THE OFFICIAL MAGAZINE OF THE NATIONAL ASSOCIATION OF PLAN ADVISORS

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SUMMER 2020

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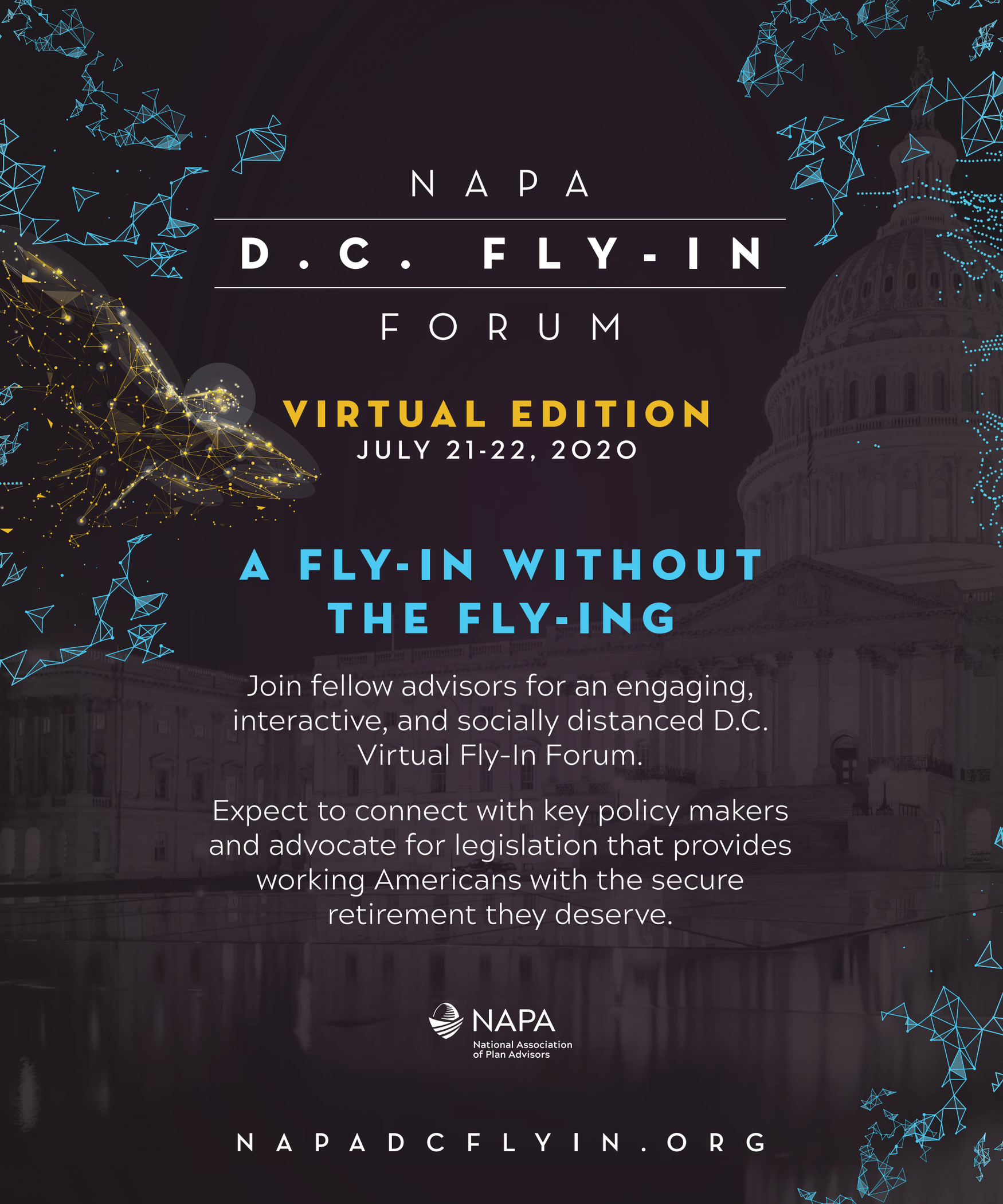
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Interview with
BRENDAN MCCARTHY

INCOME: THE 'NEW' OUTCOME

Academics and retirement industry experts alike have long advocated the inclusion of retirement income options in defined contribution plans. What's more, participant surveys routinely indicate that participants would like more help in making dependable retirement income streams a reality.

Enter the SECURE Act, which includes enhancements—and an expanded safe harbor—that some say could be transformative in providing viable solutions to this critical aspect of retirement planning. NAPA Net recently spoke with Brendan McCarthy, National Sales Director, DCIO at Nuveen, a TIAA company, for perspective.

NNTM: Interest in—and concerns about—retirement income aren't really new. What's different now?
MCCARTHY: The recent market volatility has certainly generated a heightened interest in the stability of retirement income, and we are seeing increased interest from employees in guaranteed income. Nearly 7 in 10 Americans say guaranteed income is the most important thing that their retirement plan should provide. Sadly, over 50% incorrectly believe they will receive guaranteed income from mutual funds or target date funds.

NNTM: What about plan sponsors?
MCCARTHY: We are seeing a shift in the marketplace whereby a retirement plan's success is being measured more by its ability to provide successful retirement outcomes for its participants rather than its website sophistication and/or custom enrollment materials. A key piece to providing successful outcomes is the ability for the plan to offer a guaranteed income solution that helps replace the employees' paycheck throughout their entire retirement. By having a portion of their retirement account "guaranteed" through investing in an in-plan annuity, plan sponsors can help ensure "lifetime income" for their participants and as such a successful retirement plan outcome. We like to say income is the new outcome.

NNTM: How does the SECURE Act bring a new focus to this issue?
MCCARTHY: Without question, the SECURE Act clears the path for plans to offer guaranteed retirement income to participants by offering safe harbor protection for the inclusion of annuities within a 401k plan. It also addresses some of the portability concerns that have been an issue for some. Significantly, it also requires plans to give participants projections of their current account balance as a monthly benefit using assumptions prescribed by the Secretary of Labor—and this can help shift the focus from an account balance to retirement income.

NNTM:How are you responding to these new challenges?
MCCARTHY: TIAA has been a leader in providing retirement income for more than a century, and Nuveen is a 100+ year old leader in asset management. The combination means that we are in an advantageous position to leverage the unique capabilities of both firms. As recordkeepers develop the required technologies to support in-plan guaranteed income features on the heels of the SECURE act, I would expect to see solutions from us that best fit the needs of retirement plan participants.

NNTM:What does that mean for advisors?
MCCARTHY: As the 401k plan has replaced the traditional defined benefit, or pension plan for a number of American workers, that has also shifted the burden of securing that retirement to millions of individual employees. Just as target-date funds have long provided ready access to professional money management in building their retirement savings, an in-plan annuity offering can help workers structure a consistent retirement income. A strong retirement advisor can help their plan sponsor clients design a plan that includes a guaranteed income component that best positions the plans employees for successful retirement outcomes. Adding guaranteed income into the plan design during the accumulation stage can help employees save more, guarantee growth and protect potential retirement savings.

To learn more about how Nuveen can help you grow your retirement plan business, visit Nuveen.com

1.TIAA 2019 Lifetime Income Survey

Times That Try Men's Souls

SURELY, THESE ARE, CERTAINLY IN RECENT MEMORY, EXTRAORDINARY TIMES.

The way things are going, it's difficult to imagine what things will be like once this issue reaches you (or, in the case of the digital edition, once you reach it). It seems trite, almost unnecessary, to comment that we are living in and through extraordinary times. We're told there's a "new normal" on the other side of… this—and yet, punditry aside, I suspect most of us are just anxious to get back to… normal.

I'm a student of history, and I have often found comfort, if not guidance, from what has gone before. As often as not, however unique and extraordinary the times seem (or are portrayed in the headlines), there's inevitably a comparable, and almost always, an even more extreme example, of such times in decades past.[1] And while there's been a renewed interest in and awareness of the pandemic of 1918 (though I'm told the pandemic of 1957-58 is a more apt comparison, and I hadn't even known there *was* a pandemic then), as the anniversary of our nation's declaration of independence nears, I've been drawn to the events of 1776.

As it turns out, the newly declared (but not yet formal) nation was confronted not only with the struggle for independence (and no small number of voices that simply wanted to preserve the status quo), but with the scourge of smallpox. Just as the close quartering and movement of troops in the First World War served to spread what is now termed the "Spanish flu," the Continental Army was confronted with a deadly disease that was arguably a larger threat to its cause than the British army. Indeed, General Washington once wrote to Virginia Governor Patrick Henry that smallpox "is more destructive to an Army in the Natural way, than the Enemy's Sword." We're talking about a pandemic that killed one in three in the Continental Army who contracted the virus.

We mark the Fourth of July, and indeed the year of 1776, as the birth of our nation, but it was a year full of disappointments and near disasters for George Washington's Continental Army. One can garner a sense for the change in tide by noting that Thomas Paine published "Common Sense" in January of that year, but before the year was out had turned his pen to "The American Crisis," fretting about "sunshine patriots" and "times that try men's souls." And we hadn't yet gotten to that awful winter at Valley Forge.

There are challenges both personal and professional confronting us every day—they were "before," though most were individualized, personal events: a death in the family, a job lost, a flood or tornado's impact. And while the events of the past several months have imposed new burdens on us all, it's imperative that we remind ourselves that those we support and serve are struggling as well; their retirements, their plans for retirement, indeed their retirement plans themselves, despite years of careful planning and attention, may well have been upended in ways that no one could anticipate just a few short months ago.

Your insights, your expertise… your empathy… are going to be called upon in ways you might never have imagined. Surely, these are, certainly in recent memory, extraordinary times—times that have, and will, in some measure, continue to try our collective "souls."

But, bleak as things may seem at times, this is our time to shine.

America's retirement is depending on us.

Nevin E. Adams, JD
Editor-in-Chief

TIDBITS

NAPA Black Book Wins Graphics Award

We all know that NAPA's Black Book has become the industry's leading resource for retirement plan advisors and those who support them. However, we were honored to recently receive notice that the 2019 Black Book was voted "Best of Category in Directories & Source Books" by the Great Lakes Graphic Association.

It takes a lot of work to bring this all together – but a special congratulations and THANK YOU to Ethan Duran, who makes it all not only look good, but "work" – continues to do an amazing job with the Black Book, and all our publications.

– NEA

FOOTNOTES

[1] Perhaps unsurprisingly, one of my favorite quotes is George Santayana's "Those who cannot remember the past are condemned to repeat it."

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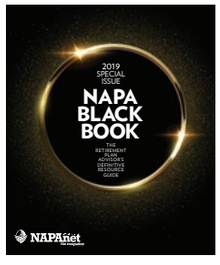

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What Have We Learned from Times of Crisis?

HERE ARE SIX LESSONS WE SHOULD ALWAYS KEEP IN MIND.

By Patricia S. Wenzel

Patricia S. Wenzel, CRPC®, C(k)P®, CFP®, CPFA, is a Managing Director at Merrill Lynch in Houston, TX. She serves as NAPA's 2020-2021 President.

I am both honored and humbled to be serving as the next NAPA President. This year has already proven to be one of the most challenging for us all, both personally and professionally. Every crisis, whether it be a financial recession or personal in nature, is a learning experience, no matter how brutal.

Over the last 29 years of being in the industry I have experienced three recessions and the deaths of both parents, as well as grandparents, aunts, multiple pets, and almost the death of my husband multiple times—not to mention many professional struggles. They say what doesn't kill us makes us stronger. Then we should all be superheroes by now!

> "They say what doesn't kill us makes us stronger. Then we should all be superheroes by now!"

Here are six valuable lessons we can all relate to and sometimes need a reminder of:

Always remember your 'why.'

We all have a reason of why we do what we do. For me, I'm trying to provide a good life for my family and save so that one day I can do for myself what I've worked so hard to do for my clients—retire comfortably. I also want to be able to look back at my life and feel confident that I've made a difference in other people's lives. Why do you do what you do? Don't lose focus in times like these. If you don't know, now is a time to reflect and figure it out.

Never take your family and closest friends for granted.

Over the last several months, spending more time at home hopefully has given you a chance to spend time you never had before with your family. We've been given the best gift that money can't buy—time together. Think of all the people that have died alone this year from COVID-19; it makes us reflect on the importance of family and togetherness.

Turn off the news and watch a good movie.

Just like 9/11 and Hurricane Harvey, we just can't seem to turn off the dramatically bad news. It's good to stay informed, but give your mind a rest. Go watch that good movie or great series you never had time to watch before!

Call everyone!

Your clients, friends, and family want to hear from you. Early on in every serious market downturn you have to call clients and be the voice of knowledge, reason, and calm they need you to be. Too much communication is better than too little. Plus, we are all mentally and physically exhausted—we need someone to talk to too. Find your confidant—and it's okay to get a therapist!

Get physical!

It's easy to eat and drink your way through a crisis. March and April were worse than the "Freshman 15" for me! It's amazing what a good run does to clear your mind. This crisis has certainly put emphasis on the importance of physical health. Just to be clear, you still deserve a good glass of wine every now and then!

Stop being pessimistic but be realistic.

Financially we are all impacted. Our plan balances have declined substantially because of the market downturn, plan distributions, and reductions in contributions. If your fees are asset-based like most of us, we are all getting pay cuts. This is out of our control. We knew when we got into this industry that our incomes would fluctuate. This is why we should all be living way below our means. Practice what you preach to plan participants and clients: Do your budget, evaluate the efficiencies of your practice, and start making needed changes now.

Again, I know in time we will get through this, but more than likely this crisis will radically change our lives forever. I hope we all continue to learn from these difficult times and use what we learn to help others and ourselves in the future. Memory can be short!

I hope to see you in September at Summit! Stay healthy! NNTM

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Trying Times

TIMES LIKE THESE PROVIDE A UNIQUE OPPORTUNITY TO PROVE NOT ONLY YOUR METTLE, BUT YOUR WORTH AS WELL.

Brian H. Graff

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

How are you? Without question, the past couple of months have been extraordinarily stressful and challenging for us all, both in our professional capacities and for the nation—and world—at large.

Like many of you, we had only just begun to get our arms around the nuances of the SECURE Act, the culmination of months of active lobbying, working to make sure that the concerns of our members and the needs of our nation's retirement system were addressed. We hit the ground running in 2020 with our sleeves rolled up, ready to move ahead on the work of 2019: to achieve clarity around the provisions in SECURE, and to start work on e-delivery, PEPs, the fiduciary rule, and even SECURE 2.0.

And then COVID-19 struck.

In short order we—and I'm sure you—were scrambling to move staff and operations offsite, to (re)establish connectivity, to put into action those disaster recovery plans, to try things that hadn't been done before, or at least hadn't been relied upon for an extended period. However, from the outset, it was clear that retirement plan relief—both for individuals impacted by the Coronavirus and the employers who maintain the plans—was critical. There were, of course, models for participant-focused disaster relief, templates dating back to Hurricane Katrina. But the breadth—and depth—of the impact, both economically and physically, was well beyond anything our industry—our nation, and indeed our world—had confronted, certainly in our lifetimes.

Challenging as it can be to coordinate staff activities when everyone is "out of office," connecting with regulators and those on the Hill had its own set of unique obstacles. As we worked (remotely) with lawmakers and regulators to craft effective relief, the participation and engagement of NAPA members was an essential voice, helping shape and refine both the key questions, and eventual answers, to an array of complicated but essential administrative issues, including the crucial ability to include retirement plan contributions in the Paycheck Protection Program.

> **"From the outset, it was clear that retirement plan relief—both for individuals impacted by the Coronavirus and the employers that maintain the plans—was critical."**

Critically, as we worked to make the case for safe harbor contribution relief, it was insight from members that helped us quantify both the size and potential monetary impact, and to garner media attention for the issue. As we head to press, that effort remains ongoing—and you can (still) help by going to www.araadvoacy.org and helping us make the case.

We are continuing to lobby on your behalf, and with your participation, to share critical information, and to develop alternatives for conferences that cannot (yet) happen. That includes a "virtual" version of the NAPA DC Fly-In, moving the NAPA 401(k) Summit to the fall, and in the interim developing and delivering online training, instructor-led "boot camps," and remote testing alternatives. We appreciate very much your continued engagement and support in these programs—indeed, we depend upon it, this year more than ever.

Opportunity likely lies ahead—messages about the importance of emergency savings and financial wellness that previously met with skepticism will almost certainly warrant fresh eyes and attention in the future. But now is the time to try new approaches, to build and strengthen relationships—not only to share important information, to respond to questions, but also to reach out in empathy, to listen—not just about this business, or even business in general—but life itself.

The conditions of these last several weeks—and those still ahead—aren't what any of us expected. At a critical period in this nation's history, Thomas Paine wrote about the "times that try men's souls"—an apt description in many ways for the challenges that currently surround us. However, times like these also provide a unique opportunity to prove not only your mettle, but your worth.

Stay safe, stay healthy. We're getting through this. NNTM

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Trends 'Setting'

AS WE HEAD TO PRESS, WHILE THE DAMAGE—BOTH PHYSICAL AND FISCAL—OF THE CORONAVIRUS LINGERS, ALL 50 STATES ARE IN SOME STATE OF REOPENING. FOR ADVISORS THE IMPACT ON THE WORKPLACE—YOURS AND THAT OF YOUR CLIENTS—WILL BE WITH US FOR A WHILE STILL. THIS ISSUE WE TURN FOR WORKPLACE INSIGHTS TO A SURVEY OF EMPLOYERS THAT STAYED OPEN DURING THE PANDEMIC, TO AN APRIL ASSESSMENT OF THE IMPACT ON RETIREMENT CONFIDENCE, A SURGE IN INTEREST IN FINANCIAL WELLNESS AND HEALTH SAVINGS ACCOUNTS, AND SOME INTERESTING SHIFTS IN THE REASON(S) THAT PLAN SPONSORS TURN TO ADVISORS…

'Back' Track

Considerations for 'back to work'

U.S. employers holding return-to-work discussions can gain insight from the experiences of employers with essential workers that remained open throughout the pandemic.

To gain a better understanding, Mercer surveyed U.S. employers that have remained open to find out how they have adapted to the COVID-19 business and workforce environment. Not surprisingly, the firm found that the most important safety consideration, by far, is to maintain adequate distancing.

While nearly all employers of essential workers have made changes to ensure employees keep the proper distance from coworkers and customers, 30% say they have had problems doing so. Mercer notes that there is no one distancing solution that will work in all situations, so employers will need a plan that best suits their workplace and staffing needs.

Consequently, overcoming the physical distancing challenge may also mean fewer employees in a worksite at a given time. According to Mercer's survey, 63% of respondents planning for return to worksites are considering "staggered returns" with measures such as having employees whose last names start with A-M working on certain days and N-Z working other days. Other employers (44%) say they plan to create smaller work groups to limit the mixing of employees and groups in the workplace at the same time.

And with the COVID-19 pandemic still looming, 45% of responding employers with essential workers said they have had issues with employees not coming to work because they are afraid of getting sick. Not surprisingly, Mercer found that this problem is more widespread in industries like retail/wholesale (84%), manufacturing (64%) and health care (57%), where there is a higher risk of exposure.

"The fact that so many employers have reported issues with employees not coming to worksites due to fear of becoming ill underscores that the first priority is to develop a comprehensive plan to keep employees safe at work," advises Dr. David Zieg, Mercer's Clinical Services Leader. "The second priority is to clearly communicate this plan to employees so as to allay their fears."

Screenings and Assessments

Mercer also found that while 43% of respondents with essential workers say they have conducted COVID-19 screenings and assessments on-site, only 35% of the respondents planning for return to work say they will conduct COVID-19 screening and assessments on-site—most commonly with temperature screenings (26%) and/or by administering a symptom questionnaire (20%).

Additionally, even though antibody testing is receiving heightened attention, just 4% of all respondents say they are planning to conduct serology screening for antibodies. Mercer suggests that this low percentage may reflect concerns about testing reliability and that much is still unknown about immunity to COVID-19.

Other findings show that 63% of employer respondents planning for a return to work say they will provide employees with masks. Mercer observes, however, that based on the experience of employers with essential workers, this could be challenging—37% of respondents

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with essential workers reported difficulty in finding enough masks to purchase.

"To be an effective strategy, everyone in a worksite needs to wear a mask to ensure that any person carrying the virus without being aware of it is wearing one. That's why it's concerning that employers report difficulties in purchasing masks for their essential workers," Zieg notes. "Employers should understand that general-use facemasks that improve respiratory hygiene do not need to be surgical masks or N-95 masks; those should be reserved for healthcare workers," he emphasizes, adding that the CDC has advised that cotton masks can be used for this purpose.

Virtual Reality

With employers facing the complexity of staggered returns, variances of testing and mask availability, Mercer notes that many have speculated that keeping nonessential workers "virtual" will be a popular and effective way for employers to ensure social distance and safety. Yet, the reality is that not all employers can, or desire to, continue virtual working arrangements.

While 38% say that employees will continue to work virtually in the short-term and return to on-site working when deemed safe, only 8% say they will continue to allow most employees to continue to work virtually as much as possible, regardless of social distancing rules, the survey found. Even among high-tech companies, where virtual work was relatively common before the pandemic, only 14% say they would support long-term virtual working for all employees.

The survey results are based on responses from 735 U.S. employers that participated in a global online survey through May 6, 2020. Among the employer sizes: 37% have fewer than 500 employees; 39% have 500-4,999, and 24% have 5,000 or more. The survey opened April 20 and is ongoing.

— Ted Godbout

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'Wait', Listed

How are plan sponsors responding to the COVID-19 pandemic?

A survey of plan sponsors taken at the outset of the pandemic finds notable decision gaps between large and small employers in their adoption of the provisions of the CARES Act.

Considering the breadth and potential depth of those retirement plan options now on the table, it is perhaps not surprising that nearly half (47.4%) of the 152 plan sponsor respondents indicated they are still deciding which of the CARES Act provisions to implement, according to the survey by the Plan Sponsor Council of America (PSCA), part of the American Retirement Association.

Larger plans (plans with 5,000 or more participants) are more likely to have made a determination, with two-thirds already making a decision (66.0%), while fewer than half of smaller plans (plans with fewer than 200 participants) have (48.3%).

Overall, plan sponsors seem somewhat more open to adopting emergency distribution provisions than increasing loan limits, with nearly half (45.4%) already moving to do so, compared with just a third (32.2%) adopting the new loan provisions.

The "snapshot" survey also found that:

- COVID-19 distribution: Nearly 70% of large organizations are allowing the distribution of up to 100% of the vested account or $100,000 versus only 20.7% of smaller organizations.
- Distribution repayment: Nearly half of respondents (46.7%) have embraced the option to allow repayment of Coronavirus-related distributions during the next three years. This is also size-corelated, with 68.1% of large organizations allowing it versus only a third of smaller organizations.
- Loan limits: While a third of respondents overall are increasing the plan loan limits in COVID-19 qualified circumstances to $100,000 or 100% of vested account balances, this is true of only 17.2% of small organizations, versus nearly half (46.8%) of large organizations.
- Loan payments: More than 60% of large organizations are suspending loan payments due on or before Dec. 31, 2020 and deferring repayment for up to a year, versus only 20.7% of small organizations.

About 1 in 10 (9.2%) aren't planning to adopt any of these new options, though that is the case at only 2.1% of large organizations.

"While the long-term implications of the Coronavirus pandemic on retirement security have yet to be fully realized, some cracks are starting to show in the retirement confidence of American workers."

While the full impact of the COVID-19 pandemic is not yet known, most plan sponsor respondents—76.5%—are not currently contemplating changes to their current plan designs as a result, including more than 90% of small organizations. However, more than 20% of large organizations indicated they are suspending matching contributions, while only 3.6% of small plans have moved to do so. The report explains that during the financial crisis of 2008-2009, about 20% of companies suspended or reduced plan contributions, and most resumed them relatively quickly.

The full report is available at www.psca.org/research/cares_snapshot.

— Ted Godbout

COVID Concerns

Retirement confidence cracks under pandemic pressures.

While the long-term implications of the Coronavirus pandemic on retirement security have yet to be fully realized, some cracks are starting to show in the retirement confidence of American workers.

"Retirement Security Amid COVID-19: The Outlook of Three Generations," a recent study by the Transamerica Center for Retirement Studies (TCRS), finds that nearly one in four workers (23%) who are employed or recently unemployed say their confidence in their ability to retire comfortably has declined in light of the Coronavirus pandemic.

Across generations, the decline in retirement confidence increases with age: Millennials (20%), Generation X (25%) and Baby Boomers (32%). Encouragingly though, 53% of workers say their retirement confidence remains unchanged, while 13% said it has improved and 11% answered "don't know/not sure."

The new study is based on a survey conducted in late 2019 and offers comparisons with a supplemental survey conducted in April 2020, after several states issued stay-at-home orders and large segments of the U.S. economy had temporarily closed due to the pandemic. "The pandemic's economic fallout should not be underestimated," says Catherine Collinson, CEO and president of Transamerica Institute and TCRS. "For some workers, the current recession may be a major setback and for others it could be a knockout blow."

One in five workers (22%) have already and/or plan to take a loan and/or withdrawal from their 401(k), 403(b), or similar plan, including 15% who have already done so and 13% who plan to do so.

Millennials are more likely than older generations to be dipping into their retirement savings. One third of Millennial workers have already and/or plan to take a loan and/or withdrawal from their retirement account, including 22% who have already done so and 20% who plan to do so. By comparison, only 15% of Gen X and 10% of Baby Boomer workers have already done so and/or plan to do so, while 17% of Baby Boomers are "not sure."

Interestingly, workers' level of familiarity with the retirement provisions contained in the CARES Act is relatively low. Only 17% of workers are "very familiar" with these provisions, including 18% of Millennials, 20% of Gen X and 10% of Baby Boomers.

Retirement Risks

The percentage of workers who cite "saving for retirement" as a financial priority declined from 54% before the pandemic to 45%, while those citing "building emergency savings" slightly increased from 37% to 39%.

Meanwhile, workers estimate they will need $500,000 (median) by the time they retire in order to feel financially secure. This estimate is shared by Gen X and Baby Boomers, but Millennials estimate they will need only $300,000. Gen X (39%) and Baby Boomers (34%) are more likely than Millennials (29%) to say they will need $1 million or more by the time they retire in order to feel financially secure, the study further notes.

— Ted Godbout

Management Objective

Plan investments no longer the top reason sponsors turn to advisors.

In years past, the top reason sponsors decided to use a plan advisor was for help with plan investments, but that apparently has shifted this year, according to Fidelity Investments' Plan Sponsor Attitudes Study.

In the 11th iteration of the study, Fidelity looked back at data after the financial crisis in 2008 to gain perspective on plan sponsors' areas of focus during what were also uncertain times. In 2010, the top reason sponsors decided to begin using a plan advisor was because they needed help with plan investments, especially given the market situation (35%). This year, however, Fidelity found that the top reason was for help with the

increasingly complicated process of managing a retirement plan (29%)—although plan investments will likely become an area of focus again in the future.

When asked how their plan advisors underscore their value, more than half of sponsors (56%) cited performance of plan investments. Overall, a majority (53%) of sponsors said investment menu changes were driven by a desire for better performance. Nearly three-quarters of plan sponsors (74%) have made changes to their investment menus in the past two years. The top changes were to:

- increase the number of investment options (28%);
- replace an underperforming fund (23%); and
- add a target date fund (23%).

In addition, 44% of sponsors reported that they review performance of their plans' investment options at least quarterly, which was down from 58% last year. "In our conversations with plan sponsors and advisors, investment performance is now top-of-mind given the potential for continued market volatility," says Liz Pathe, head of DCIO Sales, Fidelity Institutional. "Plan advisors can play a more active role by proactively reviewing plans' investment menus with sponsors and working to address their concerns."

The study also found that 92% of plan sponsors reported they work with plan advisors and 70% are "very satisfied" with their relationships. Sponsors with advisors said they were more satisfied that their plans are achieving company (67% with vs. 56% without) and participant (66% vs. 50%) objectives.

Match Watch

Most (82%) plan sponsors have made changes to plan design in the past two years, with the company match appearing to be top of mind. Three of the top four changes made over the past two years included adding a matching contribution, increasing the matching contribution amount and changing the matching formula. Adding a Roth contribution option rounded out the top four.

This year's study also revealed that plan sponsors working with advisors have made certain plan design changes at a higher rate than those without advisors, including increasing the auto-enrollment deferral rate (7% higher), adding a Roth contribution option (6% higher) and adding automatic increase (4% higher).

The Big Picture

The top overall concern for plan sponsors was whether their plan is effectively preparing employees for retirement financially, consistent with previous years. Fidelity also surveyed in late March nearly 1,000 plan sponsors that recordkeep with Fidelity and their top concern was employee financial well-being.

Beyond Retirement

More than half of plan sponsors said they offer financial wellness programs to employees (57%), and the number is significantly higher for those with advisors (59%) than those without (38%). Of plans with programs, 61% reported the programs have had a strong positive impact on employees.

Most sponsors said they offer a High Deductible Health Plan (56%), and of those that do, 86% also offer a Health Savings Account. Employees may not fully understand the benefits of HSAs, as sponsors that offer them reported that only 40% of all employees choose to enroll. Eight in 10 plan sponsors offering HSAs said they would be willing to pay to have someone provide HSA education to employees.

Nearly two-third of companies (64%) are aware of student loan repayment programs for their employees. Forty-four percent of those without programs said that they feel employees would be interested in a program that could help them both save for retirement and pay their student loans. And 68% of sponsors with repayment programs saw a positive response from employees, Fidelity notes.

The findings are based on an online survey of 1,555 plan sponsors conducted during February 2020. Respondents were identified as the primary person responsible for managing their organization's 401(k) plan; all plans had at least 25 participants and $3 million in plan assets. NNTM

— Ted Godbout

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Now's Your Time to Shine

MARKETING YOUR RETIREMENT PLAN BUSINESS IN OUR NEW WORLD.

By Rebecca Hourihan

This year has been quite the whirlwind. With each passing month, we continue to see new measures, challenges and enhancements that consistently push us farther into a new world. It is inspiring to see how resilient people and businesses are and how quickly we have learned to adapt.

We are witnessing a profound impact on the environment, health care advancements, digital technology, consumer behavior and the retirement industry that will likely affect our lives for years to come. It has also been a reminder that in order to support clients and attract new prospects, our businesses need to adapt.

The New Table Stakes

Over the last few months, we've seen how important, powerful and effective it is to communicate digitally. From social media to email correspondence to video conferencing, we have all embraced technology to stay in front of our clients, prospects and centers of influence.

While plan sponsors have been using the internet to research service providers for more than a decade, social distancing has made the need for a strong digital presence

> "It is inspiring to see how resilient people and businesses are and how quickly we have learned to adapt."

abundantly clear. Is your digital first impression—your website and social media profile—strong enough to portray your professionalism and passion for the retirement plan industry? Or does it cause a plan sponsor prospect to "x" out of the site, questioning your ability to manage their plan securely and effectively?

Let's look at a few proactive marketing ideas that you can use to enhance your digital presence, build stronger relationships and grow your firm.

Let's Get Social

One huge marketing lesson that may be taken from our recent quarantine time is that social media is no longer optional; it is required.

A professional-looking LinkedIn profile goes a long way. Here are three ways to enhance your profile:

- Use an accurate profile picture (less than three years old)
- Add a banner image (show readers more about you)
- Link your companies in the experience section properly (no gray boxes)

However, looking professional is only the first step. For social media to work, you have to be social. This means publishing regular content, liking, commenting, sharing, and joining groups. LinkedIn's article publishing platform is a very powerful tool to build your reputation as a thought leader.

Eye Catching Materials

With competition increasing, only the best will thrive. We live in a visual world. When new prospects are evaluating your firm, they want to be impressed, and great design is no longer "nice to have"—it's a necessity.

According to Templafy's "Corporate identity and branding trends: 2020's forecast" study, consistent branding leads to a 23% increase in revenue.

Your marketing materials need to excite and impress. As new prospects browse your website, you want them to fill out your contact form, download your gated content, opt-in for your value-add automated email sequence, and voluntarily enter your pipeline funnel. Without capturing, optimizing and maximizing the prospect experience, they will get lost in the digital sea.

Drip Marketing

Our industry normally has a 14-month sales cycle. With over a year from prospect introduction to new client signing, it is important to build a pipeline of prospects that you contact regularly—and we're not talking cold calls.

One way that retirement plan advisors can communicate consistently is through email marketing. With plan sponsor specific campaigns, you can build brand awareness and boost engagement. Automated email campaigns can increase your efficiency, creating more frequent touchpoints and keeping you top-of-mind with your prospects, and lead them farther down the sales funnel.

Send drip content that adds value. Use your touchpoints to educate your prospects on retirement plan topics that will make them better fiduciaries, demonstrate your knowledge, reinforce how you will service them, and solidify the fact that you are a 401(k) expert. Your communication will strengthen your relationship and remind them why they should hire you.

Thanks for reading and Happy Marketing! NNTM

The Ben Franklin Strategy

FOLLOW THIS THREE-STEP FORMULA AND MAXIMIZE YOUR SOCIAL MEDIA EFFECTIVENESS.

By Spencer X Smith

Benjamin Franklin will never know this, but he gave you and me the only social media strategy we need: "Either write something worth reading or do something worth writing."

Said another way, produce content that will be interesting to other people. What Mr. Franklin didn't know, back when he was printing newspapers, is that eventually we'd all have the ability to share whatever we'd like with the public, whenever we want. No longer are we limited by gatekeepers or those who might prevent us from being heard.

This is both good and bad, of course. Newspapers and magazines have editors, and TV shows and movies have producers. But social media has, well, nothing in the middle. Open a social media app on your phone, take a picture or type some words, tap the "post" button, and an irreversible process starts.

That's the problem for a lot of us, isn't it? What if you say something wrong, or stupid, or offensive? Those sentiments will forever be memorialized in the cloud, ready for everyone and anyone to see it. Returning to Mr. Franklin's tenet, let's ensure that we do only the things worth reading (or watching).

What are those things, you may ask? The good that's happening around you.

As I write this, in the middle of the COVID-19 crisis, there's never been a better time for a financial services professional to look for the good she or he can highlight within their communities, within their companies, or for individual people.

Those in Mr. Franklin's era had an arduous two-step job:

- Produce content worth reading. This is both difficult and time-consuming.

Jono Erasmus / Shutterstock.com

- Physically distribute the paper on which that content was written. This is also difficult and time-consuming.

Said another way, the distribution of the content (i.e., hoping people see what you wrote) was a harder process than writing the content itself.

Here's the great news for you and me in our current era: Now you can help ensure that your content is seen through purposeful promotion in a digital world for free, at the push of a button. Unlike the days of finite paper, finite distribution, and a fixed audience (based on proximity to you), our ability to reach a worldwide audience is unlimited.

Here's a three-step process you can use to help you stay in front of your target audience:

- **Say what you're going to do.** This is as easy as a post on social media: "My team and I have an initiative to raise money for our local food bank. We'll be hosting a virtual coffee session with the mayor, the President of the Chamber of Commerce, and the CEO of ABC Company here in town. Care to join us? Here's the link to register." This is your first touch with your target audience.
- **Do that thing.** Like in Mr. Franklin's era, this is the difficult and time-consuming part. Create the content, or in this case, effectively document the content. In this example, you'll be the one responsible for booking the guests, creating the agenda, and moderating the panel.
- **Show your audience what happened.** As an epilogue to the event, share the results: X amount of attendees, Y amount of money raised, here are the notes from our panel discussion, etc. Again, very simple compared to step 2. Take excerpts of the transcript or vignettes of the video and share them on your social media accounts.

Here's an important consideration: Content you create is something to which you grow acclimated very quickly. After the process of writing or recording a video is done, you know that content forwards and backwards because, hey, you originated it.

Once you're done, if you're at all like me, the last thing you want to do is revisit that same material. You just want to move on to the next thing, don't you? That's the exact opposite of what needs to happen. This is when the real work starts: the promotion of the content. Promotion, however, is so much easier than the creation. It's time-consuming work, yes, but simple.

Think about the Hollywood production process (or Netflix, or anyplace that makes movies or series): Do everything necessary to create and produce a show, "tease" that the show is coming, and then send the stars of the show on a press junket to promote the movie/series. This tried and true process is what we should use as well, but I see very few people or companies following this straightforward and proven approach.

Say what you're doing to do (simple), do something worth writing (difficult), and tell what happened (simple). By adopting this three-step strategy, you'll garner more attention from your target audience—and just as importantly, remind them that you do what you say you're going to do. Many of us have great intentions, but until they're codified in a written sense and shared with the public, those intentions don't materialize.

All of us, especially now, are jockeying for attention in a crowded digital and social environment. By sharing good news about others, you're effectively shining the spotlight on them and away from yourself. This is not to your detriment, however. Since you have unlimited media available with which to propagate your message, you'll be in the tiny minority of people who are highlighting others first.

> **"You can help ensure that your content is seen through purposeful promotion in a digital world for free, at the push of a button."**

Good news, good acts, and good people are prolific, despite our very challenging current environment. We've all heard of posts going "viral." One way to help ensure that happens to your posts is by adding a layer of "virality," if you will, to your posts. Focus on others with your posts and who will, in turn, share your posts with their audiences? The people you're highlighting. In the aforementioned example of the virtual coffee session, the mayor, the Chamber president and the CEO from your panel will all share their involvement with your initiative, and you'll have exposure to their audiences.

Will you adopt this three-step formula in your social media strategy? NNTM

DATA-DRIVEN

THE USE OF PARTICIPANT DATA FOR PROVIDER MARKETING HAS BECOME A HOT TOPIC—AND A POTENTIAL LEGAL RISK. BY JUDY WARD

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"This whole participant-data privacy issue has 'legs,'" says Fred Reish, a Los Angeles-based partner at law firm Faegre Drinker Biddle & Reath LLP. "There will be a lot more said about participants' data-privacy rights in the next 10 years."

Several recent settlements of 403(b) plan lawsuits have addressed the use of participant data by recordkeepers. Reish anticipates more lawsuits dealing with use of participant data, and says plan fiduciaries need to get up to speed on how their recordkeeper and advisor utilize this data, and evaluate whether to limit that data's use for marketing.

"The easiest fiduciary breach to prove is where a plan sponsor has done nothing about it," Reish says. "Once you can show that a plan committee has investigated the issue and taken reasonable steps, it's actually quite difficult to prove a fiduciary breach in this area. The key for fiduciaries is to be educated, and be thoughtful."

A PLAN ASSET, OR NOT?

Is participant data a plan asset? And do plan sponsors have a fiduciary duty to limit marketing use of this sensitive data by providers? The law on that isn't yet defined, Reish says.

ERISA doesn't specifically discuss use of participant data, but several recent fee lawsuits that also allege misuse of participant data deal with this issue, Reish says. Each lawsuit focuses primarily on plan fees, but plaintiffs additionally alleged that the plan fiduciary didn't do enough to protect participants' data from the recordkeeper. In *Divane v. Northwestern University*, the trial court found that the sponsor doesn't have a fiduciary duty to manage the use of participant data by its recordkeeper. "The *Divane* appeal has been decided in favor of Northwestern University. However, the appellate decision did not address the plan-asset issue," he explains. "As a result, the trial court decision—which said that plan data was not a plan asset—stands."

> "THERE WILL BE A LOT MORE SAID ABOUT PARTICIPANTS' DATA-PRIVACY RIGHTS IN THE NEXT 10 YEARS."
>
> — FRED REISH, FAEGRE DRINKER BIDDLE & REATH LLP

In two other cases—*Cassell v. Vanderbilt University* and *Kelly v. The Johns Hopkins University*—the lawsuit got settled. "Because the lawsuits both say that the recordkeeper was overpaid, the settlements require the plan sponsor to engage in an RFP (request for proposal) process to get bids from recordkeepers," Reish says. "These settlements also say that the new recordkeeping agreement has to prevent the recordkeeper from marketing additional investments and products beyond the plan to participants, unless they opt in to receiving that marketing. With this 'opt-in' approach, if a participant doesn't opt in to the provider offering outside-the-plan services, products, and investments, the provider couldn't promote them, and correspondingly, wouldn't earn money from those products and services."

St. Louis-based law firm Schlichter Bogard & Denton filed the Northwestern, Vanderbilt, and Johns Hopkins cases. In an interview, Senior Partner Jerry Schlichter talks about why he sees it as a breach if a plan fiduciary allows the use of participant data for marketing, without a participant's consent.

"It starts with the fact that participant data is highly confidential," Schlichter explains.

"[PARTICIPANT DATA] IS NOT PROVIDED UNDER ANYBODY'S UNDERSTANDING THAT IT WILL BE USED FOR OTHER PURPOSES, SUCH AS ALLOWING THE RECORDKEEPER TO TRY TO SELL PARTICIPANTS ADDITIONAL SERVICES."

—JERRY SCHLICHTER, SCHLICHTER BOGARD & DENTON

Recordkeepers have data such as a participant's Social Security number, total account assets, and investment allocations. "This is the most confidential information you can have on someone, alongside health information, which is very protected," he says. "And it's not provided under anybody's understanding that it will be used for other purposes, such as allowing the recordkeeper to try to sell participants additional services."

Participant data is a plan asset because it is generated by the plan, Schlichter continues. "Why is it a violation of ERISA, even if it were not a plan asset? Because, while ERISA doesn't speak specifically to participants' data, it does speak to operating the plan in the exclusive best interests of participants," he says. A provider using participant data to market additional products and services is operating in its own financial interests, and a plan fiduciary has a duty to understand that, he says. "The implicit backing of the employer also creates tremendous leverage for a service provider to stand alone in offering those products and services to participants," he adds.

What should employers do about the use of participant data: explicitly prohibit the recordkeeper from using it for marketing without a participant's consent, or leverage access to the participant data to negotiate better recordkeeping fees? "They should prohibit the use of that data," Schlichter responds. "Would anyone contest that it would be highly improper for a doctor's office to take the Social Security numbers and health information of its patients and sell it to pharmaceutical companies? No one would argue for that."

To Thomas E. Clark Jr., chief operating officer and partner at Boston-based The Wagner Law Group, Schlichter's legal thinking on use of participant data has several big holes. "The first hole is, whether participant data is a plan asset has not been mentioned in ERISA, or regulations put out by the DOL (U.S. Department of

PHIL TROYER, RESOURCES INVESTMENT ADVISORS

Four Keys to Working at Home Safely

You're a valuable target for a cybercriminal, especially when you're working remotely.

"If you're a financial advisor, you've got a lot of information that's of value," says Saad Gul, partner and co-chair of the privacy and cybersecurity practice at law firm Poyner Spruill LLP in Charlotte, North Carolina. "Sometimes, enough information could be available to steal money outright."

To help protect participant data, keep these tips in mind:

Access client data only on a company device. Working at home himself this spring, Gul had two devices on his desk. "The company device is basically for all client work," he says. "And the personal device, I use to access materials that are in the public domain." Cybercriminals use technology to constantly scan for vulnerable devices, he says. "If somebody is doing client work on their own device, at some point that is going to get picked up and flagged by one of these (cybercriminal) 'robots.' And come the day when they want to steal something, your device is going to be exceptionally vulnerable."

SAAD GUL, POYNER SPRUILL LLP

Only use a "closed" home network or other secure network. "You don't want to use public Wi-Fi, ever," Gul says. "In the good old days, when people actually traveled, it was inconvenient if you were at a facility like a coffee shop that offered free Wi-Fi, and couldn't use it," he says. "But the reality is that a lot of the time, those places have been compromised. Somebody can be physically present in that same location, and intercept that data."

Limit data access to employees who need it for their work. "Every network is only as strong as its weakest link," Gul says. "A lot of your employees don't need access to your sensitive material to do their job. Any silo of information that is valuable, you want to lock down tight. If all your employees have equal access to data, somebody working remotely could have an unscrupulous brother-in-law, or an old computer that can easily be compromised."

Keep doing cybersecurity practice drills. In addition to annual training, Gul says his law firm runs cybersecurity drills throughout the year. "We will send out mock messages constantly to our staff," he says. "There are law firms that, if you click on a link in one of those emails, they will lock you out of the system, and then you have to go to a three-hour training and take an exam to get back into the system. We're nowhere near that draconian in our response. But the best way to prepare is to keep sending mock messages to your employees, and see how they react." *—J.W.*

Four Keys to Good Cyber-Liability Coverage

No matter how many precautionary steps an advisor takes to protect participants' data, a cybercriminal may still find a way around them. So even careful plan advisors need good cyber-liability insurance coverage, says Tom Schrandt, Philadelphia-based vice president, Lockton Affinity, the group program division of Lockton Companies, the nation's largest privately held insurance broker.

Lockton Affinity, in partnership with the American Retirement Association, recently launched the Lockton Affinity Plan Advisors Insurance Program, which includes a cyber-liability policy specifically designed for retirement plan advisors. When looking for cyber-liability coverage, Schrandt suggests paying special attention to these four keys:

Get coverage for fraudulent instruction requests. This protects an advisor in case a cybercriminal successfully submits a request for a fraudulent withdrawal from a participant's retirement account, Schrandt says. These incidents are happening already in cases where an advisor serves as plan fiduciary, he says, aided by fraudsters having gained access to the personal information of a participant (like a driver's license number) they need to make the withdrawal request appear legitimate. But many policies don't affirmatively state that they cover distributions stemming from fraudulent instructions, he says.

TOM SCHRANDT, LOCKTON AFFINITY

Have a policy that includes losses from participants' accounts. Most of today's policies only cover fraud if the advisor loses money, not if clients' funds are stolen, Schrandt says. "Coverage for clients' funds is the nuance of what an investment pro needs," he says. "Just about every policy out there is written on a first-party basis, which means that it does not extend to a client account."

Make sure there's no "sub-limit" for fraudulent request coverage. Many policies have a sub-limit on coverage for certain types of incidents. "So even if you've got a $1 million policy, the coverage for a fraudulent-instruction request may only be $250,000, or it may be $50,000," Schrandt says. "Even the good policies that affirmatively state they cover a fraudulent-instruction incident are generally pulling back on coverage for it, so they're not exposing themselves to the whole policy dollar limit."

Understand the policy's internal-control requirements. "Be sure to know if your policy has any exclusions around the cybersecurity procedures you need to follow. A lot of cyber-insurance policies state that if you have this scenario happen and you didn't have a process, or you didn't follow it, then no coverage applies," Schrandt says. "I recommend formally establishing internal controls for withdrawal requests, making them public to everyone at your firm, and then enforcing the heck out of them." *—J.W.*

Labor)," he says. "Second, there is no open market for participant data, for a recordkeeper to sell the data and profit from it."

"Third, the possibility that a recordkeeper may be able to make additional income itself from working with plan participants on other things is already built into the bidding process," Clark continues. "If the recordkeeper believes it has the ability to earn additional fees from working with participants, it is going to lower the fees in its bid for a plan's business. And the use of participant data is addressed in almost every major recordkeeping agreement I've ever reviewed. So from a legal perspective, even if it's a plan asset, it's already addressed in the service agreement."

Chief Compliance Officer Phil Troyer of Overland Park, Kansas-based Resources Investment Advisors sees the potential problems with recordkeepers' unfettered use of participant data. "Do I think the issue needs to be addressed? Yes," he says. "For a recordkeeper to slip in language to the service agreement that essentially says, 'You agree that we can mass-market all our products and services to your participants' is probably not a good idea."

But Troyer has concerns that if use of participant data gets too restricted, it will prevent plan advisors from helping participants as much as they could. "We're starting to get more pushback from clients who've read about the Vanderbilt case," he says. "They've seen the publicity around the Vanderbilt case, and they now want to prohibit all access to the data for us. I explain to them that we have to coordinate things with the recordkeeper and custodian, and that requires us to have access to certain participant data. Also, there's been a big push among employers for us to provide financial wellness education to their employees, and that means us being able to reach out to their employees about more than the retirement plan."

There's value in an advisory firm that knows a plan's participants best giving them additional help with services like financial wellness education and rollover advice, Troyer believes. If participants can't get that help from the plan advisor, he says, most would have to fend for themselves on the retail market. "Now the 'wolves' are going to try to get that money, and people have no idea what to do," he says.

Three Main Options

Up to now, service agreements with recordkeepers haven't directly addressed use of participant data, Reish says. "Virtually every recordkeeping agreement I've seen has a provision around the

"THE POSSIBILITY THAT A RECORDKEEPER MAY BE ABLE TO MAKE ADDITIONAL INCOME ITSELF FROM WORKING WITH PLAN PARTICIPANTS ON OTHER THINGS IS ALREADY BUILT INTO THE BIDDING PROCESS."

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

IF I WERE AN ADVISOR, I'D PROACTIVELY DO A REVIEW WITH MY CLIENTS, TO DRAW SOME CLEAR LINES AROUND THE PERMITTED AND NON-PERMITTED USES OF PLAN DATA (BY THE ADVISOR). MAKE SURE THAT YOU'RE ON THE SAME PAGE AS YOUR CLIENTS ON THIS ISSUE, GOING FORWARD."

— ANDREW S. WILLIAMS, GOLAN CHRISTIE TAGLIA LLP

cybersecurity ground rules the recordkeeper agrees to follow," he says. "But as for the use of participant data specifically, in the past, there haven't been specific provisions in service agreements about how providers will use participant data."

While the legal lines remain unclear, Troyer says, plan fiduciaries have a lot of leeway in how to handle this with recordkeepers and advisors. "But now is a good time to set up best practices," he says. "They need to set up guidelines on who will have access to contact their employees. So, later on, they can say, 'Yes, we understand how our participant data is being used, and we control who has access to it.'"

Plan fiduciaries have three main options to address the use of participant data for provider marketing, as Reish sees it. One is to tell the plan's recordkeeper outright that it can't use participant data at all to market non-plan products and services, and make that explicit in the service agreement. The second is to follow the approach used in the California Consumer Privacy Act, and require notification to participants on the use of their data, with the ability for them to opt out of their data's marketing use. Or third, a plan fiduciary can allow marketing of non-plan products and services, and follow a sound process to ensure the fiduciary's comfort that the additional products and services "are helpful, reasonably priced, and of good quality," he says.

Attorney Andrew S. Williams calls it "the first line of defense" against a potential future lawsuit, for a plan fiduciary to impose restrictions in the service agreement on the provider's ability to use participant information to market non-plan products and services. "Plan fiduciaries ought to give serious consideration to restricting the use of participant data, beyond the core use of data that is essential to plan administration," says Williams, a partner at Golan Christie Taglia LLP in Chicago. "It's not just a question of when the current contract expires: It's a question that a fiduciary should be raising with the current provider and plan advisor, if they're in the midst of a contract. And if I were an advisor, I'd proactively do a review with my clients, to draw some clear lines around the permitted and non-permitted uses of plan data (by the advisor). Make sure that you're on the same page as your clients on this issue, going forward."

On the wealth management side of the business, Troyer says, Resources Investment Advisors is subject to the U.S. Securities and Exchange Commission (SEC) Regulation S-P, which covers privacy of consumers' financial information. "It requires that an annual notice be sent to all our wealth management clients, explaining how we will use the information we have about them," he says. "The SEC has said that these regs don't apply to retirement plans, only individuals. But for several years, we've treated our retirement plan clients as if Regulation S-P does apply to them." So Resources voluntarily provides an annual privacy notice to its plan clients, which includes information regarding its use of the plan's participant data.

Williams doesn't anticipate an explosion of lawsuits centered on use of participant data. "I think that for the time being, it's going to be an ancillary issue for these fee lawsuits," he says. "It seems like it's not yet a juicy-enough issue for a suit that's based just on the use of participant data. There's a question of what the 'dollars and cents' would be for the plaintiff's attorneys bringing the suit. Damages caused by non-plan use of participant data would be as difficult to establish as damages resulting from the robo-call solicitations many of us receive every day."

Asked about the potential for the spread of lawsuits alleging a fiduciary breach on use of participant data, Schlichter says he doesn't think recordkeepers' unrestricted use of participant data is unique to a few 403(b) plans. "I can't say if this practice is the norm, but it is an increasing practice. From what we've seen, recordkeepers aren't confining this practice to certain types of industries or businesses," he says. "So plan fiduciaries should be on notice on this issue. There is a very simple beacon that should be followed: When in doubt, fiduciaries should ask themselves the question, 'Is this in the exclusive best interests of plan participants?'" NNTM

WHAT NEXT?

BY
JUDY WARD

EIGHT OF THE NATION'S TOP YOUNG RETIREMENT PLAN ADVISORS TALK ABOUT HOW THEY'RE HELPING SPONSORS DURING AN UNPRECEDENTED TIME.

Maxx-Studio / Shutterstock.com

"Anxious" is how Michael Curry described plan sponsors' mood in the early spring, as the Coronavirus crisis, market volatility, and economic decline converged. "Anxiety seems to be an ever-present emotion across plan sponsors now," says Curry, a senior retirement plan consultant at The Hocking Group at UBS Financial Services in Los Angeles. "They're dealing with the uncertainty of the months ahead, and how things seemingly go a different way every day."

But Curry, working in the first state to issue a stay-at-home order, saw an opportunity for plan advisors amid all the uncertainty. "I've had more conversations with plan sponsors and participants in the past month than in the past year, and there's a very human component to a lot of the conversations I'm having," he said in early April. "I think where we can provide the most value right now is just optimism, and talking about the resiliency of our society, and the markets. There's a lot of negativity out there. But remaining calm and confident in a better future is really important right now."

"The mood of employers has been tough, because there's a lot going on for them, with their whole business," says Julie Braun, corporate retirement director at The Dubie Group at Morgan Stanley in Colchester, Vermont. "What's happening is unprecedented, and how that is happening is different for all of them. As advisors, we just need to be there for them, and to help them."

Two Pressing Issues

As employers struggled to keep their business going, Erin Hall says, many looked to cut expenses where they could—including the 401(k) match. "The match is typically the biggest cost of a plan to the employer, and there has been a lot of discussion about suspending the match," says Hall, managing director at Strategic Retirement Partners in Los Angeles. "As a retirement plan advisor, you hate to see a plan reduce or eliminate its match. But we try to respect that they know their business. If a sponsor calls me right now and says, 'We need to suspend the match,' I'm not going to question that."

Match suspensions didn't get much employee blowback when employers announced them, Hall saw. "Employees get it: They recognize that this is a 'necessary evil.' Honestly, they're happy to still have a job, and a paycheck," she says. "The communication has been honest. The employers are saying, 'We've lost our revenue, and we're trying to do everything we can to maintain our operations. Right now, as much as we don't want to, we have to suspend the match.' And they're expressing confidence to employees that this is an important benefit, and they still value giving it to their employees. It's just about honesty and empathy."

Braun, who also has gotten requests from employer clients to help them move forward on their match suspension, says she doesn't see this as the time to try to talk them out of it. "It comes back to really listening to them, because they all have different needs and different budgets,"

From Left:
Erin Hall, Strategic Retirement Partners;
Julie Braun, The Dubie Group;
Mark Beaton, Bukaty Companies Financial Services

"THERE'S A LOT OF NEGATIVITY OUT THERE. BUT REMAINING CALM AND CONFIDENT IN A BETTER FUTURE IS REALLY IMPORTANT RIGHT NOW."

– Michael Curry, The Hocking Group

she says. "I think we have to be impartial, and help them through it. If it was a more normal situation, maybe I'd try to talk it through with them, and talk about whether they have other options besides suspending the match."

Mark Beaton works with plan sponsors of safe-harbor plans, and a few have reluctantly decided to suspend their match. "Because of the safe harbor's minimum match requirements, they have to suspend the match, not reduce it," says Beaton, vice president, retirement plan consultant at Bukaty Companies Financial Services in Denver. "We're working with TPAs on making plan amendments, and helping plan sponsors distribute the required 30-day notice to participants. We're also performing testing due diligence, to make sure that these plans are not top-heavy now."

The other pressing thing many sponsors need their plan advisor's help on now: figuring out the CARES Act, especially the optional loan and distribution provisions. "I was actually surprised by the

Kelli Davis (R), CSI Advisory Services with co-work Joe Nierman

number of clients interested in really evaluating each provision," says Jessica Espinoza, senior vice president of retirement plan services at NFP in Bethesda, Maryland. "I expected the vast majority to just opt in, but it's interesting to have a lot of what we've taught plan sponsors come into play on this."

Espinoza's years of helping sponsors focus on retirement readiness has apparently made an impression, because many clients are aware that increasing participants' ability to take money out of their account could create a longer-term problem for their retirement outlook. So she's talking through the pros and cons with clients. "What I'm seeing is 75% are deciding to opt into the provisions," she says. "For some clients that are opting out, it might be that the industry or business they're in is well-insulated from furloughs or layoffs, so they don't think they need to offer that additional access."

Kelli Davis also has been helping sponsor clients weigh whether to implement the loan and withdrawal provisions. "As much as we would like to say that everyone has three to six months of income in emergency savings, we know that's not the reality. You're going to have employees who don't have any other option than their retirement account," says Davis, vice president of retirement plan consulting at CSI Advisory Services in Indianapolis. "On the other hand, it's really in the next two or three years where the gains are going to be made in the market: If people take money out of their account now, they've lost out on the opportunity to make those gains back. And if sponsors make it easier to take money out, there may be participants who take their money out just because that's an option, not because they really need it."

Davis and her CSI colleagues had a lot of conversations with participants in the early spring about plan loans and withdrawals. "I always tell people, 'This really should be a last resort,'" she says. "They need to understand the ramifications, not just today, but down the road. It's so disheartening to hear people in their 20s say, 'It's only $5,000, it won't make any difference.' But when you look 20 or 30 years down the road, it *will* make a difference. Down the road, they may be looking at, 'I wanted to retire at 65, and now it's going to be 68.'"

ALEXEY GRIGOREV / Shutterstock.com

TALES OF WORKING REMOTELY

"It's interesting working from home, to say the least," CSI Advisory Services' Kelli Davis says. "I'm trying to keep everything as consistent as possible. I start my day at the normal time, and I finish my day at the normal time. And during the day, I don't leave our family room upstairs, which I'm using as my office."

Davis and her husband have 5-year-old twins at home. "They don't quite understand why Mommy is here all day, but can't play with them," she says. "One time I was having a meeting on Zoom, and my son popped into the room in a Star Wars Stormtrooper costume."

Davis jokes that she's going to add a section to her resume on her video-conferencing skills, which have come into play with recent sponsor meetings. One client committee, all of whose members are over the age of 55, recently did its first-ever virtual meeting with her. "They told me, 'We've never used Skype before, so you can be our guinea pig,'" she says. "But I had another committee meeting the same week with a global company, and their company has been using video conferencing for years, since they're never in the same room. So it was just another meeting for them."

Strategic Retirement Partners' Erin Hall has done a number of quarterly committee meetings on Zoom recently. "The content and the flow of the meetings really hasn't changed much," she says. "Investments are only about 10% of our meetings, unless there's something we're concerned about on the menu. In the meetings, we primarily focus on things like fiduciary training, cybersecurity, current legislation, plan design changes, engaging employees with the financial wellness program, and adding ancillary benefits like a student loan repayment program."

Many participant meetings also have continued, virtually. Bukaty Companies offered to switch to doing participant meetings by Webex, and got a lot of interest from employers who appreciated giving employees a way to ask their questions and get answers. "It's a great time to educate participants," Bukaty's Mark Beaton said in early spring. "I tell people, 'Don't sell your investments right now, because you don't want to lock in a 30% decline.' Stocks are 'on sale' right now. So if people have the ability, I tell them that now is the time to increase their contribution and invest more."

While working at home, UBS' Michael Curry has spent a lot of time hearing out worried participants. "A number of these conversations have been over 30 minutes, which is atypical," he says. "It's really important for them to know that we're here for them, still. I tell them, 'Remember that the markets don't always go up,' and 'Unless you absolutely have the need for the funds, you should remain invested.' I also tell them that I'm confident the value of their accounts will go back to where they were, at some point. It's just a question of when."

–J.W.

Five Ways To Help, Post-Crisis

When the immediate crisis subsides, the Aces talked about how they'll help sponsors and participants:

1. Help Sponsors Gauge the Impact, and Respond

"Sponsors are being overloaded right now. But in our practice we've had some discussion about, 'When the time is appropriate, what can we do to help participants get back on track?'" says Jordan Sibler, vice president/wealth management at Tower Circle Partners of Janney Montgomery Scott LLC in Franklin, Tennessee. "If you were about to retire, and your portfolio is down 30%, that may change your decision. But for most people who are further away from retirement, this is something they can recover from."

Amid the market and economic downturns, Braun already started looking ahead to how to help participants recover. "It unfortunately will have a negative impact on retirement savings," she says of the downturns. "But I think there's going to be a great opportunity for advisors to help participants get back on track. In our practice, we're going to sit down one by one, with each client, and look at the recordkeeping data, to get a good sense of what happened. How many people took money out of their account, for example? Then we're going to come up with a game plan for each plan, to get them back on track."

Jessica Espinoza, NFP

"ONCE WE GET BUSINESSES BACK, THERE IS GOING TO BE A LOT OF HIRING, AND I THINK THERE WILL BE A LOT OF COMPETITION FOR SKILLED TALENT ESPECIALLY."

– Jordan Sibler, Tower Circle Partners

The impact of the crisis on retirement readiness could motivate some sponsors to make plan-design improvements, Braun says. "I think there could be some positive changes that come out of this time, once the dust settles," she says. "We may see some employers start doing reenrollment, or add auto enrollment or auto escalation, if they don't have that already."

2. Build the Business Case for Match Reinstatement

Sibler expects to see employer interest in reinstating the match for 2021. "Most employers are not looking at this whole situation as a way to save pennies," he says. "Where employers are suspending their match, they want to get back to where it was, when they can."

That may involve making a business case for match reinstatement with senior management. "I don't think the business case is any different than it was before the pandemic," Sibler says. "There is always the struggle of, 'What do we need to do to recruit and retain good employees?' Once we get businesses back, there is going to be a lot of hiring, and I think there will be a lot of competition for skilled talent especially. If someone has a choice between two (otherwise-equal) employers, and one has a great match and one doesn't, it's an easy choice."

Shaun Eskamani points to the business case that can be made from a behavioral-finance perspective. "We've seen how the amount of money deferred by participants often coincides with the employer's match," says Eskamani, principal and financial advisor at CAPTRUST in Raleigh, North Carolina. "People want to know, 'How much will my employer give me in free money to put toward my retirement?' When you remove the employer contribution, many employees immediately think, 'My employer removed the match, therefore I need to stop my participation or reduce my deferral amount.' So there's a dual negative impact that often takes place." That impact could delay retirement for some people.

When NFP talks about justifying the match expense, Espinoza says, it includes the long-range perspective on retirement readiness. "We talk about the long-term cost if people don't accumulate enough, and don't retire on time. So we're asking, 'If employees prolong retirement, how does that impact the employer's costs in areas like health care?" she says. NFP uses modeling tools to project the long-term costs for employers if employees delay retirement. "We're telling employers, 'Don't look at the match cost in a vacuum,'" she says.

3. Help Sponsors Reexamine Their Target Date Funds

When they see the first-quarter performance, some sponsors and participants likely will be surprised by the steep decline in their plan's target date funds. "For those sponsors who have not focused on the suitability of their asset-allocation solution for their participants, they'll be forced to do it now," Espinoza says. "There is a 'silver lining' to this situation if it results in higher attention to that."

The Dubie Group at Morgan Stanley regularly does a deep dive of the target date funds in its clients' plans, looking at their asset allocation, glide path, and risk parameters, Braun says. "You need to do that not just when a sponsor picks the funds, but continue to do it," she says. "At least once a year, we come back and ask, 'Does the target date fund family you chose still perform well? And is it still right for your participants?'"

Target date fund reviews can help limit damage in the next market downturn. Beaton has been performing target date fund analysis with his clients, to see if they had the right target date funds for their plan demographics. "That has actually paid off pretty well in the downturn," he says. One client switched from an all-index TDF to a TDF family that blends use of active and passive management, for example. "That has saved them on the downside of the 2020 fund almost six percentage points," he adds.

Eskamani sees a tremendous opportunity for advisors to help sponsors reexamine their target date funds after the crisis subsides. "We can help them really understand their glide path and allocations, then marry that with their actual participant behaviors, and with the committee's philosophical views," he says. The philosophical questions

he has for committees include their beliefs about using active versus passive management, their prioritization of fees and expenses, their sense of whether a "to" versus a "through" glide path makes more sense for their participants, and whether they prefer a target date fund family with "plain vanilla" allocations, or one that diversifies more broadly into areas like commodities, real estate, and emerging markets. CAPTRUST looks at participant data including the average age of participants in each vintage of a plan's target date funds, how far employees are from normal retirement age, and whether they typically keep their money in the plan or roll it out when they leave the employer. "Distribution behaviors are important," he adds.

4. Look Closer at the Core Menu, Beyond Equities

There's been a lot of focus on the implications of the downturn in equities, but it's also an important time to reassess a plan's capital preservation funds, Eskamani says. "The investments you think would be the least complex are, in some cases, the most complex. So we want to get ahead of what happened in 2008, with some capital preservation funds having negative yields," he says. "In 2008 and 2009, we saw their market-to-book ratios decline in many cases. When participants went to move their money, there were consequences: They anticipated getting $1 back for every $1 they invested, plus interest, but in some cases they didn't."

The equities downturn also could make the argument for having a broader and more diversified menu of fixed-income options. "That can mean having not just an intermediate-term bond fund, but also a high-yield fund and a TIPS fund," Eskamani says. The move to add more core fixed-income options especially has happened with sponsor clients that opt to utilize CAPTRUST's fiduciary investment advice service for participants. "We'll often keep the investment menus more basic when a client hasn't elected to have us provide investment advice at the participant level," he says. "But when we do provide that advice, we can discuss in detail with a participant, 'Your plan has a broad array of fixed-income options, and let's talk about what diversified combination makes the most sense for you.' We don't want people making the mistake of seeing the name 'high yield' and thinking that it's always better than low yield."

Shaun Eskamani, CAPTRUST

5. Make the Case for Financial Wellness

This crisis will strain many Americans' finances, and Sibler sees a lot of potential for helping them with financial wellness education on basics like budgeting and building emergency savings. "A crisis like this wakes people up," he says. "We have to get folks to the point where, when the unexpected happens, people don't have to figure out how to pay for their groceries."

Asked about making the case to employers on the need for a financial wellness program, Hall says that Americans had lots of financial stress even before the events of early spring. "If people then dipped into their savings or went into credit card debt during this time, there is going to be a greater need for financial wellness education," she says. "Hopefully employers will understand that. At least now, everyone has a shared reference point on the need."

Advisors will need to assess so many different areas with plan sponsors, once the U.S. and global economies start to experience a period of more normalcy, Eskamani says. "From a participant standpoint, it's going to be about getting their financial house in order, and that starts with budgeting and debt management," he says. "People are going to want to get their personal financial balance sheet in order, before they think about their retirement savings. So we'll need to start with the basics, then work our way toward more complex financial wellness topics.". NNTM

NAPA'S TOP PLAN ADVISORS UNDER 40

(UNDER) **40** 'ACTS'

By Nevin E. Adams, JD

One of the first of NAPA's standard-setting industry lists, many of the individuals who have been recognized here since 2014 have indeed gone on to become the very industry leaders this recognition was designed to help identify.

Nominations from the list were provided by NAPA Broker-Dealer/RIA Firm Partners. Nominees had to be retirement plan advisors with their own book of business, had to be less than 40 years of age—and were required to submit responses to an application comprised of a series of quantitative and qualitative questions about their experience, size and composition of their practice, awards and recognitions, and industry contributions. Those were then reviewed by a panel of senior advisor industry experts, who, based on those criteria—and following a broker-check review—selected the top young advisors.

Nearly 750 nominations were submitted this year.

Note that this accolade—officially the NAPA Top Retirement Plan Advisors Under 40, but what we have long nicknamed our "Young Guns"—we are now rebranding as "Aces."

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

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

JAKE **ADAMCZYK**
Firm: Aurum Wealth Management Group
Broker-Dealer / RIA: *Aurum Wealth Management Group*

EDWARD **AHN**
Firm: Merrill Lynch
Broker-Dealer / RIA: *Merrill Lynch*

KHALIL **ANDRAOS**
Firm: Merrill Lynch
Broker-Dealer / RIA: *Merrill Lynch*

ALEXANDER G. **ASSALEY III**
Firm: AFS 401(k) Retirement Services
Broker-Dealer / RIA: *Commonwealth Financial Network*

CHARLES M. **BARACCO**
Firm: OneGroup Retirement Advisors / LPL Financial
Broker-Dealer / RIA: *LPL Financial*

KEN **BARNES**
Firm: SageView Advisory Group
Broker-Dealer / RIA: *Cetera Advisor Networks, LLC*

LUCAS **BARTON**
Firm: SageView Advisory Group
Broker-Dealer / RIA: *SageView Advisory Group*

MARK **BEATON**
Firm: Bukaty Companies Financial Services
Broker-Dealer / RIA: *Resources Investment Advisors*

CARLY **BELL**
Firm: Lockton Retirement Services
Broker-Dealer / RIA: *Lockton Investment Advisors*

MICHAEL JARED **BENSON**
Firm: NFP
Broker-Dealer / RIA: *Kestra*

TONY **BLACK**
Firm: SevenHills Cleveland Benefit Partners (Pensionmark)
Broker-Dealer / RIA: *Pensionmark Financial Group*

NATASHA **BONELLI**
Firm: Merrill Lynch
Broker-Dealer / RIA: *Merrill Lynch*

JULIE **BRAUN**
Firm: Morgan Stanley
Broker-Dealer / RIA: *Morgan Stanley*

ERIC **BRUNTON**
Firm: Merrill Lynch
Broker-Dealer / RIA: *Merrill Lynch*

KYLE **CAMPBELL**
Firm: CAPTRUST
Broker-Dealer / RIA: *CAPTRUST*

BRIAN **CATANELLA**
Firm: UBS Financial Services, Inc.
Broker-Dealer / RIA: *UBS Financial Services*

JOHN **CLARK**
Firm: Heffernan Retirement Services
Broker-Dealer / RIA: *Global Retirement Partners*

DANIEL **COLLUCCIO**
Firm: Wilmington Trust
Broker-Dealer / RIA: *Wilmington Trust*

JAKE **CONNORS**
Firm: Compass Financial Partners
Broker-Dealer / RIA: *LPL Financial*

SHAUN **COX**
Firm: Oswald Financial, Inc.
Broker-Dealer / RIA: *LPL Financial*

MICHAEL **CURRY**
Firm: UBS Financial Services, Inc.
Broker-Dealer / RIA: *UBS Financial Services*

BRADY **DALL**
Firm: 401k Advisors Intermountain
Broker-Dealer / RIA: *Resources Investment Advisors*

TAYLOR **DANCE**
Firm: GBS Retire
Broker-Dealer / RIA: *Resources Investment Advisors*

KELLI **DAVIS**
Firm: CSi Advisory Services, LLC
Broker-Dealer / RIA: *LPL / Global Retirement Partners*

JOE **DEBELLO**
Firm: Chepenik Financial
Broker-Dealer / RIA: *Resources Investment Advisors*

SATYAM (SATY) **DESAI**
Firm: Merrill Lynch
Broker-Dealer / RIA: *Merrill Lynch*

SEAN **DEVINEY**
Firm: Provenance Wealth Advisors, LLC
Broker-Dealer / RIA: *Raymond James & Associates*

JUSTIN **DOMBER**
Firm: Plante Moran Financial Advisors
Broker-Dealer / RIA: *Plante Moran Financial Advisors*

MICHAEL **DOWN**
Firm: NFP
Broker-Dealer / RIA: *Kestra*

MICHAEL **DUCKETT**
Firm: Lockton Retirement Services
Broker-Dealer / RIA: *Lockton Investment Advisors*

RICH **EAGAR**
Firm: Qualified Plan Advisors
Broker-Dealer / RIA: *N/A*

SHAUN **ESKAMANI**
Firm: CAPTRUST
Broker-Dealer / RIA: *CAPTRUST*

JESSICA **ESPINOZA**
Firm: NFP
Broker-Dealer / RIA: *Kestra*

BLAKE **FAUST**
Firm: Wipfli Financial Advisors, LLC
Broker-Dealer / RIA: *Wipfli Financial Advisors, LLC*

MICHAEL **FINE**
Firm: Monarch Plan Advisors
Broker-Dealer / RIA: *Monarch Plan Advisors*

DEREK **FIORENZA**
Firm: Summit Group Retirement Planners
Broker-Dealer: *LPL Financial*
RIA: *Summit Group Retirement Planners, Inc.*

JESSICA **FITZGERALD**
Firm: Morgan Stanley
Broker-Dealer / RIA: *Morgan Stanley*

MATT **FLECK**
Firm: ProCourse Fiduciary Advisors
Broker-Dealer / RIA: *ProCourse Fiduciary Advisors*

PATRICK **FLINT**
Firm: CAPTRUST
Broker-Dealer / RIA: *CAPTRUST*

GEOFFREY **FORCINO**
Firm: Kathmere Capital Management
Broker-Dealer / RIA: *Kathmere Capital Management*

LEE **FOREHAND**
Firm: Morgan Stanley
Broker-Dealer / RIA: *Morgan Stanley*

ANTHONY **GARGANO**
Firm: CBIZ Retirement Plan Services / CBIZ Investment Advisory Services
Broker-Dealer / RIA: *CBIZ Financial Solutions Inc. / CBIZ Investment Advisory Services, LLC*

STEVEN **GIBSON**
Firm: Plante Moran Financial Advisors
Broker-Dealer / RIA: *Plante Moran Financial Advisors*

MATT **GIOVINAZZO**
Firm: NFP
Broker-Dealer / RIA: *Kestra*

CHRIS **GIOVINAZZO**
Firm: Fiduciary 401(k) Advisors
Broker-Dealer / RIA: *Kestra / NFP-Retirement*

SPENCER **GOLDSTEIN**
Firm: StoneStreet Equity, LLC
Broker-Dealer / RIA: *Resources Investment Advisors*

WESLEY **GOLIE**
Firm: First Interstate Bank
Broker-Dealer / RIA: *LPL Financial*

BENJAMIN **GOTTLIEB**
Firm: Merrill Lynch
Broker-Dealer / RIA: *Merrill Lynch*

MATTHEW **GREENE**
Firm: HUB International Retirement and Private Wealth, formerly Summit Financial Corp.
Broker-Dealer / RIA: *Commonwealth Financial Network*

JACOB **HAAS**
Firm: Merrill Lynch
Broker-Dealer / RIA: *Merrill Lynch*

MOIRA M. **HAGY**
Firm: Assurance Financial Services
Broker-Dealer / RIA: *Kestra*

ERIN M. **HALL**
Firm: Strategic Retirement Partners
Broker-Dealer / RIA: *Global Retirement Partners*

THOMAS **HARDY**
Firm: Mariner Wealth Advisors
Broker-Dealer / RIA: *Mariner Wealth Advisors*

BRANDON **HELMS**
Firm: Retirement Plan Analytics
Broker-Dealer / RIA: *Global Retirement Partners*

EVAN **HIRSH**
Firm: HB Retirement
Broker-Dealer / RIA: *LPL / Global Retirement Partners*

EVAN **HOLMES**
Firm: CAPTRUST
Broker-Dealer / RIA: *CAPTRUST*

EMILY **HOPKINS**
Firm: NFP
Broker-Dealer / RIA: *NFP Retirement*

MICHAEL **HOUGHTON**
Firm: Houghton Financial Partners
Broker-Dealer / RIA: *M Holdings Securities*

DOUG **JOHNSON**
Firm: Summit Financial, a Division of Hub International New England
Broker-Dealer / RIA: *Commonwealth Financial Network*

KAMERON **JONES**
Firm: NFP
Broker-Dealer / RIA: *NFP Retirement*

MIKE **KASECAMP**
Firm: CBIZ Retirement Plan Services / CBIZ Investment Advisory Services
Broker-Dealer / RIA: *CBIZ Financial Solutions Inc. / CBIZ Investment Advisory Services, LLC*

JACK **KELLER**
Firm: CBIZ Retirement Plan Services / CBIZ Investment Advisory Services
Broker-Dealer / RIA: *CBIZ Financial Solutions Inc. / CBIZ Investment Advisory Services, LLC*

JAMIE **KERTIS**
Firm: Grinkmeyer Leonard Financial
Broker-Dealer / RIA: *Commonwealth Financial Network*

CAMERON **KLEINHEKSEL**
Firm: Plante Moran Financial Advisors
Broker-Dealer / RIA: *Plante Moran Financial Advisors*

DOUGLAS **KUBLIN**
Firm: Marsh and McLennan Agency
Broker-Dealer / RIA: *MMA Securities*

MARK **LAUGHTON**
Firm: Quintes Financial Services, LLC
Broker-Dealer / RIA: *Quintes Financial Services, LLC*

JEAN KARLO **ROCAFORT**
Firm: Rocafort Group
Broker-Dealer / RIA: *Cetera Advisor Networks, LLC*

DEAN **LYSENKO**
Firm: Marshall & Sterling Wealth Advisors, Inc.
Broker-Dealer / RIA: *LPL Financial / Marshall & Sterling Wealth Advisors, Inc.*

SARAH **MAJESKI**
Firm: Oswald Financial, Inc.
Broker-Dealer / RIA: *LPL / Global Retirement Partners*

SCHUYLER **MANN**
Firm: Retirement Wellness Group
Broker-Dealer / RIA: *Retirement Wellness Group*

PHIL **MAZUREK**
Firm: Assurance Financial Services
Broker-Dealer / RIA: *Kestra*

CASEY **MCKILLIP**
Firm: Aldrich Wealth LP
Broker-Dealer / RIA: *Aldrich Wealth*

DAVID **MONTGOMERY**
Firm: Fidelis Fiduciary Management
Broker-Dealer / RIA: *Independent Financial Partners*

DAVID **MOREHEAD**
Firm: Retirement Benefits Group
Broker-Dealer / RIA: *Triad Advisors*

JOSH **MOTT**
Firm: Morgan Stanley - Graystone Consulting
Broker-Dealer / RIA: *Morgan Stanley*

KYLE **OLSON**
Firm: NFP
Broker-Dealer / RIA: *NFP*

SCOTT **ONDEK**
Firm: Sequoia Consulting Group (Pensionmark)
Broker-Dealer / RIA: *Pensionmark Financial Group*

DOUG **O'REAR**
Firm: OnTrack 401(k)
Broker-Dealer / RIA: *Independent Financial Partners*

JASON COLIN **PATRICK**
Firm: Fiduciary Advisors, LLC
Broker-Dealer / RIA: *Kestra*

NEIL **PLEIN**
Firm: Aldrich Wealth
Broker-Dealer / RIA: *Aldrich Wealth*

JOSHUA **RAPP**
Firm: BerganKDV
Broker-Dealer / RIA: *BerganKDV*

SHAUN **RATAY**
Firm: Morgan Stanley
Broker-Dealer / RIA: *Morgan Stanley*

NICK **RAVELLA**
Firm: Wells Fargo Advisors
Broker-Dealer / RIA: *Wells Fargo Advisors*

JOHN **RICHARDS**
Firm: NFP
Broker-Dealer / RIA: *NFP*

PETER **ROWLEY**
Firm: NFP Mid Atlantic
Broker-Dealer / RIA: *Kestra*

MITCH **RYAN**
Firm: Morgan Stanley
Broker-Dealer / RIA: *Morgan Stanley*

W. DEAN **SALYER III**
Firm: WD Pensionmark Financial Group
Broker-Dealer / RIA: *Pensionmark Financial Group*

RICK **SAUERMAN**
Firm: NFP
Broker-Dealer / RIA: *NFP*

BRENT **SHEPPARD**
Firm: Cadence Financial Management
Broker-Dealer / RIA: *MMLIS*

JORDAN **SIBLER**
Firm: Janney Montgomery Scott
Broker-Dealer / RIA: *Janney Montgomery Scott*

THOMAS **SMALL**
Firm: The Mahoney Group of Raymond James
Broker-Dealer / RIA: *Raymond James & Associates*

BRANDON **SMITH**
Firm: Qualified Plan Advisers
Broker-Dealer / RIA: *Schwab*

BRITTANY **SMITH**
Firm: Next Retirement Solutions
Broker-Dealer / RIA: *Raymond James & Associates*

DARREN **STEWART**
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SECURE
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Best practices for plan sponsors to address cybersecurity concerns

By
Jordan D. Mamorsky, Esq.

&

Larry E. Crocker

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A paradigm shift is occurring in the management and administration of retirement plans that is changing the way plan fiduciaries interact with participants. Plan sponsors are increasingly providing mandatory plan disclosures, historically delivered by mail, in electronic format to participants. Both the Department of Labor ("DOL") and the Supreme Court have recognized the shift and the resulting benefits for retirement plan administration. For example, on May 21, 2020, the DOL issued a new rule titled "Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA." The rule provides safe harbor relief to plan administrators who satisfy specific conditions in delivering electronic communications. *"The Department expects the rule to enhance the effectiveness of ERISA disclosures and significantly reduce the cost and burden associated with furnishing many of the recurring and most costly disclosures."*

Also, the Supreme Court's recent decision, *Intel Investment Policy Committee v. Sulyma* noted how electronic communications can enhance participant visibility of plan disclosures. These benefits are real and, as the DOL aptly noted, will simplify plan administration and lower the associated costs. While this is an important positive effect for the employee benefits industry, the increased flow of electronic communications risks the potential exposure of participants' confidential and personal data to cybercriminals and, in turn, creates a new liability source for the plan and its service providers.

Cybersecurity concerns are particularly acute as of the publishing date of this article. In the new regulation, the DOL acknowledged heightened cybersecurity concerns: *"…the Department recognizes that increased electronic disclosures may expose covered participants' information to intentional or unintentional data breach. …the Department expects that many plan administrators, or their service or investment providers, already have secure systems in place to protect covered individuals' personal information. Such systems should reduce covered individuals' exposure to data breaches."* These comments seem reasonable; however, the DOL did not offer any guidance on specific best practices, noting that *"…efforts to establish specific, technical requirements* ***would be difficult to achieve****, given the variety of technologies, software, and data used in the retirement plan marketplace."*

The DOL's appreciation of the issue but lack of specific regulatory guidance (at least in this new regulation) only makes cybersecurity a more pressing issue for plan sponsors, particularly considering that the threat of cybersecurity breaches and the resulting liability are not going away anytime soon. As recently as April 3, 2020, a participant in the Abbott Laboratories Stock Retirement Plan filed a complaint in the U.S. District Court for the Eastern District of Illinois accusing Abbott and the plan's third-party administrator of breaching their fiduciary duties by failing to stop cybercriminals from siphoning $245,000 from the participant's account.

The increased flow of electronic communications risks the potential exposure of participants' confidential and personal data to cybercriminals and, in turn, creates a new liability source for the plan and its service providers.

Making matters even more difficult, the current economic climate is new and unprecedented. First, the COVID-19 health crisis has led to increasing unemployment and furloughs. With a loss in steady income, participants are turning to their retirement plans for cash. Second, the recent CARES Act legislation makes it easier for participants to withdraw money from their retirement account and reduces the chance of tax penalties which will likely make plan withdrawals only more popular. Finally, another challenge for plan sponsors is protecting confidential data with more employees working remotely, on remote networks, and possibly even on personal computers.

With the challenges previously mentioned, the procedures many plan sponsors, third-party administrators, and record keepers currently have in place to exchange data or manage and verify participant withdrawals may no longer be prudent or feasible. Because of the urgency in dealing with this problem, the time is now for plan sponsors, plan fiduciaries and plan service providers to address and reevaluate cybersecurity concerns—to ensure they and their participants will not fall victim to fraud, hacking or phishing schemes.

With the concerns and potential risks identified, the following questions need to be addressed by the plan sponsor:

- Has a point person been prudently selected to be responsible for an internal operational audit and external vendor procedures assessment?
- What is the point person expertise in operational compliance and vendor due diligence?
- What questions are they asking?
- What materials are they reviewing?
- What are the desired results of the audit and assessment?

ERISA has statutory protections under Section 404(a) that impose a standard of knowledge and actions as a prudent expert on plan fiduciaries as one that acts *"…with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."* But what does that mean in the context of cybersecurity? The DOL expressly chose not to address the application of ERISA fiduciary protections stating, *"This safe harbor only establishes an optional method for delivery of covered documents. Issues pertaining to liability for security breaches are beyond the scope of this safe harbor."*

First, of course, the issue will be to identify what data is specifically misappropriated by hackers to constitute a "plan asset." The Seventh Circuit, for example, recently affirmed a district court's finding that confidential participant data including *"participants' contact information, their choices of investments, the asset size of their accounts, their employment status, age, and proximity to retirement"* could not be a plan asset because it was not property the plan could sell or lease in order to fund retirement benefits. See *Divane v. Nw. Univ.*, No. 16 C 8157, 2018 WL 2388118, at *12 (N.D. Ill. May 25, 2018), aff'd, No. 18-2569, 2020 WL 1444966 (7th Cir. Mar. 25, 2020). While it is an open issue whether participant personal data will be considered plan assets—the DOL has yet to opine on this topic—a distinction can be drawn with cases in which actual plan assets (e.g., the funds in an individual's account) are stolen by cybercriminals.

An important case in the U.S. District Court for the Eastern District of Pennsylvania, *Leventhal v. MandMarblestone Grp.* (*"Leventhal"*), underscores the prospective liability looming for plan sponsors and service providers in connec-

tion with data breaches that result in the loss of funds from participants' accounts.

Specifically, in *Leventhal*, a participant and the plan itself brought allegations against the plan's third party administrator (TPA) and custodian that they failed to enact prudent procedures and safeguards to protect the plan and participants from cybersecurity threats that resulted in cybercriminals obtaining a copy of a participant's legitimate distribution form and using that copy to submit a series of requests for fraudulent withdrawals totaling more than $400,000. The court not only found that the allegations plausibly stated the TPA and custodian were ERISA fiduciaries in connection with distributing plan assets to participants, but also that the custodian and TPA breached their fiduciary duties to the plan. See *Leventhal v. Mand-Marblestone Grp. LLC*, No. 18-CV-2727, 2019 WL 1953247, at *5 (E.D. Pa. May 2, 2019).

As ERISA fiduciaries, the *Leventhal* Court concluded that the TPA and custodian *"failed to act with the requisite prudence and diligence where they saw the 'peculiar nature' and high frequency of the withdrawal requests that were to be distributed to a new bank account, but failed to alert Plaintiffs or verify the requests"* and that Defendants failed to implement "typical" procedures and safeguards to notify Plaintiffs and/or verify the requests. This language begs the question: What are the "typical" procedures and safeguards that would have protected the service providers from liability in *Leventhal* and shielded the participant from having money stolen from their account? Plan sponsors and administrators should not take lightly or ignore the need for proper review of and diligence in its procedures.

As the retirement plan administration and management challenges continue and yet evolve, plan sponsors should expand the scope of their due diligence and take steps to identify appropriate criteria for service provider assessments. In addition, plan sponsors should also implement best practices for plan operations and compliance that meet procedural and substantive prudence requirements under ERISA. But unlike the established and streamlined procedures that meet ERISA's prudent standard of care with other fiduciary functions, the look of the process and substance in the context of data exchange and cybersecurity may need to be completely redesigned. Therefore, plan sponsors should consider a comprehensive review of their company's, and their service provider's, current data exchange and cybersecurity practices and procedures. If nonexistent, then immediate action should be taken to establish and deploy new data exchange and cybersecurity procedures. Investigation by the appointed person(s) or other plan fiduciaries should address at a minimum the following four steps:

- Review service agreements and identify any contractual indemnification provisions;
- Review all the provider's existing processes and controls;
- Review the methods for testing the sufficiency of processes and controls; and
- Substantiate the results of the assessment.

While this writing is not the place to go into the detail of a comprehensive service provider due diligence assessment, the beginning of a prudent assessment should include an evaluation of the following:

- A clearly written description of the providers and their responsibilities–including respective fiduciary responsibility
- The provider agreements–for indemnification language
- The provider's insurance coverages
- The provider's cybersecurity practices and/or policies
- The employer's internal controls and management procedures
- The employer's insurance coverages
- The results or findings of any network assessments
- Any participant training initiatives
- The benefits of an onsite visit to the provider
- The provider's Service Organization Control ("SOC") reports
  - SOC 1 report focuses on the description of a service organization's control and how controls are designed to achieve objectives
  - SOC 2 report is a review of operations, security, integrity of process, privacy, and confidentiality
- Any third-party provider certifications or assessments for quality and process standards from organizations like the Centre for Fiduciary Excellence (CEFEX), the American Institute of CPAs (AICPA), Dalbar, etc.

Clearly, the time is now for plan sponsors and service providers to swiftly address any lingering concerns over the security of data and plan assets. The effects of any failure to do so, particularly in the current economic climate resulting from the COVID-19 pandemic and the assistance response of the CARES Act, could have drastic implications, including fiduciary liability and costly insurance premiums, on top of any losses resulting from the stolen plan assets. Employers seeking to address such concerns should contact ERISA counsel or a fiduciary compliance expert to guide them through a thorough review and the implementation of necessary cybersecurity measures and data exchange procedures. **NNTM**

Things Happened

AGE IS GOOD FOR NOTHING, IF NOT PERSPECTIVE.

By Steff Chalk

I began my previous column with this sentence: *These are unusual times due to the state of the U.S economy*. At that time, the country was flush with employment opportunities and there was intense competition for workers at every level. Then, as W.C. Fields is frequently quoted, "Things happened."

Plan sponsors today have a to-do list that includes asking everything from "I heard you cough; you're not sick, are you?" to "How do we re-engineer our company to remain a going concern?" Plan sponsors' concerns are numerous. Unfortunately, "How can we improve the qualified plan?" is not one of them.

Advisors Strive to Stay Relevant

Many retirement plan advisors are struggling to remain connected with plan sponsors that are facing major disruption as critical issues require their undivided attention. Experienced advisors today are making a positive impact via a combination of communicating, anticipating plan sponsor needs and staying out of the sponsor's way—call it "Professional Distancing."

Communication is both a tool and a strategy for tough times. I have heard advisors say that their clients don't want to meet or talk right now. That may be true—but be careful. Avoid deserving the label of the advisor who fails to make contact with the plan sponsor's team during difficult times.

There are topics that plan sponsors do want to hear about—within reason. The three topics that advisors should be mentioning to plan sponsors are:

- Investment performance
- Cybersecurity
- Financial wellness

Plan sponsors need to understand that these three topics will be agenda items at the next Retirement Committee meeting.

Investment Performance Matters

At that next committee meeting, plan sponsors should be prepared to discuss target date funds and the importance of asset allocation—as boring as that may sound. Old themes? Yes. However, many participants lost more money than they should have by exiting the equity markets in March.

Cybersecurity is Worth Mentioning

Anticipating plan sponsor needs is not an easy task, but failing to discuss the exposure and known safeguards on the topic of cybersecurity may be a missed opportunity. Cybersecurity exposure exists anytime there is a combination of sufficient dollars and bad actors. Recordkeepers, TPAs and plan sponsors are experiencing a deluge of leakage activity via distribution requests, loan requests and suspended deferrals. The advisor can be a positive education resource for both plan sponsors and plan participants. The more cybersecurity awareness and education an advisor can provide the plan sponsor, the more protected our industry becomes. This is not an immediate need—but it is a worthy agenda item for the next Retirement Committee meeting.

Financial Wellness Takes Center Stage

Today's environment is the perfect Petri dish for why every participant, employee or corporation needs to have a sidecar emergency fund, a rainy-day fund or 6 months of living expenses in reserve. Prior to February, the term "financial wellness" was nebulous and not clearly defined. It had a different meaning for employees, plan sponsors and Retirement Committee members. Many had heard the term, and some thought they understood what it means. But there was no strong consensus on the definition of financial wellness. Now, however, the term and the stability it can bring to a participant and his or her family is crystal clear.

Older people have perspective derived from experiencing the Kennedy assassinations, 9/11, the 2008 housing bubble or Oct. 19, 1987. Each of them were monumental game changers. In their aftermath, life changed immediately. Then life bounced back and settled into a new normal.

Or, in the words of George Harrison: all things must pass. NNTM

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As the Litigation Turns

FOUR SUGGESTIONS FOR AVOIDING INVOLVEMENT IN LAWSUITS AGAINST YOUR PLAN SPONSOR CLIENTS.

By David N. Levine

The popular TV soap opera "As the World Turns" ran for 54 years. Given today's continuously rising wave of benefits litigation, it seems increasingly likely that complex retirement plan litigation will run even longer. However, there is one "turn" in the litigation world that should be top of mind for advisors: increasingly, they are being brought into lawsuits in one way or another.

Because many advisors' practices have evolved, they can be drawn into lawsuits in many ways: in their role as a fiduciary advisor to the plan, due to their affiliates providing other services and/or products to the employer or the plan, or "informally" by their plan sponsor clients when litigation happens. Regardless of the way an advisor gets brought into the process, the costs, in terms of both time and money, can be significant.

So what are some basic things to consider? Here are four.

Paper Trail

First, it is always a given that advisors should be focused on their–and their organization's–controls process that helps document their activities. These controls are essential when providing 3(21) fiduciary advice, and when 3(38) or other services and products may involve alleged "cross selling" of any kind. A solid procedural paper trail can be very protective of an advisor and their clients.

Insurance

Second, even with the best of processes, when litigation is filed we often wind up defending advisors, whether actually named in the litigation or not. Unsurprisingly, costs can escalate quickly.

As such, it is important that an advisor fully understand their insurance coverage. Key features of insurance coverage can include: (1) areas covered; (2) limitations on liability; and (3) panel counsel choices.

Coverage can be provided under a broad-based errors and omissions coverage and/or under special policies. (For example, NAPA has developed a policy designed for advisors that has specific ERISA coverage with a panel comprised of multiple firms, including Groom, that is designed to address these concerns.)

While there is no one right or wrong way to buy insurance, understanding the distinctions between policies is essential. We have seen many instances in which these distinctions, if handled in the selection process, made the difference between having insurance coverage or not.

Contractual Provisions

Third, an advisor's contract can have a significant impact on their role in litigation. Most importantly, as the services provided by an advisor (and any related parties) to a client change, it is helpful to carefully detail:

- which services are "fiduciary" in nature and which are not;
- the extent of the services; and
- any limitations on obligations.

The specific wording can make a significant difference if prohibited transactions might be involved.

Who is Responsible?

Fourth, given the rise of "blender" lawsuits–whether involving MEPs, PEOs, investment funds, or other plan features–where multiple service providers work on and advise plan fiduciaries, addressing who is responsible (and who is not) for each component of the plan services can help manage an advisor's involvement and exposure in litigation.

Conclusion

Retirement plan litigation is now an ongoing fact of life. As the litigation landscape has shifted, increasingly, advisors are being pulled from the periphery of cases into the center of the process–whether as named defendants or in supporting their clients.

Litigation can be costly and burdensome. Advisors are well served to work internally and with their outside counsel on managing their process, insurance, and documentation before litigation happens. Doing so can result in significant benefits to an advisor and its clients. NNTM

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The 'Finished' Line?

PERHAPS AS WE EMERGE FROM THIS UNCERTAIN TIME, WORKERS WILL BE MORE ATTENTIVE TO THEIR RETIREMENT READINESS.

Nevin E. Adams, JD

We've been through a lot the past couple of months—and doubtless those events have unsettled (if not upended) the retirement plans of many. Or has it?

The Employee Benefit Research Institute (EBRI) and Mathew Greenwald & Associates, Inc. recently unveiled the 30th annual Retirement Confidence Survey (RCS). The most recent iteration found that 69% of all workers claimed to be very or somewhat confident in their ability to live comfortably throughout their retirement years, comparable to 2019—though that was based on a January polling. So, cognizant of the dramatic events of the ensuing weeks, the researchers at EBRI and Greenwald & Associates went back to the field in late March—and found that the percentage of workers feeling confident remained "statistically unchanged"[1] at 63%.

Now even late March might have been too soon to capture the full impact, but you might well expect that confidence is impacted, if not influenced, by movements in the market. However, back in 2006 EBRI noted that "RCS data over the past 12 years continue to show that retirement confidence overall among workers does not seem to be affected by either stock market performance or varying economic conditions."

There's comfort in knowing that the 2020 RCS found that those with access to a retirement savings plan at work were more likely to save ("dramatically more likely," EBRI notes), "significantly" more likely to have savings, and less likely to have no savings or to have high levels of debt. Little wonder that, according to the RCS, workers reporting they or their spouse have money in a DC plan or IRA or have benefits in a DB plan from a current or previous employer are nearly twice as likely as those without any of these plans to be at least somewhat confident (78% with a plan vs. 41% without a plan).

And yet, only 44% of respondents overall said they had estimated how much money they would need each month in retirement. And just under half of workers (48%) report they and/or their spouse have ever tried to calculate how much money they will need to have saved so that they can live comfortably in retirement (that's a bit higher than the historic norms here—but not much higher[2]).

While the findings in the RCS have never seemed to motivate a resurgence of interest or activity surrounding those assessments, perhaps as we emerge from this uncertain time, as we begin to take stock of our lives, our work, and our finances, workers will be more open to those considerations, more willing to establish emergency savings, more attentive to issues of personal health.

It may be worth noting that the 2020 RCS also found that 6 in 10 workers (61%) report that they either strongly or somewhat agree with the statement that preparing for retirement makes them feel stressed.

Though I'm guessing that's not nearly stressful as getting to retirement without having done so. **NNTM**

FOOTNOTES

[1] I won't quibble here with the math of that characterization, though I will comment that a drop from 69% to 63% strikes me as at least "noticeable."

[2] There's some further comfort in knowing that workers reporting that they or their spouse participate in a retirement plan were significantly more likely than those who do not participate in such a plan to have tried a calculation (58% vs. 11%).

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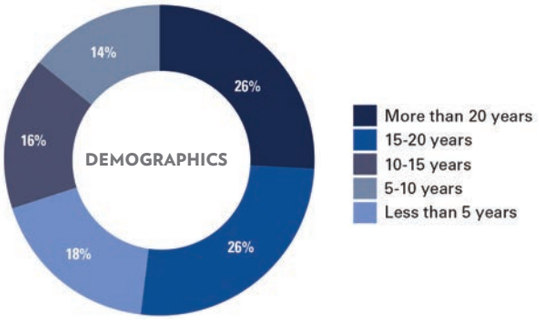

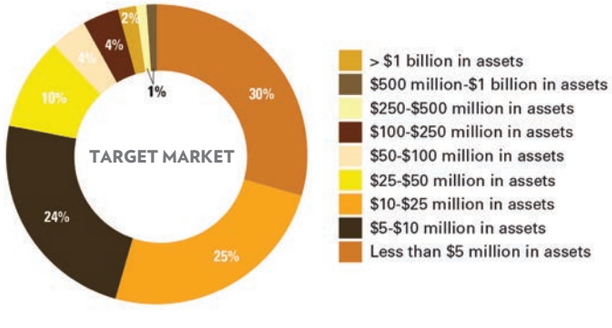

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Cases in Point

ONE MIGHT WELL THINK THAT THE COVID-19 PANDEMIC AND THE ENSUING NEAR NATIONWIDE LOCKDOWN WOULD PUT A DAMPER ON 401(K) LITIGATION… AND IF SO, YOU'D BE WRONG. THE SECOND QUARTER HAS BEEN CHOCK FULL OF LITIGATION FROM KNOWN—AND NOT (YET) AS WELL KNOWN ELEMENTS OF THE PLAINTIFFS' BAR. YOU'LL ALSO WANT TO CHECK OUT THE SUIT FILED BY A PARTICIPANT AGAINST HER EMPLOYER AND THE RECORDKEEPER/ SERVICE CENTER OPERATOR REGARDING UNAUTHORIZED ACCESS TO HER ACCOUNTS—AND THAT WAS BEFORE EVERYBODY WAS WORKING REMOTELY.

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Service, Centered?

Plan sponsor, RK sued for fiduciary breach in 401(k) hack

A new suit has been filed alleging "reckless actions in allowing an unknown individual to prey on and steal hundreds of thousands of dollars from the retirement savings of the Plaintiff…"

More specifically, the suit was filed on behalf of Heide Bartnett, 59, a retired former employee of Abbott Laboratories, who had left her savings in the Abbott Corporate Benefits Stock Retirement Plan. The suit was filed against the fiduciaries of the Abbot 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. Bartnett's account." And then, "rather than communicating with Ms. Bartnett via email concerning changes to her account, as Defendants knew Ms. Bartnett 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. Bartnett could take any steps to halt the fraud."

'Control' Voice

The suit, which claims Alight was a fiduciary to the plan, cites contract services it provided, including administration, recordkeeping and information management services for the plan. Now, while recordkeepers typically are positioned as agents of the plan sponsor/employer, and thus avoid fiduciary status, the suit claims that was not the case here because Alight not only "operated Abbott Corporate Benefits' telephone customer service center and website… both of which provided Plan participants the ability to manage their accounts, including requesting distribution of benefits." In sum, "Alight exercised control over Plan assets by directing distributions from participants' accounts, including the unauthorized distributions it allowed from Ms. Bartnett's account."

Noting that "defendants knew or should have known of the possibility of individuals attempting to make unauthorized withdrawals from retirement plans it oversaw or managed, due to prior similar incidents," the suit alleges that, on or about Dec. 29, 2018, at 10:56 PM Central Time, an unknown user accessed Ms. Bartnett's account via the internet, and chose the "forgot password" option. They then incorrectly entered four digits of the Social Security number and birth date, had those bad entries challenged, and then opted to receive a one-time code via e-mail, allegedly to Bartnett's email account, though she has no record or memory of receiving that email. Regardless, that one-time code was subsequently entered, access granted, password changed, and connected to a SunTrust bank account.

Then on Dec. 31 someone contacted the Abbott Benefits Service Center, claiming to be Ms. Bartnett, albeit from a phone number "which did not belong to Ms. Bartnett, had never been used by Ms. Bartnett, and was not associated with Ms. Bartnett's Plan account." They then allegedly told the customer service representative that they had tried to process a distribution online, but were unsuccessful, at which point the CSR asked if the caller still lived at the address on file "thereby providing Ms. Bartnett's personal information to the Impersonator."

> **"This suit—and perhaps many more that haven't risen to this level—serve as reminders that our retirement savings are threatened by more than the Coronavirus."**

'Snail' Fail?

Then the CSR told the caller that a new bank account had been added to the account, and that that had to be on file for seven days before money could be transferred to the newly added account. And then confirmed that they could go online and transfer money the following Monday. And then, on Jan. 1, "… despite Ms. Bartnett's preferred method of communication being via email, 'snail mailed' a 'Direct Deposit Address Addition' notice to Ms. Bartnett, advising her of the change made to her direct deposit access to her account." The suit notes that if the defendants had instead sent an email to Bartnett, she would have had an opportunity to question the account addition.

On Jan. 4, 2019—no funds yet having been transferred—Ms. Bartnett's husband attempted to access the account, but the password had been changed. However, he properly answered the security question asked by the site and changed her account password. This change was communicated to plaintiff Bartnett via email.

House Call

On Jan. 8, 2019, about 8:00 in the morning, the imposter once again—and from a strange phone number—called the Abbott Benefits Support Center, again claiming to be Bartnett. Once again, they opted for the one-time code, rather than responding to the personal security questions—though once again, the Barnetts don't recall ever receiving the code. And then, the imposer asked about a transfer of funds, claiming it was needed for purchasing a house. "At that time, upon the Impersonator's request, Defendants authorized $245,000 to be transferred from Ms. Bartnett's account[1] to the SunTrust Bank account."

On the next day, defendants… sent a letter via first class U.S. Mail to Bartnett, advising her of the transfer of funds. A letter she did not receive until Jan. 14, 2019.

The impersonator made two additional calls to the call center on Jan. 9, 2019, inquiring about the balance and asking about the status of the wire transfer (they were told the funds would be transferred on Jan. 14, 2019).

On Jan. 15, 2019, Bartnett called Abbott Corporate Benefits to report that she had discovered that money was missing from her Plan account—and at that point, the defendants froze the account and advised her to contact the police.

With some effort, law enforcement was able to track back the IP address of the account access attempts to an individual living in the city of Panta, in the state of Bihar, in the country of India.

The suit chronicles Bartnett's subsequent efforts at recovery; $48,991 from withheld taxes were redeposited, and SunTrust managed to get back $59,494.02. But that, according to the suit appeared to be the end of the recovery, save for what the suit describes as "a take-it-or-leave-it offer to restore just 10% of the funds that had been stolen from Ms. Bartnett's Plan account."

What This Means

This is not the first time that the immediacy of account access, coupled with a decidedly slower process of transaction confirmations has produced litigation, or where a customer service center operation has played a role and been a party to it.

While there has certainly been a growing concern about cybersecurity risks, there have also been recent cases where individuals within the sponsoring employer and others where TPA or recordkeeping staff have taken advantage of their access to misappropriate funds.

And while this activities here weren't recent, we stand here today on the brink of what could be an enormous increase in the number and size of emergency transaction requests. This suit—and perhaps many more that haven't risen to this level—serve as reminders that our retirement savings are threatened by more than the Coronavirus.

— Nevin E. Adams, JD

Three Peat?

Another plan 'panned' by Capozzi Adler

Capozzi Adler PC has filed (yet) another excessive fee suit, claiming that the plan fiduciaries' actions were "contrary to actions of a reasonable fiduciary and

FOOTNOTES

[1] [i]As of Dec. 31, 2018, Bartnett had a total of $362,510.84 in her plan account.

cost the Plan and its participants millions of dollars."

Capozzi Adler happens to be one of the three law firms specifically named in at least one P&C insurer's policy renewal questionnaire, alongside Schlichter Bogard & Denton LLP and Nichols Kaster PLLP. Earlier this month they filed suit against Aegis Media Americas Inc.—the firm that brought suit about a year ago against the BTG International Inc. Profit Sharing 401(k) Plan, earlier this year the $2 billion health technology firm Cerner Corp., and less than a month ago Pharmaceutical Product Development, LLC Retirement Savings Plan.

The target this time is the $839 million 401(k) plan of defense contractor ManTech International Corp., sued in the Eastern District of Virginia (*Gerken v. ManTech Int'l Corp.*, E.D. Va., No. 3:20-cv-00350, complaint 5/15/20) by four former employees. The allegations are familiar: The plan "had substantial bargaining power regarding the fees and expenses that were charged against participants' investments," but "…did not try to reduce the Plan's expenses or exercise appropriate judgment to scrutinize each investment option that was offered in the Plan to ensure it was prudent."

Match 'Makings'

This case—and this new wave of litigation—does make some unique points, notably that the employer here "enjoys both direct and indirect benefits by providing matching contributions to Plan participants," that they are "… generally permitted to take tax deductions for their contributions to 401(k) plans at the time when the contributions are made," and that "…it is well-known that "[o]ffering retirement plans can help in employers' efforts to attract new employees and reduce turnover." Ultimately, the point is that "given the size of the Plan, ManTech likely enjoyed a significant tax and cost savings from offering a match."

Beyond that, and consistent with the excessive fee litigation genre, the plaintiffs here allege that the defendants:

- "included and retained in the Plan many mutual fund investments that were more expensive than necessary and otherwise were not justified on the basis of their economic value to the Plan"
- "failed to have a proper system of review in place to ensure that participants in the Plan were being charged appropriate and reasonable fees"
- "failed to leverage the size of the Plan to negotiate for (1) lower expense ratios for certain investment options maintained and/or added to the Plan during the Class Period and (2) lower recordkeeping and administrative fees"
- "retained several actively-managed funds as Plan investment options despite the fact that these funds charged grossly excessive fees compared with comparable or superior alternatives, and despite ample evidence available to a reasonable fiduciary that these funds had become imprudent due to their high costs"

Other Allegations

The suit claims that "a significant portion of funds in the Plan, almost half, were much more expensive than comparable funds found in similarly sized plans," and takes issue with the choice of mutual fund option, rather than either collective trusts or separate accounts," as well as the use of active rather than less-expensive passive strategies. With regard to the latter, the plaintiffs characterized them as "closet index funds because they charge as if they are actively managed but vary little from the index benchmark."

The plaintiffs here criticize, though do not out-and-out condemn the use of revenue sharing. They also criticize the longevity of the relationship with the plan's recordkeeper (Fidelity), with "…no evidence Defendants have undertaken an RFP since 2004 in order to compare Fidelity's costs with those of others in the marketplace." The plaintiffs further claim that what they determined was the recordkeeping fees paid by the plan ("on average between $65-$90 for each year during the Class Period") was "clearly

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unreasonable as they are well above recognized reasonable rates for large plans," although in support of that notion, they rely on a series of cases and the assertions of plaintiffs' experts in those cases.

And while not a party to the suit, the plaintiffs allege that "the structure of this Plan is rife with potential conflicts of interest because Fidelity and its affiliates were placed in positions that allowed them to reap profits from the Plan at the expense of Plan participants," citing the provider's role as trustee and recordkeeper, as well as investment manager, and its brokerage link, going on to note that "…even when Plan participants roll out of the Plan because they have ended employment with the Company, they are subject to an automatic rollover where their funds are rolled over into an IRA managed by Fidelity Investments."

What's Next?

While there are a couple of new elements raised, for the very most part this is a recitation of all the customary elements that these suits dredge up. Will these allegations hold up under scrutiny? Will this defendant push back, or will they settle—or will they push back and then settle? Or might they stand in, take it to court and prevail?

Time will tell.

— Nevin E. Adams, JD

'Multiple' Personalities

ADP MEP draws Schlichter scrutiny

> **"The suit claims that retirement plan participants 'have an absolutely reasonable expectation that their Confidential Plan Participant Data will be protected by the plan sponsor and not disclosed outside of the plan for non-plan purposes.'"**

Twice in one week in mid-May, suit was brought against the fiduciaries of the $4.4 billion ADP TotalSource Retirement Savings Plan—but with some interesting twists, including allegations about the use of "confidential plan participant data for profit."

Earlier, suit had been brought by a participating employer in ADP's multiple employer plan (MEP)—and if most of the allegations were similar, and the venue (the U.S. District Court for the District of New Jersey) and the named defendants (ADP TotalSource, Inc., Automatic Data Processing, Inc., the ADP TotalSource Retirement Savings Plan Committee, NFP Retirement, Inc., and John Does 1–40) identical, this time the plaintiffs were participants (Beth Berkelhammer and Naomi Ruiz)—participants represented by none other than the law firm of Schlichter Bogard & Denton (and Spiro Harrison).

The Allegations

At a high level, the allegations made in this suit (*Berkelhammer v. ADP TotalSource Group Inc.*, D.N.J., No. 20-cv-05696, complaint filed 5/7/20) were that the ADP defendants:

- breached their fiduciary duties and engaged in prohibited transactions by failing to monitor and control the Plan's recordkeeping fees and causing the Plan to pay excessive fees;
- breached their fiduciary duties and engaged in prohibited transactions by unlawfully paying themselves from Plan assets; and
- selected and retained imprudent investments in the Plan (higher cost—"though it is difficult to discern the share classes or total Plan investment alternative expense ratios from available data, preliminary calculations indicate that Defendants' failure to include the least-expensive shares of identical investments in the Plan resulted in losses to participants of nearly $9 million" and lower performing).

Another common point of contention; reliance on asset-based fees to cover the recordkeeping costs. "Although paying for recordkeeping with an asset-based fee is not a per se violation of ERISA," the plaintiffs acknowledge here, they go on to note that "it can lead to excessive fees if not monitored and capped by the plan fiduciary." Moreover, asserting that "if a fiduciary allows the plan recordkeeper to be compensated with an asset-based fee then the payments can become excessive based on an increase in plan assets alone." While the suit once again embraces the premise that recordkeeping charges should be per-participant, they note that significant increases in asset values can produce "large increases in asset-based fees for services which have not changed," but that "if plan assets decline, participants will not receive a sustained benefit of paying lower fees, because the recordkeeper will demand that the plan make up the shortfall through additional direct payments."

The suit also treads familiar grounds raised in other cases brought by the Schlichter law firm (first raised in a suit involving Shell's 401(k) and subsequently in one involving Liberty Mutual), bringing in for (unfavorable) reference the recordkeeping fees paid by comparable plans, specifically Nike, New Albertsons and Fidelity.

The plaintiffs claims that the defendants "failed to analyze whether the direct and indirect compensation paid to Voya and its affiliates was reasonable

compared to market rates for the same services," and also that they "failed to retain an independent third party to appropriately assess the reasonableness of Voya's compensation in light of the services rendered to the Plan." The suit claims that in 2015, the plan paid Voya at least $6.8 million in recordkeeping fees, which they claim amounts to an average of $91.36 per participant—and that a year later that had risen to an average of $117 per participant. However, the plaintiffs claim that "…at maximum the reasonable recordkeeping fee for the Plan would have been … an average of $30 per-participant from 2014 to 2015 and $25 per-participant from 2016 to 2018."

New Angles

There were also a couple of new angles, specifically that the defendants:

- breached their fiduciary duties and engaged in prohibited transactions by causing the Plan to pay excessive managed account fees ("lower-cost alternatives, such as balanced funds or target date funds, are prudent alternatives, which provide the objective of participants being able to avoid having to make frequent decisions about asset allocations"); and
- breached their fiduciary duties and engaged in prohibited transactions by allowing the Plan's service providers to collect and use Confidential Plan Participant Data for profit.

The latter is an issue first introduced in the 403(b) university suits (the first introduced in August 2016 by the Schlichter firm, though the data issue didn't emerge until the suit against Vanderbilt University in 2018). Specifically outlined here was the use of plan participants' "highly confidential data, including social security numbers, financial assets, investment choices, and years of investment history to aggressively market lucrative non-Plan retail financial products and services, which enriched the service providers at the expense of participants' retirement security."

The plaintiffs allege that the "entities that provide services to defined contribution plans have an incentive to maximize their fees by putting their own higher-cost funds in plans, collecting the highest amount possible for recordkeeping and managed account services, rolling Plan participants' money out of the Plan and into proprietary IRAs, soliciting the purchase of wealth management services, credits cards and other retail financial products, and maximizing the number of non-plan products sold to participants." They claim that "for each additional dollar in fees paid to a service provider, participants' retirement savings are directly reduced by the same amount, and participants lose the potential for those lost assets to grow over the remainder of their careers."

Because of this, the plaintiffs allege that "fiduciaries must be cognizant of providers' self-interest in maximizing fees, and cannot simply accede to the providers' desires and recommendations—e.g., by including proprietary funds and managed account services that will maximize the provider's fees without negotiating or considering alternatives," and that "…fiduciaries must negotiate as if their own money and information is at stake."

PEO 'Petard'

In making their case, the plaintiffs point out that "a key selling point for PEOs that offer their clients the opportunity to join a multiple employer defined contribution plan is the ability to leverage the assets and efficiencies of the whole group to drive down costs," and that "plans that bundle together employers offer significant cost efficiencies, because costs are spread across a larger participant and asset base." Taking pages (literally) from promotional materials regarding MEPs, the suit cites the "substantial economies of scale and cost efficiencies" of that platform, and note that "MEPs may provide the ability for employers

to transfer fiduciary responsibility and oversight to a single, centralized entity."

The suit notes that in 2019, an asset-based fee of 0.32% of all Plan assets was deducted as part of the expense ratio of each investment alternative in the plan to fund this plan account, and that the plan pays Voya's recordkeeping fees from these revenue sharing funds, but not only that "the ADP Defendants caused the Plan to pay any remaining revenue sharing, after administrative expenses are paid, to ADP TotalSource," but that these payments are "wholly unconnected to any services that ADP TotalSource provides to the Plan." The plaintiffs allege that "all these excess amounts were Plan assets, since they constituted excessive fees generated from participant investments, and should have been restored to the Plan." They claim that, from 2014-2018 "the ADP Defendants took for themselves out of these Plan assets nearly $10 million in putative reimbursement of administrative costs in the following amounts per year."

The plaintiffs also claim that "each Adopting Employer separately pays ADP TotalSource fees under their respective Client Services Agreements for the costs to maintain payroll and other services—a component of the PEO arrangement," that ADP TotalSource must maintain detailed records regarding each of the Adopting Employers' employees—and that not only are these recordkeeping and other tasks "duplicative of the typical core recordkeeping and administration functions provided to defined contribution plans," but that the fees that the ADP Defendants collect from the Plan (and its participants) for administration are "wholly duplicative of other fees that Participating Employers must pay as a condition of joining the PEO." All in all, they claim that had "Defendants performed their fiduciary duties, the Plan would not have suffered over $13.5 million in losses from May 2014 through 2019, accounting for lost investment opportunity."

Data Driven?

The suit claims that retirement plan participants "have an absolutely reasonable expectation that their Confidential Plan Participant Data will be protected by the plan sponsor and not disclosed outside of the plan for non-plan purposes," and that "allowing a retirement plan's recordkeeper to exploit Confidential Plan Participant data is contrary to plan participants' best interests because the recordkeeper has the advantage of employer approval of it selection for the Plan and the implicit endorsement of these non-plan services and products, without competition."

Instead, the plaintiffs argue that the participants' data here "was made available to conflicted sales representatives who had access to their personal details, including at vulnerable times in their lives, such as contemplating rollovers or other major investment decisions, under the imprimatur of employer-sponsored Plan approval." They go on to state as fact that "plan participants' valuable Confidential Plan Participant Data, a Plan asset, was transferred to a party in interest…" entitling the Plan to complete disgorgement of the profits generated therefrom." However, arguing in the alternative, they allege that "even if Confidential Plan Participant Data were not a Plan asset, permitting the use of Confidential Plan Participant Data is a fiduciary breach…"

As for that managed account, the suit alleges that "defendants allowed Voya to decide the Plan's managed account provider not based on merit, but because Voya requested that Voya Retirement Advisors provide managed account services." They also take issue with the structure where Voya Retirement Advisors "limits its investment recommendations to the investment alternatives available in the Plan, a far smaller number, and many of which are its own proprietary funds," and that the amount the plan's participants paid to Voya Retirement Advisors for managed account services "rose dramatically between 2014 and 2018, from approximately $770,000 to $2.3 million."

Relief Brief

As for what the plaintiffs are seeking:

- A finding and declaration that "Defendants have breached their fiduciary duties," that the "Defendants are personally liable to make good to the Plan all losses to the Plan resulting from each breach of fiduciary duty, and to otherwise restore the Plan to the position it would have occupied but for the breaches of fiduciary duty."
- A determination of the method by which those losses should be calculated—and for the defendants to "provide all accountings necessary to determine the amounts Defendants must make good to the Plan."
- Remove the fiduciaries who have breached their fiduciary duties and "enjoin them from future ERISA violations."
- To "surcharge against Defendants and in favor of the Plan all amounts involved in any transactions which such accounting reveals were improper, excessive and/or in violation of ERISA."
- To "reform" the plan so that it includes "only prudent investments," such that it obtains "bids for recordkeeping and to pay only reasonable recordkeeping expenses," to "obtain bids for managed account services and to pay only reasonable managed account service fees if the fiduciaries determine that managed account services is a prudent alternative to target date or other asset allocation funds."
- Oh, and to certify the class, appoint the plaintiffs as a class representative, Schlichter, Bogard & Denton LLP as Class Counsel—and to award fees and costs.

Stay tuned. NNTM

— Nevin E. Adams, JD

THOUGHT-PROVOKING CONTENT

During the second quarter 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.

MASSMUTUAL

PASSING THROUGH THE FIRE: REFINING RETIREMENT PLANS IN A CRISIS

We've seen disruptions in the market before, but what we are experiencing now is different. The COVID-19 crisis has pervading humanistic and economic aspects that seem to shake us at our very core. We will prevail, but it will not be easy.

Realistically, the restoration of the economy will require a highly balanced, delicate combination of corrective measures. Right now, we have to struggle through the fight-or-flight mode. Businesses, in general, are taking stock of all operations—including their retirement plans—and shoring up all they can in the short term with the hope of securing long-term survival.

A new whitepaper focuses on the details of Phase 1: Shoring up the business and managing cash flow. This includes making adjustments to retirement plans and communicating to employees to ease their angst. During this phase, financial professionals can go beyond investment discussions to be a source of support for their plan sponsor clients.

Check out the top five plan sponsor concerns in the wake of the COVID-19 pandemic, and how fi nancial professionals can help plans with their Crisis "Management" at https://www.napa-net.org/sites/napa-net.org/files/MassMutual_Refining_Retirement_Plans_in_Crisis_050620.pdf

INVESCO

THE FORGOTTEN PARTICIPANT

What beliefs and needs drive various participants to construct their retirement portfolios in the way that they do—some for better and some for worse?

By narrowing the focus on how (and most importantly, why) these participants invest this way, often to their detriment, we uncovered three key insights that could help plan sponsors provide the right mix of investment solutions for an optimal menu that may better address the retirement needs of participants.

1. There is a significant subset of participants who prefer more control in building their own portfolios, and don't view investing in a single target-date fund (TDF) as right for them.

2. There is a healthy appetite among participants and plan sponsors for a professionally managed solution tied to their investment risk profile.

3. There is substantial interest among participants and plan sponsors for a dynamic risk profile tool that helps with decision-making and increases engagement.

Forgotten participants are engaged investors. They are hands-on, like to feel in control of their investing and want the flexibility to make changes as needed.

Find out more at https://www.invesco.com/us/defined-contribution-resources/forgotten-participant?audienceType=dc

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ADP

THE POWER OF FINANCIAL WELLNESS

Fluctuations in the market have many employees worried. Wouldn't it be comforting to offer them some help in situations like these?

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.

It is important for investors to know their tolerance for risk to align their investing strategy accordingly.

Also to know how much risk they are comfortable with and monitor it over time.

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

SECURIAN

THE EVOLUTION OF RETIREMENT INVESTING

Today, a majority of retirement plan participants (56%) use some form of professionally managed offering, with Millennials more likely to use such accounts (63%) then Generation X (48%) or Baby Boomers (54%).

In the retirement space, most managed portfolios include Target Date Funds (TDFs) and Retirement Managed Accounts (RMAs). There are pros and cons to both, and TDFs have certainly grabbed headlines, as well as a substantial amount of retirement plan assets; however, by today's standards they are falling behind. TDFs are under pressure from RMAs, which offer a more personalized investment solution that has a better chance of meeting the retirement income needs of each plan participant—and appeal to younger generations that demand customized experiences and results in this digital age.

The new way to retire—RMAs

RMAs present a more personalized investment option for investors and plan sponsors. Like TDFs, if properly structured, an RMA will be considered a QDIA.

Unlike TDFs, however, the investment account of an RMA is elected at the participant level and overseen by a professional money manager, with the goal of attaining growth within certain parameters of risk that are unique to each individual investor. Importantly, RMAs consider many variables beyond age or retirement dates, and this multiple-factor approach presents a far more personalized investment solution that better supports a participant's ability to achieve targeted retirement income goals.

Find out more at http://www.pardot.securian.com/evolution-retirement-investing-paper-94659

CONTENT MARKETING

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‘Inside’ Insights

NAPA-NET READERS SHARE TIPS AND BEST PRACTICES FOR SHELTERING IN PLACE.

By Nevin E. Adams, JD

In early May we asked readers about any tips they had to share for productively and positively getting through this pandemic period. Here’s what they said…

Exercise was mentioned a lot… as was diet, and mental “exercise”…

Regular exercise can keep your spirits up and the endorphins you release reduce stress. I ride an exercise bike every day and feel like I get more done.

When I meditate every morning, I project positivity and gratitude. I also try hard to be present and think only of today, not yesterday or tomorrow.

Meditation and running has helped.

Practicing yoga each morning is a great way to begin each day energized.

Don’t slack off from your regular exercise routine. Sure, it might be different than going to the gym, but still doing something is good for both your body and your brain.

I’ve tried intermittent fasting to eat less calories since I’m not burning as many as I used to being out and about.

Setting—and keeping to—a schedule was key…

Keeping a good routine is key. Starting work at the same time every day, having a team meeting

Olga Strelnikova / Shutterstock.com

at the same time every day, taking a lunch break at the same time every day, taking an afternoon walk at the same time every day and stopping work at the same time every day have been critical.

Schedule breaks and stick to it, even if it is taking a walk around your house.

Have a list of daily work things to accomplish. On a piece of paper. We are already on screens way too much.

Take breaks by standing up and stretching every hour, go out for a walk once or twice a day when you can. Take periodic mental breaks... watch a show, read a book, or just find a quiet place.

Make yourself a schedule and stick to it. It takes a lot of self-discipline and willpower, but I've been sleeping better and feel less "down" on the days when I stick to the schedule I made for myself (which includes a workout, even if it's just a 30 min walk, as well as scheduled meal times).

Stick to/create a routine. I still set my alarm and get up early to workout. I'm busier than I was before we were sheltering in place, so having time to get 'my time' in is a mental-health saver!

Adapt your work hours to fit your new life schedule. Example: I now start my morning at 7 AM instead of 8:30 AM. This gives me a 1-2 hour head start over the rest of my family that is home with me. This way I start my morning off feeling productive before I end up having to be pulled away periodically to help with school work or whatever else occurs throughout the day.

Prioritize. Whether it's work, home or helping kids with school, prioritize what must be done today. If you get those things done, you did great! If not, it's still ok.

Including the scheduling of some "down" time…

During "down time" at least 3x per week, I have the ear buds in and listen to industry related Podcasts. At times this may be when I'm doing the dishes during the lunch hour, for example.

Shut off email for short periods of time. The quantity of emails is overwhelming.

Take a time out during the day to walk away from the screen. Get some fresh air.

For people like me things have been as busy as they ever were. However depending on rile, some employees can have more downtime. The smart advisor

offices like ours our taking full advantage of this by increasing employee training, organizing internal resources, etc.

Staying in touch… particularly via video… makes a difference

Stop worrying about kids, pets & other families in the background. Most people enjoy waving to each other, and watching a dog grunt & spin 8 times before lying down always brings a smile.

Schedule regular team meetings to stay on task and get co-worker feedback.

Make sure you touch base with all employees on a regular basis. Keep people informed.

Reach out and touch someone. Call as many of your clients personally as you can. It makes you feel better and it makes them feel better. Talk to your team daily.

We have gone from weekly team meetings to daily check ins at the end of the day. It has made a huge difference for all of us.

Make sure to regularly check in with your team. Since we can't just drop by each other's offices for an informal discussion, it's important to find a way to keep that connection.

Virtual happy hours are a must!

Remembering, of course, that others (like your clients) need/want to hear from you…

In uncertainty clients don't expect you to have all the answers but just letting them know you're there for them and can help them navigate things is pretty meaningful.

Clients have surprisingly had time and interest in discussing plan related items including meeting to conduct quarterly committee meetings, albeit virtually.

We have hosted a weekly "From Uncertainty to Insight" webinar for 4 consecutive weeks and will have a part 5-6 the next 2 weeks. They have been a huge success to host experts: Labor & Employment Atty, CEO of Bank on PPP, Tax CPA, ERISA atty, and this week an HR Consultant on 'returning to work.' My tip: Do things no one else is doing and step out and be a resource.

Starting work meetings and calls off asking about how everyone and their families doing has been a nice change and personal connection.

Not unique at all, but call your client. Twice wouldn't hurt.

Don't just email your clients give them a call and talk with them.

Phone calls to clients. Not revolutionary but finding it cathartic for clients. We talk business for 5 minutes then all things COVID/personal for 25 minutes. I think a lot of my clients miss in person interactions and appreciate my phone calls. It's helpful for me as well.

Multi-tasking remained in vogue for some…

Attend as many webinars as you can! Also, walk on the treadmill while you are working.

I have been walking while listening to all of the webcasts, I've probably walked 100 miles so far.

And there were some working (better) tips…

Stay focused on the future. We made a conscious decision at our firm to not watch the "train wreck" but rather look at ways to get better internally and how to take advantage of the unique time.

Document the basis for decisions being made. With lack of guidance on many things the next best is a documented procedure that is followed.

Have a playbook to use for client reviews.

I am used to multi-tasking. However, when I am in a zoom meeting I am learning to top doing anything else but focus at that meeting. It is too easy to get distracted so just focus on the meeting and nothing else.

Make sure you have a comfortable work space with a comfortable chair and a clean desk with sufficient space.

1. Have 2 separate computers. 2. Have the fastest internet speed that you can order. It turns out that people who buy the fastest speed get priority, and conversely, if you pay for normal service, your upload speed can drop to zero (you are unimportant to the internet company).

Don't stress too much about how you look on video calls–webcams are somewhat grainy–a red or deep pink lipstick, some earrings and a necklace or colorful scarf are all you need. (editor's note: this won't work for all of you…)

Along with some (better) "practice" tips…

Have an "I'm working from home but still professional" appearance in all business interactions. The worst I have seen is a participant in a video conference with an unmade bed in the background. Working from home now is not the same thing as being asked to tune in while otherwise on vacation.

Remember to use the Mute button on your phone to minimize household noise distraction when on calls. Especially helpful when your "office" is the kitchen.

You should leave plenty of time for the things that REALLY matter…

Set a date night with your significant other. Get good take-out food from a local restaurant you want to support, get dressed up and light a candle. Definitely include some good music!

Spending lunch extended hours at home giving my spouse a mid-day break from virtual school.

Play with your dog and cat.

Enjoy the extra time with family if at all possible, and even if you all want to kill each other after a while.

Get up from your home desk in the MIDDLE of the day and take your kids and dog for a walk. They need it as much as you do and it helps everyone come back refreshed, wanting to grab a snack, and then get back to the computer.

I'm using this time to write more handwritten notes and cards to friends and family, particularly for special occasions such as birthdays, anniversaries and just to say hello. Even though it's old fashioned, it's a nice way to keep in touch and let someone know you care.

And there were, of course, some good things to keep in mind—regardless of the current pandemic…

Plant your corn early.

Be the positive, optimistic, and opportunistic voice that helps others (and yourself) get through these challenging times.

We never thought that the world would stop spinning and we would never be able to slow down. But it has and we've all had time to do some things that we never made time to do before.

Be kind to yourself. If your kids are home and you're having to do all the things, take inventory and decide what you're going to let go of–there isn't time for doing it all. You will feel good if you purposely chose the things to let go of, instead of feeling like they got dropped.

Practice gratitude every single day!

Give to others during this time–you will receive more than you give! It's a great strategy for managing stress.

Thanks to everyone who participated in this–and every–NAPA-Net Reader Poll! NNTM

MOVING ON…

In late April roughly three-quarters of the respondents to a NAPA-Net Reader Poll had account transitions slated for the second quarter—and a plurality are proceeding per schedule. Asked about the status of those account changes, readers responded:

44% - Yes, and they're still on schedule.
21% - Yes, but we've moved that back.
9% - Yes, but we might have to move that back.
26% - No account transitions are scheduled.

According to this week's respondents, in roughly half of those situations, the plan sponsor/committee made the call, with nearly as many calling it a joint decision. Only 1 in 10 laid it at the feet of the advisor, with 2% citing the recordkeeper. — *NA*

Regulatory Review

THE FEDERAL GOVERNMENT, LIKE MOST OF US, WAS WORKING REMOTELY DURING THE PANDEMIC—BUT THEY (LIKE US) WERE KEPT BUSY DEALING WITH CLARIFYING THE IMPLICATIONS OF THE CARES ACT, NOT TO MENTION THE MYRIAD QUESTIONS THAT ARISE WHEN YOU'RE ACTUALLY TRYING TO IMPLEMENT THOSE PROVISIONS. IN ADDITION TO ALL OF THAT INFORMATION (AND QUESTIONS), WE ALSO—FINALLY—GOT AN EXPANSION OF THE E-DELIVERY SAFE HARBOR—AND, IN THE MIDST OF THE PANDEMIC, NOT A MINUTE TOO SOON.

Electronic Avenues

DOL issues final rule on e-delivery

Acknowledging that technology has made significant strides over the past two decades—and that many Americans are working remotely during the COVID crisis—on May 21 the Labor Department unveiled its much-anticipated new safe harbor for electronic disclosures.

The final rule is "fundamentally similar" to the rule proposed last October, although it does include some modifications in response to comments received. Over 10 years, the Labor Department anticipates that the new safe harbor will save plans approximately $3.2 billion net, annualized to $349 million per year (using a 3% discount rate).

In a call announcing the new rule, Assistant Secretary of Labor Preston Rutledge explained that under the final rule employers will be allowed to make better use of modern technology in ways that are more efficient, reduce plan costs to the benefit of plan participants, and which, during the current COVID crisis allows them to send information to plan participants where traditional methods may be impossible.

"We're very pleased and grateful that the Department of Labor has finalized this extremely important regulation," noted Brian H. Graff, CEO of the American Retirement Association upon the release. "These challenging times have—more than ever before—highlighted the importance of being able to deliver information electronically. Through this regulation, the Department of Labor is allowing plan sponsors to provide more effective communications, while saving plan participant hundreds of millions of dollars a year in wasteful and unnecessary expenses. This is truly a big win

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"The final rule is "fundamentally similar" to the rule proposed last October, although it does include some modifications in response to comments received."

for everyone who cares about America's retirement system."

The final rule, which will be effective 60 days following the May 21 publication in the Federal Register,[1] continues to require, as a condition of reliance on the safe harbor, that a plan administrator possess an electronic address that enables electronic communication with a covered individual. The rule outlines a variety of ways to comply with the condition to obtain an electronic address for each covered individual; the company can, of course, provide plan participants an electronic address because of their employment, but the requirement can also be satisfied if an employee provides a personal electronic address to the plan administrator or plan sponsor.

The Labor Department also notes that a plan administrator or service provider can request an electronic address in plan enrollment paperwork or to establish a plan participant's online access to plan documents and account information. However, to satisfy the rule's definition of a covered individual, the electronic address assigned by an employer for an employee must be assigned for some employment-related purpose other than the delivery of covered documents under the new safe harbor.

The final rule continues to require that each individual with respect to whom a plan administrator intends to rely on the new safe harbor, be furnished a notification, *on paper*, that some or all of the plan's covered documents will be furnished electronically to an electronic address. That initial notice, as in the proposed rule, requires that a statement of the right to request and obtain a paper version of covered documents and of the right to opt out of receiving covered documents electronically, be provided free of charge, along with an explanation of how to exercise these rights.

As a general rule, the proposal required that plan administrators furnish to each covered individual a Notice of Internet Availability (NOIA) for each covered document in accordance with the requirements of this section—and the final rule continues to allow plan administrators to furnish a combined NOIA each plan year for more than one covered document. If a combined NOIA was furnished in the prior plan year, the next plan year's combined NOIA must be furnished no more than 14 months later.

The final rule notes that the system for furnishing an NOIA must be designed to alert the administrator of a covered individual's invalid or inoperable electronic address. If alerted that a covered individual's electronic address has become invalid or inoperable, such as if a notice of internet availability sent to that address is returned as undeliverable, the administrator must promptly take reasonable steps to cure the problem ("for example," the Labor Department explains, "by furnishing a notice of internet availability to a valid and operable secondary electronic address that had been provided by the covered individual, if available, or obtaining a new valid and operable electronic address for the covered individual") or treat the covered individual as if he or she had opted out of electronic delivery. And in that latter case, the administrator "must furnish to the covered individual, as soon as is reasonably practicable, a paper version of the covered document identified in the undelivered notice of internet availability."

For those concerned about the default switch, the final regulation guarantees covered individuals the right to not only request and receive paper copies of specific covered documents, but to globally opt out of electronic delivery altogether. Additionally, not only are plan administrators prohibited from charging covered individuals a fee in connection with their exercise of these rights, the rule states that plan administrators also are prohibited from having "procedurally cumbersome or complex processes for exercising these rights." Finally, the final rule mandates that covered individuals receive "multiple reminders, on different mediums, of these rights." Consequently, the Labor Department explains that a participant's initial decision against opting out of electronic delivery "is not permanent and can be revisited with each reminder or at any time."

The final rule is available at https://www.napa-net.org/sites/napa-net.org/files/DOL%20final%20rule%20on%20edelivery_052120.pdf.

— Nevin E. Adams, JD

States of 'Grace?'

Is that COVID-19 distribution subject to state taxes?

Just when you thought the rules around COVID-19 distributions couldn't get any more complicated…

For many households, "COVID-19 distributions" from qualified plans and IRAs may be a welcome backstop against

> "To varying degrees, most state income tax regimes rely on the federal income tax regime, including the Internal Revenue Code and the associated Treasury regulations."

financial challenges of the Coronavirus pandemic. The general rule is that a COVID-19 distribution is one that is received between Jan. 1, 2020, and Dec. 31, 2020, by an individual who has been diagnosed with the Coronavirus, is caring for a spouse or dependent diagnosed with the Coronavirus, or is experiencing adverse financial consequences due to certain pandemic-related situations (such as a quarantine). Under the CARES Act, to ease the federal tax burden, taxes on COVID-19 distributions, if elected, may be paid over three years. And COVID-19 distributions are not subject to the mandatory 20% withholding.

But those receiving those distributions (and those who process them) need to be aware of the potential sting of state tax liability due to differences between federal and state tax rules. To varying degrees, most state income tax regimes rely on the federal income tax regime, including the Internal Revenue Code and the associated Treasury regulations. That is, depending on the particular state, COVID-19 distributions may be currently subject to state taxes.

The impact of federal tax rules under state law depends on whether and how a state follows the Internal Revenue Code under its tax system. This varies from state to state, and all states selectively "decouple" assorted Code provisions. The results can be surprising. For example, for purposes of personal income tax, New York City and New York City State opted not to incorporate any Code amendments made after March 1, 2020, including CARES Act amendments. This means that if a participant who is subject to tax in New York receives a COVID-19 distribution in 2020, 100% of the distribution is taxed in 2020, regardless of the election for federal tax purposes.

On the other hand, some states, by law, automatically follow the CARES Act. Others generally have to take action to adopt its provisions, including the three-year ratable income inclusion of the CARES Act. Ohio, for example, already enacted rules providing for the state to conform with federal law as it existed on March 27, 2020, the date the CARES Act was signed into law. This means that if a participant in Ohio elects ratable three-year inclusion in income of a COVID-19 distribution, their Ohio tax liability will be determined on the same basis. For states other than Ohio, new guidance is being published daily.

The bottom line is that differences in federal and state taxation can have a material impact on participants. Plan sponsors may wish to give employees a heads up regarding potential state tax liability when COVID-19 distributions are being taken to cover financial shortfalls.

— Allison Wielobob, General Counsel, American Retirement Association

CARES Act—Optional or Required?:

Part 1—Distributions

A common question regarding the CARES Act distribution, loan and required minimum distribution (RMD) waiver provisions[2] is whether these provisions are optional or mandatory. In most cases, they are optional—but in the retirement world there are very few questions where a short answer will suffice.

There are two aspects to COVID-19 distributions (referred to in the Coronavirus Aid, Relief, and Economic Security Act as Coronavirus-related distributions). First, is a plan required to permit a COVID-19 distribution (i.e., is it a distributable event under the plan)? Second, if it is optional for a plan, does that impact whether a participant can treat a distribution made for another reason as a COVID-19 distribution (no 10% additional tax for early distributions, taxation can be spread over 3 years; and the ability to repay distributions over 3 years)?

A plan sponsor is not required to permit a distribution to a qualifying individual.

One area of confusion, however, relates to which plans can permit these distributions. Technically, all ERISA-qualified plans, §403(b) arrangements, and §457(b) plans may permit them. However, pension plans (defined benefit and money purchase pension plans) have more limitations with respect to the distributions. This is because non-pension plans (e.g., §401(k) plans) can permit distributions upon the occurrence of an event such as a hardship or an individual being affected by the COVID-19 pandemic.

In fact, the CARES Act specifically provides an exception for elective deferrals, qualified nonelective contributions, qualified matching contributions, and ADP test safe harbor contributions. These amounts are subject to additional restrictions where they generally cannot be distributed to active employees

prior to age 59½ or unless they have a financial hardship. However, the CARES Act does not provide an exception for the distribution restrictions that apply to pension plans. This means a COVID-19 distribution can only be made from a pension plan if the individual would otherwise have a permissible distributable event. For example, suppose a cash balance plan only permits distributions upon attainment of normal retirement age. The plan could provide for COVID-19 distributions to participants who are age 59½ (the earliest in-service distribution age that could apply to a pension plan).

An individual's ability to treat a distribution as a COVID-19 distribution is not dependent on how a plan treats the distribution. Under the CARES Act, an individual has received a COVID-19 distribution if: (1) the individual is an eligible individual (see below); and (2) the distribution was received between Jan. 1, 2020, and Dec. 31, 2020. There are some exceptions for corrective distributions (e.g., failing nondiscrimination tests). But other than that, it really is that simple.

Let's look at a situation where an RMD was made in January 2020 before we knew (under the CARES Act) no RMDs were required for 2020. That RMD could be a COVID-19 distribution if it's made to an eligible individual (remember this could apply if the individual's spouse or dependent was diagnosed with the virus). Now let's assume the same participant was laid-off in March 2020 due to a COVID-19 related downturn in business and received a distribution under the plan's termination of employment distribution provisions. This would also be a COVID-19 distribution. And, what if that same participant has a loan that was defaulted and offset against his or her account? You guessed it—another COVID-19 distribution.

As it turns out, this is true even if the plan sponsor didn't elect to permit a COVID-19 distribution (remember that the distribution provisions, like the expanded loan provisions, are optional). Assume that same plan sponsor then reported the distribution on the 1099-R as being taxable (assuming pre-tax dollars were distributed) with no known exception to the additional 10% tax for early distributions. How does that work? First off, the plan has to allow for the distribution—and if not the COVID-19 type, then a type of distribution (say, a hardship) that would apply.

However, the tax treatment of a COVID-19 distribution is an individual issue, not a plan issue. It is handled as part of the individual's income tax return and it doesn't matter how the plan reported the distribution. This is not unusual—think about 60-day rollovers where the plan reporting is not determinative of whether an individual ultimately owes taxes on

Viacheslav Lopatin / Shutterstock.com

the distribution. The same applies here—and the individual would also be electing whether to pay any taxes over a 3-year period.

If a plan permits a COVID-19 distribution, is it also required to accept a participant repayment? Most plans would probably want to accept the repayment. But if a plan didn't want to accept the repayment, it appears that the plan would not be required to accept it. Note that this differs from the language on repayments for a qualified birth or adoption distribution (as permitted under the SECURE Act) where the legislative intent is that the distributing plan must accept repayments from active participants.

The government agencies are working hard to provide additional relief and guidance on the CARES Act. Likewise, the American Retirement Association (ARA) Government Affairs team is continuing to stay in the forefront of providing input on regulatory and legislative initiatives. We will continue to keep you informed of future developments.

— Robert M. Richter, J.D., LL.M, Retirement Education Counsel, American Retirement Association

CARES Act—Optional or Required?

Part 2—Loans

Remember that, if allowed by the plan, a qualifying individual[3] may take a plan loan up to the lesser of $100,000 or 100% of the participant's vested account balance. This only applies to loans made on or before Sept. 22, 2020 (180 days following enactment of CARES).

Remember also that a plan is not required to permit loans up to these increased limits for qualifying individuals. The law seems clear on this point. What is not clear is whether the 1-year extension of the due date of a loan is optional. There is good reason for this confusion.

The CARES Act provides that if the due date of a loan falls between March 27, 2020 (the date of enactment), and Dec. 31, 2020, then the due date "shall" be extended for 1 year. On its face, this reads that it is mandatory. While a plan is not required to permit loans, if it does, then this would indicate that the extension is mandatory, even though a participant might not want that result.

Fortunately, the IRS posted Q&As on its website confirming that each of the loan provisions is optional. A plan is not required to permit the increased loan limits, nor is it required to permit participants to delay repayments for a year. This is the same interpretation the IRS had in IRS Notice 2005-92, which was interpreting the same provision (except that it was for Hurricane Katrina relief).

— Robert M. Richter, J.D., LL.M, Retirement Education Counsel, American Retirement Association

CARES Act—Optional or Required?:

Part 3—RMD Waivers

The last CARES Act provision that has generated confusion on whether it is optional or mandatory is the waiver of 2020 required minimum distributions (RMDs). Similar to COVID-19 distributions, the provision is mandatory at the plan level and the treatment of a distribution to a participant is not affected by how the plan treated the distribution. Many people question the position that a plan is not required to stop distributions in 2020 that would have been required minimum distributions (RMDs) but for the CARES Act. However, the basis for this position is that plans are permitted to have mandatory distributions once a participant has attained the later of age 62 or the plan's normal retirement age. Thus, even though the law does not require an RMD, a plan's provisions that provide for minimum distributions can continue to be followed. The CARES Act provides that the distributions are not treated as eligible rollover distributions if they would have been ineligible but for the CARES Act. Thus, a plan that continues to follow the existing plan terms can continue to treat the distributions as though they were RMDs for processing purposes.

A plan is not required to, but could, provide an IRC §402(f) notice and offer the participant the right to directly roll over the distribution. However, the plan could not impose the mandatory 20% withholding if a direct rollover is not elected. Rather, the distribution is subject to the voluntary withholding rules (generally 10% unless otherwise elected by the participant).

The treatment of a distribution to the participant is not affected by how the plan processes the distribution. It doesn't matter why the participant received the distribution (i.e., the participant elected to receive it or the plan didn't allow a waiver and forced the distribution). No distributions from a defined contribution plan (or IRA) made in 2020 are RMDs. The distribution that would have been an RMD, but for the CARES Act, is an eligible rollover distribution (assuming it is not ineligible for another reason) and can be rolled back into the same plan (if permitted by the plan), or to any other plan or IRA that is allowed to accept eligible rollovers. NNTM

— Robert M. Richter, J.D., LL.M, Retirement Education Counsel, American Retirement Association

FOOTNOTES

[1] However, the Department of Labor notes that, as an enforcement policy, it will not take any enforcement action against a plan administrator that relies on this safe harbor before that date.

[2] A qualifying individual is defined as someone: (1) who Is diagnosed with the virus (via test approved by CDC); (2) whose spouse or dependent is diagnosed with virus; or (3) who experiences adverse financial consequences as a result of: quarantine, furlough, laid off, hours reduced, unable to work due to childcare, closing of business, or other factors as determined by the Secretary of the Treasury. The plan may rely on participant certification that those condition(s) are met.

[3] Sections 2022, 2023 and 2024 of the CARES Act. This article does not explain the details of these provisions.

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