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## Retirement Wonks and Honky-Tonks

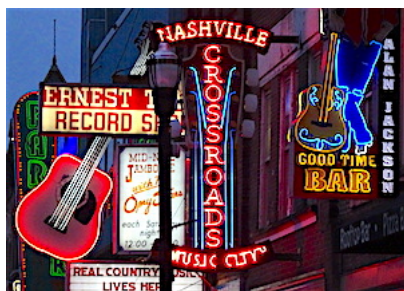
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By Kerry Pechter     *Thu, Apr 19, 2018*

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*Having stopped Congress from cutting tax breaks for savers in December's tax bill, the American Retirement Association celebrated with three-days of reflection and revelry in Nashville.*

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The virtue and the defect of the US retirement savings industry is that the nation's 700,000 small, medium and large plan sponsors can choose their own advisors, recordkeepers, fiduciaries, third-party administrators, software vendors, investment managers, pension attorneys and financial wellness coaches.

The diversity of service providers gives employers countless options to choose from, while competition keeps prices down and sparks innovation. That's the industry's virtue. But the multiplicity of choices can be so bewildering that (despite the hefty tax advantages for business owners) many employers don't sponsor plans at all, leaving as many as half of US workers with no savings plan except Social Security.

Together, all those varied advisors and vendors comprise a vast and motley crowd, ranging in attire from jeans and khakis to pin-stripes, and an estimated 2,200 of them (half advisors) tumbled into Nashville, Tennessee's guitar-themed Music City Center last weekend for the largest-ever meeting of the National Association of Plan Advisors (NAPA) and its umbrella organization, the American Retirement Association (ARA).



Brian Graff

The ARA is the voice of the small- and mid-sized plan industry. Its CEO and chief lobbyist is Brian Graff, an Ivy League lawyer who likes to say he "has friends in low places"—meaning

Washington, DC—and who sometimes recalls watching, at age 11, as his schoolteacher parents bought a 403(b) plan across their kitchen table.

Graff has been busy defending his industry from what it sees as adverse legislation and regulation. In late 2017, he and other 401(k) advocates spent much of late 2017 successfully prevented Congress from reducing the tax deductibility of retirement plan contributions; some in Congress hoped to use the resulting revenue to finance corporate tax cuts.

### **‘Divine misunderstanding’**

One official told him, he told NAPA members, that ‘Rothification’ alone—i.e., the taxation of all or some 401(k) contributions as ordinary income—could allow Congress to cut corporate tax rates by three percentage points. Last November’s surprising election result and the Republican tax cuts had left him with “a doozey of a hangover,” Graff said.



At NAPA’s party at the Wildhorse Saloon

A “divine misunderstanding” helped stave off the raid on 401(k) contributions, he told his Nashville audience. After *Good Morning America* telecasters misreported that the Congress planned to cap 401(k) contributions at \$2,400 (the proposal would have capped *deductible* contributions at \$2,400), President Trump quickly tweeted that there would be no changes to 401(k) plans. “That’s the only one of the president’s tweets that I ever liked,” Graff said.

Graff and others in the retirement industry took a loss in March when legislation that they supported, Sen. Orrin Hatch’s Retirement Enhancement and Savings Act (RESA), failed to become incorporated into the massive bipartisan \$1.2 trillion omnibus spending bill that prevented a government shutdown.

RESA would have made it much easier to start so-called open multiple-employer plans (MEPs). That change would have allowed financial services companies to sponsor full-service 401(k) plans that small plans could easily join. It would have enabled the larger providers to bring economies of scale to the small plan market, make that market profitable for them and in theory, expand the availability of retirement savings plans to more small-firm workers. In other words, it would help close the “coverage gap.”

“Senate Democrats and Republicans wanted to do RESA,” Graff told *RIJ* this week, “But House Republicans wanted improvements in health savings accounts in exchange for Republican Senators’ support for RESA and they didn’t get it.” So they left RESA out of the spending bill. The disagreement wasn’t about the substance of the measures, Graff said.

### **Whither the fiduciary rule?**



JPMorgan’s conference booth

ARA is currently monitoring the after-effects of the Fifth Circuit Court of Appeals’ recent 2-to-1 decision to nullify the Department of Labor’s fiduciary rule. At the Nashville conference, Graff discussed the ramifications of the decision with attorneys David Levine of Groom Law Group and Tom Clark of Wagner Law Group.

Everyone seems to be waiting to see how the Trump DOL will respond to the ruling. (Preston Rutledge, who wrote RESA while working for Sen. Hatch, is the new head of DOL’s Employee Benefit Security Administration. He was scheduled to speak in Nashville but canceled due to the sensitivity of the ongoing litigation.)

The Fifth Circuit ruling takes effect May 7. If the DOL wants to appeal the decision, it has until April 30 to request a re-hearing of the matter by all of the Fifth Circuit judges, not just

a three-judge panel, Clark said. Alternately, the DOL has until May 13 to appeal the decision to the U.S. Supreme Court. (The Trump DOL's reason to appeal: Displeasure with the way the Fifth Circuit ruling could curtail its authority.)



At State Street Global Advisor's booth

The DOL may let the decision stand and not respond, he added. In that case, the DOL would simply continue its current policy of not enforcing the Obama version of the rule while preparing to replace it with something more aligned with the Trump administration's business-friendly stance. Or the DOL could simply let the rule die and not replace it with anything.

That would leave a "void," Clark said. Levine added, "It leaves us in a bit of a morass." The fiduciary rule got rid of the so-called five-part test for determining whether an intermediary (investment advisor, registered rep or insurance agent) is a fiduciary—which would determine whether he or she could sell products on commission to retirement plan participants or IRA owners.

"The [definition of a fiduciary] was clearer under the fiduciary rule," said Clark, who spoke carefully lest he antagonize the largely anti-fiduciary rule audience. "This is the only situation where things might be more painful than if we had just kept the rule. It's better to have one fiduciary rule than to have 20 different opinions" issued by, for instance, the DOL, the Securities & Exchange Commission and the individual state insurance commissions.



At 'Women in Retirement' booth

Graff saw another benefit to the existing rule: It showed plan advisors and participant call-center operators what they could say to educate plan participants about IRA rollovers without crossing the line into soliciting business for themselves or their firms. "Before the rule this was a question mark," Graff said. "I'm concerned that we might be headed back to that world."

The next big legislative issue for the retirement plan industry will be the shortfall in plan coverage. The controversy over Rothification demonstrated to legislators that 401(k)s are a hot-button issue for voters, Graff said. It also alerted them to the fact that only about half of Americans workers are enrolled in a workplace savings plan at any given time.

"The coverage gap is the next big issue," he said at the conference. "The math is adding up to government doing something about it." As a lobbyist, his job will be to steer state and federal legislators to rely on the private sector for specific solutions, and to steer them away from state or federal "public option" solutions that might crowd out private service providers.

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