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MANAGING YOUR 401(K) DURING A PANDEMIC

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Fee Litigation Developments

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New Case Filings

- *There have been more than 20 new 401(k) class actions in 2020*
  - New plaintiffs' lawyers entering the market
    - Pennsylvania, Wisconsin – Nationwide
    - The story of Mark Gyandoh
  - Smaller plans
    - $250 million – $900 million
  - Same claims
    - Fees
    - Share classes
    - Recordkeeping
    - Active v. Passive
    - Mutual fund v. Collective trust
    - Revenue-sharing rebates – how do they factor into the analysis?
    - Performance claims?

Might SCOTUS Finally Weigh In?

- *Divane v. Northwestern Univ.*, No. 18-2569, __F.3d__, 2020 WL 1444966 (7th Cir. Mar. 25, 2020).
- The court held that "[w]hen claiming an ERISA violation, the plaintiff must plausibly allege action that was objectively unreasonable." Begs question of appropriate pleading standard.
  - Based on plaintiffs' allegations and Northwestern's reasonable explanations for its fiduciary decisions, court determined that Northwestern fiduciaries had valid reasons for multiple recordkeepers and offering the challenged investments.
  - ERISA does not mandate any particular fee structure or recordkeeping arrangement, that the plans offered an appropriate range of investment options, and that mere underperformance of an investment does not "add up to a breach of fiduciary duty."
  - Plaintiffs only seek review of portion of the Seventh Circuit's affirming dismissal of the excessive-fees allegations; not appealing the dismissal of the underperformance claims.
  - Argue split with Third Circuit in *Sweda v. Penn*, which has own SCOTUS backstory.

Eighth Circuit Clears Its Throat

- *Davis v. Washington University in St. Louis*, No. 18-3345 (8th Cir. May 22, 2020).
  - Reversed dismissal on the question of fees, but affirmed dismissal on the underperformance allegations.
  - Fees -- "The complaint alleges that the marketplace for retirement plans is competitive, and with $3.8 billion invested, Wash U's 'pool of assets' is large."
  - "For an investment-by-investment challenge like this one, a complaint cannot simply make a bare allegation that costs are too high, or returns are too low. Rather, it 'must provide a sound basis for comparison—a meaningful benchmark.'"
  - Theoretical large exposure typically grounded upon investment performance claims. Ninety percent of the exposure eliminated here with Eighth Circuit ruling.

Who's On First?

- *Martin v. CareerBuilder*, No. 19-06463 (N.D. Ill. July 1, 2020).
  - "Plaintiffs and courts cannot use ERISA to paternalistically dictate what kinds of investments plan participants make where a range of investment options are on offer."
  - Fees charged indistinguishable from those at issue in Northwestern. As to performance, because changes were made, could be no inference that an unreasonable process.
  - "Perhaps an imaginative reader could spin a speculative yarn as to Defendants' imprudence."
- *Pinnell v. Teva Pharmaceuticals USA,* No. 19-5738 (E.D. Pa. March 31, 2020).
  - The shortest of shrifts, i.e., rapid and unsympathetic dismissal.
    - "But the participants plausibly alleged Defendants failed to adequately review the Plan's investment portfolio to ensure prudence of investment options, maintaining expensive investments despite the availability of 'virtually identical' lower-cost alternatives."

Summary Judgment Granted in *Oracle*

- *Troudt v. Oracle Corp.*, 2019 WL 1006019 (D. Colo.)
  - One of the largest 401(k) plans in the nation ($12B assets, 65,000+ participants)
  - Plaintiffs asserted fiduciary breach claims for excessive recordkeeping fees and offering allegedly imprudent investment options in the plan
    - Alleged defendants breached fiduciary duties by failing to monitor recordkeeping fees and take the plan out for competitive bidding
    - Breached duty of loyalty by retaining Fidelity to advance Oracle's other business relationships with Fidelity
    - Failed to monitor and remove three investment options that underperformed

Summary Judgment Granted in *Oracle*

- *Troudt v. Oracle Corp.*, 2019 WL 1006019 (D. Colo.)
  - Claim for failure to monitor recordkeeping fees
    - Undisputed facts demonstrated a prudent process
      - Committee met with Fidelity and investment consultant on a quarterly basis
      - Investment consultant provided quarterly reports showing investment options' expense ratios and administrative fees paid (total and on per-participant basis)
      - Fidelity provided four reports showing its compensation and how it compared to fees paid by other plans
      - Even though committee minutes did not reflect that the committee discussed recordkeeping fees at every meeting
      - Overall plan costs decreased throughout the class period through choice of cheaper replacement funds, selection of lower-cost share classes, and elimination of revenue sharing

Summary Judgment Granted in *Oracle*

- *Troudt v. Oracle Corp.*, 2019 WL 1006019 (D. Colo.)
  - Claim for imprudent investment options
    - Plaintiffs alleged that committee selected and retained three underperforming investment options
    - Court noted "voluminous and arguably compelling evidence" of a prudent investment management process
      - Committee retained an investment consultant who attended committee meetings and provided advice and quarterly reports, including reviewing investment performance, comparing plan investment options to benchmarks, highlighting market trends, and suggesting potential changes to the plan's lineup
      - Implemented and followed IPS
      - Made 57 fund replacements throughout the class period
    - However, the court refused to grant summary judgment
      - Testimony from plaintiffs' expert Buetow sufficient (not challenged by defendants)

Ramos v. Banner Health

- *Ramos v. Banner Health & Jeffrey Slocum & Assocs.* (D. Colo.)
  - Only Slocum, the plan's investment advisor, moved for summary judgment
  - Court granted summary judgment as to recordkeeping claims because Slocum was not responsible for advising on recordkeeping issues
  - Slocum settled (less than $1 million)
  - Banner Health trial
    1. Court found several problems with the process for selecting and monitoring investments, and negotiating recordkeeping fees
    2. Plaintiffs experts did not prove damages because the damages models were flawed

University 403(b) Plan Cases

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Recent Third Circuit Decision

Sweda v. University of Pennsylvania, 2019 WL 1941310 (May 2, 2019)

- Plan had two recordkeepers (TIAA and Fidelity) and, over time, offered from 78 to 118 investment options arranged in four tiers
- District court dismissed all claims
- Third Circuit reversed as to two counts: breach of fiduciary duties by allowing plan to pay excessive recordkeeping fees and offering imprudent investments

Other Courts

- NYU
  - Appeal pending in case post trial where NYU prevailed
- Northwestern
  - Same allegations as *Sweda*
  - Seventh Circuit affirmed dismissal
  - Supreme Court review sought
- Washington University of St. Louis
  - Again, same allegations
  - Eighth Circuit affirmed dismissal of investment claims, but allowed recordkeeping claims to go forward

Stock-Drop Litigation Revived

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Prior State of Play

- Claims for breach of fiduciary duties brought by 401(k) plan participants alleging that insider fiduciaries failed to act on non-public information to prevent losses from investments in allegedly overvalued employer stock
- *Fifth Third Bancorp. v. Dudenhoeffer* , 573 U.S. 409 (2014)
  - Set forth criteria for adequately pleading breach on the basis of inside information
  - Plaintiff must allege:
    - an alternative action that the plan fiduciary could have taken that would have been consistent with securities laws and
    - that a prudent fiduciary in the same circumstances could not have been viewed as more likely to harm the fund than to help it
  - Very high bar - Fifth Circuit described it as "virtually insurmountable"

Prior State of Play

- Standard confirmed in *Amgen Inc. v. Harris*, 136 S. Ct. 758
  - Ruled that Ninth Circuit erred in permitting fiduciary breach claim to proceed without first determining whether the complaint contained facts and allegations supporting a claim that removal of the Amgen stock fund was an alternative action that no prudent fiduciary could have concluded would cause more harm than good
- Since *Dudenhoeffer*, four circuit courts have affirmed dismissal of stock drop complaints
  - Reasoned that a prudent fiduciary could have concluded that an unusual disclosure of negative news by a plan fiduciary before issues were fully investigated would spook the market into believing that problems at the company were worse than they actually were and thus harm plan participants already invested in the company stock fund
    - Second Circuit: *Rinehard v. Lehman Bros. Holdings Inc.*
    - Fifth Circuit: *Whitley v. BP; Martone v. Robb*
    - Sixth Circuit: *Saumer v. Cliffs Natural Resources; Graham v. Fearon*
    - Ninth Circuit: *Laffen v. Hewlett Packard, Co.*

Recent Second Circuit Decision

- Gives the plaintiffs' bar renewed hope in stock-drop claims
- *Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620 (2d Cir. 2018)
  - Plaintiff alleged that the defendants knew of, and should have disclosed to plan participants, certain accounting irregularities that the defendants themselves were responsible for
  - Failure to disclose that it left IBM's stock price artificially inflated and harmed participants when the irregularities were eventually disclosed and the price of stock declined
  - Second Circuit reversed district court's dismissal of complaint
  - Supreme Court granted review, but did not decide anything – just asked the Second Circuit to reconsider
  - Second Circuit reached the same decision again
  - What happens next?

Presenters

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Jeremy P. Blumenfeld represents defendants on a range of employee benefit litigation matters, including numerous Employee Retirement Income Security Act (ERISA) class actions. Co-chair of the firm's ERISA litigation practice, Jeremy's experience includes defending class action claims challenging the administration of 401(k) savings plans, stock drop litigation involving 401(k) savings plans, cash balance and other defined benefit plans, and employee stock ownership plans (ESOPs) and traditional severance pay plans. He also advises clients on litigation and risk avoidance.

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Brian T. Ortelere defends employee benefits litigation, including Employee Retirement Income Security Act (ERISA) class actions. Co-chair of the ERISA litigation practice, he litigates class action claims challenging the administration of 401(k) plans, cash balance plans, and employee stock ownership plans (ESOPs). With his victory in Renfro v. Unisys, Brian became the first US lawyer to defeat "401(k) excessive fee" claims on a motion to dismiss and to successfully defend the judgment in the US Court of Appeals. Brian is ranked among the top three ERISA litigators in the nation according to Chambers & Partners.

Our Global Reach

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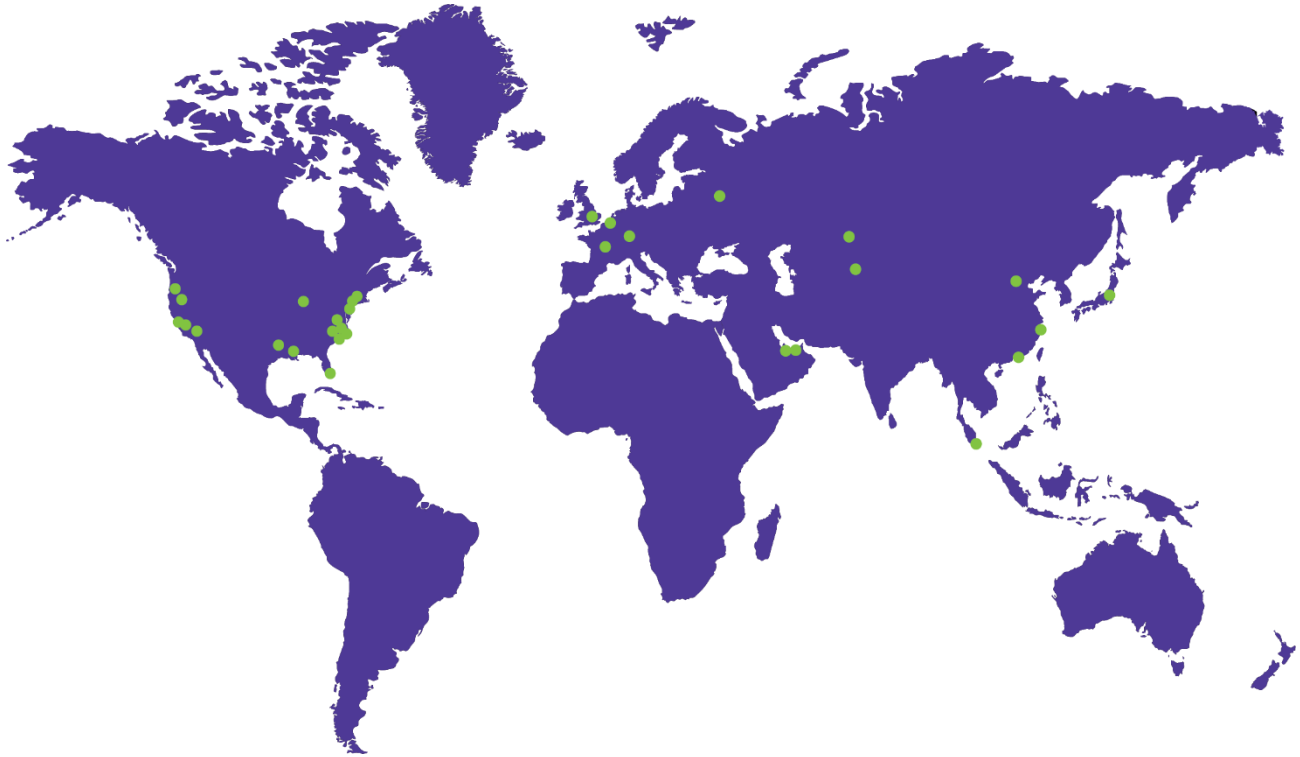

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Retirement savings plans

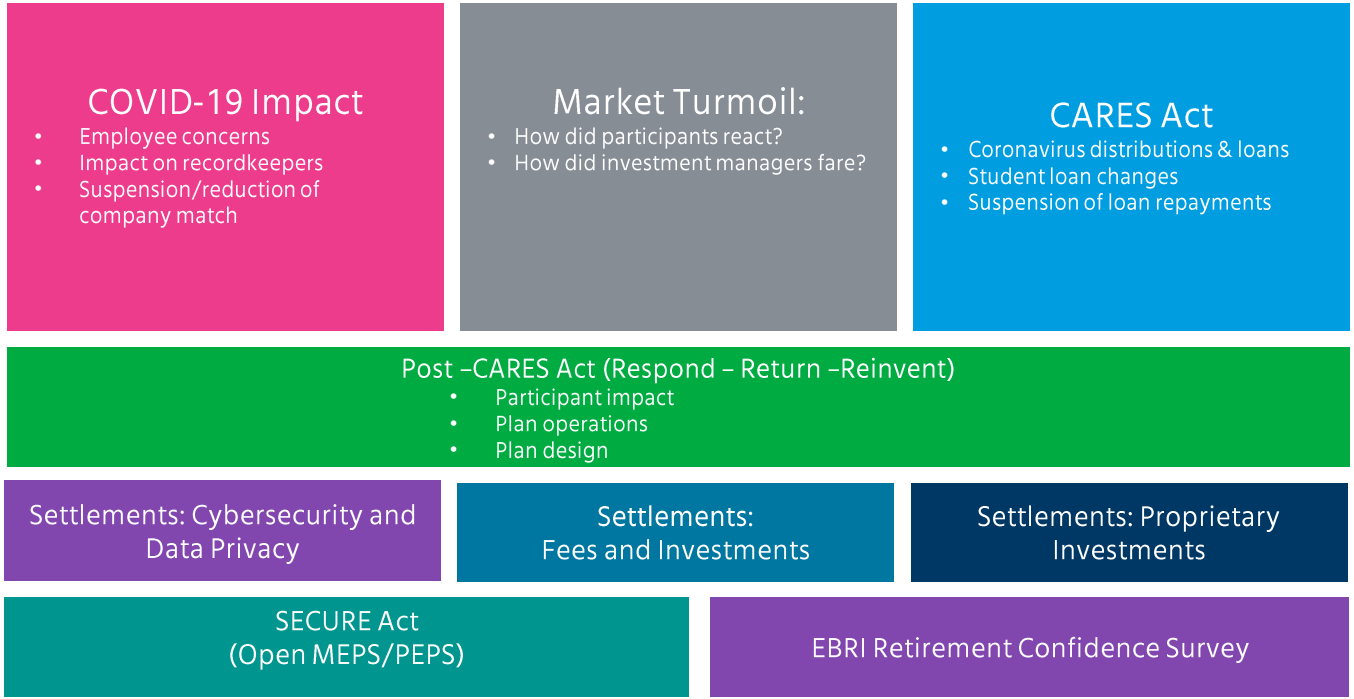
the way forward

July 2020

welcome to brighter

Creating and maintaining a high-performing DC plan can be complicated

DC landscape at a glance
2020 seems just as busy



Fiduciary risk
Understanding your fiduciary risk

The Employee Benefits Security Administration (EBSA) is responsible for enforcing ERISA and ensuring the integrity of the private employee benefit plan system.

Every year, they investigate a number of employee benefit plans, targeting ERISA violators.[1]

1,329

private employee benefit plans closed civil investigation in 2018 by the Employee Benefits Security Administration.

64.7%

of those investigations in 2018 resulted in corrective action.

$1.6b

was recovered in total from 2018 EBSA investigations.[2] **Up 45% from 2017.**

1 DOL Employee Benefits Security Administration "Agency Enforcement Results."
2 Includes recoveries from enforcement actions, voluntary fiduciary correction program, abandoned plan program and monetary benefit recoveries from informal complaint resolution.

Fiduciary best practices

Best practices

- Form a Retirement Plan Committee
- Know your role and responsibilities
- Hire experts
- Understand service provider contracts
- Ensure reasonableness of Plan fees
- Use fiduciary protection tools
- Comply with plan operational provisions
- Follow procedural prudence
- Document decisions and actions

Potential benefits of adopting best practices

Uncover omissions

Define philosophy

Educate fiduciaries

Evaluate compliance

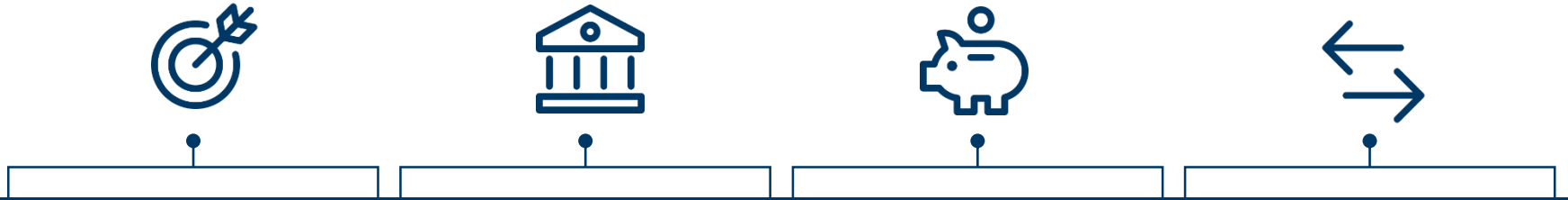
Prioritize objectives

Measure progress

Reduce Fees

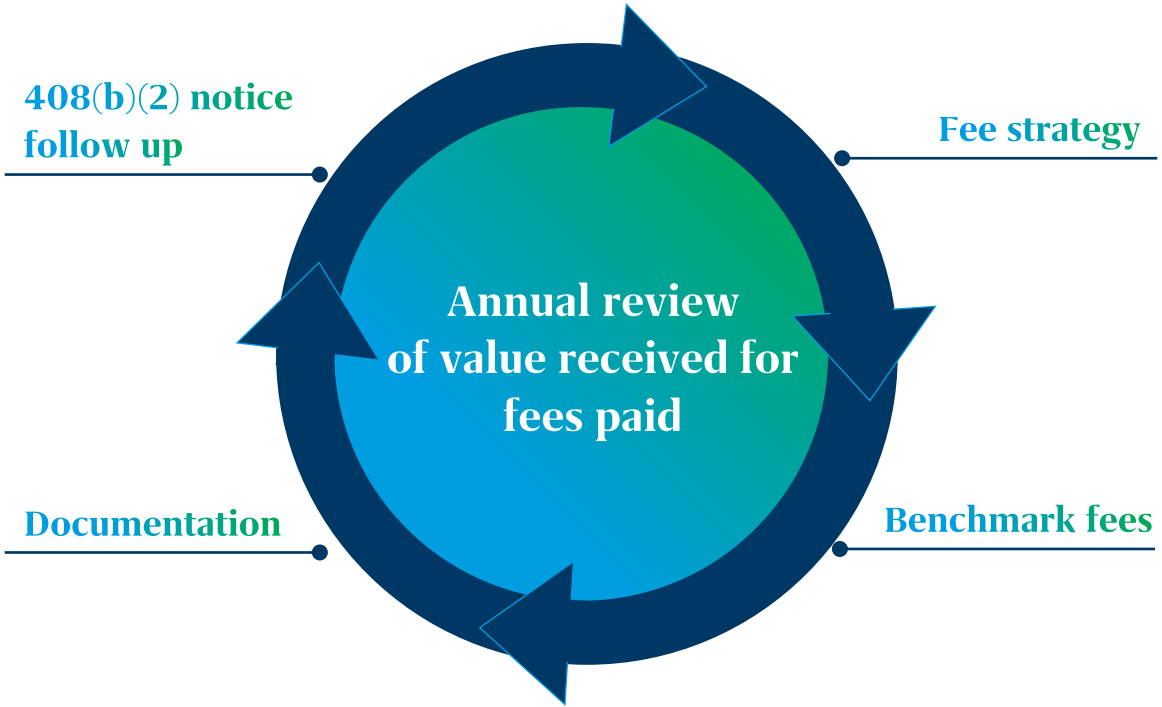
Help improve outcomes

Potential benefits of adopting best practices



Streamlined line-up	Broad use of institutional vehicles	Use of Multi Manager Funds	Disaggregated fees
• Make it simple • Use of Target Date Funds • Managed accounts	• Lower fees • Manager variety	• Broader diversification • Ease of transition	• Clarity of fees • Equality in disaggregation

Ensure reasonableness of plan fees



Get fiduciary training early & often

Fiduciary training is highly recommended for retirement committee and subcommittee members

Baseline training for each new member

At least annual refresher training for all members to keep current

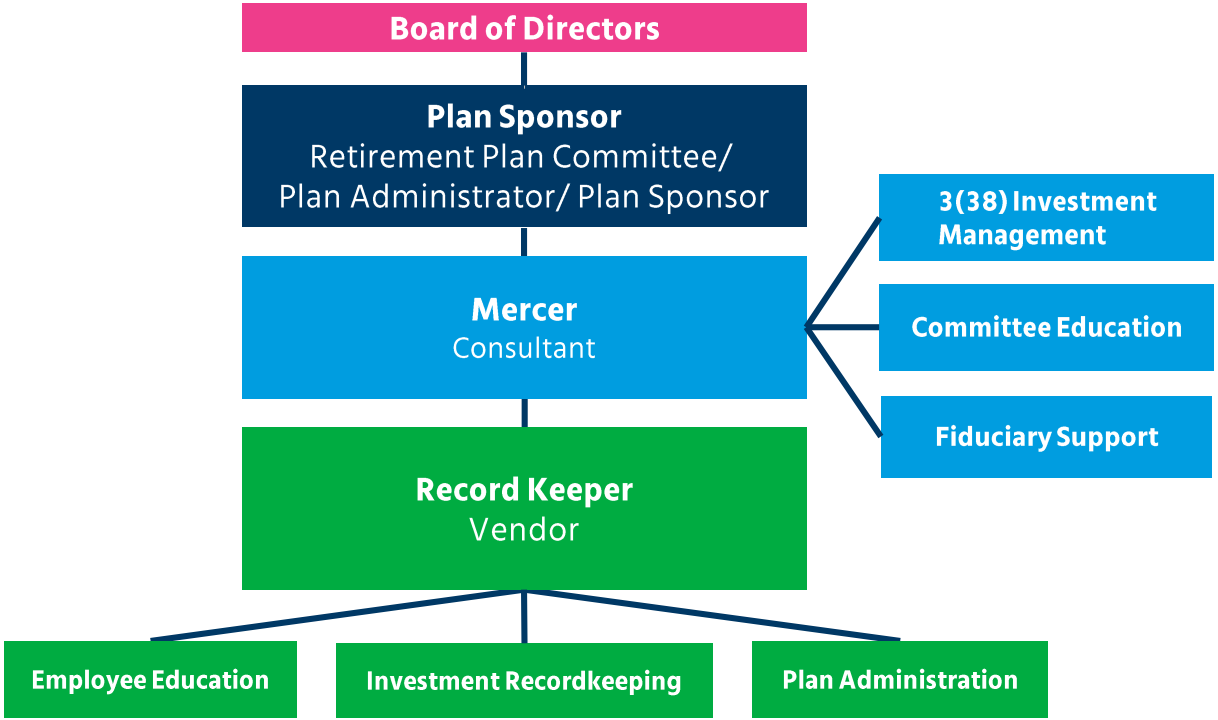
Keep records of what training was provided

Delegating fiduciary responsibility

The committee is typically established via a charter

- Establishes governance protocols
- Considers applicable provisions of the plan document and/or organizational bylaws
- Defines Committee membership
- States members' authority and responsibilities

Plan sponsor 401(k)
Typical plan structure



Changing risk
Fiduciary protections explained

3(16): Outsourced administration

A 3(16) fiduciary covers only non-investment services and can vary from vendor to vendor.

What is covered could include: loan approval, distribution of notices and enrollment materials.

3(21): Investment advice

Mitigate fiduciary risk with appropriate level of plan oversight and ongoing monitoring

3(38): Outsourced investment decisions

Provide employees with potential benefits to improve financial well-being, enhance participant success

The plan sponsor is ultimately responsible for any decisions made, on behalf of the plan, through an obligation to prudently select and monitor all third party service providers.

Revisiting plan governance
Why now?

[1]Savings cannot be guaranteed

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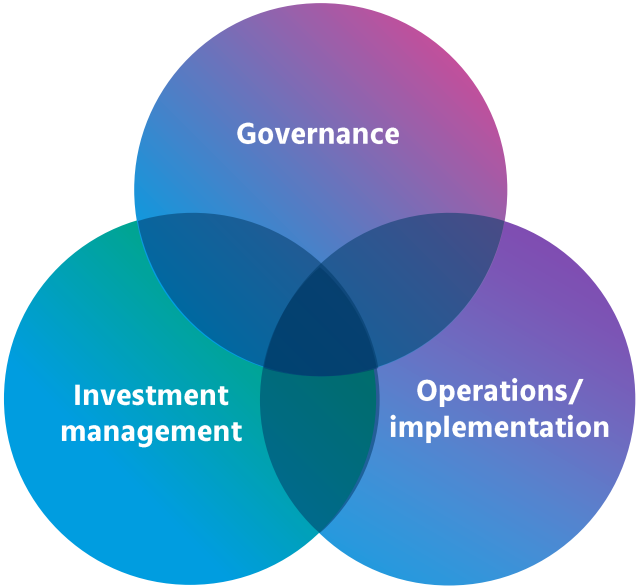
DC OCIO solutions
What's working



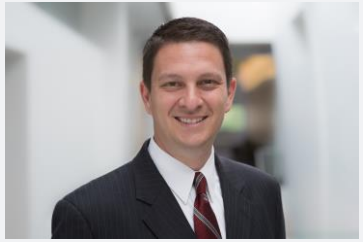
- An extension of staff
- Less demand on resources
- Mitigate fiduciary risk
- Daily portfolio oversight
- Timely portfolio adjustments
- Potentially reduced investment management fees
- Multi-manager portfolios help ensure diversified exposure to a variety of styles, with regular rebalancing

Our solution helps allow clients to focus on critical business issues

Summary
Suggested action items

- Review fiduciary governance process
- Analyze plan costs and structure
- Regularly review investments
- Consider alternative governance models

Questions



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Michael Cianciulli is a Partner and leads the Philadelphia market for Mercer's Wealth business where he is responsible for leading growth in the local market and advising clients on the design and management of their retirement plans.

Prior to joining Mercer, Mr. Cianciulli spent 20 years at Vanguard holding several positions representing Vanguard's investment and administrative solutions in the institutional marketplace, serving retirement plan clients and institutional consultants. He also managed several teams serving Vanguard's high-net-worth retail clients.

Mr. Cianciulli earned a B.A. from Temple University and an M.B.A. from The Pennsylvania State University. He holds FINRA Series 6, 63, and 7 licenses and has achieved the Qualified 401(k) Administrator (QKA) designation with the American Society of Pension Professionals & Actuaries.

He is a CFA® charterholder and a member of the CFA Society of Philadelphia.

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