Please note: This is a transcription so there may be slight grammatical errors.

Hello, and welcome to Revamping Retirement, a podcast brought to you by CAPTRUST, where we explore the opportunities and challenges facing today's retirement plan sponsors and fiduciaries. Our hosts, Jennifer Doss and Scott Matheson lead the employer-sponsored retirement plan practice at CAPTRUST, one of the largest registered investment advisors in the U.S., and the thought leader in the retirement plan advisory and consulting space. We hope you enjoy Revamping Retirement.

Jennifer Doss:

Thanks everyone for joining us today for another episode of Revamping Retirement. I'm Jennifer Doss, your co-host. My normal co-host Scott Matheson, I've left him and I've come to Las Vegas, so he's still back in our Raleigh headquarters. But I do have a special co-host today that you'll hear from a little bit later, Phyllis Klein, who is a senior director in our retirement plan services group. But today we're going to interview Fred Reish, and also David Levine, and [inaudible] going to be talking about some of the panels that we've had from the NAPA Summit, which is why we are in Vegas. The NAPA Summit, National Association of Plan Advisors 401(k) summit, it's one of the largest and most prestigious conferences for retirement plan advisors. And last year, unfortunately we had to do it 100% virtual, but this year we are back in person, and it's just been a truly great event so far. Lots of content for advisors like ourselves to bring back to our plan sponsors for sure.

But just a little bit, Frederick Reish is a partner in Faegre Drinker's Benefits & Executive Compensation practice group, the investment management group, and the financial services ERISA team. His practice focuses on fiduciary issues, prohibited transactions, tax qualification, and retirement income. Fred is commonly hailed as one of the most influential people in the retirement industry. He also has his own blog @fredreish.com where he provides his opinion on popular retirement issues in a very recent new podcast with Nevin Adams, the chief content officer for the American Retirement Association, called Nevin & Fred: Fresh and Best Perspectives.

So Fred, thank you so much for joining us today. I know it's been a busy couple of days. So let's talk a little bit about the panel that you participated at the summit so far. It was called, Hot “Spots”: Same-Same or Different, DOL and IRS Hot Buttons. And I believe our colleague, Devyn Duex was your moderator, and you were joined by a few other ERISA attorneys to get your perspectives on, really you guys covered a lot, I was there. You guys covered just a whole slew of topics very quickly, it was very impressive. So tell us a little bit about what you covered, maybe some of the highlights, and what might be of particular interest to our plan sponsor audience?

Fred:

Sure. Hello everybody, and thank you very much. It is a little odd to be here in Las Vegas, talking about retirement savings with slot machines in the background going ding, ding, ding, but onto the topics of the conference. In terms of plan sponsors, I want to make some comments about regulations, DOL investigations and IRS audits, and I'll be brief. But they're all hot topical issues that plan sponsors need to be aware of. First, with regard to regulations, there is a new requirement that lifetime income illustrations be given to participants. And that will have to start this year somewhere between September of this year and September of next year. Every participant in every 401(k) plan in the country will get a lifetime income illustration. I think in most cases it'll be the December 31st, 2021 balance, which means it'll be delivered in the first quarter of next year.

The problem from a plan sponsor perspective is not that that has to be done, because in most cases the record keep is going to take care of it for them. The problem from the plan sponsor perspective is that the rules don't work very well. They require that the illustration given to participants assume in my

hypothetical that the participant is 67 on December 31 of this year, no matter how old they are. For example, a 40 year old with a $100,000 account balance will get a statement that says they're going to get $401 a month. A 67 year old with $100,000 account balance will get a statement that says they're going to get $401 a month. In other words, there's no projection of earnings to retirement. So if there were projections, even not assuming future contributions, the 40 old instead of $401 would get $525 as estimated income, where of course, if you're assuming you're 67 it would still be $401. It's going to be really misleading.

I think plans sponsors need to think about getting examples from their record keepers, or what those are going to look like. Perhaps asking the record keepers to also provide projections that assume a growth in the account between now and retirement, and talk about an educational campaign so that these new illustrations don't catch the participants off guard, and lead to a lot of frustrations and questions down the line. So that's one where there's going to be a lot of work. It'll be done by the providers generally speaking, but I think there's a need for education. And that process needs to start now, because those illustrations will be handed out before too long. Another regulation that's in development and it could come out as early as this week, is a new proposal on ESG investing, environmental, social and governance factors used to select investments in mutual funds and collective trusts that are included in plans.

The Trump administration adopted a role that was somewhat negative to ESG type investing, this role is going to reverse that. We don't know what it's going to say quite yet, but I would be willing to bet money if I were a betting person that the least it'll say is you can invest in ESG investments, don't worry about it. But it may go on to say, in the alternative, a more aggressive version might say, it could be a fiduciary breach to not consider ESG investing. We don't know where within that range it will end up, but either way, ESG investing as early as this week is going to be viewed much more favorably than it was under the last set of rules. So I think going forward plan sponsors can have some confidence in that if they've heard something negative about ESG investing from a rules perspective, they can now have confidence going forward. And that's out. They're going to be out immediately. It's already been approved. It just needs to be published in the federal register.

In terms of DOL investigations, two things that I'll just mention briefly. One is cyber security. It is the new hot issue for DOL investigations, and DOL guidance. There's some new guidance, and they've already started the investigations. So it's way too technical for a short thing like this, but get copies of the DOL guidance for participants, for plan sponsors, and for service providers, three sets of guidance. All best practices, not regulations. And easy to read, if you can read technology terms, which I can't, but easy to read otherwise. And work with your advisors and your consultants on what that guidance is, and what you should be doing about it. The second is missing participants. Again, soft guidance as it's called, or more technically sub-regulatory guidance, meaning best practices, or tips, or frequently asked questions, all that falls in that category. But, there are best practices on missing participants.

Another national DOL investigative issue. If you haven't been paying attention to your missing participants, or nonresponsive participants. Former employees who still have account balances, and you're investigated by the department of labor, they may assert that you committed a fiduciary breach. So now is the time to pay attention to that. It's another one of those odd issues that's just emerging, cybersecurity, missing participants. Then the last thing I want to mention is IRS audits. For those of you who've been around for a while like me, you remember not too many years ago the IRS was auditing for misclassification of employees, fancy title for saying, hey, this is an independent contractor, but perhaps if you looked at it more closely, they're actually being managed, and supervised like an employee. And the government may classify them as an employee, meaning that the employer owes all the social security taxes, withholding all the things that go with an employee relationship as opposed to an independent contractor relationship.

That's bad enough. But then if they find that they're also then going to open a retirement plan audit on your plan, saying you should have included that employee in the plan. And then you would have to put in money for employee contributions, money for matching contributions, money for missed earnings on those contributions, so it's the kind of thing that could mushroom really quickly on you. And so work with your attorneys, and your accountants, and your HR people, and see if you might have some risk in that area. Because, it's been years since the IRS really was out actively auditing on it, and I worry a little bit that practices may have gotten a little looser because there hasn't been the tension that government investigations create. So I just want to alert you that, that's a hot issue. So that's my list, regulations, DOL investigations, and IRS audits, there they are.

Jennifer Doss:

As I said at the beginning, it was certainly a lot of topics that you guys covered, and there's a lot going on out there. Again, you just hit on a good number of them, and questions that we're getting from our plan sponsors too. And I think one of the things that you said yesterday that I wrote down was the advisor is the quarterback for compliance. So you mentioned a lot of these things, and as an advisor, obviously, we're here to help our plan sponsors make sure that they're in compliance with some of these things. In your experience, I guess, as a practicing ERISA attorney, what are the areas that you're getting the most questions from plan sponsors on currently? What are they most concerned about?

Fred:

Sure. And just to reiterate what you said, I think that the advisor can provide a lot of value to the plan sponsor, and effectively as the quarterback bringing new information like this to the plan sponsor, and then helping them figure out what to do with the new issue. Plan sponsors have to spend time on their own business, and this is not a business. This is a not profit making venture for the company. It's interesting, the concerns of plan sponsors really fall into two categories that are entirely different one from the other. The first one is, how do we help participants? How do we help them achieve better results? How do we get them to retirement, and invested properly? And a plan that has reasonable expenses on and on. And the income projections, if they're added in addition to the illustrations are one way to help them.

You could even augment that by saying, well, the benchmark is a 70% income replacement ratio. If you want to get there, here's a way to increase your contributions that will get you to that level, your deferrals. So there's a lot of support services that plan sponsors can provide for that. In terms of helping participants, some of the things that we're seeing at the conference are auto enrollment and automatic enrollment increases, or automatic deferral increases. That's a topic of discussion here. Interestingly, that is now coming up as a diversity and inclusion issue because, automatically enroll plans end up covering more Black employees, Latinx employees, young employees, lower compensated employees. And the data is there that if a plan is automatically enrolled it has a good cross, a representative cross section of employees, so it goes a long way towards solving that problem. Financial wellness programs, helping your millennial employees learn how to budget, and helping them figure out how to defer, maybe helping them with a side car savings account, so if we go through another pandemic, and they get laid off, they've got some money in the bank to get them through it.

And then last, it's for the retirees, allowing them to continue in the plan and take distributions out of a plan with support services, like not charging for each distribution, having investments that are styled for income rather than accumulation, so that sort of a thing. The front end for some of the services like automatic enrollment, the backend for retirees. The second area, like I said, is very different, and it's more about the employer themselves. How do we stay out of trouble? Everybody reads about these

cases, the headline cases, and folks just want to avoid getting into that kind of trouble, and of course, there's a segment of that here at the conference as well. And I think some of the issues that come up there is, do you have the lowest cost share class?

Not too many years ago we were talking about the lowest cost mutual fund, now we're talking about the share class of the mutual fund. Too technical to get in here too, but your CAPTRUST advisor can help you understand that. That's not something that you as a business person, or I as a lawyer would necessarily know what's available to you, but they do. Benchmarking or record keeper and other service providers to make sure that, particularly through revenue sharing and other payments from the investments they're not being way overcompensated, and get that money back for the benefit of the plan. And then the last, how do I stay out of trouble issue, goes back to one of the things I already mentioned, cybersecurity is the new hot issue this year. I really recommend anybody listening to this, do something about cybersecurity this year, because it's not going to wait.

Jennifer Doss:

No, those are all great. Well, hopefully, you just covered a lot, and like you said, we've talked about some of these topics at some of the other panels that we've had at the conference so far. Hopefully you've been able to attend some of those other panels in between doing interviews like this. What were some of the more interesting ones for you, and any surprises that you've heard so far?

Fred:

I think I've already alluded to a couple of them, the whole concept of financial wellness, or retirement planning. 401(k) plans have grown very much looking at the front end. How do I get into the plan? How do I defer? What mutual funds are available? Should I put money in a target date fund? A whole bunch of front end questions. And I think it's going to move more to a holistic view. So financial wellness for the employees, how do I save? How do I know if I'm accumulating enough money, not just am I putting in, but what am I actually accumulating? Am I on course to achieve my goals in life? And in this incredibly complex financial world that we're in now, because record keepers are given so much data by plan sponsors about the employees, they're opportunities for record keepers and advisors to provide additional services based on that additional data.

So how much money, have I accumulated enough? Am I on course to do well? Do I need a managed account? I'm 50 years old now. I've got 250 or $500,000 in my account. I don't know if this target date fund, this design for everybody else is appropriate for me. I'm more aggressive, because I'm going to work to 70, or I'm more conservative, I'm going to retire at 60. What do I need to do different? That would be an advisor managed account, or a managed account. Now that I'm well into the process, how do I individualize this for me as I get older? So a lot of attention on the older employees now. The boomers are retiring at the rate of roughly 10,000 a day, and so we have this first generation, the boomers of workers who are actually going to retire on 401(k) plans.

Oh my goodness, has this 401(k) experiment worked? And they don't know the answers for a lot of things. How much do I need? How much can I withdraw each month to live on? How can I replace my paycheck at work? And that's where I think additional services, financial wellness services. And then what's the role of the employer going to be ultimately? Are you going to have products and services, or allow employees after they retire to stay in the plan and get distributions along the way?

And we're seeing a very large number, as I'm sure you all are, of the very large employers that are doing that. It's flipping now, whereas, years ago people would say, gee, I don't want any legal responsibility for my former employees, that's changing. And not for the better, by the way, in my opinion. Because, a large plan can buy services and products, institutionally priced, institutional quality, where when

somebody goes out of the plan and do a retail, they're at retail. If they get a good advisor, great, they get a [inaudible] advisor they're going to be taken advantage of, and everything is more expensive. So that's again, sort of the same thing, front end, middle, backend, how do we make it all work even better?

Jennifer Doss:

All right, that's great. So before we let you go, Fred, I guess, again, we like to ask all of our guests, it's a doozy of a question, I suppose. It's probably the hardest question that we ask any of our guests, which is funny. Because retirement is personal, we always want to know, what does retirement look like for you, Fred Reish?

Fred:

Retirement for Fred Reish looks really frightening. It is a scary thing, and it's not financially. I've been in 401(k) plans and more recently cash balance plans for almost four decades. So I've accumulated the money. I'm in good shape in terms of the finances, that's not the scary part to me. To me the scary part is, I feel like as a lawyer I've helped people accomplish a lot, that I've made a difference, and I figuratively look in the mirror and say, how do I continue making a difference? And as a part of trying to think about how to do that transition, I've done a lot of work at Arizona State University. I'm now a trustee of the university. I'm setting up scholarships for veterans and scholarships for first generation college students, where nobody else from their families ever gone to college.

Because I think it's harder for those two groups than it might be for the average student who just graduates from high school, and their parents went to college, so they just go on to college. So I'm trying to make a difference there. And that's not really a transition plan, but it's an example of the things I want to do.

So also professionalism, being a professional lawyer has mattered a lot to me having ethical standards, and high expectations. As a result, I've gotten involved with the CFP board for financial planners. I'm on their public policy council, and what's called their standards resources commission, and chair of the fiduciary committee. So there I'm trying to have an impact outside of working for money, but actually contributing time, but that's an example of professionalism. I think they are a really high regarded organization for their professional and ethical standards and part of what I want to be part of. So until I find enough replacements like that, I can't retire because I will not sit on the couch, so I'm stuck. Anyway, there you go. There's the answer?

Jennifer Doss:

Well, there's certainly no shortage of things to watch on Netflix, but we don't want you to go anywhere anytime soon, either. So we certainly appreciate your expertise, and all the work you do with clients, and within the industry. So, all right, we're going to pivot to our minute with Mike really quickly, he's going to talk about retirement plan loans, and some myths around those. And then we'll come back, and Phyllis is going to talk to David Levine. All right, thanks everyone.

Mike Webb:

Thanks Jennifer and Phyllis. Mike Webb here with another minute with Mike. This month's minute focuses on a topic that often causes confusion even amongst some industry experts, the taxation of retirement plan loans. You may have heard that retirement plan loans are taxed twice, or perhaps you heard that they're not taxed at all, but neither is entirely correct. When it comes to retirement plan loans, the interest is double taxed, but the loan's principle is not, let me explain. Let's say I borrow

$10,000 on my retirement plan at a 6% annual interest rate for a standard five year term. Now, the loan principle is 10,000, and the loan interest is approximately $1,600 over the term of the loan. Let's start with the loan's principle. I take the loan. I receive a check for the principal amount of $10,000, which was contributed to my retirement plan pre-tax. This is tax free money.

However, as I make repayments to the loan, they come from after tax income. And down the road, when I take a retirement plan distribution I will taxed again. Well, it may appear as though I'm taxed twice. The original $10,000 loan proceed was never taxed, which cancels out one of the two taxable events. Thus, I am only taxed once on the principle. However, when it comes to interest it's a different story. Since the moneys paid in loan interest were never provided to be tax free, the loan's interest is indeed taxed twice. Once when we paid for my after tax income, and again at the retirement plan distribution, since interest on a retirement plan loan is paid back into my retirement account. Thus while retirement plan loans are not necessarily a tax break, they're also not tax burdensome either. Of course, avoiding and retirement plan loans altogether is the best case scenario for both taxes and retirement readiness. For Revamping Retirement, I am Mike Webb, and this has been your minute with Mike. Now, back to Jennifer and Phyllis.

Phyllis:

So thanks, Mike. So I'm Phyllis Klein. We're back with David Levine, principal and co-chair of Groom Law's employer focus practice. David advises plan sponsors, advisors and other service providers on a wide range of employee benefit matters, from retirement and executive compensation, to health and welfare plans. David, thanks so much for being here. We just spoke with Fred Reish about his NAPA panel and what he got out of the conference, and we'd like to hear the same from you.

David Levine:

Well, thanks for having me and it's good to be here. Our panel was about governance, what do you do with governance in your plan? What's an advisor's role? Things to watch out for, and what not to do. It was a really good discussion. You moderated it, so I'm sure you have some real insight here.

Phyllis:

So, yes, our panel was called risky business.

David Levine:

It was risking business.

Phyllis:

Well, I like risky better.

David Levine:

I like risky better too. So those with risking [inaudible] has the sunglasses to match.

Phyllis:

Thanks for pointing that out. So why effective plan governance and fulfilling fiduciary obligations matter? And really, as I said, our audience here today is plan sponsors. So give them a few tidbits from our panel. What are some of the main takeaways, and what do you think sponsors would want to know from a fiduciary standpoint?

David Levine:

Absolutely. I think one of the main things that really stands out to me from the panel is the discussion of meeting minutes. We talked about, who does them? Does the advisor or do them? Does the committee? Does the lawyer? To me the answer is all of the above. Each case is different. It was great because each of our panelists had a slightly different perspective of who and what was done by each person. And I think that it's important to keep in mind who, when, where and why, the old story to figure out exactly who's responsible. As long as you don't have gaps, I don't think there's one standard rule.

And another big takeaway that came out for me was, and Phyllis, you made this comment. If someone writes the meeting minutes, there's always got to be someone who reviews and reads it, because in the long run a committee, they're the fiduciaries who usually approve them minutes. Now, there's always edge cases, but that's the main case, but the committee has to approve it. So if you're the sponsor and I'm really going to say the committee, the buck does stop with you. And it's also good to have different insight into how these minutes are written and get different perspectives. Because, we know that many committees have vibrant discussions, but in the end they try to do what's right for participants and beneficiaries.

Phyllis:

I thought that was a great discussion about meeting minutes also. So were you able to catch some of the other panels, or some of the other industry folks? Because, this is my goodness, the first time we've all been together in literally years. And what kind of takeaways are you hearing topically? What's going on since two years ago when we were at the summit?

David Levine:

Well, a lot has certainly changed in the last couple of years. A couple things, first, I think from a planned sponsor perspective, it's understanding the broader changes in the industry. Two years has been a lot of time. There's been a lot of mergers and acquisitions and you may well say, I'm a sponsor, why should I care? But it means your record keeper may be merging or changing. You may be switching to a different record keeper. There have been many advisor and consultant mergers, even your advisor might have changed. So there's so many different changes going on at this point, your service providers, your contracts, and what you're actually are agreeing to hire and pay for could be changing. I admit there's a lot of good things that came out of this. You can get better technology, more efficiency, better systems, resolutions of problems that may have plagued the industry.

There's a lot of things of improvement, because we've seen the convergence of focus on overall wellness, whether it's health, retirement, how do we look out for people? But on the flip side, there are some who say that the mergers have their drawbacks, changes in choice. There are some who say, I want to have individual vendors with this specialty area. There's some who say I like aggregated vendors, so I'm hearing a lot of discussion on this. Let me give an example of this. If you're a planned sponsor, do you want the person who does your retirement work to do your health work? And who do you want for your wellness vendor if you have some? Some people say, yes, some people say, no. Definitely, as a lawyer it is not my place to pick winners and losers on this topic. But that's the example of understanding what is going on in the market, and why it's relevant to a plan sponsor.

When you're dealing with litigation, the plaintiffs often say, why did you do this? Were you asleep at the switch? Were you on top of things? And it's important to keep things in mind. Also, the last thing I'll mention is there's been a lot more litigation during this time. And I think a takeaway for plan sponsors is, each case has very unique facts oftentimes. Getting lost in the weeds of the case for me is not

necessarily where I begin, but I look at the themes. And it's important to say, what can I learn from these cases, and how do I grow, and do I evolve my process? Sometimes the plaintiff's lawyers will say, this is the way things should be done. But in reality, there's no one hard black and white in a lot of these cases, instead you just need to figure out what works best for you and what you think is prudent.

Phyllis:

I think that's a great point, especially around everybody getting into these gray areas where they are maybe trying to figure out... And if you are a plan sponsor, you're trying to figure out not only who's doing what, but who's doing it well. So what would be your top piece of advice for plan sponsors based on things you've heard today, and just things that are going on, and your personal knowledge with your clients? What do you think they need hearing?

David Levine:

For me, I would start with the sky is not falling. Unfortunately with changes in the industry and just, this is a business, there's always something new. There's always a new shiny penny. Some of these new shiny pennies are outstanding and of a great value to participants and beneficiaries, but some of them may not be right for you. The reality is I hear plan sponsors talk about all these things, and they know their fiduciaries. And underneath it all, the standard prudence approach, what's your process wide understanding? What's the money flow? What's the business? What am I getting? What's the value? What's the cost? It's all the same thing. It's hard to say this, but it's not rocket science a lot of the time. Yes, each different product can have unique questions, and as I said, no one right way to approach things, but if you're used to applying that standard process, you can apply it consistently regardless on whether it's something new today or new 10 years from now.

Phyllis:

Great. Well, so our last question, which we ask all the participants in our podcast is, because retirement is personal, we'd like to know what does retirement look like for you, David Levine?

David Levine:

To me, it looks like being on a bicycle. To me, bicycling is the place where I find my moment of Zen. And between that and time with my family, it provides me happiness. Retirement is certainly about economics, and health and wellbeing, but those two things really epitomize what retirement is. I want to enjoy it. And I know I can't envision myself sitting around eating bon-bons all day, but I know that I'll want to enjoy the time and just relax. We'll see how it goes, but that's a while off.

Phyllis:

David, thank you so much for joining Jennifer and me today, and CAPTRUST thanks you also for your great observations from the conference, and we look forward to including you in the future on a Revamping Retirement segment. Thanks, and thanks to everybody who's listening.

Vo Artist:

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