self-help" book on relationships titled, *Men Are From Mars, Women Are From Venus*. The basic premise, of course, was that men and women have different means and styles of communication – that, in essence, they might as well be from different planets (hence the title).

It suffers, as most such works do, from over-generalizing (to say the least – the hidden points system ostensibly maintained by each gender struck me as truly bizarre, even in the 1990s) – but it no doubt stimulated some relationship conversations, and if it opened some of those doors – well, that's a good thing.

The relationship between plan sponsors and participants isn't generally fraught with the same layers of complexity, but every so often a survey comes out that makes me think otherwise.

The latest was a report by American Century which surveyed (separately, but both during Q1 2019) 1,500 respondents between the ages of 25 and 65, currently working full-time outside the government and 500 defined contribution plan decision makers.

The survey found that only a small minority of plan participants (14% of those ages 25-54) wanted employers to "leave them alone" when it came to help with retirement savings – about half the number that plan sponsors thought felt that way. And, according to the survey, more than 80% of participants wanted at least a "slight nudge" from their employers (though, let's face it, plan fiduciaries might well be reluctant to go too far).

On target-date funds, some 40% of responding employers felt that investment risk pertaining to market movements was the most important factor in target-date investments – while a comparable number

of employees were more concerned about longevity risk (in fairness, investment risk wasn't far behind).

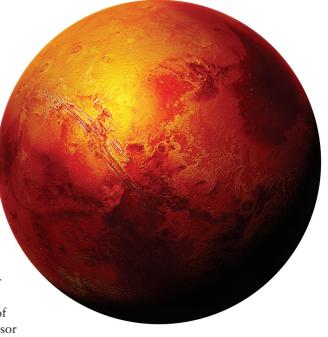
Speaking of investments, nearly all – 90% – who either already offered or were considering offering ESG investments thought their participants would be interested (and why wouldn't they), while two-thirds of sponsors say their retirement plan advisor is currently or should be recommending ESG solutions.

However, only 37% of participants actually expressed some interest in ESG options – and we've seen plenty of industry surveys (including the Plan Sponsor Council of America's, among others) – and that interest, not surprisingly, was apparently at least somewhat dependent on performance comparable to the average product. Ultimately, American Century found that while sponsors believed that 88% of workers were at least somewhat interested in the option, fewer than 40% actually were.

Sometimes the disconnects aren't even between different parties; the American Century survey found that 82% of plan sponsors believe it was at least "very important" to measure how ready employees are for retirement – and yet only 46% formally did so.

Over the years, we've seen similar "disconnects" in the benefit priorities, availability of retirement income options and, in fairness, we've also seen disconnects between what individuals say they would do – and what they seem to actually do given an opportunity. Not to mention those between plan sponsors and providers – and yes, between plan sponsors and advisors.

There are, of course, any number of rational explanations for those apparent gaps. We can be reasonably sure that these surveyed plan sponsors and participants



aren't coming from the same place – literally. We also know that different industries, and different employers, and even different geographic locations seek to hire and attract different kinds of workers – who are, in turn, motivated and attracted by different things – which they may or may not choose to share with their employer.

Sometimes people are more inclined toward openness with an anonymous survey – which may present option(s) they hadn't even considered. And sometimes, of course, they're "led" by questions designed to produce a certain outcome. Plan sponsors glean their sense of their workforce from any number of sources with a wide range of reliability – everything from personal experience to industry surveys to the headlines in the press... to the inevitable "squeaky wheels" that (too?) often darken the door of HR with their latest complaint and/or suggestion.

That there are different perspectives should come as no real surprise – and, if the occasional survey highlights some apparent discrepancies in priorities, well, one hopes that should spur some constructive consideration and engagement.

Because, ultimately, what matters isn't what "planet" you're coming from – but that you're speaking the same language.







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#### Case(s) in Point

Three years after the first of the excessive fee suits were filed against 403(b) university plans — and 13 years after the law firm of Schlichter Bogard & Denton emerged as a force in ERISA litigation — the lawsuits, settlements, and even the occasional judgment continue. Not only have the terms of recent settlements taken an interesting turn (or two), the details in support of those terms provides an eye-opening perspective into the true costs of litigation.

#### **RETRO 'FIT'?**

Is fiduciary responsibility retroactive?

A federal judge has weighed in on a question relevant to new plan committee fiduciaries: When and how does their liability for the decisions of previous committee members begin?

This case (Fuller v. SunTrust Banks, Inc., N.D. Ga., No. 1:11-cv-00784-ODE, 7/16/19) arises out of a suit brought by five former SunTrust participants who alleged violations of ERISA's fiduciary duty provisions as to the SunTrust Banks, Inc. 401(k) Plan, generally that (as many of the proprietary fund/excessive fee suits have alleged) that the defendant fiduciaries "improperly furthered SunTrust Banks, Inc.'s corporate interests – in lieu of interests of the Plan's participants – by favoring investment options that were affiliated with and enriched SunTrust Banks, Inc."

However, the specific motion considered here alleged that certain specific members of the committee "were aware that their predecessor fiduciaries had breached their duties" in selecting funds and thus breached their own duties "by failing to take adequate steps to remedy, within the Class Period, their predecessors' breaches in selecting the funds at issue." The so-called "Successor Fiduciary Defendants" were members of the Benefits Plan Committee and/or the later Benefits Finance Committee during the March 11, 2005, to Dec. 31, 2012, Class Period.

#### 'Actual' Knowledge

Judge Orinda D. Evans of the U.S. District Court for the Northern District of Georgia first considered whether the Successor Fiduciary Defendants needed "actual knowledge" of their predecessors' imprudent selections for liability to attach, or whether constructive knowledge was sufficient. And then, the court looked to determine whether the plaintiffs in the case had "sufficiently demonstrated the

Successor Fiduciary Defendants had the requisite state of mind" regarding their predecessors' selection process.

Judge Evans then turned to 29 U.S.C. §§ Section 1109(b), which he noted "makes clear that [n]o fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary." However, she noted that this "ban on vicarious liability for fiduciary breaches committed outside one's fiduciary tenure does not prevent a successor fiduciary from being held liable for his independent fiduciary breach in failing to remedy the continuing effect of a predecessor fiduciary's breach."

Judge Evans then cited language from the Labor Department (DOL Opinion No. 76-95), and noted that, while the DOL didn't explain whether the duty for successor fiduciaries arises by application of ERISA's "general fiduciary provisions"



(Plaintiffs' argument), or by application of Section 1105(a)(3) for co-fiduciaries (Defendants' argument), "the outcome appears to be the same: predecessor fiduciaries have a duty to remedy the continuing effect of breaches by predecessor fiduciaries if they know of them."

She went on to note that "courts and the Department of Labor alike have demonstrated that a successor fiduciary must have actual knowledge of a predecessor's breach to be liable for failing to remedy said breach."

### **Deconstructing Constructive**

In response to the position taken by the plaintiffs that "constructive knowledge" is

the proper standard, Judge Evans noted that "none of the cases cited by Plaintiffs quote or otherwise use constructive knowledge language," and "the cases do not appear to otherwise suggest constructive knowledge is the appropriate standard." She did note the plaintiffs' citation of "...one unreported district court case, Martin v. Harline, that suggests constructive knowledge is sufficient...", but concluded that "...this cursory approval of constructive knowledge is, to this Court's knowledge, the only of its kind; the Court finds more persuasive the many cases requiring actual knowledge and the Department of Labor's indication that actual knowledge is the appropriate standard."

Thus, in short, the Court agrees with Defendants that Plaintiffs must present evidence creating a genuine issue of material fact that the Successor Fiduciary Defendants had actual knowledge of their predecessors' alleged breaches in selecting the Affiliated Funds.

#### 'Familiar' Places

That wasn't the end of it for the plaintiffs, who went on to cite testimony of the defendant fiduciaries that they note indicate that the successor fiduciaries "familiarized themselves with Plan affairs upon becoming committee members by being briefed by other committee members and reviewing prepared documents." Additionally,

the plaintiffs noted that the Benefits Plan Committee "created documents summarizing key [Benefits Plan Committee] decisions, including some of the initial selection events."

But Judge Evans noted that there was no indication that these successor members ever saw a key document, and "even if they had, the document itself hardly provides knowledge of any breach by predecessor fiduciaries; rather, the document frames the Benefits Plan Committee's actions in a positive light, stating, for example, that the Benefits Plan Committee selected the Affiliated Funds in 1999 to provide continuity and further diversification," she wrote, "Thus, even if the Successor Fiduciary Defendants saw this document, it could hardly be said to

mind but simply looking to see if, in fact, Plaintiffs failed to present evidence of actual knowledge."

#### 'Constructive' Received?

In arguing that the defendants had sufficient awareness, the plaintiffs claimed

- there was a clear conflict of interest in offering proprietary funds;
- a "cursory review" of meeting minutes for the meetings in which the Affiliated Funds were selected would have revealed the improper selection process used;
- the defendants had a "duty to familiarize themselves with the Plan (including reviewing past committee minutes" and talking with other Benefits Plan Committee members);

improper about the inclusion of proprietary funds in the Plan," and "the mere fact that the Plan included the Affiliated Funds - and Defendants were aware of that fact – is not sufficient to charge them with constructive knowledge of their predecessors' alleged improper selection process."

All of which Judge Evans said that the "plaintiffs have failed to adduce evidence that Defendants had actual knowledge of their predecessors' breach; Defendants thus cannot be liable for failing to remedy the allegedly imprudent selection process for the Affiliated Funds," and that "even if willful blindness or constructive knowledge were enough for liability to attach, Defendants' motion would still be successful because Plaintiffs did not produce sufficient evidence."



The decision will surely be good news for newly minted committee members, providing a level of respite from committee moves that predated their participation, at least to the extent they lack actual knowledge of imprudence.

provide them actual knowledge of their predecessors' alleged fund selection breaches."

Judge Evans went on to note that, "the mere fact that some of the Successor Fiduciary Defendants familiarized themselves with the Plan and spoke with other Plan Committee members upon appointment does not show that they had actual knowledge of the alleged prior breaches." All in all, she summed it up: "Plaintiffs have failed to produce any evidence such as would create a genuine issue of material fact as to whether Defendants had actual knowledge of their predecessors' alleged breaches in selecting the Affiliated Funds."

In making the decision for summary judgment, Judge Evans reminded the parties that "the Court is not weighing conflicting evidence related to Defendants' state of

and the defendants should have known "no fund company offers the best funds in every asset class."

Unfortunately for the plaintiffs, "the Court disagrees."

Ultimately, Judge Evans agreed with the defendants that "Plaintiffs' alleged showing of constructive knowledge assumes Defendants had a duty to scour past meeting minutes and interrogate Benefits Plan Committee members for any indication of prior breaches," but "fail to cite any case justifying such a stringent obligation for Defendants," going on to explain that "the availability of meeting minutes to Defendants does not give them constructive knowledge of everything therein."

"Moreover," she wrote (agreeing with the defendants), "there is nothing inherently

#### **What This Means**

The decision will surely be good news for newly minted committee members, providing a level of respite from committee moves that predated their participation, at least to the extent they lack actual knowledge of imprudence. The 24-page decision also provides an interesting read regarding the various committee members' depositions as to their respective recollections of the training and information they received upon joining the committee.

It's also worth noting that this is only one claim resolved from the 30,000-person class action targeting the affiliated investment funds in SunTrust's 401(k) plan - and a reminder that the causes of action in this kind of litigation can have tentacles that are long-standing and far-reaching.



# **COSTS ACCOUNTING**

## Schlichter settlement highlights the costs of litigation

The final order approving a \$55 million settlement in an excessive fee case offers some compelling insights into the costs of litigation – on both sides.

Noting that "this kind of litigation has made a 'national contribution' in the clarification and refinement of a fiduciary's responsibilities and duties," and that "this litigation not only educated plan administrators throughout the country, it educated the Department of Labor," the terms of the proposed settlement in *Tussey v. ABB* which were announced earlier this year have now been approved (*Tussey et al. v. ABB Inc.*, case number 2:06-cv-04305, in the U.S. District Court for the Western District of Missouri) by U.S. District Judge Nanette K. Laughrey.

The calculation of damages in this case has been a long-standing issue as it has bounced its way up to the U.S. Supreme Court and back (the Court denied review of the case in 2014 and 2017). Ultimately, the settlement was more than monetary—as was acknowledged in the order approving the terms. Moreover the work—and the expense—of litigation was borne by both parties over a decade.

The Schlichter Bogard & Denton team said they put in 28,700 hours of work over more than a decade in a case whose outcome was "uncertain, sharply contested, often protracted, and required willingness by class counsel to risk unusual resources in time and money," Judge Laughrey wrote in support of the settlement terms. The settlement included an \$18,331,500 award to the plaintiff's attorneys (a third of the settlement amount, which, as Judge Laughrey notes, is "common in these cases"), reimbursement

of costs and expenses of \$2,256,805 and \$25,000 for the three named plaintiffs.

"Not only was the claim novel, but Class Counsel was required to fight for over a decade with well-funded defendants represented by highly-qualified national attorneys to achieve this result. Unless that risk is compensated with a commensurate award, no firm, no matter how large or well-financed, will have the incentive to consider pursuing a case such as this," she wrote.

And they weren't the only ones. Judge Laughrey noted as a matter of public record that "the two Defendants' legal fees in this case, not including expenses, exceeded \$42 million – through the trial in 2010" – a figure, she acknowledged that does not include fees paid for experts or other expenses, which were substantial. In fact, the cost for just one of ABB's experts, Glenn Hubbard, and his research was \$3.2 million, far exceeding the entire requested expenses for Class Counsel in the 12 years of this case.

"Class Counsel brought this case without guarantee of reimbursement or recovery, so they had a strong incentive to keep costs to a reasonable level, and they did so," Judge Laughrey concluded. Noting that "an empirical study of the costs awarded in class action litigation found that the average cost award was equal to 4% of the relief obtained for the class," she concluded that the requested reimbursement of costs and expenses totaling \$2,256,805 – less than 3% of the recovery sought – were "well within the range to be considered generally reasonable."



# **'WASTE' KNOT?**

Investment advisor settles excessive fee suit

In the interest of efficiency and to avoid wasting the resources of the Court and the parties," just five days before their trial date, the parties in an excessive fee suit have come to terms.

This time it's the investment advisor to the plan AON Hewitt Investment Consulting, Inc. – and their actions as part of an excessive fee suit that also involved Safeway and its recordkeeper (now Empower, by way of Great-West, by way of J.P. Morgan Retirement Plan Services). The Safeway fiduciaries had just settled two related class actions regarding its 401(k) plan; the instant case, and another class action (*Lorenz v. Safeway Inc.*) that had raised general concerns regarding the plan's investments and fee structure.

In mid-April, AON Hewitt's motion to dismiss the plaintiff's claims had been largely (though not completely) dismissed by Judge Jon S. Tigar of the U.S. District Court for the Northern District of California. Judge Tigar had found that there were triable issues of fact with regard to:

• Whether "Aon's persistent and relatively consistent 'advice' was to retain the existing investments in the Plan" and Aon "recommended that the other Defendants do little or nothing to improve the investments offered by the Plan and the expenses paid by the Plan and its participants," even when those investments were significantly underperforming.

• Whether Aon met its duty of prudence to monitor the performance of the Interest Income Fund and determine whether to recommend its replacement as a plan asset, with similar questions related to the SSgA S&P 500 Index Fund, the Wells Fargo Advantage Strategic Large Cap Growth Fund, the RS Partners Fund, and the Chesapeake Core Growth Fund.

Now Plaintiff Maria Karla Terraza and defendant AON Hewitt Investment Consulting Inc. informed the court (*Terraza v. Safeway Inc.*, N.D. Cal., No. 16-cv-03994, 5/2/19) that "they have accepted a mediator's proposal and reached an agreement in principle for a proposed class-wide settlement," and that they intend to seek the court's approval of same.

In this filing, the parties requested that the court "vacate the May 7, 2019 trial date and set a Case Management Conference (CMC) for July 31, 2019 at 2:00 p.m. – the same date that the Court set for the CMC to address the proposed settlement between Plaintiff and the Safeway Defendants."

The cases were all slated to go to trial on May 7 in the Northern District of California. The amount of the settlements weren't disclosed.

# **'SETTLED' LAW**

While disputing allegations and denying liability, plan fiduciaries have announced the second largest monetary settlement to date regarding a university retirement plan.

This settlement – for \$14,000,000 – involves the \$4.3 billion Johns Hopkins University 403(b) Plan, a suit brought by the law firm of Schlichter, Bogard & Denton as part of the first wave of these suits.

The defendants had had some success in late 2017 in persuading a federal judge to dismiss some, though not all, of the claims made – specifically claims that "Johns Hopkins acted imprudently by offering too many investment options or higher-cost share classes in the Plan," and to the extent that Plaintiffs alleged that maintaining "mutual funds or that revenue sharing from a mutual fund is a prohibited transaction."

The settlement announcement notes that it comes "after extensive arm's length negotiations with assistance of two independent mediators" and acknowledges that it "comes at a time when the Fourth Circuit had accepted an interlocutory appeal of the denial of Defendant's motion to dismiss."

And, in what seems to have become something of the norm for these cases (at least those brought by the Schlichter firm), it has both a monetary and a non-monetary component, the latter of which involves actions committed to by the defendant-fiduciaries for a future three years.

#### **Monetary Terms**

The terms of the proposed settlement (must still be approved by the court) include \$14,000,000 that will be used to pay the participants' recoveries, administrative expenses to facilitate the Settlement, and Plaintiffs' counsel's attorneys' fees and costs, and Class Representatives' Compensation if awarded by the Court. Those additional costs include:

• \$4,666,667 – Plaintiffs' counsel (not more than one-third of the

Gross Settlement Amount, as well as reimbursement for costs incurred of no more than \$75,000); the settlement notes that they won't seek fees from any interest earned in the settlement account, nor for their time communicating with class members or defendant during the settlement period (more on that in a minute)

- \$25,000 Newport Trust Company as the Independent Fiduciary (explained later)
- \$89,072 RG/2 Claims
  Administration LLC as the Settlement
  Administrator to provide notices
  electronically for those class members
  for whom a current e-mail address is
  available and by first-class mail to the
  current or last known address of all
  class members for whom there is no
  current email address.
- \$20,000 for each of the named plaintiffs

#### Non-Monetary

The defendants agreed to provide an annual update to the plaintiffs' counsel of the investment options, investment policy statement and fees of the plan; to retain an "independent consultant" to help them (the fiduciaries) in reviewing the plan's investments and removing inappropriate options; to document for plaintiffs' counsel any options that are retained despite that recommendation; to conduct a recordkeeping and administrative services RFP (including an agreement not to solicit participants for any extraneous services; to provide to plaintiffs' counsel the bids received within 30 days of the selection and plaintiff's counsel basically reserves the right to seek enforcement of the terms if they believe the fiduciaries haven't lived up to the agreement.

They also agree to communicate with participants about their investment options, and to provide online access to information regarding those options

(including performance and fees) and contact information for individuals that can facilitate a fund transfer (if desired).

The settlement agreement states that those non-monetary terms "are substantial and materially add to the total value of the settlement."

#### Other Cases

Of the roughly 20 universities that have been sued over the fees and investment options in their retirement plans since 2016, this is the fifth announced settlement; the largest to date was Vanderbilt University, which in April 2019 announced a \$14,500,000 cash settlement, as well as a long list of process/ procedural changes that were also to be monitored over a three-year period. In March, Brown University settled for \$3.5 million, as well as "other, structural relief." In May 2018, the University of Chicago entered into a class action settlement for a \$6.5 million cash payment and changes to the university's \$3 billion plan, while earlier that year Duke University announced a \$10.65 million settlement.

On the other hand, St. Louis-based Washington University, New York University, the University of Pennsylvania and Northwestern University have thus far prevailed in making their cases in court.

#### **What This Means**

For the Schlichter law firm, anyway, these settlements seem to have moved beyond "mere" money, and into some fairly extensive procedural guidelines in plan administration and review. While arguably none seem to go beyond what might reasonably be expected of the ERISA fiduciaries of a multi-billion dollar plan, there's little question that the external oversight of – and reporting to – plaintiffs' counsel over an extended period could become tedious, at best.



# Polling Places

NAPA-Net readers weigh in on conducting client meetings via webcasts.

# **VIRTUAL REALITIES**

Virtual committee calls catching on, but...

As another quarterly calling cycle got underway, a reader asked: "How many advisors use webcast platforms for some or all of the quarterly Committee meetings – and how are those received?"

As NAPA-Net readers know, there are few things more valuable in your day than time – and so-called "virtual" meetings can certainly enhance productivity – but at what relational satisfaction cost?

#### Committee 'Calls'

We started by asking if readers have ever used some kind of webcast platform to conduct plan committee meetings, and found that a plurality (41%) had, that 26% had done so for some clients, but not all, and that 9% had done so for some meetings, though not all. Roughly a quarter (24%) hadn't done anything.

"This only takes place when a committee member needs to dial in remotely and cannot attend in person," explained one reader. Another commented, "We use a webcast platform only rarely. We use conference calls a bit more frequently, but meet in person most of the time."

"Only when a client either has multiple meetings per year and requires a flight to get there. Then at least 1 meeting a year is done in person. Also, if a client requests the meeting be handled over the web," commented another.

"This is really for some clients and for some meetings from a majority perspective," observed another. "We have one client with committee members across the US, every meeting is a GoToMeeting."

"Availability of an easy to use tool has been the main problem," explained one reader. "Currently I have not conducted webinar meetings. However, I am exploring the idea and very interested in the survey results," noted another.

Asked how those sessions had gone:

48% - Very well 29% - Pretty well 18% - Mixed reviews 4% - Some liked it, others not so much

"I think it depends on the company's culture," noted one reader. "For some of our clients they are very accustomed to web meetings, that is how they themselves conduct business internally. If that's the case, they are very open to, and in many cases prefer, a web meeting."

"Next best thing to being there," noted another. "We do try to be in front of our clients as we feel this helps to build our client relationship. We do recognize the need for virtual meetings and will certainly accommodate these requests to meet our clients' needs, whenever necessary."

#### **Participant Protocols**

Committee meetings are one thing – but what about participant/employee meetings? Only about 12% responded that they did so "all the time," while nearly a quarter (24%) said they hadn't, though a plurality (47%) said they had done so "occasionally." The rest were in the "yes, but only rarely" category.

"This is a growing need as more and more employees work from home," noted one reader. "We see the numbers of web participants joining these sessions growing. Again, per my point above, as the company culture evolves for our clients."

One reader noted that they did so "typically in education situations for

presentation delivery across a wide geographic area." Another said they are doing "GoToMeetings with participants so that we can have a nationwide reach." Another reader explained that this approach "works well for employee education for off-site employees."

Still another commented, "This is an area we are considering at this point; especially with new technology advances that will enable us to do so."

But as for social media interactions as a platform for participant/employee meeting interaction – well, that was a horse of a different color

The vast majority – nearly 85% – had not, while another 9% said they had done so, "but only rarely." The rest split between "yes, all the time" and "yes, occasionally."

One reader explained: "We do use LinkedIn primarily as a platform to reach the C suite audience. Due to compliance regulations we have not done so at the participant 1:1 level on LinkedIn or FB. We do some outreach on FB and likely will do more in the near future geared towards the broader participant population."

#### (More) Reader Comments

As is often the case, we got a number of reader comments on the subject. Here's a sampling:

"We conduct webinars for a fair number of our clients. We also take many phone calls/emails from participants. Not sure this is considered virtual but we are not meeting face to face."

"I would like to conduct more of them but feel clients may not receive well. Not for every meeting but if we meet four times a year with some, it would be nice to do



two of them via a virtual webcast. I fear clients will feel we are slighting them by not being there in person. You also never know if the platform will operate properly based on the technology access of the client."

"Would love to see the survey results and how advisors are using it."

"We plan to increase use of webcasts for committee meetings. Our caution with doing so is that we might decrease the sense of engagement felt by clients, which in turn could lead to loss of clients."

"Virtual meetings are helpful, especially for clients located far away. We will usually employ a different strategy with more condensed subject matter as a webinar is not a perfect substitute for in-person meetings. But webinars can be helpful on occasion if schedules don't come together properly for an in-person meeting."

"As mentioned in your intro, 'time' is one of our most valuable commodities the same is true for participants and for the 'employee time' is a valuable commodity for employers – webcast benefit all three parties by eliminating logistics/travel time."

"With fee compression, our team is thinking about how to incorporate an 'every other meeting' approach using webcasts and for smaller plans possibly only doing an annual in-person review and participant education meeting. At recent peer group meetings, it is apparent that using technology to improve margins continues to be important. We have a Committee that is made up of executives spanning the country. The only way to conduct the Committee meeting is using a virtual webcast. Since that client led us to the virtual meeting approach, we are using this more. After we began assembling all the meeting materials in a single 'bookmarked' PDF, the Committee members stayed on track. Originally we emailed multiple PDFs (performance, plan level stats, legislative updates, benchmark reports, etc.) and this proved to be most confusing and problematic. We also conduct open enrollment meetings for NQ plans using virtual webcast given many eligible are geographically dispersed. Our fallback is to use a conf # and the PDF. Ideally, we prefer to use a platform, but often there are technical hurdles. Our firm uses SKYPE and we have heard that ZOOM is a better platform. I would like to know more about what platforms others are using with success."

"I don't think I'd start the relationship only expecting virtual meetings, I think it's easier to transition a client to them after you've been meeting with them awhile."

"I would like to read more about what webcast platforms advisors are using and how they feel about their ease of use, effectiveness and cost."

"We find it works well with plans whose committees are traveling or are located in different geographical locations."

"Virtual is great – when it works!"

"Even local participants we serve are taking advantage of virtual one on one. Easier for them to do it from their desk or from their home office than to come to the corporate office for the meeting. Also helps to take bad weather out of the equation (think polar vortex that hit much of the country this past winter)."

"We are looking to offer more virtual 1:1 participant and group meetings as we do have clients that are geographically spread out. Would love to hear from others on best practices on conducting virtual meetings and what creative ways they have successfully reached their participant population (webcasts, YouTube videos etc.)."

"If everyone has the information or materials in front of them (on a screen or papery bits), just a plain old telephone call is all that's needed."

"As you mentioned, we have limited time. I don't have many plans with formal committees but I do have many plans that are very interested in participant outcomes. The problem is that I work with plans across the country. Knowing if virtual participant education/communication is well received will be very helpful. Thanks for the survey."

Thanks to everyone who participated in this – and every week's – NAPA-Net Reader Poll! 🕥



# Regulatory Review

It was only a year ago that President Trump directed Treasury, the IRS and the Labor Department to work together to resolve a number of issues seen as holding back plan adoption and participation. And, as we go to press and the federal government winds up its fiscal year, we have final regulations for association retirement plans and an electronic disclosure proposal at the Office of Management and Budget. We've also got DOL approval of an auto-portability program, and some clarity around the status of those uncashed plan checks... and the year isn't over yet.

# 'OPEN' DO-ERS

**DOL** unveils final rule on Association Retirement Plans

The Department of Labor has announced a final rule that expands the availability of some multiple employer plans (MEPs) – and an RFI that seeks more information on "open" MEPs.

Acknowledging that Association Retirement Plans (ARPs) and MEPs exist now, the Labor Department notes that in addition to employer groups in the same industry or line of business, the final rule makes it clear that an ARP can also cover employers in the same geographic area, such as a common state, city, county, or a metropolitan area (even if it crosses state lines). Moreover, they note that working owners without employees, including sole proprietors, can participate.

In a press release announcing the final rule, the Labor Department notes that under the rule, ARPs could be offered by associations of employers in a city, county, state or a multi-state metropolitan area, or in a particular industry nationwide. In addition to association sponsors, the final rule includes a regulatory safe harbor for Professional Employer Organizations (PEOs) (human resources companies that contractually assume certain employment responsibilities for their employer clients),

noting that the final rule helps PEOs with a pathway to be certain they are offering a valid MEP.

Moreover, by expressly permitting these new plan arrangements, the Labor Department says the rule enables small businesses to offer benefit packages comparable to those offered by large employers, and that it "expects the plans to reduce administrative costs through economies of scale and to strengthen small businesses' hand when negotiating with financial institutions and other service providers." The final rule's effective date is Sept. 30, 2019.

#### Open MEP RFI

Noting that "many commenters asked the Department to give further consideration to facilitating "Open MEPs," a 16-page Request For Information (RFI) is published with the final rule. Responses to the RFI are due by Oct. 29, 2019.

Just ahead of the Labor Day weekend in 2018, President Trump signed an executive order directing the Departments of Labor and Treasury to consider changes to make it easier for businesses to join together to offer MEPs, which the order refers to as

Association Retirement Plans (ARPs). In keeping with that directive, last October the Department of Labor released proposed rules that would expand access to multiple employer retirement plans for small employers and self-employed workers, while also - critically - maintaining fiduciary oversight. The proposal was modeled after the Association Health Plans (AHPs) concept, and provided that an association - under certain conditions - would be permitted to serve as the employer for purposes of sponsoring the 401(k) for members of the association, such that the association will be the standing in the shoes of the employer. The proposal also clarified that PEOs can sponsor a 401(k) for clients that a PEO works with on other human resource functions, and would also permit certain working owners without employees to participate in a MEP sponsored by a group or association.

However, that proposal did not include the kind of "open" MEP by unrelated employers that has been the subject of much industry enthusiasm, and which has been incorporated in a number of recent legislative proposals, most notably the Setting Every Community Up for



Retirement (SECURE) Act. The DOL notes that it has to interpret the law as currently written and that pending legislation on Capitol Hill would address this.

### Disclosure 'Closure'?

Pending passage of the SECURE Act, advisors and plan sponsors alike have more to look forward to, as delegates at the seventh annual NAPA D.C. Fly-in Forum were told July 23 by a senior Labor Department official to keep an eye out for proposed guidance addressing electronic disclosure of retirement plan information. Jeanne Wilson, Principal Deputy Assistant Secretary with the Department of Labor's **Employee Benefits Security Administration** (EBSA), said the agency would soon be issuing a proposal that follows up on President Trump's 2018 Executive Order directing the agency to improve the effectiveness of and reduce the cost of retirement plan disclosures.

As we head to press, the Labor Department sent a proposed rule for electronic disclosures to 401(k) participants to the White House's Office of Management and Budget.

That order directed the Labor Department to "explore ways to reduce the costs and burdens imposed on employers and other plan fiduciaries responsible for the production and distribution of retirement plan disclosures" required under title I of ERISA, as well as "ways to make these disclosures more understandable and useful for participants and beneficiaries."

The current retirement plan disclosure rules were established more than a decade ago (2004).

The proposal, noted as "economically significant," was received at the OMB for review on Aug. 16; OMB typically takes 30 days or less to review a proposal.

A report commissioned by the American Retirement Association and the Investment Company Institute in 2018 estimated that participants could save more than \$500 million per year, assuming about eight participant mailings per year across more than 80 million 401(k) account holders. By contrast, once an electronic notice is drafted, the incremental cost of an email to one person is essentially zero, the study notes. And as discussed in the 2011 study, there are also enormous environmental benefits to e-delivery from the reduction of tons of discarded paper every year. A 2015 report prepared for the SPARK Institute offers similar findings, with estimated annual savings of shifting to e-delivery for retirement plan notices in the range of \$300 million to \$750 million per year.

One presumes the proposal was delivered... electronically.

Stay tuned.



# **CHECK 'POINTS'**

The Check is (Still) in the Mail?

It's a question that your plan sponsor clients – and perhaps TPA partners – struggle with – what happens when a qualified plan mails a distribution check, but the check is not (yet) cashed? Here's what the IRS thinks...

In Revenue Ruling 2019-19, the IRS takes up the issue – and considers three foundational questions about what happens when a qualified plan mails a distribution check, but the check is not (yet) cashed.

It addresses whether the uncashed check is gross income and whether failure to cash the check affects the withholding obligation or the reporting obligation. The IRS has determined that if an individual receives a distribution check from a qualified plan and does not cash it, the amount of the designated distribution is includible in gross income and the employer remains subject to withholding and reporting obligations.

The conclusions reached by IRS are not surprising. After all, Code Section 402(a) provides that amounts "actually distributed" from a qualified retirement plan are includible in income in the year distributed. The alternative of allowing individuals to delay recognition of a distribution by simply ignoring a

distribution check would allow them to delay taxable income, a path IRS clearly does not want to go down. In effect, Section 402(a)'s "actual distribution" language effectively trumps constructive receipt for distributions from qualified plans under which earlier inclusion of income otherwise might be consistent.

Regardless, in practice, Section 402(a) generates confounding results for distributions made at or near the end of the tax year that cannot be deposited until the following year. Plan sponsors and service providers face reporting and withholding puzzlers, particularly when actual receipt is lacking due to death or an incorrect address – and, of course, there are many such situations.

We know that the IRS continues to analyze other situations involving uncashed checks, including situations involving missing participants. It's a good bet that this Revenue Ruling will serve as a baseline for future guidance.

Additional guidance from IRS would be welcome.

— Allison Wielobob, General Counsel, American Retirement Association

# LIMIT 'ED'

**IRS Announces 2020 HSA Limits** 

The Internal Revenue Service has announced updated deduction limits for high-deductible health plans.

For calendar year 2020, the annual limitation on deductions under § 223(b)(2)(A) for an individual with self-only coverage under a high-deductible health plan is \$3,550, up \$50 from the 2019 limits. Additionally, for calendar year 2020, IRS Revenue Procedure 2019-25 notes that the annual limitation on deductions under § 223(b)(2)(B) for an individual with family coverage under a high-deductible health plan is \$7,100, increased from \$7,000 in 2019.

In 2018, the annual limit on deductible contributions was \$3,450 for individuals with self-only coverage (a \$50 increase from 2017) and \$6,900 for family coverage (a \$150 increase from 2017).

For calendar year 2020, the Revenue Procedure also explains that a high-deductible health plan is defined under § 223(c)(2)(A) as a health plan with an annual deductible that is not less than \$1,400 for self-only coverage or \$2,800 for family coverage, and the annual out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) do not exceed \$6,900 for self-only coverage or \$13,800 for family coverage.

Those limits are up slightly from the 2019 limits of \$1,350 for self-only coverage or \$2,700 for family coverage, with annual out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) that don't exceed \$6,750 for self-only coverage or \$13,500 for family coverage.

— NAPA Net Staff



Congratulations to all four of our sales directors recognized by NAPA for their contributions to the success of retirement advisors. We would also like to thank the retirement plan professionals who placed their confidence in our retirement team.

# **Top 10**

# **Nancy Tassiello**

Mid-Atlantic region

## **John Kutz**

Mid-Atlantic region

# **Matt Digan**

Northeast region

## **Carrie Temkin**

Midwest region

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# 'A' OK?

In an effort to help address the issue of retirement plan leakage, the Department of Labor has approved the Retirement Clearinghouse's request for relief from ERISA's prohibited transaction restrictions to receive fees in relation to its pioneering auto-portability program.

The DOL's Employee Benefits Security Administration on July 30 granted a five-year exemption permitting the Retirement Clearinghouse (RCH) to receive certain fees in connection with the transfer under the firm's RCH Program of an individual's default IRA or eligible mandatory distribution account (EMDA) assets to the individual's new plan account without the individual's affirmative consent.

Among other things, the RCH Program seeks to help eliminate duplicative fees

and reduce retirement savings leakage by providing individuals who are changing jobs with a way to transfer retirement assets from their prior employers' plans to their new employers' plans. The program also helps identify when an individual with a default IRA or EMDA has opened a new plan account with his or her current employer. To do all of this, the program features "locate and match" technology that coordinates among multiple recordkeeper systems.

Participating plan sponsors can designate RCH or a participating recordkeeper to be the plan's default IRA provider for automatic rollovers of mandatory distributions and for distributions from terminated DC plans. Then assets will be transferred from an EMDA to an RCH default IRA and then to a new plan account, or from a non-RCH default IRA to an RCH default IRA and then to a new plan account, after the individual has given consent or failed to respond to specified notifications within a certain time period.

Relief under the exemption is solely available for the payment by a default IRA of a transfer fee and a communication fee to RCH in connection with the transfer of \$5,000 or less, with a limited exception, to a new plan account.

#### 2018 Advisory Opinion

In response to RCH's request, the DOL issued an advisory opinion (AO) in November 2018 clarifying that neither the plan sponsor of the former employer nor the new employer would be considered a fiduciary in connection with a decision to transfer the individual's default IRA into the new employer's plan, nor would have any involvement or responsibility for the decision by individuals in that program to transfer those IRA assets into the plan of a new employer.

The AO further explains, however, that the decision by a plan sponsor/fiduciary to participate in the RCH Program is a fiduciary decision, and one that must be prudent and solely in the interest of plan participants and beneficiaries.

How big of an effect might the program have? EBRI research from 2017 shows that system-wide adoption of auto portability for all retirement balances could increase private-sector savings by nearly \$2 trillion, and preventing leakage from smaller accounts alone would save \$1.5 trillion. And according to Retirement Clearinghouse President and CEO Spencer Williams, approximately 37% of job-changers cash out of their retirement accounts because they need the money, while the remaining 63% do so because it is "the easiest path available," despite the early withdrawal penalty and taxes.

— Ted Godbout





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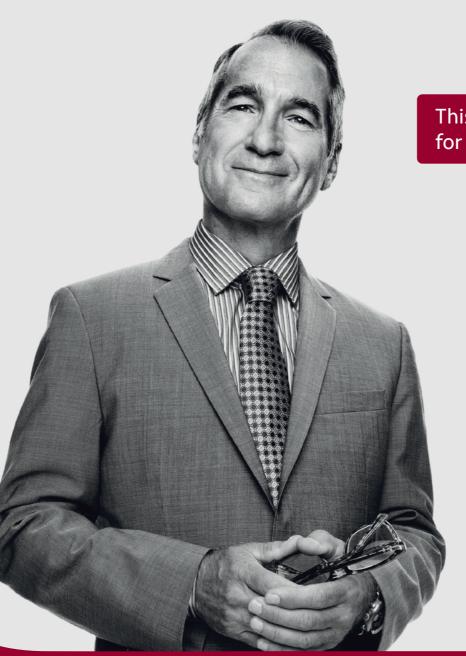




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<sup>1</sup>Alight 2018 401(k) and HSA Analysis. Alight surveyed more than a million participants at 34 large employers in 2017. Among people who are enrolled in HSA-eligible health care plans, those who contribute to both the HSA and the 401(k) save, on average, 8.9% in the 401(k) plus an additional 2.9% in the HSA. Compared to the 6.8% average for workers who save only in the 401(k).

<sup>2</sup>Nationwide Retirement Plans won the DALBAR Plan Participant Service Award 2014-2018.

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Barbara Wilderman Regional Vice President Retirement Southeast Division





**Dan Zibaitis** Regional Vice President Retirement **Northeast Division** 



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