BCG Retirement News Roundup

September 2018 Volume 7, Issue 9

Boomershine Consulting Group, 3300 North Ridge Road, Suite 300, Ellicott City, Maryland 21043

www.boomershineconsulting.com 410-418-5525

Boomershine Consulting Group (BCG) provides this monthly news roundup of highlighted significant articles from the retirement industry – for clients and friends. Retirement plan news has become increasingly pertinent for many audiences these days, including:

- Retirement Plan Sponsors – addressing both private and public sector issues
- Employers – dealing with complicated decision making for their plans
- Employees – educating the Boomer generation that is nearing retirement
- Industry Practitioners - helping to understand and resolve today's significant challenges

We review numerous industry news services daily and will include a collection of timely and significant articles each month concerning compliance, actuarial plan costs (including assumption debates), plan design change issues and benefit trends, as well as other related topics. If you would like to discuss any of these issues, please contact us.

Inside This Issue

Public Sector/Government Plans

Private Sector

Public Sector/Government Plans

Wilshire Consulting Report Shows Retirement System Funding Levels Increased in Cities and Counties in Fiscal Year 2017

Wilshire Consulting, the institutional investment advisory and outsourced-CIO business unit of Wilshire Associates Incorporated (Wilshire®), a diversified global financial services firm, announced today that it estimates the funding ratio for the city and county pension plans it studied was 71 percent in fiscal 2017, up from 67 percent in fiscal year 2016, reversing two consecutive years of declines.

The Wilshire 2018 Report on City & County Retirement Systems: Funding Levels and Asset Allocation is based upon data gathered by Wilshire from the most recent financial and actuarial reports available and includes 107 city and county retirement systems. Of these 107 systems, 96 systems reported actuarial values on or after June 30, 2017. This is Wilshire Consulting's sixteenth report on the financial condition of city and county sponsored defined benefit retirement systems.

"The increase in global equity values for the twelve-month period ending June 30, 2017 was a primary driver of the improved funding levels. Robust investment returns and contributions also drove asset values higher for the year," noted Ned McGuire, Managing Director and a member of the Pension Risk Solutions Group of Wilshire Consulting. "With that, we found that 93 percent of the plans in this year's study have market value of assets less than pension liabilities or are underfunded."

Aggregate pension liabilities grew by 4 percent, from $697.3 billion in 2016 to $725.4 billion in 2017. Despite the increase in aggregate liabilities, pension plans saw a decrease in aggregate shortfall by $22.7 billion, from $233.3 to $210.6 billion. This decline in the aggregate shortfall is the result of the significant increase in aggregate assets by over 10 percent, from $464.0 billion in 2016 to $514.8 billion in 2017. The estimated aggregate value is the highest since Wilshire began reporting on City and County-sponsored retirement system funding levels.

"Discount rates have trended lower over the past several years and continued for this year's study as nearly half of the plans lowered their discount rate," McGuire added. "The range for discount rates this year is 5.13 percent to 8.50 percent with a median of 7.25 percent, which is down 25 basis points from last year."

On average, city and county pension portfolios have a 64.3 percent allocation to equities, including real estate and private equity, a 24.7 percent allocation to fixed income, and a 11 percent allocation to other assets. This equity allocation is somewhat lower than the 65.9 percent equity allocation a decade prior in 2007.

Federal court orders Baltimore County to pay back workers who overpaid for pensions

A federal appeals court ruled Wednesday that Baltimore County must pay back employees who were forced to overpay into the county's pension system for years.

A lower court will determine how much the county would have to reimburse older workers who, until 2007, were charged more for pension contributions than younger workers. The county has previously estimated it could be on the hook for up to $19 million.

County officials haven't decided whether they'll appeal this latest ruling in a long-running lawsuit over the pension system. It's unclear how long it would take for the U.S. District Court to figure out payments to an undetermined number of current and former county workers.

"The county executive has asked the county attorney to review the court's decision," Ellen Kobler, a spokeswoman for County Executive Don Mohler, said in a statement. "Once that review is complete, the county will decide what to do next."

Mohler was appointed to the county's top job in May following the death of County Executive Kevin Kamenetz, who had vigorously defended the county against the lawsuit. Baltimore County attorneys argued through multiple appeals that the county hadn't violated discrimination laws.

The county could petition for a re-hearing in the federal appeals court or request a hearing before the U.S. Supreme Court.

The case affects county employees who were hired before 2007, when Baltimore County ended its decades-long practice of setting pension contribution rates for new hires based on an employee's age. Workers who were hired at an older age were required to pay more into the pension plan than newly hired workers who were younger.

The pension system includes all county workers except Board of Education employees, who participate in a different system. There are about 9,500 active employees and 6,000 retirees in the county system.

County officials have said it would take years to sort through records to determine how many workers and retirees might be due payments.

The lawsuit, brought by the U.S. Equal Employment Opportunity Commission on behalf of two correctional officers, has bounced around the federal court system since 2007. The county attempted to appeal to the U.S. Supreme Court in 2014, but the high court declined to hear the case.

A U.S. District Court judge ruled in 2012 that the county was improperly charging older workers more for their pension contributions. Another federal judge, however, ruled in 2016 that the county was not required to pay back the workers. The EEOC appealed that ruling, and both sides made oral arguments before the Fourth Circuit U.S. Court of Appeals last October.

A three-judge panel in the Fourth Circuit wrote Wednesday that the workers must be paid back under one of the federal laws central to the case, the Age Discrimination in Employment Act.

The EEOC declined to comment on the ruling Wednesday.
As a result of the litigation, the county revamped its pension contributions system, eliminating the age-based contribution rates, and fired and sued its longtime pension advisory company, Buck Consultants. That lawsuit was dismissed.

Connecticut's State-Run Plan on Hold as State Seeks Director

The Nutmeg State's state-run retirement program for private-sector workers remains on hold as the Connecticut Retirement Security Authority (CRSA) seeks an executive director to run it.

Legislation establishing the program was enacted in 2016 providing for the creation of the Connecticut Retirement Security Exchange for the state's private-sector employers and their employees. The exchange is intended to promote and enhance retirement savings for the private-sector workforce in the state by offering employees in Connecticut who lack access to employer-sponsored retirement plans the opportunity to save for their retirement through Roth IRAs. The exchange also will offer companies that employ people in Connecticut a way to collect payroll contributions that will then

be invested in the employee's choice of private investment funds that the board has selected.

The law set Jan. 1, 2018 as the implementation date for the exchange. In November 2017, however, the CRSA Board of Directors voted to defer the statutory implementation date. Labor Commissioner Scott D. Jackson, who also serves as CRSA Chair, said at that time that the CRSA Board agreed that "because the authority is currently in the preliminary stages of plan development, the implementation date specified in the state statute is not achievable."

On Sept. 11, CRSA spokesperson Nancy Steffens reported that there still "is no specific date yet for the program start time." She attributed this to the board action and to the fact that the CRSA "is actively seeking to hire an Executive Director to oversee the Authority."

Looking Beyond
The board has a broader vision for the position than simply one that affects Connecticut. In the job listing it posted, the board says that it intends the executive director not only to provide leadership for the authority, but also "establish a national profile." Says the board, "This unique position presents the opportunity to establish a program that serves as a national model as additional states seek to enter this emerging market space. The Board expects that the Executive Director will establish a national profile, and through this platform, provide leadership and policy development in and beyond Connecticut."

DOL Clarifies Guidance on Socially Responsible Investing

Summary

Socially responsible investing often sounds like an intriguing idea, but investing plan assets in a socially responsible manner is a notoriously tricky proposition. Earlier this year, the US Department of Labor issued additional guidance clarifying existing DOL guidance applicable to socially responsible investment of plan assets. However, the clarifications included in FAB 2018-01 may further limit the scenarios in which socially responsible investing could be considered prudent under the Employee Retirement Income Security Act of 1974, as amended (ERISA).

In Depth

While socially responsible investing often sounds like an intriguing idea, investing plan assets in a socially responsible fashion is a notoriously tricky proposition. The US Department of Labor (DOL) issued additional guidance earlier this year (Field Assistance Bulletin (FAB) 2018-01) clarifying existing DOL guidance applicable to socially responsible investment of plan assets. However, the clarifications included in FAB 2018-01 may further limit the scenarios in which socially responsible investing could be considered prudent under the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Background

Interpretive Bulletin 2015-01 (IB 2015-01) and Interpretive Bulletin 2016-01 (IB 2016-01) set forth the DOL's current position on socially responsible investment of ERISA plan assets. IB 2015-01 addresses "economically targeted investments" (ETIs), defined as "investments selected for the economic benefits they create apart from their investment return to the employee benefit plan." The preamble to IB 2015-01 summarizes the DOL's position on two ETI points. First, the preamble states that plan fiduciaries "should appropriately consider factors that potentially influence risk and return," including environmental, social and governance (ESG) factors. According to the DOL, these factors "are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of competing investment choices." Second, the preamble reiterates the DOL's longstanding position that "plan fiduciaries may invest in ETIs based, in part, on their collateral benefits so long as the investment is economically equivalent, with respect to return and risk to beneficiaries in the appropriate time horizon, to investments without such collateral benefit."

IB 2016-01 summarizes the DOL's position on (1) the voting of proxies on securities held in ERISA plan investment portfolios and (2) statements of investment policy, including proxy voting polices. In IB 2016-01, the DOL notes that a plan investment policy may include rules regarding the use of ESG factors to evaluate ERISA plan investments.

New Guidance

FAB 2018-01 clarifies the application of IB 2015-01 to socially responsible investing in two primary respects. Both of these clarifications sound a warning bell for plan fiduciaries engaged in socially responsible investing.

Treatment of ESG Factors in Investment Review Process
The DOL cautions fiduciaries against "too readily" treating economic, social and governance

(ESG) factors as economically relevant to a particular investment decision. FAB 2018-01 reiterates and elevates the long-standing DOL belief to "always put first the economic interests of the plan in providing retirement benefits."

QDIAs

The DOL clarifies the application of ESG factors to a defined contribution plan's qualified default investment alterative (QDIA). In FAB 2018-01, the DOL confirms that a plan fiduciary could add a "prudently selected, well managed, and properly diversified ESG-themed investment alternative" to a defined contribution plan's investment lineup, but strongly cautions a plan fiduciary against adding such ESG investment option as the plan's QDIA. The DOL believes that a fiduciary's decision to favor its own ESG preferences in selecting an ESG-themed investment option would raise questions about the fiduciary's compliance with ERISA's duty of loyalty. According to FAB 2018-01, offering a socially responsible QDIA is still technically feasible, but only if the selection otherwise strictly complies with the guidelines set forth in IB 2015-01.

With respect to IB 2016-01, FAB 2018-01 clarifies that if a plan's investment policy includes rules around the use of ESG factors to evaluate investment options, the plan fiduciary must disregard these ESG rules if following the rules would result in an imprudent investment decision. Prior to issuing FAB 2018-01, the DOL believed that some plan fiduciaries may have felt obligated to follow the plan investment policy's ESG rules regardless of the outcome.

Next Steps

If your ERISA plan engages in socially responsible investing, please discuss FAB 2018-01 with your plan's investment advisor or investment manager so that you fully understand the potential impact on your plan's investment strategy. More specifically:

- If you have a plan investment policy that includes ESG rules, consider revising this investment policy to specify that these ESG rules will be ignored if adhering to the rules would lead to an imprudent investment decision.
- If your defined contribution plan's QDIA could be viewed as a socially responsible QDIA, reevaluate this selection under a strict interpretation of IB 2015-01.

Governor Murphy Marks 10 Year Anniversary of 2008 Financial Crisis by Announcing Plan to Require NJ Financial Industry to Put Customers' Interests First

Governor Phil Murphy today marked the 10-year anniversary of the 2008 global financial crisis by announcing plans to issue a rule strengthening the standards for investment professionals in New Jersey to better protect residents seeking to invest their life savings and to close a regulatory gap in federal oversight that helped fuel the economic meltdown a decade ago.

The rulemaking, being initiated by the New Jersey Bureau of Securities, would impose a fiduciary duty on all New Jersey investment professionals, requiring them to place their clients' interests above their own when recommending investments.

Most investors assume all financial professionals are obligated to provide unbiased advice. But under current federal standards, only investment advisers and their representatives have a fiduciary duty to put their clients' interests above their own.

In a distinction not often recognized or understood by investors, broker-dealers and their agents—who provide similar financial services—are subject to a less stringent duty to provide recommendations that are merely "suitable" for their clients. Most investors are unaware that broker-dealers and their agents often receive significant undisclosed financial benefits in exchange for steering clients toward certain investment products.

New Jersey would be among the first states to adopt a uniform fiduciary standard, one of the many Obama-era post-crisis financial reforms abandoned by the Trump Administration.

"New Jersey is pursuing state-level regulatory reforms that would enhance the integrity of its financial services industry by holding every investment professional to the highest standard under the law," said Governor Murphy. "At a time when President Trump is systematically dismantling the consumer protections implemented in the wake of the 2008 economic crash, we are building stronger safeguards for our consumers. The fiduciary rule announced today would provide New Jersey with the strongest investor protections in the nation and send a clear message to Washington that New Jersey is committed to ensuring its residents are never again left vulnerable to the predatory financial practices that led to the economic collapse ten years ago."

"In the wake of the 2008 financial crisis, the federal government implemented a series of reforms, including a nationwide 'fiduciary rule,' designed to protect investors and consumers from the next crash. With the Trump Administration gutting those protections left and right, it

falls to states like New Jersey to fill the void," said Attorney General Gurbir S. Grewal. "This action by our Bureau of Securities will make the state's financial markets stronger and safer for New Jersey families."

After the 2008 financial crisis, Congress grew concerned that investors misunderstand the duties owed to them by broker-dealers. These investors put their life savings at risk, wrongly assuming that the investment advice they receive reflects their best interests and comes free of conflicts.

In the Dodd-Frank Act of 2010, Congress required the Securities and Exchange Commission (SEC) to study whether the existing rules adequately protected broker-dealers' retail customers and to conduct any necessary rulemaking to require broker-dealers to act in accordance with the fiduciary standard of conduct that already applied to investment advisers. In 2011, SEC staff recommended rulemaking to promulgate a uniform fiduciary standard.

The SEC still had not acted on the recommendation of its staff by 2016, when the U.S. Department of Labor (DOL) stepped in. At that time, the DOL issued a rule imposing fiduciary obligations on all persons who provide investment advice or recommendations for compensation with respect to the assets of employee benefit plans or IRAs. The DOL's fiduciary rule was repeatedly challenged in court and repeatedly survived, until one federal court struck down the rule in March 2018. Instead of continuing to defend the rule, the Trump Administration abandoned its case.

The withdrawal of federal support for the fiduciary rule is widely regarded as part of the Trump Administration's mission to unwind important federal consumer protections implemented after the financial crash.

At the same time, the Trump Administration is taking steps to weaken the federal Consumer Financial Protection Bureau, a watchdog agency charged by Congress in the Dodd-Frank Act of 2010 with safeguarding consumers from the kind of predatory lending and borrowing practices that contributed to, and exacerbated, the 2008 financial crisis.

More recently, in May 2018, the SEC proposed a rule that purportedly would require broker-dealers to act in their clients' "best interest." The rule would be a higher standard of conduct than the current suitability standard required for broker-dealers, but would still fall short of protecting investors as much as a uniform fiduciary standard would.

In response to the federal government's failures, Governor Murphy has promised to provide financial protections to consumers at the state level, using the broad enforcement and rulemaking powers of the Division of Consumer Affairs.

"Today we are taking an important step in fulfilling Governor Murphy's promise to protect New Jersey's consumers, who find themselves increasingly exposed by the federal government's regulatory retreat," said Paul R. Rodríguez, Acting Director of the Division of Consumer Affairs. "We are exercising our authority to initiate the first of many actions that will serve as the building blocks of a robust state-level consumer financial protection framework to safeguard the interests of all New Jersey residents."

"The roles, duties and obligations of investment advisers and broker-dealers are confusing to investors under current federal regulations," said Christopher W. Gerold, Chief of the New Jersey Bureau of Securities. "The implementation of a fiduciary rule applicable to all financial professionals will finally reconcile investors' current expectations with the law."

Bureau Chief Gerold will issue a Notice of Pre-Proposal to solicit public input on the Bureau's anticipated rulemaking.

Private Sector

Abbott 401(k) program to help employees who have student debt could become national model

A new perk at Abbott Laboratories that helps employees save for retirement even as they pay down student debt has caught the attention of a national employer group that is asking the government to clear the way for more companies to offer a similar benefit.

Abbott had sought and received the blessing of the Internal Revenue Service for a program that would allow workers who direct a certain amount of their paycheck toward student loan repayments to still get an employer contribution in their 401(k) retirement accounts, even if the workers don't contribute themselves.

On Wednesday, the ERISA Industry Committee, which advocates on behalf of large employers regarding benefit plans governed by the Employee Retirement Income Security Act, sent a letter to the IRS commending the agency for its ruling. The IRS did not name the company when it publicly released its ruling in August, but Abbott confirmed it was the employer that had requested and received the ruling.

Because the IRS ruling applied only to Abbott, the ERISA group wants the agency to issue a broader ruling that would make the guidance generally applicable, a move that could encourage more employers to implement similar programs.

"Many employers recognize the burden that student loan debt can have on their workers' ability to save for retirement and would like to help these workers," Will Hansen, senior vice president of retirement policy for the group, wrote in the letter. "However, while we believe that current law allows employers to make contributions to their retirement plans on behalf of workers who repay student loan debt, the IRS has yet to clearly articulate that such contributions will not affect the tax-qualified status of an employer's retirement plan."

The IRS declined to comment on whether it was considering issuing broader guidance. Student loan help has become a hot issue in employee benefits, but many employers who wish to offer it don't know the best way to go about it, said Jeffrey Holdvogt, a partner in the employee benefits practice at McDermott Will and Emery. Most employers with a student loan perk make monthly cash payments against an employee's debt to the loan holder, typically about $100 per month, but those payments are taxed.

Abbott's program is unique because the employer makes a tax-free contribution to an employee's 401(k) on the condition that the employee make student loan payments. Holdvogt said it was the first time he has heard of the IRS approving of contributions being conditioned on an employee doing something independent of the retirement plan.

The benefit doesn't generally cost the employer any more, because the company would expect to match an employee's 401(k) contributions anyway, he said.

The thumbs-up the IRS gave the program "is quite likely to kick-start a lot of interest from other employers and potentially be something that really causes a change in the way employers provide these types of benefits," Holdvogt said.

The rising cost of college, as well as rising admissions, has caused student debt to triple nationally since 2005. In Illinois, more than 60 percent of students who graduate college have student debt, with an average bill of nearly $30,000, and those struggling to pay it off forgo critical years of saving. College graduates with student loans have retirement assets that are 50 percent lower than their peers without debt by age 30, and it can be difficult to catch up, according to a June report from the Center for Retirement Research at Boston College.

At Abbott, which started enrolling employees in the voluntary program this month, any U.S. employee who devotes at least 2 percent of his or her paycheck to paying off student loans can get a 5 percent 401(k) contribution from Abbott. That's the same percentage match given to employees who contribute 2 percent to their 401(k)s. The program will allow people to accumulate savings in their retirement accounts without committing any of their own money. The medical device manufacturer, which is based in the north suburbs, said a couple of hundred people have signed up for the program so far and it anticipates several thousand will eventually take advantage of it.

"Student loan debt is one of the biggest financial concerns in the U.S. today and we're thrilled we've been able to address this issue for our employees in an innovative, meaningful way," Steve Fussell, executive vice president of human resources, said in an emailed statement. "We're proud to be pioneers in this space and hopeful we may have paved a pathway for more companies to help employees with this crushing problem."

While other companies wishing to offer the same benefit could also request an individual ruling from the IRS to protect them from questions down the road, having broader guidance affirming the legality of the practice would open the door wider, said Holdvogt. The letter from the ERISA industry group is a first step toward pushing the agency in that direction. "The more interest there is, the more groups submit requests, the more likely it is the IRS will

issue guidance," Holdvogt said. "They want to be helpful."

Legal Alert: IRS issues updated guidance on safe harbor notices for eligible rollover distributions

September 18, 2018, the Internal Revenue Service (IRS) released Notice 2018-74, which updated the safe harbor guidance that employers may use to comply with the notice requirements under section 402(f) of the Internal Revenue Code. Section 402(f) requires a written notice be provided in advance to participants receiving eligible rollover distributions under certain qualified retirement plans (generally, section 401(a), 403(a), 403(b) and certain 457(b) plans). The written notice must explain certain rules and information related to the eligible rollover distribution, such as the participant's rights to transfer the distribution to another eligible retirement plan and the various tax implications involved. The updates in Notice 2018-74 – reflecting recent legislative changes and IRS guidance, and providing certain clarifications – further amend the safe harbor model notices issued nearly a decade ago in Notice 2009-68 and subsequently updated in Notice 2014-74.

Notice 2018-74 provides two methods that employers may use to implement the revised model safe harbor notices:

- A set of updated model notices in Appendix A to replace the prior safe harbor notices outright; or
- Alternatively, Appendix B provides for the first time instructions on how employers may update the safe harbor explanations in Notice 2014-74 by amendment, instead of by replacement.

Of course, employers may also provide a section 402(f) notice that is different from the safe harbor explanations.

The specific modifications discussed in Notice 2018-74 relate in part to recent legislation and IRS guidance including:

- The extended rollover deadline for qualified plan loan offset amounts under the Tax Cuts and Jobs Act of 2017 – a specific point on which the 2014 model notice is no

longer accurate;
- Revised exceptions to the 10% premature distribution penalty tax under section 72(t) enacted in the Moving Ahead for Progress in the 21st Century Act (MAP-21, relating to phased retirement for federal employees) and the Defending Public Safety Employees Retirement Act (DPSERA, expanding the exception for qualified public safety workers receiving distributions from governmental plans); and
- Self-certification procedures for claiming eligibility for a waiver of the 60-day deadline for making rollovers under Revenue Procedure 2016-47.

The model notices also include clarifications, such as:

- Confirming that the 10% premature distribution penalty tax under section 72(t) for early distributions applies only to amounts includable in income, but the section 72(t) exception for qualified public safety employees does not apply to payments from IRAs;
- Explaining how the rollover rules apply to governmental section 457(b) plans that include designated Roth accounts; and
- Recognizing the possibility that the 60-day deadline for making rollovers may from time to time be extended for those taxpayers affected by certain events such as federally declared disasters.

The Notice does not state an effective date for implementing the updated safe harbor notices, and as usual disclaims the ongoing reliability of the 2018 model explanations in the event of subsequent changes in applicable law. Employers thus would be well-advised to:

- Update their section 402(f) notices as soon as administratively feasible, if they have not already done so. Employers making use of the safe harbor notices may continue to omit sections of the explanations that are inapplicable to their plans; and
- In the event of future changes in the law, consider at least interim updates to their existing notices even in advance of the IRS publishing updated models, particularly if the new law causes a statement in the existing notice to become affirmatively inaccurate.

NYU v. Sacerdote – Thoughts for Plan Fiduciaries

Since 2016, participants have filed 19 lawsuits against universities over the fees charged to the universities' 403(b) plans. In the first of these cases to reach trial, New York University (NYU) secured a complete victory when the court found that NYU did not breach its ERISA fiduciary duty of prudence. The court's decision provides some important takeaways for plan sponsors and the retirement committees that act as plan fiduciaries.

> **Background of the Case:** NYU's Retirement Plan Committee ("Committee") is responsible for overseeing NYU's two 403(b) retirement plans, which are multi-billion dollar plans. Plaintiffs alleged that the Committee breached its duties under ERISA by imprudently managing the selection and monitoring of recordkeeping vendors, which resulted in excessively high fees charged to participants, and imprudently failing to remove two specific funds from the NYU plans' investment lineup. The judge conducting the bench trial on these claims scrutinized the Committee's fiduciary processes, reviewing over 600 documents admitted into evidence related to the steps the Committee took in making decisions concerning the plans.

The court's written opinion offers plan fiduciaries some food for thought with respect to the fiduciary decision-making process generally.

Fiduciary Decisions Should Be Highly Fact-Based. The opinion highlights the fact-based nature of a retirement committee's decision-making process, with the court recognizing that plan-related decisions are unique to the institution and body of participants, and should come after reasoned consideration of all the circumstances, not price alone. Fiduciaries Should Understand the Importance of Their Roles. The opinion also emphasized that the Committee and its individual members, as fiduciaries to a multi-billion dollar plan, should understand their roles as fiduciaries and take the role seriously. The court closely reviewed the details of the Committee's decision-making process and made credibility determinations of all Committee member witnesses who testified at trial. The court observed that some of the Committee members did not meet standards for prudent participation on a committee because they lacked sufficient understanding of their fiduciary obligations and did not understand plan-related issues. However, some Committee members were engaged and knowledgeable. Significantly, even though the court was concerned about some Committee members, the Committee's overall process as a body was sufficiently prudent.

> **Fiduciaries Cannot Defer Blindly to an Expert's Advice.** The opinion also emphasizes that fiduciaries cannot defer entirely to or rely passively on the Committee's investment consultant's expertise. In order to rely on an expert's advice, fiduciaries must investigate the expert's qualifications, provide the expert with complete and

accurate information, and make certain that reliance on the advice is reasonably justified under the circumstances. This includes meaningfully probing the investment consultant's advice and making informed decisions.

In addition to raising some overarching themes about the fiduciary process, the judge's approach to reviewing the case shined a spotlight on the specific elements of the Committee's fiduciary process. The opinion identifies several elements that contributed to the court's finding of overall procedural prudence, including:

- The Committee held meetings on a quarterly basis.
- In advance of Committee meetings (at least one week before each meeting), the investment consultant for the plans prepared and distributed reports on the plans' investment funds, which included detailed benchmarking information, market analysis, information about the plans' asset allocations, and other types of investment fund information.
- At least some of the Committee members reviewed the meeting materials in advance, asked questions of the investment advisor in the meetings, asked investment-related questions of the investment advisor outside of Committee meetings, and were actively engaged in the Committee meetings.
- The Committee meeting minutes reflected discussion of fund performance, including discussion of the watch list, at almost all meetings.
- The Committee had in place an investment policy statement (IPS), and the IPS was reviewed at least annually.
- The Committee used requests for proposal (RFPs) periodically/when appropriate with respect to recordkeeping services, and the Committee evaluated responses to RFPs holistically, taking into account not just fees but how a particular recordkeeper's services could benefit the plans' participants and how a particular recordkeeper would fit with the plans overall, given plan-specific characteristics and needs (e.g., the substantial portion of plan assets held in annuities).
- When the Committee decided not to follow the investment consultant's recommendations on a particular item, the Committee documented its consideration of the investment advisor's recommendations and its rationale for taking a different approach than the one that was recommended by the investment advisor.

As the 403(b) cases and other fee-related lawsuits against plan fiduciaries continue to work their way through the courts, the NYU opinion is a reminder to plan fiduciaries to continue to pay attention to and consider ways to strengthen their fiduciary decision making process.

Bill Beefing Up Retirement Protections for Women Introduced

Two U.S. Senators (including Sen. Patty Murray (D-WA), Ranking Member of the Senate Health, Education, Labor, and Pensions Committee) have introduced legislation to address some of the challenges families face as they plan for retirement – particularly for women.

The Women's Pension Protection Act of 2018 (WPPA) – co-sponsored by Sen. Maria Cantwell (D-WA) – would, according to a press release, "strengthen consumer protections to safeguard retirement savings, improve access to retirement savings plans for long-term, part-time workers, help increase women's financial literacy, and give support to low-income women and survivors of domestic abuse seeking the retirement benefits they are entitled to following a divorce."

Specifically, with regard to retirement plans, the bill would:

Expand existing spousal protections for defined benefit plans to defined contributions plans. It also explicitly outlines the rights of participants and beneficiaries to bring a civil suit for violations of these new requirements – rights which are currently available for participants and beneficiaries of defined benefit plans.

Change the minimum participation standards for long-term, part-time workers (most of whom are women). It would allow employees to participate in a plan once they have reached the current minimum participation standards (age 21 or the completion of one year of service – generally 1,000 hours of service during a 12-month period) or once they have completed at least 500 hours of service for two consecutive years, if earlier. This provision would not apply to employees who are covered by a collective bargaining agreement provided that retirement benefits were the subject of good faith bargaining. Oh, and the provision further provides that plans that fail to permit participation for these long-term, part-time workers may be subject to a civil penalty of $10,000 per year per employee;

Effective Dates

The increased spousal protections under defined contribution plans provision would become effective for distributions and rollover contributions six months following the enactment of the bill. The improved coverage for long-term part-time workers provision would apply to plan years beginning after Dec. 31, 2016. (The bill's sponsors point out that any 12-month period beginning before Jan. 1, 2014 in which an employee worked at least 500 hours would not be counted for purposes of this provision.)

Other Provisions

The bill would also:

- increase financial literacy by providing grants for community-based organizations to improve the financial literacy among women who are of working or retirement age; and
- support low-income women and survivors of domestic abuse seeking retirement benefits by providing grants of at least $250,000 for community-based organizations that assist them in obtaining qualified domestic relations orders.

In addition to Sens. Murray and Cantwell, co-sponsors of the Women's Pension Protection Act of 2018 include Elizabeth Warren (D-MA), Jeanne Shaheen (D-NH), Tammy Baldwin (D-WI), Heidi Heitkamp (D-ND), Mazie Hirono (D-HI), Debbie Stabenow (D-MI), Amy Klobuchar (D-MN), Maggie Hassan (D-NH), Catherine Cortez-Masto (D-NV), Tammy Duckworth (D-IL), Tina Smith (D-MN), Claire McCaskill (D-MO), Dianne Feinstein (D-CA), Kamala Harris (D-CA) and Kirsten Gillibrand (D-NY).

House Passes Bill With Many Savings Arrangement Enhancements

The U.S. House of Representatives passed two of three bills that collectively comprise "Tax Reform 2.0" this week, and is expected to vote on the third today, September 28. One of these bills passed this week—the Family Savings Act of 2018—would make significant changes to the landscape of tax-advantaged savings arrangements. Included in it are provisions affecting employer-sponsored retirement plans, IRAs, 529 college savings programs, as well as a new all-purpose tax-free savings arrangement known as the Universal Savings Account.

Tax Reform 2.0

The Tax Reform 2.0 package is intended to be a follow-up to the Tax Cuts and Jobs Act, enacted in December of 2017. The primary objective of Tax Reform 2.0 has been to make permanent the individual income tax cuts in the 2017 legislation, which currently are set to expire in 2026. In addition to individual tax cut permanence and savings arrangement enhancements, a third component of Tax Reform 2.0 relates to "business innovation." The business innovation component also was passed by the House this week; the individual income tax permanence bill is expected to be voted on by the House today (Friday, September 28).

Senate Opposition

Prospects for making the 2017 individual income tax cuts permanent, however, are considered poor because of opposition in the U.S. Senate. In light of this, there has been increasing focus on the possibility of advancing stand-alone legislation to enhance tax-advantaged savings arrangements. Some speculate that the House's passage of the Family Savings Act could lead to a counter-move by the Senate with its own savings enhancement proposals, with the potential for a compromise bill containing a blend of House and Senate provisions.

Family Savings Act Details

It is believed that the Family Savings Act bill that just passed virtually mirrors the legislation as first described at ascensus.com News early in September. Added to this are the addition of a fiduciary safe harbor for employers who include lifetime income investments in their retirement plans, and a provision allowing 529 education savings program accounts to be established for unborn children.