BREAKING DOWN THE MANY "FIDUCIARY" ROLES, OBLIGATIONS & SERVICE MODELS

Dr. Gregory W. Kasten, Chief Operating Officer
Unified Trust Company, N.A.

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THE WORD “FIDUCIARY” IS USED OFTEN TODAY

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ERISA FIDUCIARY TYPES & ROLES

MOST

- Named Fiduciary
- QPAM
- Delegated Manager
- Functional Fiduciary
- Co-Fiduciary
- Directed Trustee

LEAST

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THE "FIDUCIARY" WORD IS USED IN MANY SETTINGS

- Too often used solely in marketing/sales to give the plan sponsor a false level of comfort without understanding the limitations of the service
- Non discretionary or "co-fiduciary" = limited status
- Delegated investment management at plan fund menu, model construction or even participant advice level
- Fully discretionary plan management (named fiduciary with allocated duty)

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ACTUAL "FIDUCIARY" VERBAL SALES PITCHES

- "We are a fiduciary with regards to the quality of our administrative services."
- "We put the client first 90% of the time."
- "It doesn't really matter because the plan sponsor is always responsible anyway."
- "We are a directed trustee which is an ERISA fiduciary."
- "We have the best fiduciary warranty in the business."
- "We do the same things a fiduciary does, only better."

PLAN SPONSORS HAVE CONFUSION ABOUT FIDUCIARY STATUS & DUTIES

Unified Trust 2009-2010 survey of 100 random plan sponsors (non Unified Trust clients) revealed startling observations:

- > 50% did not think of themselves as a fiduciary
- > 50% thought a Fiduciary Warranty would defend them from a participant lawsuit
- < 50% understood that the fiduciary must only be loyal to the plan participant
- < 50% understood that the fiduciary standard of care is that of an expert

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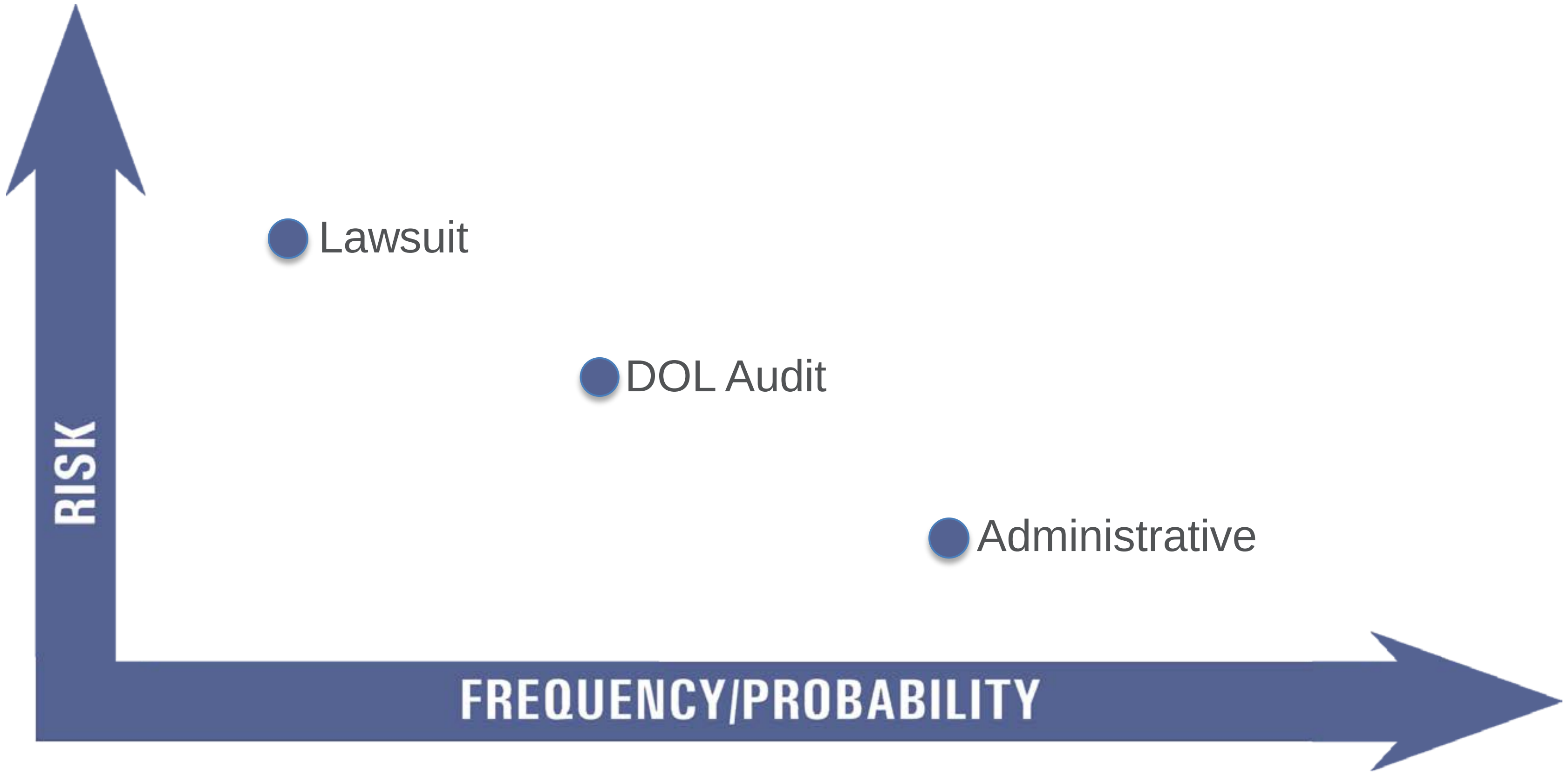
FIDUCIARY RISKS VARY IN FREQUENCY AND SEVERITY



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PLAN SPONSORS TEND TO BELIEVE FIDUCIARY STATUS IS "ALL OR NONE"

FIDUCIARY STATUS IS GENERALLY NOT "ALL OR NONE"

FIDUCIARY SERVICES ARE DELIVERED AS A CONTINUUM—NOT "ALL OR NONE"

Verbal Sales Promises "Fiduciary Warranty"	Co-Fiduciary	Delegated Investment Manager	Discretionary Plan Trustee
No Protection Limited Protection	Some Help But Very Narrow "To the Extent"	More, But Still Limited to Explicit Contract Services	Generally Complete For All Allocated Duties Named Fiduciary

ERISA ASSETS ARE HELD IN TRUST FOR A REASON

- ERISA § 403(a) generally requires all assets of an employee benefit plan to be held in trust by one or more trustees;
- The trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, unless directed;
- Participants and beneficiaries are guarantee the highest standard of conduct– “The trust fiduciary conduct is the highest duty known to the law.”
- The discretionary trustee carries the greatest burdens of care, loyalty and utmost good faith for the beneficiaries.

ERISA § 404(A)(1) "EXCLUSIVE PURPOSE"

- …a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and – for the exclusive purpose of:
- (i) providing benefits to participants and their beneficiaries; and
- (ii) defraying reasonable expenses of administering the plan;

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FIDUCIARY CONDUCT BEGINS WITH THE DUTY OF LOYALTY

- The Duty of Loyalty is to the plan participants and their beneficiaries
- ERISA § 404(a)(1)(A) requires that in discharging his fiduciary duties, the fiduciary's decisions….

"Must be made with an eye single to the interests of the <u>participants</u> and beneficiaries."

Donovan v. Bierworth, 680 F.2d 263, 271 (2d Cir.),cert. denied, 459 U.S. 1069 (1982)

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FIDUCIARY DUTIES REQUIRE AN EXPERT STANDARD OF CARE

ERISA § 404(a)(1)(B) requires that in discharging his fiduciary duties, the fiduciary must act…

"With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use with like aims."

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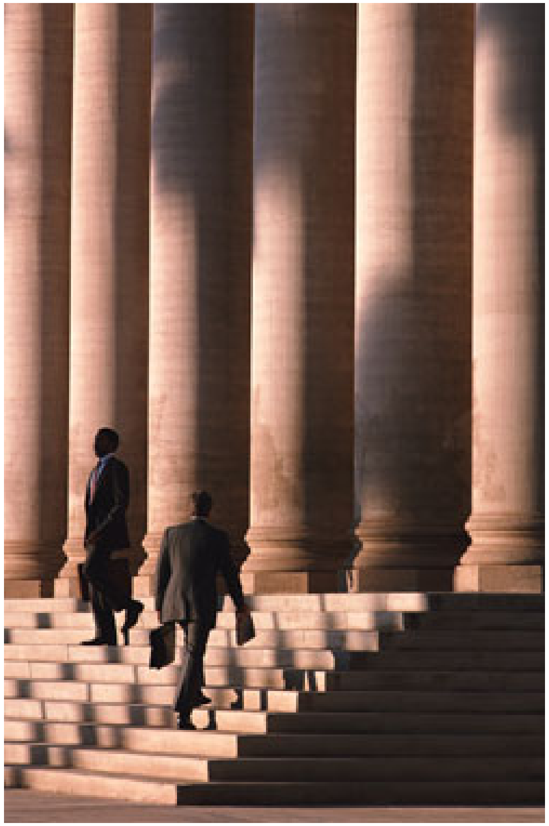
FIDUCIARY DUTY IS THE "HIGHEST KNOWN TO THE LAW"



Fiduciary duties under ERISA…

"Are the highest known to law."

Donovan v. Bierworth, 680 F.2d 263, 271 (2d Cir.),cert. denied, 459 U.S. 1069 (1982)

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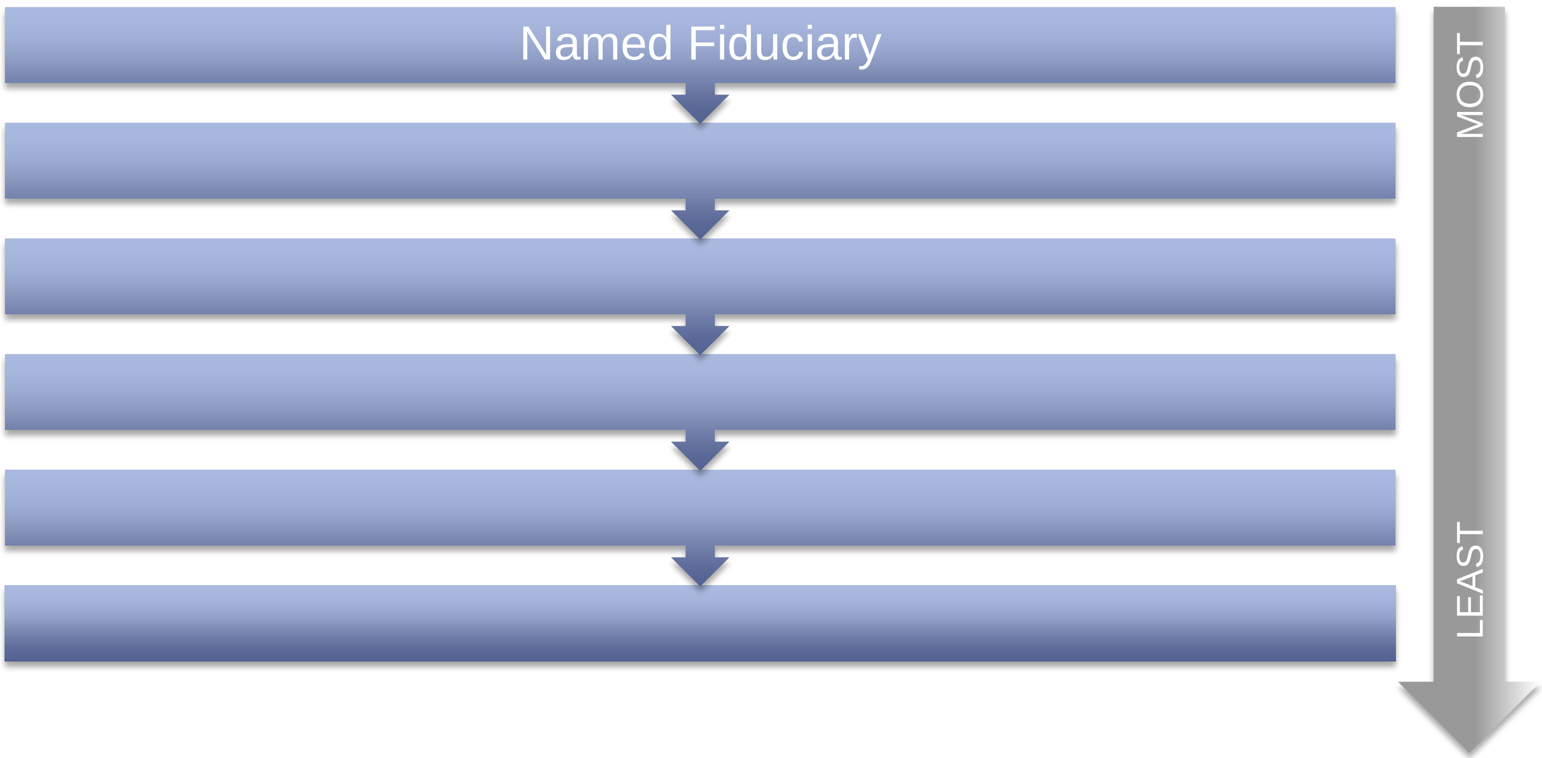
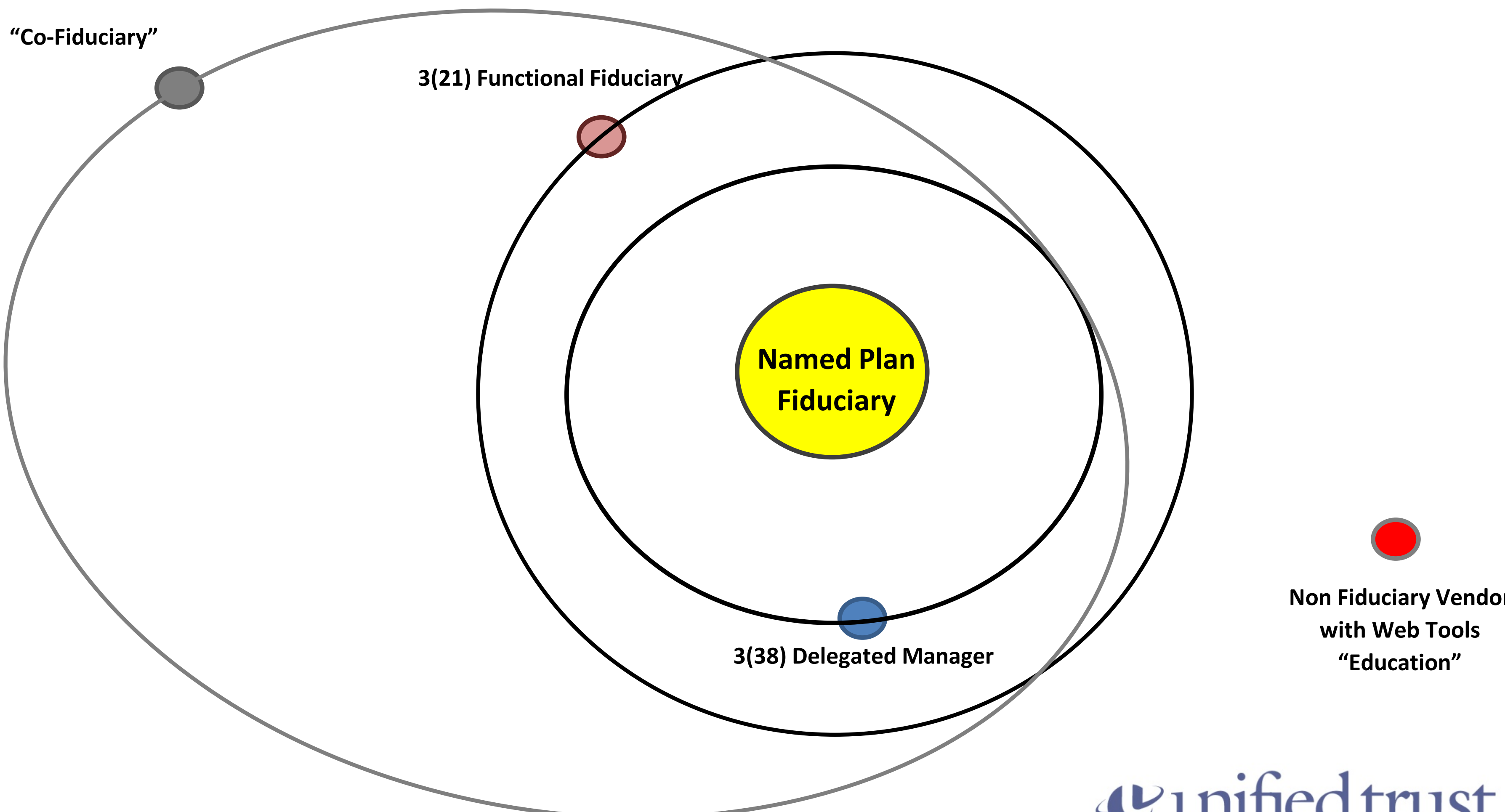
ERISA FIDUCIARY TYPES & ROLES



FIDUCIARY ROLES VARY GREATLY– THE NAMED PLAN FIDUCIARY HAS THE GREATEST IMPACT



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THE NAMED FIDUCIARY

ERISA § 402(a) requires each covered plan to provide for one or more "named fiduciaries" who jointly or severally shall have authority to control and manage the operation and administration of the plan.

402(a) NAMED FIDUCIARY

- Functions as the plan's "CEO"
- "Most important fiduciary"
- Generally named in plan document or sometimes identified by specific procedure
- Congressional intent was to focus responsibility for proper plan management
- Plan may have more than one named fiduciary and in such cases the duties are allocated

402(a) NAMED FIDUCIARY CATEGORIES

- Employer (Plan Sponsor)
- Trustee--if discretionary
- Administrator (usually the Plan Sponsor--not the TPA)
- Investment Manager (if named in plan document--but rarely done)

402(a) NAMED FIDUCIARY BROAD RESPONSIBILITIES

- To establish and, as appropriate, adjust the fundamental investment policies of the plan, including asset allocation and diversification guidelines;
- To oversee the operation and administration of a plan to assure proper payment of benefits;
- To appoint delegated investment managers for plan assets;
- To direct trustees with respect to specific investment of plan assets, when such trustees are not discretionary;
- To oversee the activities of persons to whom operation, administration and investment responsibilities have been delegated

CORPORATION (PLAN SPONSOR) AS NAMED FIDUCIARY

Some corporate officers have mistakenly believed by designating the corporation as named fiduciary they could limit their own potential individual fiduciary liability.

Courts have found that an individual performing a fiduciary function on behalf of his or her corporate employer becomes a fiduciary under ERISA and has individual liability.

Dardaganis v Grace Capital, 889, F.2d 1237 (2nd Cir) and Kayes v Pacific Lumber, 51, F.3d 1449 (9th Cir)

ALLOCATION OF DUTIES BETWEEN NAMED FIDUCIARIES

ERISA § 405(C); DESIGNATED PERSONS TO CARRY OUT FIDUCIARY RESPONSIBILITIES:

(1) The instrument under which a plan is maintained may expressly provide for procedures

(A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and

(B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

DISCRETIONARY TRUSTEE HIRING IS ALLOCATED, NOT A DELEGATED FIDUCIARY PROCESS

Allocated

Named Fiduciary 1

Named Fiduciary 2

Duty List 1

Duty List 2

"Carve Out"

Delegated

Named Fiduciary 1

Duty List 1

"Hand Off"

Delegated Fiduciary Duty

Duty List 1 Subset

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DELEGATED FIDUCIARY DUTIES

Delegated Duties….

A fiduciary is able to delegate their responsibilities.

However, except in the case of the proper appointment of an investment manager, the delegator remains responsible, which differs from the result in the case of an allocation of fiduciary duties.

Accordingly, delegation of fiduciary responsibility is generally less favored.

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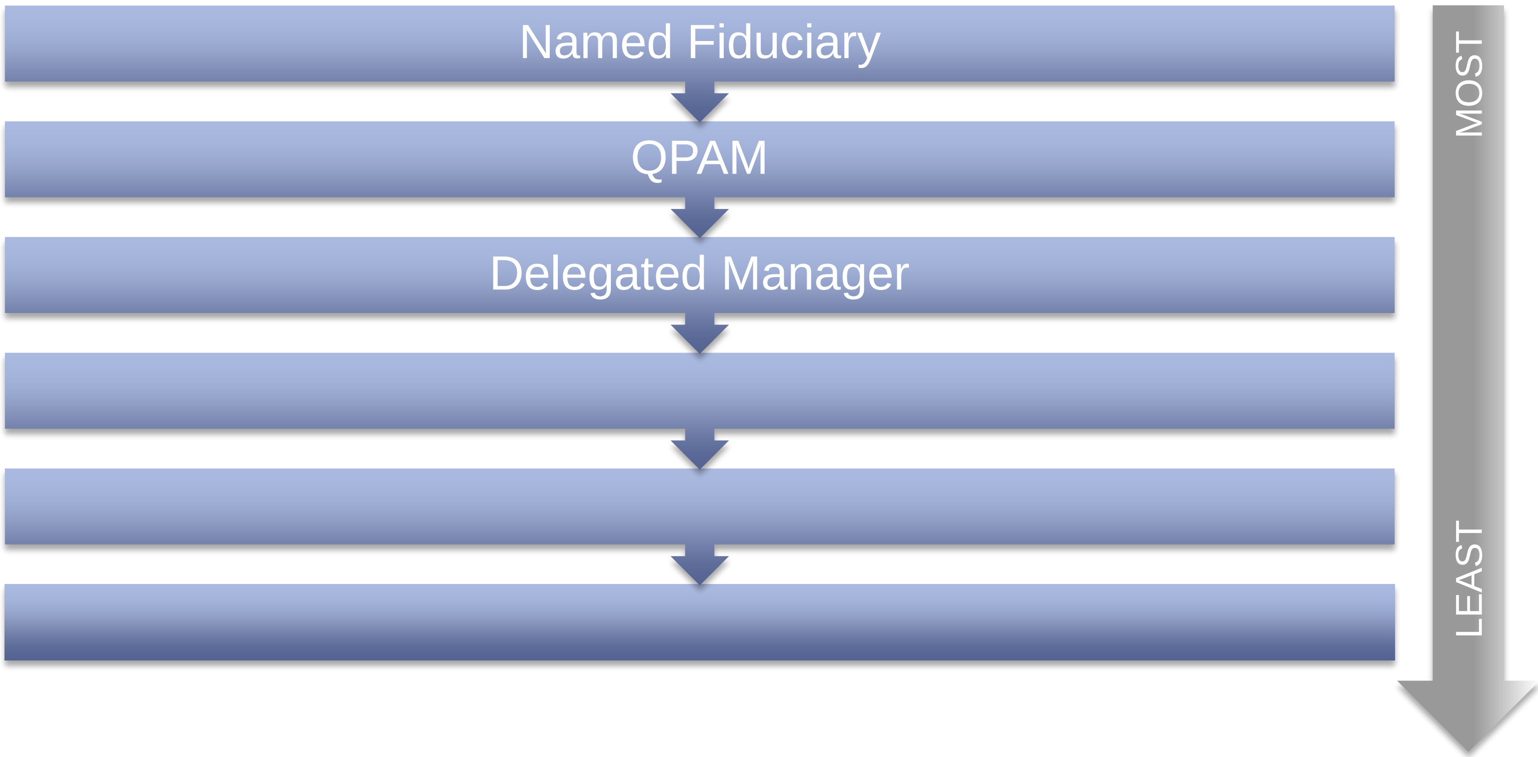
ERISA FIDUCIARY TYPES & ROLES



3(38) INVESTMENT MANAGER

- Presented as a “new” hot topic, but not
- Must be a bank, insurance company or registered investment advisor
- Must acknowledge fiduciary status in agreement
- If the Committee prudently appoints an "investment manager," it is no longer responsible for the management of the assets and is not liable for the manager‘s breaches. The Committee does retain the duty to monitor the manager. ERISA § 3(38), 402(c)(3), 405(d)(1).
- Make sure that the entity appointed as investment manager is the entity actually managing the assets -- to preserve the Committee's delegation of responsibility and to preserve the Qualified Professional Asset Manager exemption in selected cases.

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3(38) INVESTMENT MANAGER PRACTICE MODELS GENERALLY FOCUSES ON PLAN LEVEL ACTIVITY

1. Investment Policy Statement
2. Initial Fund selection
3. Ongoing fund monitoring and replacement when indicated
4. Meet with Retirement Committee quarterly
5. Document actions and record meeting minutes

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THERE ARE ADDITIONAL ACTIONS--- WHO WILL PROVIDE THESE SERVICES?

6. Model portfolio construction and monitoring
7. QDIA selection
8. ACA, EACA, and QACA Participant Notices
9. Responsible for determining if plan fees are reasonable for services
10. Duty to avoid prohibited transactions and also monitor full plan for them
11. Document prudent and appropriate portfolios at the participant level

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PRUDENT DELEGATION

1. ERISA § 405(c)(1)(A) only allows allocation among named fiduciaries
2. Delegation must be expressly provided in the governing plan document
3. ERISA § 405(c)(1)(B) only allows delegation to another fiduciary by a named fiduciary
4. The named fiduciary responsible for improperly allocated or delegated functions cannot rely on ERISA section 405(c)(2) protection, and would be susceptible to fiduciary liability

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STEPS REQUIRED TO PRUDENTLY DELEGATE TO A 3(38) MANAGER

INVESTIGATE:

- Assets with plans similar to proposed plan
- Historical results
- Experience with plans similar to proposed plan
- Proposed fee structure
- Client references
- Capitalization and financial condition
- Bonding
- Fiduciary liability insurance
- Written description of proposed investment style

Lowen v. Tower Asset Management, 829 F.2d 1209 (2d Cir. 1987)

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STEPS REQUIRED TO PRUDENTLY DELEGATE TO A 3(38) MANAGER

- Qualifications and experience of the professionals involved
- Any pertinent regulatory action or litigation
- Regulatory agencies such as SEC, DOL, and FINRA
- Business structure and affiliations
- Full disclosure of how affiliates will be involved in servicing the client and any compensation received by affiliates
- Procedures for compliance with prohibited transaction rules
- Fiduciaries must verify through independent sources
- Any information provided by vendors

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STEPS REQUIRED TO PRUDENTLY DELEGATE TO A 3(38) MANAGER

QUARTERLY MONITOR:

- Compliance with investment guidelines
- Compare investment manager reports to custodian reports
- Ensure all assets have been properly valued
- Compare portfolio returns versus benchmark
- Verify each manager’s fee computation

Lowen v. Tower Asset Management, 829 F.2d 1209 (2d Cir. 1987)

STEPS REQUIRED TO PRUDENTLY DELEGATE TO A 3(38) MANAGER

ANNUAL MONITOR:

- Review brokerage and trading practices
- Proxy voting policy and performance
- Procedures for communicating investment information
- Investment performance
- Changes in corporate or capital structure
- Changes in investment style
- Changes in brokerage affiliation or practices
- Changes in investment process
- Changes in professional staff

Lowen v. Tower Asset Management, 829 F.2d 1209 (2d Cir. 1987)

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ERISA FIDUCIARY TYPES & ROLES

- Named Fiduciary
- QPAM
- Delegated Manager
- Functional Fiduciary

MOST

LEAST

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PLAN ADMINISTRATOR AS A 3(16) ERISA FIDUCIARY

- The term “3(16) fiduciary” comes from Section 3(16) of ERISA, which provides that the term “administrator” means either the person “specifically so designated” by the plan terms or if an administrator is not so designated, the plan sponsor.
- “Plan Administrator” required to fulfill certain reporting and disclosure obligations under ERISA that are not imposed on other types of plan service providers.
- These functions make such an administrator a unique ERISA fiduciary.

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PLAN ADMINISTRATOR AS A 3(16) ERISA FIDUCIARY

- The Plan Administrator's failure to file a Form 5500 on a timely basis may result in a penalty of up to $1,100 per day.

- Failure to furnish certain required information (e.g., the plan's SPD, Form 5500 or plan document) to a participant within 30 days of a request, the administrator may be subject to a penalty of up to $110 per day.

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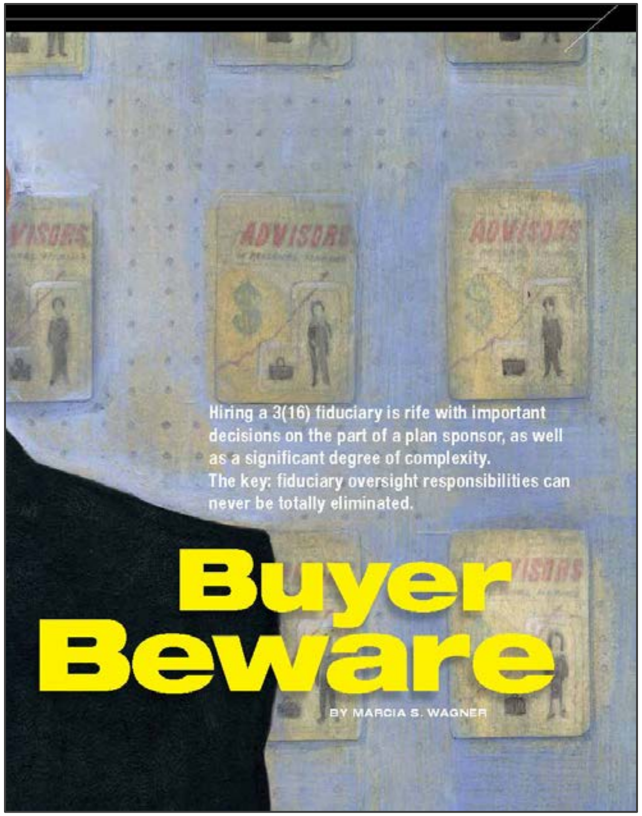
PLAN ADMINISTRATOR AS A 3(16) ERISA FIDUCIARY

- A number of third party service providers holding themselves out as "3(16) fiduciaries" are now willing to accept certain plan management responsibilities that traditionally had been performed by plan sponsors.

- If a plan sponsor elects to engage a third party to serve as the plan's 3(16) fiduciary, the plan document must be amended to designate this third party provider of fiduciary services as the plan's administrator.

- The level of fiduciary responsibility that may be accepted from plan sponsors varies considerably, and sponsors should clearly understand and focus on the nature of their remaining fiduciary administrative duties.

PLAN ADMINISTRATOR AS A 3(16) ERISA FIDUCIARY



Although a plan sponsor may hire various service providers, the sponsor typically retains primary responsibility for the management of the plan as a fiduciary under ERISA. However, a number of providers are now willing to accept certain plan management responsibilities as so-called "3(16) fiduciaries." In this article, we will examine the implications of this development.

DEFINITION AND DUTIES OF 3(16) FIDUCIARY

The term "3(16) fiduciary" is derived from Section 3(16) of ERISA, which provides that the term "administrator" means either the person "specifically so designated" by the plan terms or if an administrator is not so designated, the plan sponsor. Every plan must have a person who serves as its administrator for ERISA purposes, and this person is required to fulfill certain reporting and disclosure obligations under ERISA that are not imposed on other types of plan service providers. These functions make such an administrator a unique ERISA fiduciary.

The administrator's duties include providing summary plan descriptions (SPDs) to participants and ensuring that they receive quarterly benefit statements. In addition, the administrator must furnish participant-level fee disclosures in accordance with the DOL's new participant-level disclosure regulations. A copy of the plan document must be provided by the administrator to participants upon request.

Furthermore, the administrator has a duty to sign and file a plan's Form 5500, and must engage an accountant to conduct audits of the plan's financial statements where necessary for purposes of these annual filings. The administrator has a duty to maintain the tax-qualified status of the plan and ensure that it is operated in accordance with its terms.

In addition to being subject to the aforementioned obligations, a plan's administrator is also subject to a unique set of sanctions that only apply to administrators and their reporting and disclosure duties. Specifically, the administrator's failure to file a Form 5500 on a timely basis may result in a penalty of up to $1,100 per day. Upon a failure to furnish certain required information (e.g., the plan's SPD, Form 5500 or plan document) to a participant within 30 days of a request, the administrator may be subject to a penalty of up to $110 per day.

The plan fiduciary responsible for these duties that come within ERISA's definition of "administrator" should never be confused with ordinary administrative service providers. Accordingly, this statutory term should not be used to describe a TPA that does not accept any fiduciary responsibility from the plan sponsor. When the plan sponsor serves as administrator, it has the fiduciary responsibility of ensuring that the participants receive their mandatory disclosures even if as a practical matter it relies on the plan's record keeper or TPA to deliver these materials.

Furthermore, even if the TPA prepares the Form 5500, it is the plan sponsor in its capacity as the administrator that must file the form, making it responsible for its informational content. If the record keeper or TPA makes an error, it is the plan sponsor in its capacity as the administrator that is subject to a fiduciary penalty.

ADVANTAGES OF HIRING A 3(16) FIDUCIARY

To meet the desire of some plan sponsors to "outsource" fiduciary responsibilities attributable to their status as administrators, a number of third party service providers holding themselves out as "3(16) fiduciaries" are now willing to accept certain plan management responsibilities that traditionally had been performed by plan sponsors. For example, some TPA firms are now willing to perform certain fiduciary functions as 3(16) fiduciaries. Trust companies which offer trust and custody services to plans, as well as certain registered investment advisors under federal or state securities laws, may also be willing to serve as 3(16) fiduciaries.

If a plan sponsor elects to engage a third party to serve as the plan's 3(16) fiduciary, the plan document must be amended to designate this third party provider of fiduciary services as the plan's administrator. When a 3(16) fiduciary is designated as the administrator, the plan sponsor ceases to be responsible for the applicable ERISA reporting and disclosure obligations.

For example, if the plan's record keeper fails to distribute a plan document upon a participant's request, it would be the 3(16) fiduciary (rather than the plan sponsor) that would be subject to the applicable statutory penalties. Furthermore, since the 3(16) fiduciary would be responsible for signing and filing the plan's annual filings on the Form 5500, the 3(16) fiduciary (rather than the plan sponsor) would be liable under ERISA for any delinquent or defective filings made on behalf of the plan.

As a result of the transfer of potential liability from the plan sponsor to another 3(16) fiduciary, there are some clear benefits for the plan sponsor from a fiduciary perspective once it engages the 3(16) fiduciary. However, it should be noted that the transfer of fiduciary responsibilities from the plan sponsor to the 3(16) fiduciary may in fact be limited to the transfer of the sponsor's fiduciary reporting and disclosure obligations. Unless the 3(16) fiduciary voluntarily agrees to accept additional fiduciary responsibilities, the plan sponsor would remain responsible for discharging all other plan management responsibilities, including the fiduciary oversight of the plan's investment menu and management of all other benefits-related aspects of the plan.

SHIFTING FIDUCIARY RESPONSIBILITIES

Some plan sponsors may

Wagner, M.,"Buyer Beware: Hiring a 3(16) Fiduciary is Rife with Important Decisions", ASPPA Plan Consultant, Summer 2013, pages 22-27.

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3(21) FUNCTIONAL FIDUCIARY

- Defined under ERISA § 3(21)(A), does not depend on title or contract, a person is a fiduciary with respect to a plan to the extent…….
- (i) Exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, or
- (ii) Renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
- (iii) Has any discretionary authority or discretionary responsibility in the administration of such plan.

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ERISA FIDUCIARY TYPES & ROLES

- Named Fiduciary
- QPAM
- Delegated Manager
- Functional Fiduciary
- Co-Fiduciary

MOST

LEAST

WHAT IS A "CO-FIDUCIARY"?

- Mostly a marketing term that just confuses most plan sponsors
- No special legal meaning under ERISA
- Only ERISA context was for a fiduciary to be responsible for the acts of other fiduciaries if they knew or should have known about the transaction or fiduciary breach
- Today "co-fiduciary" is a greatly overused marketing term that produces a minimal impact on plan sponsor liability reduction and negligible impact on prudent management of the plan
- Plan sponsors do not understand "<u>to the extent</u>"

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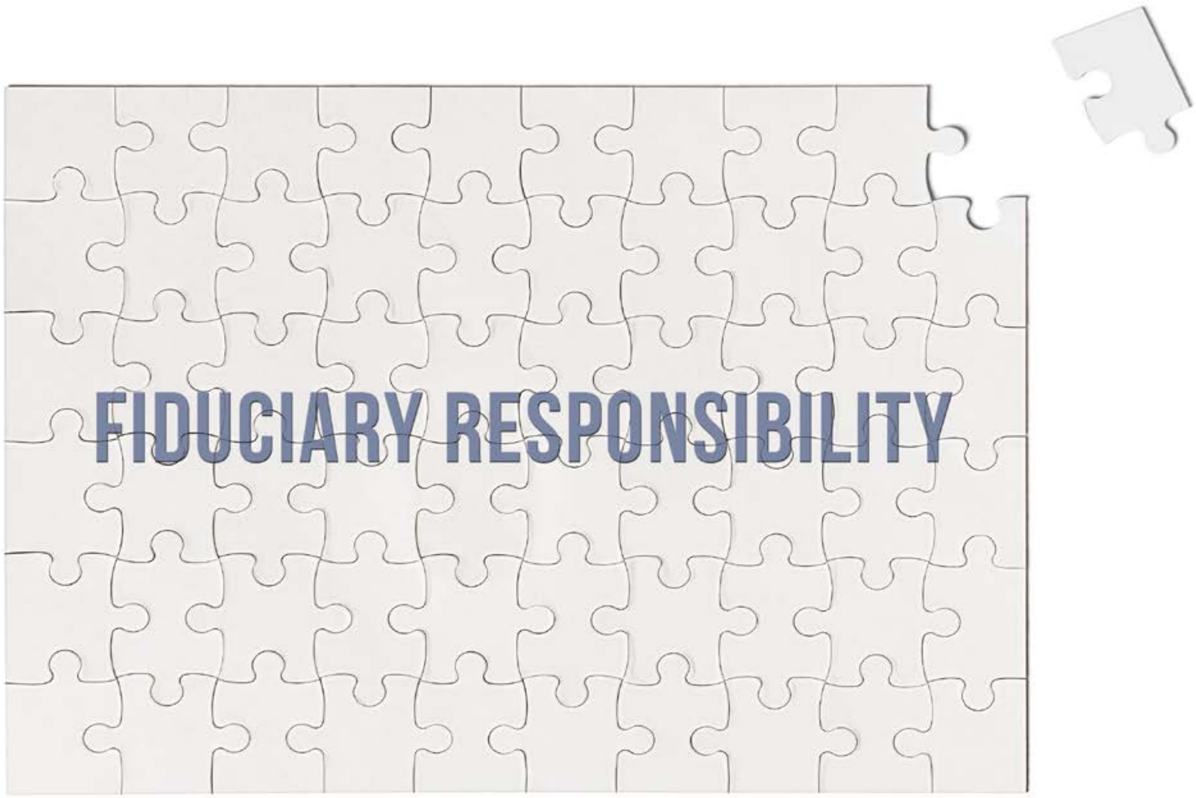
"CO-FIDUCIARY" SERVICES ARE ALMOST ALWAYS LIMITED IN SCOPE



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- Directed Trustee

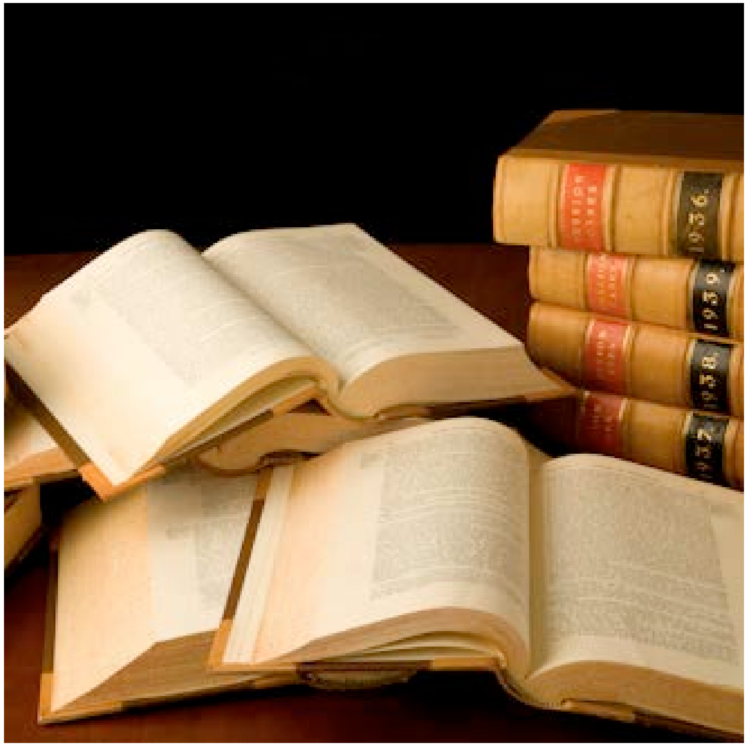
LEAST

ERISA INTENDED FOR THE PLAN TRUSTEE TO BE A DISCRETIONARY FIDUCIARY… WHERE DID THEY ALL GO?

Under ERISA §403(a), the discretionary trustee….

"SHALL HAVE EXCLUSIVE AUTHORITY AND DISCRETION TO MANAGE AND CONTROL THE ASSETS OF THE PLAN."

Katsaros v. Cody, 744 F.2d 279 (2d Cir.), (1984)



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THE DIRECTED TRUSTEE TAKES INSTRUCTIONS FROM A NAMED FIDUCIARY”

- ERISA § 403(a)(1)…. the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan.
- The directed trustee is not responsible for determining if the instructions are prudent.

Renfro v. Unisys Corp., 671 F. 3d 314 - Court of Appeals, 3rd Circuit 2011
Moench v. Robertson, 62 F. 3d 553, 571 3d Cir. 1995)

THE DIRECTED TRUSTEE IS “IMMUNE FROM JUDICIAL INQUIRY”

“As we have explained, a directed trustee is essentially **"immune from judicial inquiry"** because it lacks discretion, taking instructions from the plan fiduciary that it is required to follow.”

Renfro v. Unisys Corp., 671 F. 3d 314 - Court of Appeals, 3rd Circuit 2011

THE DIRECTED TRUSTEE MAY BE (AND USUALLY IS) CONFLICTED

- Not subject to ERISA § 406(b)(1) or 406(b)(3)
- May be conflicted
- Not required to be loyal
- Not required to function as expert
- May “double dip” revenue
- Does not need to follow Frost Model (DOL 97-15)

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THE DIRECTED TRUSTEE IS "IMMUNE FROM JUDICIAL INQUIRY"

"Fidelity's limited role as a directed trustee, delineated in the trust agreement, does not encompass the activities alleged as a breach of fiduciary duty—the selection and maintenance of the mix and range of investment options included in the plan."

"As we have explained, a directed trustee is essentially **"immune from judicial inquiry"** because it lacks discretion, taking instructions from the plan that it is required to follow."

"See Moench v. Robertson, 62 F.3d 553, 571 (3d Cir.1995)."

Renfro v. Unisys Corp., 671 F. 3d 314 - Court of Appeals, 3rd Circuit 2011

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TUSSEY $36.9 MILLION AWARD SHOULD BE A “WAKEUP CALL”

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

RONALD TUSSEY, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 2:06-CV-04305-NKL
	)	
ABB, INC., ET AL.,	)	
	)	
Defendants.	)	

ORDER

Plaintiffs bring their claims on behalf of a class of present and former ABB, Inc., employees who are participants in two retirement plans offered by ABB, Inc. The first is the Personal Retirement Investment and Savings Management Plan and the second is the Personal Retirement Investment and Savings Management Plan for Represented Employees

TUSSEY V ABB SHOULD BE READ BY ALL PLAN SPONSORS

$36.9 Million Award
$13.5 Million Plaintiff Legal Fees
<u>$42.5 Million Defense Legal Fees</u>
$92.9 Million and Counting

6.64% of Plan Assets ($1.4 Billion)

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MOST “CO-FIDUCIARIES” & DIRECTED TRUSTEES DISAPPEAR IN COURT

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WE ARE NOT A PLAN FIDUCIARY

"By the plain language of the Trust Agreement, Fidelity Trust has no responsibility for reviewing the merits of fund choices made by the Pension Review Committee.

Thus, Fidelity Trust had no responsibility to prevent the addition of the Fidelity Freedom Funds to the Plan's investment line-up.

For these reasons, the Court finds that Fidelity Trust cannot be held liable for ABB's breaches under ERISA Section 405(a)(2)."

Tussey v. ABB, Inc., Case 2:06-CV-04305, 2010 Document 103

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TIBBLE V EDISON “NON FIDUCIARY” JUDICIAL QUOTES

- “As explained, independent expert advice is not a ‘whitewash.”
- “The named fiduciary must (1) probe the expert’s qualifications, and (2) furnish the expert with reliable and complete information, but also requiring it to “(3) make certain that reliance on the expert’s advice is reasonably justified under the circumstances.”
- “A firm in Edison’s position cannot reflexively and uncritically adopt investment recommendations—it must question the methods and assumptions that do not make sense”
- “We offer this background to illustrate a point, which, though it should be unmistakable, seems to have eluded Edison in its briefing. HFS is its consultant, not the fiduciary.”

Tibble v Edison, No. 10-56406 (9th Cir. 2013).

NOLTE V CIGNA $35.0 MILLION AWARD

$35.0 Million Award + Plaintiff Legal Fees
<u>? Defense Legal Fees</u>

1.94% of Plan Assets ($1.8 Billion)

Total Most Likely 4.0% of Plan Assets

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SOME VENDORS EVEN ADVERTISE THEY ACCEPT FIDUCIARY STATUS

LEAVE IT TO THE EXPERTS

With the Principal Financial Group® (The Principal®) and the Principal Due Diligence Program℠ on your side, we understand your concerns with selecting and monitoring investment managers. In partnership with your advisor, the Principal Life Insurance Company is a fiduciary with respect to the initial selection and ongoing monitoring of investment options among our Foundation Options as appropriate investment options offered for a retirement plan.

A Recognized Program

WILSHIRE

For the second year in a row, Wilshire Associates has validated our due diligence program for the selection and ongoing monitoring of our investment managers among our overall platform of Foundation Options. It's a program you can trust to help you manage your fiduciary responsibilities. Look at some of the highlights of our program:

- 24 sub-advisors whose investment managers average more than 18 years in the industry
- 55 sub-advised investment options
- Over 20 investment professionals supporting the Principal Due Diligence Program and investment platform
- 70 face-to-face visits with 22 managers in 2005 alone

WHY GO IT ALONE?

Why face the challenges of selecting and monitoring investment managers alone, when The Principal is here to help? Put our experience and expertise to work for you today.

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BUT IN COURT---THEY ARE NOT A PLAN FIDUCIARY!

Page 11 Question 25

Defendants admit that Principal Life is an ERISA fiduciary with respect to the Property Account pursuant to the terms of the governing contractual agreements between Principal and plan sponsors (or fiduciaries), **but Defendants deny that Principal Life is a fiduciary for any other purposes.**

Page 11 Question 26

Principal Life, a registered investment advisor which acts as an investment advisor for the Property Account, and an ERISA fiduciary with respect to the investment and reinvestment of Property Account assets. **Defendants deny that Principal Real Estate is an ERISA fiduciary for any other purpose.**

Mullaney v. Principal, No. 4:10-cv-00198-RP-TJS, Southerr District of Iowa, 2009 Response Filed 5/2/2011

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VENDORS OFFER "FIDUCIARY SUPPORT" &"PLAN SPONSOR ADVICE"

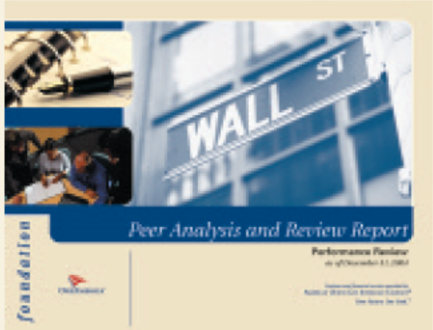
Plan Sponsor Advice helps plan sponsors choose the appropriate investment options to offer in their retirement plans. Plan Sponsor Advice also provides assistance with plan documentation and ongoing portfolio maintenance.

Fiduciary support

In today's business environment, plan sponsors are faced with the ever-increasing burden of fiduciary responsibility. With Plan Sponsor Advice, AUL can help alleviate that burden. You can rest easy, knowing you have retirement plan expertise in your corner.

We also help you manage your fiduciary obligations through our Peer Analysis and Review Report (PARR). This extensive investment review approach allows us to:

- identify stable, well-managed investment management firms;
- monitor these firms to identify any adverse changes in their organizations, investment processes and/or performance results; and
- score each corresponding investment option on a quarterly basis.



By providing tools like Advice by Ibbotson®, Plan Sponsor Advice and PARR, we can help you and your participants feel confident in your chosen investment options and stay on track to successfully manage your retirement plan.

AUL qualified plans are funded with group variable annuity contracts. While a contract owner may receive additional investment and annuity-related benefits under the annuity contract, any tax deferral is provided by the qualified plan and not the annuity contract. The distributor for AUL group variable annuity contracts is OneAmerica Securities, Inc. Registered group variable annuity contracts issued by AUL are distributed by OneAmerica Securities, Inc., Member NASD, SIPC, a Registered Investment Advisor, P.O. Box 1984, Indianapolis, IN 46206, (317) 285-1877, which is

VENDOR DENIES FIDUCIARY STATUS ALL THE WAY TO THE SUPREME COURT

IN THE

Supreme Court of the United States

ROBERT LEIMKUEHLER, AS TRUSTEE
OF THE LEIMKUEHLER, INC. PROFIT SHARING PLAN
AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

AMERICAN UNITED LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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VENDOR DENIES FIDUCIARY STATUS ALL THE WAY TO THE SUPREME COURT

Feb. 24 --The U.S. Supreme Court won't review an appellate court decision holding that a profit-sharing plan's recordkeeper didn't act as a plan fiduciary in selecting mutual funds for the plan's investment lineup for purposes of a challenge to the recordkeeper's receipt of revenue-sharing fees

(Leimkuehler v. Am. United Life Ins. Co., U.S., No. 13-536, cert. denied 2/24/14).

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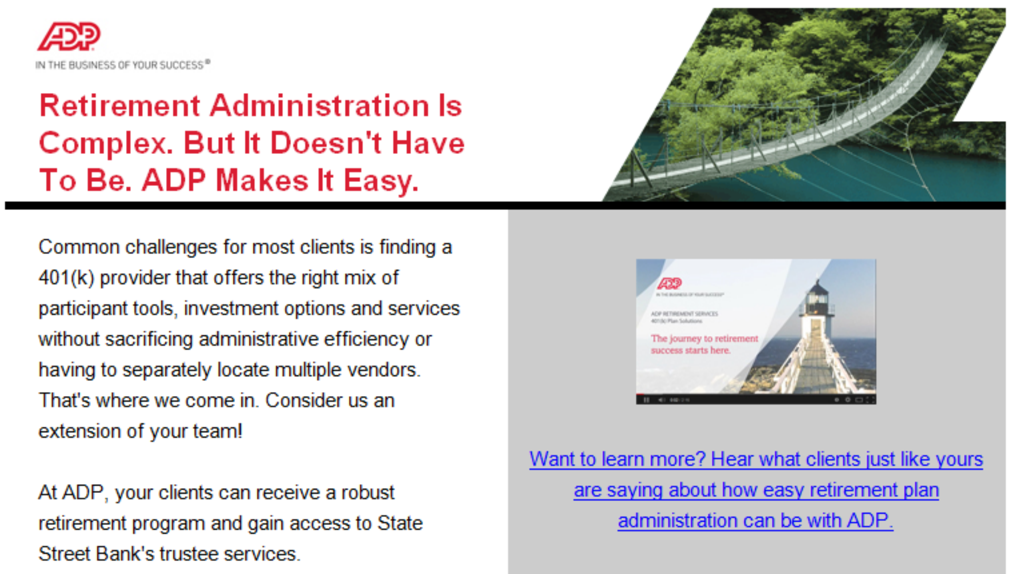
VENDORS SAY THEY OFFER HELP WITH FIDUCIARY DUTIES



“Combining their services with our recordkeeping system will help your clients meet their fiduciary responsibilities while reducing risk.”

VENDOR'S FINE PRINT SAYS SOMETHING DIFFERENT

"For its retirement plan recordkeeping customers, ADP agrees to act as a *nondiscretionary* recordkeeper performing ministerial functions <u>at the direction of the plan sponsor</u> and/or plan administrator.

Accordingly, ADP <u>does not serve in a fiduciary capacity</u> to any of the retirement plans for which it provides recordkeeping services.

ADP also does not serve as an investment advisor or manager to any of the retirement plans for which it provides recordkeeping services."

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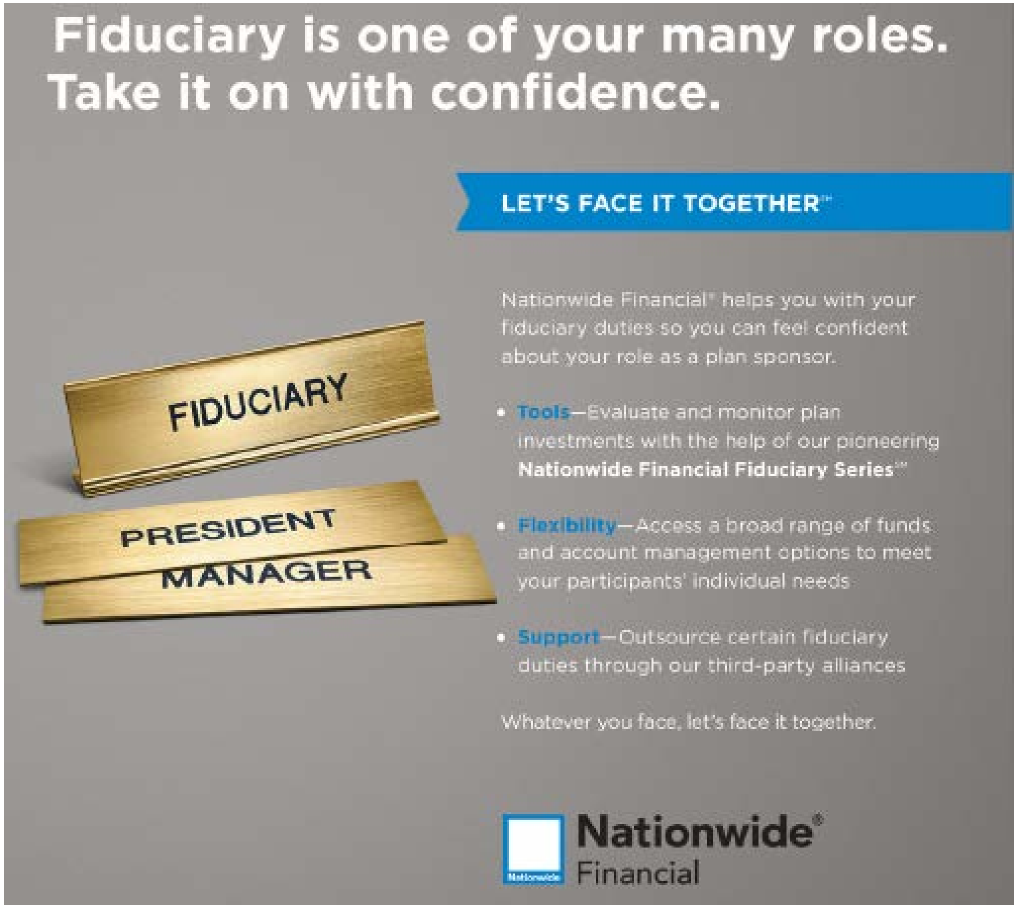
SOME VENDORS APPEAR TO ACCEPT FIDUCIARY STATUS



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63

VENDOR HAS EVEN SUED THE PLAN SPONSOR CLAIMING "NEGLIGENCE" IN HIRING THE VENDOR

"If Nationwide Life is found to have violated ERISA by arranging for, receiving, or retaining payments from funds…then the Trustees are reckless and also at fault to the extent the Plans suffered any harm…, because the Trustees had the ultimate responsibility for managing the Plan, and investing Plan assets."

Haddock v Nationwide Life and Financial Services, Case 3:01-cv-01552-SRU Document 290 Filed 10/12/2007

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VENDOR HAS EVEN SUED THE PLAN SPONSOR CLAIMING "NEGLIGENCE" IN HIRING THE VENDOR

Likewise in Charters v John Hancock , John Hancock countersued their client Charters (the plan trustee) for breach of fiduciary duty, monetary contribution and indemnity for being negligent in hiring John Hancock in the first place.

Charters v John Hancock Life Insurance Company, Civil Action No. 07-11371-NMG, September 30, 2008

CAN WE MAKE IT EASY FOR THE PLAN SPONSOR?

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THE PLAN SPONSOR SHOULD ASK FOUR QUESTIONS

1. Are you serving as a fiduciary?
2. If yes, will you accept fiduciary status in writing and give an unambiguous written description of the covered services and fees?
3. What is your experience in these matters, and what is your financial ability to make the plan whole in the face of your fiduciary breach?
4. Which fiduciary duties do I still retain?

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USE THE FIDUCIARY ROLE TO IMPROVE OUTCOMES
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THE FIDUCIARY GOAL SHOULD BE AN OUTCOME GOAL

Our goal should be that the vast majority of participants in a defined contribution plan are on track to adequately replace their paycheck, as determined on a sound actuarial basis.

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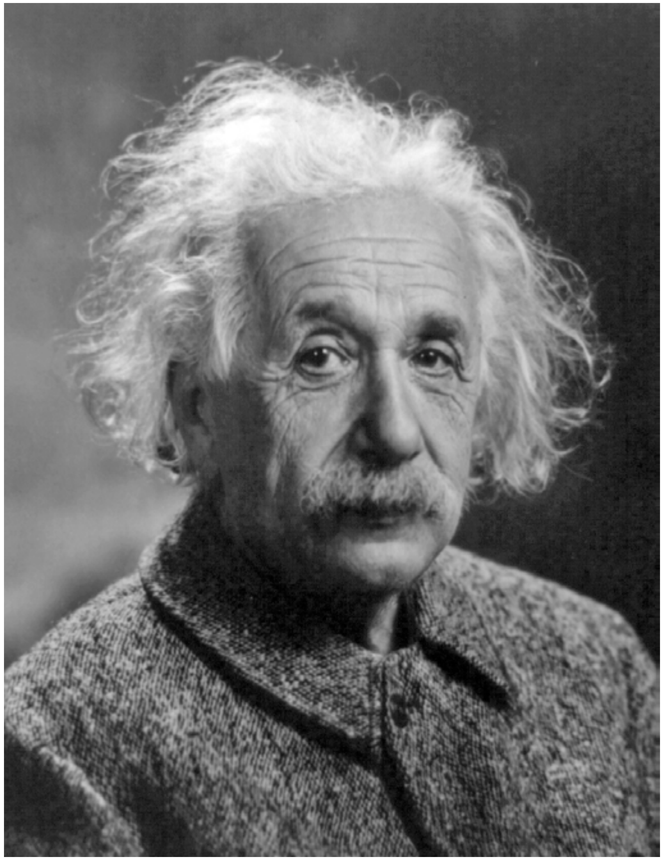
NEW APPROACHES CAN HELP MOST PARTICIPANTS SUCCESSFULLY RETIRE



"INSANITY: DOING THE SAME THING OVER AND OVER AGAIN AND EXPECTING DIFFERENT RESULTS."

−Albert Einstein

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A NEW APPROACH

1. The 401(k) is a retirement plan, not an investment plan.
2. Control, not education, is required to improve retirement outcomes.
3. The discretionary trustee can be trusted to have control.
4. The UnifiedPlan consistently improves success outcomes.

IMPORTANT RETIREMENT SUCCESS CONCEPT QUESTIONS

1. What does “retirement success” mean?
2. Does “investment success” always lead to “retirement success?”
3. If not, then what else is needed for “retirement success?”

DEFINING RETIREMENT SUCCESS

We define **Retirement Success** as being on track to adequately replace your paycheck and retiring free from financial worry for as long as you and your spouse live.

This does not occur by chance or through benign neglect.

The holistic process should follow a reliable and trustworthy roadmap with a high degree of certainty, and not rely on luck or guesswork.

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ONLY ONE IN FOUR 401(K) PARTICIPANTS WILL SUCCEED USING TRADITIONAL METHODS

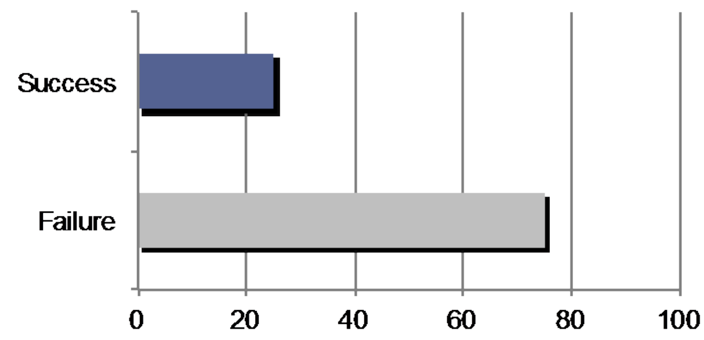
September 24, 2010, 11:07 AM ET/4:07 PM GMT

Pensions&Investments

75% in DC Plans Won't Have Enough for Retirement, Survey Says

By Robert Steyer
Source: Pensions & Investments
Date: September 22, 2010

Three-quarters of defined contribution plan participants are projected to fall short of what they will need in retirement, said Christopher L. Jones, chief investment officer at Financial Engines.



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"PLAN HEALTH INDEX" IS NOT AN OUTCOME

"Plan Health Index" =

Participation Rate

x % Saving at Least 10%

x % in "Diversified Portfolios"

"Diversified Portfolios" = almost anything

Many vendor's full book of business "plan health" is 15% or lower.

(100% = best and 0% = worst)

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FOUR KEY STRUCTURES WILL PRODUCE RETIREMENT SUCCESS

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PRE-DEFINE THE GOAL FOR THE PARTICIPANT AND MANAGE IT AS A DEFAULT

- Target income replacement is 70% of final average compensation
- As near as possible to the Social Security Normal Retirement Age
- Least amount of risk required to still meet goal

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START THE ENROLLMENT MEETING WITH THE ANSWER

Your Projected Retirement Benefit Statement

This retirement benefit statement helps you understand whether you are on course to achieve a successful retirement. Unified Trust Company estimates the "nest egg" savings required to meet your retirement spending goals. We regularly evaluate your progress and, if needed, we will make changes to help you. This projection is based on information from a variety of sources. Please visit our website at www.unifiedtrust.com/UnifiedPlan to add or update your information.

Your Projected Monthly Retirement Income	Your Monthly Retirement Income Need	Your Monthly Retirement Income Surplus
$7,665	**$7,500**	**$165**

Sources of Your Projected Monthly Retirement Income

Your 401(k) Plan	$3,514
Social Security	$1,933
Part Time Work	$280
Pension	$1,100
Additional Assets	$837
Totals	**$7,665**

(Note these are retirement lifespan

How to Achieve Your Retirement Goals

- **Save More:** by saving 2% more, you will improve your chances of retirement success.
- **Take Advantage of Automatic Savings Increases**: by saving 1% or 2% more automatically each year you will improve your chances of retirement success.
- **Spend Less or Work Part-Time**: you have already indicated that you are working part time in retirement, or you are replacing a small percentage of your salary.
- **Retire Later:** by delaying your retirement, you will improve your chances of retirement success.
- **Model Your Retirement on Our Website**: you can use our UnifiedPlan® website tools to enter specific information at www.unifiedtrust.com/UnifiedPlan

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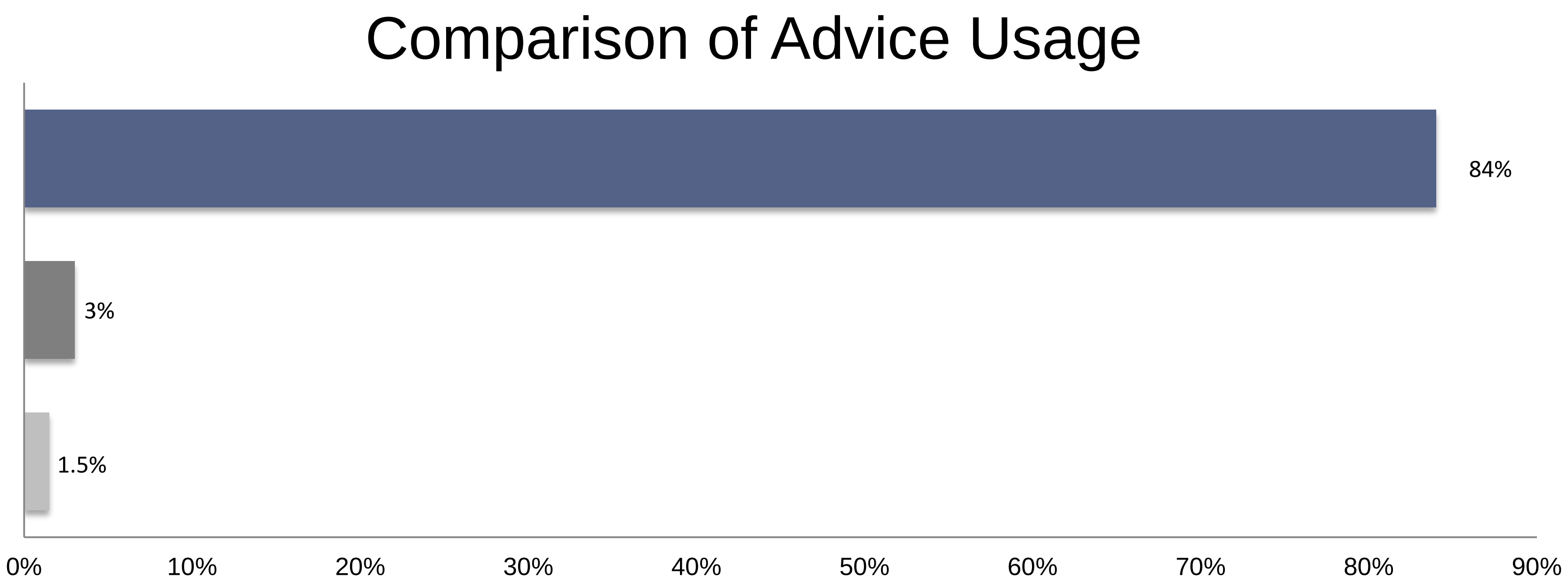
INERTIA AND PROCRASTINATION CAUSES PLAN PARTICIPANTS TO FORGO ADVICE, THE HOLISTIC APPROACH SOLVES THIS PROBLEM



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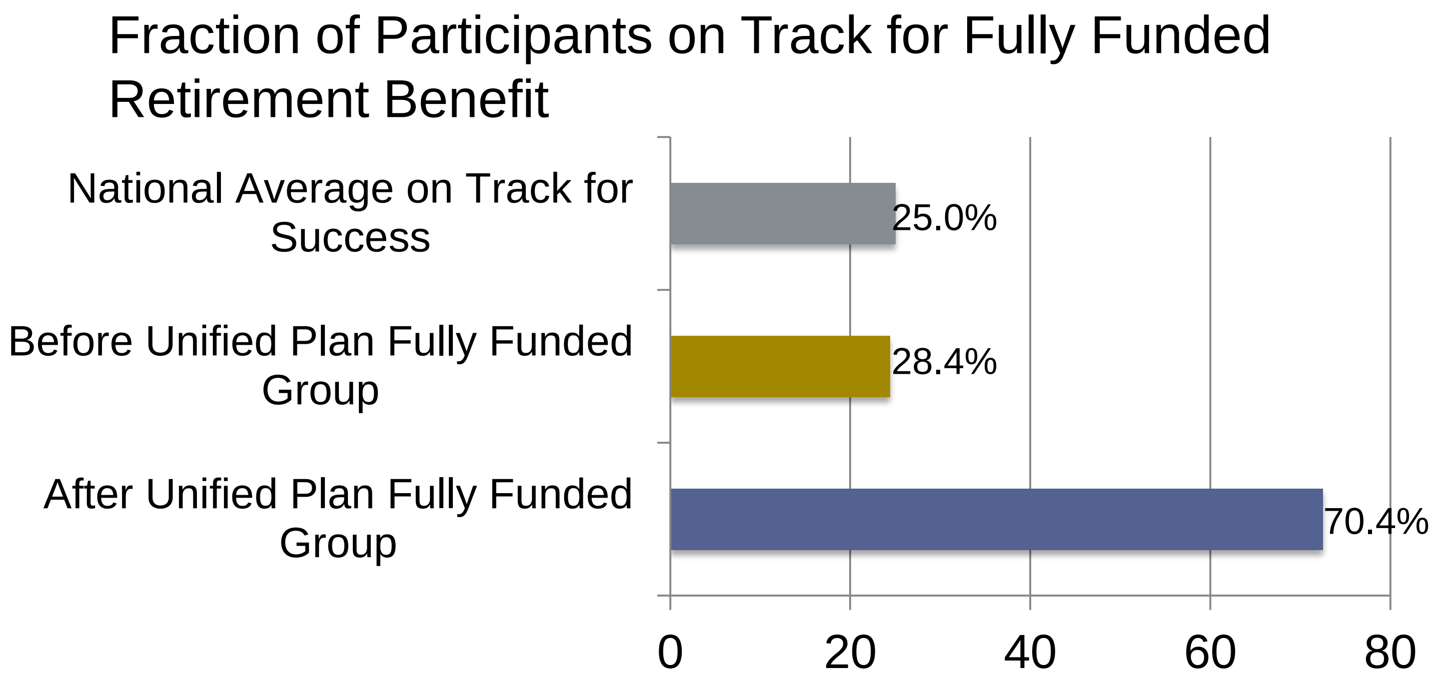
THIS APPROACH MOVES MOST PLAN PARTICIPANTS TO FULLY FUNDED STATUS



"Fully Funded" means forecast Asset/Liability at least 1.00.

National Average data from Pensions & Investments Sept 22, 2010

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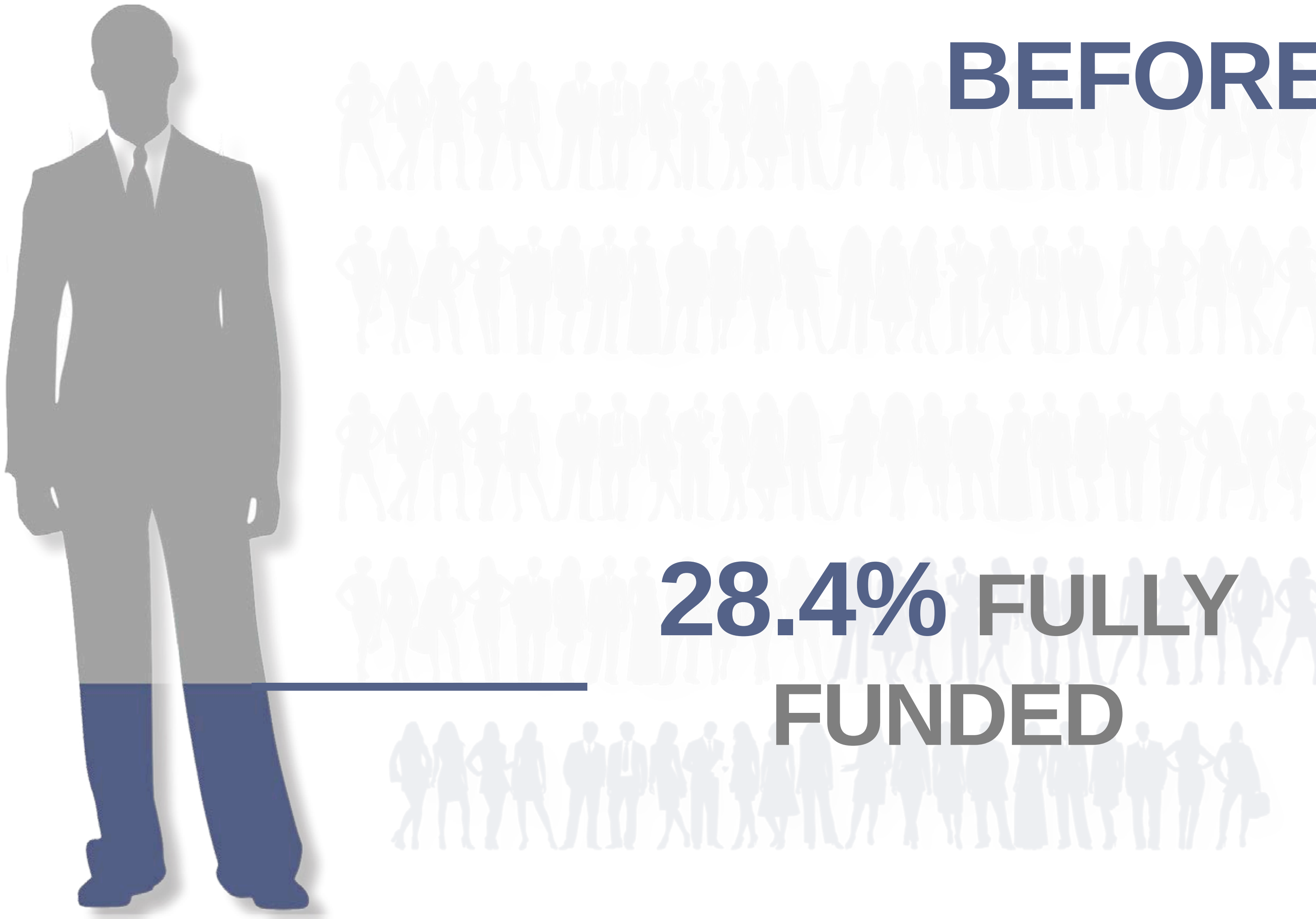
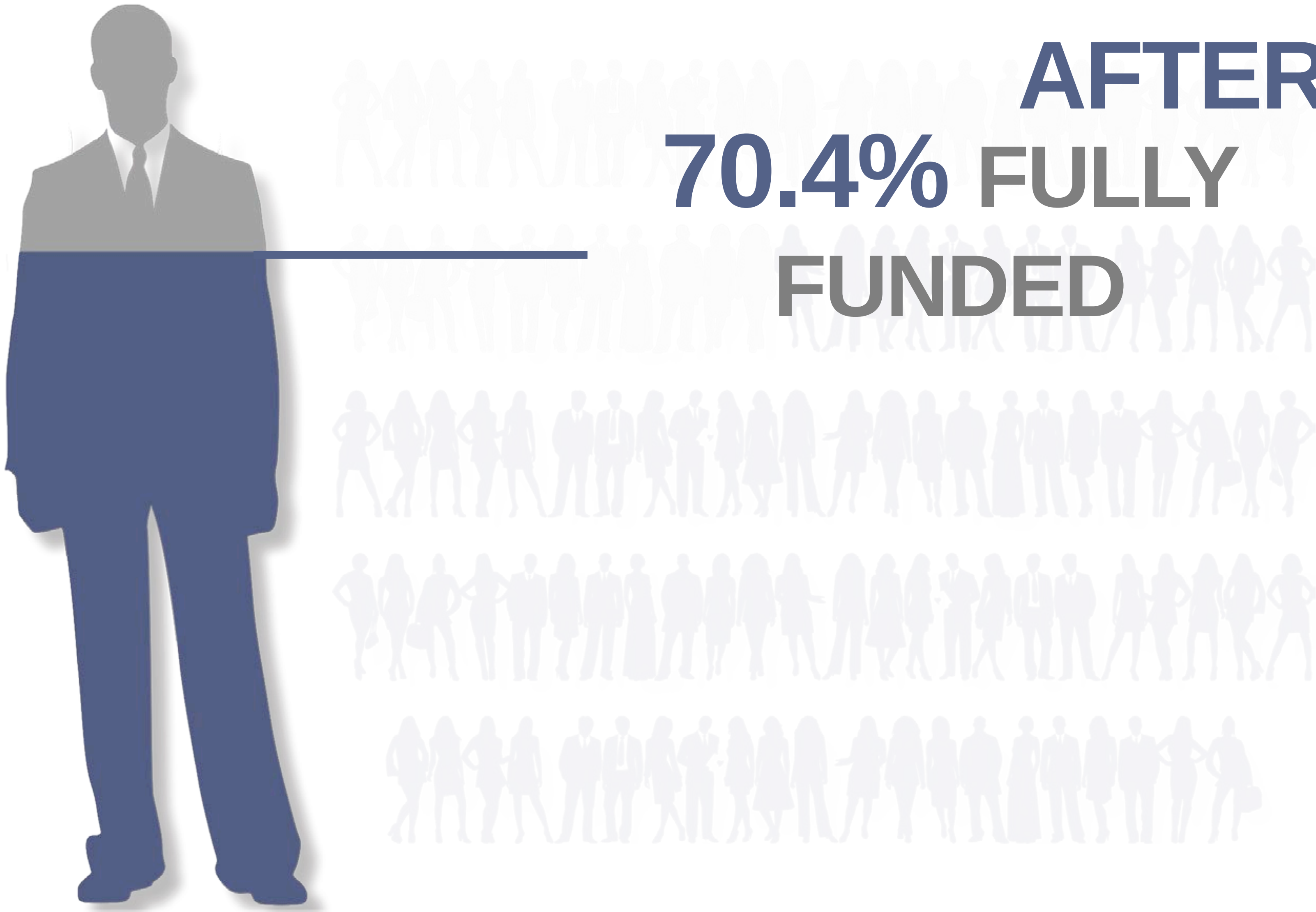
BEFORE



28.4% FULLY FUNDED



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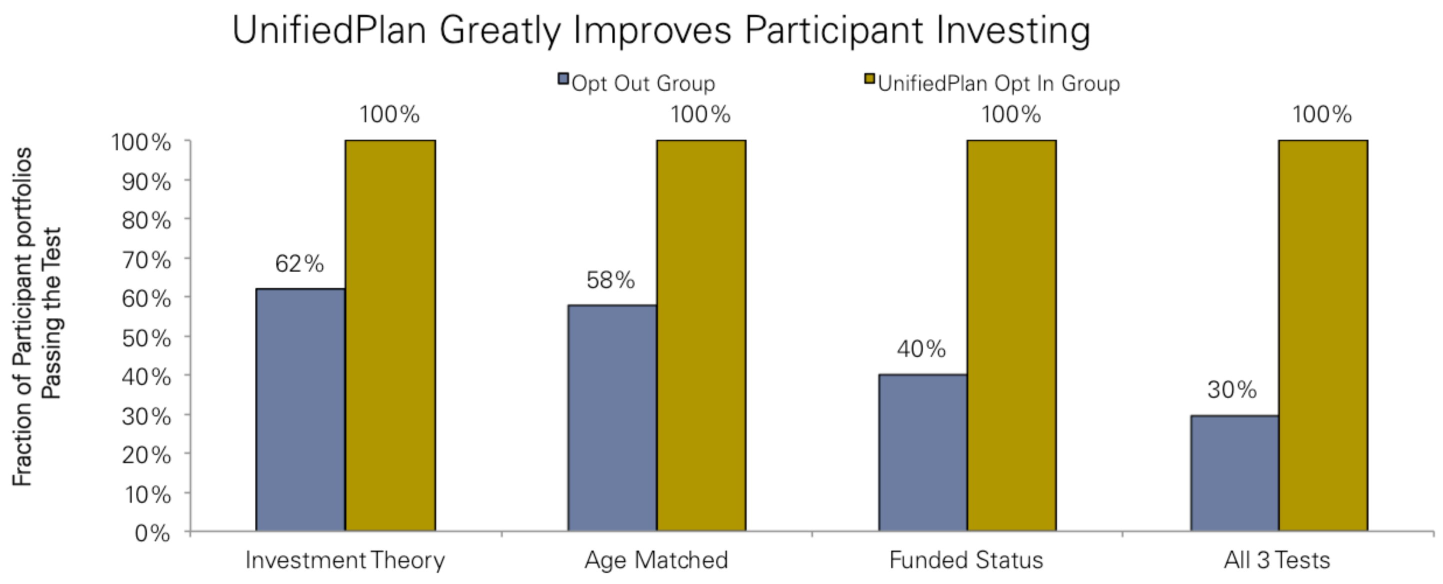
THE APPROACH REDUCED WASTED DOLLARS BY MORE THAN 57%

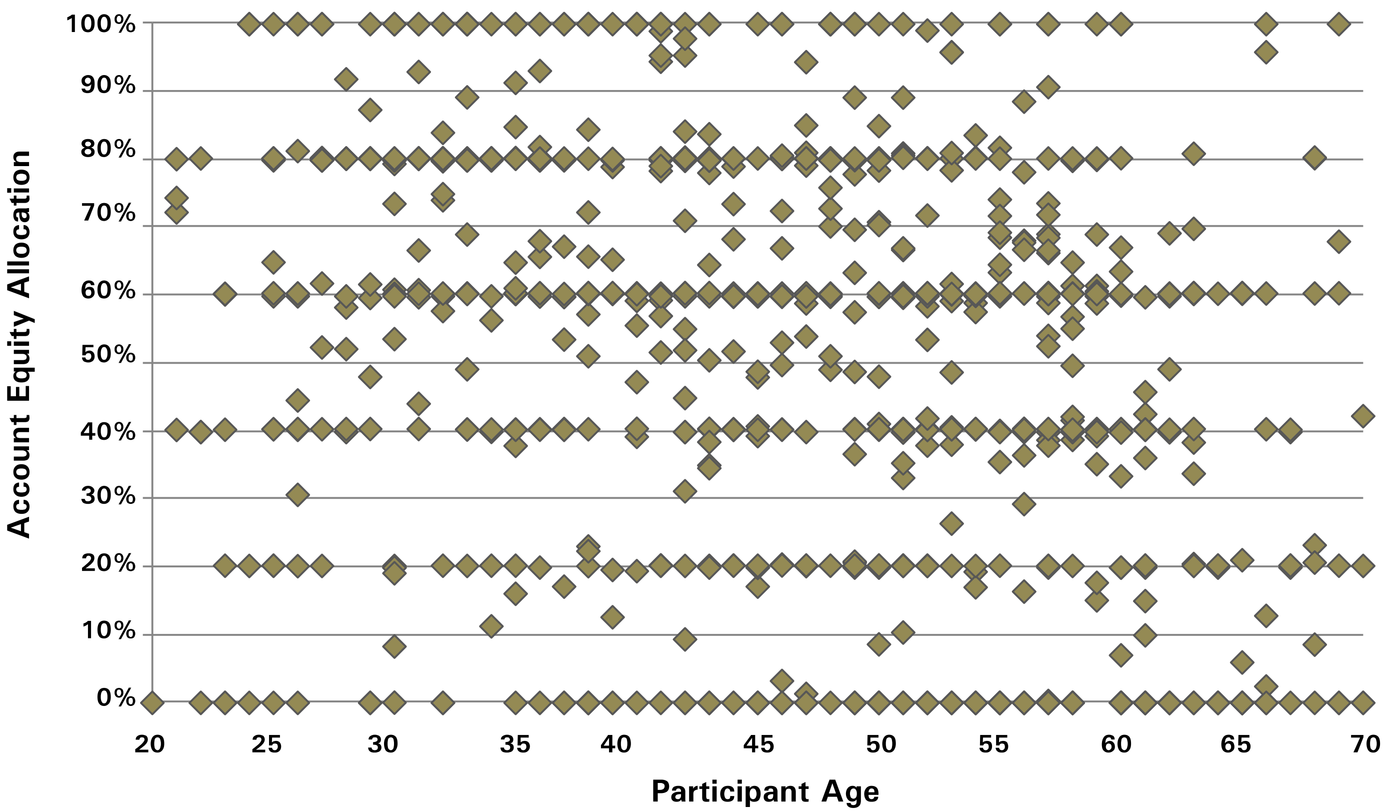
The relative cost calculation shows that for every dollar previously spent to achieve a successful participant, it will now cost the plans only $0.43, a savings of 57%.

THE APPROACH IMPROVES PARTICIPANT INVESTING COMPARED TO “OPT OUT” GROUP



“Appropriate Investing” means the participant has a fixed income and equity allocation consistent for their age, for their funded status, their portfolio asset allocation is efficient, and passes prudent fiduciary tests by generally accepted investment theory.

THE "OPT OUT" GROUP HAS A RANDOM ASSET ALLOCATION COMPARED TO AGE



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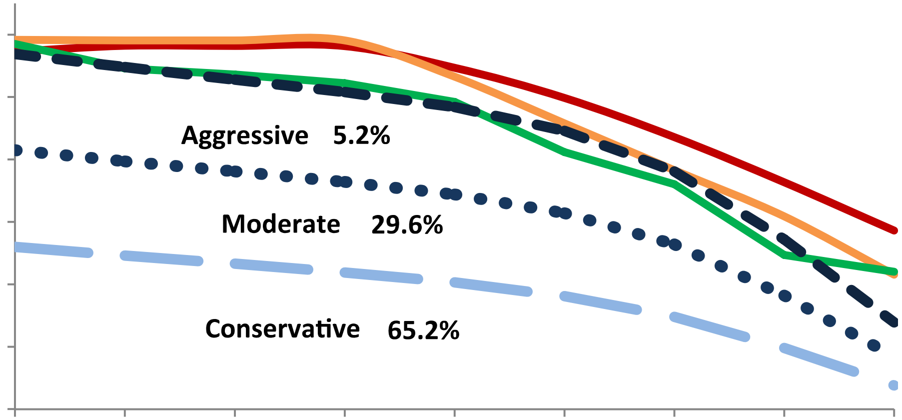
MANY FULLY FUNDED EMPLOYEES TO TAKE LESS RISK THAN A TARGET DATE FUND

UnifiedPlan Glidepaths Distributions for Fully Funded Participants



The % figures show the breakdown of the fully funded group as allocated to each UnifiedPlan glidepath.

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DISCLOSURES

1. The UnifiedPlan reporting tool helps investors understand whether they are on course to achieve a successful retirement. The UnifiedPlan uses “asset liability” matching. The asset is the money forecast to be accumulated and the liability is the amount of money needed to pay for the retirement. For investors who are planning for retirement, the tool estimates the amount of funds required to meet their retirement spending goals and provides alternatives such as delaying retirement or lowering retirement spending for those who may not be able to save the required amount.

2. For investors who are already retired, the tool estimates the confidence that their portfolio will be able to sustain their desired spending throughout retirement. The tool uses a combination of deterministic methods and Monte Carlo simulation that consider factors that include saving and spending levels, long-term market expectations associated with the risk profile selected, pre- and in-retirement time horizons, and other sources of outside income.

3. The UnifiedPlan limitations relate to the large number of assumptions used in the analysis. The accuracy of these assumptions directly impacts the quality of the tool's assessment. Potential problems may include, but are not limited to, the use of inaccurate financial data by the investor, the selection of a risk tolerance by the investor that does not represent how their portfolio is actually invested, long term market expectations of risk, return, and inflation that are not achieved in the modeled time frame, the inclusion future income that is never received, and unforeseen life emergencies that require decreased saving before retirement, force an earlier retirement, or increase spending needs during retirement.

4. The UnifiedPlan is highly dependent upon assumptions of annual income and annual savings. Any variances or changes in the figures used should be reported immediately by the plan participant. Unified Trust is not responsible for any discrepancies in the data, or output from the UnifiedPlan tool.

5. All mutual fund and collective investment fund data was gathered from publicly available sources of information such as Standard & Poor’s, Morningstar, Zephyr or vendors’ own websites. We take reasonable care in collecting the data, and believe the data are accurate, but reserve the right to correct any errors. Individual mutual fund or collective fund performance data throughout the document are net of underlying fund expense ratios but gross of add-on expenses such as Trustee fees, administration fees, or advisory fees. The performance histories reported are simply dollar-weighted historical returns for the proposed funds and do not reflect the effects of rebalancing or fund replacements.

DISCLOSURES

6. Any past performance information for the illustrated investment selections is not indicative of future returns but is merely a snapshot of historical performance. Past performance is not a guarantee of future performance. The investments are not FDIC insured.

7. Differences will probably exist between prospective and your actual results because events and circumstances frequently do not occur as expected, and those differences may be material, especially when making estimates over extended time periods. All figures are shown in current (inflation adjusted) dollars. The estimated inflation rate used in this analysis may vary over time.

8. The UnifiedPlan portfolio changes and time line changes for each participant are governed by the Plan Document, the Investment Policy Statement and the Benefit Policy Statement for their Plan.

9. The calculated 70% income replacement goal includes the estimated Social Security benefit. The actual Social Security benefit may be different from the estimated value.

10. Compensation in excess of the IRC 415 limit is excluded. All figures reported in current (inflation-adjusted) real dollars.

11. The projections or other information generated by the tool regarding the likelihood of various investment outcomes are hypothetical in nature, do not reflect actual investment results, and are not guarantees of future results. Projected growth of assets is based Unified Trust Company's Projected Future Modeled Returns and the asset allocation of your portfolio for this goal. The graphical representations are an approximation taken from the direct path between the pertinent events tied to your goal. Indices are unmanaged, do not incur management fees or expenses, and cannot be invested in directly.

12. Neither the Plan Sponsor nor Unified Trust can guarantee that any participant will achieve a successful retirement. The UnifiedPlan reporting tool helps investors understand whether they are on course to achieve a successful retirement. The UnifiedPlan uses “asset liability” matching. The asset is the money forecast to be accumulated and the liability is the amount of money needed to pay for the retirement. For investors who are planning for retirement, the tool estimates the amount of funds required to meet their retirement spending goals and provides alternatives such as delaying retirement or lowering retirement spending for those who may not be able to save the required amount.

13. Projections are made based upon expected asset transfers. Actual transfer amounts may be different and may require a new retirement solution.

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BREAKING DOWN THE MANY “FIDUCIARY” ROLES, OBLIGATIONS & SERVICE MODELS

Dr. Gregory W. Kasten, Chief Operating Officer
Unified Trust Company, N.A.

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