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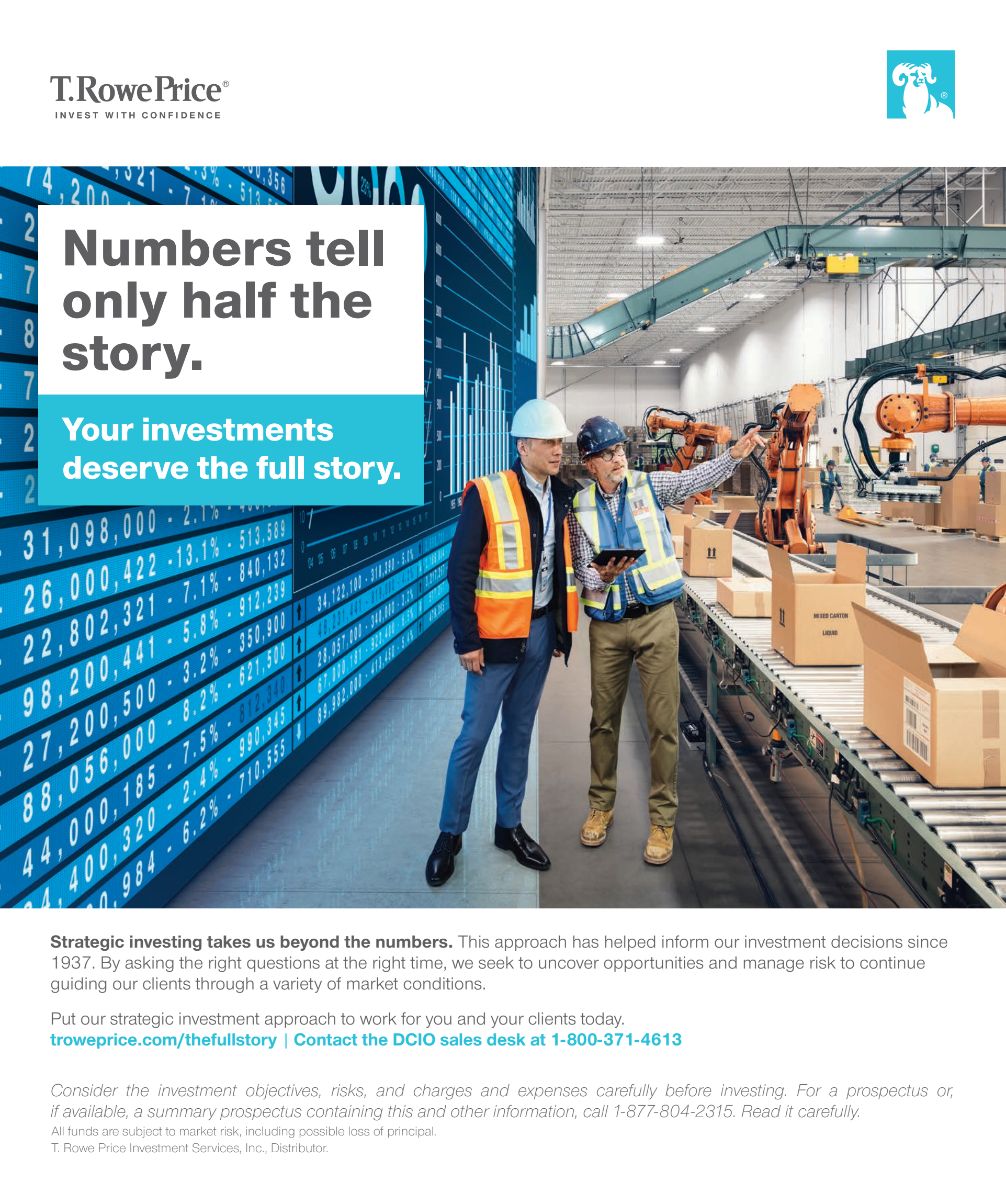
NEW
THINKING
ON ITS USE
IN 401(K)
PLANS
EMERGES,
WHILE THE
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2020 Hindsight

WHAT A DIFFERENCE A YEAR MAKES.

This is a time of year when we normally look back, take note of what's been accomplished, and in the words of that holiday classic, "settle down to a long winter's nap."

Not this year.

As we head to press, the pandemic which has literally plagued our world this year remains active. And while there are promising signs for the future, for many the holiday season will be muted—hindered by travel barriers and health concerns—and millions of households will make do without the voices and smiles of those who have been taken from us, by COVID-19 or the forces that inevitably separate us from the ones we love.



record books." Indeed, with those developments, coupled with a series of proposals, comment periods and final rules, it feels like our industry has been operating under our own version of Operation Warp Speed.

It was a year in which the support our community provides working—and furloughed—American workers information, guidance, help, and—surely in a multitude of cases—hope. While many days were a struggle, the successes of 2020—and they are myriad—have required extraordinary measures of resilience, persistence, perseverance and patience.

Of course, we're not done yet. These past few months have surely taken a toll—undermined confidence, jostled planning, accelerated the pace of change, and—in some cases—retirement. While the markets have held up, those gains feel fragile—and many, though not as many as feared—have been forced to draw from those retirement savings to sustain their life in the here and now. The economic toll on small businesses threatens to widen and deepen a consistent and significant

Beyond that, as we head into 2021, we shouldn't lose sight of the importance and impact of our profession, the significance of relationships, both new and enriched by the shared experiences of the past year—and the opportunities ahead to not only rebuild, but build a better future for those we serve and support.

Wishing you and yours the best this holiday season—with thanks for all you do, have done, and will do in the months ahead!

Nevin E. Adams, JD
Editor-in-Chief

“Yes, this year has been one for the record books—one filled with turmoil and uncertainty, one that brought us together as it pulled us apart.”

Yes, this year has been one for the record books—one filled with turmoil and uncertainty, one that brought us together as it pulled us apart. It was a year that forced us to look at our world and our priorities differently—and in strange ways gave us an opportunity to reconsider ways of living and working that heretofore would have been dismissed as... impossible.

Without question, between SECURE, and CARES and PPP, it's been another kind of "one for the

component of the retirement coverage gap.

But today, as we head into a new year, with the hope of a vaccine for this virus and the prospects of a return to normalcy in our lives, it's worth looking back—remembering not only what has been lost this past year, but what we've (hopefully) gained—a fresh appreciation for the joy of human contact, a greater consciousness of the benefits of good health, and the freedom of travel.

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2020: The Year of Adaptation

OUR LIVES HAVE CHANGED, NOT JUST FOR 2020, BUT I BELIEVE FOREVER.

By Patricia S. Wenzel

According to Darwin's *Origin of Species*, "It is not the most intellectual of the species that survives; it is not the strongest that survives; but the species that survives is the one that is able best to adapt and adjust to the changing environment."

This year, we have personally and professionally had to adapt to our changing environment in order to survive.

Our lives have changed, not just for 2020, but I believe forever. It is vital to embrace our new normal. Many of the changes we've seen in our industry, frankly, have long been overdue. Additionally, I hope the many of the changes this past year will be

can engage in four or more virtual committee meetings daily.

- **Saving money:** No travel means no travel expenses. For years, our compensation has continued to get compressed. Now, we keep a little more of what we earn.

- **Killing fewer trees:** We used to have to print, copy, bind and mail hundreds of committee books with thousands of pages every quarter. Doing away with this printing is saving us hundreds of hours as well as helping the environment. Now, our communications are electronic, and most clients have accepted the digital age.

This virtual world is a huge game-changer for us regarding efficiency, capacity,



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to innovate new processes for servicing and onboarding clients. Change brings challenges, but we must continue to adjust to make interactions better and easier.

From what I've seen, advisors who had good processes and were actively servicing and prospecting never slowed down; they just stepped it up. Those who were not as driven or organized and not actively growing their client base are at risk of extinction. I am fortunate that I have 29 years in the industry, so most of my business comes from referrals. However, many of my new clients this year came to me because their advisors were MIA.

During a challenging market, you have to step up calling and communicating with your clients. Our digital tools make interactions and the frequency of communication easier than ever before. Make sure you continue to use technology to innovate on how to make business even better. As a leader, it's even more difficult now to motivate and supervise your team. What matters is effective communication and organizational skills. Of course, we still have to constantly learn what works best with different people. I know many individuals have struggled with social distancing and isolation, leading to depression and anxiety. We always have to count our blessings—we are safe, comfortable and healthy. Our situation could be much worse!

Eventually, as we continue to adapt during COVID, we may feel more natural wearing masks, staying at home and engaging in our personal and business relationships virtually. Just as species have evolved and adapted to their changing environments through the generations, so must we. It is vital to our survival. Remember, the dinosaurs did not survive, but we will, and we will reap the benefits as a result!

I wish you and your families a happy and healthy holiday season! **NTM**

“Remember, the dinosaurs did not survive, but we will.”

permanent. Let's reflect on 2020 and discover how innovation will bring us a stronger future.

Virtual Meetings

If you weren't using WebEx, Zoom, Microsoft Teams or other virtual meeting software before, I bet you're a pro now! Here's what I love about this technology:

- **Time efficiency:** Before going virtual, I only had one to two committee meetings per day due to travel time. Now with no travel, I

and profitability of our teams. Hopefully, beyond COVID, our clients will continue to accept this form of communication.

Working from Home

We've proved we can successfully work from home, service our clients and bring in new business. Additionally, adapting to new communication protocols helps assure business gets done efficiently and effectively. As we adapt, we must continue



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Unfinished Business

TOGETHER, WE'VE ACCOMPLISHED SO MUCH IN THIS EXTRAORDINARY YEAR—BUT THE BUSINESS OF AMERICA'S RETIREMENT REMAINS A WORK IN PROGRESS.

A year ago most had written off any prospect of legislative developments, much less something as sweeping as the Setting Every Community Up for Retirement Enhancement (SECURE) Act—one of the most significant pieces of retirement legislation in more than a decade. We hadn't even gotten to the New Year's champagne before we were immersed in sorting out the implications, identifying needed points of clarity, and fleshing out FAQs—that hadn't even had an opportunity to be asked—but would be. Questions that would continue to be asked—and answered during the first quarter. And then...

Who could have imagined that mere weeks following that we'd find ourselves in the middle of a worldwide pandemic—necessitating sweeping legislative relief in the Coronavirus Aid, Relief and Economic Security (CARES) Act. This time the relief was real, but optional, and the retirement provisions primarily focused on making it easier for participants to access retirement savings. Which, of course, created extraordinary challenges, operationally, administratively, and in communications for plans and our members.

You were an integral part of the process—helping highlight key issues, to prioritize areas that needed confirmation, clarity, and correction, working together to provide results that could be sustained with minimal impacts of retirement security. With the assistance of members, we were able to identify which providers had embraced default assumptions about adoption of CARES distribution and loan provisions, and to provide that information to

assist planning and communication, we conducted webinars that helped bring to the fore critical questions that not only fostered another set of FAQs, but informed and helped guide our discussions with regulators as we sought to work out the “kinks” and fill in the blanks that the hastily crafted legislation missed.

Members were also an essential aspect of our assessment and evaluation of the impact of COVID-19 on employers and their ability to sustain the financial commitments of these programs, notably safe harbor plans. Through member surveys (ASPPA, NAPA and PSCA), and collaboration with the Employee Benefit Research Institute (EBRI), we were not only able to quantify the potential impact



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

“We took your concerns—and those of your clients—to lawmakers and regulators, and, with your help, effected positive change that made a difference.”

across the industry, but to provide legislators with some “real world” examples of employer/plans in their districts, and the implications for their continued support of their plans in the absence of relief. It is, unfortunately, a message that we continue to press on Capitol Hill—and one that we'll likely need your help on in the weeks ahead.

We've been there with you as we sorted out the impact of the SECURE Act, developed FAQs to help you help your customers understand and take action, took on the CARES Act, tracked the legislative and subsequent

regulatory guidance, and along the way—via webinars, publications, and virtual events—strove to provide you with the most accurate, actionable intelligence and insights. We took your concerns—and those of your clients—to lawmakers and regulators, and, with your help, effected positive change that made a difference.

We're not done, of course—and 2021 looks to be just as challenging. We're already working with your Government Affairs Committee to map out a strategy for needed relief and clarity on a series of new rules and regulations, both proposed and (now) final. On that front, we've just seen the introduction in the House of Representatives of what's been called SECURE 2.0, the Securing a Strong Retirement Act of 2020. It's a bipartisan bill—sponsored by House Ways & Means Committee Chairman Rep. Richard Neal (D-MA) and Rep. Kevin Brady (R-TX), the ranking Republican on the committee—the same duo that managed to get the SECURE Act through a sharply divided House by a margin of 417-3 less than a year ago. That legislation could, as SECURE was a year ago, find its way into law as part of a year-

end agreement. There are also a number of retirement provisions contained in the House-passed HEROES Act and the Senate's HEALS Act package that could be folded into a year-end agreement.

Together, we've accomplished so much in this extraordinary year—but the business of America's retirement remains a work in progress. It's “unfinished” business, but one in which—under extraordinary strains and circumstances—we've been able to make a positive impact—together. **NTM**



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Trends ‘Setting’

IN A YEAR OF EXTRAORDINARY AND UNPRECEDENTED EVENTS, DISCERNING TRENDS AND MAKING PREPARATIONS FOR THE FUTURE IS MORE ESSENTIAL—THOUGH PERHAPS MORE CHALLENGING—THAN EVER. COULD THE “FERVOR” FOR FINANCIAL WELLNESS SOLUTIONS BE FADING, MIGHT 403(B) PLAN PRIORITIES BE (SLIGHTLY) SHIFTING, AND HOW IS HAS EDUCATION COMING UP SHORT? ALL THAT, AND HOW PLAN SPONSOR AND ADVISOR PRIORITIES AND PERSPECTIVES VARY IN THIS ISSUE’S TRENDS SETTING.



Fading Fervor?

Is financial wellness fervor fading?

Employer interest in financial wellbeing benefits appears to have plateaued, though the engagement with such programs seems to be deepening.

That interest level has leveled off at just about half (52%) of employers, and that includes those who said they were at least “interested” in implementing financial wellbeing benefits. While this is “essentially unchanged from 2018 and 2019,” according to the Employee Benefit Research Institute (EBRI), their recent report notes that, increasingly, employers that do not currently offer financial wellness initiatives say they are actively implementing such a program, rather than just expressing interest in those programs. Specifically, the percentage actively implementing increased from 12% in 2018 to 25% in 2020, while the “just interested” percentage slipped from 34% to 22%.

However, note that the 2020 EBRI Financial Wellbeing Survey was conducted only among full-time benefits decision makers at firms¹ with at least 500 employees that were at least interested in offering financial wellness programs.

Larger employers (10,000 or more employees) were more likely to be currently offering a program than smaller employers—approximately three-in-four of those firms, compared with just under half (49%) for employers with 2,500–9,999 employees, and 47% for employers with 500–2,499 employees.

‘Whole’ Listing?

The report cites a “significant change” that they claim indicates a maturation in approach with these programs was the increased likelihood that the programs were considered “holistic”—57% of the responding employers in 2020 compared with 42% a year ago. This labelling occurred regardless of whether the program was currently being offered, it was

being actively implemented, or the employer was just interested in offering it.

Not surprisingly, the largest employers were most likely to have a holistic initiative, as were those currently offering benefits.

The report cites as another sign of maturation the finding that just over half (54%) of the employers with an interest in financial wellness initiatives said they have a strategy to improve their employees’ financial wellness, while another 36% said they were currently developing one. Once again, the firms most likely to currently have a strategy were the largest firms, as well as those currently offering financial wellness benefits, those with a holistic program, and those with the highest level of concern about employees’ financial wellbeing.

Of those who have developed or are developing a strategy, 88% stated they had some outside help with development of the strategy, either benefit consultants (56%), financial wellness providers (47%), or retirement services providers

¹ The results were collected through a 15-minute online survey of 250 full-time benefits decisionmakers conducted in June and July 2020.

(43%), with some apparent overlap.

Pandemic Portents

The COVID-19 pandemic has had an impact on these programs—two-thirds of employers with these programs took steps to understand their employees' financial wellness needs since the onset of the pandemic, according to the report. Not surprisingly, emergency funds/employee hardship assistance emerged as key benefits during the pandemic, but other programs that had previously seen some momentum now have been placed on the back burner, notably student loan debt assistance. Additionally, overall financial planning and coaching on all aspects of

Priority Perspectives

How advisor and plan sponsor priorities differ

A recent report takes the results of two separate surveys of advisors and plan sponsors and looks at their perception of the industry as it relates to selling, adopting and maintaining plans.

Vestwell's 2020 Retirement Trends Report analyzed these two profiles independently and comparatively to see where the groups align, where they differ and how they dictate current retirement trends. Conducted in August 2020, only advisors who sell retirement plans were allowed to respond to the advisor component of the survey, resulting in 434 responses. The

significantly different. Overhaul advisors believe educating plan participants is where they add the most value (29% versus 16%) while "status quo" advisors are most likely to say that the biggest value they bring is supporting plan sponsors when they run into an issue (27% versus 13%).

As to determining the success of their plan, the surveys found that advisors are more focused on plan participation rates (61% listed it as a top factor versus 39% of plan sponsors), while sponsors were more focused on the administrative side, citing no administration errors 60% of the time and minimal time managing a plan 59% of the time, the study notes.

“Overhaul advisors believe educating plan participants is where they add the most value (29% versus 16%) while “status quo” advisors are most likely to say that the biggest value they bring is supporting plan sponsors when they run into an issue (27% versus 13%).”

finances are overtaking the prevalence of more single-issue offerings focused on student loan debt, according to the report.

Top Issues

Companies' top issues to address with their financial wellness initiatives were health care costs and retirement preparedness—each cited by 40% of the responding organizations. While health care was tied as a top issue to be addressed by the financial wellbeing programs, the top areas of focus were topped by two financial-related initiatives—retirement planning and basic finance or budgeting. Health/medical was only the third-highest-rated area of focus.

The report, “2020 EBRI Financial Wellbeing Employer Survey: COVID-19 Driving Benefit Offerings and Potentially Forcing Tough Budget Decisions” can be downloaded at ebri.org.

— NAPA Staff

sponsor survey included 164 plan sponsors that use Vestwell's platform.

When sponsors were asked where they believe advisors add the most value, the top two answers—tied at 25%—were recommending/monitoring plan investments and educating sponsors on effectively running a plan.

Vestwell found, on the other hand, that educating sponsors on how to administer a plan was the least common answer, chosen by only 10% of advisors, while advisors' most commonly see their greatest value as educating the plan participants instead (26%). This was followed by recommending and monitoring plan design (17%).

However, the way so-called “overhaul” advisors (those who believe recordkeeping technology should be overhauled) and status quo advisors perceive value to plan sponsors is

Recordkeeping and the SMB Space

With respect to recordkeeping, the advisor portion of the survey also assesses their perception of recordkeeping technology and the challenges of selling and servicing in the small and medium-sized business (SMB) retirement space.

The survey found that three out of four advisors believe recordkeeping technology should be overhauled. In light of that finding, the general view held by those who believe the technology needs a refresh versus those who believe it is fine as is, affect additional responses across the survey.

An example of the differing views is seen when comparing what they find to be the most challenging part of working with other recordkeepers. Both groups align on lack of integrations as a challenge, but overhaul advisors are more likely to say high fees

“More than a third of organizations now state that their primary purpose for providing plan-related education is retirement planning (34.8%), outpacing the previous years’ top goal of increasing participation.”

(45% versus 28%) and poor user experience (52% versus 33%) are their biggest challenges.

Aside from working with recordkeepers, the firm asked advisors about what they found to be the most challenging part of selling in the SMB retirement space, defined as under \$10 million. The number one answer was prospecting (33%) followed by fee compression (26%) and “too much hand holding” (20%).

When asked what the most common pain point their retirement plan clients face, the top issues cited were related to plan administration:

- Payroll data discrepancies (34%)
- Year-end testing (32%)
- Investment allocations (16%)
- Eligibility calculations (11%)
- Other (7%)

In comparing advisor attitudes, overhaul advisors were much more likely to select user-friendly experience (55% versus 41%) and payroll integration (31% versus 16%) as among their top three features from a provider versus status quo advisors.

Looking Ahead

As for what new services they plan on incorporating into their practices over the next year, the most common answers among advisors were participant financial wellness planning at 44%, followed by Multiple Employer Plans (MEPs)/Pooled Employer Plans (PEPs) at 33%, managed accounts at 27%, and HSAs at 26%.

When asked about what trends they are following, financial wellness also came out on top at 51% followed by Regulation Best Interest and fiduciary rules (46%) and advisor/recordkeeping consolidation (41%).

— Ted Godbout

‘Primary’ Colors?

A ‘new’ education priority for 403(b) plans?

For the first time ever, organizations that provide 403(b) plans reported that retirement planning, rather than increasing participation, was their top focus for employee education, according to the 12th annual 403(b) Plan Survey from the Plan Sponsor Council of America (PSCA), sponsored by Principal Financial Group.

More than a third of organizations now state that their primary purpose for providing plan-related education is retirement planning (34.8%), outpacing the previous years’ top goal of increasing participation. While this was the first time the primary goal has been anything other than to increase participation, that objective remained a high priority (33.0%). Increasing appreciation for the plan—perhaps reflecting previous emphasis on that aspect in communications—came in a distant third, at 12.2%.

The most common ways employers educated participants were through email (90.4%), Intranet/Internet sites (48.7%), enrollment kits (40.9%), and providing one-on-one assistance with a financial professional (40.0%).

And, while those plan sponsors hadn’t yet contemplated the work from home environment wrought by the COVID-19 pandemic, 30% of organizations initiated a cybersecurity awareness campaign related to retirement plans, and a third distributed email alerts about specific security issues in 2019.

Participation, Contributions Climb

As has been the case with 401(k) plans, 403(b) programs saw increases in both participation and

plan sponsor contribution rates. More participants contributed to their plan this year (76.6%, up from 72.0% in the prior year’s survey), while plan sponsor contributions climbed to 6.3% this year, up from 5.5%. Significantly, over the last two years, employer contributions have increased 34%.

The survey also found an increase in participant contributions, which now average 7.2% of pay. The increase in participant contribution rates is helped in part by higher default deferral rates and automatic escalation of contribution rates. Nearly half (45.1%) of plans now use a default deferral rate higher than the traditional level of 3%, up from 37.7% last year. More than half (51.1%) of plans with automatic enrollment automatically escalate that default deferral percentage over time.

PSCA’s 2020 403(b) Plan Survey of nearly 400 non-profit organizations across the U.S. is the only independent 403(b) research report that delivers actionable data on trends among plan sponsors in the non-profit sector. This year the survey was conducted while many non-profits and their employees faced unprecedented hardships from the health and economic impacts of COVID-19.

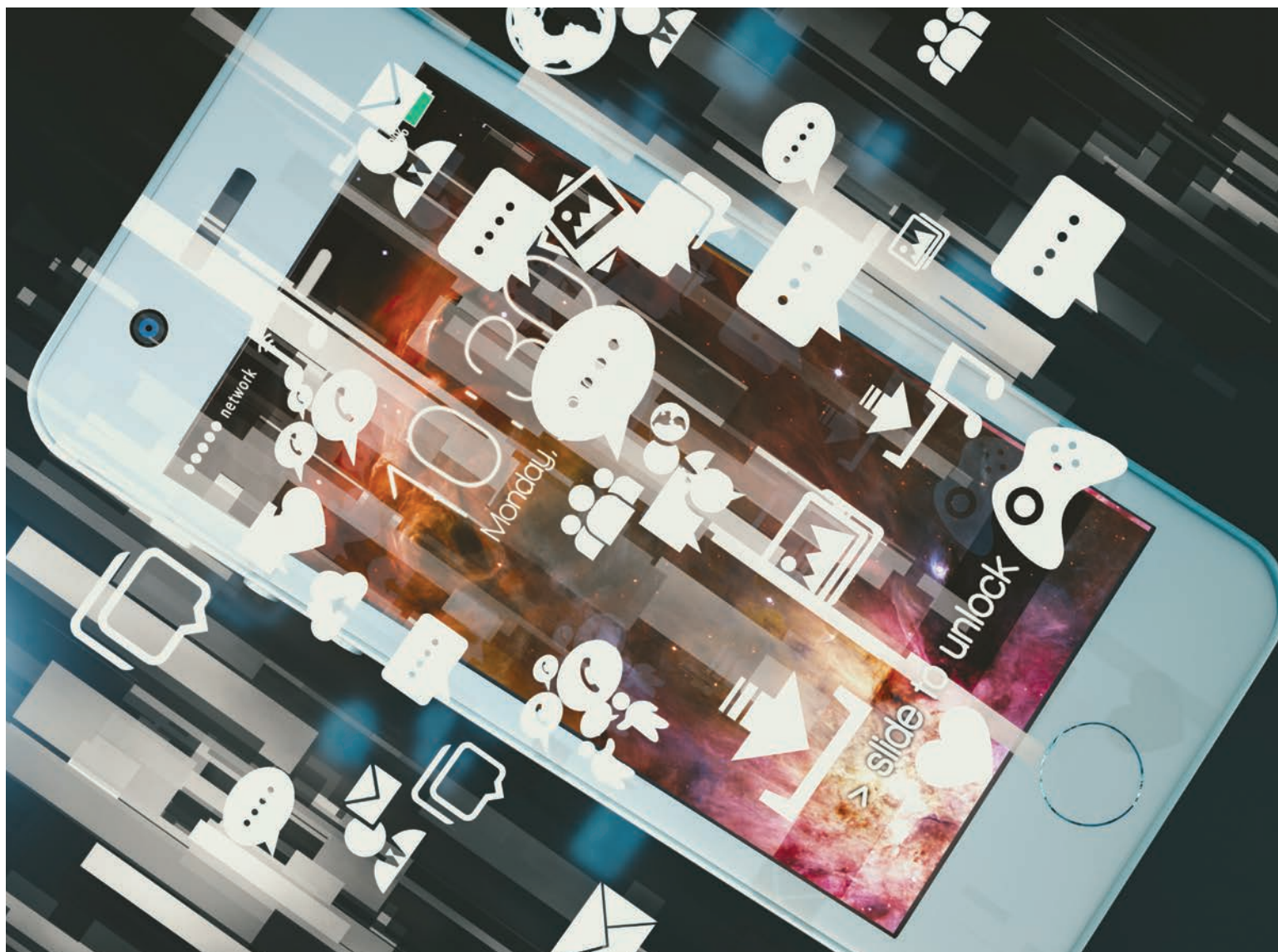
For more information on the PSCA 403(b) Survey, visit <https://www.psc.org/research/403b/2020AR>.

— NAPA Staff

‘Critical’ Path

Social media offers FAs critical link during pandemic

Nearly three-quarters of U.S. financial advisors who used social media for business were able to initiate new relationships or onboarded new clients since late February, according



to a recent study by Putnam Investments.

The pulse edition of the firm's annual Social Advisor Survey of financial advisors found that 55% of advisors who initiated new client relationships say they had increased their use of social media during the pandemic. In addition, 9 in 10 advisors indicate that social media has changed the nature of client relationships during the pandemic.

Advisors Adapt

Indeed, advisors have proven adept at managing their practices through the public health crisis by finding additional ways of engaging their clients.

The study found that 74% of advisors relied on direct messaging through key social network platforms to communicate

with clients and prospects, and of those, 94% reported gaining new assets. Among the survey's key findings are that:

- 50% use direct messaging on LinkedIn, with 92% gaining assets;
- 38% use Facebook for direct messaging, with 98% reported gaining assets;
- 33% use Twitter for direct messaging, with 98% gaining assets; and
- 26% use direct messaging on Instagram, with 98% gaining assets.

And it appears these adjustments are here to stay, as 84% of respondents expect that the changes made to their communications methods will largely be kept intact moving forward.

Platforms of Choice

Putnam notes that even though there has been increased usage across all networking platforms since it began tracking the usage in 2013, LinkedIn remains the clear leader. According to the findings, the social network platforms that advisors use most for business are:

- LinkedIn (85%)
- Facebook (65%)
- Twitter (57%)
- YouTube (53%)
- Instagram (46%)
- Snapchat (31%)

In using LinkedIn during the first few months of the pandemic, nearly half of advisors (48%) who initiated new relationships report using the platform's InMail feature to contact out-of-network prospects and 36% say they

have hosted or participated in a LinkedIn Live session.

Moreover, 80% of advisors who initiated new relationships since late February used one of LinkedIn's premium memberships, the survey found.

Home Office Support

Nearly all advisors (90%) reported that support from their home offices made a positive difference as they worked remotely by enabling and supporting their use of social media. Notably, advisors pointed toward specific areas where their home offices have laid the groundwork for their social media efforts, including:

- providing timely content to post (55% of advisors);
- expanding the number of social networks approved for business use (48%);
- providing access to support resources (45%); and
- offering training from partner firms (40%), home office (37%) and third parties (27%).

The pulse survey was conducted online June 9-23, 2020, in conjunction with NMG Consulting, and included 252 financial advisors across the U.S. who have advised retail clients for more than two years and have used social media for business. The 2020 edition of the survey was conducted in November and December 2019 among 1,010 retail advisors.

— Ted Godbout

Personality 'Traits'

Study: HSA holders need more personalized offerings, education

A new study suggests that providers' prevailing approach to servicing the typical health savings account holder are off the mark and that more personalized offerings and education are needed.

Looking at how consumers are using their HSAs, Lively's first-ever HSA Persona Report found that a majority of people who use HSAs have just \$1,050 in assets. In addition, they are primarily motivated to save in case of unexpected health care

costs, rather than using an HSA for its long-term benefits. This, according to Lively, suggests that there needs to be more offerings and education to help account holders start saving.

As part of the study, the firm compiled 13 account traits from 40,000 randomly selected HSAs, including accounts with and without active contributions. Lively then used a machine learning k-means user clustering approach (vector quantization) to organize and delineate the optimal number of HSA personas based on the firm's entire data set of anonymous HSA account holders.

Not surprisingly, it found that there are no average HSA account holders and that individual health savings needs vary greatly. The HSA saver personas are:

- "Base Jumpers" with an average balance of \$1,040 are the largest contingent (56%) of holders, are new to HSAs and are just getting their health savings started.
- "Conductors" with an average balance of \$6,700 are the fifth largest segment of HSA accounts (4.2%) and have made strides towards saving for the future.
- "Catalysts" with an average balance of \$5,940 are the second largest segment (24%) but keep most of their funds in cash and 80% have never invested.
- "Cartographers" sit in the middle with an average balance of \$6,942, but over 95% of their balance is invested with a "set it and forget it" mentality.
- "Mayors" have an average balance of \$25,900 and keep a balanced portfolio, but are not afraid to use it if needed.
- "Monopolists" have an average balance of \$24,075, but hold large coffers of cash in case they need it.
- "Mavens" with an average balance of nearly \$33,000 use their HSA exclusively as a retirement savings vehicle.

Mavens, Lively notes, represent only 2.4% of account holders, are typically the oldest (59) and have the highest household income

(HHI) of all personas. What's more, over 95% of their assets are invested, showcasing the HSA primarily as a retirement vehicle for this older, investment savvy persona.

Still, the study found that HHI is not directly correlated to HSA assets. Instead, the age of an HSA has more impact when it comes to HSA account balance—the older the account (and account holder), the higher the account balance, suggesting that holders need to start as early as possible.

What's more, the study observes that HSA investing is often thought of as exclusively a high asset account feature. "What we have learned is that investment offering impacts both savings and investments. Even lower asset account holders want to invest but have been turned off by high HSA investment thresholds and traditional HSA providers' fees," the report explains.

To that end, Lively contends that the low investment participation rates of many HSA accounts are based on poor offerings by providers, not from a lack of understanding of the value of long-term HSA account growth.

As such, this should change how HSA providers should approach education and account engagement. "What should also be apparent to the industry is that long-held practices like minimums, cash balances, fees to invest, and hidden transactional fees hinder the account holder and overall account growth," the study observes.

And in further emphasizing that not all HSA investors are the same and that there are differences in goals, the report suggests, for example, that the more investment-savvy may want a self-directed option, while newer investors may look for a more hands-off approach, like a guided portfolio. "Offering only one option will limit the opening of investment accounts. Having a choice of investment options drives adoption, and ultimately HSA account balance growth," the study suggests. **NTM**

— Ted Godbout



Interview with DEBORAH RUBIN



'OPEN' DOERS

One of the most anticipated aspects of the Setting Every Community Up for Retirement Enhancement (SECURE) Act—and one that has yet to take hold—is its “open” multiple employer plan structure, “pooled employer plans,” or PEPs. We’re still months away from the effective date outlined in that legislation—and some much anticipated—and needed—guidance still hasn’t been issued by the Labor Department. Meanwhile, opinions vary as to their ultimate efficacy in fulfilling the aspirations of their proponents—or making the nightmares of opponents a reality.

As that effective date nears, we sat down with Deborah (Deb) Rubin, Vice President & Managing Director, TPA and Specialty Markets at Transamerica to flesh out some of the issues and potential with this “new” plan structure.

NNTM: We’re still in the middle of working our way through the COVID-19 pandemic. Do you think that will have any impact on the Jan. 1, 2021 effective date for PEPs?

RUBIN: COVID-19 won’t slow this down. However, what might slow it down is lack of guidance. The Department of Labor has just released guidance on Pooled Plan Providers (the organizations that will sponsor the PEPs), and (as of publication) that’s still in comment period. We’ll still have to wait for final regulations, and then organizations will have to apply and be approved. As a result, as of right now there are still lots of questions to which we don’t know the answers; what will the registration process look like, what is the full scope of PPPs, what will disclosure require, etc.—so many questions. Less about COVID-19, but also gave people less time to be distracted by other things.

NNTM: What’s the biggest “bad” assumption people make about PEPs?

RUBIN: When there’s change, there’s naturally both excitement and fear—and nobody exactly knows what path it’s going to take, what it might do to margins, to client retention—what might be at risk. We see it not so much as change, but as an expansion of opportunity. This is an opportunity for our industry to stop, pause and potentially rethink the ways we’ve done business, ultimately to expand coverage.

NNTM: What kind of plan is a good candidate for participation in a PEP?

RUBIN: It’s been thought that it would best fit micro plans or start-ups, but our experience says that’s not the case. True, there are more small plans than large plans in our pooled exchange, but not for the reasons you might think. Let’s say you have a prospect—a plan that struggles with fiduciary liability. Or consider the time and staff commitment they have to make. Participating in a PEP will reduce the ongoing fiduciary responsibility for that sponsor and may save the sponsor time and money. It may also help the sponsor with getting things done timely, address payroll challenges, and may reduce the cost of an audit. Existing plans might value the benefits of a PEP more than an employer that has never had a plan.

NNTM: While many advisors seem to think PEPs will be a help, there are those who worry that it will simply become a means for large organizations—say a big recordkeeper—to disintermediate them from their clients. What would you say to those who have those fears?

RUBIN: While PEPs are new, Transamerica has been supporting pooled plans for more than 20 years, and if anything, we’ve seen the role of advisors expand. Our pooled platform is an exchange—a collection of single employer plans that have many of the benefits that a PEP will have, but do not share a common business network nexus. With that pooled platform, the advisor helps to determine the path for plan sponsor, and still helps to determine not only if the approach is a good fit, but once a variety of pooled platforms are available, to pick the best fit. Even with an outsourcing of fiduciary duties, there are still monitoring requirements, and there’s still a need to educate workers. Every advisor should be a student of this business, to understand the features, benefits, and challenges with a PEP, an exchange, or a single plan. You want to be able to talk to clients about it because you don’t want other people to be talking to your clients about it.

NNTM: What advisors benefit most from a PEP structure?

RUBIN: From the advisor standpoint, PEPs can free up their time by providing a scaling opportunity in the way that target-date funds did. This provides a streamlined strategy, an ability to sharpen focus on the aspects of the plan where an advisor can have an impact. Pooled plans allow the advisor to add value for clients by helping them to assess options and determine what plan type best meets their needs. The advisor’s role is as important as ever.

Your 2021 Marketing Plan

START BY USING THIS PROSPECT PIPELINE FUNNEL TO IDENTIFY GAPS IN YOUR CURRENT ACTIVITIES.

By Rebecca Hourihan

Who's ready to close the books on 2020? Thankfully, it's that time of year again, when we get to welcome a new beginning. To help you on your marketing journey, let's do some business planning, so that when the ball drops at midnight, your business is ready for success in the New Year.

Goal Casting

When you look back at 2021, we want you to feel proud of your accomplishments. That is why we are starting out by identifying your goals. Take your time and think about your ambitions for the year ahead. Do you want to grow your practice? Increase profitability? Hire a new associate? There are no wrong answers—write them below.

My top three business goals for 2021 are:

1. _____
2. _____
3. _____

Your Goals in Action

I'm taking a wild guess, but was one of your goals business growth? If it was, great! Let's look at a helpful tool that will help you build your business: the pipeline funnel. We want to help you specifically identify where you can enhance your pipeline management process to nurture cold leads into new retirement plan clients.

Next to each pipeline activity listed below, you will see an open checkbox. If you are doing that marketing activity, place a check mark within the box.

AWARENESS: Top of the funnel.

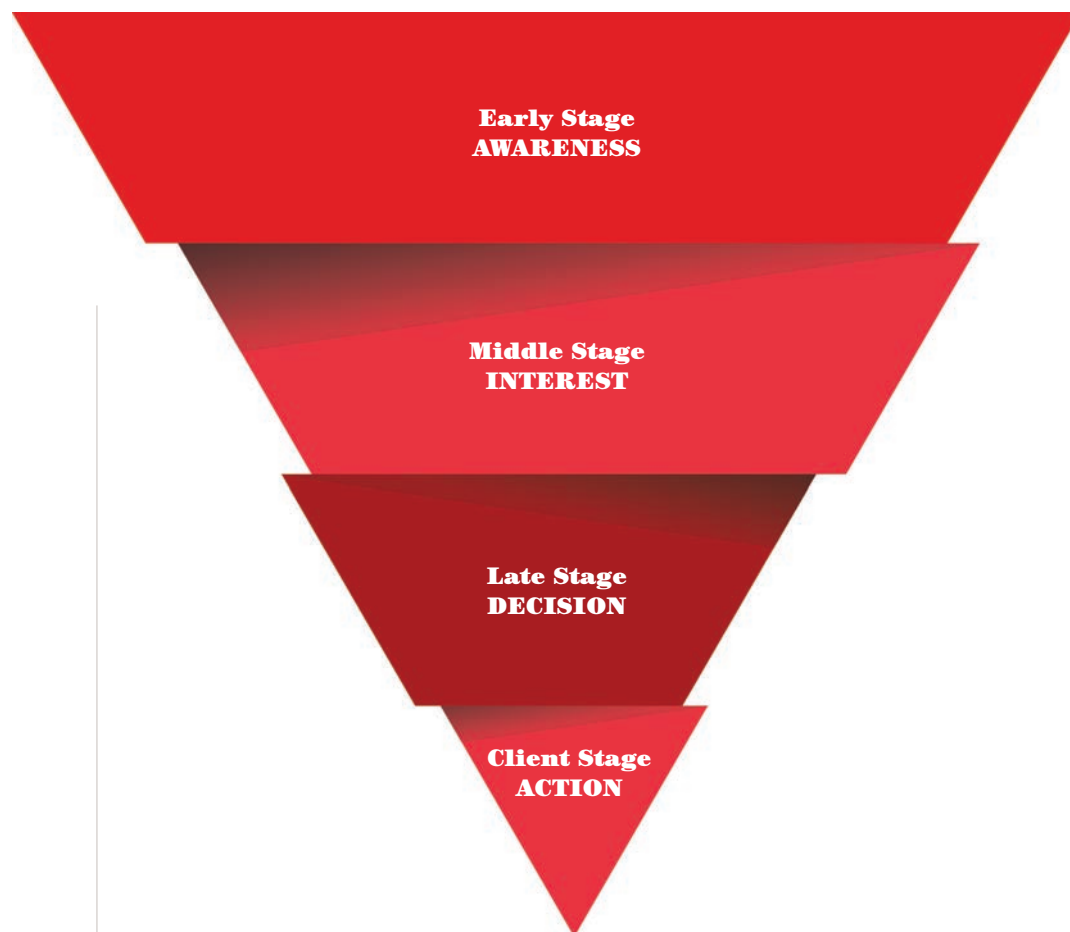
This stage focuses on generating buzz. What activities are you implementing to drive top of the funnel awareness?

These activities keep you top of mind with your clients and centers of influence so that when an opportunity presents itself, they can rave about you and your professional retirement plan services.

have a problem and are looking for an experienced retirement plan advisor with expertise to help them solve it. This is where you can demonstrate your authority.

- ☐ Blog articles
- ☐ Plan sponsor guides
- ☐ Newsletters
- ☐ Gated content
- ☐ Case studies
- ☐ Financial wellness programs
- ☐ Other content marketing materials

DECISION: The iron is getting hot. Like it or not, the events of 2020 have changed our world and



- ☐ Sharing social media updates
- ☐ LinkedIn ads
- ☐ Sending emails
- ☐ Hosting webinars
- ☐ Recording videos
- ☐ Digital ads

INTEREST: First level of engagement. This phase means that the prospect realizes they

with that, we all need to adapt. This includes reviewing your foundational marketing materials (websites, brochures, pitch decks, handouts, etc.) and reevaluating your digital content.

Assess it like an outsider; if you need help, ask your wholesaler partners for feedback. The purpose of this exercise is to ensure that your visual



presentation reflects your professional services.

- Have a great website
- Professional social media profile
- Up to date pitch deck
- Digital brochures
- Sample reports
- Service calendar
- RFP responses
- Nurture marketing campaigns

ACTION: Signing on the dotted line. At this stage, the plan sponsor is going to make a binary action: hire you or not. Ideally, they have chosen you as their new retirement plan advisor. Congratulations!

While this is a win, don't stop there. It is important to nurture this valuable relationship because they are now back in the "awareness" portion of the funnel, not as a prospect but as a potential referral

source. This is a great opportunity to evaluate your post-finalist and onboarding process. How are you reinforcing the relationship? Small touch points and gratitude go a long way.

- Case studies
- Client appreciation events/ small gifts
- Newsletters
- Email campaigns
- Social media connections
- Educational webinars
- Best practice guides
- Thank you notes

Identify Soft Spots

Now that you have checked all the activities you are currently implementing, do you see any blank sections? Are you missing anything within your pipeline process? If so, circle three new activities that you would like to focus on in the new year.

Also, strive for a minimum of three activities in each layer of the pipeline. By having a pipeline management process, you can track how prospects are graduating through each section as they convert into warmer and warmer leads. This is going to help effectively and efficiently move your prospects from cold prospects into new 401(k) clients.

Fix the Leaks

2021 is your year! If you are missing any sections, no worries—you have 365 days in front of you to address them. Use this plan sponsor pipeline funnel to identify any opportunities for improvement so that you can make 2021 your best year yet!

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

How COVID-19 Forced Everyone into Sales

...AND WHAT YOU SHOULD DO ABOUT IT.

By Spencer X Smith



Before COVID-19, winning new business in the qualified plan space consisted of getting the right handful of people on a plane or in a car, sending them to the prospect's location, and allowing them to work their magic in person.

That might consist of a boardroom pitch, nice dinner out, and taking in a ballgame. Those involved in this traveling sales team were chosen for a reason, both in title (salesperson, account manager, C-level if the account is

big enough) and in personality. Spending multiple hours in both a work-related and social setting needs the right kind of demeanor.

As business development has moved to a video-centric focus, we're no longer relegated to bringing a finite amount of people to the sales party. Because everyone is accessible via a click, those normally uninvolved in the sales process are now expected to be on Zoom/WebEx client pitches. Often, this will consist of those in more technical fields (plan design, recordkeeping mechanics) and

those who are more junior at the company. Why is that? Two reasons:

First, given the efficient nature of video calls, clients can consider more vendors than before. Instead of spending a half a day each with two potential suitors, clients can interview four vendors by lunch and spend the afternoon evaluating their offerings. Increasing the quantity of competitors forces those pitching their wares to refine and focus on their distinct value proposition. Adding a technical team member to a meeting through a video call allows clients to ask directed questions to the subject matter expert. During in-person presentations, technical questions would sometimes be answered by the salesperson saying, "We'll have to get back to you on that." Now, because everyone is accessible instantly, those queries need not be deferred.

Second, more people on video means more reputability. Pretend you're doing an in-person presentation, and you and your other two team members are sitting in the waiting room. Out of the conference room comes your competition, seven people strong, after their presentation. How does that make you feel? Inadequate, and wishing you brought more people to the meeting. There are many implications to the quantity of individuals involved in a pitch meeting, and all of them affect the confidence of those in sales. What better way to inject the element of "Here's the large team that will support you," than to add more people to the call? Even if

“Your pitch team, previously limited, has now grown to encompass many more individuals in your organization. Have you taken to time to show them what sales feels like?”

the more junior people don't say a word, they're still there.

Gear Up!

When the work-from-home initiatives really hit their stride in early spring, most video gear was suddenly backordered for months. Now, though, inventory is available for WFH additions that—simply and inexpensively—will help your team step up their game. Marginal improvements in video and audio will make you appear all the more professional than the competitors against whom you're pursuing business. Purchase these three items for those who will spend a lot of time on video:

- **An HD webcam.** Upgrading to a 1080p webcam (most cost less than \$75) will both improve the look of the subject on camera and give an option for a wider degree of view. Confidence on camera will improve performance.
- **A ring light.** As we approach winter, natural lighting will be more difficult. An inexpensive ring light (sometimes called a selfie light) for about \$100 will help illuminate you and your team members.
- **A professional microphone** (around \$100). This will make the biggest difference on video calls for two reasons. First, the mics in laptops or desktops are horrendous; a professional mic will yield a noticeable increase in sound quality. Second, pro mics have built-in headphone adapters that allow you to hear yourself talk in your headphones. Instead of the approach “I need to speak

louder than normal to ensure people hear me,” you and your team can use a natural conversational tone.

3 Presentation Tips

Now that we have everyone looking good, let's ensure they perform well. Since sales training is expensive, those in technical fields and those who are more inexperienced at a company oftentimes haven't been taught what the business development process looks like.

Following are three simple tips you can share with those who are newly involved in sales.

1. Objections during a meeting are a really good thing. If the client didn't care about what you were presenting, or had no interest, they wouldn't prompt your team with questions. Objections are an opportunity to both answer the specific query, but also to expand to the subtext of the question. This is an important point upon which to focus, particularly with technical people. A technical person can simply answer the question presented, but it's critical for the more experienced salesperson to follow-up with another question, which gets to the core of what the prospect is asking. For example, if a prospect asks, “Why don't you integrate with ABC software?” a technician will answer with the specific reason. The salesperson can then ask (on the prospect's behalf), “Why have we built our existing integrations to work the way they have,

and why could that make sense given their situation?” During the pre-meeting meeting, teach the technical people on your team why objections are a prospect showing his or her desire for knowledge, and not him or her saying, “No.”

2. Simple is best. “A confused mind will say no.” Technical people pride themselves on their prowess in their field, and rightfully so. Your prospects, however, only need the details they're ready to understand. Encourage your technical people to practice succinctly explaining difficult concepts, and the best way to practice this is through a pre-pitch trial video call. Your now-expanded pitch team can easily do this together the day before the big meeting.
3. Everyone on the team is important. Just because the junior people might not be expected to say anything, this doesn't mean that will happen. A savvy prospect might “call on” one of the people from your group who hasn't said anything with something as broad as, “What do you think?” Preparing your more inexperienced people with elevator pitch-worthy responses will pay off when queries like this come their way.

Your pitch team, previously limited, has now grown to encompass many more individuals in your organization. Have you taken to time to show them what sales feels like? **NTM**





'LEADING' INDICATORS

TOP WOMEN ADVISORS
TALK ABOUT HOW THEY
LEAD IN COMPLICATED TIMES

By Judy WARD



“IN any crisis, that’s when the real leaders rise to the top,” says Eva Kalivas, senior vice president at New York-based EPIC Retirement Services Consulting, LLC, a division of HUB International. “A time like this is when people really get an idea of, who do they want

to be in the foxhole with?” she says.

“We have the opportunity to serve clients and participants in one of the most difficult environments that we’ve ever seen,” says Susan Shoemaker, senior vice president at CAPTRUST in Southfield, Michigan. “If somebody has a problem, we will be there for them—and they know that.”

Here are 10 lessons they’ve learned:

1. **KEEP YOUR FOCUS**

Nicole Corning started her career in the political world of Washington, D.C., aiming to help people, and switched career paths when she became disenchanted with Washington’s focus on



VIRGINIA TAYLOR
BayBridge Capital Group, LLC



“A TIME LIKE THIS IS WHEN PEOPLE REALLY GET AN IDEA OF, WHO DO THEY WANT TO BE IN THE FOXHOLE WITH?”

— EVA KALIVAS, EPIC RETIREMENT SERVICES CONSULTING

winners and losers. “To me, it has always been about helping people,” says Corning, managing partner at Buckman & Corning Financial Strategies Group in Scottsdale, Arizona. “And it’s not only about helping people with \$10 million: It’s about helping small and mid-sized employers do right by their employees, and giving employees the tools they need to retire in a dignified and meaningful way.”

That mindset helps during a time of upheaval, she adds, because “it shifts the focus away from, ‘How is this affecting me?’” Corning and her partner Perry Buckman started their practice in November 2019, just a few months before the pandemic began. “Helping sponsors and participants navigate these awful times helps you elevate your game,” she says now. “Practically speaking, it helped us that earlier this year there were so many changes that plan sponsors needed to be aware of, with the SECURE Act and CARES Act, and we needed to get that information to them. That helped us to get through mentally, because we were less focused on, ‘Oh my God, what’s happening with our practice?’”

2. LEAD WITH EMPATHY

Shoemaker helped plan sponsors through the market and economic uncertainties of 2008-2009, and the lessons stayed with her. “I learned to start by reaching out to sponsors and simply offering to help,” she says. “The first call in March was just, ‘We’re here to help you.’ At that point, I also kept in mind that probably the 401(k) plan was one of the last things on their minds. All of them were scrambling and focusing on, how do they run their business in this situation?”

3. DON’T PANIC, PRIORITIZE

Asked what she’s learned in her career that taught her how to help clients in 2020, Kalivas says, “Not to panic. That’s the biggest one.” After reaching out to clients in March, “it has really just been about helping them sort out the important stuff, what needs their attention ASAP,” she says. “We let them know, ‘This needs your attention now,’ or ‘We can talk about this in two weeks.’”

During times like these, most sponsors appreciate an advisor being proactive and alerting

them when something requires their action, says Virginia Krieger Sutton, investment advisory representative, Global Retirement Partners and vice president, retirement plans practice at Burlingame, California-based Johnson & Dugan Insurance Services Corp. “They need us to help prioritize where to spend their time on the plan now: to talk about ‘triaging,’ and what needs to be done when. And it’s important for us to be able to answer their questions quickly, so that they feel that they are in control of the situation, when so much is out of their control overall.”

Peggy Slaughter, who works mostly with very small plans, has experienced first-hand how sponsors really value an advisor’s ability to keep up with their plan’s administrative details. “I used to be a TPA (third party administrator), so my entire career has been in the minutiae,” says Slaughter, retirement plan consultant at Saling Simms Associates, Inc. in Columbus, Ohio. “A lot of my advisory clients now were my TPA clients before. So they’re used to that level of detail from me—they expect it.”



"IT'S ACTUALLY BEEN NICE TO SEE THE LITTLE FOIBLES THAT COME OUT, DOING VIRTUAL MEETINGS: THERE'S A BIT OF A BAKED-IN INFORMALITY TO IT THAT I THINK WILL HELP WITH CLIENT RELATIONSHIPS IN THE LONG TERM."

— VIRGINIA KRIEGER SUTTON, JOHNSON & DUGAN INSURANCE SERVICES/GRP

4. MAKE TIME TO MENTOR

Novice committee members at her clients give Virginia Taylor an opportunity to mentor, something that's been a focus for her throughout her career. "I've never considered myself a leader. But if you think about it, a leader is anyone who works with people to motivate, educate, or inspire, which is how I mentor," says Taylor, senior vice president at BayBridge Capital Group, LLC in Pleasanton, California.

"When I get new people on a committee, I take them under my wing, and teach them what 'investment monitoring' means," Taylor continues. She'll walk them through the basics of her quarterly investment reporting, for example. She started in the advisory business in 1981, and still has some of the plan clients from her early career. "At one of my clients, I'm no longer working with the business owner who hired me, and who I mentored: Now, I'm working with his grandson, and I'm mentoring him," she says.

5. EMBRACE THE PERSONAL 'TOUCHES'

This year's virtual meetings have given Sutton an opportunity to know her clients better as individuals, whether from seeing



their home's interior in the background, or hearing other family members in the home. "It's been fun and rewarding to see our clients in a more casual environment," she says. "It's brought more roundedness to our relationships with them." And she sees the value in them learning more about her life, as she works from home. "Originally, it would have been much more embarrassing to me if my kids walked into the room during a virtual meeting with a client," she says. "It's actually been nice to see the little foibles that come out, doing virtual meetings: There's a bit of a baked-in informality to it that I think will help with client relationships in the long term."

6. PROVIDE CONTEXT FOR CRITICAL TIMES

Her previous experience as an advisor during major market swings has given Slaughter insights into how to help participants understand market volatility. That's especially true of participants whose 401(k) experience so far has been mostly during a prolonged bull market. "I went through the 1999-2000 and 2008-2009 time periods. So I'm able to more calmly help people in their 30s and 40s, who are just starting to accumulate significant savings, and some of whom wanted to get out of the (equities) market in the spring. I helped take the edge off of their anxiety," she says. "I used illustrations to show them how volatility repeats itself, and how getting away from volatility if you have decades left until your retirement can

actually hurt you in the long term. I explained that volatility can be your friend, as long as you're not coming up on your retirement soon."

Taylor also brings her years of experience as an advisor to talking with participants nervous about market volatility. "I tell them that one of the best things about 401(k) plans is that they can take advantage of the market both going up and down," she says. "I explain that market volatility actually works in their favor: When the market is down, that will help them more to build their savings, because they are buying at the bottom of the market."

7. STAY 'COOL'

What's the most challenging part about being an advisory team leader in turbulent times? "Not only keeping my clients' heads above water, but my team's heads above water, too," Kalivas responds. "As a leader, you have to remain cool as a cucumber."

So, even though she's working from home at the moment, Kalivas still frequently checks in with her team, about both the status of their work projects and how they're doing as people. "We start out every morning with a virtual 'coffee meeting,' and talk about what we're going to do that day. It's about keeping the team positive, helping to decrease their anxiety, and making sure that everything is up and running," she says. Her team also has virtual "happy hour Fridays," when they don't talk about work at all. "We talk about things like, 'How are

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Three Predictions

How will the plan advisory business evolve over the next five years? Here are a few of the Top Women Advisors' thoughts:

Fee pressure intensifies: "Fee compression is one of my greatest concerns for keeping plan advisors in business: The liability is going up, while the income source is going down," says Peggy Slaughter of Saling Simms Associates. "I think that fees will be a huge, huge discussion, and sponsors will want more services for the fee. There is going to be a lot more discussion by sponsors—whether it's a \$10 million plan or a \$100 million plan—around, 'What is our plan advisor actually doing? And why should my participants be paying more for it?' It's all coming under the microscope."

Robo-advisors hit hurdles: BayBridge Capital Group's Virginia Taylor is based in the Bay Area, and has seen robo-advisors win the retirement plan business of some startup companies. But she's already seen limits to the robo-advisors' ability to keep that business. "I've lost a startup company's business to a robo-advisor, but as that company grows and is successful, they don't keep the robo-advisor," she says. "As they grow, they need a proper 401(k) plan, and an advisor who knows what's going on."

The competitive landscape shifts: The past couple of years have seen a lot of consolidation, as advisory shops get acquired, Pensionmark's Kristen Deevy says. "If I think about what our competitors have now, a lot of plan advisors have the same basic tools," she says. "And moving forward, a lot of advisors are concerned about 'fintech' (financial technology) companies and Amazon: Amazon comes up a lot, although I can't see Amazon becoming a 401(k) recordkeeper. But I think that as plan advisors, we have to think about, how can we be a disrupter in this business?"

—J.W.

you holding up?" she says. She also regularly reaches out to team members individually, to see how they're doing.

8. BE A RESOURCE

Corning has learned that it's worth investing time in building relationships with her "circle of influence," because they're a strong source for new-client development. Especially with

in-person networking on hold in 2020, she says, "Now it's, who can open up some 'warm' introductions to plans you're interested in working with?" Benefits brokers, third party administrators, and wholesalers all have helped her connect with potential new clients during this unique year. "It's about saying to them, 'Hey, if you have any plan sponsor clients who don't have an advisor and who are scared

KRISTEN DEEVY
PENSIONMARK FINANCIAL GROUP





“VOLATILITY CAN BE YOUR FRIEND, AS LONG AS YOU’RE NOT COMING UP ON YOUR RETIREMENT SOON.”

— PEGGY SLAUGHTER, SALING SIMMS ASSOCIATES

and have questions about their plan, please consider us as a resource.’ It is not so much about making a sale as it is about being a resource.”

Sutton also gravitates to what she calls “the softer side” of business development, to meet new clients. “To me, it’s all about the ‘warm’ referrals,” she says. So, for example, a CPA firm may ask her to do a webinar for employers, to talk about current issues impacting 401(k) plans. “There is less cold-calling now, and more putting myself into forums where I can be seen as an expert,” she says. “Then those individuals see me as a credible problem-solver.”

Throughout 2020, Shoemaker has stayed in touch with potential new clients she’d previously identified. “We sent them information, even if it was non-401(k) related, such as on the PPP (Paycheck Protection Program) loan funding,” she says. “A lot of it is finding information that you know is relevant to that potential client. I think it’s more important than ever to make sure that you are not sending people fluff. You have to ask yourself: How does this help them today?”

9. DON’T PUSH ‘SHINY OBJECTS’

It can be tempting for advisors, especially in an environment

of compressed fees for plan advisory work, to nudge clients and prospects toward utilizing new, ancillary products and services. Kristen Deevy, managing director of retirement plans at Pensionmark Financial Group in Denver, has seen it happen. She actually won a new client last year in large part, according to the client, because she focused only on talking about retirement plan work—not repeatedly urging the employer to start a student loan repayment program, as the plan’s previous advisor had done.

“There are a lot of what I call ‘shiny objects’ out there,” Deevy says. “Yes, we should talk about the pros and cons of these new ideas with our clients. But at the end of the day, we need to do what is in the best interests of the client and its participants. We’re not going to push something like HSA (health savings account) consulting, just because it will provide us with additional revenue. If an idea is potentially right for the client, then there should be conversations, and we should educate them on it.”

10. BE PREPARED TO PIVOT

Experience has taught Corning to have a strategic plan, and to be prepared to tweak it. “As an advisor, I think you always have

to have a next-year plan, a 5-year plan, and a 10-year plan,” she says. “You have to stay focused on the strategic long game: It’s important for your team, and for you, to have that vision. But your 5-year plan and 10-year plans change all the time, so you have to be able to stay flexible.” She’s got enough experience to know that she needs to keep her mental focus, remain positive, and remember that this challenging time will end. “We had to tell ourselves the same things that we told participants: ‘We’ve been there, done that, gotten the T-shirt,’” she says.

Deevy has thought about how to sum up what it takes to be an advisor capable of helping clients in a challenging environment. “The word that comes to mind, more than anything, is pivot,” she says. “I feel like, being in this business for as long as I have been, working as advisor and before that a wholesaler, I have learned to adapt. You might have had a one-year plan or budget or sales goal going into 2020, but you had to adapt them. This year more than ever, as an advisor, you have to stop and think—and then adjust.” **NNTM**



NAPA TOP WOMEN ADVISORS 2020

CAPTAINS

Julie Babcock
Lockton Investment Advisors

Kari Baker
401K Resources

Kristi Baker
CSI Advisory Services

Jessica Ballin
401k Plan Professionals

Pam Basse
NFP

Carly Bell
Lockton

Kathleen Branconier
Pensionmark

Linda K. Bright
Precept Advisory Group

Mary Caballero
Impact Benefits & Retirement

Deana Calvelli
Lockton Investment Advisors, LLC

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Advizrs, Inc.

Nicole Corning
Buckman & Corning
Financial Strategies Group

BREA DANTIN
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SS/RBA

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Jamie Hayes
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Woodruff-Sawyer & Co.

Kathleen Kelly
Compass Financial Partners

Nichole Labott
SageView Advisory Group

Ellen Lander
Renaissance Benefit
Advisors Group, LLC

Shannon Main
Pensionmark

Shannon Maloney
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Deborah Matustik
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Dawn McPherson
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Janine Moore
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Kimberly Oros
CBIZ Retirement Plan Services
& CBIZ Investment Advisory Services

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CBIZ Retirement Plan Services
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Jennifer Pearson
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Duffield Retirement Plan Solutions

Renee Scherzer
401K Resources

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Courtenay Shipley
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Summit Financial Group, Inc.

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Western Wealth Benefits

Jania Stout
Fiduciary Plan Advisors

Marcy Supovitz
Boulay Donnelly &
Supovitz Financial Services

Virginia K. Sutton
Virginia Sutton

Jacinta Thompson
VisionPoint Advisory Group

Vanessa Watkins
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THE ILLUMINATING USES

NEW THINKING ON ITS USE IN 401(K) PLANS EMERGES, WHILE THE DOL TAKES A CLOSER LOOK

BY JUDY WARD

NOTE: With extraordinary speed, the Labor Department went from issuing a proposed rule on “financial factors” that devoted some 60 pages of preamble expressing concerns about the “non-pecuniary” emphasis in ESG fund marketing in June to a final rule four months later that didn’t even (specifically) reference ESG (see ‘Final’ Words). The interviews and comments that follow preceded the issuance of the final rule, and while they remain applicable to the topic, please bear that timing in mind.

ARE WE AT THE DAWN OF A NEW ERA FOR THINKING ABOUT HOW ESG (ENVIRONMENTAL, SOCIAL, AND GOVERNANCE) FACTORS CAN PLAY A ROLE IN 401(K) PLANS’ INVESTMENT MENUS? NEAL WEAVER BELIEVES SO.

“In this new world, I think that advisors need to throw away what they know about ESG,” says Weaver, chief executive officer at LeafHouse Financial in Austin, Texas. It’s not just about screening out funds with holdings in certain sectors anymore, or picking an ESG-themed fund, he says. Just 2.9% of plans included in the Plan Sponsor Council of America’s “62nd Annual Survey” offer an ESG/socially responsible fund option in their plan. And only 0.1% of total plan assets are in those funds, the PSCA survey found.

“ESG is so much more broad than that,” Weaver says. He sees potential for ESG funds in some plans’ core menu, but also for ESG funds to be utilized within target date funds, and especially for ESG analysis as an overlay to broader fiduciary investment analysis of all funds. “I think that it will start piecemeal,” he says. “Advisors and plan sponsors will take the first step of including an ESG fund or two in the core lineup. They will put their feet in and say, ‘Here’s a couple of funds out of 20 on the menu.’ That way, they give participants a choice of whether they want ESG. And if participants demand it, then you’ll see bigger changes.”

THE DOL WEIGHS IN

That optimism comes as Americans take a keener interest in both environmental and social justice issues. And it coincides with the U.S. Department of Labor (DOL) stepping up its interest in the use of ESG in 401(k) plans. In June, the DOL released proposed regulations to clarify plan fiduciaries’ responsibilities for ESG investments—and in late October published a final, modified rule (see ‘Final’ Words below).

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No one appears to have been asking for these new regs, says Thomas E. Clark Jr., chief operating officer and partner at Boston-based The Wagner Law Group. "Everyone seemed comfortable with the back and forth, ping-pong guidance we'd gotten as (presidential) administrations changed," he says.

In July, the DOL also requested as part of its enforcement program that one RIA provide information on its ESG analysis. Clark, who represents the RIA on the DOL request, says he doesn't know whether other advisors have been asked for documentation of their ESG investment analysis. "But that doesn't mean it hasn't happened," he says. "I certainly suspect that the DOL is doing more: The idea that just one advisor in Texas got a request from the office in Cincinnati doesn't feel right, based on how they've handled previous investigations."

Speaking about the information request letter, Clark says, "it's clear that they are very interested in determining whether a prudent process under ERISA was followed when ESG funds were selected for a plan." Asked about the implications for advisors of the DOL's interest, he says, "To me, the primary takeaway is that ESG funds have to be equally as prudent as non-ESG funds. If you've got XYZ steps in your investment screening process for non-ESG funds, your ESG funds better be able to pass those same steps—no exceptions."

Some people saw the proposed rules as reflecting new DOL thinking, says Preston Rutledge, who stepped down in May as assistant secretary of labor for the Employee Benefits Security Administration (EBSA), and who is now founder and principal of Washington-based Rutledge Policy Group. "The proposed rules actually reflect a longstanding view of the DOL: A fiduciary may not accept lower returns or increased risk for some other purpose than the plan participants' retirement security," he says. "Under ERISA, plan fiduciaries may not select ESG vehicles when they are subordinating returns or increasing risk for the purpose of non-financial objectives, or for stakeholders other than a plan's participants."



BRENDAN MCCARTHY
Nuveen



"TO ME,
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FUNDS."

— THOMAS E. CLARK JR.,
THE WAGNER LAW GROUP

‘Final’ Words?

On October 30, the Labor Department, following a brief period for comment on the proposed rule, unveiled a final version that didn’t even include a reference to ESG since, as the publication noted, “the lack of a precise or generally accepted definition of ‘ESG,’ either collectively or separately as ‘E, S, and G,’ made ESG terminology not appropriate as a regulatory standard.” Instead, it refers to “pecuniary factors and non-pecuniary factors” in defining the relevant fiduciary investment duties.

The “Final Rule on Financial Factors in Selecting Plan Investments” outlines the following “core additions” to the current investment duties regulation at 29 CFR 2550.404a-1.

Loyalty Duty. The final rule adopts the proposal’s addition of a general restatement of the loyalty duty under ERISA section 404(a)(1)(A). The final rule continues to treat the original 1979 regulation’s provisions on the fiduciary duty of prudence as a safe harbor, and separately sets out a new provision regarding a fiduciary’s duty of loyalty under ERISA section 404(a)(1)(A) as minimum requirements for meeting the statutory standard of loyalty.

Pecuniary Factors. The rule adds a specific provision to confirm that ERISA fiduciaries must evaluate investments and investment courses of action based solely on pecuniary factors—i.e., factors that the responsible fiduciary prudently determines are expected to have a material effect on risk and/or return of an investment based on appropriate investment horizons consistent with the plan’s investment objectives and the funding policy. The DOL notes that this provision also provides that the duty of loyalty prohibits fiduciaries from subordinating the interests of participants to unrelated objectives and bars them from sacrificing investment return or taking on additional investment risk to promote non-pecuniary goals.

Reasonable Alternatives. The rule adopts—with modifications—the provision in the proposal that explicitly requires fiduciaries to consider reasonably available alternatives to meet their prudence duties under ERISA. The modifications were made “to avoid suggesting that fiduciaries must scour the marketplace or look at an infinite number of possible alternatives as part of their evaluation.”

Investment Analysis and Documentation. The rule includes new regulatory text setting forth required investment analysis and documentation requirements for those “limited circumstances in which plan fiduciaries may use non-pecuniary factors to choose between or among investments that the fiduciary cannot distinguish based on pecuniary factors alone.”

Investment Alternatives. The rule states that the prudence and loyalty standards set forth in ERISA apply to a fiduciary’s selection of a designated investment alternative to be offered to plan participants and beneficiaries in an individual account plan (such as a 401(k) or defined contribution plan). However, the DOL states that this rule does not “categorically prohibit the fiduciaries of such plans from considering or including, as designated investment alternatives, investment funds, products, or model portfolios that support non-pecuniary goals if the plans allow participants and beneficiaries to choose from a broad range of investment alternatives, as defined in 29 C.F.R. § 2550.404c-1(b)(3).” The DOL goes on to point out that the rule makes clear that the fiduciaries must first satisfy the prudence and loyalty provisions in ERISA and the final rule, “including the overarching requirement to evaluate investments solely based on pecuniary factors when selecting any such investment fund, product, or model portfolio.”

In response to what to many had been one of the more controversial aspects of the proposed rule—and which the American Retirement Association had commented on—the DOL acknowledged that “in response to public comments,” the final rule modifies the provision in the proposal on qualified default investment alternatives (QDIAs), and prohibits plans from adding or retaining any investment fund, product, or model portfolio as a QDIA, or as a component of such a default investment alternative, if its objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.

Documentation

The DOL says that the final rule provides that “if, after completing an appropriate evaluation, a fiduciary cannot distinguish between alternative investments on the basis of pecuniary factors and the fiduciary chooses one of the investments on the basis of a non-pecuniary factor,” the fiduciary must document:

- why pecuniary factors alone did not provide a sufficient basis to select the investment or investment course of action;
- how the selected investment compares to the alternative investments with regard to certain factors listed in the rule; and
- how the chosen non-pecuniary factor or factors are consistent with the interests of participants and beneficiaries in their retirement income or financial benefits under the plan.

In addition, the preamble of the final rule encourages fiduciaries to break ties using their best judgment on the basis of pecuniary factors alone.

— Nevin E. Adams, JD

1970s	1980s	1990s	2000s	2010s	2020s
<ul style="list-style-type: none">• Investors align around key social concerns (i.e. South Africa, Vietnam War)• Pioneering institutions are created (IRRC, ICCR)	<ul style="list-style-type: none">• Dedicated industry networks are formed (Ceres, USSIF)• Increased emphasis on corporate governance and the environment	<ul style="list-style-type: none">• First social indices launched and universe of Socially Responsible Investing (SRI) funds expands• Advance business case for sustainability and reporting (i.e. GRI)	<ul style="list-style-type: none">• Investor convergence on climate issues• Global investor networks formed (i.e. PRI, Global Impact Investing Network)	<ul style="list-style-type: none">• RI approaches expand across asset classes• Expansion of ESG data and reporting to better quantify ESG factors• Greater focus on outcomes (i.e. UN SDGs)	<ul style="list-style-type: none">• Greater emphasis on "S" from COVID-19 and racial equity issues• Greater investor scrutiny of ESG within the investment process to ensure authenticity• Heightened urgency around climate change

Source: Nuveen

The DOL has been talking about socially responsible investing in retirement plans for years, Rutledge says, citing interpretive bulletins issued in 1994, 2008, and 2015, as well as a 2018 field assistance bulletin. "You can go back and look at any of these, and see that same position taken: You are not allowed to accept lower returns or increased risk, in order to consider ESG factors," he says. "Plan fiduciaries are subject to ERISA's 'exclusive purpose rule,' which means that they always have to make decisions that are for the exclusive purpose of providing benefits to participants. So you can see where the exclusive-purpose rule could clash with an ESG focus."

The new rules can help advisors to think in more depth, when analyzing potential investments, about the distinction between financially material ESG factors versus non-financially-material ESG factors, Rutledge says. The DOL is saying that it's fine to make investment decisions that take into account financially material ESG factors, but not to make decisions incorporating ESG factors that aren't financially material. As an example of an appropriate use, he says that if a pension plan divested from coal company stock a decade ago, based on the growing use of clean energy and the implications for coal companies, that's a financially material factor in how coal companies and their stocks have fared. "It's clear there are ESG factors that are material to an investment's risk/return profile," he says.

Brendan McCarthy, Boston-based head of DCIO at Nuveen, points to results of Nuveen's "Fifth Annual Responsible Investing Survey," released in June. For the first time, a majority (53%) of people surveyed cite performance as their primary reason for investing in ESG. Seventy percent of wealth management advisors cite superior risk management and better performance as top reasons for their high-net-worth clients' allocations to responsible investing, compared with 39% in 2018. "The majority of investors now cite better performance as their reason for choosing socially responsible investing," he says.

Even the DOL's proposed rules did not preclude an advisory firm from making recommendations that consider ESG factors, believes Bonnie Treichel, chief operating and compliance officer at Portland, Oregon-based advisory and consulting firm ZUNA. "The proposed rules make clear that you must not give up financial returns for the environmental, social, and governance factors—but that has always been the case," she says. "I see this as a close extension of the 2018 guidance (Field Assistance Bulletin 2018-01) we already had."

In terms of trailing annualized five-year returns, Morningstar's analysis finds that as of year-end 2019, 32% of sustainable funds placed in the top quartile of their categories (which also include conventional funds), with another 32% placing in the second quartile. "ESG funds may continue to outperform, and they may not," Aron Szapiro, Washington-based head of policy research at Morningstar, says. "But there is no current problem of expensive, low-return ESG funds being sold into 401(k) plans. There's no 'plague' of these funds in 401(k) plans. So, what problem are they trying to solve?"

"YOU ARE NOT ALLOWED TO ACCEPT LOWER RETURNS OR INCREASED RISK, IN ORDER TO CONSIDER ESG FACTORS."

— PRESTON RUTLEDGE, RUTLEDGE POLICY GROUP



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ESG THINKING EVOLVES

Meanwhile, Treichel is among those who see a transition in thinking about how ESG applies to 401(k) plans. "There is so much misinformation about what ESG used to be, and what is ESG is today," she says. "The old way of thinking about it was more from the perspective of things such as screening out 'sin stocks' like gun manufacturers. The new perspective is that it is a layer of your quantitative and qualitative analysis that can overlay your entire investment analysis process."

ESG analysis can play an important role in risk management for participants' benefit, Treichel continues. "It is not just about the inclusion of one 'good' thing, or the exclusion of one 'bad' thing, on a plan's investment menu," she says. "It is having a whole menu that has an ESG overlay in the investment analysis. The idea is to follow a prudent process on evaluating investment returns and managing risk, and that the evaluation of risks includes looking into ESG factors. The belief is that this will lead to the ability to manage the risks of the underlying holdings better—which will improve returns for participants in the long run."

It's becoming more important when doing investment analysis to take ESG risk factors into account, in a world increasingly focused on environmental and social justice issues, says Jonathan Drimmer, Washington, D.C.-based partner at law firm Paul Hastings LLP. "I think what we're seeing is two different, related trends," he explains. "One is that companies that do have strong ESG performance are generally doing better in the COVID environment: They have greater organizational resilience; greater product, consumer, and brand loyalty; and they perform more effectively in this environment. To some extent, we can say that strong ESG performance is a proxy for good management."

"The second trend is that we're seeing something of a change in the way that society views businesses, and what they expect of businesses," Drimmer continues. "More and more, investors and consumers are attentive to a company in terms of its response to environmental, social, and governance issues. Increasingly, they believe that companies have a responsibility to not ruin the world."

Drimmer suggests a three-step framework for evaluating ESG risk factors. (He co-authored a paper published in July, "The Growing Importance of ESG Due Diligence Post-COVID-19," that discusses this framework in more depth.) The first step centers on looking at ESG factors on an industry basis, identifying issues with all three elements (environmental, social, and governance). "In certain industries, there are basic, salient risks that exist," he says. "They may not apply to every company, or every location of every company, but that's your starting point." As a second step, he suggests breaking that analysis down on a geographic basis, because the risks can differ widely depending on the location.

The third step focuses on analyzing how an industry's ESG risks apply to a particular company, and that involves both looking back and looking ahead, Drimmer says. "The real test is how effectively a company has responded to ESG issues in the past: Did the company brush them under the rug, or learn from them?" he says. "Try to understand how the company looked at the issue and responded. Just as importantly, what were the lessons learned by the company? What were the follow-up items in the (company's) report on the ESG issue, in terms of actions and strengthening the company's policies, and were those measures carried out? That is an indicator of how seriously a company takes these issues."

Looking ahead, Drimmer says, it's important to understand a company's ESG governance, processes and internal resources to get a sense of its ability to respond to future issues. "In a predictive sense, that really goes to: What are their management systems in place to deal with these issues? What policies and procedures do they have? What are the key performance indicators that the company uses on these issues? And where do any issues that come up get reported: to senior management and the board?"

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PROCESS."

— BONNIE TREICHEL,
ZUNA



ESG's Challenges

ESG analysis, and ESG investing, have some challenges. They include these three:

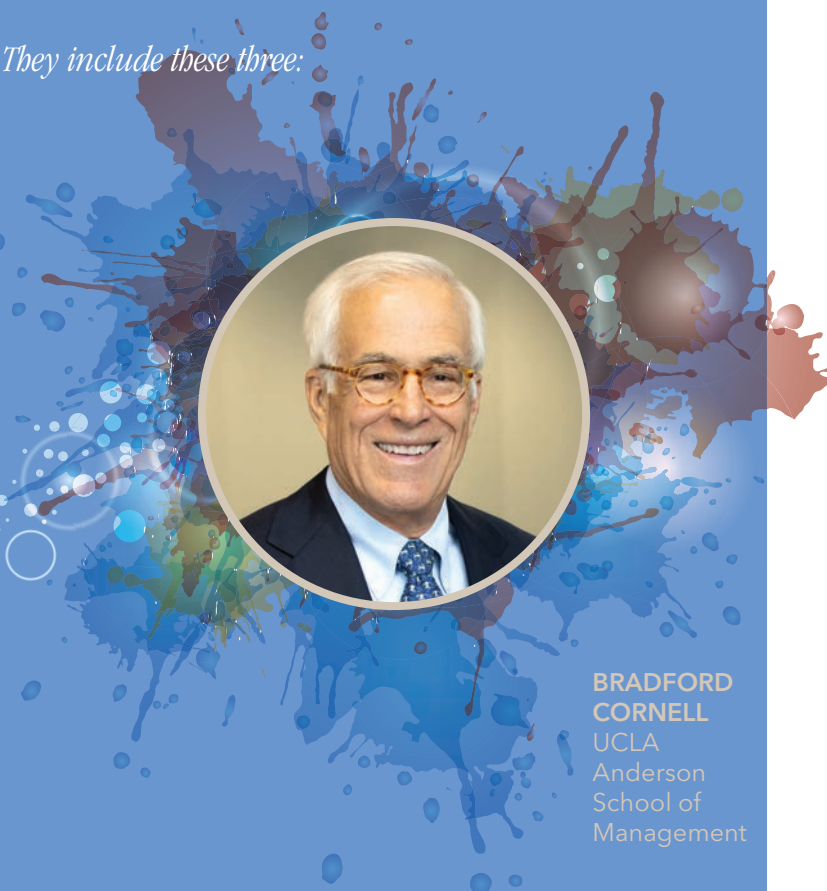
The Weighting Question. “How do you utilize ESG factors as a qualitative consideration, and what is the metric?” ZUNA’s Bonnie Treichel asks. “From my perspective, that is the big question. One of the questions with any investment due-diligence process is weighting. The DOL’s proposed ESG rules don’t say specifically, ‘You can’t weight it as more than 5%, or 10%,’ or some other threshold. If you ask one advisory firm versus another about how they’d weight it, you’d probably get different answers. If I would sum that issue up in two words, I’d say that right now it’s the ‘wild west.’”

Lack of Reporting Standardization. Numerous third-party organizations around the world have developed ESG reporting frameworks, Morningstar’s Aron Szapiro says. “There are a lot of different ESG standards being used out there. The problem is that they are not being used consistently by companies in their ESG reporting,” he says. “Even if two companies are using the same organization’s set of ESG disclosures for their reporting, they may pick and choose what they actually want to disclose.”

Szapiro would like to see an organization such as the Sustainability Accounting Standards Board (SASB) play a key role in moving companies’ ESG reporting toward a more-standardized approach. “What we need to see is more of a convergence: We need comparable disclosures across different companies,” he says. “Today, a lot of companies’ sustainability reports aren’t aligned with their financial disclosures. A lot of those reports are kind of advertisements for the company.”

Potentially Limited Upside. The value of a company’s strong ESG credentials may already be priced into its stock, since there’s been talk about ESG investing for years, says Bradford Cornell, professor emeritus at the UCLA Anderson School of Management. If that’s true, of course, it dampens the return potential for an investor getting in now. “The most important point is that you’ve got to consider (stock) price, in addition to alpha,” he says. (He has written more about analysis considerations in an article, “ESG Investing: Conceptual Issues,” published in the Winter 2020 issue of *The Journal of Wealth Management*.)

Cornell thinks the potential for ESG investment, moving forward, has been overhyped. “If investors have a preference for highly rated ESG stocks for non-pecuniary reasons—such as concerns about the environment—research (on previous market history)



BRADFORD CORNELL
UCLA
Anderson
School of
Management

has shown that will soon be reflected in the prices for those securities, which will reduce the expected returns,” he says. “People start wanting to buy ESG stocks, so when they do buy the stock, it drives the prices up and the returns down.”

There is typically an “adjustment period” in which an investor in the stock of a company with strong ESG performance may see higher returns, before the market fully catches on to that stock’s value, Cornell says. That time period varies, he says, “but I’d say it’s on the order of a few years.” After that, he says, a new investor can expect to see lower returns because the value of the ESG factor already has been fully priced into the stock. “Going forward from here, my prediction is that you will get lower returns from many highly rated ESG securities,” he says. “I think in many cases, the value would be priced in, right now.”

“I wish that you could have your cake and eat it, too: to be ‘good’ and also get higher returns,” Cornell says. “But finance theory doesn’t suggest that will be the case.”

—J.W.



**JONATHAN
DRIMMER**
Paul
Hastings
LLP

LeafHouse has developed a proprietary overlay tool for its ESG analysis. The LeafHouse Investment Sustainability Technology™ (LIST™) tool was designed to be consistent with the DOL's 2018 guidance on ESG, Weaver says. The advisory firm already has its LeafHouse GPA™ comprehensive investment-screening tool, to certify that investments recommended meet all its fiduciary scoring criteria, including for performance. "Every investment we score for ESG already has passed that first, comprehensive screening system," he explains.

The LIST overlay grades strategies by using scores based on environmental, social, and governance factors. It's a peer-to-peer analysis, relative to other strategies in the same category. "There are a lot of ways to look at ESG criteria: Is it values-based? Is it based on best-in-class? Or are you using an exclusionary process that takes out companies that meet certain negative criteria?" Weaver says. "We consider multiple lenses, depending on the industry they're in," he says, adding that the tool utilizes a proprietary system to score each fund on ESG factors.

LOOKING AHEAD

Nuveen's McCarthy sees the use of ESG funds and ESG analysis expanding in retirement plans over time, irrespective of the DOL's proposed new rules. "We're seeing a shift that demonstrates an understanding of ESG factors, and that they can reduce risk and improve performance over the long term," he says.

"With or without the DOL's proposed rules, based on the investment merits and the investor demand, we see ESG continuing to grow," McCarthy continues. "Most advisors already have a rigorous due-diligence process that is based on investment merits, and a lot of advisors have selected ESG funds, utilizing that process. Provided there is thorough documentation to demonstrate why plan fiduciaries select an ESG investment, including thoughtful due diligence that is applied to all funds—ESG and non-ESG—the decision to include that ESG fund should be considered prudent." **NNTM**

"THERE IS NO
CURRENT
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BEING SOLD
INTO 401(K)
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NO 'PLAGUE'
OF THESE
FUNDS IN
401(K) PLANS."

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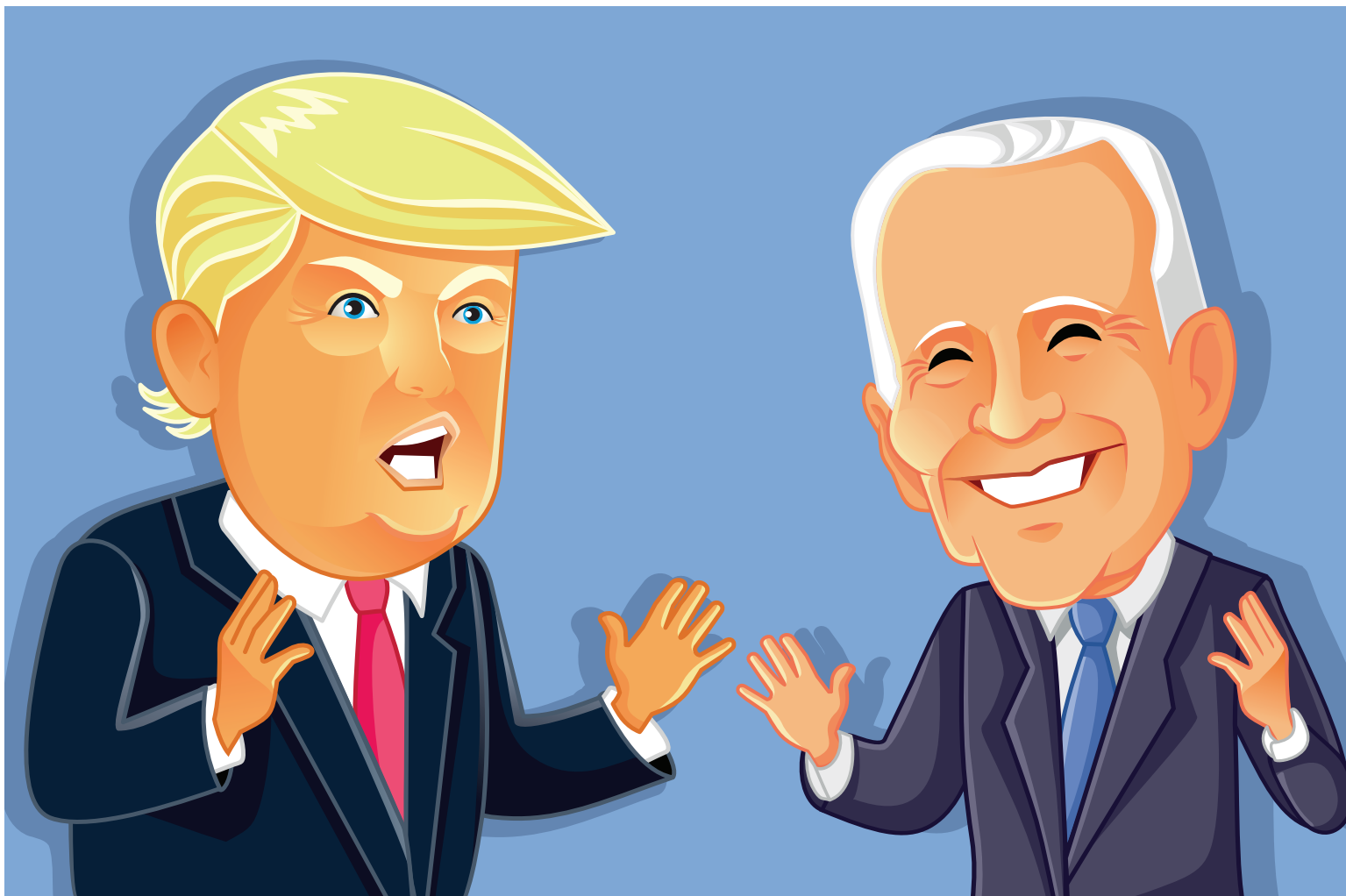
WHAT MIGHT THE
2020 ELECTIONS
MEAN FOR
RETIREMENT
POLICY?

BY TED GODBOUT



As this issue headed to print in mid-November, former Vice President Joe Biden looks set to become the 46th President of the United States. That said, the “blue wave” that some had anticipated failed to materialize. The GOP actually picked up seats in the U.S. House of Representatives, though the Democrats retain their majority.

As for the Senate, even with 23 seats to defend, Republicans managed to stave off Democratic party inroads in all but two races (Arizona and Colorado)—and even managed to “recover” one that was lost in 2018 (Alabama). However, one critical state—and two critical races—remain to be determined—and the results could have a major impact on the speed—and direction—of policy shifts under a Biden administration.



RETIREMENT POLICY LEGISLATION HAS GENERALLY ENJOYED BIPARTISAN SUPPORT AND COMPROMISE THROUGHOUT THE YEARS, IF NOT DECADES, SO IT'S POSSIBLE PARTY LEADERS COULD COME TOGETHER ON RETIREMENT LEGISLATION.

WHY IT MATTERS

If the Democrats take control of the Senate, and oversee both houses of Congress and the executive branch, then significant changes are possible, as the Democrats would set the policymaking agenda. Still, with the margins tight in both the House and Senate, the need for compromise will likely be necessary, as small coalitions of lawmakers could hold out for pet-policy priorities.

On the other hand, if the Republicans maintain control of the Senate, most of Biden's policy ideas would likely be dead on arrival, including, for example, Biden's 401(k) tax credit concept or a financial transaction tax that the American Retirement Association has strongly opposed.

It also will force the need for compromise between the two parties to get anything done or Washington will be headed for major gridlock. One possibility that was discussed if the Democrats were to win control of the Senate was to do away with the filibuster, but Sen. Joe Manchin (D-WV) has poured cold water on that prospect, saying he would not go along with the idea. Currently, to move any legislation through the Senate, other than budget reconciliation legislation, it takes 60 votes to end a filibuster.

That said, retirement policy legislation has generally enjoyed bipartisan support and compromise throughout the years, if not decades, so it's possible party leaders could come together on retirement legislation, but more on that later.

FOCUS ON GEORGIA

For now, all eyes are on Georgia and what happens with the special runoff elections for the state's two Senate seats, which are set for Jan. 5, 2021.

The first contest—a special election—is between Sen. Kelly Loeffler (R-GA), who was appointed by Gov. Brian Kemp (R) in December 2019 to replace Sen. Johnny Isakson, who retired early, and Democratic challenger Reverend Raphael Warnock. The second race—a regular election following the expiration of his six-year Senate term—is between

incumbent Sen. David Perdue (R-GA) and Democratic candidate Jon Ossoff.

These two races will determine which political party controls the Senate. The current breakdown is 50 Republicans to 48 Democrats (including two independents who caucus with the Democrats). If the Democrats win both Georgia seats, the resulting 50-50 tie would mean that, with Vice President-elect Kamala Harris serving as President of the Senate and casting the tie-breaking vote, the Democrats would be in control. However, if one—or both—of the seats remain in Republican hands, radical shifts in policy—and even in cabinet appointments—could be slowed if not stymied altogether. That would not, however, impede actions via Executive Orders, and—at least eventually—changes at regulatory agencies, notably the Securities and Exchange Commission and Department of Labor. Considering the active and sometimes controversial proposals and final rules promulgated this past year, a Biden administration would probably take a hard look at putting its stamp on the regulatory agenda.

REGULATORY FREEZE

With a change in administration comes new regulatory priorities. One of the first things that every new administration does—and that Biden is widely anticipated to do—immediately after being sworn in is to freeze any new regulatory proposals that have not been finalized or have become effective. With respect to any regulation that has been published in the *Federal Register*, but not taken effect, the administration may seek to temporarily postpone the effective date and consider extending it out further. Biden would also likely review and potentially revoke various Executive Orders and sub-regulatory guidance issued by the Trump administration.

Moreover, a Biden Labor Department may want to revisit the recently finalized rule on Financial Factors in Selecting Plan Investments that took a step back from mentioning environmental, social and governance (ESG) factors in the

WITH THE MARGINS TIGHT IN BOTH THE HOUSE AND SENATE, THE NEED FOR COMPROMISE WILL LIKELY BE NECESSARY, AS SMALL COALITIONS OF LAWMAKERS COULD HOLD OUT FOR PET-POLICY PRIORITIES.

text, but focused more on addressing pecuniary and non-pecuniary factors in defining the relevant fiduciary investment duties. That final rule, announced Oct. 30, was not published in the *Federal Register* until Nov. 13, meaning that it would be effective shortly after the New Year.

The Trump administration's Labor Department has also proposed a prohibited transaction exemption on investment advice, as well as a proposed proxy voting rule. As of this writing, the regulators had not finalized these rulemaking initiatives, and time is quickly running out.

Even if the Trump administration is able to move these packages through, it is very likely they would be revisited by a Biden administration or even challenged under the Congressional Review Act or Administrative Procedures Act. The likelihood of a CRA challenge would also depend on whether the Democrats gain control of the Senate, since both the House and Senate would have to sign on—and within a limited time window—along with the president for that to take place.

It's also worth noting that a Biden administration and whoever he might appoint to replace Securities and Exchange Commission Chairman Jay Clayton may well choose to revisit Regulation Best Interest. The Commission likely would not be able to reopen the regulation, but it could theoretically make some tweaks, particularly with respect to defining "best interest." Clayton's current term at the SEC doesn't expire until June 2021, but he announced Nov. 16 that he will be leaving at the end of December. This would presumably allow Biden to select a nominee for the position (which requires Senate confirmation), returning the party ratio of the SEC to three Democrats and two Republicans.

SECURE 2.0?

What are we likely to see in the 117th Congress when it comes to retirement-based legislation? Assuming Congress does not act on the "Securing a Strong Retirement Act of 2020" during the lame-duck session, this legislation could form the basis for bipartisan retirement security legislation in the upcoming Congress.

This bill, dubbed SECURE 2.0, was introduced by House Ways & Means Committee Chairman Richard Neal and the Committee's ranking Republican, Rep. Kevin Brady (TX),

on Oct. 27, 2020. It seeks to build on the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which was enacted in December 2019. While it is perhaps more modest than the SECURE Act, it includes some 36 provisions addressing everything from expanding coverage and increasing retirement savings, to preservation of income, simplification and clarification of retirement plan rules, to technical and administrative provisions.

"The introduction of this bill shows that retirement policy issues will continue to be a priority going into the new Congress," notes Brian Graff, CEO of the American Retirement Association.

And let's not forget that Senate has its own bipartisan legislation waiting in the wings. The "Retirement Security and Savings Act" was introduced by the bipartisan duo of Sens. Rob Portman (R-OH) and Ben Cardin (D-MD), who both sit on the Senate Finance Committee, which has primary jurisdiction over this legislation.

The legislation was last introduced in May 2019, and since then, has had some provisions incorporated into the SECURE Act. Still, the legislation shares many similarities with SECURE 2.0, and in other ways, it goes beyond the current Neal/Brady bill, but is more comparable to the Retirement Plan Simplification and Enhancement Act (RPSEA) introduced by Neal in 2017.

While a Biden administration would want to have a say on any retirement policy legislation moving through Congress, these two bills provide a good snapshot of what may be possible with a closely divided Congress.

Additional priorities of a Biden administration, as well as of members of Congress from both parties, include finally finding a solution to the multiemployer funding crisis that is reaching critical status. Single-employer funding relief—something that the American Retirement Association has been actively advocating for—may also be in the mix.

Over the coming weeks and months we will get more answers to many of these "what ifs," but for now, don't count out the possibility of having bipartisan retirement security legislation moving through the 117th Congress—even if there is much polarization and gridlock on other issues. **NTM**



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ARA's Wonder Women

MEET THE ARA WOMEN IN RETIREMENT COUNCIL!

By Nicolle Corning

It's no secret that women are in the minority when it comes to the professionals who service this country's retirement plans. For me, being a female financial advisor in a field where women account for only 20% of all advisors is a particular frustration.

That's what made it so inspiring to serve on the NAPA Leadership Council with powerhouse women like Jania Stout and Pat Wenzel, where we were able to do our part to create tools for women to enter and advance in our industry by creating and advocating for programs like the Thrive mentorship program for women and the Women in Retirement Conference (WiRC). Each of these efforts began as a kernel of an idea which grew into meaningful outlets for women in this industry to connect, empower and motivate each other.

And as I spoke with my counterparts in the leadership of ASPPA and the other ARA sister organizations, I realized that the efforts we were making in NAPA could easily be used as a template by those organizations without them having to reinvent the wheel. While the WiRC conference was having success in fostering relationship building and professional growth for the women in ASPPA and NAPA, it was starting to feel like a once-a-year conference was not enough to capitalize on the ideas birthed there.

That confluence of events led to the beginning of the idea of forming an ARA Women in Retirement Council. The five sister organizations within the American Retirement Association family represent just about every aspect of the retirement universe—from plan sponsors (PSCA) to actuaries (ASEA) to 401(k) advisors (NAPA)

to the not-for-profit plan advisors (NTSA) to pension professionals (ASPPA). We have such power to be able to promote through every single professional channel in the retirement plan space.

The vision was to support the membership of each sister organization to promote and advance women within their professions through coordination and increased awareness of resources for our female members. There was already a need; there was the will to advance women; and we had begun to make individual efforts within each of our organizations. If we could have a permanent council with a representative from each of the sister organizations meeting on a regular basis to share ideas and drive momentum around recruiting and retaining women in the industry, we felt we could effect real change within this industry we all love.

Easy, right? Now all we had to do was convince each of the sister organizations to approve it. With the help of the ARA staff, we put together the pitch book. Now it was up to each of the sister organizations to vote it up or down. We identified an advocate on each Leadership Council and they led the charge. Starting with NAPA, the case was made to each Leadership Council for the formation of an effort we believed was long overdue. One by one, each of the sister organizations gave the council their stamp of approval. It passed all five organizations unanimously.

On August 26, Women's Equality Day, the ARA officially launched the Women in Retirement Council. I had been appointed the Chair and NAPA representative along with a team of women I can best describe as the "Wonder Woman" collective:

“On August 26, Women's Equality Day, the ARA officially launched the Women in Retirement Council.”

Lynn Young from ASEA, Shannon Edwards from ASPPA, Kristine Coffey from NTSA and Michelle McGovern from PSCA. This is a group of women who get things done—and we wasted no time.

Our first order of business was to create a better structure for the NAPA Thrive program and to roll it out to the entire ARA family. And while there are still some finishing touches to put on the project, we have made it available to all ARA members. You can learn more at <https://www.usaretirement.org/ara-women-in-retirement-council>. We encourage any woman looking for a mentor or to serve as a one to please sign up.

In addition, we have identified a succinct list of areas of focus with specific projects designed to further the advancement and inclusion of women in our industry. My highest hope for the council is that we are able to effect gender parity within our industry to the point that someday councils like ours will not be needed. With numbers like only 30% of actuaries being female, that goal can seem daunting. But I know our group of Wonder Women won't stop until we get there. **NTM**

Help May Be on the Way

FORWARD-THINKING RETIREMENT PLAN ADVISORS WILL BE THE ONES WHO CAN DEMONSTRATE AN EXPERTISE AND EXPERIENCE AROUND THE MOST TAX-EFFICIENT CONVERSION AND UTILIZATION OF TAX-DEFERRED RETIREMENT AND IRA ASSETS.

By Steff Chalk

Plan sponsors and fiduciaries have a lot on their minds these days. One's duty as a retirement plan fiduciary often can be the most challenging of all job functions. Yet rarely is a new plan sponsor or a new retirement committee member fully aware of all the duties and responsibilities they assume as a retirement committee decision maker.

Instead, most retirement plan sponsors begin their fiduciary journey on a firm foundation of fiduciary ignorance. In addition to monitoring investments, benchmarking, administration and payroll, there are two macro-level concepts of which all retirement advisors and most plan sponsors should be fully aware. They are:

- the accumulation phase; and
- the decumulation phase.

The accumulation phase is a simple enough concept to grasp when advisors communicate with plan sponsors or plan participants. While the concept is simple enough to define and communicate, however, it can be anything but simple for



plan participants to execute a successful savings and growth strategy. Even though a variety of investment strategies exist for accumulation, many of them can deliver a plan participant to a successful retirement outcome.

The decumulation phase is a different process—and one that can be difficult to explain succinctly. However, this phase—spending down retirement plan assets—is rarely a problem for anyone to execute. Most retirees have no problem spending their accumulated assets.

What Occurs Between Accumulation and Decumulation?

To oversimplify, one could refer to target date funds or managed accounts and reference the reduction of equity exposure as being an important component of what contributes to a successful retirement. However, there is so much more for each plan participant to consider than just the glidepath of the target date fund. Multiple investment strategies can successfully deliver a significant asset to the plan

participant upon reaching normal retirement age.

For each plan participant there needs to be substantial thought, consideration and conversation when answering this question: *When should I convert my assets from the existing tax-qualified structure to an after-tax account status?*

What Are the Known and Unknown Factors?

When considering the conversion of tax-deferred assets to after-tax assets, the plan participant likely knows the following: existing tax law, the participant's current age, current year's income level and the potential tax obligation created by the conversion.

The unknown factors pose potential pitfalls in the form of future required minimum distribution (RMD) tables, a participant's mid- and long-term health, future market returns, future earned income (year over year) and any future tax reform.

These known and unknown factors have a direct impact on the tax obligation created by the conversion of any pre-tax asset into after-tax money, which ultimately results in how much of one's retirement savings will be lost to taxes in the coming years.

Since most plan fiduciaries—and frankly, many retirement plan advisors—are not addressing this line of thinking, perhaps it is time for the true retirement plan specialists to start doing so. Decisions around the orderly conversion of retirement plan assets into post-tax assets could enable millions of plan participants to keep more of their hard-earned retirement assets during the time they need it most.

Forward-thinking retirement plan advisors will be the ones who can demonstrate an expertise and experience around the most tax-efficient conversion and utilization of tax-deferred retirement and IRA assets. This outside-the-box thinking may become the advantage these advisors use to help plan sponsors and participants.

Plan sponsors rarely think this far ahead. Overseeing the orderly decumulation of retirement plan assets makes sense for retirement plan advisors and their clients. **NTM**

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Data and Security: The Current Frontier

TODAY YOU CAN PROVIDE SIGNIFICANT VALUE TO YOUR CLIENTS BY FOCUSING ON SECURITY PROCESSES, INSURANCE LEVELS, AND DATA USAGE PROVISIONS.

By David N. Levine

I recently set up my first computer, an Atari 400 computer from the days of Asteroids and Pong, for the first time in decades. As a kid, I spent hours learning how to program and rewrite existing software on this computer. Eventually, I moved beyond my technology roots and became a lawyer and then a benefits lawyer. Now my two worlds have converged as an old topic has come to the forefront in the retirement industry: the use of data and data security.

Data and security have been significant areas of focus in the retirement industry for a long time. However, as the retirement industry has moved more and more to enhanced technologies and the use of data has become ever more central to the industry, there is more attention being paid by both regulators and plaintiffs' firms to these topics than ever. Advisors play a key role in addressing these topics as follows:

- **Data Breach Litigation.** Fraud and impersonation have long been a concern for participants and retirement plan sponsors. Recently, plaintiffs have filed a number of lawsuits relating to the takeover and liquidation of participant accounts by fraudsters. In addition, there continue to be increasing attempts to breach service provider systems. To the extent that advisors have access to participant data or discretion over participant accounts, advisors may benefit from the lessons learned from these cases in evaluating their data security practices.

- **Privacy Litigation.** Data security litigation is often intertwined with claims about how data related to a plan is used by plan service providers. Historically, many advisors had limited exposure to participant-level data. However, as many advisors have expanded their services and offerings, such as wellness, in-plan advice and management, and general wealth management, some advisors may have increasing access to participant data. Advisors can benefit from watching the evolution of this litigation and how data privacy is addressed as part of their own service offerings.
- **Department of Labor Initiatives.** Very recently, the Department of Labor has begun to increasingly focus on providing guidance on security and data issues and is now actively asking security and data-related questions in investigations of plans and

service providers. Answering these questions often requires depth of knowledge that fuses an understanding of technology and ERISA requirements, which are often separated by a chasm in the silos of a service provider's organization. An advisor can play an essential role in bridging that gap.

- **Vendor Management.**

Historically, a central focus of an advisor's practice has been to support her or his clients in evaluating potential plan vendors' services. The focus of these evaluations has often been on pricing, service teams, and service offerings. However, with the rise in prominence of data security and usage, an advisor can provide significant value to her or his clients through a focus on security processes, insurance levels, and data usage provisions. This knowledge can help provide leading edge support for clients while also differentiating an advisor's services from potential competitors.

Retirement plan data and security issues are likely to continue to garner increasing attention in the next several years. These topics impact advisors' own clients as well as their businesses. By staying up to date and focusing on this rapidly evolving area of retirement, advisors can have the ability to better serve their clients while also enhancing their advisory businesses as a whole. **NNTM**



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False Pretenses

THE REAL 'COVERAGE' GAP.

Nevin E. Adams, JD

Teresa Ghilarducci doesn't give American employers—or advisors—much credit. Back in September, she penned an article in *Forbes* titled "Employers Can't Provide Retirement Plans. Let's Stop Pretending They Can."

Her point appears to be that all employers won't provide

retirement plans, or at least to date haven't. She attempts to prove her case by pointing to the coverage gap—a real issue, and one that we've written about previously. Unfortunately, she tries to make the case—and exaggerates it—by citing as a reference a dataset that has been drawn into question by none other than the non-partisan

Employee Benefit Research Institute (EBRI), and more recently *Forbes* contributor Andrew Biggs (who in a recent *Forbes* article also cites the EBRI research). Relying on this dataset, Ghilarducci claims that retirement plan participation actually declined between 2015 and 2019.

She has a solution, of course, though she doesn't call it by

“There is a coverage gap—though not as wide, nor as deep, as Ghilarducci assumes.”

name. In the article she claims that, “if every worker had an employer that contributed 3% of their salary in a retirement plan at work” it would cost employers—well, her figures suggest it would be about half what they currently do. That’s not completely illogical—employer contributions averaged 5.2% of worker pay in 2018, according to the Plan Sponsor Council of America’s 62nd Annual Survey of Profit Sharing and 401(k) Plans. It’s no accident that Ghilarducci invokes a 3% rate—it’s the basic assumption underlying her Guaranteed Retirement Account (GRA) proposal, which she has advocated—with some “fluidity” in the underlying assumptions—for some time now.

Indeed, not specifically mentioned in this particular article, but surely implicit in Ghilarducci’s premise that employers can’t/won’t offer retirement programs, is the mandatory contribution aspect of her GRA—oh, and the elimination of the current tax preferences of the 401(k) to “pay” for it.

More than that, one might well wonder if the employer “spend” Ghilarducci advocates is only half of the current rate, could it be “enough?” Well, a couple of years back I asked Employee Benefit Research Institute (EBRI) Research Director Jack VanDerhei to run the GRA program assumptions—for younger workers only (ages 26-30)—and asked him to compare that to what those same workers

might get if they simply continued in their 401(k)s. To do so he took actual balances, contribution rates and investment choices across multiple recordkeepers from more than 600,000 401(k) participants, looking at those currently ages 26-30, including those with zero contributions, with 1,000 alternative simulated outcomes for stochastic rate of returns based on Ibbotson time series (with fees between 43 and 54 bps), including the impact of job change (an assumption was made that 401(k) participants would continue to work for employers who sponsored 401(k) plans), cashouts, hardship distributions, loan defaults, and with contributions based on observed participant data as a function of age and income and asset allocation based on observed participant data as a function of age. For the GRA, EBRI assumed no cashouts, hardship distributions or loan defaults (they aren’t allowed), assumed a deterministic 7% nominal return with no fees, and took their assumptions about the 3% mandatory contributions. And then compared the two outcomes at age 65.

The result? Well, let’s just say that if current rates of saving aren’t sufficient, 3%—even mandatory, and even with no leakage—won’t match the performance, the “contribution” of the 401(k).

Ghilarducci is correct in that most of the current coverage “gap” is among employers with

fewer than 100 workers, and that many of those employ workers that are lower-income, part-time, part-year workers. But she’s off base in her characterization of the participants in that system. According to EBRI, in 2016, more than 80% of 401(k) participants (for whom this information was available) made less than \$100,000 per year, and more than half of 401(k) participants made less than \$50,000. Even more importantly, moderate income workers participate when they have the option: In 2017, Vanguard reports that more than two-thirds of workers earning between \$30,000 and \$50,000 save in their 401(k).

There is a coverage gap—though not as wide, nor as deep, as Ghilarducci assumes. In fact, the system she chooses to characterize as a “failure” works remarkably well for those who have access to it—thanks to the hundreds of thousands of employers that have... voluntarily, supported and encouraged by tax considerations, chosen to provide them.

The real “coverage” gap is that they—and the advisors who help them—often don’t get the credit they deserve for doing so. **NNTM**

Cases in Point

THE PAST YEAR HAS BEEN A “BANNER YEAR” FOR THE PLAINTIFFS’ BAR, PANDEMIC NOTWITHSTANDING. A SERIES OF NEW CASES HAVE BEEN FILED (AND SOME BY “NEW” ATTORNEYS), AND THE U.S. SUPREME COURT IS TAKING A LOOK AT ONE OF THE UNIVERSITY 403(B) CASES. OH, AND NAPA EVEN FOUND ITSELF DEFENDING—ULTIMATELY SUCCESSFULLY—ITS CLAIM TO USE THE NAPA CPFA CREDENTIAL.

Confuse ‘Shun’

Federal judge backs NAPA in credential challenge

Citing the “absence of any evidence indicating actual confusion in the marketplace,” a federal judge has decided in favor of the American Retirement Association (parent organization of NAPA) in litigation brought by the CFA Institute regarding use of the NAPA CPFA credential.

On Nov. 5, the U.S. District Court in the Western District of Virginia granted in full the American Retirement Association’s motion for summary judgment¹ and dismissed CFA Institute’s complaint in its entirety, noting that “no reasonable trier of fact could find in favor of Plaintiff on any of its four counts in this action, because Plaintiff fails to put forth evidence sufficient to create a genuine dispute of fact

that Defendants’ use of their CPFA credential creates a likelihood of confusion in the marketplace.”

Case History

In February 2019, the CFA Institute chose to file a civil lawsuit regarding alleged trademark infringement with NAPA’s Certified Plan Fiduciary Advisor name and program, claiming that it would result in confusion in the marketplace with their Chartered Financial Analyst name and program. Among other things, their arguments had gone so far as to note that CPFA and CFA both included three identical letters in the same sequence.

The CFA Institute plaintiffs had argued that those pursuing the credentials might be confused by the similarity in their acronyms, but Judge Norman K. Moon dispensed with that notion quickly, explaining that “there can be no serious debate that those in the financial services industry are not likely to obtain the CPFA credential under the mistaken belief that it is affiliated with the CFA credential.”

‘Speculative and Irrelevant’ Arguments

The CFA Institute plaintiffs had also argued that, despite significant differences in the



FOOTNOTES

¹ A judgment by the court for one party without a full trial



target audiences (investment management professionals in the CFP and retirement plan advisors with the NAPA CPFA), "secondary" markets, such as retail clients or employers, might be misled, but Judge Moon determined that argument was "both speculative and irrelevant." He noted that "Plaintiff fails to offer even a scintilla of evidence showing actual confusion in the marketplace. No survey, no anecdotal evidence, not even a single account from anyone who once called CFA Institute seeking a CPFA credential, or vice-versa."

He went on to explain that, "As Defendants correctly note, even two years without any identifiable instance of actual confusion is a damning fact undermining the Plaintiff's claim." Moreover, "the

absence of any confusion makes Plaintiff's particular theory of trademark infringement difficult to accept at face value," and Judge Moon described their premise as "entirely speculative without a single example of someone confusing the credentials or thinking them merely interchangeable—much less a consumer survey showing a demonstrable portion of the market believes as much."

Judge Moon also found no evidence "to demonstrate bad faith or malintent" on the part of the American Retirement Association/NAPA in choosing the credential name or abbreviation.

In sum, Judge Moon concluded, "Plaintiff fails to overcome opposing evidence regarding the sophistication of the

consuming parties, the innocent intent of Defendants, and, most importantly, the absence of any evidence indicating actual confusion in the marketplace."

Commented Brian Graff, CEO of the American Retirement Association and Executive Director of NAPA, "We are extremely pleased that the U.S. District Court recognized that NAPA's Certified Plan Fiduciary Advisor (CPFA) credential program is designed for those advising employers on their fiduciary duties in providing retirement plans for their employees. At this point we hope that both organizations can now better focus their attention and resources on our respective missions rather than on wasteful litigation."

—Nevin E. Adams, JD

'Happen' Stance

Split decisions in 401(k) theft suit for plan sponsor; RK

A plan sponsor, sued for a 401(k) account theft, is off the hook for now—but not the recordkeeper.

The suit was filed on behalf of Heide Barnett, 59, a retired former employee of Abbott Laboratories, who had left her savings in the Abbott Corporate Benefits Stock Retirement Plan. Filed against the fiduciaries of the Abbott Labs retirement plan, and Alight Solutions, LLC, the recordkeeper for the plan, the suit alleges that the defendants "failed to enforce a security question routine set up for security purposes on the Defendants' website"... and "instead simply provided a one-time code over the phone that was used to loot Ms. Barnett's account." And then, "rather than communicating with Ms. Barnett via email concerning changes to her account, as Defendants knew Ms. Barnett preferred, they mailed notices, allowing the theft to be consummated and \$245,000 to be transferred out of the country via email to an Indian IP address before Ms. Barnett could take any steps to halt the fraud."

The series of events involving Barnett's account are worth a read—suffice it to say that an

individual (subsequently tied to an IP address in India) accessed her account online, and after entering invalid information, triggered the “forgot password” option, and with the code (they apparently had access to her email account) was able to access the account, had communications (yes, more than one) with service center personnel, and changed the bank account associated with that account, and transferred money from it to that other bank—without being noticed—until the confirmations of the activity were actually received—by regular postal mail (Bartnett—who no longer works at Abbott Labs—claims her established communication preference was email).

The Counts

Bartnett’s complaint contains two counts: one against the Abbott Defendants and Alight for breach of fiduciary duty under ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2), and the other against Alight for violations of the Illinois Consumer Fraud and Deceptive Business Practice Act (ICFA).

U.S. District Judge Thomas M. Durkin of the U.S. District Court for the Northern District of Illinois quickly dispensed (*Bartnett v. Abbott Laboratories et al.*, case number 1:20-cv-02127, in the U.S. District Court for the Northern District of Illinois) with the claims against Abbott Labs as a fiduciary, dismissing Bartnett’s “conclusory allegation” regarding Abbott Labs

role with regard to plan assets as “nothing more than a ‘formulaic recitation’ of 29 U.S.C. § 1002(21).” In fact, despite the complaint’s labelling of Abbott as a functional fiduciary who failed to take acts in defense of Bartnett’s account, he wrote: “The complaint fails to allege any fiduciary acts taken by Abbott Labs, no less link them to the alleged theft. And while the complaint alleges that the call center and website were used to perpetuate the theft, it also indicates that both are operated by Alight.”

Fiduciary’s Duties

As for Marlon Sullivan, administrator and named fiduciary of the Abbott Labs plan, while Judge Durkin acknowledged that



“As is common in lawsuits against recordkeepers, Alight argued that it only performed “ministerial functions,” and that it was therefore not a fiduciary, and that the claims against it should be dismissed.”

there “is no dispute that he had a fiduciary duty to Barnett,” he found no evidence that Sullivan “misled” or acted contrary to the exclusive purpose of providing benefits to plan participants, nor that he failed to make sound investment decisions on behalf of the plan. He went on to state that, while Barnett asserts that the duty of prudence extends to the “safeguarding of data and prevention of scams,” “Barnett has not pointed the Court to any case law in the Seventh Circuit that states as much. Further, the cases on which Barnett relies are inapposite.” Dismissing claims regarding Sullivan’s breach of prudence, he continues, “the complaint does not allege that Sullivan knew about the unauthorized attempts to access Barnett’s account. Further, Barnett’s account was frozen as soon as she told the call center about the improper withdrawal of funds.”

As for a duty to monitor, Judge Durkin notes that Barnett’s allegation that Sullivan “fail[ed] to monitor other fiduciaries’ distribution processes, protocols, and activities” amounts to “nothing more than speculation.” Moreover, he notes that “the complaint does not allege any monitoring process between Sullivan and Alight, let alone a defect in that process,” and that while Barnett “makes several allegations concerning Alight’s own protocols, none of those allegations speak to Sullivan or his duty to monitor Alight.” In other words, he found no credible

case for the notion that Sullivan breached a fiduciary duty to monitor.

Judge Durkin made even shorter work of alternate claims against the plan, and Abbott Corporate Benefits (which, he pointed out, was neither a legal entity, nor the actual plan sponsor—that, according to the Form 5500, was Abbott Labs).

On the other hand, Judge Durkin left the door open, noting that “Barnett may file a motion for leave to file an amended complaint if she believes she can cure the deficiencies in the allegations against the Abbott Defendants described in this opinion. That motion must be filed within 21 days or dismissal of the claims against the Abbott Defendants will be with prejudice.”

Alight Allegations

On the other hand, “the complaint alleges far more than legal conclusions concerning Alight,” Durkin wrote. “The complaint catalogues the repeated actions taken by Alight related to the Retirement Plan and its assets, including, most importantly, the disbursement of \$245,000 in plan assets.”

As is common in lawsuits against recordkeepers, Alight argued that it only performed “ministerial functions,” and that it was therefore not a fiduciary, and that the claims against it should be dismissed. However, Durkin commented, “Unlike the sparse allegations concerning the Abbott Defendants,” he continued, “there are sufficient allegations on the

face of the complaint to infer that Alight acted as a fiduciary by exercising discretionary control or authority over the plan’s assets. And even though Alight argues that its actions were purely ministerial, Barnett’s complaint challenges that assertion.”

As regards the legal standard for dismissal, “Since competing factual allegations and any reasonable inferences drawn from them must be resolved in favor of the nonmoving party at the pleading stage, Alight’s factual assertions do not provide a proper basis to dismiss Barnett’s claim,” Durkin concluded.

ERISA Preemption

Alight had also argued that ERISA preempted the IFCA state law claim. Judge Durkin disagreed. “The ICFA claim does not require the Court to interpret the terms of the Retirement Plan,” he wrote. “Indeed, the claim is premised on the allegations that Alight misrepresented the quality of its services and engaged in an unfair business practice, which have little to no bearing on the plan itself. And while the ICFA claim involves an ERISA plan, the claim arises in the context of that plan.”

Judge Durkin goes on to point out that “the complaint specifically alleges that Alight made representations online about the quality of its services and that those representations were misleading because Alight failed to protect her retirement money. It also alleges that Alight engaged in an unfair business practice because it failed to implement

“The issue that the plaintiffs—represented by the law firm of Schlichter Bogard & Denton—want the Supreme Court to resolve is what they argue is a split in the district courts in the standard to be applied in these cases.”

proper security procedures online and over the phone, which led to the improper withdrawal of her funds,” he noted. “The claim therefore seeks recovery for activities that occurred outside the terms of the plan. Accordingly, the ICFA claim is not preempted by ERISA.”

And while he did conclude that Barnett’s assertions that the website service claims were deceptive weren’t valid (and dismissed them), he concluded that “Bartnett has sufficiently stated a claim for unfair business practice under ICFA” with allegations that “Alight failed to protect Barnett’s personal information and properly notify her of important changes to her account.” The allegations that “Alight’s failures allowed the scammer to steal hundreds of thousands of dollars in retirement funds,” and that “proper security measures would have prevented the theft” were “...sufficient to state an ICFA claim for unfair business practices.”

The plaintiff in this case is represented by Todd A. Rowden, James L. Oakley, Jeramee T. Gwozdz and Donnell J. Bell of Taft Stettinius & Hollister LLP.

What This Means

In considering a motion to dismiss a suit, the courts must accept “all well-pleaded facts as true and draws all reasonable inferences in favor of the non-moving party.” On the other hand, it is expected that the plaintiff “pleads factual content that allows the court to draw the reasonable inference

that the defendant is liable for the misconduct alleged.”

We still really only have one side of events, and easy as it seems with that version to see plenty of room for improvement in the process, it’s worth remembering that it is only one side. However, it seems a good opportunity for recordkeepers—and those that rely on them—to say, “could something like this happen here?” And, if so—to take steps to prevent it.

—Nevin E. Adams, JD

‘Chilling’, Affects?

SCOTUS seeks Fed input on excessive fee suit

The nation’s highest court has sought the federal government’s input on a case that the law firm of Schlichter Bogard & Denton says is having a “chilling effect” on excessive fee litigation.

Specifically, the U.S. Supreme Court has “invited” the Acting Solicitor General to “file a brief in this case expressing the views of the United States” in a suit brought against Northwestern University and the fiduciaries of its 403(b) plan. It was the second of the 403(b) university excessive fee suits to go to trial—and the second in which the university defendants prevailed, back in May 2018.

The issue the court has agreed to consider is “Whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services

are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1)(B).”

The original suit, filed against Northwestern University in 2016 by the law firm of Schlichter Bogard & Denton, had argued that Northwestern had “eliminated hundreds of mutual funds provided to Plan participants and selected a tiered structure comprised of a limited core set of 32 investment options,” including five tiers—one a TDF tier, the second five index funds, the third consisting of 26 actively managed mutual funds and insurance separate account, and an SDBA. However, the suit noted that Northwestern continued to contract with two separate recordkeepers (TIAA-CREF and Fidelity) for the retirement plan, and only consolidated the Voluntary Savings Plan to one recordkeeper (TIAA-CREF) in late 2012. The suit also took issue with the alleged inability of the plan fiduciaries to negotiate a better deal based on its status as a “mega” plan, for presenting participants with the “virtually impossible burden” of deciding where to invest their money (because of too many investment choices), and for including active fund choices when passive alternatives were available.

As noted above, the district court² ruled in favor of the plan fiduciary defendants in March 2018, and the appellate court affirmed that decision earlier this year.



‘Split’ Decision

The issue that the plaintiffs—represented by the law firm of Schlichter Bogard & Denton—want the Supreme Court to resolve is what they argue is a split in the district courts in the standard to be applied in these cases. Their petition for consideration notes that “the Seventh Circuit dismissed petitioners’ ERISA claims for imprudent retirement plan management, even though the Third and Eighth Circuits have allowed lawsuits with virtually identical allegations to advance, and the Ninth Circuit has also upheld similar claims.” This, they claim is “...not a factual disagreement about whether the specific allegations at issue

clear the pleading hurdle,” but rather, they claim it is “a legal disagreement about where that hurdle should be set.”

The plaintiffs argue—and claim that “most courts have properly held”—that, at the pleading stage, ERISA plaintiffs are entitled to the plausible inference that excessive fees result from imprudent management.” The plaintiffs argue that “ERISA fee litigation has become an increasingly common mechanism for employees and retirees to obtain compensation for losses caused by imprudent management and to spur plan fiduciaries to improve their practices,” and that “at issue here is whether such lawsuits can continue or whether they

will be cut off by insurmountable pleading standards.”

Indeed, the plaintiffs argue not only that these suits “have revolutionized fiduciary practices, spurring operational improvements that have sharply reduced plan expenses for millions of Americans,” but that the decision of the Seventh Circuit “...is already having a chilling effect on such litigation,” referencing several recent cases that have cited the precedent in dismissing other litigation.

We shall see. **NTM**

—Nevin E. Adams, JD

FOOTNOTES

² It also happens to be a case in which the district court spoke to the issue of the use of participant data, holding that the sponsor doesn’t have a fiduciary duty to manage the use of participant data by its recordkeeper. However, the appeal didn’t address the participant data issue.

THOUGHT-PROVOKING CONTENT

During the second and third quarters a number of white papers were published on a variety of thought-provoking topics of interest to retirement plan professionals and those they support. This issue we're featuring insights on the "forgotten" participant, the impact of financial wellness, the evolution of retirement investing, and the top five concerns of plan sponsors dealing with the impact of the COVID-19 pandemic. We encourage you to check these out at the links below.



ADP

THE POWER OF FINANCIAL WELLNESS

Risk is often thought of as the chance an investment will lose money. You may consider creating a diversified asset allocation for your retirement account to help you balance risk to help you reach your future financial goals. In general, the more risk an investment carries, the greater the potential for a higher return. Investments with less risk generally offer lower potential return.

Find out more at https://s3.amazonaws.com/www.adpretirementmarketing.com/landing_pages/99-5246/0420/99-5246_0420_ADVLP1_Financial_Wellness_LP.html



ALLIANCEBERNSTEIN

CITS: WHAT'S OLD IS NEW AGAIN

Collective investment trusts continue to gain momentum in DC plans. The reasons are simple.

The use of collective investment trusts (CITs) is on the rise. In 2019, it was estimated that total CIT assets were \$3.1 trillion. Plan sponsors and their advisors like CITs because they combine the cost savings of a separately managed institutional account with the convenience of a mutual fund. That may explain the growth of CITs versus mutual funds in defined contribution (DC) plans.

More at <https://www.alliancebernstein.com/library/whats-old-is-new-again.htm>



AMERICAN CENTURY

AN ERISA ATTORNEY ON TDF SELECTION

How sound is your fiduciary process for TDF selection? Does it incorporate the DOL TDF Tips? In this white paper, top ERISA attorney Brad Campbell offers his thoughts about how Target-Date Blueprint can help you implement and document the DOL's guidance.

More at <https://ipro.americancentury.com/content/ipro/en/retirement/dc-plan-resources/target-date-blueprint.html>

CONTENT MARKETING





INVESCO

FIDUCIARY PROTECTION AND BENEFITS OF RISK-BASED STRATEGIES

The inclusion of risk-based strategies in a defined contribution plan investment menu helps address participants' investment preferences and provides additional protections for fiduciaries.

More at <https://www.invesco.com/us-rest/contentdetail?contentId=31cfb4570e380710VgnVCM1000006e36b50aRCD&dnsName=us&audienceType=institutions>

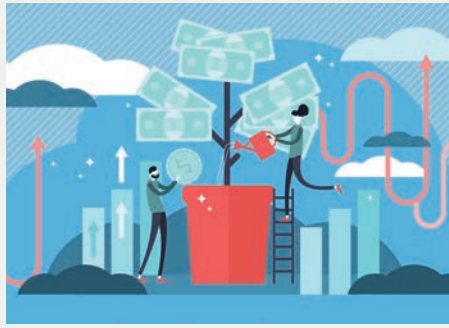


SSGA

MORE THAN ASSET PROTECTION

Investors in State Street's 2020 target date fund accumulated more in the last 10 years compared to three large "to retirement" managers.

More at https://www.ssga.com/ic/insights/pre-retirees-need-asset-protection?WT.mc_id=pe_tdf_napa-pre-retirees-need-more_us_n_text_n_n_n_aug20



NUVEEN

CLOSING THE INCOME GAP

The majority (70%) of employees say guaranteed retirement income is the most important thing their plan should provide.

More at <https://www.nuveen.com/en-us/thinking/retirement/dcio-next-on-the-horizon-issue-2>



T. ROWE PRICE

EVOLUTION WITH PURPOSE

Learn how an informed, research-based approach can help lead to better retirement outcomes.

More at [https://bs.serving-sys.com/serving/adServer.bs?cn=trd&mc=click&pli=29844370&PluID=0&ord=\[timestamp\]&pcp=\\$\\$\[pub_token\]\\$\\$](https://bs.serving-sys.com/serving/adServer.bs?cn=trd&mc=click&pli=29844370&PluID=0&ord=[timestamp]&pcp=$$[pub_token]$$)



SECURIAN

INVESTING EVOLUTION

Target date funds are popular with retirement plan participants, but younger generations are demanding more personalization.

More at <http://www.pardot.securian.com/evolution-retirement-investing-paper-94659>

PEP Prognostications

WHAT ARE THE PROSPECTS FOR PEPS?

By Nevin E. Adams, JD

One of the most anticipated aspects of the SECURE Act—and one that has yet to take hold—is its “open” multiple employer plan structure, “pooled employer plans,” or PEPs. This week we asked readers to dust off their crystal balls and give us their take on the prospects for PEPs.

First we took a quick temperature read—and asked readers to pick one word to describe how they felt about PEPs:

- 31% - Ambivalent.
- 30% - Excited.
- 15% - Depends on the day.
- 12% - Nervous.
- 5% - Anxious.
- 5% - Eager.
- 1% - Scared.

One reader noted, “Nevin. You missed an important emotion, ‘Skeptical.’ While in concept this seems like a great idea, we’re still seeing a gap between plan sponsors and advisors who think this will save them money and record keepers who don’t see that this will be a money saving opportunity.”

Indeed, one word expressions weren’t enough to fully convey many readers’ sense of things. Here’s a sampling:

I think this is a good step for small plan sponsors and overall access to plans, but not likely to impact me personally a great deal.

In my small plan corner of world, the one plan, one plan sponsor arrangement works well if the advisor provides great service. There’s no substitute, and the added cost is justifiable. I don’t see PEPs gaining a foothold any time soon. I said that about email in 1990. Still, I’m ready for PEPs. My

TPA is ready too, and we’re looking for opportunities.

I think this will be a great opportunity to help scale our business and potentially reduce cost for our clients.

Not sure how successful PEPs will be so I’m just waiting to see. I hear that some PEPs are not really focusing on small plans but rather focusing on mid-market plans over \$10M.

Whenever a new way to sell plans comes about it is an opportunity to increase my business.

I love the idea of the PEP and anything that might make it easier to cover more Americans with a retirement plan. Any time something new happens in our industry, someone will try to exploit it for profit without regard for the people. What concerns me is that the industry giants will likely create a giant PEP that they will end up offering for free and the independent recordkeepers and advisors who would take great care of the employers won’t be able to compete. I’m usually very optimistic by nature, but I’ve been around for a long time. :)

They will help move more small business to offering a plan and that is a good thing for the American worker, the retirement industry. So that is good. Will it take over the industry, I don’t think so and we will have to wait to see if it’s as cost effective as some people think it will be.

I think PEPs are a great idea, in theory. However, there are still

too many questions that need to be answered around pricing, administration and how much liability the plan sponsor will offset.

I don’t think they will create the cost savings that everyone anticipates. There are already a handful of providers who have created low cost products for small businesses at making the PEP possibly irrelevant.

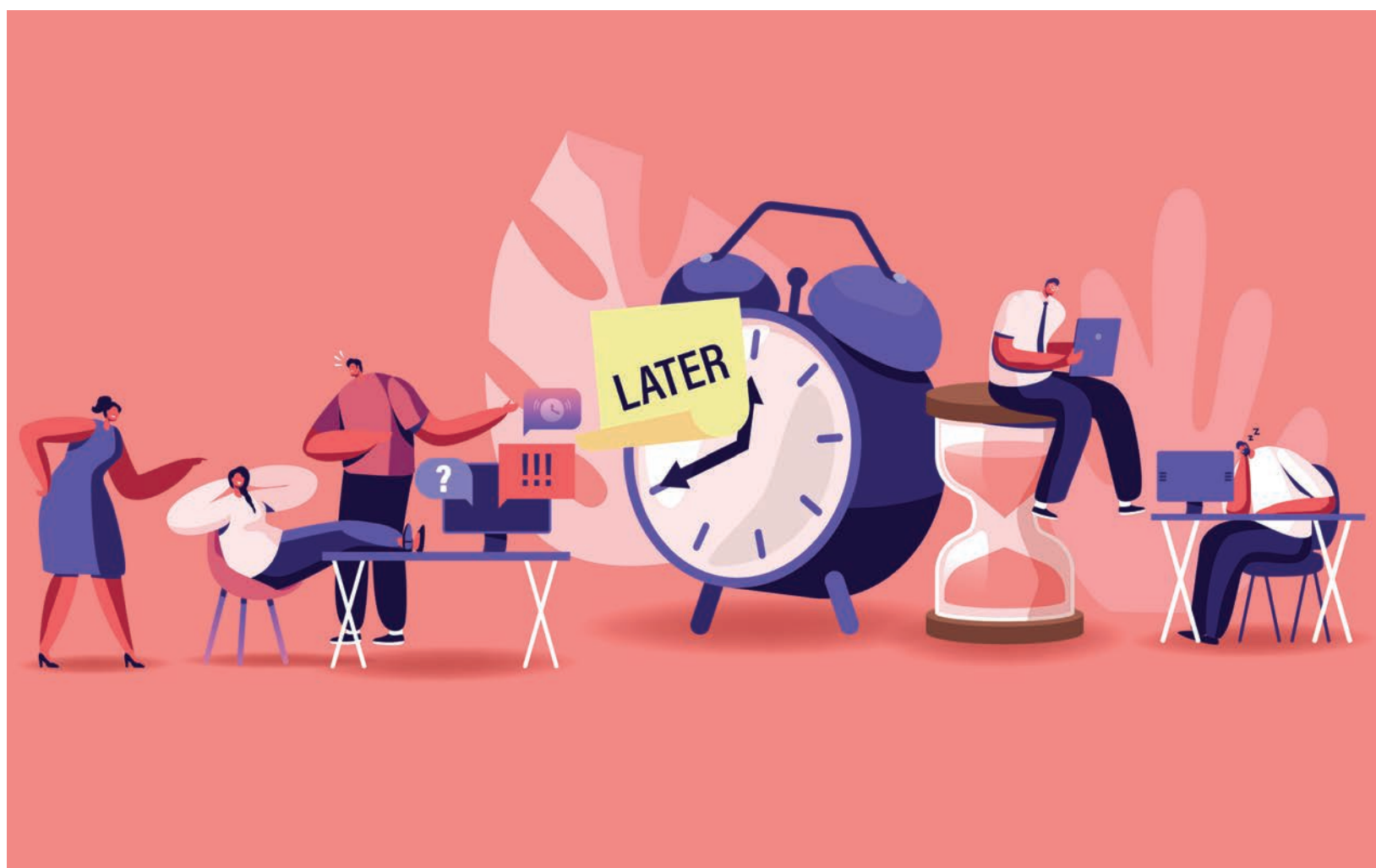
Pandemic Pause?

But here we are in the middle of a pandemic—and we had only just begun to get our arms around the CARES Act (with the PEP provisions) when everything changed. So, we asked readers what impact, if any, they thought COVID-19 might have on the implementation timing—and, for the most part, readers did see it having some impact—and mostly to slow it.

- 35% - It will slow adoption and implementation.
- 29% - It won’t have any (noticeable) affect.
- 17% - It will slow adoption.
- 7% - It will accelerate adoption and implementation.
- 4% - It will slow implementation.
- 3% - It will slow adoption, but accelerate implementation.
- 2% - It will speed adoption.
- 2% - It will speed adoption, but slow implementation.
- 1% - It will accelerate implementation.

Market Timing?

We also asked readers to dust off their crystal balls—to look out five years from now—and predict the



impact of PEPs on the market... by assets:

- 34%** - Between 5% and 10%.
- 26%** - Less than 5%.
- 23%** - Between 10% and 20%.
- 9%** - Between 20% and 30%.
- 4%** - Between 30% and 40%.
- 3%** - Between 40% and 50%.
- 2%** - More than 50%.

And we also asked how much of the retirement plan market would be in PEPs five years from now, by participant:

- 26%** - Between 5% and 10%.
- 20%** - Less than 5%.
- 19%** - Between 10% and 20%.
- 17%** - Between 20% and 30%.
- 9%** - Between 40% and 50%.
- 8%** - Between 30% and 40%.
- 2%** - More than 50%.

"I think smaller plans will remain as they are," said one reader. "I feel that smaller employers like to have control over the plan. And larger

corporations, who are used to working on/with boards, like a board of directors, will be easy and comfortable with a broad design for controlling the plan."

Although another commented, "Smaller employers (under 50 lives) will find this approach easier to navigate." "It will appeal to smaller plans that are unable to capture the economies of scale imperative to their success from a cost structure standpoint, and I believe it will appeal to smaller organizations looking to streamline/offload more of the administrative burden, 3(16) will be a compelling element of the value proposition," said another. "We have gotten lukewarm feedback, at best, from clients who are larger (above \$20 million), and who feel (substantiated) that they have already captured the economies of scale the market offers them. They don't like the

idea of being lumped in with other plans as an adopting employer, preferring their independence and autonomy. We believe PEPs will play a role in the industry, but the plan design and value proposition will not become the end all."

"Probably not going to impact large asset plans," said another. "Large plans already have economy of scale and can hire fiduciaries to help mitigate risk," concurred another. "It is going to be the small plans that will be tempted. Large plans already get lower pricing and better service," noted another.

"I think take up will be mixed. A decent number of small employers will adopt PEPs, but not huge numbers. I also think a few small to mid-sized employers will convert over to PEPs. Again, not a big shift but some."

“I look forward to working with PEPs. The biggest hurdle will be pricing. Once the PPPs figure that out it will fundamentally change the retirement world. It will start with smaller plan sponsors and will eventually grow to larger companies.”

“Crystal ball is a little foggy,” acknowledged another reader. “If 2 or 3 out of 10 plans is a PEP I wouldn’t be surprised. If individual plans that can be customized are priced low enough and incentives to start a plan are still in place then I think an individual plan market will still be the more prevalent option. If PEPs really get the costs down and ease of doing business/starting up the plan are in place then the % will be higher for the PEP.”

“I think the larger providers (Payroll, RIA, BD, Record Keepers, TPAs) will make a wholesale push to bring blocks of business together inside of PEPs.”

“These will predominantly be start up plans with negligible annual cash flow and high turnover so I don’t expect the assets to grow significantly in the first 5 years.”

“If small plans and startups are the biggest adopter, it will take a while to move the needle as far as assets go,” noted one reader. “5-10% in assets in 5 years since this will be primarily a small plan play. Even though there will be larger plans that may move to a PEP, those will be fewer,” concurred another.

There were, of course, skeptics. One noted, “Many new and revolutionary retirement vehicles have tried and failed... this will be no different.” Another observed, “MEPs have never been terribly successful due to an inability to achieve scale (many MEPs start small and remain that way) and

this should be a problem for PEPs as well.” One said, “I think it will take longer than five years to really take hold. Some won’t have heard of it and some that have will want to hold back and see how it goes for others first.”

And yet another said, “It is up in the air how this will happen but if this Wild, Wild West scenario is successful there will be a big shift in plan provider design.”

“Again, the movement will be to a national retirement system so ultimately one retirement plan,” noted another. “The PEP is dangerous in my humble opinion because it is a step in the direction of a national retirement system,” agreed another. On the other hand, “LOTS of small plans and startups to go after!” shared another, while “I believe it will be slow to adopt, but once launched will present a good opportunity for our clients,” commented another.

Primary ‘Colors’

As long as they had their crystal balls in hand, we also asked readers to opine as to what they thought the primary outcomes of PEPs would be five years from now:

- 30%** - Expanded opportunities for some advisors and some TPAs.
- 20%** - Consolidation of existing plan administration.
- 18%** - Disintermediation threat for TPAs and advisors.
- 9%** - New plan adoption.
- 6%** - Expanded opportunities for advisors and TPAs.
- 3%** - Expanded opportunities for TPAs.

3% - Disintermediation threat for advisors.

2% - Disintermediation threat for TPAs.

1% - Expanded opportunities for advisors.

Other Observations

I believe there will be a market for them and an opportunity for more small business to take advantage of the opportunity to offer their employee retirement programs.

I wonder how much consolidation there will be with existing plans. One F5500 is compelling for many audit plans.

Once they work through the regulations and the hurdles I think in the future this will provide expanded opportunities, but will be slow in the early stages.

I used to be really excited about the prospect. Then I delved deep into the MEP world and realized it’s not all it’s cracked up to be. I think too many advisors will use the PEP as a marketing ploy rather than a solution that is limited to who it will benefit.

They’re good for the small plan market—smart and simple.

The industry is waiting for the key to PEP projections, perceptions, concerns, enthusiasm, etc.... what will PLAN SPONSORS think about them and will they take action?

And that, ultimately, is the \$64,000 question...

Thanks to everyone who participated in this—and every—week’s NAPA-Net Reader Poll! **NTM**

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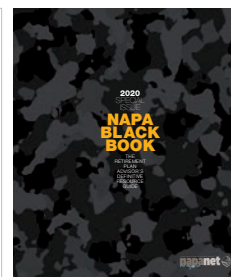
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NAPA

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Regulatory Review

GOVERNMENT AGENCIES KEPT UP A RIGOROUS PACE OF RULEMAKING IN RECENT WEEKS, FINALIZING A RULE (RE)ESTABLISHING STANDARDS FOR FINANCIAL FACTORS IN INVESTING (SIDESTEPPING FOR THE MOMENT CONTROVERSY REGARDING A PROPOSED RULE'S FOCUS ON ESG INVESTING), PROVIDING A NEW, AND ARGUABLY LESS STRINGENT, PROPOSAL ON PROXY VOTING (AGAIN WITH AN ESG FLAVOR), WHILE THE SEC CONTINUED TO REFINES APPLICATION OF FORM CRS, AND THE IRS PROPOSED APPROACHES TO REPORTING OFFSETTING PLAN LOANS UNDER THE CARES ACT.

Pecuniary Perspectives

Final rule on financial factors in investing sidesteps ESG focus

The final rule on ESG investing by ERISA plans steps away from the proposed rule's focus on ESG.

Indeed, the Labor Department notes that "unlike the proposal, the final rule's operative text contains no specific references to ESG or ESG-themed funds."

Rather, acknowledging the fluid definition of environmental, social, and governance factors, the Labor Department's position is that "the lack of a precise or generally accepted definition of 'ESG,' either collectively or separately as 'E, S, and G,' made ESG terminology not appropriate as a regulatory standard." Therefore, the final rule—which will be effective 60 days after publication in the Federal Register—refers to "pecuniary factors and non-pecuniary factors" in defining the relevant fiduciary investment duties.

Core Additions

The Final Rule on Financial Factors in Selecting Plan Investments and comments (the DOL noted that there were more than 1,100 written comments and more than 7,600 form letter responses to the proposal) runs some 148 pages (the final rule is less than 8 of those).

In response to what to many had been one of the more controversial aspects of the proposed rule—and which the American Retirement Association had commented on—the DOL acknowledged that "in response to public comments," the final rule modifies the provision in the proposal on qualified default

investment alternatives (QDIAs), and prohibits plans from adding or retaining any investment fund, product, or model portfolio as a QDIA, or as a component of such a default investment alternative, if its objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.

You can read more in this issue's cover story, "The ESG Evolution."

—Nevin E. Adams, JD

History 'Lesson'

SEC warns firms about failure to include disciplinary history on Form CRS

A joint statement released Oct. 8 by the Securities and Exchange Commission reminds firms that they must report disciplinary history on its customer relationship summary if that history must also be reported on other forms.

"Firms do not have discretion to leave the answer blank or to omit reportable disciplinary history from the relationship summary," said the statement by Chairman Jay Clayton; Division of Investment Management Director Dalia Blass; and Division of Trading and Markets Director Brett Redfearn.

As such, firms should review their reportable disciplinary history and that of their financial professionals to ensure that their relationship summaries are "accurate, complete and consistent" with those other forms, the statement advises.

The SEC officials further emphasize that when responding to the disciplinary history heading in their relationship summaries, firms may not add descriptive or other

qualitative or quantitative language. "Adding such language might, intentionally or unintentionally, obfuscate or otherwise minimize the disciplinary history," the statement reads. It further adds, however, that firms or their financial professionals may provide the relevant disciplinary history directly to retail investors.

Despite disruptions caused by the COVID-19 pandemic, the SEC announced last spring that it was moving forward with its June 30, 2020, compliance date with Regulation Best Interest and Form CRS. In previously issued risk alerts, the SEC explained that it will be assessing good-faith efforts to comply with Reg BI, as well as the filing of a firm's Form CRS, including, for example, whether the form includes all required information and is accurate.

In connection with its review of these filings, the staff Standards of Conduct Implementation Committee has observed examples of relationship summaries where firms did not provide a response in the disciplinary history section. The staff also observed examples where firms' responses in the disciplinary history section appear to lack required information or otherwise could be improved, the statement further notes.

New Disciplinary History FAQs

To address issues that the Committee's review has identified or questions that firms have posed, SEC staff has published additional frequently asked questions (FAQs) in relation to the Form CRS disclosure requirements to include a firm's disciplinary and legal history. (Note: each FAQ



includes the date it was posted, which for this most recent series was Oct. 8.)

The FAQs state, for example, that a firm's relationship summary may not omit the disciplinary history section in its entirety or omit the disciplinary history with respect to either a firm or its financial professionals, even when there is no such reportable disciplinary history.

The FAQs explain that the required heading—which applies to both a firm (including relevant affiliates) and a firm's financial professionals—requires a "yes" or "no" response. To facilitate retail investors' ability to efficiently assess the information provided, the FAQs also advise that a firm may include separate "yes" or "no" responses for the firm (including relevant affiliates) and its financial professionals.

Additionally, the FAQs state that Form CRS does not preclude firms or their financial professionals

from providing separately copies of additional regulatory disclosures directly to a retail investor. The staff notes that these separate disclosures may include, for example, disclosures from BrokerCheck or the Investment Adviser Public Disclosure website for specific financial professionals who service or are expected to service the retail investor.

Specifically, a firm must indicate whether it or its financial professionals currently disclose, or are required to disclose:

- disciplinary information in Form ADV (Item 11 of Part 1A or Item 9 of Part 2A);
- legal or disciplinary history in Form BD (Items 11 A-K) (except to the extent such information is not released to BrokerCheck, pursuant to FINRA Rule 8312); or
- disclosures for any financial professionals in Items 14 A-M

on Form U4, or in Items 7A or C-F of Form U5, or on Form U6 (except to the extent such information is not released to BrokerCheck, pursuant to FINRA Rule 8312).

— Ted Godbout

'Hone' Economics

DOL sharpens focus of plan proxy voting

The Department of Labor proposed a proxy voting rule Aug. 31 that says fiduciaries should "refrain from spending workers' retirement savings to research and vote on matters that are not expected to have an economic impact on the plan."

The proposed regulation—issued with a goal of providing "clear guideposts" for plan fiduciaries—would amend the department's 1979 Investment duties regulation to specify that—in voting proxies

“The DOL notes that it has reason to believe that responsible fiduciaries may sometimes rely on third-party advice without taking sufficient steps to ensure that the advice is impartial and rigorous, falling short of ERISA’s standards of fiduciary care and loyalty in the exercise of plans’ shareholder rights.”

and in exercising other shareholder rights—plan fiduciaries must consider factors that may affect the value of the plan’s investment and not subordinate the interest of participants and beneficiaries in their retirement income to unrelated objectives.

Persistent Misunderstandings

The preamble explains that, since the Department first spoke on these topics, a “persistent misunderstanding” among some stakeholders has set in that ERISA fiduciaries are required to vote all proxies. It also notes that the DOL decided to propose the regulation due to significant changes in the way ERISA plans invest and considering recent actions by the SEC related to the proxy voting process.

“The Avon Letter [from 1988] and subsequent sub-regulatory guidance from the Department has resulted in a misplaced belief among some stakeholders that fiduciaries must always vote proxies, subject to limited exceptions, in order to fulfill their obligations under ERISA,” the preamble states.

What’s more, the DOL notes that it has reason to believe that responsible fiduciaries may sometimes rely on third-party advice without taking sufficient steps to ensure that the advice is impartial and rigorous, falling short of ERISA’s standards of fiduciary care and loyalty in the exercise of plans’ shareholder rights.

In proposing the regulation, the DOL says that it “wishes to be clear: there is no fiduciary mandate under ERISA always to vote proxies appurtenant to shares of stock.

... Instead, ERISA mandates that fiduciaries manage voting rights prudently and for the ‘exclusive purpose’ of securing economic benefits for plan participants and beneficiaries—which may or may not require a proxy vote to be cast.”

Proposed Changes

The proposal includes provisions outlining general duties requiring fiduciaries to vote any proxy where the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan. Likewise, it also prohibits fiduciaries from voting any proxy unless the fiduciary prudently determines that the matter has an economic impact on the plan.

The proposal also specifies that Interpretive Bulletin 2016-01 no longer represents the view of the department regarding the proper interpretation of ERISA with respect to the exercise of shareholder rights by fiduciaries and will be removed once a final rule is adopted.

To assist in complying with these duties, the proposal also sets forth “permitted practices” under which the plan fiduciary can adopt certain proxy voting policies and parameters “reasonably designed” to serve the plan’s economic interest.

— Ted Godbout

Rollover Rules

IRS issues proposed rollover rules for qualified plan loan offset amounts

The Aug. 18 proposed rules spell out procedures for rolling over qualified plan loan offset

amounts under the Tax Cuts and Jobs Act (TCJA).

The rules set forth regulations relating to amendments made to Internal Revenue Code Section 402(c) by Section 13613 of the TCJA. That provision of the law provides an extended rollover period for a qualified plan loan offset. The IRS notes that the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) amended Code Section 401(a)(9) by changing the required beginning date applicable to Section 401(a) plans and other eligible retirement plans described in Section 402(c)(8).

The proposed regulations:

- Add Treas. Reg. § 1.402(c)-3 to take into account changes to the rollover rules made by Section 13613 of TCJA regarding qualified plan loan offset (QPLO) amounts. They provide examples to illustrate the interaction of the special rules for QPLOs with the general rules for plan loan offsets.
- Provide that a distribution of a plan loan offset amount which is an eligible rollover distribution and not a QPLO amount may be rolled over by the employee (or spousal distributee) to an eligible retirement plan (as defined in Code Section 402(c)(8)(B)) within the 60-day period set forth in Code Section 402(c)(3)(A).
- Specify that a plan loan offset amount is the amount by which, under plan terms governing a plan loan, an employee’s accrued benefit



is reduced (offset) in order to repay the loan (including the enforcement of the plan's security interest in the employee's accrued benefit). A distribution of a plan loan offset amount is an actual distribution, not a deemed distribution under Section 72(p).

- Provide several special rules for purposes of determining whether a plan loan offset amount is a QPLO amount. Specifically, they provide that whether an employee has a severance from employment with the employer that maintains the qualified employer plan is determined in the same manner as under Treas. Reg. §1.401(k)-1(d)(2).

They also provide that a plan loan offset amount is treated as distributed from a qualified employer plan to an employee or beneficiary only due to the failure to meet the plan loan repayment terms because of severance from employment if the plan loan offset: (a) relates to a failure to meet the repayment terms of the plan loan; and (b) occurs within the period beginning on the date of the employee's severance from employment and ending on the first anniversary of that date.

Applicability Date

The IRS proposes that these regulations apply to plan loan offset amounts—including

qualified plan loan offset amounts—treated as distributed on or after the date of publication of a Treasury decision adopting these rules as final regulations in the Federal Register.

However, taxpayers may rely on these proposed regulations regarding plan loan offset amounts, including qualified plan loan offset amounts, treated as distributed on or after Aug. 20, 2020, the date the proposed regulations are to appear in the Federal Register, and before the date the regulations are published as final regulations in the Federal Register. **NTM**

— John Iekel

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Unprecedented. Novel. Coronavirus. Covid-19. Pandemic. Quarantine. Social distancing. Face masks. Contact tracing. Essential workers. Essential businesses. Lockdown. Flatten the curve. Zoom/Teams meetings. Remote work. Virtual – everything. These are some of the words and phrases that we have become all too familiar with in 2020.

At the top of that list is another phrase that cannot be said enough – **thank you!** Thank you to all the people who work tirelessly to help those who have fallen ill, who work tirelessly to help prevent us from getting ill, and who work tirelessly providing various services to us every day so our lives can be as normal as possible, even if virtually, during this crisis.

I would also like to say thank you to all of you – the leaders, volunteers and members of the American Retirement Association – for your continued amazing support. Thank you for understanding when conferences or events were cancelled, maybe virtual, back on, then virtual again. Thank you for embracing our many new virtual education programs for plan administrators, consultants, advisors and sponsors. Thank you for recognizing that pandemics apparently do not slow down the work on legislation and regulations affecting retirement policy. And thank you for the work that each and every one of you do every day helping American workers save for retirement and reassuring plan participants to stay the course during this crisis. As an organization we believe in what you do, which is why we will always fight to protect, preserve and enhance our nation's retirement plan system.

On a personal note, thank you to the staff of the American Retirement Association who so seamlessly converted to a remote working environment while remaining steadfast in their commitment to the organization and its mission. Finally, I would certainly not want to leave out a thank you to my family for putting up with Dad disrupting their routines, sharing the home office space, and giving up some of their WiFi.



Thank you,

Brian H Graff, CEO
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