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The Yale Letter Saga

Throughout the summer of 2013, Professor Ian Ayres of Yale Law School sent out over 6000 letters to 401(k) plan sponsors chastising them for exorbitant 401(k) Plan fees and threatening to publicly call attention to the fees within their plans. This letter included a web address for a draft of the research study white paper that sparked the sending of the letter. Along with Associate Professor Quinn Curtis of the University of Virginia School of Law, Professor Ayres prepared the empirical research study entitled *"Measuring Fiduciary and Investor Losses in 401(k) plans"*, aimed at quantifying "the relative costs to 401(k) plan participants of menu limitations, excess fees, and investor allocation mistakes".

Key Points

Based on the research study, Professor Ayres identified the employers receiving the letter as sponsoring a "potential high cost [401(k)] plan". He refers to Form 5500 data, filed by the company in 2009, as well as data from BrightScope Inc., also from 2009.

In some versions of the letter, companies were informed of how their plan ranked relative to other plans. The letter continues that the findings of this research study will be available to newspapers, including the New York Times and Wall Street Journal, as well as dispersed via Twitter "with a separate hashtag for your company". A cautionary note accompanies the contact information at the end of the letter. "As a reminder, fiduciary duties are the most stringent imposed by the law, and require administrators to act solely in the interests of plan participants". Some versions include unsought legal advice. One letter states "To best comply with your duties to plan investors, I recommend that you improve your plan offerings, including adding lower-fee options, both at the plan and fund-level, and consider eliminating high-fee funds that do not meaningfully contribute to investor diversification."[1]

Reaction to the "Yale Letters"

Brian Graff, CEO of both the American Society of Pension Professionals and Actuaries (ASPPA) and the National Association of Plan Advisors (NAPA), released one of the first professional responses to these letters entitled "*Love Letters from Yale*"[2]. Graff highlights four main flaws with the data used in Ayres' research study:

[1] Redacted Copy of "Yale Letter", NAPA Net; http://www.napa-net.org/wp-content/uploads/Yale-Letter.pdf

[2] Love Letters from Yale by Brian Graff, NAPA Net; http://www.napa-net.org/news/plan-optimization/love-letters-from-yale/

- Old data — the data is from 2009 Form 5500s — and insufficient to make meaningful relative comparisons.
- Incomplete data – the data ignores fees paid directly by the plan sponsors, thus not allowing for a complete assessment of the reasonableness of aggregate fees. A recent study by the Government Accountability Office recognized the limitations of Form 5500 data in regards to assessing plan fees.
- The data does not take into account the relative complexity of the plan design.
- The data does not factor in levels of service or relative performance, including whether a professional plan advisor is helping the plan sponsor and participants.

Thomas E. Clark, Jr., Chief Compliance Officer and Director of Fiduciary Oversight at FRA/PlanTools, points out a few inconsistencies regarding Professor Ayres' research still yet to be resolved. Clark points out that the plan universe used to draw comparisons in the sponsor letters varies widely from the universe actually used in Professor Ayres' research. Clark poses an interesting question: "What is the motive of these professors and BrightScope in sending these letters?"[3] We may never know as BrightScope has since severed all ties with Professor Ayres and this study. Co-founder of BrightScope, Mike Alfred, muses, "I think he was trying to test plan sponsors' reactions. Some [letters] are aggressive as saying 'we're going to go public on this in The Wall Street Journal and tweet about it.' It was pretty unanimous across the board and people felt the language used was irresponsible."[4]

The data Ayres' used in his study is indeed outdated and is at risk of being flawed due to a misuse of relative comparisons. The most pressing issue that we find with this study, however, is that a major conclusion was formed from incomprehensive data. Ayres' took potentially incomplete and outdated information, paired with BrightScope's infamous BrightScope Rating™ and caused potentially undue concern among plan sponsors. Taking the initiative to send people a letter regarding the downfalls of their 401(k) Plan when you have not seen the necessary details of their Plan is preposterous as well as a reckless, irresponsible use of professional prestige. Certain information such as the services that Plan participants receive and the value added is important in determining reasonableness of fees.

[3] Seriously? Yale Law Professor Sends Letters to Plan Sponsors Alleging Potential Fiduciary Breach by Thomas E. Clark, Jr., FRA/PlanTools; http://blog.fraplantools.com/seriously-yale-law-professor-sends-letters-to-plan-sponsors/

[4] 401(k) industry flummoxed over Yale professor's 6,000 'threatening' letters to plan sponsors by Lisa Shidler, RIABiz; http://www.riabiz.com/a/4850066049204224/401k-industry-flummoxed-over-yale-professors-6000-threatening-letters-to-plan-sponsors

Contacting Yale

After several attempts to speak with Professor Ayres, Brian Graff, on behalf of affected retirement plan sponsors as well as ASPPA's 16,000 members, sent a letter to Dean Robert C. Post, J.D., Ph.D. of Yale Law School. This letter requests action on the part of Yale Law School to assure Ayres' future research contains "sound methodological consideration and propriety".[5]

Dean Post quickly responded to Graff explaining that Professor Ayres' letters "neither represent, or purport to represent, the views of Yale University or of Yale Law School" and that Yale will not "in any way interfere with Professor Ayres' research." Dean Post also declined to meet with Graff regarding the Professor's research, rather he encouraged ASPPA and NAPA to "engage in whatever public debate with Professor Ayres you feel is appropriate."[6]

Key Takeaways

All flaws and miscalculations aside, the Yale letter craze can benefit all retirement plans as it should incite plan sponsors to examine their offerings more closely. The Rosenbaum Law Firm's blog encourages "a recipient of this letter should take this letter from Ayres as a call to action to improve their plans. If Ayres sees it based on old data, plan sponsors should see the same problems using current data. The Ayres letter is no[t] a scarlet letter, it can be removed by a little action by the plan sponsor."[7]

In conclusion, it is important for a plan sponsor to ensure the reasonableness of fees and perform their fiduciary due diligence. A full fiduciary review can allow plan sponsors significant insight into plan operations, fee reasonableness and overall success of a retirement plan.

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[5] ASPPA Letter to Dean Post by Brian Graff, NAPA Net; http://www.napa-net.org/wp-content/uploads/ASPPA-Letter-to-Dean-Post-REDACTED.pdf

[6] Letter by Dean Robert C. Post of Yale Law School to Brian Graff and ASPPA, NAPA Net; http://www.napa-net.org/wp-content/uploads/Dean-Post-Response-to-ASPPA.pdf

[7] Yale Law Professor scares 6K Plan Sponsors and everyone missed the point by "admin", Rosenbaum Law Firm
http://therosenbaumlawfirm.com/blog/?p=1486