# An Appraisal: ERISA at 40

*By Randy Myers*

Forty years ago President Gerald Ford signed into law the Employee Retirement Income Security Act of 1974, better known as ERISA. Congress' overarching goal in writing the law was to protect the interests of workplace retirement plan participants and their beneficiaries. The results have been mixed, although many of the shortcomings in the nation's private retirement system have less to do with ERISA than they do with how the retirement system itself has evolved over the past four decades. In a wide-ranging panel discussion at the 2014 SVIA Fall Forum, four retirement experts—Gary Ward of Prudential Retirement and attorneys Jan Jacobson, Donald Myers and Michael Richman—discussed how the retirement plan landscape has changed under ERISA, how it continues to evolve, and what the implications are for the stable value industry.

## The great shift from DB to DC

The defining development in the private-sector retirement system since ERISA's passage has been the shift away from defined benefit pension plans funded by employers in favor of defined contribution plans typically funded at least in part by employees. From 1975 to 2011 the number of private-sector DB plans fell by more than half to just over 45,000, according to Department of Labor statistics, while the number of DC plans tripled to more than 638,000. Critics contend that this shift has left many American workers unprepared for retirement.

"I think employer-sponsored plans have done a good job, but we can do better and we can do more," said Jacobson, senior counsel, retirement policy, for the American Benefits Council, an employer association.

Jacobson explained that the performance of the private retirement system is typically gauged by two metrics: coverage and adequacy. The first relates to the percentage of workers covered by retirement plans, the latter to how much they have accumulated for their retirement years. The system often comes under criticism on both fronts, largely based on data indicating that the average 401(k) plan account balance is insufficient to support the typical worker in retirement and that only about half of U.S. workers have access to an employer-sponsored retirement plan. But those numbers can be misleading. Average account balances do not reflect the fact that many workers change jobs every few years and may have more than one account, or that older workers approaching retirement often have larger balances. Jacobson also pointed out that if one excludes part-time and seasonal workers and looks only at full-time employees, about 74 percent of workers have access to a workplace retirement plan.

Jacobson also noted that the employers who offer those plans are taking steps to make them more effective by adopting features such as automatic enrollment and automatic escalation of participant contributions. In a survey of ABC members last year, she said, 56 percent of plan sponsors said they have adopted automatic enrollment. Of that group, 26 percent also have adopted automatic escalation of deferrals.

On the legislative front, Jacobson said, policymakers are looking to address coverage and adequacy by providing more ways for people to save. One example is the MyRA, a new type of Individual Retirement Account which President Obama announced in his January 2014 State of the Union Address. Meanwhile, Jacobson said, as many as 17 states are in various stages of trying to create state-sponsored plans that would be available to people who don't have access to a retirement plan at work.

While those efforts are encouraging, Jacobson said it's also important that policymakers remain committed to protecting the tax advantages of the retirement plans Americans currently enjoy. Over the fiscal years 2015 through 2019, she noted, the exclusion of employer-sponsored pension plan contributions and earnings from federal taxation, for both defined benefit and defined contribution plans, is expected to cost the U.S. about $649 billion dollars—a tempting sum for legislators struggling to balance the federal budget. ABC recently filed a statement with the Senate Finance Committee emphasizing the successes of the current retirement system and explaining how even seemingly small changes in the tax code could have large consequences for its health.

## Rethinking fiduciary duty

The basic rules of fiduciary duty first established by ERISA have not changed much. Among other things, they hold that a person who exercises any discretionary authority or control with respect to management of a retirement plan or disposition of its assets is a fiduciary—as is anyone who renders investment advice to the plan for a fee.

Soon, however, the rules may change. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, regulators are taking a fresh look at what constitutes investment advice and who should be held to fiduciary standards for offering it. Currently, investment advisors are considered fiduciaries but brokers, barring an agreement to the contrary, are not. Donald Myers, senior counsel in the Employee Benefits and Executive Compensation Practice Group at the law firm of Morgan, Lewis & Bockius, noted that the Securities and Exchange Commission is considering designating brokers as fiduciaries, too, but thus far has not acted.

One reason may be that the Department of Labor has announced that it is coming out with a proposal of its own in 2015, and neither entity seems to be sure who should move first.

One area where the DOL has already acted is in requiring that service providers offer additional disclosures about their services, fiduciary status and compensation to their retirement-plan clients.

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Now, Donald Myers said, the Labor Department must consider what it will do if it finds those disclosures to be inadequate, or if it sees an inappropriate reaction to those disclosures by plan sponsors or plan fiduciaries.

### Litigation

The additional disclosures that service providers must now make are required under Section 408(b)(2) of ERISA. Michael Richman, of counsel to Morgan, Lewis & Bockius' Employee Benefits and Executive Compensation Practice Group, said no discussion of 408(b)(2) is complete without a discussion of litigation.

He noted that over the past decade the plaintiffs' bar has been more active in filing lawsuits against plan sponsors in two major areas: declines in company stock price where company stock was held in an employer-sponsored retirement plan, and excessive fees. Increased fee disclosure under Section 408(b)(2) could provide additional fodder for the plaintiffs' bar, he remarked.

### Stable value: thriving amid the change

Gary Ward, senior vice president and head of stable value for Prudential Retirement, which is part of Prudential Financial, noted that throughout the 40-year history of ERISA stable value funds have continued to play an important role in the retirement plan marketplace. But, he cautioned, the stable value industry must continue to exert its influence on retirement plan policy, particularly around the issues of making sure plans are available to as many American workers as possible and that those plans are up to the task of providing workers with a financially secure retirement.

Stable value can play an important role in those plans, Ward noted, not only for participants looking for stable and reliable investment returns but also for those looking to convert their savings to retirement income.

The stable value industry can also further its cause by staying involved in government efforts to expand the private retirement system, whether through the introduction of new individual retirement accounts such as the federal MyRA or through the expanded use of multiple small-employer plans, Ward said. One way the industry can do that, he said, is by working toward developing a simple and standardized approach to stable value, something retirement plan advisors and their clients increasingly value. SVIA

## Millennials and Stable Value: Made for Each Other?

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That could be good for the stable value industry as millennials begin saving for retirement, since stable value funds are conservative investments offering principal preservation and interest rate stability that are not available from most other investment products.

One way we know millennials are risk averse is by their behavior, Howe said at the 2014 SVIA Fall Forum. The violent crime rate for offenders ages 12 to 20 peaked in the early mid-1990s, when Generation X last occupied those age brackets, and has since fallen by 75 percent.

Meanwhile, surveys show that substance abuse rates are at their lowest levels ever for students in grades 8, 10 and 12. Elsewhere, the percentage of teens applying for drivers' licenses fell over the 25 years from 1983 to 2008. And finally, data and surveys shows that older millennials are leery of investing in stocks.

"Risk-taking and independence no longer attract this generation," Howe said.

He expressed little surprise at the development. He contends that generations cycle through four archetypes: the heroes (such as the "government issue," or G.I., generation that came of age in the 1920s and 1930s), the artists (the "silent generation" that followed the G.I. generation), the prophets (the Baby Boomers) and the nomads (Generation X).

The millennials, Howe said, remind him in many ways of the G.I. generation, which also eschewed risk-taking by turning inward, to family, amid the turmoil of the Great Depression. In fact, he said, millennials are much closer to their parents than previous generations were. In one recent survey, 82 percent of teenagers reported having no problems with any family member, up from 75 percent in 1983 and 48 percent in 1974.

Howe said millennials are accustomed to being protected by their parents and feeling special, and want to be good citizens and team players. He concluded that organizations that want to market to them should factor these attitudes into their messages. SVIA