



FIDUCIARY PLAN GOVERNANCE, LLC

# **Retirement Plans, The Wizard of Oz & You: Understanding the Ethical Imperative of Fiduciary Responsibility**

**Mark D. Mensack, AIFA®, GFS®**

**April 2013**

# The Wizard of Oz & Retirement Plans

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“Pay no attention to that man behind the curtain.”

**Professor Marvel’s Magical Elixir aka Snake Oil** comes from the 19th-century American practice of selling cure-all elixirs in traveling medicine shows. Snake oil *salesmen would falsely claim that the potions would cure any ailments.* Now-a-days it refers to fake products.

*Urban Dictionary*



# AGENDA

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- Moral Hazard
- Ethics on Wall Street?
- Ethical vs. Legal Obligations
- Negative & Affirmative Ethical Obligations
- Voluntary UNinformed Consent
- Suitability vs. Fiduciary Standards
- Suitability Standard in Action
- The Moral Hazard of Suitability



# Moral Hazard

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**Information Asymmetry** occurs when one party to a transaction has less information upon which to base a decision than the other party.

**Risk Asymmetry** occurs when the risk faced by the parties involved is significantly lop-sided.

In the 401k arena, 401k service providers typically have greater knowledge regarding the 401k product and a plan sponsor's fiduciary duties than the plan sponsor.

A 401k service provider faces minimal, if any, risk in selling an imprudent 401k product, while a plan sponsor faces great risk for choosing an imprudent 401k product.



# Moral Hazard

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“Moral hazard may exist anytime there is *difficulty or cost* associated with monitoring and enforcing the behavior of a party with interests that are in conflict with our own.”

*Richard Lindsey, former Director, SEC Division of Market Regulation*

Moral hazard is "any situation in which one person makes the decision about how much risk to take, while someone else bears the cost if things go badly.“

*Economist Paul Krugman*



# Ethics on Wall Street?



*"The First Rule for Fiduciaries Is to Put Their Interests Last."*

# Ethics on Wall Street?

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## Goldman Sachs Business Principles

- "Our clients' interests always come first. Our experience shows that if we serve our clients well, our own success will follow."
- "We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard."
- "Integrity and honesty are at the heart of our business."



# Ethics on Wall Street?

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**“Puffery”** has been described by one legal scholar as vague statements of corporate optimism that is often characterized as “so obviously unimportant to a reasonable investor that reasonable minds could not differ.”

*Dan Solin in “‘Puffery’ Can Blow Away Your Retirement Goals”*

**Puffery** consists of promotional claims that no one out of diapers takes literally. Your two-year old might believe that polar bears enjoy sipping Coca-Cola. But you know better.”

*Donald J. Boudreaux*





# Ethics on Wall Street?

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Goldman's attorney's argument against an investor class action:

"Further, the vast majority of the supposed "misstatements" alleged in the Complaint -- e.g., regarding the firm's "integrity" and "honesty" -- are nothing more than classic "*puffery*" or statements of opinion that, under well-settled law, cannot give rise to a securities fraud claim."

*United States District Court for the Southern District of New York  
(In re Goldman Sachs Group, Inc. Securities Litigation: Master File No. 1:10-cv-03461)*



# Ethics on Wall Street?

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"[I]f Goldman's claim of "honesty" and "integrity" are simply puffery, the world of finance may be in more trouble than we recognize."

*U.S. District Judge Paul A. Crotty, June 21, 2012*



# Ethics on Wall Street?

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## Haddock v. Nationwide

Haddock alleged that Nationwide was a fiduciary and its acceptance of revenue sharing compensation from the mutual funds within the Nationwide product was in violation of ERISA's exclusive benefit rule.

Nationwide filed a counter-class action against all of the Haddock trustees arguing “that, to the extent the plans were harmed by its revenue sharing arrangement, the trustees (its clients!) were responsible to reimburse them because of their “...failure to exercise reasonable prudence and care.”

“If our conduct caused harm to the plan participants, it was our clients' fault for not being smart enough to put a stop to it.”

*Dan Solin, Nationwide Tosses Its 401(k) Clients Under the Bus*



# Ethical vs. Legal Obligations

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“...our free market economy and, indeed, our whole way of life, are built on *trust* – *trust in the markets*, and *trust in our fellow citizens*.”  
*FBI Director Robert Mueller*

“Ethical misconduct doesn't need to reach criminal levels in order to harm investors. What we often see is a culture of neglect or rationalization, where the pursuit of profit obscures a sense of any *moral obligation* to the investor.”  
*Mary Shapiro, Commissioner of the SEC*



# Ethical vs. Legal Obligations

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Gyges was a shepherd for the King. One day, there was an earthquake while Gyges was out in the fields, and he noticed that a cave had opened up on the side of a mountain. When he went to investigate, he discovered the tomb of an ancient King, and on the finger of the corpse was a gold ring. He took the ring and soon discovered that it allowed the wearer to become invisible. Gyges realized that if he was invisible, he could do whatever he desired with no fear of punishment. The next time he went to the palace to give the king a report about his sheep, he put the ring on, killed the king, seduced the queen, and ruled the land. *Plato, The Republic*

*What would you do today with the ring, that you would not have done yesterday without it?*



# Ethical vs. Legal Obligations

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## Prohibited Transactions

ERISA 406(a)(1)(c) prohibits plan assets to be used to pay ANY party in interest for ***ANYTHING!*** Violation of this statute is a prohibited transaction!

ERISA 408(b)(2) provides a prohibited transaction exemption only if three criteria are met:

1. The services must be ***necessary*** for the operation of the plan;
2. The services must be furnished under a ***contract or arrangement which is reasonable*** and;
3. No more than ***reasonable compensation*** is paid for the service.



# Ethical vs. Legal Obligations

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**Duty of Exclusive Purpose** - “A fiduciary shall discharge his duties . . for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
- (ii) **defraying reasonable expenses** of administering the plan. . . .”

*ERISA §404(a)(1)(A)*

A penny saved is a penny earned.

*Ben Franklin*

1% in excess fees over the average American’s working lifetime,  
reduces their nest egg at retirement by 28%.

*DOL, EBSA Website*



# Ethical vs. Legal Obligations

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A fiduciary is *personally liable for any losses* the plan incurs by reason of its breach. A fiduciary who has breached its duty is liable to restore to the plan any profits the fiduciary made through its use of plan assets and for any other equitable or remedial relief deemed appropriate by the court, including removal of the fiduciary.

*ERISA § 409*





# Ethical vs. Legal Obligations

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Because you are dealing with others' money either directly or indirectly, *you have an obligation not to abuse the trust* that others have either explicitly or implicitly placed in you to treat them fairly.

*Sarah Peck, Investment Ethics*

“A broker has a fiduciary duty to the client where the broker knows, or should have known, *that trust has been placed* in that broker.”

*Gouger v. Bear Stearns, 823F. Supp. 282, 288 (E.D. Pa. 1993))*



**Is Your Company's 401(k) Plan Operated by  
any of these Insurance Companies?**

**TRANSAMERICA  
LINCOLN FINANCIAL GROUP  
HARTFORD FINANCIAL GROUP  
NATIONWIDE  
AXA, OR  
JOHN HANCOCK**

If So, You May Have Legal Claims Against, Transamerica, Lincoln Financial Group, hartford financial Group, Nationwide, AXA or JohnHancock.

These potential claims are related to fees and charges taken from retirement assets by Transamerica, Lincoln Financial Group, Hartford Financial Group, Nationwide AXA, or John Hancock.

For a free consultation to learn more about your potential claims contact Robert L. Lakind, Esq. at (609)276-0400 or [rlakind@szaferman.com](mailto:rlakind@szaferman.com)

**KNOW YOUR RIGHTS! WE CAN HELP!**

CONTACT THE FIRM OF  
**SZAFERMAN, LAKIND, BLUMSTEIN & BLADER, P.C.**

Attn: Robert Lakind, Esq.

[rlakin@czaferman.com](mailto:rlakin@czaferman.com)

1-609-275-0400

1-888-534-2571

*Newark Star-Ledger  
August 28<sup>th</sup>, 2010*



# Negative & Affirmative Ethical Obligations

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West Point Honor Code:

**A Cadet will not lie, cheat, steal, or tolerate those that do.**

“Fiduciaries are not sued for what they do, instead they are sued for what they do not do.”

*Fred Reish*



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*"The First Rule for Fiduciaries Is to Put Their Interests Last."*

# Negative & Affirmative Ethical Obligations

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## ASPPA Code of Professional Conduct

- Professional Integrity
  - **Shall perform** services with *honesty, integrity*, skill and care.
- Disclosure
  - **Shall make** full & timely disclosure...of all sources of compensation or other material consideration that the member or the member's firm may receive...
- Conflicts of Interest
  - *If the member is aware of any significant conflict between the interests of a principal and the interests of another party, the member should advise the principal of the conflict...*

*Does a plan sponsor's ignorance of hidden fees pose a conflict of interest?*



# Negative & Affirmative Ethical Obligations

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Because investments are complicated, you have *an obligation not to* knowingly engage in an investment transaction either you or others do not sufficiently understand. *This includes knowing the underlying source of returns or fees charged.*

*Investment Ethics, Sarah Peck*

“48 percent of plans did not know if their service providers had revenue sharing arrangements with other providers.”

*Government Accounting Agency, April 2012*



# Voluntary Informed Consent

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1. “Neither buyer nor seller is compelled to enter into the exchange as a result of *coercion, severely restricted alternatives, or other constraints* on their ability to choose.”
2. “Both the buyer and the seller must *understand* what they are giving up and what they are receiving in return.”
3. “Both buyer and seller are able at the time of the exchange to make *rational judgments* about its *costs & benefits*.”

*A Modal Evaluation of Sales Practices*, David M. Holley



# Voluntary **UNinformed** Consent

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“Plan fees are eating up thousands of dollars of employees’ retirement savings *without them even knowing it.*”

*Alison Borland, retirement strategy leader at Hewitt Associates, LLC.*

“Regulators and employers were unconcerned about pervasive conflicts of interest; excessive, *hidden fees* and wrongdoing that *resulted in billions being skimmed from 401k accounts.... Fraud of this magnitude, involving trillions, makes Madoff look like chicken feed.*”

*Edward Siedle, 401k industry critic and former SEC attorney*



# Voluntary **Uninformed** Consent

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- [Rule 408(b)(2)] “Regulations permit *disclosures that are a patchwork*, requiring plan sponsors and participants to do *a scavenger hunt without the clues to put the pieces together...*”  
*Lou Harvey, Dalbar, Inc.*
- “The *burden of having to reasonably believe* that service providers disclosed the requisite information *is of great concern.*”  
*Jeff Mamorsky*
- “That, in effect, *requires the employer plan sponsor to retain experts to ascertain compliance* with the regulations and *identify all “hidden” fees.*”  
*Jeff Mamorsky*





# Voluntary **UN**informed Consent

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Regarding Rule 408(b)(2), “it is amazing how much effort and creativity has been put into the creation of many fee disclosures making it extremely difficult and in some cases impossible to understand what the fees are, even for someone like myself who knows what to look for.”

“Many vendors are going to go down kicking and screaming before succumbing to full transparency.”

*Craig Freedman, Retirement Readiness Institute*



# Disclosure ≠ Voluntary **Informed** Consent

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“In 2011, when viewed in relation to total MSSB client assets of in excess of \$1.6 trillion, *the payment made by each\* such service provider...equaled an amount of not more than 31/10,000 of one basis point (otherwise expressed, 31/1,000,000 of one percent)*. We do not believe that such payments were made in connection with retirement plan business specifically, and were certainly not made in connection with any particular retirement plan, but, for perspective, the amount of retirement plan assets included in the total MSSB client asset number set forth above is approximately \$112 billion.”

*\*28 service providers listed below this paragraph*

*Could a plan sponsor adhere to Rule 408(b)(2) using this disclosure?*



# Disclosure ≠ Voluntary **Informed** Consent

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“In 2011, when viewed in relation to total MSSB client assets of in excess of \$1.6 trillion, the payment made by each such service provider...equaled an amount of not more than 31/10,000 of one basis point (otherwise expressed, 31/1,000,000 of one percent).”

$$31/10,000 = 0.0031\% \text{ or } 0.00000031$$

$$\$1,600,000,000,000 \times 0.00000031 = \$496,000$$

\$496,000 from EACH

28 listed (“but other providers may have made similar payments.”)

$$28 \times \$496,000 = \$13,888,000?$$



# Disclosure ≠ Voluntary Informed Consent

## FOOTNOTES FOR INVESTMENT FUNDS PERFORMANCE

For Period From July 01, 2010 through September 30, 2010

Contract Number 995814-000

<sup>40</sup> Transamerica Aggressive Growth Ret Opt- Effective 01-29-07, the Transamerica Aggressive Growth Fund changed its name to the Transamerica Aggressive Growth Ret Opt.

<sup>41</sup> Transamerica Balanced Ret Opt- Effective 01-29-07, the Transamerica Balanced Fund changed its name to the Transamerica Balanced Ret Opt.

<sup>42</sup> Transamerica Core Equity Ret Opt- Effective 01-29-07, the Transamerica Core Equity Fund changed its name to the Transamerica Core Equity Ret Opt. Effective 02-11-02, the Transamerica Value Fund changed its name to the Transamerica Core Equity Fund to be consistent with its expanded investment criteria.

<sup>43</sup> Transamerica Partners Core Bond Ret Opt - The Transamerica Partners Core Bond Ret Opt invested in the Investor Class Shares of the underlying mutual fund prior to 05-14-10 but currently invests in the Transamerica Partners Core Bond - Collective Trust Fund. As of this date, the Separate Account charges changed. The IM and Admin Charges are 0.93%. No adjustments have been made to reflect the difference between the charges and expenses for the Separate Account invested in the mutual fund in the collective trust fund. This Separate Account was named Diversified Investors Core Bond Ret Opt before 06-30-08.

The IM and Admin Charges are 0.93%

<sup>44</sup> Transamerica Partners High Quality Bond Ret Opt - The Transamerica Partners High Quality Bond Ret Opt invested in the Investor Class Shares of the underlying mutual fund prior to 05-14-10 but currently invests in the Transamerica Partners High Quality Bond - Collective Trust Fund. As of this date, the Separate Account charges changed. The IM and Admin Charges are 0.94%. No adjustments have been made to reflect the difference between the charges and expenses for the Separate Account invested in the mutual fund in the collective trust fund. This Separate Account was named Diversified Investors High Quality Bond Ret Opt before 06-30-08.

The IM and Admin Charges are 0.94%

<sup>45</sup> Transamerica Partners Large Core Ret Opt - The Transamerica Partners Large Core Ret Opt invested in the Investor Class Shares of the underlying mutual fund prior to 05-14-10 but currently invests in the Transamerica Partners Large Core - Collective Trust Fund. As of this date, the Separate Account charges changed. The IM and Admin Charges are 1.11%. No adjustments have been made to reflect the difference between the charges and expenses for the Separate Account invested in the mutual fund in the collective trust fund. This Separate Account was named Diversified Investors Large Core Ret Opt before 06-30-08.

The IM and Admin Charges are 1.11%

<sup>46</sup> Transamerica Partners Large Value Ret Opt - The Transamerica Partners Large Value Ret Opt invested in the Investor Class Shares of the underlying mutual fund prior to 05-14-10 but currently invests in the Transamerica Partners Large Value - Collective Trust Fund. As of this date, the Separate Account charges changed. The IM and Admin Charges are 0.97%. No adjustments have been made to reflect the difference between the charges and expenses for the Separate Account invested in the mutual fund in the collective trust fund. This Separate Account was named Diversified Investors Large Value Ret Opt before 06-30-08.

The IM and Admin Charges are 0.97%

<sup>47</sup> Transamerica Partners Mid Value Ret Opt - The Transamerica Partners Mid Value Ret Opt invested in the Investor Class Shares of the underlying mutual fund prior to 05-14-10 but currently invests in the Transamerica Partners Mid Value - Collective Trust Fund. As of this date, the Separate Account charges changed. The IM and Admin Charges are 1.21%. No adjustments have been made to reflect the difference between the charges and expenses for the Separate Account invested in the mutual fund in the collective trust fund. This Separate Account was named Diversified Investors Mid-Cap Value Ret Opt before 06-30-08. The historical return prior to 09-30-01 is calculated based on the Mid Cap Value Mutual Fund (Institutional Shares) Composite performance of the initial sub-adviser (Cramer, Rosenthal, McGlynn, LLC), but is adjusted to reflect the 1.25% total operating expenses of the underlying mutual fund.

The IM and Admin Charges are 1.21%

# Revenue Sharing ~ Voluntary Informed Consent

## American EuroPacific Fund

	A	R-1	R-2	R-3	R-4	R-5	R-6
Management fees	0.43%	0.43%	0.43%	0.43%	0.43%	0.43%	0.43%
Distribution and/or service (12b-1) fees	0.24	1.00	0.75	0.50	0.25	none	none
Other expenses (Sub-TA Fees)	0.18	0.21	0.48	0.22	0.18	0.13	0.09*
Total annual fund operating expenses	0.85	1.64	1.66	1.15	0.86	0.56	0.52



*"The First Rule for Fiduciaries Is to Put Their Interests Last."*



# Revenue Sharing ~ Voluntary Informed Consent

Funds	Est. Assets	Total Exp Ratio	12b1	Sub TA	Mgmt Fee	12b1 Revenue	Sub TA Revenue
AB Bal Wealth Stra R	\$9,482.59	1.37%	0.50%	0.25%	0.62%	\$47.41	\$23.71
AB Wealth Presv Strat R	\$2,199.59	1.40%	0.50%	0.25%	0.65%	\$11.00	\$5.50
AB Wealth Apprec Stra R	\$62,655.28	1.48%	0.50%	0.25%	0.73%	\$313.28	\$156.64
BR MidCap Value Equity A	\$94,798.81	1.25%	0.00%	0.25%	1.00%	\$0.00	\$237.00
GS Growth Opportunities	\$213,345.45	1.47%	0.25%	0.15%	1.07%	\$533.36	\$320.02
AIM MidCap Core Equity R	\$283,636.51	1.47%	0.50%	0.25%	0.72%	\$1,418.18	\$709.09
AIM Basic Value	\$149,911.75	1.39%	0.50%	0.25%	0.64%	\$749.56	\$374.78
Opp Global Fund N	\$197,260.64	1.46%	0.50%	0.25%	0.71%	\$986.30	\$493.15
Allianz CCM Cap App - A	\$30,252.44	1.07%	0.25%	0.25%	0.57%	\$75.63	\$75.63
Pioneer Small Cap Value A	\$160,740.80	1.49%	0.25%	0.25%	0.99%	\$401.85	\$401.85
PIMCO Real Return Bond A	\$168,039.87	0.90%	0.25%	0.10%	0.55%	\$420.10	\$168.04
Amer. Funds Amcap R1	\$272,775.24	1.47%	1.00%	0.10%	0.37%	\$2,727.75	\$272.78
Amer Funds U.S. Gov't Sec.	\$107,559.77	1.65%	1.00%	0.10%	0.55%	\$1,075.60	\$107.56
Amer. Funds Cash Mgmt	\$48,947.01	1.50%	1.00%	0.25%	0.25%	\$489.47	\$122.37
Amer Funds Bal Fund R1	\$189,187.87	1.38%	1.00%	0.25%	0.13%	\$1,891.88	\$472.97
Vanguard Total Intl Stock Idx	\$8,038.58	0.27%	0.00%	0.00%	0.27%	\$0.00	\$0.00
Vanguard Total Stock Mkt	\$8,403.96	0.15%	0.00%	0.00%	0.15%	\$0.00	\$0.00
<b>Total</b>	<b>\$2,007,236.16</b>	<b>1.25%</b>				<b>\$11,141.38</b>	<b>\$3,941.08</b>

FPG

*"The First Rule for Fiduciaries Is to Put Their Interests Last."*

# Revenue Sharing ~ Voluntary **Informed** Consent

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- \$7,726.30                      Hard Dollar
- \$11,141.38                    12(b)(1) fees
- \$3,941.08                    Sub-TA fees
- \$22,808.76                    Total (67.7% higher )
- \$15,082.46                    Unknown to Plan Sponsor



# Penalty of Voluntary **UNinformed** Consent

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What if the plan sponsor fails to spot excessive Compensation?

- ✓ Both the plan sponsor and the service provider engaged in a PT.
- ✓ The service provider's PT is the receipt of the excessive compensation;
- ✓ The plan sponsor's PT is that it **allowed the plan to pay unreasonable** compensation.

**“In these circumstances, there is no relief for the plan sponsor or for the service provider.”**

*Fred Reish, Esq.*





# Suitability & Fiduciary Standards

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“Make a habit of two things: to help, or at least, to do no harm.”

*Hippocrates 400BC*

***Beneficence:*** an affirmative obligation that means “do good.”

- One ought to act in ways that promote the well-being of others.

***Non-maleficence:*** a negative obligation that means “do no harm.”

- One ought to act in ways that do not cause harm to others.\*

***\*Includes the negative obligation not to do harm inadvertently or by carelessness, or malice or negligence.***



# Suitability & Fiduciary Standards

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**The Suitability Standard:** a broker must have a reasonable basis to believe that a recommended investment is suitable given the client's objectives.

Or

**Non-Maleficence / Do no harm**

**The Fiduciary Standard:** an advisor must put the client's interests above their own, and act in the client's best interest.

Or

**Beneficence / Do good**



# Suitability & Fiduciary Standards

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## The 2010 ORC/Infogroup Survey

- 60% of U.S. investors mistakenly think that insurance agents have a fiduciary duty to their clients.
- 66% of U.S. investors are incorrect in thinking that stockbrokers are held to a fiduciary duty.
- 76% of investors are wrong in believing that “financial advisors” – a term used by brokerage firms to describe their salespeople - are held to a fiduciary duty.



# Suitability & Fiduciary Standards

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## Fiduciary Standard under the Investment Advisors Act

- Registered Investment Advisor
- Investment Advisor

## Suitability Standard under the Securities Exchange Act

- Registered Representative
- Stockbroker

## Marketing Terms not found in the Law

- Financial Consultant
- Financial Advisor
- Co-fiduciary



# Suitability vs. Fiduciary Standards

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“a fiduciary’s duties are the highest known to the law, a trustee is held to something stricter than the morals of the market place...”

*Donovan v. Bierwirth, 680 F.2d 263 (2nd Cir. 1982)*

**What is suitable when dealing with a client who is a fiduciary?**

For example, a 401k plan sponsor.

**Non-Maleficence / Do no harm**

**or**

**Beneficence / Do good**

**Which protects a plan sponsor from moral hazard?**



# Suitability & Fiduciary Standards

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"Many brokers and insurance companies "throw around the "fiduciary" word with abandon and mislead employers into believing they will share legal responsibility in the event of a lawsuit concerning plan choices."

*Dan Solin, The 401(k) Sucker Punch*

Regarding *Phantom Fiduciaries*: "They get to throw around the word "fiduciary"--without being on the hook for any real fiduciary responsibility (and therefore liability) to plan fiduciaries."

*W. Scott Simon, Fiduciary Focus: Non Fiduciary Investment Consultants*



# Suitability Standard in Action

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“If I know he’s a salesman, I will evaluate his recommendations differently,...When he is an adviser, I don’t question him, I assume he is a *better expert* than I am.”

*Professor Tamar Frankel, Boston University*

“The *greatest risk* the average investor runs is the *risk of being misled* into thinking that the broker is acting in the best interest of the client, as opposed to acting in the firm’s interest.”

*Professor Arthur Laby, Rutgers School of Law*



# Suitability Standard in Action

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“Unless they possess the necessary expertise to evaluate such factors, fiduciaries would need to obtain the advice of a *qualified, independent expert*.”

*DOL Reg. § 2509.95-1(c)(6)*

*“For many plan sponsors, investment and other fiduciary responsibilities can seem overwhelming. That’s where we can help.”*

*“We are dedicated to making your retirement plan a success and, at the same time, helping you meet your fiduciary responsibilities.”*

*The Services Available to your 401(k) Plan*

*“When it comes to meeting your complete fiduciary responsibilities as a retirement plan sponsor, there are many considerations XYZ can help you make sense of it all.”*

*Your Responsibilities as a Retirement Plan Sponsor*





# Suitability Standard in Action

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West Point Cadets violate the Honor Code by lying if they deliberately deceive another by stating an untruth or by any direct form of communication to include *the telling of a partial truth and the vague or ambiguous use of information or language with the intent to deceive or mislead.*

At West Point, this form of lying is called “quibbling”.

Ethically speaking quibbling is called “paltering.”



# Suitability Standard in Action

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**Palter** - to intentionally deceive or mislead without making a false statement in order to advantage one's self and /or disadvantage another.

**The 401k industry is fraught with paltering and puffery  
which contributes to the moral hazard  
facing retirement plan sponsors!**



# Suitability Standard in Action

	1 mo.	3 mos.	YTD	1 yr.	3 yrs.	5 yrs.	10 yrs.	Since* Inception	Expense Ratio
Vanguard Target Retirement 2030 Ret Opt	-0.54	10.59	7.58	9.53	-3.67	N/A	N/A	1.90	0.94

Performance shown is average annual total separate account investment choice returns (except 1 month, last quarter, and year-to-date) for the period indicated, net of the total operating expenses of the separate account or underlying investment as listed on the individual investment fact sheets. Performance returns reflect reinvestment of dividends and capital gains distributions. *Application of the contract asset charge and any discontinuance charges or service fees deducted from the account would reduce this return.*

*Group Annuity 401k Participant Website*



# Suitability Standard in Action

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## Professor Marvel's Magical Elixir = Fiduciary Warranties

*“...we are committed to helping you meet the highest fiduciary standards in the investment selection and monitoring process and commit to restore losses and pay litigation costs in the event that legal action is brought against qualifying plans. Now that's security for your plan!”*

*“Review the minimum Fund requirements and a copy of the Warranty Certificate (PS 9613) to see if your plan qualifies.”*



# Suitability Standard in Action

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## Professor Marvel's Magical Elixir = Fiduciary Warranties

“Also, since past performance is not a guarantee of future results, we cannot warrant or guarantee either that any investment option will yield any specific return, or even that it will yield a positive return. *Nor does our Fiduciary Standards Warranty extend to claims that any expenses paid directly or indirectly by the Plan are reasonable.*”

*John Hancock Warranty Certificate, PS9613, 12/05 – 10024*



# Suitability Standard in Action

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## Fiduciary Delegation

ERISA §3(21) “Full-scope” Fiduciary

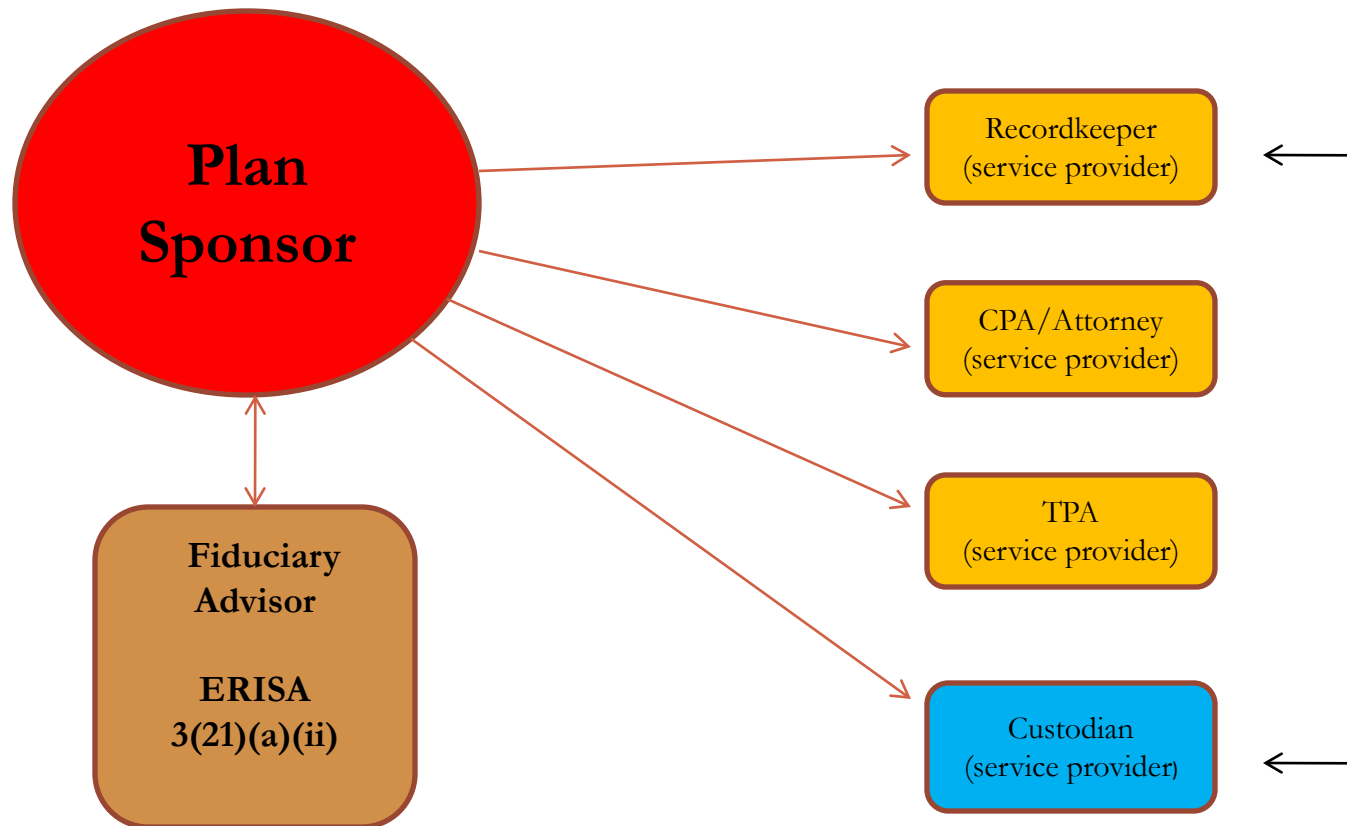
≠ ERISA §3(21)(a)(ii) Limited-scope Fiduciary

While a “Full-scope 3(21)” or ERISA 402(a) fiduciary can truly protect plan sponsors by assuming responsibility and decision making authority, a limited-scope 3(21)(a)(ii) assumes no true responsibility, and therefore, provides no protection from fiduciary liability.



# ERISA 3(21)(a)(ii) “Limited-Scope” Fiduciary

The Plan Sponsor is fiduciarily responsible for all aspects of the plan



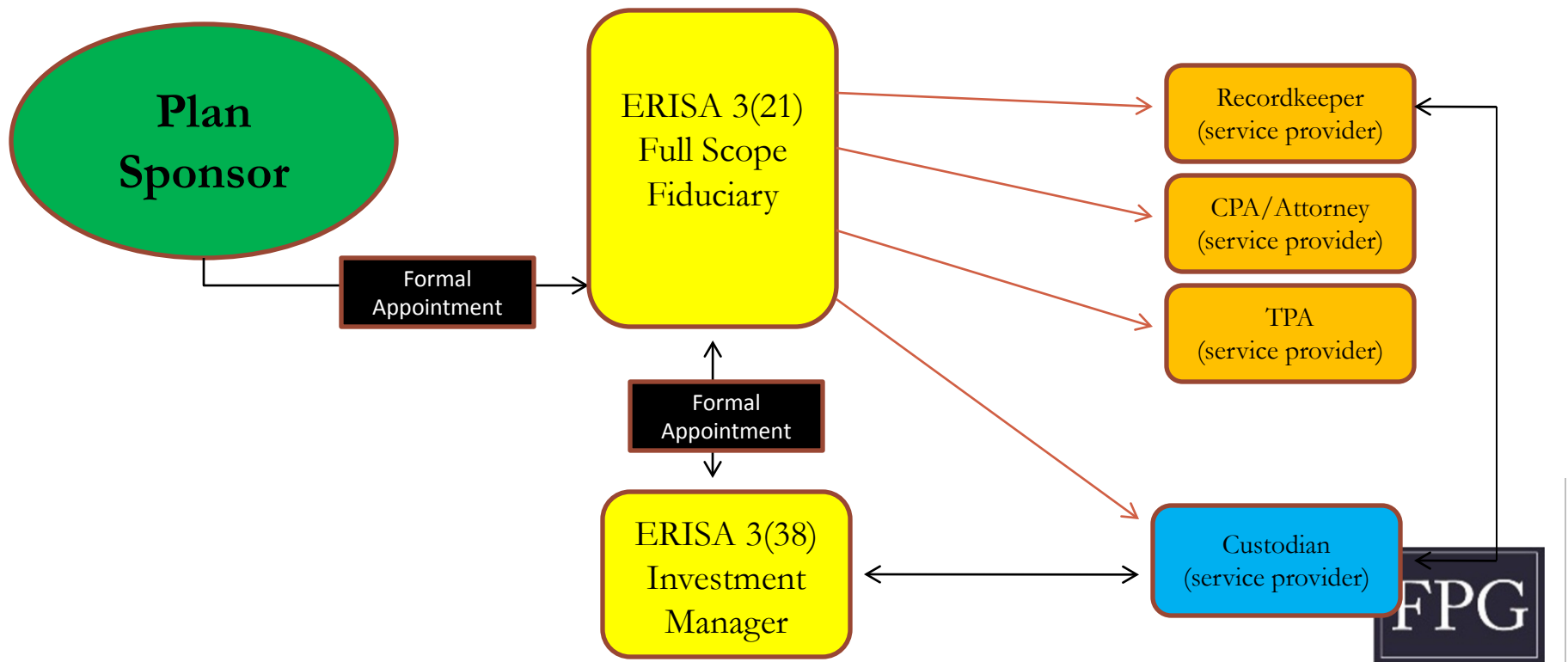
*"The First Rule for Fiduciaries Is to Put Their Interests Last."*

# ERISA § 3(21) Full Scope or §402(a) Fiduciary

Plan Sponsor

Fiduciary Line  
of Defense

Non-Fiduciary  
Service Providers



*"The First Rule for Fiduciaries Is to Put Their Interests Last."*



# Suitability Standard in Action

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An ERISA 3(38) Investment Manager assumes discretion, and therefore potential liability, for investment decisions *including the reasonableness of the fees for the investments he/she chooses.*

## Another fiduciary warranty:

“Our responsibility as a fiduciary is for the prudent investment management of the assets in participants’ accounts over which ABC Money Management has discretionary control. In that capacity, we hereby represent, warrant and covenant that: ABC Money Management satisfies the criteria in section 3(38) of ERISA to be an “investment manager.””

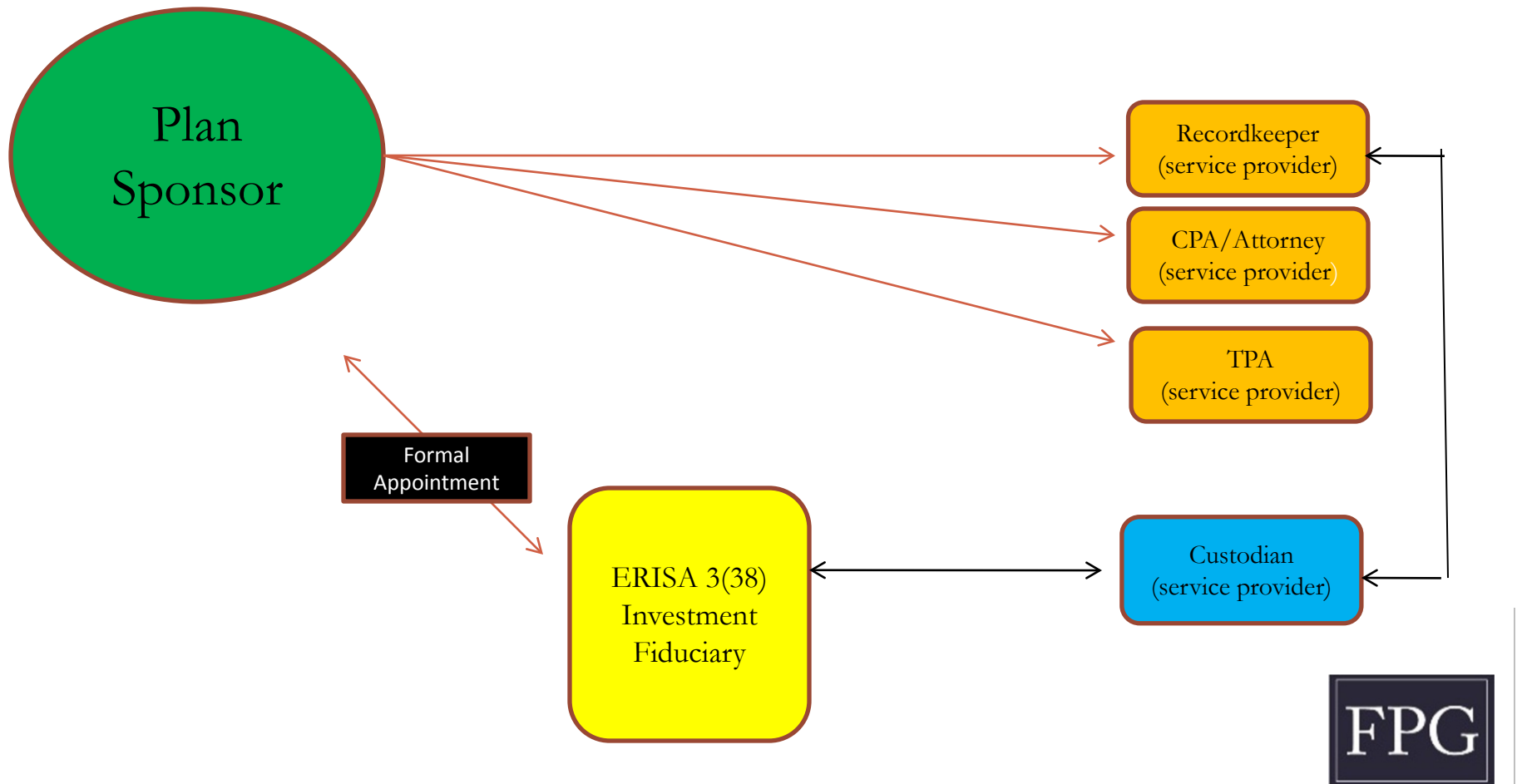


# ERISA 3(38) Investment Manager

Plan Sponsor

Fiduciary Line  
of Defense

Non-Fiduciary  
Service Providers



*"The First Rule for Fiduciaries Is to Put Their Interests Last."*

# Suitability Standard in Action

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“The Warranty *does not cover any Claim or Loss resulting from, or in any manner related to, the fees and expenses*, direct or indirect, of the investments or of the Program. This includes, for example (but is not limited to), any expenses charged to or by any mutual funds, or plan providers or advisers.”

“The Plan fiduciaries must consider any such fees and expenses and compare them to the value received by the Plan and the participants and to the cost of similar investments and services.”



# Parting Thoughts

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Encourage us in our endeavor to live above the common level of life. Make us to choose the harder right instead of the easier wrong, and never be content with a half-truth when the whole can be won.

*West Point Cadet Prayer*



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**Fiduciary Plan Governance, LLC** nor **Mark D. Mensack, LLC.** are investment advisory firms and do not provide any investment-related services. We are an expert resource actively engaged in advising, training and supporting broker/dealers, registered representatives, registered investment advisors, trustees and other fiduciaries in effectively meeting their responsibilities.

Please contact us for further information on how we can strengthen and broaden your professional services. Our team is looking forward to working with you.

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