



## Pension & Benefits Quarterly

### Inside this edition

President's Letter .....	pg. 2
Member Profile: Victoria Fung .....	pg. 3
Member Profile: Karen S. Casillas .....	pg. 4
Executive Compensation Update .....	pg. 6
Health and Welfare Updates .....	pg. 8
Spring Into Summer Conference Recap .....	pg. 11
Keynote Speech .....	pg. 12
Defined Contribution Plan Survey Reveals New Insights About Perception of Risk .....	pg. 13
Leave Laws and Their Impact on Benefits .....	pg. 14
ERISA Litigation Update .....	pg. 15
DOL Update .....	pg. 16
Thank you to our Sponsors .....	pg. 17
Sponsorship Opportunities .....	pg. 18

### Qualified Retirement Updates

By Ami Givon | GCA Law Partners LLP

**Final Regulations Permitting Forfeitures to Fund QMACs and QNECs:** On July 20, 2018, the Internal Revenue Service (IRS) issued final regulations that have the effect of permitting the use of plan forfeitures to fund qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs) in order for an Internal Revenue Code (Code) section 401(k) plan to pass nondiscrimination testing or as contributions

*Continued pg. 7*

## Summer 2018



“Your feedback on programming and growing the organization is always welcome and highly encouraged.”

**Kevin Nolt**  
*Trucker Huss*

*President's Letter - Pg 2*

## President's Letter

Happy Summer 2018!

I hope you have had a nice summer and enjoyed some quality time with family and friends.

As I enter my second year as President of the SF Chapter, I reflect on some highlights from the last program year. One highlight was our complimentary, industry networking event. The event was a success on many levels. Information was shared, connections were made, delicious wine was tasted, and new members joined the organization.

Another highlight was our partnership with the National Institute of Pension Administrators (NIPA) for an annual three-day benefits conference – the Annual Forum & Expo. WP&BC added its own track to NIPA's retirement-focused tracks. This conference provided the opportunity to connect with your peers from the other WP&BC chapters and to make new connections with NIPA members. Due to its success, WP&BC will be partnering with NIPA again for an annual conference in San Diego next April 28th to May 1st.

During this summer break, your SF Chapter leadership team is already diligently planning the upcoming meetings and events. You should have received an announcement for another complimentary networking event scheduled for September 25th. This event is designed to increase membership in the organization while showing appreciation for our current members. The Membership Committee is planning an informative and fun evening. Please keep a look out for more details and consider attending and bringing a colleague or client. You soon also will receive an announcement for the first regular Chapter meeting of the year scheduled for October.

Your feedback on programming and growing the organization is always welcome and highly encouraged. Our Chapter is here to help you succeed in your career as a benefits professional - whether you are an actuary, administrator, attorney, auditor, consultant, investment advisor or plan sponsor. If you have renewed your membership, thank you! If you have not, please consider doing so and getting more involved. We appreciate you and hope you will continue to support our Chapter's continued success.

Thank you and I look forward to the 2018 - 2019 Year!

Kevin Nolt, Director

Trucker Huss, APC



Summer 2018

2



*Register Now!*

**WPBC-SF MEMBERSHIP NETWORKING EVENT**

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*September 25 • 4:00 PM - 7:00 PM*

*Orrick • 405 Howard Street*

## Member Profile

### BASICS

**Name:** Victoria Fung

**Company:** T. Rowe Price  
Associates, Inc.

**Title:** Vice President, Senior Defined  
Contribution Specialist

**Education:** B.A., Political Science University of  
California Berkeley

**Years in the Industry:** 14



**Please tell us about your first “real” job:** My first “real” job was a retail sales role at the age of sixteen at a well-known San Francisco chocolatier establishment. Selling chocolate paid a handsome \$5.75 per hour, and was my starting point to developing commercial awareness, communication, customer service skills and my affinity for chocolate.

### BUSINESS BACKGROUND

**Nature of your work:** I serve as Vice President in the Institutional Defined Contribution Team within the Global Investment Services Division at T. Rowe Price. In this role, I am responsible for distributing institutional investment solutions to participant-directed plans in the western U.S. I am also tasked to develop effective resources for plan sponsors to drive better financial retirement outcomes for participants.

**How you got into the field:** My interest began with an internship at an investment advisory firm during undergrad. I had an amazing opportunity to meet and learn from prospective clients who were seeking help with managing their life savings soon after a tumultuous dot-com tech bubble burst. Spending days listening to personal stories of grievances and witnessing the consequences to people’s financial lives from poor decision making held my interest and further set me on a mission to play a part in improving our retirement system.

**What you like about the field:** The field has so much potential to evolve in its mission to enhance financial lives. The challenges we face today to re-engineer a retirement system bring together some of the brightest minds from government, academia, asset management, recordkeeping, technology, and legal advisors, to converge and debate on possibilities to empower financial wellness and retirement readiness for the masses.

### PERSONAL

**Ways you spend free time:** Enjoy fitness activities, such as running, cycling and hiking. I also enjoy gardening, reading and walking my dog.

**Guiding philosophy:** The purpose of human life is to serve, and to show compassion and the will to help others. – Albert Schweitzer

**Favorite charities:** SF SPCA, Project Open Hand, and SF Food Bank.

**Last books read:** *Shoe Dog* by Phil Knight; *All the Light We Cannot See* by Anthony Doerr (an exquisitely written novel of a young French girl and German boy in the midst of World War II); *The Rosie Project* by Graeme Simsion (a romantic comedy that is pure entertainment and an easy and light read).

**Restaurant recommendations:** Sotto Mare, Lazy Bear, Fiorella, NOPA, and Commonwealth.

**What will you do when you retire:** When I am retired, my activities will include – if blessed to have my parents around then, caring for them; playing with my future grandchildren; going back to school; and volunteering at animal shelters.



## Member Profile

### BASICS

**Name:** Karen S. Casillas

**Company:** CAPTRUST

**Title:** Vice President, Financial Advisor

**Education:** B.S. Economics, UC Davis; AIF®, CPFA, CFS® certifications

**Years in the Industry:** 28

**Please tell us about your first “real” job:** The summer I turned 14, I lived with my over-achiever older sister (who had just completed her MBA) to help her launch a yarn and needlecrafts shop. My first job out of college was as a margin analyst at Dean Witter. Months later, we faced the daunting market crash of 1987.



Summer 2018

4

### BUSINESS BACKGROUND

**Nature of your work:** At CAPTRUST, I serve corporate and nonprofit employers by providing investment advisory and consulting services to retirement plans and large endowment and foundation asset pools. Our holistic services are designed to optimize employee experiences and participant outcomes through investment research, plan design, participant advice, vendor fee and service benchmarking, and fiduciary governance.

**How you got into the field:** Throughout my career I had helped investors save for retirement; however, at times, I was a step or two removed. When I managed an investor center at Fidelity Investments, our branch made a measurable impact on people's lives by helping improve retirement plans. It was then that I decided to focus solely on the institutional side of retirement planning.

**What you like about the field:** I'm humbled yet driven by our altruistic calling: to improve hard-working employees' outcomes. I am passionate about diving into the details to thoughtfully solve complex problems, while striving to provide exceptional client service. I absolutely adore the tremendous range of opportunities and challenges we face in our industry, how the multifaceted components continuously evolve, and how we can creatively get in front of what is around the corner for plan sponsors and employees. I'm grateful for my fabulous clients, collaborative peers, exceptional leaders and relationships with so many talented and dedicated industry professionals.

### PERSONAL

**Ways you spend free time:** My husband and I enjoy spending time with our two amazing kids and our rambunctious Labrador. This past year we focused on my daughter's high school senior year activities: volleyball, National Charity League, debutante ball, and preparing for college. Additionally, my son was recently engaged to a gorgeous, intelligent young lady. So, we have much to look forward to!

**Guiding philosophy:** Be grateful, be kind, be the positive change. Always act with integrity.

**Favorite charities:** Hugh O'Brian Youth Leadership, National Charity League, Assistance League, St. Maximilian Kolbe Church, Mi Casa de Angeles

*Continued pg 5*

## Member Profile, continued

**Last books read:** *Principles: Life and Work* by Ray Dalio, *Time for Wonderlust: Planning Your Retirement Renaissance* by Forrest J. Wright, *The Cormoran Strike* series by Robert Galbraith (aka J.K. Rowling). *Next up:* *Fintech in a Flash: Financial Technology made Easy* by Agustin Rubini

**Restaurant recommendations:** Venticello, Sociale, Lord Stanley, Firefly Restaurant. Anticipating our next worthy occasions to try Birdsong, La Folie, and The Topsy Pig.

**What will you do when you retire:** Volunteer, keep learning, cook interesting meals and scrumptious desserts, spend time with family and friends, and finish my kids' scrapbooks!



## Executive Compensation Update

By Anjuli Cargain  
Duane Morris, LLP

**Amended Rule 701(e) Disclosure Requirements:** On July 23, 2018, the Securities and Exchange Commission (SEC) adopted a final rule amending Rule 701 of the Securities Act of 1933 (the "Act") which provides an exemption from registration for securities issued by private companies. Under Rule 701, companies can offer their own securities as part of written compensation agreements to employees, directors, general partners, trustees, officers, or certain consultants without having to comply with federal securities registration requirements.

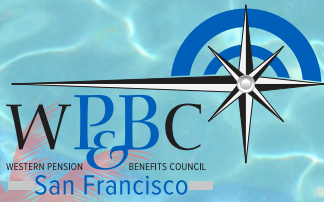
Rule 701 exempts from registration requirements offerings where the total sales price or amount of securities sold during a 12-month period do not exceed the greater of: (1) \$1 million; (2) 15% of the total assets of the issuer, measured at the issuer's most recent balance sheet date; or (3) 15% of the outstanding amount of the class of securities being offered and sold in reliance on the rule, measured at the issuer's most recent balance sheet date. In addition, if the aggregate sales price or amount of securities sold during the 12-month period exceeds \$5 million, the issuer must deliver required disclosures, including financial statements, to investors within a reasonable period of time before the date of sale. The amendment revises Rule 701(e) to increase from \$5 million to \$10 million the aggregate sales price or amount of securities sold during any consecutive 12-month period in excess of which the issuer is required to deliver additional disclosures to investors. The purpose of the amendment is to expand the use of stock compensation by companies, and allow companies to more easily pay their employees in stock while still complying with federal securities laws.

As amended, Rule 701(e) will otherwise continue to operate in the same manner as it currently does. Specifically, the additional disclosures required by Rule 701(e) will not be required for sales up to \$10 million in the 12-month periods. If aggregate sales during that period exceed \$10 million, however, the issuer must deliver those additional disclosures within a reasonable period of time before the date of sale to all investors in the 12-month period. Issuers that have commenced an offering in the 12-month period will be able to apply the new \$10 million disclosure threshold immediately upon effectiveness of the amendment.

The SEC has requested public comment on several aspects of Rule 701 and Form S-8, the SEC's short-form registration statement for offers and sales of securities to employees. The topics are outlined in the SEC's "Concept Release on Compensatory Securities Offerings and Sales" issued on July 18, 2018, and primarily focused on whether companies should be allowed to issue stock compensation to even more people without having to register the offering with the SEC, cost concerns relating to Form S-8.

SOURCE: [www.sec.gov](http://www.sec.gov)





Summer 2018

7

## Qualified Retirement Updates, continued

under a safe-harbor 401(k) plan. Like the proposed version of those regulations (which the final regulations did not substantially modify), the final regulations do so by amending the definitions of QMACs and QNECs so as to allow employer contributions to serve as QMACs or QNECs if they satisfy applicable nonforfeitability and distribution requirements at the time they are allocated as QMACs or QNECs, even if they didn't do so when originally contributed to the plan. The final regulations are effective for plan years beginning on or after July 20, 2018, but may be relied upon for earlier periods.

### **Disaster Relief Provided By the IRS and Pension Benefit Guaranty Corporation (PBGC):**

In May and June, the IRS and PBGC provided plan-related relief to victims of Indiana storms and flooding (IRS IN 2018-1; PBGC Disaster Relief 18-04); North Carolina tornado and storms (IRS NC 2018-1; PBGC Disaster Relief 18-05); and Hawaii volcanic eruptions, earthquakes, storms, flooding, landslides and mudslides (IRS HI 2018-03; PBGC Disaster Relief 18-06 and 18-07). IRS relief consists of an automatic extension, without penalty, to file Form 5500 series returns. PBGC relief consists of extending the applicable filing and completion deadlines, without penalty, although interest charges on premiums filed after the unextended deadline will not be waived.

### **On July 2, 2018, the PBGC released its Disaster Relief Announcement, effective for disasters for which the IRS has issued a disaster relief news release on or after July 2, 2018:**

- o Provides that PBGC-related disaster relief would become available at the same time the IRS issues its release instead of when the PBGC issues a separate relief announcement;
- o Eliminates late payment interest charges for the disaster relief period; and
- o Details which disasters are covered, the requirements for disaster relief, the relief granted and the manner in which disaster relief may be claimed.

On July 9, 2018, the IRS provided deadline relief to victims of Texas storms and flooding (IRS TX 2018-05), to which the revised PBGC disaster relief provisions apply.

**Spousal Consent Period to Use An Accrued Benefit As Loan Security:** In an Issue Snapshot issued in May 2018, the IRS concluded that the amendments made by the Pension Protection Act of 2016 changing various Code time periods for qualified plans from 90 days to 180 days allows plans to provide for a period of up to 180 days prior to the date a loan is secured by a participant's accrued benefit for the spouse to consent to that use.

**Department of Labor (DOL) Fiduciary Rule Development:** On June 21, 2018, the U.S. Fifth Circuit Court of Appeals issued a mandate effectuating its decision on March 15, 2018, in *U.S. Chamber of Commerce v. DOL* to vacate the DOL regulation seeking to expand the definition of an "investment advice fiduciary" (the Fiduciary Rule). The March 15 decision concluded that the Fiduciary Rule, including the "Best Interest Contract Exemption" and other related exemptions, should be vacated in their entirety. As a result of the June 21, 2018 mandate, the Fifth Circuit's decision has a final effect, thus rendering the Fiduciary Rule and its related exemptions null and void.

QUALIFIED RETIREMENT UPDATES

## Health and Welfare Updates

By Elizabeth M. Harris

Orrick, Herrington & Sutcliffe LLP

### FCC Commences Inquiry on Establishing \$100 Million Telehealth Pilot Program

On August 2, 2018, the Federal Communications Commission (the FCC or Commission) unanimously approved a Notice of Inquiry (the NOI) to create a \$100-million telehealth pilot program. The FCC strives to identify how the agency can “help advance and support the movement in telehealth towards connected care everywhere and improve access to the life-saving broadband-enabled telehealth services it makes possible.”

The purpose of the program would be to support delivery of broadband enabled telehealth services and applications by low-income Americans and low-income veterans, with an emphasis on direct delivery of such services and applications to patients beyond the doors of physical health care facilities. Thus, the Commission’s NOI provides several remote patient monitoring and success stories.

The Commission projects that it will set aside up to \$100 million in total funding from the Universal Service Fund for the pilot program. This would allow up to 20 health care providers that serve primarily low-income populations to partner with a minimum of one facilities-based broadband provider and apply for a maximum of \$5 million in universal service funding for supported services that would be used to deliver the connected care services to eligible patients.

The NOI foresees that the pilot program would help fund broadband connectivity that eligible low-income patients of participating clinics and hospitals would utilize to receive connected care services and broadband connectivity that participating clinics or hospitals need to conduct the planned connected care pilot project. However, the Commission also inquires whether funding should be permitted to support equipment necessary for effective use of the broadband service and end-user devices, such as remote patient monitoring equipment.

The Commission requests comment on the duration of the pilot program and whether a two or three-year funding period should be approved. The NOI seeks comment regarding potential federal, state or local regulatory barriers that it should consider in designing the program and requests recommendations on how to safeguard that funds are used only for intended purposes. The Commission also raises the question of protecting patient information, while collecting data to measure the effectiveness and success of the pilot program. Lastly, the NOI requests comment on how to best quantify the program’s effectiveness in improving health outcomes for low-income consumers through increased access to broadband-enabled telehealth services.

The NOI seeks public comment on various aspects of the considered program with initial comments by September 10, 2018, and reply comments by October 10, 2018, on several aspects of the potential program.

### DOL Issues Final Rule Expanding Access to Association Health Plans

On June 21, 2018, the US Department of Labor (DOL) published its final rule (the Final Rule), amending the definition of “employer” under Section 3(5) of the Employee Retirement Income Security Act (ERISA) to allow for the establishment of group or association health plans (AHPs). Similar to a corresponding proposed rule issued earlier this year, the Final Rule broadens the criteria under ERISA for determining when and how employers may form associations to offer group health plans to multiple employers and self-employed individuals.

According to the DOL, the Final Rule is intended to expand access to group health coverage by allowing businesses, sole proprietors and self-employed individuals to form associations to sponsor AHPs based on common geography, industry or trade as long as certain criteria are met.

Summer 2018

8





Summer 2018

9

## Health and Welfare Updates, *continued*

Under prior interpretations, the DOL limited single “multiple employer” plans to employer groups or associations where a close “nexus” of the employers participating in the plan existed. Additionally, employer groups were prohibited from forming associations for solely providing group health coverage. The final rule has eased these requirements.

Under the Final Rule, an association may now establish a group health plan if certain requirements are met regarding the purpose and control of the association, make-up of the employer members, availability of group health coverage and compliance and nondiscrimination provisions. By meeting these requirements, an association can achieve “bona fide group or association” status and consequently, act as an employer for the purpose of offering a group health plan.

The Final Rule allows “dual treatment” of working owners as both “employer” and “employee,” permitting self-employed individuals to join an association to obtain AHP coverage. Unlike the Proposed Rule, the Final Rule eliminates some eligibility criteria for “working owners” and clarifies others, expanding the type of self-employed individuals that may obtain AHP coverage.

The Final Rule also clarifies requirements regarding “former employee” eligibility; the prohibition against a health insurance issuer as a bona fide group or association; and the applicability of the nondiscrimination provisions. Further, the Final Rule makes clear that it does not invalidate any existing DOL advisory opinions (or preclude future advisory opinions) that address circumstances in which a person may be considered an “employer” for the purposes of sponsoring an AHP.

This Final Rule is effective August 20, 2018, but the applicability dates roll out over the next 10 months:

- September 1, 2018: for employee welfare benefit plans that are fully insured and meet the requirements for being an AHP sponsored by a bona fide group or association of employers.
- January 1, 2019: for any employee welfare benefit plan that is not fully insured; is in existence on August 20, 2018; meets requirements that applied before August 20, 2018; and chooses to become an AHP.
- April 1, 2019: to any employee welfare benefit plan established to be and operated as an AHP.

### **In Beneficiary Dispute, Life Insurance Policy Was Subject to ERISA**

In a beneficiary dispute involving death benefits under a supplemental life insurance policy, the US Court of the Appeals for the Seventh Circuit held that the life insurance policy was governed by ERISA and not exempt from coverage under the DOL’s regulatory safe harbor for certain voluntary benefits (*Cehovic-Dixneuf v. Wong*, 7th Cir. July 11, 2018). As a result, the policy’s death benefits were payable to the designated beneficiary – the participant’s sister – without regard to equitable arguments asserted by the participant’s ex-wife.

The participant obtained basic and supplemental life insurance coverage, which was offered by the participant’s employer through a commercial insurer. The participant listed his sister as the sole beneficiary for both policies. However, after the participant died, his ex-wife claimed that she and the couple’s child were entitled to \$788,000 in death benefits under the supplemental policy.

The participant’s sister sought a declaration that she was entitled to the death benefits. The district court granted summary judgment for the sister, holding that the supplemental life insurance policy was subject to ERISA and that the sister was entitled to death benefits under the policy.

*Continued pg. 10*

## Health and Welfare Updates, *continued*

On appeal, the Seventh Circuit agreed that the policy was subject to ERISA. The rationale was that the policy:

- Satisfied the five requirements for being an ERISA employee welfare benefit plan under 29 USC Section 1002(1); and
- Did not satisfy all four requirements of the DOL's safe harbor exception from ERISA's definition of employee welfare benefit plan (29 C.F.R. Section 2510.3-1(j)).

### Policy Qualified as a Welfare Benefit Plan Under ERISA

Under Seventh Circuit precedent, ERISA covers a welfare arrangement that meets five elements based on ERISA's definition of "employee welfare benefit plan" and under the arrangement, it must be a plan, fund or program that:

- Is established or maintained by the employer, employee organization, or both; and
- Provides certain listed benefits to participants or their beneficiaries, including medical, sickness, accident, disability and death benefits.

The court found that the policy met this standard.

### Did Not Satisfy DOL's Safe Harbor for Voluntary Plans

The Seventh Circuit rejected the ex-wife's argument that the supplemental life insurance policy fell outside the scope of ERISA because the participant had paid all the premiums for the policy himself without any funding from the employer. The Seventh Circuit noted that an arrangement is not excluded from ERISA under the DOL's voluntary plan safe harbor if it fails to satisfy any of the safe harbor's four requirements. Under 29 C.F.R. § 2510.3-1(j), the safe harbor requires that:

- No contributions are made by an employer.
- Participation in the arrangement is completely voluntary for employees.
- The employer's sole functions regarding the arrangement are, without endorsing the program, to:
  - o permit the insurer to publicize the program to employees or members;
  - o collect premiums through payroll deductions or dues checkoffs; and
  - o remit premiums to the insurer.
- The employer receives no consideration in connection with the program, other than reasonable compensation for payroll deduction services.

The Seventh Circuit held that the policy failed the safe harbor's third requirement because the employer performed all administrative functions associated with maintenance of the policy. Relying on the summary plan description (SPD), the Seventh Circuit concluded that the employer's functions exceeded the limited functions permitted under the safe harbor. Specifically, the SPD indicated that:

- The employer was the policyholder for all components of its plan, of which the supplemental life insurance policy was a listed item of several components.
- The supplemental policy would remain part of the employer's group insurance policy, though it could be converted to an individual life insurance policy in certain scenarios.

Further, the Seventh Circuit declined to sever the supplemental life insurance policy for separate consideration from the basic life insurance policy and other benefits in the employer's group plan. Referring to Seventh Circuit precedent in rejecting this argument, the court noted that the various components of a benefit plan should not be unbundled in determining whether the plan is subject to ERISA.

Summer 2018

10



## Spring-into-Summer Conference Recap



*Laraine McKinnon*



*Brad Huss*



*Michael Davis*



### CONFERENCE COMMITTEE

Thanks to **Mike Zeld**, Moss Adams, Chair of the Conference, and his dedicated committee: **Karen Casillas**, CapTrust Advisors; **Victoria Fung**, T. Rowe Price and **Angel Garrett**, Trucker♦Huss, for all of their hard work in putting this conference together. Also a special thanks to **CliftonLarsonAllen** for sponsoring the Conference.



## Keynote Speech

The keynote speech for the 2018 Conference had an interesting title: Culture / Diversity / H.R. in the Modern Workplace / Retirement Readiness / Defined Contribution Plans. The speaker, **Laraine McKinnon**, was no less interesting. Ms. McKinnon is the CEO of a strategic consulting firm, LMC17, and is a retirement readiness strategist specializing in defined contribution plans. She has an educational background in political science and women's studies. She spent 23 years at BlackRock and predecessor firms Barclays Global Investors and Wells Fargo Nikko. She has worked with hundreds of plan sponsors to help them redesign their 401(k) plans to deliver better outcomes in retirement. She is also a former president of The Women's CLUB of Silicon Valley, an incubator of women leaders.

Ms. McKinnon addressed several topics: diversity and inclusion, key pieces of academic research on 401(k) plans, behavioral science, unconscious bias, and defined contribution (DC) plan design. She emphasized that diversity and inclusion does more than make people feel good. In particular, diversity unlocks innovation, which enables higher quality decisions and drives economic growth. She said the following six behaviors further unlock innovation across the board:

- (1) ensuring that everyone is heard;
- (2) making it safe to propose novel ideas;
- (3) giving team members decision-making authority;
- (4) sharing credit for success;
- (5) giving actionable feedback; and
- (6) implementing feedback from the team.

With respect to retirement readiness, Ms. McKinnon recommends the following six steps:

- Save 10% to 20% of your income over your career
- Save early – starting as soon as you can
- Save enough by increasing your savings each year
- Invest – remember, you're investing for retirement
- Diversify – use the default system if available or actively rebalance
- Don't make mistakes – be smart about your money

Ms. McKinnon highlighted Sheena Iyengar, one of the authors of a key academic article on 401(k) plans: "[How Much Choice is Too Much? Contributions to 401\(k\) Retirement Plans.](#)" Ms. McKinnon described a study that Ms. Iyengar was involved with in which shoppers on one day were offered the opportunity to sample 24 varieties of gourmet jam. On another day, shoppers at the same store were offered the opportunity to sample six varieties of jam. The shoppers who were presented with fewer options of jam responded more favorably. This study along with others have demonstrated that more choice is not always better.

In her concluding remarks, Ms. McKinnon said that she recommends a very simple DC plan with five investment options, automatic enrolling, and automatic increases in contributions each year.



Summer 2018

12



Summer 2018

13

## Defined Contribution Plan Survey Reveals New Insights About Perception of Risk

**Michael Davis** shared insights gained from a recent survey that T. Rowe Price conducted of 289 defined contribution (DC) plan sponsors to capture a deeper understanding on the connections between long-term plan objectives, plan sponsor perceptions of risk, and selection of target date strategies and other qualified default investment alternatives (QDIAs). Mr. Davis is Head of the U.S. Institutional Defined Contribution Plan Specialists for Global Investment Services at T. Rowe Price.

Mr. Davis explained that survey results reveal that DC plan sponsors generally take a broad view of their responsibility: 78% of plan sponsors report selecting asset allocation investments primarily focused on the full and diverse needs of their participant population, including participants who have already retired, rather than on a targeted cohort; and 69% say it remains or has become more of a priority to keep assets of retiring participants in their plan. Although noble, juggling multiple plan objectives for many participant audiences could lead to an uncertain prioritization of risks and strategies to mitigate them.

According to Mr. Davis, the good news is while DC plan sponsor perception of “risk” is complex and often nuanced, the research indicates clear patterns of strategic alignment between QDIA selection priorities and long-term participant outcomes. Generally, mitigation of longevity risk and preservation of growth opportunities take precedence over addressing short-term investment volatility and downside risk when evaluating target date investment strategies. What’s more, plan sponsors’ focus is squarely on supporting participant outcomes in retirement. Nearly two-thirds (65%) of plan sponsors agreed that achieving the highest retirement income opportunity is a more important priority than minimizing a possible point-in-time downside risk when selecting a target date investment or other QDIA.

What’s driving this alignment? Mr. Davis said that DC plan sponsors agree that attempts to reduce the risk of an adverse sequence of investment returns often presents potential trade-offs, and more specifically, 59% agree that mitigation of downside risk will reduce the expected income in retirement. With that context, the choice between preserving sufficient growth and reducing point-in-time downside risk might be clearer after all. Mr. Davis’s presentation encapsulated the spirit of working together to meet retirement challenges, advancing the way we think about perceived risks and desired outcomes.

*NOTE: T. Rowe Price’s survey “Advancing How We Think About Retirement Outcomes” was conducted from January 29 through February 20, 2018, by Signet Research, a marketing research firm. The universe consisted of members of Pensions & Investments’ (P&I) Research Advisory Panel, a list of DC plan sponsors and consultants selected from the P&I database, and a list of financial advisors provided by T. Rowe Price. A total of 337 responses were received from 266 plan sponsor officials, 45 plan consultants, 3 financial advisors, and 23 other individuals active in the DC plan market. Respondents participated via online surveys, and were offered a chance to win prize awards as incentives for their participation. T. Rowe Price designed the survey questions and is solely responsible for the interpretation of the results.*

SPRING-INTO-SUMMER CONFERENCE

## Leave Laws and Their Impact on Benefits

**Tiffany Santos**, Director, Trucker Huss, APC, led an informative breakout session exploring leave laws that impact benefit plans, including both federal and state requirements. Among the big federal players are the Family Medical Leave Act (FMLA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Under FMLA, employees of covered employers have the right to take unpaid, job-protected leaves to address certain family or medical issues. A “covered employer” is a private employer that employed 50 or more employees during 20 or more weeks of the previous year. A government employer or a public or private elementary/secondary school is a “covered employer” regardless of amount of employees. Ms. Santos pointed out that small private companies should keep track of the amount of employees on payroll to determine when they become “covered employers.”

There is no requirement that FMLA leave taken be contiguous—leave may be intermittent and as needed, and it may be applied as a reduced hourly schedule under most circumstances. Throughout the leave arrangement, employers must provide continued health plan benefits on the same terms as employees that have not taken leave.

Ms. Santos’ presentation stressed the complexities of continued health coverage when employee contributions are required to maintain benefit eligibility. In such cases, those contributions would need to continue to maintain coverage. Continued contributions present little problems if the employee continues to receive a paycheck, as contributions can just be deducted from future pay. However, alternative arrangements must be made for employees that will not receive a paycheck while on FMLA leave.

Ms. Santos also presented on how USERRA impacts benefit plans. USERRA requires reemployment and benefits rights to employees who serve or have served in the military. Included in these rights are the right to elect to continue coverage while absent from work due to active duty, guaranteed employment upon return, and the right to service credit under retirement plans.

Additionally, Ms. Santos explained some state law basics, including the fact that there are only four states that currently offer paid family leave: California, New Jersey, Rhode Island, and New York. States with laws that are similar to the FMLA include California, Connecticut, D.C., Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington and Wisconsin. Ms. Santos encouraged parties interested in state law development to bookmark the National Conference of State Legislature’s website ([www.NCSL.org](http://www.NCSL.org)), which tracks proposed state legislation that would affect leave laws.



*Tiffany Santos (right) led the Leave Laws breakout session.*



## ERISA Litigation Update

**Brad Huss**, Director, Trucker Huss, APC, presented a lively update on current litigation related to the Employee Retiree Income Security Act (ERISA). Mr. Huss covered a broad area of lawsuit topics: 401(k) fee litigation, 403(b) litigation, fiduciary liability, equitable relief under ERISA section 502(a)(3), strategies for mitigating future plan risks, contractual limitation provisions, forum selection clauses, arbitration provisions, and assignment clauses.

Mr. Huss put great emphasis on litigation challenging both new and longstanding practices in defined contribution (DC) plan management (including both 401(k) and 403(b) plans). He said a history of large settlements has encouraged additional lawsuits, particularly given ERISAs fee shifting provisions and attorneys' fees awards in class settlements. Under the common fund theory, plaintiff attorneys usually receive 25% of the settlement amount.

Mr. Huss delved into the following common allegations against DC plan sponsors, administrators and advisors; excessive investment fees; under performance of investment options; excessive administrative (e.g., recordkeeping) fees; imprudent fiduciary process and decisions made to benefit plan sponsor and not participants; failure to monitor continued appropriateness of investment options and recordkeepers; breach of fiduciary duty where there are too many options in the plan; failure to seek a request for proposal (RFP) from service providers every three or four years; and breach of fiduciary duty where actively managed investment options were offered instead of passive or index funds.

Mr. Huss discussed the following defenses to the above allegations:

- Fiduciaries are not required to scour the market for the cheapest funds which may have problems
- ERISA does not require plan fiduciaries to offer any particular investment options
- Fiduciaries have latitude to value investment features other than price
- Plans offer a broad range of investment options with an acceptable range of fees
- Under ERISA, investment performance is to be judged by circumstances at time of investment and not with hindsight

Mr. Huss also suggested that plan sponsors adopt the following best practices:

- (a) formalize service provider selection periodically with RFPs;
- (b) determine a per-head recordkeeping fee rather than asset based fee;
- (c) where revenue-sharing continues, set a cap on recordkeeper fees and utilize excess revenue sharing by crediting back to participants or having an ERISA expense account;
- (d) obtain independent investment advisory services;
- (e) have an investment policy statement that includes a fee policy;
- (f) keep minutes of administrative/investment committee meetings;
- (g) consider use of passive funds; and
- (h) document chain of delegation of authority from board of directors down to investment committee and/or administrative committee.

## Department of Labor Regulatory Update

**Klaus Placke**, Acting Regional Director for the San Francisco Regional Office of the U.S. Department of Labor, Employee Benefits Security Administration (EBSA), detailed a lively overview of EBSA's mission to develop effective regulations; assist and educate workers, plan sponsors, fiduciaries, and service providers; and vigorously enforce the law. Nationally, EBSA's 400 field investigators monitor over 680,000 benefit plans covering over 143 million workers. He also outlined EBSA's national and regional structure before he launched into his presentation. Mr. Placke highlighted the 2018 National Enforcement Projects, types of investigations, and process for civil plan investigations. One such focus of late has been on plan sponsor procedures for locating lost participants. He emphasized that it is imprudent for plan administrators to receive returned mail and take no further action.

He provided insight on EBSA's focus on the following 2018 National Enforcement Projects:

1. **Employee Stock Ownership Plans** - especially regarding inflated stock valuations at purchase and fair pricing when stock is sold
2. **Plan Investments Conflicts** - many of these investigations are instigated by the Securities Exchange Commission and involve conflicts of interest regarding plan investments and improper or undisclosed compensation by advisors or service providers
3. **Protecting Benefit Distributions** - including finding lost participant processes and ensuring that the aged receive appropriate benefits
4. **Health Enforcements** - including aggressively pursuing retroactive cancellation of coverage, reviewing the process for paying promised benefits, and investigating fraudulent medical providers
5. **Contributory Plans Criminal Project** - targeting those who commit fraud and abuses against participants and beneficiaries of pension and health contributory plans including plan sponsors or service providers who do not deposit or invest participant contributions

Mr. Placke reviewed the general documents and plan records requested during common investigations and where EBSA's requests for investigations originate. He reiterated the need for plan sponsors to know their duties under the plan's governing documents and to hire experts to assist them in their duties. Mr. Placke concluded with some harrowing examples of violations in group health plans which EBSA field investigators have uncovered in their consistent and diligent pursuit to protect workers' benefit plans.



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- Conversely, sponsors must realize they are not buying speaking slots at Chapter Meetings.
- The Chapter Board of Directors reserves the right to decline sponsor applications.
- Sponsors may sign up any time during the 2018-2019 Chapter fiscal year, but benefits may only be enjoyed during that year (July 1, 2018-June 30, 2019) and will not be carried over to the next fiscal year unless specifically authorized by the SF Chapter Board of Directors.

For more information, please contact Terri Fulton, Chapter Account Manager, WP&BC San Francisco Chapter  
1900 Point West Way, Suite 222, Sacramento, CA 95815-4706  
Phone: (415) 730-5479, Email: [terri@wpbcsf.org](mailto:terri@wpbcsf.org)

### PLATINUM \$6,000

(Only 2 slots available)

4 Chapter Memberships  
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Exclusive sponsor of Premium Event or  
Named Sponsor of all Brown Bag Lunches  
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2 free Chapter Meeting  
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Premier listing of company  
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Half page Advertisement in  
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Member Registrations  
(Total value: \$110)  
4 free Guest Passes  
(Total value: \$380)

Listing of company on the  
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sponsorship level

3 Registrations (Total value: \$450)  
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- Company name on invitation and program (differentiated by sponsorship level)
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- Shared display table to offer promotional material

### SILVER \$2,500

2 Chapter Memberships  
(Total value: \$300)

2 free Chapter Meeting  
Member Registrations  
(Total value: \$110)  
4 free Guest Passes  
(Total value: \$380)

Quarter page Advertisement  
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Listing of company on  
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2 Registrations (Total value: \$300)  
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Listing of company on the  
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- Company name on invitation and program (differentiated by sponsorship level)
- Company name on sign (differentiated)
- Shared display table to offer promotional material

**EMPLOYMENT OPPORTUNITIES**

***If you wish to post an employment opportunity on our website, please read the following note:*** Listings must comply with applicable regulations for employment advertising. Online job postings are free to WP&BC San Francisco Chapter members. Call Terri Fulton at the Chapter office for more information, (415) 730-5479. Email all listings to [info@wpbcfsf.com](mailto:info@wpbcfsf.com)

The Newsletter welcomes contributions from its members. If you would like to submit a topical benefits-related article for an upcoming issue, please contact the chapter at [info@wpbcfsf.org](mailto:info@wpbcfsf.org).

Special Thanks to **Serena Aisenman**, Trucker Huss, APC, for help in drafting and editing newsletter articles.

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**Summer 2018**

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