# WELCOME

April 30

# Stay out of the *headlines:* reducing risk in your *employee benefit plan*

717-761-7210
www.cpabr.com

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Certified Public Accountants and Consultants


# Cyber Security: What You Must Know to Protect Your Employees…

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# Your Presenters

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## Crystal Skotedis CPA, CFE

Principal of Boyer & Ritter, LLC

Co-Chair, Employee Benefits Services Group

CERTIFIED FRAUD EXAMINER

***16 years in the field***

*Specialized EBP Services*

- Retirement Plan Compliance and Risk Mitigation
- Audits of 401(k), ESOP, 403(b), Pensions, Health and Welfare Plans

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# Melissa Gallagher CPA, MAcc

Manager, Boyer & Ritter, LLC

***7 years in the field***

***Specialized EBP Audit & Consulting Services:***
**401(k), Pension, & ESOP Plans**

Overview:

I. Statistics on cybercrime
II. Risk in your retirement plan
III. Case studies and common fraud schemes
IV. Consequences of a cyberattack
V. Fiduciary responsibilities
VI. Policies and procedures to protect against cyberattacks

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# Statistics on Cybercrime

# Polling Question

When did your Organization last review its ***cyber fraud prevention*** program?

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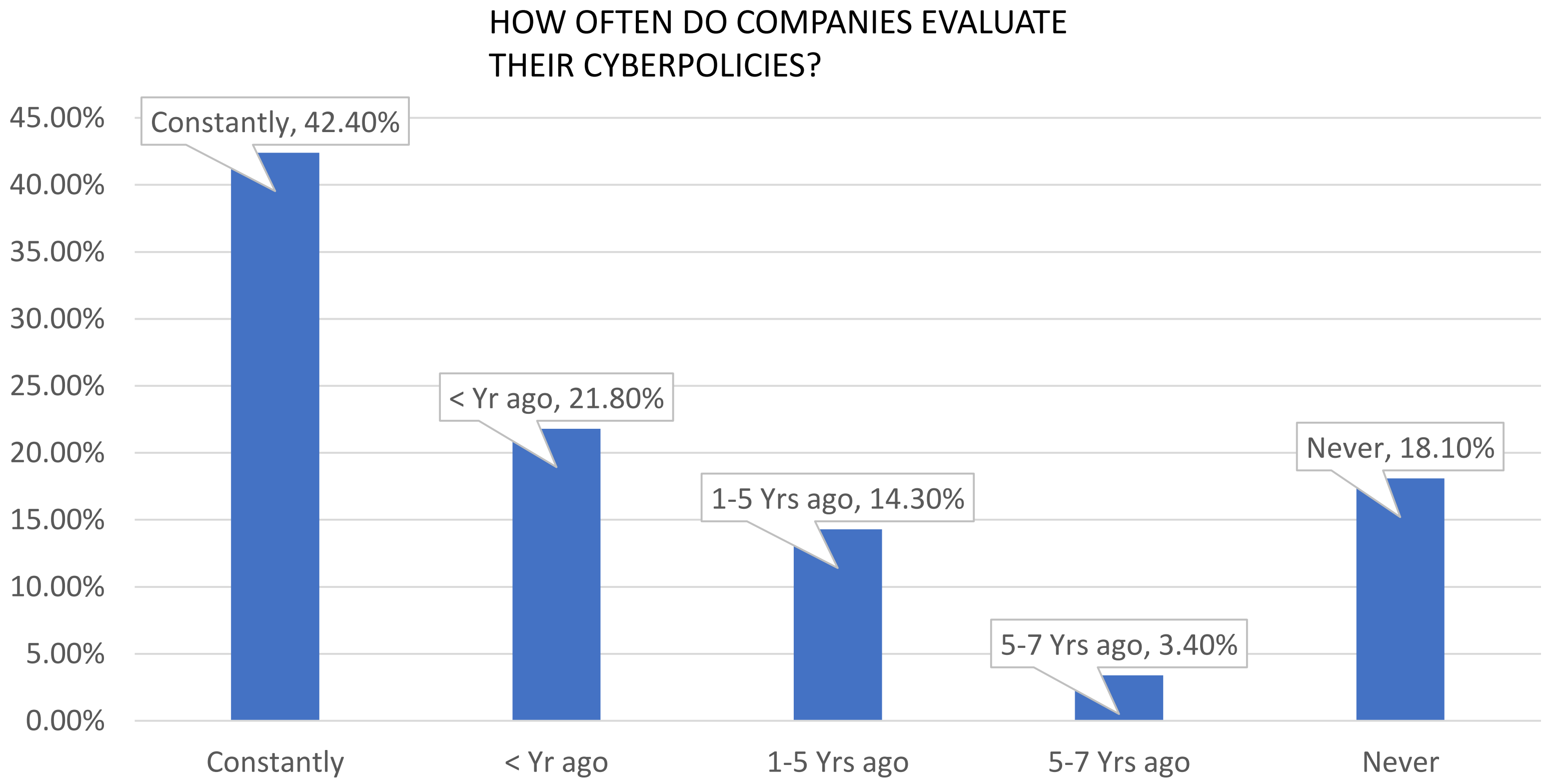
# Fraud Prevention Planning

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# Polling Question

When have you reviewed cyber-risk for your *retirement plan*?

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# MAJOR DATA BREACHES

540-Million Users (2019)

YAHOO!

3-Billion Users (2013-2014)

EQUIFAX®

143-Million Users (2017)

ebay

145-Million Users (2014)

JPMorganChase

7-Million Small Businesses

76-Million Households (2014)

UNDER ARMOUR®

150-Million Users (2018)

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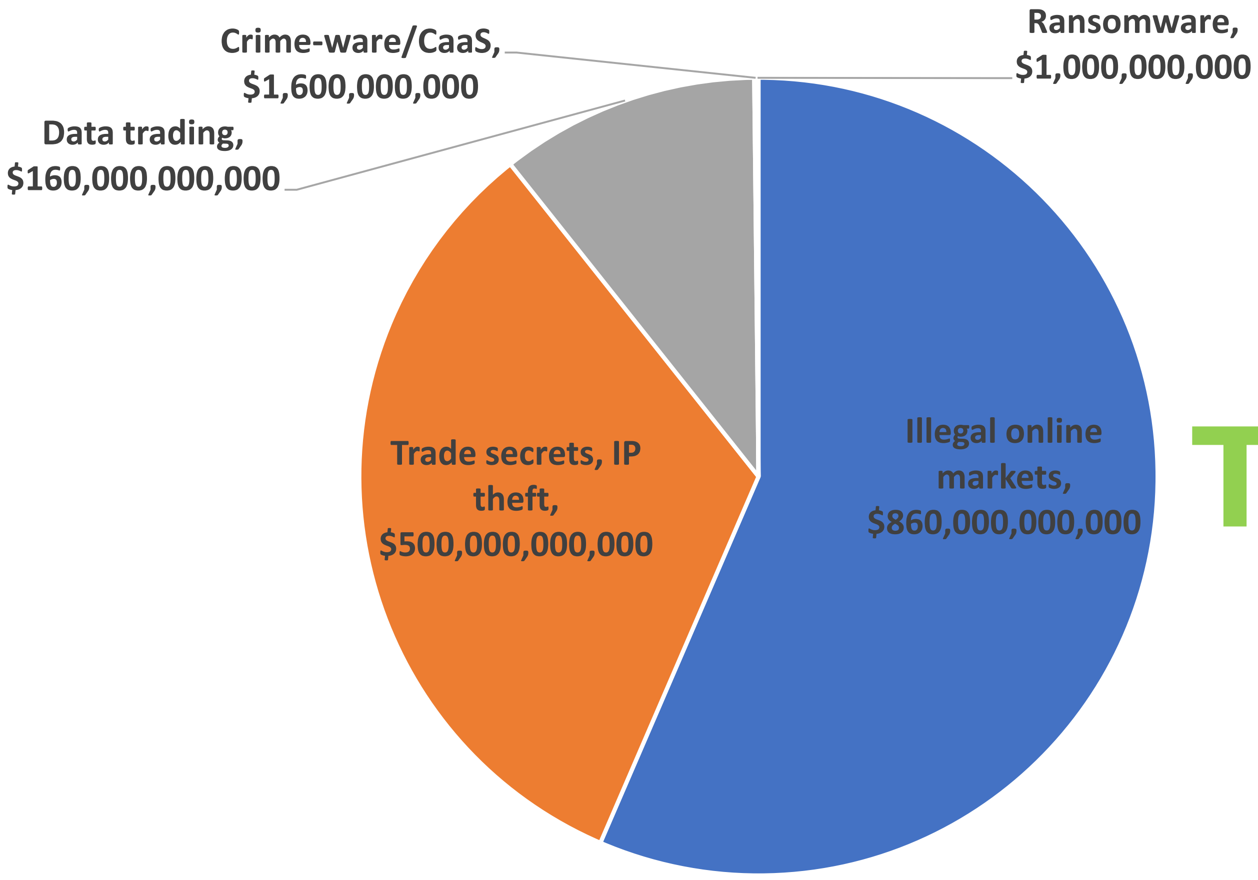
# HOW MUCH REVENUE WILL CYBERCRIME GENERATE THIS YEAR?




**$1.5 Trillion**

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# Why is Retirement Plan Cybercrime Increasing?

Low Investment

High Yield

Low Risk

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# How Your Retirement Plan is at Risk

# Is Your Retirement Plan a Target for Hackers?

- U.S. 401(k) Plan Assets are valued over $5 Trillion and have become an increased target of foreign hackers.

- Since 2013, there have been over 3.8 Million records stolen daily and their skills are more sophisticated than ever.

- Retirement Plans operate almost entirely in an electronic environment and utilize large amounts of sensitive information that is shared and stored with multiple third parties.

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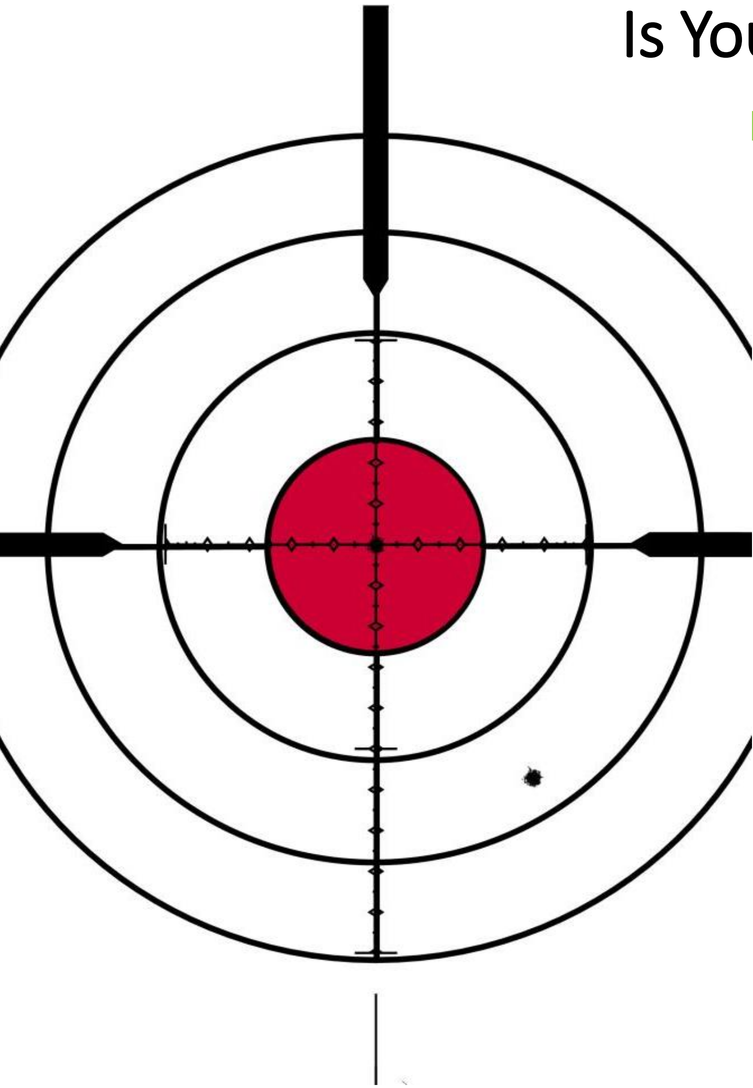
# Is Your Retirement Plan a Target for Hackers?



- Retirement Plans are not regulated for cybersecurity purposes, as are other businesses that handle personal information.
- Benefit plans often fall outside of the scope of a sponsor organization's cybersecurity planning with regard to the ongoing business activities.
- Plan Sponsors may have a false sense that anti-virus and anti-spam software protects their plan from risk.
- Plan Sponsors may have a false sense that their service organizations' internal control audits address cyber risks at the service organization.

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# What data do they want?

- ✓Social Security Information
- ✓Date of Birth
- ✓Residential Address
- ✓Bank Account Numbers

By gathering enough information to construct an identity, hackers can make a *fortune*.

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# Case Studies and Common Fraud Schemes

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# How Can Your Retirement Plan be Hacked?

- Phishing techniques
- Socially engineered malware
- Cyber impersonation
- Ransomware attacks
- Loss or theft of mobile phones, hard drives, laptops, flash drives
- Interception of unencrypted digital information
- Under-secured business networks
- Data breach by your Third Party Administrators

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# Phishing Techniques

Deceitful obtainment of login credentials and passwords to gain access to online participant account information and request distributions or loans, redirect benefits to another account, or create fraudulent health claims.

# Are you skeptical enough?

How do you *verify* that each email or phone call you receive from an employee or plan service provider is coming from an *official known source*?

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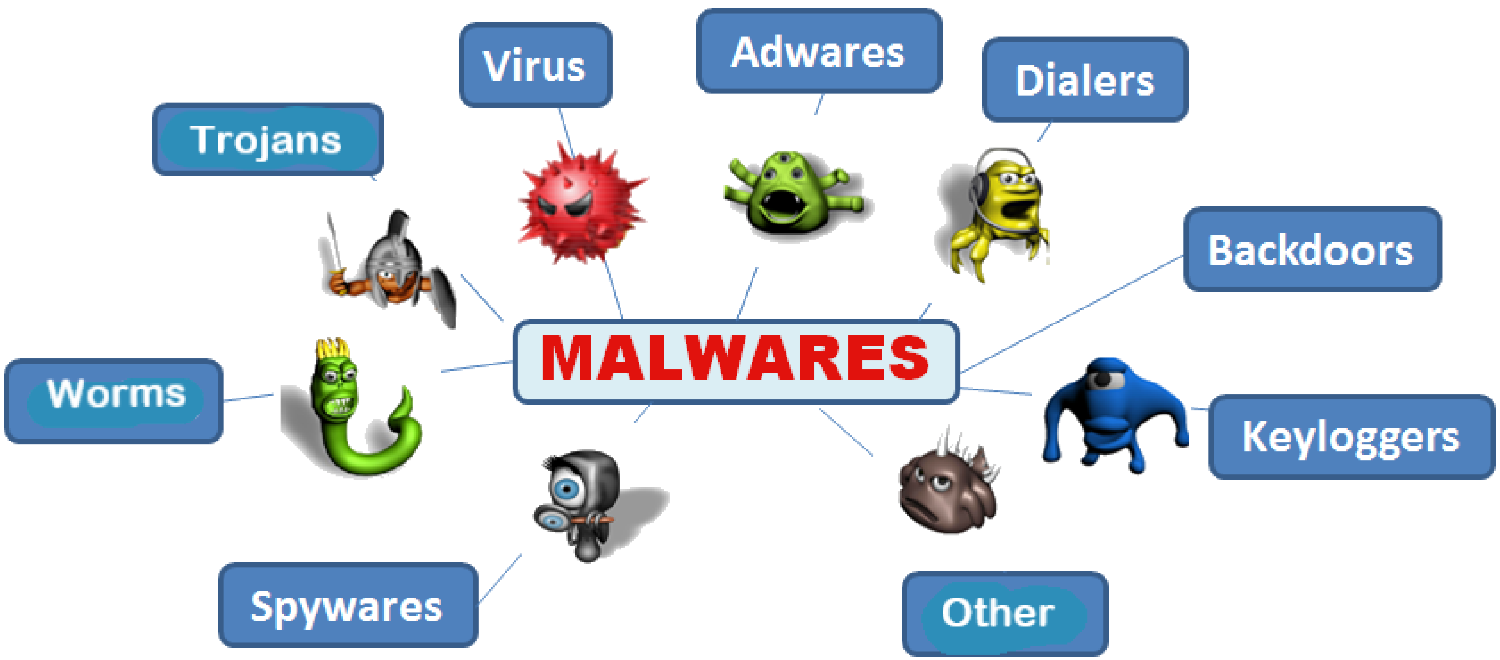
# Socially Engineered Malware

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# Do you know….

*Who* has been granted access to your TPA, Payroll and Auditor websites?

# Cyber Impersonation

**Cyber criminals** can use employees' personal information and set up web profiles that allow them to take out loans or distributions from individual participant accounts.

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# Ransomware


Cyber criminals encrypt and seize an entire hard drive, only releasing it in exchange for a ransom.

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# Loss or Theft



- **Loss or theft** of mobile devices, laptops, and flash drives with personal data.

- Personal information transmitted via **unsecured email** or portals.


# Ask Yourself?

- *How* have you protected employees' sensitive data you store?
- *Where* are all the places sensitive data stored?
- Are you certain your servers, cloud applications and your mobile devices are *safe*?

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# Retirement Plan: Service Providers

- **Payroll Provider**
- **Third Party Recordkeeper**
- **Asset Custodian**
- **Investment Advisor**
- **Auditor**
- **ERISA Counsel**


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# Have you ever asked....

How much *do you* know about your Third Party Administrators, Payroll Providers and Auditor's *cyber controls*?

# SOC Report Comparison

SERVICE ORGANIZATION CONTROL REPORTS

| | What it reports on | Who uses it |
|---|---|---|
| SOC 1 | Internal controls over financial reporting | User auditors & users' controller's office |
| SOC 2 | Security, availability, processing integrity, confidentiality or privacy controls | Management, regulators & others. Shared under NDA |
| SOC 3 | Security, availability, processing integrity, confidentiality or privacy controls | Publicly available to anyone |

# Consequences of a Cyberattack

# Costs of a Cyberattack


- $ Detecting the extent of the breach
- $ Attempts to recover the data
- $ Restoring the system's integrity
- $ Breach notification and credit monitoring
- $ Potential assessment of penalties under state and federal law
- $ Potential for civil claims by those affected
- $ Loss of productivity and stunted business growth during remediation
- $ Damage to reputation
- $ Loss of employees or customers

# Fiduciary Responsibilities

# Is Cybersecurity Part of Your Fiducary Role?

It's your *duty*, by law.

- ERISA 404 requires benefit plan sponsors and other fiduciaries to administer their plans for the exclusive benefit of their plan participants and with the "care, skill, prudence, and diligence under circumstances that a prudent person acting in a like capacity and familiar with such matters would use."
- DOL Reg. 2520.104b-1(c) and DOL Technical Release No. 2011-03 and 2011-03R impose obligations to ensure that electronic systems protect the confidentiality of personal information.
- Other state privacy and cyber laws, *Dittman v. UPMC* case

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# Cyber Security Framework

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National Institute of Standards and Technology

Cybersecurity Framework


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# NIST Cyber Security Framework

| Identify | Protect | Detect | Respond | Recover |
|---|---|---|---|---|
| Asset Management | Access Control | Anomalies and Events | Response Planning | Recovery Planning |
| Business Environment | Awareness and Training | Security Continuous Monitoring | Communications | Improvements |
| Governance | Data Security | Detection Processes | Analysis | Communications |
| Risk Assessment | Info Protection Processes and Procedures | | Mitigation | |
| Risk Management Strategy | Maintenance | | Improvements | |
| | Protective Technology | | | |

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# Policies and Procedures to Protect Against Cyberattacks

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# Cyber Security Program: BASICS

| Establish | Document | Create | Review |
|---|---|---|---|
| Establish procedures for how you will communicate with your service providers, management, employees, participants and beneficiaries. | Document a process for determining how a breach will be detected, corrected and what remedies will be used. | Create annual checklists for vetting your service providers and negotiate contract provisions to lower or mitigate the costs of correcting a cyberattack. | Review and understand your business insurance coverage and consider cyber insurance to address coverage gaps. |

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# Cyber Security Program: UPGRADED

- Establish internal security policies for storage, transmission and destruction of sensitive information or files. Control indirect and direct access to sensitive data.
- Establish routine training policies for management and staff to reinforce data security.
- Invest in a reliable data backup system and store it off-network.
- Identify service providers' security programs and manage the perceived risks.
- Establish best practices for protecting all system access passwords.

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# Cyber Security Program: ADVANCED

1

Request SOC 2 Reports from service providers that specifically address cybersecurit y controls.

2

Routinely adopt and maintain up-to date software and technology.

3

Continuously evaluate cybersecurity risk, analyze gaps and implement an action plan.

4

Require background checks and screening of employees handling sensitive information.

5

Hire external cybersecurit y experts for penetration testing and Readiness assessments.

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# Navigating the Fog

## Understanding and Evaluating 401(k) Plan Costs

Presented By:
**J. Scott Gehman, ERPA, CEBS**
*Retirement Plan Consultant*

Conrad Siegel™

Conrad Siegel has been in business since 1963. We have offices in Harrisburg and Lancaster. We specialize in Employee Benefits and Investment Management.

# What we will cover …

- What's the big deal?
- What are the common misconceptions about plan costs?
- What are the most common fees, and where can you find them?
- How can you properly evaluate expenses?

# What's the **big deal?**

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# Recent and Not-So-Recent Developments

- Recent lawsuits
  - Not just large plans are affected anymore
  - Down to small differences in mutual fund share class costs
  - Fiduciary self-dealing, using mostly proprietary funds, etc.
  - Recent university 403(b) plan lawsuits
- Employee Retirement Security Act of 1974 (ERISA)
  - Fiduciaries must pay only reasonable expenses from plan
- 2012 ERISA 408(b)(2) and 404a-5 Regulations
  - Stresses that plan sponsors must review plan fees regularly
  - Ensures that expenses are disclosed to participants
- Participant outcomes

# Participant Outcomes

- Assumptions:
  - 2 participants, beginning balance of $100,000 each, expecting to earn an 8% average return before expenses
  - Each earns $50,000 per year, contributes 5% of salary to the plan, and will get a salary increase of 5% per year
  - One plan costs 1% of assets to maintain, the other 2%


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# What the Law Requires

- ERISA focus is on a Prudent Process ("the two 'PRs'"), not investment results.
  - Consists of a written process and evidence that it is being followed
  - Fiduciaries must act as prudent experts, including in cost evaluation.
  - Upon a random audit, a plan sponsor that can't produce documentation that fees were evaluated could be in trouble, even if the plan is outperforming the market.
- Reminder - Employee Retirement Security Act of 1974 (ERISA)
  - Fiduciaries must pay only reasonable expenses from plan

# Common misconceptions about plan costs

# Common Misconceptions

- "Our provider said that if we invested with them, they'd do our record keeping for free/give us a discount."
  - DC plan record keeping and compliance is complicated, and providers are generally staffed by (hopefully) highly-educated professionals.  Somebody is getting paid, somehow.
  - The invoice is **NEVER** the only cost – look at the investments and any revenue sharing; that's probably how your providers are getting paid if your plan is "free" or "cheap."

# Common Misconceptions

- "I must choose the lowest cost provider or I will breach my fiduciary duty."
  - ERISA says to pay *reasonable* costs from the plan
  - Your plan or your participant population may require more services than the lowest-cost option can provide
  - You sometimes get what you pay for – the cheapest provider could become the most expensive if errors are found later

# Common Misconceptions

- "It doesn't matter what the plan costs, as long as the participants are getting better returns."
  - ERISA focus is on a **Pr**udent **Pr**ocess ("the two '**PR**s'"), not outcomes.
    - Consists of a written process and evidence that it is being followed
    - Fiduciaries must act as prudent experts, including in cost evaluation.
  - Upon a random audit, a plan sponsor that can't produce documentation that fees were evaluated could be in trouble, even if the plan is outperforming the market.

# Common Misconceptions

- "I must put the plan out to bid occasionally in order to fulfill my obligations."
  - We have seen this idea used as a scare tactic
  - There is no such requirement
  - Going through the RFP process is pretty time-consuming and is often best done when making a change is actually being considered
  - You may need some outside help to do a truly objective RFP process, therefore higher costs
  - Regardless, you should use other means to ensure your costs are reasonable, even if not putting your plan out to bid
    - Check out some independent benchmarks
    - Do some research to make sure you're getting the right services

# Common Misconceptions

- "Our provider is giving us a break because of other business we have with them."

  -- OR --

- "We invest with our CFO's brother-in-law; he gives us a great deal."
  - Both are significant conflicts of interest
  - **Very bad idea** fiduciary-wise, unless it is truly the optimum situation for your employees and you have documented the evaluation and decision process exhaustively

The most common

# Plan fees

# Common Plan Fees

- Fiduciaries must understand the fee landscape, and that landscape is pretty foggy.
- There are three ways a fiduciary should look at plan fees:
  - WHO is getting paid?
  - HOW are they getting paid?
  - WHAT are the hidden costs?
- If you don't look at all three, something will get missed.

# Common Plan Fees

- WHO is getting paid?  The main players…
  - Record Keeper – tracks detail of participant accounts, maintains web site, and processes transactions
  - TPA – performs annual compliance testing, 5500 prep, plan document work, etc. (sometimes same firm as Record Keeper)
  - Investment Advisor – if a true RIA, provides fiduciary investment services.
  - Custodian and/or Corporate Trustee – holds the assets for safekeeping and often issues checks (sometimes provides brokerage services, especially if no investment advisor)

# Common Plan Fees

- WHO is getting paid? The main players…
  - Mutual Fund Company – the expense ratios represent what it costs to manage and market the individual investment fund.
  - Insurance Company – if your plan operates on an insurance company platform, there are often additional charges on the investments.
  - There may be other providers, e.g. a law firm that drafts an individually-designed plan document, an employee communications provider, etc. Identify them all!

# Common Plan Fees

- HOW are they getting paid?
  - Is the plan sponsor paying the invoice directly?
  - Is the invoice being paid by the plan?
  - Are all or some plan costs are being paid via revenue sharing, an insurance wrap, etc.?
  - Are participants being assessed charges individually (e.g. for a loan, distribution, etc.)?
  - Is there a combination of some of the above?  Probably.

# Common Plan Fees

- HOW are they getting paid?
  - Are there additional special costs?  Examples:
    - Plan document services
    - Special investments
    - Employee education or extra participant services
    - Complicated plan provisions
    - NOTE – most providers **will** charge extra for special projects such as IRS/DOL audits, plan terminations, special testing, and the like

# Common Plan Fees

- HOW are they getting paid?
  - By dollar-based formula?  (e.g. flat base charge plus per-participant cost)
  - By percent-of-assets formula? (e.g. a percentage of assets, which may be tiered to decrease as plan assets increase)
  - By embedded investment fees such as revenue sharing?
  - Charge for service, either flat or based on hourly rates?
  - Is it a combination of the above?  Very possibly.

# Common Plan Fees

- WHAT are the hidden costs?  Some common sources:
  - Revenue sharing (embedded in mutual fund expense ratios)
  - Insurance company "wrap" fees
  - Insurance company mortality charges
  - Cash float
  - Loads, surrender charges, etc.
- "Hidden" does not mean "bad" – as long as the costs are reasonable.  It just means they are harder to identify and to quantify.

# Yikes!

# Properly evaluating

# **Plan expenses**

# Properly Evaluating Plan Expenses

- The basic process
  - Identify all providers
  - Figure out how they are being paid
  - Figure out what they are being paid
  - Convert everything either to dollars or percentages
  - Compare to a benchmark or to alternative providers, or both
  - Consider the value received for the cost paid
  - Repeat annually for ongoing monitoring

# Properly Evaluating Plan Expenses

- Identify all providers - Record Keeper, Custodian, Advisor, etc.
  - Do some research and make sure you have them all.
- Figure out how and what they are being paid
  - Contracts and insurance company documents
  - 408(b)(2) notices (disclosures from the provider to the plan sponsor)
  - Invoices
  - Participant 404a-5 notices (DOL-required annual investment disclosures)
  - Public mutual fund data (ensure you have the right share class)
  - 5500 schedules C, A, and H
  - Review actual performance vs. published returns
  - Read the fine print

# Properly Evaluating Plan Expenses

- Example: Using publicly available mutual fund data
  - Go to fund company web site, prospectus, Morningstar Inc., etc.
  - Look at overall expense ratio, 12b-1 fees (the latter is usually a source and indication of revenue sharing)
  - Ensure that a weighted average of the expense ratios is a part of any evaluation of plan costs
  - If your plan or the plan sponsor pays no other costs, this is how most or possibly all of your fees are being paid

Class A
0.55%
0.25%
0.09%
0.89%
N/A
0.89%

**Annual Fund Operating Expenses (expenses that you pay each year as a percentage of the value of your investment):**

| | Inst Class | I-2 | I-3 | Admin Class | Class A |
|---|---|---|---|---|---|
| Management Fees[1] | 0.46% | 0.56% | 0.66% | 0.46% | 0.55% |
| Distribution and/or Service (12b-1) Fees | N/A | N/A | N/A | 0.25% | 0.25% |
| Other Expenses[2] | 0.09% | 0.09% | 0.09% | 0.09% | 0.09% |
| **Total Annual Fund Operating Expenses** | 0.55% | 0.65% | 0.75% | 0.80% | 0.89% |
| Fee Waiver and/or Expense Reimbursement[3] | N/A | N/A | (0.05%) | N/A | N/A |
| **Total Annual Fund Operating Expenses After Fee Waiver and/or Expense Reimbursement** | 0.55% | 0.65% | 0.70% | 0.80% | 0.89% |

# Properly Evaluating Plan Expenses

- Example: Using Investment Return to Evaluate Costs in Excess of Published Returns
  - Find a participant with no activity other than investment returns
  - Divide investment results by beginning balance
    - Divide $1,574.34 by $52,433.05 – result of 3.00%
  - Compare to the fund's ***actual published rate of return*** of 3.09%
    - Ensure comparing the correct fund ticker
    - Plan return is 0.09% lower than published return
    - Multiply by 4 to get rough cost (*in excess of mutual fund expenses*) of .36%.
    - If your plan's costs vary considerably, you may want to review an entire year rather than multiplying one quarter by 4

| | Beginning Balance | Contributions | Investment Results | Forfeitures | Withdrawals | Loan Repayments | Fund Transfers | Ending Balance |
|---|---|---|---|---|---|---|---|---|
| Vanguard Target Retirement 2030 | | | | | | | | |
| 401(k) Employee | $52,433.05 | 0.00 | 1,574.34 | 0.00 | 0.00 | 0.00 | 0.00 | $54,007.39 |

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# Properly Evaluating Plan Expenses

- Example: Form 5500 Schedule A (Note – Commissions are atypical for larger plans; Schedule A is getting fairly rare)

**Part I** **Information Concerning Insurance Contract Coverage, Fees, and Commissions** Provide information for each contract on a separate Schedule A. Individual contracts grouped as a unit in Parts II and III can be reported on a single Schedule A.

**1** Coverage Information:

(a) Name of insurance carrier

PRINCIPAL LIFE INSURANCE COMPANY

Commissions, etc. with larger plans are getting more rare - are commissions justified by value received?

| (b) EIN | (c) NAIC code | (d) C... identific... | ...ximate number of ...covered at end of ...r contract year | Policy or contract year (f) From | Policy or contract year (g) To |
|---|---|---|---|---|---|
| 42-0127290 | 61271 | 441463 | 292 | 01/01/2013 | 12/31/2013 |

**2** Insurance fee and commission information. Enter the ... paid. List in line 3 the agents, brokers, and other persons in descending order of the amount paid.

| (a) Total amount of commissions paid | (b) Total amount of fees paid |
|---|---|
| 12785 | 11316 |

**3** Persons receiving commissions and fees. (Complete as many entries as needed to report all persons).

(a) Name and address of the agent, broker, or other person to whom commissions or fees were paid

WOODBURY FINANCIAL SERVICES
5575 GARDEN VILLAGE WAY
STE C102
GREENSBORO, NC 27410-8578

| (b) Amount of sales and base commissions paid | Fees and other commissions paid (c) Amount | (d) Purpose | (e) Organization code |
|---|---|---|---|
| 12785 | 11316 | REFERRAL/SERVICE FEE | 3 |

# Properly Evaluating Plan Expenses

- Example: Form 5500 Schedule C

**(a)** Enter name and EIN or address (see instructions)

Conrad Siegel Actuaries 23-1669823
PO Box 5900

Harrisburg PA 17110-0900

| (b) Service Code(s) | (c) Relationship to employer, employee organization, or person known to be a party-in-interest | (d) Enter direct compensation paid by the plan. If none, enter -0-. | (e) Did service provider receive indirect compensation? (sources other than plan or plan sponsor) | (f) Did indirect compensation include eligible indirect compensation, for which the plan received the required disclosures? | (g) Enter total indirect compensation received by service provider excluding eligible indirect compensation for which you answered "Yes" to element (f). If none, enter -0-. | (h) Did the service provider give you a formula instead of an amount or estimated amount? |
|---|---|---|---|---|---|---|
| 15 50 17 59 37 38 49 | None | 26,071 | Yes ☐ No ☒ | Yes ☐ No ☒ | 0 | Yes ☐ No ☒ |

**(a)** Enter name and EIN or address (see instructions)

Charles Schwab & Co., Inc. 94-1737782

This indirect compensation should be reviewed and understood

| (b) Service Code(s) | (c) Relationship to employer, employee organization, or person known to be a party-in-interest | (d) Enter direct compensation paid by the plan. If none, enter -0-. | (e) Did service provider receive indirect compensation? (sources other than plan or plan sponsor) | (f) Did indirect compensation include eligible indirect compensation, for which the plan received the required disclosures? | (g) Enter total indirect compensation received by service provider excluding eligible indirect compensation for which you answered "Yes" to element (f). If none, enter -0-. | (h) Did the service provider give you a formula instead of an amount or estimated amount? |
|---|---|---|---|---|---|---|
| 19 25 50 59 62 | None | 10,333 | Yes ☒ No ☐ | Yes ☒ No ☐ | 0 | Yes ☒ No ☐ |

# Properly Evaluating Plan Expenses

- Example:  Form 5500 Schedule H

**Expenses**

| | | | | |
|---|---|---|---|---|
| **e** | Benefit payment and payments to provide benefits: | | | |
| | **(1)** Directly to participants or beneficiaries, including dire | | 2,358,627 | |
| | **(2)** To insurance carriers for the provision of benefits | | | |
| | **(3)** Other | | | |
| | **(4)** Total benefit payments. Add lines **2e(1)** through **(3)** | | | 2,358,627 |
| **f** | Corrective distributions (see instructions) | **2f** | | 1,645 |
| **g** | Certain deemed distributions of participant loans (see instructions) | **2g** | | |
| **h** | Interest expense | **2h** | | |
| **i** | Administrative expenses: **(1)** Professional fees | **2i(1)** | 36,404 | |
| | **(2)** Contract administrator fees | **2i(2)** | | |
| | **(3)** Investment advisory and management fees | **2i(3)** | 45,256 | |
| | **(4)** Other | **2i(4)** | | |
| | **(5)** Total administrative expenses. Add lines **2i(1)** through **(4)** | **2i(5)** | | 81,660 |
| **j** | Total expenses. Add all **expense** amounts in column (b) and enter total | **2j** | | 2,441,932 |

**Net Income and Reconciliation**

| | | | | |
|---|---|---|---|---|
| **k** | Net income (loss). Subtract line **2j** from line **2d** | **2k** | | -2,256,098 |
| **l** | Transfers of assets: | | | |
| | **(1)** To this plan | **2l(1)** | | |
| | **(2)** From this plan | **2l(2)** | | |

This section is only going to be your direct compensation; will not include revenue sharing, etc.

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# Properly Evaluating Plan Expenses

- Example: Insurance Company Documents

## Vanguard Target Retirement 2035 Ret Opt

| Asset Classification | Benchmark |
|---|---|
| Multi-Asset/Other | Morningstar Lifetime Moderate 2035 |
| *Target Date Investment Choices* | |

**Investment Information**

The Vanguard Target Retirement 2035 Ret Opt, a Separate Account, invests exclusively in the Vanguard Target Retirement 2035 Fund (Investor Class), a mutual fund (Fund).

**Investment Objective & Strategy**

The investment seeks to provide capital appreciation and current income consistent with its current asset allocation.

The fund invests in other Vanguard mutual funds according to an asset allocation strategy designed for investors planning to retire and leave the work force in or within a few years of 2035 (the target year). A time, its asset allocation may be affected by a factors, such as whether the underlying funds additional investments. The fund's indirect sto a diversified mix of U.S. and foreign large-, mi small-capitalization stocks.

0.93% of assets, vs. Vanguard published Expense Ratio of 0.18% at the time

**Operations**

| | |
|---|---|
| Redemption Fee/Term | — |
| Expense Ratio | Type 7*: 0.93% of fund assets |

**Performance**

**Investment Choice Annual Retur**

| | Total Ret % |
|---|---|
| 2006 | 14.47 |
| 2007 | 6.69 |
| 2008 | -35.15 |
| 2009 | 27.25 |
| 2010 | 14.27 |
| 2011 | -2.97 |
| 2012 | 14.34 |

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**Investment choices are**

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# Properly Evaluating Plan Expenses

- Example: Insurance Company Documents (Read the Fine Print)

Type 7: The expense ratio quoted reflects the maximum total operating expenses, of the investment choice, which include the Separate Account Maintenance and Administrative Charges assessed by (if applicable), and the total operating expenses of the underlying investment, net of any fee waivers. There may also be charges to your balance in the separate accounts for contract asset charges, discontinuance charges or service fees, as applicable under your contract, which are not reflected on these fact sheets.

**Charges Upon Termination**

Depending on the features elected by your plan, a discontinuance charge may apply at the time the investment contract is terminated.

**Performance**

Unless otherwise noted, all data is shown as of the release date of these investment fact sheets. Performance shown is average annual total separate account investment choice returns (except 3 months and year-to-date) for the period indicated, net of the total operating expenses of the separate account and underlying investment (if applicable) as listed on the individual investment fact sheets. Performance returns reflect reinvestment of dividends and capital gains distributions. Performance does not reflect application of the contract asset charges and any discontinuance charges or service fees deducted from an account: such charges and fees would reduce a participant's return.

**Contract Asset Charges**

*The applicable monthly contract asset charges (CAC) range from 0.0000% to 0.3333%.*

# Properly Evaluating Plan Expenses

- Compare to a benchmark or to alternative providers
  - If choosing a benchmark, make sure it's independent
  - 401(k) Averages Book is a source used by some providers – can use for 403(b) plans as well.
  - If comparing among alternative providers, create a comparative chart
  - Make sure services across providers or as compared to benchmarks are comparable (for example, not every provider is a fiduciary, employee education products may differ, etc.)

# Properly Evaluating Plan Expenses

- Convert everything to dollars or percentages
  - Sometimes hard dollars are easier to understand, especially when comparing alternative providers
  - Benchmarking statistics are almost always expressed as a percentage of assets.
  - You may want to do both

# Properly Evaluating Plan Expenses

- Example: Putting it Together

## Investment Expenses

| Fund Category | Fund Name | Actual Expense Ratio | Category Average Expense Ratio* |
|---|---|---|---|
| Stable Value | Wells Fargo Stable Value Fund** | 0.58% | 0.72% |
| Intermediate-Term Bond | Prudential Total Return Bond | 0.76% | 0.76% |
| . . . | . . . | . . . | . . . |
| Target-Date 2050 | JPMorgan SmartRetirement 2050 Fund Class C | 1.47% | 0.85% |
| Target-Date 2055 | JPMorgan SmartRetirement 2055 Fund Class C | 1.47% | 0.82% |
| **Dollar Weighted Average** | | **0.84%** | **0.90%** |

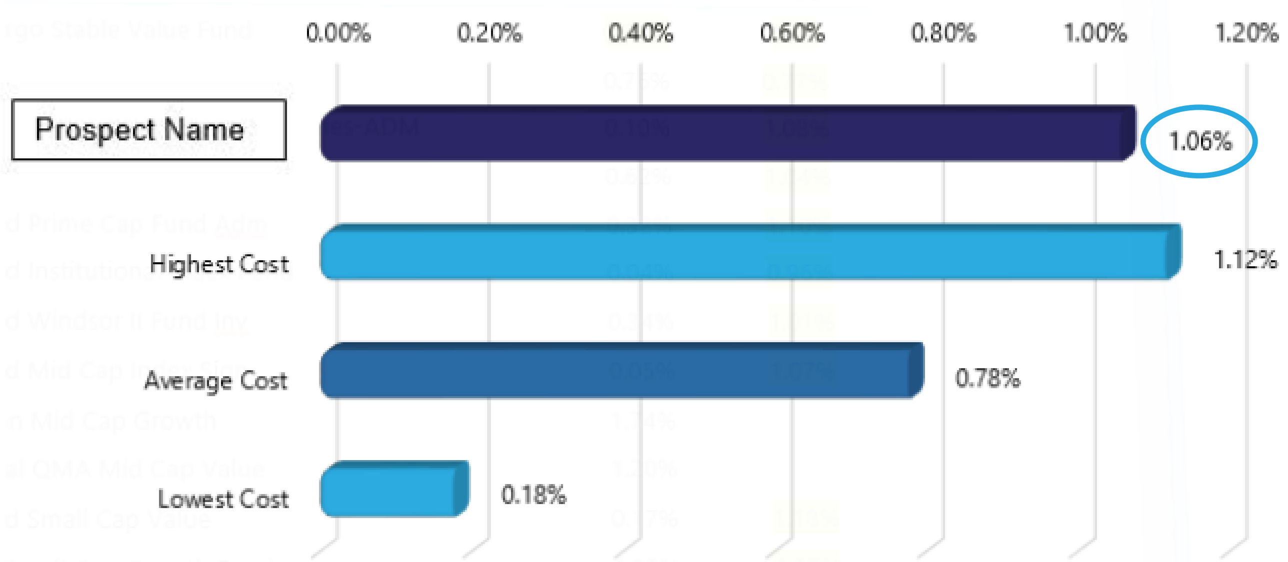
# Properly Evaluating Plan Expenses

- Example:  Putting it Together

| Description | Fee | Explanation |
|---|---|---|
| **Record Keeping**<br>Direct cost for Plan administration | 0.17% | Direct charges of $300,683 were charged by XXXXXXXX for record keeping.  It does appear XXXXXXXX is also receiving indirect compensation for record keeping.  This amount was not listed on the 5500.  Total XXXXXXXX compensation for RK services is approximately **$300,683** or **0.17**%. |
| **Investment Advisory**<br>Direct cost for investment advisory services | 0.05% | Direct charges of $80,000 were charged by XXXX XXXX for investment advisory services.  Total compensation for IA services was approximately **$80,000** or **0.05**% |
| **Mutual Fund Expenses**<br>Individual mutual fund fees | 0.84% | This is the dollar weighted average expense ratio (shown in detail on page 9).  Total mutual fund expenses are approximately **$1,477,324.** |
| TOTAL ANNUAL FEES | 1.06% | Total fees are approximately **$1,858,007** |

# Properly Evaluating Plan Expenses

- Example: Putting it Together




- Source: 401k Averages Book 18th Edition. 
- Total includes Record Keeping, Custodian, Investment Advisory and Mutual Fund expenses.
- Benchmark based on plans with 2000 participants with an average account balance of $70,000.

# Properly Evaluating Plan Expenses

- Compare to alternative providers – example
  - Assumptions:  2 plans, $7.5m in assets, 150 participants
  - The "FREE" plan is more expensive!

| | Provider A | Provider B |
|---|---|---|
| Recordkeeping | "FREE" | 0.20% ($15,000) |
| Custodian/Trustee | | 0.10% ($7,500) |
| Investment Advisory Services | | 0.21% ($15,750) |
| Mutual Fund Expenses | 1.06% ($79,500) | 0.28% ($21,000) |
| Total Annual Fees - Percentage | 1.06% | 0.79% |
| Total Annual Fees - Dollars | $79,500 | $59,250 |

# Properly Evaluating Plan Expenses

- Consider the value received for the cost paid
  - Make sure you are allowing for differences in services
  - Cheap now may equal expensive later
  - There is **no** ERISA requirement to pick the cheapest provider
  - Can the provider get you where you want to go?
  - Intangibles – such as whether they are responsive, etc.
- Repeat annually for ongoing monitoring
  - Watch for fee "creep" as the plan grows, especially for asset-based formulas and revenue sharing.

# Properly Evaluating Plan Expenses

- Other tips
  - Make sure your provider has you in the cheapest share class, all things considered.
  - Review fee schedules in detail for extras (for example, a provider with a lower base cost may charge more for your specialized contribution formula, but may still be cheaper overall).
  - A fiduciary **must** question what he or she does not understand.
  - Consider pulling in outside help if you don't have the resources
  - If your current provider helps you benchmark plan costs, make sure independent data is being used

# Properly Evaluating Plan Expenses

- What's happening to that Revenue Sharing?
  - Even if your revenue sharing represents a reasonable cost, it should be applied properly
  - Can be used to pay invoices or to provide additional services, or rebated to plan participants
  - Revenue sharing arrangements that are used to pay invoices tend to be inequitable
  - Best way to handle from a fiduciary standpoint is to rebate dollar-for-dollar to funds from where it came

# The bottom line on Plan Costs:

- Ensuring retirement plan costs are appropriate has a significant impact on participant retirement outcomes, and is a fiduciary duty.
- It can also be a complex process. Fortunately, any time spent developing a prudent process and a basic understanding of retirement plan costs will go a long way.
- Costs must be quantified and shown to be reasonable. If determined unreasonable, fiduciary is obligated to do something.
- Highly-educated professionals who add value don’t work for free, or even for cheap!

# Questions?

# Contact

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# What’s the Big Deal?
# Top 10 Most Asked Audit Questions of 2018


Nothing that is presented during this educational program is intended as tax advice, and this program does not address all federal, state or local regulatory or other issues raised by the subject matter it addresses.

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# Speaker Introductions

## Derek R. Heath, MAcc

- Supervisor
- Juniata Class of 2013, Graduate Class of 2014

## Kimbarley A. Williams, CPA

- Co-Chair of the Employee Benefit Plan Services Group with 20 years experience serving 401k, Pension and Health & Welfare Plans

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# Top 10 Audit Questions of 2018


1. Why does my plan need an audit?
2. What does an audit entail?
3. What is the difference between a limited and full scope audit?
4. I’ve outsourced my recordkeeping. Why is this my responsibility?
5. How do I correct a mistake?
6. What can I do to limit the plan’s ADP and ACP refunds?
7. What Qualifies as a Hardship Withdrawal?
8. What are the Filing Requirements of my Health & Welfare Plan?
9. What are the plan limitations? 2019 Benefits Reference Guide
10. What Plan records does an employer need to retain and for how long?

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# 1. Why does my plan need an audit?


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# 1. Why Does my plan need an audit?

Employee Retirement Income Security Act of 1974

- Administration of ERISA is divided among:
  - **U.S. Department of Labor (DOL)**
  - **Internal Revenue Service of the Department of Treasury (IRS)**
  - **Pension Benefit Guarantee Corporation (PBGC)**
- Audit requirement detailed In form 5500 filing instructions

# 1. Why Does my plan need an audit?

## Form 5500: 80-120 Participant Rule

- If the number of participants reported on line 5 is between 80 and 120, and a Form 5500 Annual Return/Report was filed for the prior plan year, you may elect to complete the return/report in the same category (''large plan'' or ''small plan'') as was filed for the prior return/report
- Filing as a large plan is required once the plan is over 120 **eligible*** participants
- Once initial audit occurs, audits continue if > 100 eligible participants

*** Eligible participant count is based on the first day of the plan year**

# 1. Why Does my plan need an audit?

## What can you do as you approach 120 participants?


Carefully review the participant listing

- Is the participant count accurate?
- Do you have a significant number of participants who have terminated employment but still have account balances in the plan?

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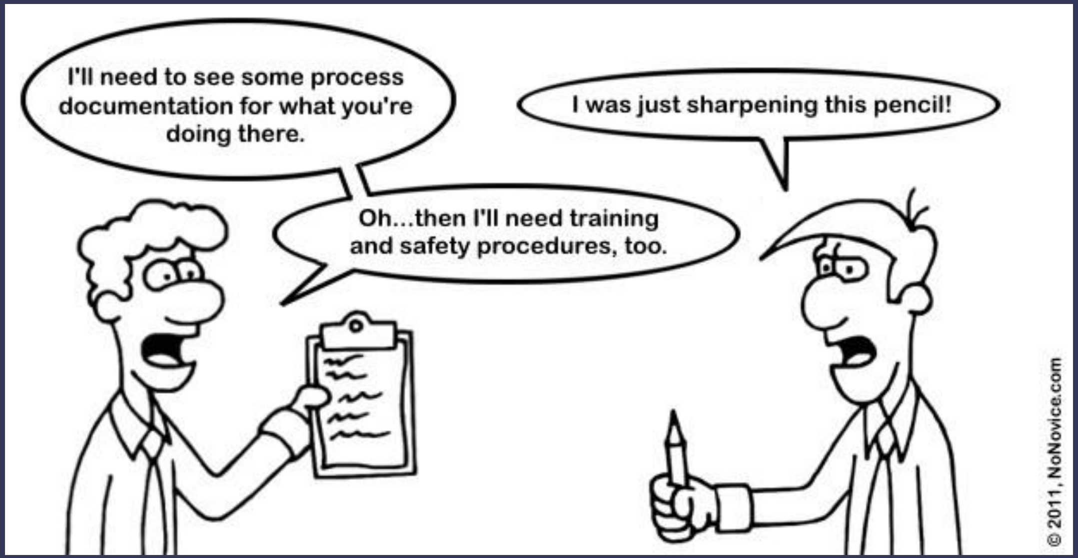
# 2. What does an audit entail?

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# What does an auditor need?

- Plan documents, for example:
  - Summary plan description
  - Adoption agreement
  - Plan amendments
- Census
  - All employees receiving pay with birthdates, hire dates, termination dates, rehire dates, gross pay, all contributions
- Fidelity bond
- Plan testing support

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# What is your auditor testing?


- Employee Data and Eligibility
- Employee and Employer contributions
- Income/Contribution Allocations to Participant Accounts
- Participant loans
- Distributions
- Fees

3. What is the difference between a limited and full scope audit?


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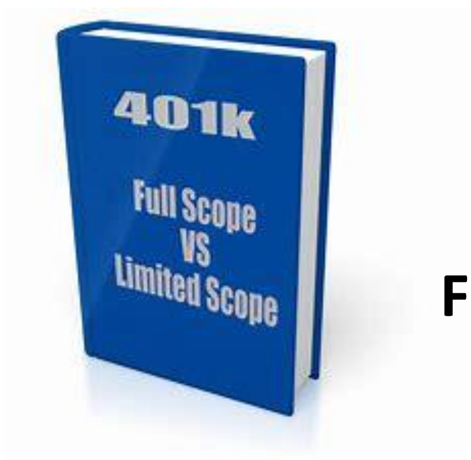
# 3. What is the difference between a limited and full scope audit?




**Limited Scope Audit**

- Receive a Certification by Custodian or Trustee
- Limited evaluation of investments
- Disclaimer of opinion on the Auditor's report

**Full Scope Audit**

- Full testing performed on investments
- Issue an opinion on the Auditor's report

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# 3. What is the difference between a limited and full scope audit?

## Limited Scope Certification:

- The limited scope certification should be prepared by a **qualified institution**, and should be in **writing and signed** by a person authorized to represent the qualified institution. It should be specific to the plan subject to audit, and the investments and investment information covered by the certification should be as of and for the period ended on the financial statement date. The limited scope exemption is available only if the qualified certifying institution certifies both the **accuracy and completeness** of the investment information submitted pursuant to 29 CFR 2520.103-5(c).

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# 3. What is the difference between a limited and full scope audit?

## Who can issue a limited scope certification?

- Banks
- Trust companies
- Insurance companies
- Similar institutions, acting as an agent for a qualified institution


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4. I’ve outsourced my recordkeeping. Why is this my responsibility?


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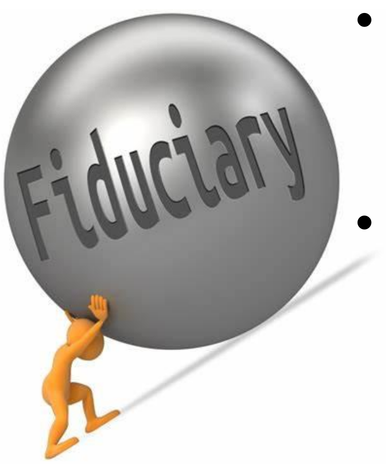
# 4. I’ve outsourced my recordkeeping. Why is this my responsibility?

A fiduciary must demonstrate he or she is:




- Monitoring plan tax and qualification compliance, reviewing operations of the Plan and the adequacy of services provided by third party providers, and approving Plan amendments.
- Approving benefit payments and determining that administrative fees and fund expenses are reasonable given the size of the plan and services provided to the plan, including any amounts third party providers directly or indirectly receive from the plan earnings under revenue sharing arrangements.

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# 4. I’ve outsourced my recordkeeping. Why is this my responsibility?

## What are my responsibilities as a fiduciary?

- Act only in the interest of plan participants and their beneficiaries.
- Carry out fiduciary responsibility prudently.
- Ensure all activities are following the plan document.
- Monitoring the investment returns, reviewing of the soundness of investments, annually reviewing and approving the plan's investment policy, which are memorialized in writing.
- Review plan expenses for reasonableness.
- Responsible that third-party service providers are doing their job satisfactorily.

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# 4. I’ve outsourced my recordkeeping. Why is this my responsibility?

## What can go wrong?

- Improper investment choices
- Actions not in accordance with plan document
- Acquire a company, sell a company, make strategic changes where documents are not reviewed/revised appropriately
- Inadequate retention of employee documents

*What could this result in?*

- Fines, lawsuits, participant complaints (DOL)

5. How do I correct a mistake?


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# 5. How do I correct a mistake?

## Common Plan Errors We See The Most

1. Timeliness of deposits
2. Not including all eligible employees in the plan
3. Most Common Plan Document departure

# 5. How do I correct a mistake?

1. Not Depositing Employee Deferrals Timely

   - Small plans (under 100 participants) are permitted to use the eligible safe harbor option which means that remittances of employee contributions must be made within 7 business days from the date the amounts are withheld from employee's pay (check date). The seven-day safe harbor option does not apply to large plans.

   - There is ***no safe harbor rule for large plans****.* Regulations provide an example with respect to the timeliness of deposits by a large employer, sighting participant contributions should be made no later than three business days after the issuance of paychecks.

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# 5. How do I correct a mistake?

## 2. Not Covering the Proper Employees

- Improper communication of eligibility (missed employees)
- Untimely plan entrance
- Not maintaining opt-out authorization forms from eligible but not participating employees
- Improper exclusion of classes of eligible employees (part time, seasonal, rehires, temps)
- Miscalculation of eligibility requirements (hours of service, employment waiting period)

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# 5. How do I correct a mistake?

3. Most Common Plan Document Departure: Definition of Compensation!

- Errors often exist when the payroll system uses a different calculation of plan compensation than as defined in the Plan Document.

- These departures result in incorrect employee and employer contributions remitted into the plan.


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# 5. How do I correct a mistake?

Correcting Plan Errors Under The IRS and DOL
IRS Employee Compliance Resolution Programs (EPCRS):

- Self-Correction Program
- Voluntary Correction Program
- Audit Closing Agreement Program

Voluntary Fiduciary Correction Program (VFCP) is a ***DOL*** self correction program.

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# 6. What can I do to reduce plan refunds?


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# 6. What can I do to reduce plan refunds?

ERISA requires several tests each year to prove that plans do not discriminate in favor of highly compensated employees

- Actual deferral percentage test (ADP)
- Actual contribution percentage test (ACP)
- Top Heavy test – plan is top heavy if 60% of plan assets belong to key employees

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# 6. What can I do to reduce plan refunds?

## Strategies To Reduce Plan Refunds

- Limit deferral amounts for highly compensated employees.
- Assess alternate testing methods – consult your third party administrator.
- Increase plan participation
  - Institute automatic enrollment
  - Increase the match


7. What qualifies as a hardship withdrawal?

# 7. What qualifies as a hardship withdrawal?

- Outlined in the plan document (can be excluded).
- Most common allowable hardships (IRS safe harbor definition):
  - Medical/funeral costs
  - Tuition/education expenses (employee, spouse, children)
  - Principal residence purchase
  - Prevent eviction or foreclosure of primary residence
  - Repair damage to principal residence
- Documentation is needed to verify and authorize the hardship withdrawal.

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# 7. What qualifies as a hardship withdrawal?

**Rules and Regulations**

- Immediate and heavy financial need
- Limited amount up to the need of the immediate financial hardship
- Hardship withdrawals are taxable income to the participant
    - Regular tax as any other taxable distribution (20%)
    - 10% penalty tax
    - Plan for at least $.30 of every dollar withdrew to go towards taxes
- Encourage participants to exhaust all other means prior to taking a hardship

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# 8. What are the filing requirements of my Health and Welfare Plan?

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# 8. What are the filing requirements of my Health and Welfare Plan?

Types of Health and Welfare Plans subject to filing under ERISA:

- Group health and medical insurance (PPO, HDHP, HMO, POS, etc.)
- Dental and vision plans
- Health Flexible Spending Accounts (FSAs)
- Health Reimbursement Accounts (HRAs)
- Prescription drug plans
- Disability plans
- Life and accident insurance plans
- Wellness and Employee Assistance Programs (providing medical care)

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# 8. What are the filing requirements of my Health and Welfare Plan?

Health and Welfare Plans are required to file a form 5500 unless they meet an exception.

Large Health and Welfare Plans are required to have an audit performed except:

- Large plans (over 100 participants) that are *unfunded, fully insured or combination that meets the requirements of 29 CFR 2520.104-44*

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# 8. What are the filing requirements of my Health and Welfare Plan?

## Do Not File a Form 5500 for a Welfare Benefit Plan That Is Any of the Following (top 4 of 10):

- A welfare benefit plan that covered fewer than 100 participants at the beginning of the plan year and is unfunded, fully insured or a combination
- A welfare benefit plan associated with a cafeteria plan
- A governmental or church plan
- An employee benefit plan maintained only to comply with workers' compensation, unemployment compensation, or disability insurance laws

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# 9. What are the plan limitations? 2019 Benefits Reference Guide

2019 BENEFITS REFERENCE GUIDE

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Annual Benefits Limits for 2019

| Contribution and Benefit Limits | 2019 |
|---|---|
| Elective deferrals to 401(k), 403(b), 457(b) plans | $19,00 |
| Catch-up deferrals to 401(k), 403(b), 457(b) plans | $6,00 |
| Definition of highly compensated employee | $125,0 |
| Annual compensation limit for benefit purposes | $280,0 |
| Annual compensation limit for key employee determination | $180,0 |
| Maximum defined contribution plan annual contribution | $56,0 |
| Maximum annual benefit from defined benefit pension plans | $225,0 |
| **Individual Retirement Account Contributions** | |
| Traditional, spousal, & Roth contribution limits | $6,00 |
| Catch-up contribution limit | $1,00 |
| **Health Savings Accounts (HSA)** | |
| **Single:** Annual contribution limit | $3,50 |
| Minimum Deductible | $1,35 |
| Maximum out-of-pocket expense | $6,75 |
| **Family:** Annual contribution limit | $7,00 |
| Minimum Deductible | $2,70 |
| Maximum out-of-pocket expense | $13,50 |
| **Catch-up Contributions** | $1,00 |
| **Flexible Spending Accounts (FSA)** | |
| Employee health FSA pretax contribution | $2,70 |
| Dependent care FSA household contribution | $5,00 |
| **Social Security** | |
| OASDI tax rate | 6.2% |
| AASDI taxable wage base | $132,9 |
| Cost of living adjustment for benefits | 2.8% |
| **Medicare** | |
| Part A tax rate | 1.45% |
| Part A additional individual tax rate* | 0.9% |
| **Qualified transportation Benefits – Monthly Limits**** | |
| Parking | $265 |
| Transit pass/commuter vehicle | $265 |
| **Employee Stock Ownership Plans** | |
| Maximum balance for 5-year distribution | $1,130, |
| Amount to lengthen 5-year period | $225,0 |

*Tax applies for married filing jointly above $250,000; married filing separately above $125,0 head of household (with qualifying person) above $200,000; and qualifying widow(er) with $200,000.

**Although employee will continue to be able to receive these benefits, employers can no lo related to certain qualified transportation fringe benefits.

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2019 BENEFITS REFERENCE GUIDE

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Key Filing Dates and Deadlines
for 2019 Calendar-Year Defined Contribution Retirement Plans

*Subject to ERISA and the Internal Revenue Code*

| | |
|---|---|
| **JANUARY** | |
| 31 | Distribute IRS Forms W-2 (to recipients) |
| 31 | Distribute IRS Forms 1099-R (to recipients) |
| 31 | Form 945 due to IRS |
| **FEBRUARY** | |
| 28 | File Form 1099-R to IRS (paper forms) |
| **MARCH** | |
| 15 | Process corrective distributions for failed ADP/ACP tests without 10% excise tax |
| **APRIL** | |
| 1 | Make Required Minimum Distributions (RMDs) for participants who turned 70½ during 2018 |
| 1 | File Form 1099-R with the IRS (electronic filing only) |
| 15 | Process corrective distributions for excess employee deferral |
| **JULY** | |
| 1 | Process corrective distributions for failed ADP/ACP tests from eligible automatic contribution arrangement (EACA) plans without 10% excise tax |
| 29 | Distribute Summary of Material Modifications for 2018 plan document changes |
| 31 | File IRS Form 5500 (plan informational return) (without extension) |
| 31 | File IRS Form 8955-SSA (deferred vested benefit reporting) (without extension) |
| 31 | File IRS Form 5558, Application for Extension of Time to File Certain Employee Plan Returns |
| 31 | Distribute annual benefit statements for 403(b) and nonparticipant-directed 401(k) plans |
| **SEPTEMBER** | |
| 30 | Distribute Summary Annual Report (SAR) to participants (without extension) |
| **OCTOBER** | |
| 15 | File Form 5500 (with extension) |
| 15 | File Form 8955-SSA (with extension) |
| **DECEMBER** | |
| 2 | Send Annual 401(k) and 401(m) safe harbor notice |
| 2 | Send annual auto-enrollment notice |
| 2 | Send annual qualified default investment alternative (QDIA) notice |
| 16 | Distribute SAR to participants (with extension) |
| 31 | Amend plan for most discretionary changes implemented during plan year |
| 31 | Process RMDs (other than initial distributions) |

BOYER & RITTER EMPLOYEE BENEFIT PLAN GROUP

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# 9. What are the plan limitations? 2019 Benefits Reference Guide

## Limitations

- Individual contributions
  - 2019: $19,000 up from $18,500 in 2018
- Compensation
  - 2019: $280,000 up from $275,000 in 2018
- Catch-up contributions
  - 2019: $6,000 (same as 2018)
- Excess deferrals, what to do when caught?


# 10. What records do I need to keep and for how long?

# 10. What records do I need to keep and for how long?

There are two specific ERISA laws that come into consideration with regard to record retention.

1. Section 107 of ERISA is a general law that requires any Plan that files with ERISA, to maintain for up to six years, documentation and records to verify or explain information in your filings from the date filed.
2. Section 209 of ERISA requires plans to maintain records specifically related to determining eligibility and/or participant benefits indefinitely, or at least until the benefit calculation and eligibility determination will not be needed.

See checklist included in participant handouts

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# 10. What records do I need to keep and for how long?

**Reporting and Disclosure Records (Six Years)**

- Forms filed with government agencies (e.g. Form 5500 etc.)
- Summary Plan Description, Summaries of Material Modifications
- Participant Benefit Statements
- Plan related minutes and resolutions
- Participant notices (including dates and methods of delivery)
- Participant elections (e.g. deferral forms and investment elections if paper)
- Nondiscrimination test results
- Plan financial statements

# 10. What records do I need to keep and for how long?


**Benefit Determination Records (Indefinite)**

- Original plan documents and all subsequent amendments or restatements, adoption agreements
- Any determination or opinion/advisory letter or  issued by the IRS
- Census information (including age, compensation history, employment history)
- Participant account records and actuarial accrued benefit analyses
- Recordkeeping/valuation reports at both the plan and participant level
- Participant loan documentation
- Participant distribution forms (including tax notices, election forms and    1099-R forms)

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# Thank you!


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# CASE STUDIES IN ERISA LAW – KNOW THE RISKS INHERENT IN YOUR RETIREMENT PLAN

## April 30, 2019

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# UNDERSTANDING FIDUCIARY RESPONSIBILITY – OVERVIEW

- What is a fiduciary?
- Standards of conduct and discharge of duties
- Fiduciary liability
- Fiduciary protection
- Protecting the employer

# WHAT IS A FIDUCIARY?

- **Any person**
- **Any discretionary authority**
  - Plan management/administration
  - Disposition of plan assets
- **Investment advice**
- **Remedial purpose of ERISA**

# WHAT IS A FIDUCIARY?

- **Generally a "functional" test**
- **Belief, knowledge and often consent are <u>not</u> required**
  - Investment manager exception
- **Unwitting violations are possible!**

# WHAT IS A FIDUCIARY?

- **Specific Positions**
  - Named fiduciary
  - Trustee
  - Plan sponsor
  - Plan administrator
  - Investment manager
  - Professional service provider
  - Third party administrator

# WHAT IS A FIDUCIARY?

- **The Enron Decision**
  - Persons who have the power to appoint fiduciaries are themselves fiduciaries
  - Corporate officers and directors acting on behalf of a corporate fiduciary are fiduciaries

# FIDUCIARY DUTIES

- **Exclusive Benefit**
  - Also known as the "duty of loyalty"
  - Acting with a "single eye"
- **Prudence**
  - Care, skill and diligence
  - Good faith is irrelevant – a "pure heart and an empty head"

# FIDUCIARY DUTIES

- **Affirmative duty to seek expert advice**
- **Prudent "expert" standard?**
- **Substantive vs. procedural prudence**
  - The result vs. the process
  - Procedural prudence is critically important!

# FIDUCIARY DUTIES

- **Diversification**
  - Unless clearly imprudent to do so
  - Minimize large losses
  - Investment policies and guidelines
  - ERISA Section 404(c) and employer securities
- **Plan Documents**
  - Must be followed to the extent consistent with ERISA
  - Knowledge of ERISA is critical!

# DISCHARGE OF FIDUCIARY RESPONSIBILITY

- **Limitation**
  - Not applicable to "settlor" functions
  - Does not relate to actions prior or subsequent to fiduciary status
- **"Objective" Standard**
  - Good faith is meaningless!
  - "Should have known" is the standard

# THREE KEYS TO SUCCESS

- **Education**
  - ERISA fiduciary duties and prohibitions
  - ERISA in general
  - Subject matter
  - Experts and other resources
- **Procedures and Documentation**
  - Procedural due diligence/prudence
  - The process is meaningless without proof

# THREE KEYS TO SUCCESS

- **Communication**
  - Don't hide the ball
  - Clear, concise and unambiguous communications
  - Mean what you say and say what you mean
  - The “Serious Consideration” doctrine

# FIDUCIARY LIABILITY

- Personal liability
- Damages
- Penalties
- Criminal liability
- Co-fiduciary liability

# FIDUCIARY PROTECTION

- **Exculpation**
  - What is it?
  - Void against public policy
- **Delegation**
  - Must be done pursuant to a prudent procedure
  - Clearly document who has what responsibilities
  - Fiduciary to fiduciary
  - Fiduciary to non-fiduciary
  - Don't forget to monitor!

# FIDUCIARY PROTECTION

- **Indemnification**
  - Is it permissible?
  - Who may provide an indemnification?
    - **The Plan**
    - **The Plan sponsor**

# FIDUCIARY PROTECTION

- **Insurance**
  - Don't become a fiduciary without it!
  - Who may pay for it?
    - **The fiduciary**
    - **The company**
    - **The plan**
      - Recourse rider/waiver

# PROTECTING THE EMPLOYER

- Proper documents
- Reservation of rights
- Plan amendment procedure
- Firestone language
- Avoid ambiguity
- Avoid inconsistency
- Procedural prudence by fiduciaries

# LITIGATION – RELATED PLAN DESIGN PROVISIONS

- Forum selection clauses
  - Limits plan-related claims to a specific federal district court
  - Can result in significant cost savings and enhance uniformity, efficiency and predictability for the plan
- ERISA Section 502(e)(2)
  - Where the plan is administered
  - Where the breach took place
  - Where the participant resides or may be found
- With the exception of a few district courts, such clauses have been uniformly approved by the courts including two Circuit Courts
- Contractual limitation on the statute of limitations
  - Must be reasonable
  - Must be disclosed

# PREVALENCE OF ERISA-RELATED LITIGATION

- The United States spends 18% of GDP annually on health care, and private health plans provided through the workplace currently cover 49% of the U.S. population.
- More than 28 trillion dollars has been accumulated in U.S. retirement plans which constitutes approximately one-third of American household wealth.
- Cases identifiably raising employee benefits issued represented approximately 4% of civil cases commenced under federal statutes in 2018.
- Employee benefits litigation filings exceed the total federal district court filings during the same period under the federal antitrust, banking, civil forfeiture, environmental, immigration, securities and tax statutes combined.

# WHAT IS A FIDUCIARY

***Teets v. Great-West Life & Annuity Ins. Co*., No. 18-1019 (10th Cir. 2019)**

- **Teets was a participant in an employer retirement plan and invested money in Great-West's fund. He sued Great-West under ERISA alleging, among other things, that it breached a fiduciary duty to participants.**
- **Great-West is an insurance company that provides recordkeeping, administrative, and investment services to 401(k) plans.**
- **Functional fiduciaries' obligations are limited in scope. "Plan management or administration confers fiduciary status only to the extent the party exercises discretionary authority or control."**
- **The participant's argument centered on the premise that Great-West exercised control over the plan assets which enabled it to change its compensation without plan approval. The Court disagreed.**

# DUTY OF PRUDENCE

***Waksman v. Retirement Plans Committee of IBM, et al.,*** **No. 17-3518 (2nd Cir. Dec. 10, 2018)**

- **IBM employees who were participants in the company's ESOP claim that the plan's fiduciaries knew that a division of the company was overvalued, which inflated the value of IBM's stock, but failed to disclose it.**
- **The employees alleged that the Plan defendants violated their fiduciary duty of prudence to the pensioner plaintiffs under ERISA. Once Defendants learned that IBM's stock price was artificially inflated, Defendants should have either disclosed the truth about the value or issued new investment guidelines that would temporarily freeze further investments in IBM stock.**
- **The district court had dismissed the case, but the Second Circuit reversed remanding for further proceedings holding that the plaintiffs had plausibly alleged an ERISA violation.**

# DUTY OF PRUDENCE

*Sacerdote v. New York University*, No. 16-cv-6284 (Jul. 31, 2018)

- Plaintiffs claimed their employer failed to fulfill its fiduciary obligations under ERISA by breaching its duty of prudence resulting in losses totaling more than $358 million.
- Plaintiffs claimed that the committee which oversees the plan imprudently managed the section and monitoring of recordkeeping vendors resulting in excessively high fees and imprudently failing to remove certain investment options.
- The court held that “while there were deficiencies in the committee’s processes - including that several members displayed a concerning lack of knowledge relevant to the committee’s mandate,” the plaintiffs had not proven that the committee acted imprudently or that that plan suffered losses.

# PRUDENT PROCESS FOR SELECTING INVESTMENT OPTIONS

***Wildman v. American Century Services, LLC*, No. 4:16-cv-00737 (W.D. Mo. May 22, 2018)**

- **Plaintiff participated in the American Century Retirement Plan, a 401(k) plan.**
- **Plaintiff alleged that the fiduciaries failed to employ a prudent and loyal process for selecting, monitoring, and reviewing the Plan's core funds, failing to consider other investments, failing to transfer to lower-cost funds, and allowing the plan to pay excessive fees.**
- **The court held that a fiduciary is not prohibited from selecting funds from a single investment management company, but it is a question for a fact finder to decide whether it is prudent to restrict a retirement plan's lineup to funds from one investment management company.**
- **Therefore, the court allowed this claim to proceed.**

# USING OLDER MORTALITY TABLES

**Three cases have been filed in the Southern District of New York alleging a violation of ERISA for failing to pay the alternative benefits under a plan in amounts that are actuarially equivalent to the plan's default benefit because the plan used older mortality tables.**

- ***Masten v. Metropolitan Life Insurance Company,*** **No. 18-cv-11229 (S.D.N.Y.)**
- ***DuBuske v. PepsiCo, Inc.*****, No. 18-cv-11618 (S.D.N.Y.)**
- ***Torres v. American Airlines, Inc.,*** **No. 18-cv-983 (S.D.N.Y.)**

# EXPERT ADVICE

***Brundle v. Wilmington Trust, N.A.*, No. 17-2224 (4th Cir. Mar. 21, 2019)**

- **Owners of a closely held company sold the company to an ESOP. A participant in the ESOP brought an action contending that the trustees breached its fiduciary duties to the ESOP and overpaid for the stock by $29,773,253.**
- **The lower court determined that Wilmington Trust failed to prove by a preponderance of the evidence that the ESOP's purchase was for adequate consideration although Wilmington Trust "relied" upon expert advice in determining the price. In relying upon expert advice, a plan trustee must show that it investigated the expert's qualifications, provided the expert with complete and accurate information and made certain that reliance on the expert's advice was reasonably justified under the circumstances.**
- **The 2nd Circuit agreed with the lower court that Wilmington Trust did not meet its burden.**

# FAILING TO FOLLOW PROCEDURES

*Jarosz v. American Axle & Manufacturing, Inc.,* No. 12-CV-39S (W.D.N.Y. Mar. 11, 2019)

- The plaintiffs sued alleging that the defendants violated ERISA by reducing their pension payments by the amount of workers' compensation payments they received. The crux of the case hinged on the interpretation of the plan.
- The plan vested "discretionary authority to determine all questions arising in the administration, application and interpretation of the Plan including the authority to correct any defect or reconcile any inconsistency or ambiguity in the Plan and the authority to determine a Participant's, beneficiary's or other individual's right to participate in the Plan, eligibility to receive a benefit from the Plan, and the amount of that benefit."
- Notwithstanding the language in the plan, because the plan did not follow its administrative procedures or DOL regulations, the Court applied a *de novo* review and did not apply the deferential standard of review.

# BREACH OF FIDUCIARY DUTY RELATED TO FEES

*McMaken v. GreatBanc Tr. Co.*, No. 17-cv-04983 (E.D. Ill. Apr. 3, 2019)

- McMaken was a participant in an ESOP, and GreatBanc was the trustee.
- McMaken sued GreatBanc for, among other things, breach of fiduciary duty under ERISA. McMaken sought to amend his complaint to allege that GreatBanc entered into a compensation arrangement under which it is paid annual fees that increase commensurate with the value of the employer's stock. Additionally, GreatBanc had the ultimate authority to determine the value of the employer's stock.
- The Court held that McMaken has set forth a plausible breach of a standard of care and allowed McMaken to amend his complaint to include the allegation.

# AGREEMENT TO ARBITRATE

*Munro v. University of Southern California, No. 17-55550 (9th Cir. 2018)*

- **An agreement to arbitrate disputes signed by employees of USC when they were hired did not prevent them from bringing an action in federal court on behalf of the plan.**

# STANDING

*Stanley v. George Washington University*, No. 18-878, (D.D.C. Mar. 29, 2019)

- Stanley brought a class action against her former employer, George Washington University, alleging multiple breaches of fiduciary duty in violation of ERISA related to the administration of the employee retirement plan.
- In 2016, Stanley entered a settlement agreement with GW that included a general release of all claims, including claims for violation of "any federal" law. The release carved out "claims for vested benefits under employee benefit plans."
- GW argued that the "claims for vested benefits" refers to claims arising under the contractual terms of an ERISA plan and did not apply to breaches of fiduciary duty. Stanley argued that it applies more broadly and includes claims for breach of fiduciary duty.
- The Court ordered additional briefing.

# ABILITY TO EXCLUDE

***Ryan v. Flowers Foods, Inc.*, No. 17-CV-817 (N.D. Ga. Jul. 16, 2018)**

- **The plaintiffs were former independent contractors of Flowers Foods and filed a class action lawsuit alleging a violation of ERISA as Flowers Foods did not provide them benefits under the terms of Flowers 401(k) plan.**
- **The Court noted that ERISA's limitations on who employers can exclude is very narrow. ERISA prohibits an employer from denying participation based upon age or length of service. Other than that, any bases for exclusion from a plan are permissible.**
- **Flowers Foods' plan specifically excluded independent contractors; therefore, the claim lacked merit.**

# IRS and DOL Hot Topics and Changes for 2019

Nothing that is presented during this educational program is intended as tax advice, and this program does not address all federal, state or local regulatory or other issues raised by the subject matter it addresses.

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Overview:

I. Regulatory Oversight
II. IRS Employee Plan Exam Priorities
III. DOL National Enforcement Projects
IV. 2019 Regulatory Changes
V. Legislative Outlook for 2019 and beyond

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# Who’s Looking Over Your Shoulder?

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# IRS, DOL and PBGC

Under ERISA, jurisdiction over employee benefit plans was assigned to three agencies:

- The Internal Revenue Service (IRS) primarily looks at participation, vesting and funding issues.
- The Department of Labor (DOL) primarily looks at fiduciary responsibility and prohibited transactions.
- The Pension Benefit Guaranty Corporation (PBGC) insures a minimum guaranteed benefit under certain pension plans.


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# Form 5500 Instructions

**Department of the Treasury**
Internal Revenue Service

**Department of Labor**
Employee Benefits
Security Administration

**Pension Benefit**
**Guaranty Corporation**

# 2018

# Instructions for Form 5500

## Annual Return/Report of Employee Benefit Plan

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IRS Hot Topics

- Employee Plan Exam Priorities

DOL Hot Topics

- National Enforcement Projects

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# IRS – EP Exam Priorities

## Employee Plan Exam Priorities Include:

1. Focus on non-compliant plans
2. Promote and enhance voluntary compliance
3. Address and eliminate abusive activities

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# 1. Non-Compliant Plans


- Plan testing failures
- Failure to provide timely notices to participants
- Failure to withhold the proper amount of deferrals
- Failure to provide the required safe harbor contributions


# 2. Voluntary Compliance

- Promote and enhance voluntary compliance through use of the Voluntary Correction Program (VCP). This program allows a plan sponsor to pay a fee and receive IRS approval for correction of plan failures.
- IRS Self-Correction Program.  Many retirement plan errors can be self corrected under Revenue Procedure 2016-51.

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# IRS Voluntary Correction Program Changes

Beginning April 1, 2019, you must make all VCP submissions electronically through [Pay.gov](Pay.gov). Any paper VCP submissions sent to the IRS with a postmark after March 31, 2019, will be returned to the applicant.


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# IRS Voluntary Correction Program Changes

A plan sponsor can authorize a legal representative to sign and submit a VCP submission on its behalf using Pay.gov.

The following documents must be part of the uploaded PDF file:

1. A special *penalty of perjury statement*
2. A complete Form 2848, *Power of Attorney*

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# 3. Abusive Activities

Promoter Investigations Program

- Includes promoters, material advisors, tax preparers and clients
- Looking for prohibited transactions
- IRS is committed to stopping the widespread use of abusive transactions that erode the voluntary tax compliance system and result in substantial tax revenue losses. These investigations are designated as priority work.

# U.S Department of Labor (DOL)

**Employee Benefits Security Administration (EBSA)**

- National Office establishes polices, reporting disclosure requirements, regulations, interpretations and high level research and outreach

- Regional Offices conduct investigations, provide compliance assistance and conduct plan sponsor outreach

# DOL Hot Topics

## National Enforcement Projects

1. Contributor Plans Criminal Project
2. Health Enforcement Initiatives
3. Plan Investment Conflicts Project
4. Protecting Benefits Distribution Project


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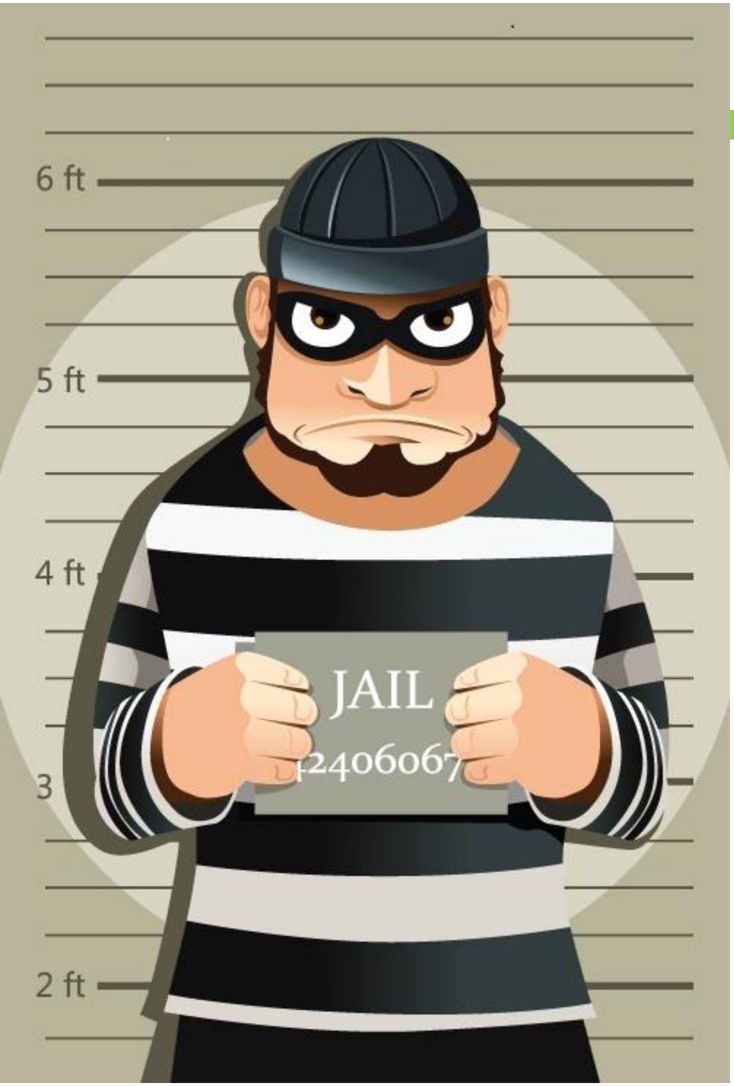


# 1. DOL Hot Topics- CPCP

**Contributory Plans Criminal Project (CPCP)** – The CPCP is EBSA's first solely national criminal project.

https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/newsroom/joint-enforcement-releases

The CPCP is designed to address the full range of criminal violations relating to contributory plans. 2018 over 25 criminal cases settled.

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# 2. DOL Hot Topics- Health Enforcement

**Health Enforcement Initiatives** - EBSA is focusing its efforts on returning money to plans and their participants adversely affected by improper administrative practices or the mishandling of plan funds.

- Common issues include improper plan administration, claims payment, service provider fees, compliance with claims procedure rules, and compliance with health care laws and stated plan terms and operations.
- Investigations also examine compliance with applicable provisions of the ACA, extension of dependent coverage, internal claims and appeals and external reviews and grandfathered health plans.

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# 2. DOL Hot Topics- Health Enforcement

- EBSA is continuing its long-standing efforts to seek out and shut down abusive Multiple Employer Welfare Arrangements (MEWAs).

  Criminal MEWAs investigated by EBSA have engaged in a range of crimes, from mail fraud, wire fraud, bankruptcy fraud, to theft. MEWA criminal cases are typically prosecuted by U.S. Attorneys' offices. They have resulted in jail sentences and court ordered restitution against fraudulent MEWA operators.

- EBSA also conducts criminal cases aimed at fraud on self-funded health plans by medical providers and other unscrupulous service providers.

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# 3. DOL Hot Topics- Plan Investment Conflicts

- **Plan Investment Conflicts** – The Plan Investment Conflicts (PIC) project investigates issues related to *fiduciary service provider compensation* and *conflicts of interest in relation to plan assets*.

- PIC exams also focus on indirect compensation arrangements, conflicted and undisclosed arrangements and arrangements that are outside of market standards. EBSA will conduct criminal investigations of potential fraud, kickback, and embezzlement involving investment managers and advisers to plans and participants.

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# 4. DOL Hot Topics- Protecting Benefits

- **Protecting Benefits Distribution (PBD)** – The PBD focuses on ensuring that participants are paid retirement benefits that remain stagnant. Participant benefits may remain in the plan for years, despite plan document and legal mandates that the benefits be distributed.
- While participants' benefits remain in the plan, they are at risk of continuing to have administration fees deducted, being abandoned by defunct plan sponsors, or impacted by the plan sponsor's bankruptcy or financial distress.

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# 2019 Plan Operational Changes


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# Plan Operational Changes for 2019

## The IRS Operational Compliance List

https://www.irs.gov/retirement-plans/operational-compliance-list

Provides list of mandatory or discretionary plan amendments

May reference other significant guidance that affects daily plan operations.

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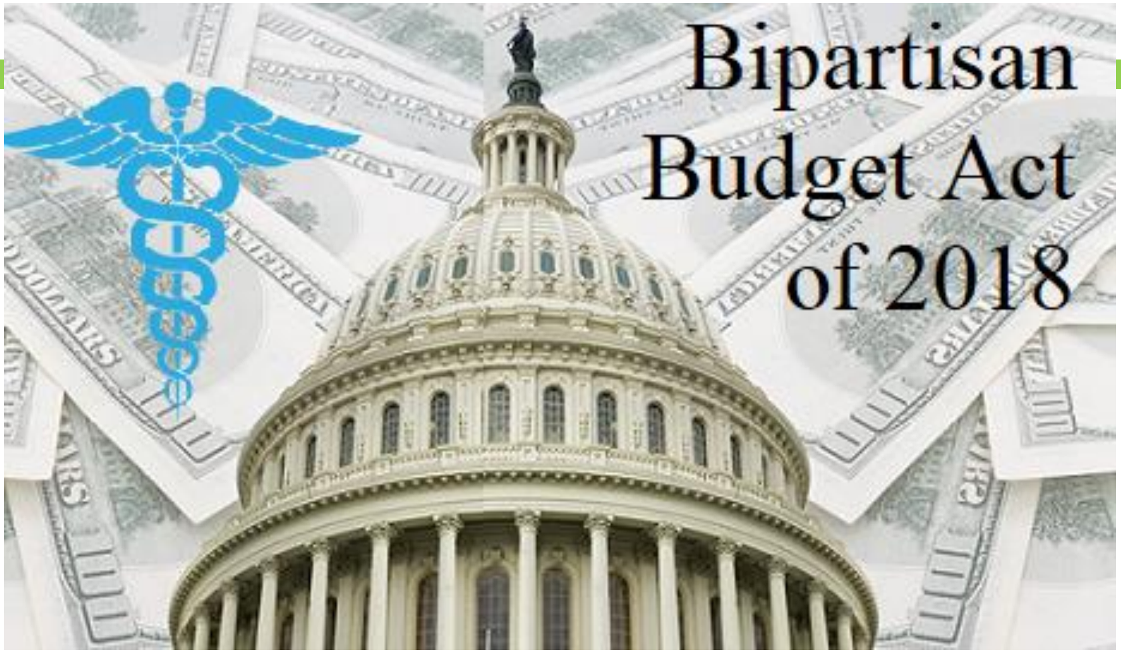


# Bipartisan Budget Act of 2018

The Budget Act Contains several provisions that impact qualified retirement plans. The most significant of which enhances provisions for hardship withdrawals.

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# Hardship Withdrawals (Proposed Regs)

**What Changed for Plan Participants**

- Effective for plan years beginning after December 31, 2018, the IRS requirement that participants be precluded from making salary deferral contributions for six months following the receipt of a hardship withdrawal is ***eliminated***.
- Effective for plan years beginning after December 31, 2017, the requirement that plan participants take advantage of available plan loans before qualifying for a hardship withdrawal has been ***eliminated***.
- Effective for plan years beginning after December 31, 2017, the types of benefit accruals eligible for a hardship withdrawal have been ***expanded*** to include employer nonelective and matching contributions, and earnings on these contributions.

**What Do Plan Sponsors Need to Do**

- Changes to hardship withdrawals are likely to require a plan amendment to be adopted on or before the end of the 2019 plan year, and a summary of material modifications to be issued soon thereafter.

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# On the Horizon: Retirement Reform?

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# U.S. Retirement Crisis

Retirement is a *huge* problem for millions of Americans.

- **42%** of Americans **have less than $10,000 saved**.
- **1/3** of those **age 55 and over have less than $10,000 saved** and **10.5% have nothing at all**.
- Health care costs are surging.
- Federal government warns that Social Security may have to be slashed 23% by 2033.

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# 2019…The Year of Retirement Reform?

**Federal**

1. Retirement Enhancement and Savings Act (RESA)
2. Retirement Security and Savings Act of *20XX*
3. The Retirement Parity for Student Loans Act of *20XX*
4. Social Security 2100 Act

**SEC** → Fiduciary discussions

**Pennsylvania** → Automatic IRAs

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# Retirement Enhancement and Savings Act (RESA)

- Authorizing broader use of multiple employer plans (MEPs)
- Remove the automatic enrollment/escalation safe harbor cap of 10%
- Simplified safe harbor rules for employees
- Creates a small employer automatic enrollment tax credit for new plans
- Repeals maximum age for traditional IRA contributions of 70 ½
- Prohibits employee loan payments to credit cards
- Direct trustee to trustee rollover of lifetime income funds (annuities)
- Consolidated 5500 filings (plans with same trustee, fiduciary, plan year)
- Fiduciary protection for guaranteed income contract losses of insurer
- Increased penalties for failure to file retirement plan returns

# Retirement Security and Savings Act (RSSA)

- Exempt balances less than $100k from Required Minimum Distribution, Increase RMD age to 75, Modernize RMD amount tables
- Allow non-spouse beneficiaries to do rollovers to IRAs
- Allow self correction of more retirement plan operational failures
- Add a second higher catch-up deferral amount for those 60+
- Consolidate retirement plan distribution notices
- Add catch-up deferral eligibility to apply to separate lines of business

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# The Retirement Parity for Student Loans Act


- Permits 401(k), 403(b), and SIMPLE retirement plans to make *matching contributions to workers* as if their student loan payments were salary reduction contributions.
- Optional for employers
- If passes this year, changes would effect plan years beginning after 2019.

# Social Security 2100 Act

**2016 package developed by a Bipartisan Policy Center Commission proposes:**

↑ Raise the payroll tax cap substantially

↑ Raise the payroll tax rate by 1% over 10 years for both employees and employers

↑ Increase the income taxation of Social Security benefits for high-income households

↓ Change the way Social Security calculates inflation

↑ Raise full retirement age by one month every two years starting in 2022 until it reaches 69 in 2070.


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# Recap of Strategies to Make the Most out of Your Retirement Plan

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# THANK YOU FOR ATTENDING

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