Evaluation of UnifiedPlan℠

A WHITE PAPER

by

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Evaluation of UnifiedPlan℠

I. INTRODUCTION

In this White Paper, we evaluate the UnifiedPlan℠ program (the “Program”) developed and offered by Unified Trust Company, N.A. (“Unified Trust”) in terms of the support it gives participants to help them reach the goal of adequate retirement benefits. We also analyze Unified Trust’s assumption of responsibility for fiduciary duties under the Employee Retirement Income Security Act (ERISA) and the help it gives fiduciaries with their remaining duties.

As a part of that analysis, we have reviewed the Investment Policy Statement (IPS) and the Benefit Policy Statement (BPS) created by Unified Trust as a part of the Program. The IPS outlines the plan sponsor’s goals and investment objectives and describes the process for evaluating the plan’s investments and related services, both initially and on an ongoing basis. The BPS sets forth procedures that both the plan and Unified Trust, as the plan’s discretionary trustee, will implement to increase the likelihood that the plan, as an individual account plan, will provide adequate benefits to participants and their beneficiaries. The IPS addresses plan level investment management; the BPS addresses active steps taken by the Discretionary Trustee to increase the likelihood of success at the individual participant level.

In describing our evaluation, we discuss the responsibilities of trustees and fiduciaries under ERISA. In doing that, we focus on the ERISA duties that require fiduciaries to:

- act for the exclusive purpose of providing benefits to participants and beneficiaries [the “exclusive purpose” rule]; and
- engage in a prudent process to fulfill their duties, including the obligation to evaluate the needs of the plan and its participants [the “prudent man” rule].

Our conclusion is that the Program offers material assistance to participants to help them increase the likelihood of success for a secure retirement. Additionally, Unified Trust accepts responsibility for many of the fiduciary duties typically borne by the primary fiduciaries (such as the plan sponsor or its officers or plan committee members) and provides significant assistance to fiduciaries in prudently fulfilling the fiduciary duties that are not transferred to Unified Trust retained legal responsibilities.

II. EXECUTIVE SUMMARY

The primary purpose of 401(k) plans is to provide retirement benefits to participants. Given the role of 401(k) participants as primarily responsible for funding the plan, managing the investments and actuarially determining their funded status, many employers are appropriately concerned about giving participants the services they need to successfully accumulate adequate retirement benefits. It is becoming clear to many employers that most of these duties may be better managed by specialized plan providers, such as discretionary trustees who focus on 401(k) plans.

UnifiedPlan^{SM} affords material assistance to participants to help them achieve benefit adequacy. The Program informs employees about the importance of saving for retirement and identifies the actions they need to take. Additionally, the Program automatically enrolls participants--if authorized by the plan document. That is, it defers a predetermined percentage of their pay into the plan unless they opt out or elect a different percentage. If authorized by the employer and the plan document, the deferrals will increase annually, up to a specified limit, to help the participants save enough for retirement. The Program also manages their accounts based on personalized investment mixes. The investment glide paths are uniquely designed for each participant's fully funded retirement date as determined by regular actuarial testing. If necessary, the program will shorten or lengthen the timeline to optimize the funded benefit with the lowest level of uncertainty. Unified Trust expects that UnifiedPlan^{SM} will help most participants obtain adequate retirement benefits if they do not opt out.

UnifiedPlan^{SM} also helps the primary fiduciaries satisfy their legal duties under ERISA, which requires that fiduciaries act prudently and for the exclusive purpose of providing retirement benefits. Under the law, fiduciaries are evaluated based on whether they use a prudent process for making decisions about their plan. A prudent process requires fiduciaries to conduct an investigation to obtain relevant information and then to use that information to make informed and reasoned decisions. Fiduciaries must consider the needs of the plan and its participants when making decisions and must act under the circumstances then prevailing (that is, the duties of fiduciaries can change with the passage of time and, for example, the introduction of new services and investment practices into the marketplace).

UnifiedPlan^{SM} helps the primary fiduciaries satisfy their duties under ERISA by providing services that are designed to maximize participants' retirement benefits. It is generally conceded that participants need help to understand the amounts of deferrals and the investment strategies needed to accumulate adequate retirement benefits. The Program helps participants make better choices about whether to participate in the plan, how much to defer and how to invest--and when and how to make changes to those decisions. By providing participants with the information and tools needed to manage their plan participation in an appropriate and productive manner, the Program helps fiduciaries satisfy their duties under ERISA.

Unified Trust also relieves the primary fiduciaries of their investment responsibilities. Under ERISA, the plan sponsor and/or the primary fiduciaries may appoint discretionary

trustees to manage a plan's assets. The discretionary trustee agrees to have responsibility for, and to exercise discretion over, the plan's investments. From a legal perspective, that is consistent with ERISA's provisions, which place the fiduciary responsibility for the selection and monitoring of the investments squarely on the shoulders of a discretionary trustee . . . and not on the plan sponsor and its officers. (By contrast, in most cases retirement plan trustees are "directed trustees" or "custodians" who take possession of the plans' assets, but who do not generally assume fiduciary responsibility for the management of the plan's assets and, as a result, they do not materially reduce the fiduciary obligations of plan sponsors.)

Consequently, fiduciaries of plans that use discretionary trustees, such as Unified Trust, retain little in the way of responsibility for the plan investments and have significantly less liability exposure than plans that use directed trustees or custodians. The responsibility of fiduciaries who appoint a discretionary trustee is limited to prudently selecting and monitoring the trustee.

For most participant-directed retirement plans, the plan sponsor, and the officers who make plan decisions (and who, therefore, are fiduciaries) retain legal responsibility for the oversight of participant investing. That is, the fiduciaries are responsible for whether participants make prudent investment decisions. (To be complete, we should point out that fiduciaries can transfer that legal responsibility to the participants if the plan complies with the 20 to 25 conditions in ERISA section 404(c) and its regulation. However, that protection may be illusory since, in our experience, most plans fail to satisfy one or more of the conditions.)

However, under ERISA, that legal responsibility can be transferred to an investment manager. Unified Trust offers protection to these fiduciaries by serving as an investment manager for participant accounts, helping to protect fiduciaries from liability for investment losses caused by imprudent participant investment decisions. That is, where participants are properly defaulted into Unified Trust managed accounts, the plan sponsor and primary plan fiduciaries are relieved of their responsibility for the prudence of participant investment decisions. Similarly, the primary fiduciaries are also relieved of their oversight responsibility for participant investment decisions where participants affirmatively elect to have Unified Trust manage their accounts. The plan sponsor's duties are limited to prudently selecting and monitoring Unified Trust as the participant investment manager.

To further assist the plan sponsor, and its officers, directors and managers who serve as plan fiduciaries, Unified Trust will work with the plan sponsor to develop both an Investment Policy Statement (IPS) and a Benefit Policy Statement (BPS). The IPS, once developed and agreed upon, provides evidence that the plan sponsor engaged in a prudent process, both initially and/or an ongoing basis, to fulfill its legal responsibilities to engage in a prudent process to select and monitor its plan provider (*e.g.*, Unified Trust) and to manage the plan's assets.

The BPS aims to outline a prudent investment management process and funding policy method at the participant level. It defines the operational parameters and constraints for a participant's account. In addition it allows Unified Trust, as discretionary trustee, to implement for each participant an effective investment strategy and funding policy based upon actuarial asset-liability analysis. The goal is to outline prudent procedures Unified Trust will implement to increase the likelihood the plan will provide the benefit goal selected by the participant or as otherwise determined under this BPS.

Correspondingly, the BPS is evidence that the plan sponsor fulfilled its legal responsibilities to prudently oversee the administration and operation of the plan . . . within the mandate that the fiduciaries act for the exclusive purpose of providing benefits for the participating employees.

III. FACTUAL DESCRIPTION

We have reviewed materials provided to us about the UnifiedPlan℠ offered by Unified Trust. The Program is an innovative system where, if participants do not opt out, most will have a higher probability of attaining sufficient retirement income replacement benefits during retirement. Unified Trust helps employers sponsor successful plans by assuming many of the responsibilities of the primary fiduciaries (the "plan fiduciaries") by acting as a discretionary trustee for the plan's investments, implementing actuarial techniques to calculate the participant's assets and future liabilities, and as an investment manager for the participants' accounts. (The plan fiduciaries are usually the plan sponsor and the officers who make decisions about the operation of the plan.)

Unified Trust developed the Program because their research concluded that "virtually no participants will achieve a sufficient retirement benefit with historical 'standard' 401(k) default design."[1] This "standard" design refers to a participant being "defaulted into [the plan at] a 3% savings rate, receives a 50% company match . . .and invests in a low risk money market or stable value fund."[2] Although the Pension Protection Act of 2006 ("PPA") encouraged employers to help participants save for retirement through automatic enrollment and default investment options, Unified Trust has estimated that only 42% to 52% of participants will have adequate retirement benefits using the PPA provisions for design-based "safe harbor" automatically enrolled plans (that is, plans which are designed in a way to automatically comply with Internal Revenue Code coverage and discrimination standards). The PPA provides for a design safe harbor if participants are automatically enrolled with initial deferrals of at least 3% of pay and with annual increases to their deferrals of at least 1% per year, up to 10% of pay.

The PPA, as interpreted by the U.S. Department of Labor (the "DOL"), also provides a fiduciary "safe harbor" for the default investment of participants' accounts in age-based or targeted-risk investment portfolios or managed accounts.[3] (A "default" occurs where a participant is given the opportunity to direct the investment of his account, but fails to do so.)

By comparison, Unified Trust estimates that 61% to 90% of participants can achieve benefit adequacy using the Program. This is accomplished through:

(i) calculating projected benefits under a variety of scenarios that include both time horizon variables and different portfolio glide paths;

(ii) performing an analysis of the difference between the amount the participant will have saved based on their current choices and the amount they are anticipated to need during retirement (known as "gap analysis"); and

(iii) implementing methods to reduce the gap.

As described later in this section, the Program contemplates using automatic enrollment with annual increases (or "step-ups") in deferrals and with managed investments based on the participant's anticipated retirement date and retirement adequacy. These services can

also help the remaining participants come closer to attaining sufficient retirement benefits than they otherwise would have.

Unified Trust Handles Many of Fiduciaries' Responsibilities

Selection and Monitoring of Investments (Including Expenses)

As part of the Program, Unified Trust serves as a discretionary trustee and investment manager. As a result, it is an ERISA fiduciary for plans that participate in the Program. In that capacity, it selects, monitors, removes and replaces the plan's investments and is responsible for managing the investment of the participants' accounts. Unified Trust works with the plan fiduciaries to develop the plan's investment policies and to prepare the plan's investment policy statement (IPS). (The IPS is a written document that reflects the investment policy decisions made by a plan's fiduciaries. It is evidence of fiduciary compliance, both in its creation--as it documents that investment policy decisions were made--and in its implementation--as it reflects a consistent and documented process for the management of a plan's assets.) Then, as a discretionary trustee, Unified Trust accepts responsibility for implementing the IPS and making the investment decisions related to the selection, monitoring and, if necessary, removal and replacement of the investments. (Technically, the IPS process starts with the selection of "asset classes," or investment categories, that are appropriate for the plan and its participants, and then moves to the selection of the mutual funds that populate those asset classes, that is, the investments selected as the plan's investment options.)[4]

In selecting the asset classes, Unified Trust applies generally accepted investment theories, such as modern portfolio theory and post-modern portfolio theory. (We are advised by Unified Trust that post-modern portfolio theory is accepted in the investment community as an enhanced version of modern portfolio theory that uses downside risk instead of standard deviation to evaluate risk.)

To select the investments that populate the investment categories, Unified Trust applies criteria that equal or exceed the prevailing investment industry standards. Unified Trust has developed a proprietary process that involves a complex and extensive set of criteria. These criteria are used to develop composite scores for investments. Unified Trust uses this process to select among the investments that are in the highest 25% of the ranked investments. In this process, Unified Trust also applies the fiduciary best practices developed by the Center for Fiduciary Studies.

Additionally, Unified Trust evaluates the expenses of the investments and determines whether they are reasonable for the plan.

Participant Investing

Unified Trust creates managed accounts for participants using the plan's investments. Unified Trust offers 150 managed accounts. Each managed account corresponds to a particular target retirement date for 50 years (*e.g.,* 2033, 2034, 2035). For each year, the Program offers three risk choices designated as conservative, moderate and aggressive. Unified Trust matches the target year to the participant's anticipated retirement date,

using either a participant's Social Security normal retirement age or a date specified by a participant. The risk choice for a participant is based either upon information provided by the participant or upon the trustee's determination. Using risk limit guidelines as defined in the BPS, Unified Trust determines if a more conservative or aggressive portfolio increases the likelihood that the participant will obtain an adequate retirement benefit. Unified Trust examines the portfolio efficiency and expected return for each plan participant. If the participant's portfolio is not optimal Unified, as discretionary trustee, will implement the corrective solution for the participant and retest the portfolio.

Unified Trust matches the target year to the fully funded retirement date. This match is based upon an actuarial asset-liability study done for each participant using a number of possible scenarios.

The Program contemplates that participants will be "defaulted" into the managed accounts. That is, if a participant does not affirmatively direct the investment of his account, the account will be managed by Unified Trust for the participant's benefit. However, a participant may elect at any time to take over the investment control of his account. Correspondingly, a participant who controls his account may elect to transfer investment management responsibility to Unified Trust.

To provide additional fiduciary protection to the plan sponsor and other fiduciaries where participants direct their own investments, Unified Trust helps plans comply with ERISA section 404(c). This section provides that, if its conditions are satisfied, fiduciaries are not responsible for losses that result from imprudent investment decisions by participants. Under 404(c), fiduciaries can also be relieved of liability for participants who "default" (that is, who do not direct the investment of their money). But, the protection (or "fiduciary safe harbor") only applies if a qualified default investment alternative (called a "QDIA") is used and if certain disclosures are made to participants. Unified's managed accounts are designed to satisfy the requirements for qualified default investment alternatives described in a regulation issued by the DOL.

While Unified Trust is responsible for the selection and monitoring of the plan's investments as a discretionary trustee, its services as a participant-level investment manager and its services with 404(c) compliance provide additional fiduciary protections should the prudence of the use of those investments by the participants come into question. This structure is designed to protect the plan fiduciaries if a participant asserts that the plan's investments were not properly selected and monitored and/or that a participant made inappropriate investment decisions (*e.g.*, because they were required to direct their investments even though they lacked the knowledge to do it properly) or that a participant was defaulted into an inappropriate investment.

Fiduciary Oversight

Unified Trust also helps the plan fiduciaries analyze how their plans are performing. It provides detailed fiduciary and actuarial "dashboard reports" to plan sponsors. These reports give a detailed analysis of a plan's performance, including a plan's overall success and the percentage of participants with at least a 25%, 50% and 75% success

probability of having at least 70% income replacement of pre-retirement income (including Social Security benefits), over the participant's life expectancy in retirement.[5] The reports also reflect the impact that changes in deferral rates and investment returns can have on participants' chances for success. Unified regularly conducts tests each participant against the fiduciary, risk and actuarial criteria in the IPS and BPS. The results of these tests for the plan are shown in the dashboard reports. Unified Trust maintains the fiduciary and actuarial data on each participant to be able to demonstrate that the fiduciaries acted prudently.

To assist plan sponsors to fulfill their duty to act for the exclusive purpose of providing retirement benefits to plan participants, Unified Trust works with each plan sponsor in the Program to develop a Benefit Policy Statement, or BPS. While an investment policy statement focuses on investments, the BPS looks at the combination of critical factors--such as participation, deferral rates, retirement age and targeted retirement income—and calculates the impact of a participant's actual experience on the likelihood of the participant reaching the target established by the plan sponsor. When viewed in the context of providing adequate retirement benefits, the BPS is arguably more important than the IPS. Then, if the participant is not "on target," the Program will adjust the participant's investment policy or retirement age based on decisions made by the participant (or if a participant has not given any input on decisions made by the plan sponsor and documented in the BPS). More precisely, the Program will, for participants who are not on target, go through the following steps to either increase the assumed retirement age or to increase the equity allocations (that is, aggressiveness) of the participants' investing. (Of course, in some cases a participant may be so far off target that not even these changes will completely close the gap.)

1. Participant request for specific target retirement age.

2. Participant request post retirement age with smallest time delay (up to three years).

3. Plan benefit policy specific target retirement age (established by plan sponsor in BPS).

4. Plan benefit policy specific post retirement age with smallest time delay (established by plan sponsor in BPS--up to three years).

5. Social Security normal retirement age with least risk.

6. Social Security normal retirement age.

7. Post Social Security normal retirement age with smallest annual time delay (up to three years).

8. Within a given target year the lowest portfolio risk is favored.

In the absence of an affirmative participant target retirement age request as outlined above (in steps 1 or 2) or plan sponsor plan level target retirement age decision in the

BPS (for steps 3 or 4), Unified Trust will seek to conduct an asset-liability gap study for steps 5, 6 and 7. Thus, in the absence of a participant or plan sponsor request, Unified Trust will seek to provide a fully funded benefit as near as possible to the Social Security normal retirement age with the least possible risk. Unified retests these scenarios each quarter and may make adjustments from time to time depending upon the funded status of the participant's account and the asset-liability studies.

For steps 5, 6 and 7, the Program establishes a set of priorities, or a hierarchy, for deciding whether Unified Trust should adjust the participants' investing style (that is, conservative, moderate or aggressive--as those approaches are defined in the Program) or the participants' retirement age (with the choices being the assumed retirement age--the ARA, or ARA + one year, ARA + 2 or ARA + 3). In making those choices, the Program directs Unified Trust, as the discretionary trustee, to prioritize the retirement age over the investment style, so that, if a hypothetical participant could achieve benefit adequacy (as defined in the BPS) through either a combination of conservative investing and ARA + 3 years or a combination of aggressive investing and the participant's ARA, the latter would be chosen because it reflects the earliest retirement age at which benefit adequacy could be projected. This method may be illustrated by the following graph:

ARA + 0 years	+1 years	+2 years	+3 years	Glide Path Risk
Test 1 0C	Test 4 1C	Test 7 2C	Test 10 3C	Conservative
Test 2 0M	Test 5 1M	Test 8 2M	Test 11 3M	Moderate
Test 3 0A	Test 6 1A	Test 9 2A	Test 12 3A	Aggressive

In performing its benefit calculations, Unified Trust would perform Test 1 first; then, if it failed, Test 2; and so on until a Test resulted in a calculation of projected benefit adequacy for the participant. The 12 steps are followed until the forecast asset is equal to the projected liability (or has the least shortfall).

This structure, and the underlying calculations, far exceed--in my experience--the abilities and resources of participants and, for that matter, of plan fiduciaries. The result will be a more sophisticated process, with objective analysis and, therefore, should produce better results for the vast majority of participants. A critical element of this process is the ability of Unified Trust, as a discretionary trustee and investment manager, to serve in the role of the participant investment manager and to calculate and implement the changes in investment strategies and retirement date timeline if required.

If the participant cannot be placed on a course for benefit adequacy (as defined in the BPS) using this twelve-step process, the participant will be notified by Unified Trust and will have the opportunity to make individual planning adjustments, such as, for example,

increasing deferrals, considering a later retirement date, or planning on a reduced standard of living in retirement.

Through the combination of these steps, plan sponsors and their fiduciaries will have a documented process of their actions to support benefits for participants. These steps which exceed the law's current requirements, provide substantial fiduciary protections by adhering to best practices.

Unified Trust utilizes the model of revenue transparency and fee neutrality described by the DOL in Advisory Opinion 97-15A (known as the "Frost Model"). That is, Unified Trust charges a flat fee and offsets its fee by any payments (*e.g.*, revenue sharing) it receives from mutual fund companies or other plan investments. The Unified Trust fee for the Program does not vary based on participant usage.

Unified Trust helps plan fiduciaries understand their responsibilities under ERISA and whether they are satisfying those duties. Unified Trust analyzes fiduciary prudence using the CEFEX® certified fiduciary best practices.

Unified Trust Encourages Participants to Make Better Choices

UnifiedPlan^{SM} helps participants make better choices about: (1) participation in the plan; (2) deferral rates; and (3) investing, that is, the allocation of their money among the investments offered by the plan. The UnifiedPlan^{SM} goes further than education. The UnifiedPlan^{SM} uses the powers of the discretionary trustee to implement a more effective solution for each participant in the program

To help participants, the Program uses a multi-step process. First, Unified Trust works with the plan sponsor to set an adequate default savings rate for participants that are automatically enrolled in the plan. The default savings rate may include automatic increases (or "step-ups"). For example, the default savings rate may be set at 4% of compensation for the first year, with annual increases of 2% per year. Under the Program, employees who do not affirmatively elect to defer money into the plan or to opt out of the plan are automatically enrolled. That is, they automatically become participants in the plan and defer a pre-determined portion of their pay (as specified in the plan document). Unified Trust will help the plan sponsor determine the amount of automatic deferrals for the plan.

If an employee does nothing and, as a result, is automatically enrolled in the plan, his account will be invested in the appropriate managed account that matches his target retirement date. For current participants, Unified Trust will perform a gap analysis that compares the amount of retirement savings the participant is projected to have (based on his prior decisions) with the amount the participant would need to be likely to have at least 70% of pre-retirement income replacement (that is, to achieve "benefit adequacy"). For participants who are not currently making 401(k) deferrals, Unified Trust will inform them of the amount they need to save in order to achieve benefit adequacy. Additionally, Unified Trust will target participants who are not on track to achieve adequate retirement benefits, by providing additional mailings and/or meetings with the plan's adviser.

To assist plan sponsors and their fiduciaries prudently implement the Program, Unified Trust will work with them to develop a written Benefit Policy Statement. The purpose of the BPS is to reflect the overall benefit objectives of the plan, the methodology for choosing and overseeing the process, and the evaluation measures used to evaluate the benefit status of the participants. The BPS, and the implementation of its provisions, demonstrate that the fiduciaries are fulfilling their responsibilities to oversee the operation of the plan and the management of plan assets, as well as to act for the exclusive purpose of providing retirement benefits to participants.

Unified Trust expects that the Program will help most participants achieve benefit adequacy, for example, participants who are under age 42 with no prior savings, and participants who are under age 52 with an amount equal to at least one year's worth of compensation in their 401(k) accounts, are expected to accumulate adequate retirement benefits by their projected retirement date. For other participants, the Program will help them make up to four decisions. These are whether to:

(1) increase their savings another 2% beyond the default deferral rates;

(2) target a different retirement date;

(3) consent to a target 10% lower replacement amount; and

(4) work part-time for a certain number of years in retirement.

The consequences of these choices will be illustrated to participants by Unified Trust.

Unified Trust monitors the progress of all participants in the plan in both the accumulation phase and the post-retirement distribution phase. Unified Trust will, if selected by a participant, continue to implement the Program for a participant even if the participant rolls his account to an individual retirement account (IRA). The distribution models would be based on the percentage of assets needed annually by the participant, time horizon and risk.

IV. ANALYSIS AND DISCUSSION

Primary Purpose of Retirement Plans

The primary purpose of 401(k) plans is to provide participants with adequate income replacement benefits during retirement. Historically, plan sponsors accomplished this objective through defined benefit plans. A plan sponsor established the pension plan, determined the level of benefits to be provided by the plan, and then funded the plan. They appointed fiduciaries who were responsible for carrying out their decisions and making sure the plan was run properly and its assets were prudently invested. Participants had little, if any, responsibilities with respect to the plan.

With the transition to 401(k) plans, the roles have changed. Companies are still responsible for establishing and making decisions about the structure of the plan and fiduciaries continue to be responsible for implementing their decisions and managing the plan. However, participants have increased responsibility for funding the plan and investing the plan's assets.

As a practical matter, as 401(k) plans become popular, both fiduciaries and participants tend to focus on "features," such as daily valuation and internet access, as opposed to the more fundamental issue of whether the plans were "working" as retirement plans (that is, were the plans providing adequate benefits to a broad base of employees). However, that is changing now.

Companies that want to help their employees accumulate meaningful benefits need to give participants the tools to save enough and to invest well. Many companies can maximize their 401(k) plans by providing the employees with services that will help them adequately save and invest for retirement.

Research has shown that many participants are not saving as much as they could, and should, for retirement.[6] The Preamble to a proposed regulation issued by the U.S. Department of Labor (DOL) states:

> A number of recent studies indicate that significant improvements can be made in 401(k) plan participation and in retirement savings levels through plan design changes. Specifically, the studies show that adoption of automatic enrollment provisions (provisions pursuant to which employees are automatically enrolled in the plan and must affirmatively opt-out of plan participation) by 401(k) plans can dramatically increase plan participation rates.[7]

Research by Professors Shlomo Benartzi, Ehud Peleg and Richard Thaler indicates that participants who are automatically enrolled in plans frequently do not object in any meaningful way to being automatically deferred at rates as high as 20% of compensation.[8]

Additionally, research by the Vanguard Center for Retirement Research concludes that many participants may not be properly investing their accounts.[9] The research revealed

that when investment professionals took over the management of participant-directed accounts, the professionals determined that the participants were invested too conservatively for their retirement goals in 62% of the cases. Vanguard reports that "Nearly two-thirds of participants adopting a managed account advisory service saw a sharp increase in their equity exposure. Expected returns rose by 82 basis points (after fund expenses but before any managed account fee), while Sharpe ratios improved by 22%."[10] The study also found that:

> Sixty-two percent of participants in the program saw their equity exposure increase by an average of 39 percentage points. Conversely, 30% of participants saw an average equity reduction of 18 percentage points. At the extremes, 27% of participants moved from an all- or no-equity portfolio to a balanced portfolio.[11]

The participants were at risk of having inadequate retirement benefits if the allocations had not been changed.

Research conducted by the Pension Research Council of the University of Pennsylvania Wharton School also indicates that many participants in 401(k) plans are not properly investing their accounts. The research uses a simple stop light color approach to characterize the conformance of 401(k) participant's portfolios to the paper's rules of portfolio construction.[12] The paper estimates that:

> [N]early 43% [of participants] construct "green" portfolios with balanced exposure to diversified equities, while another 26% construct "yellow" portfolios with possibly too-aggressive or too-conservative equity holdings. Another three in ten participants make egregious errors and have "red" portfolios--either holding zero in equities or over concentrating their account in employer stock.[13]

Note that while the study evaluates whether participants are investing in a diversified way, it does not consider whether the "green light" participants are optimally invested for retirement benefits. Thus, it actually understates the problem.

Many 401(k) experts and policymakers have embraced the idea that the more a defined contribution plan is managed like a defined benefit plan, the higher the success rate for the plan participants.[14] In fact, Morningstar recently published a study showing the public defined benefit plans had significantly better long term investment performance than mutual fund investors.[15] On a 10-year basis, which includes the bear market of 2000-2002, public defined benefit plan returns outpaced retail mutual funds by 322 basis points. For any time period evaluated and whether measured by time-weighted or by investor returns, public defined plans outperformed retail mutual funds.[16]

Programs such as UnifiedPlan℠ can materially assist participants to obtain adequate retirement benefits. The discretionary trustee, Unified Trust, utilizes actuarial techniques to find an asset-liability match for each participant. The Program demonstrates to employees how much more they need to save in order to have adequate retirement benefits. Additionally, if employees do not opt out, they will be automatically enrolled in the Program and have their accounts invested for them. The discretionary trustee will also manage the time horizon for each participant to improve the chances of them receiving an adequate benefit.

Unified Trust expects that the Program will help most participants achieve benefit adequacy. For example, participants who are under age 42 with no prior savings, and participants who are under age 52 with an amount equal to at least one year's worth of compensation in their 401(k) accounts, are expected to accumulate adequate retirement benefits by their projected retirement dates.

For other participants, the Program will help them make decisions to facilitate greater retirement savings, including whether to: (1) increase their savings; (2) retire later; (3) retire with a lower income replacement amount; and (4) work part-time during a portion of retirement. Unified Trust will then help them to understand the consequences of these choices.

Satisfying the Exclusive Purpose Rule

ERISA requires fiduciaries to act for the exclusive purpose of providing retirement benefits to participants, known as the Exclusive Purpose Rule.[17] ERISA states:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--
>
> (A) for the ***exclusive purpose*** of:
>
> (i) ***providing benefits to participants*** and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan….[18]

However, neither ERISA nor the DOL provide additional clarification of that rule in the context of 401(k) plans. For example, ERISA does not specify whether fiduciaries are required to provide services to assist participants with identifying the amounts they need to save to have adequate retirement benefits or the manner in which to invest their accounts. As a result, fiduciaries are left to wonder about the full extent of their responsibilities.

In order to be comfortable that they have satisfied ERISA's requirements, prudent fiduciaries should analyze whether participants have the abilities and/or tools necessary to help them make choices necessary to accumulate adequate retirement benefits. Fiduciaries who want to make sure they satisfy the exclusive purpose rule should provide

effective assistance to participants to help them obtain sufficient retirement benefits. For example, fiduciaries may decide to educate employees on the importance of participating in the plan, help participants understand how much they need to defer, and provide services to help them make prudent investment decisions. The UnifiedPlan[SM] goes further and uses an actuarial and portfolio management process to increase the probability of an adequately funded benefit for each participant.

The structure of 401(k) plans can help fiduciaries satisfy their duties under ERISA. For example, plan sponsors can encourage participation by including automatic enrollment provisions in the plan document. Automatic enrollment refers to plan provisions that automatically begin making deferrals from participants' pay checks at a predetermined rate unless a participant elects a different rate or opts out of the plan. In addition, a plan document can provide for automatic deferral increases--unless a participant selects a different rate or opts out.

Unified Trust advises plan sponsors regarding the types of plan provisions that they can include to help satisfy their duties under ERISA. As part of the Program, Unified Trust works with plan sponsors to help them decide whether to include automatic enrollment provisions and whether to systematically increased participants' deferral rates every year, known as "step-ups."

Fiduciaries Must Use A Prudent Process

ERISA holds fiduciaries to very high standards.[19] When courts evaluate whether fiduciaries have satisfies their duties under ERISA, they analyze whether they have acted prudently as compared to a knowledgeable person under similar circumstances, known as the prudent man rule. ERISA explains:

> [A] fiduciary shall discharge his duties…with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the context of an enterprise of a like character and with like aims….[20]

To determine whether a fiduciary has satisfied these requirements, both the federal government and courts have required that fiduciaries use a prudent process. This refers to using both procedural and substantive prudence. Procedural prudence involves conducting an investigation to obtain relevant information needed to make a decision. Substantive prudence refers to using that information to make a reasoned decision. The court in *Riley v. Murdock* explained:

> Courts have articulated two ways in which to measure a fiduciary's use of prudence in carrying out their duties. The first is whether the fiduciary employed the appropriate methods to diligently investigate the transaction and the second is whether the decision ultimately made was reasonable based on the information resulting from the investigation.[21]

Procedural Prudence Involves Gathering Relevant Information

To engage in procedural prudence, courts have indicated that fiduciaries must conduct an investigation to gather the relevant information.[22] The court in *Roth v. Sawyer-Cleator Lumber Co.* explained "[A] fiduciary is obligated to investigate all decisions that will affect the pension plan…"[23] Similarly, the court in *Fink v. National Savings and Trust Co.* stated "A fiduciary's independent investigation of the merits of a particular investment is at the heart of the prudent person standard."[24]

Courts have held that the failure to conduct an investigation is a fiduciary breach. In *United States v. Mason Tenders Dist. Council of Greater New York*, the court stated "The failure to make any independent investigation and evaluation of a potential plan investment is a breach of fiduciary obligations."[25]

For 401(k) plans, prudence requires that fiduciaries evaluate and understand the needs of the plan and the participants. Thus, fiduciaries should investigate whether participants have sufficient information and skills to properly determine the amount of funding, or deferrals, they need to make to their 401(k) accounts and how to invest their accounts to obtain adequate retirement savings. As discussed above under "Primary Purpose of Retirement Plans," research has shown that many participants are not saving as much as they could for retirement[26] and that participants may not be properly investing their accounts.[27] Thus, fiduciaries of 401(k) plans are likely to find that participants need assistance with both investment management and actuarial analysis to fully fund their retirement benefit.

Substantive Prudence Requires Using Relevant Information to Make Decisions

After obtaining the relevant information, fiduciaries must make a reasoned decision based on that information. As the court in *Lanka v. O'Higgins* stated, substantive prudence requires a fiduciary:

> [T]o act in a manner as would others who have a capacity and familiarity with such matters; and…exercise independent judgment when making…decisions.[28]

Fiduciaries of 401(k) plans that determine through procedural prudence that participants need help determining the amount of money to save and how to invest for retirement will likely decide using substantive prudence to provide assistance to participants. Fiduciaries will want to evaluate programs that are available in the marketplace, such as UnifiedPlan℠, to help their participants save and invest properly. The UnifiedPlan℠ Investment Policy Statement and Benefit Policy Statement provide a defined procedural framework to help the trustee make decisions to improve the outcome of the participant.

Evaluating the Needs of A Plan and Its Participants

When making decisions regarding the plan, fiduciaries should consider the needs of the plan and its participants. Fiduciaries are evaluated based on the "care, skill, prudence, and

diligence" that a hypothetical person "familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[29] Courts have interpreted this language as requiring that fiduciaries consider the needs of the plan and its participants when making decisions. The court in *Donovan v. Cunningham* stated:

> [T]he prudent man rule as codified in ERISA is a flexible standard: the adequacy of a fiduciary's investigation is to be evaluated in light of the "character and aims" of the particular type of plan he serves.[30]

Similarly, the court in *GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.* explained:

> Failure to ***investigate the needs of a plan*** or to ascertain the particular requirements or restrictions of a plan, and failure to invest in accordance with the best interests of plan participants…constitutes a breach of fiduciary duties imposed by ERISA.[31] [Emphasis added.]

Additionally, courts have indicated that fiduciaries must consider participants' needs. The court in *Liss v. Smith* explained:

> ***At the very least, [fiduciaries] have an obligation to (i) determine the needs of a fund's participants***, (ii) review the services provided and fees charged by a number of different providers and (iii) select the provider whose service level, quality and fees best matches the fund's needs and financial situation.[32] [Emphasis added.]

The court in *Whitfield v. Tomasso* stated:

> In providing…benefits, in order to fulfill their fiduciary duties, the [fiduciaries] should have considered the ***needs of the…participants*** and an appropriate level of benefits, and then should have solicited multiple proposals and completely evaluated the proposals before entering into an agreement.[33] [Emphasis added.]

Additionally, the court in *Lanka v. O'Higgins* stated, "Indeed, it has been held that an investment manager has a duty to inquire of the particular ***needs of the plan vis-à-vis its participants***."[34] [Emphasis added.]

ERISA does not explicitly state that fiduciaries of 401(k) plans must help participants with funding their benefits and investing their accounts. However, a reasonable interpretation of ERISA, as interpreted by applicable case law, is that fiduciaries should take these matters into account. Thus, fiduciaries who want to be confident that they have satisfied ERISA's requirements will evaluate the plan's services in light of participants' goals and needs.

Programs such as UnifiedPlan[SM] can provide considerable assistance to participants. The Program is designed to help participants make better choices about participating in the plan, the amount to defer and investing their accounts among the investments offered by the plan. The Program notifies employees about the amount they need to save for retirement. It also uses automatic enrollment, if authorized by the plan, to set deferral rates for participants unless they select different rates or opt out. In addition, if the plan sponsor agrees, the Program will automatically increase the participants' deferral rates, within defined limits and at a specified rate, to increase the likelihood of adequate retirement benefits. It also manages their accounts based on personalized investment mixes. The investment glide paths are uniquely designed for each participant's fully funded retirement date as determined by regular actuarial testing. If necessary, the program will shorten or lengthen the timeline to optimize the funded benefit with the lowest level of uncertainty.

Unified Trust also actuarially monitors the progress of participants in both the accumulation phase and the post-retirement distribution phase. If selected by a participant, Unified Trust will continue to implement UnifiedPlan[SM] for a participant even if the participant rolls his account to an individual retirement account (IRA).

Because UnifiedPlan[SM] offers materials assistance to participants with preparing for retirement, fiduciaries who select UnifiedPlan[SM] can have a high degree of confidence that they have satisfied the spirit of ERISA's requirements to focus on the exclusive purpose of providing retirement benefits.

Acting in Accordance with the Circumstances Then Prevailing

ERISA's prudent man rule requires that fiduciaries satisfy its requirements under the prevailing circumstances. ERISA states that "fiduciaries shall act…with the care, skill, prudence, and diligence ***under the circumstances then prevailing*** that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims…"[35] [Emphasis added.]

In order to comply with this requirement, fiduciaries must take into consideration the circumstances prevailing at each point in time. Because investments and services are constantly changing, fiduciaries must periodically evaluate the needs of the plan and the services available to meet those needs.

The availability and cost of products to help participants make decisions about deferral rates and investment allocations have changed significantly over the years. For example, UnifiedPlan[SM] was not available until recently. Thus, the circumstances currently prevailing are significantly different than the circumstances of just a few years ago. Since fiduciaries are evaluated at least partially based on their attentiveness to the circumstances existing at any point in time, they should regularly examine the types of services that are available and appropriate for their plans and participants.

Investment Responsibilities

ERISA provides that the responsibility for investments is borne by the trustee for the plan. ERISA section 403(a) states that "the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan…." The use of the term "trustee" in ERISA generally refers to a "discretionary trustee," that is, someone who agrees to take responsibility and exercise discretion for the investments. In contrast, there are also "directed trustees," who do not exercise discretion over the management of plan assets. Where a plan uses a discretionary trustee (as opposed to a directed trustee), the fiduciaries' responsibilities for the plan's investments are limited to monitoring the trustee. Guidance issued by the DOL explains:

> Q. … What are the ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries with respect to these appointments?
>
> A. At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan.[36]

Thus, a plan that uses a discretionary trustee divides the fiduciary duties among the primary fiduciaries, such as the plan sponsor or its officers, and the trustee. The responsibilities related to the plan's assets, which are basically investment responsibilities, are handled by the trustee, while the primary fiduciaries monitor the performance of the trustees. The primary fiduciaries of plans that use discretionary trustees, such as Unified Trust, are otherwise relieved of responsibility for the plans' investments. However, the primary fiduciaries are responsible for the administration of the plan, including the selection and monitoring of the providers.

For plans that use Unified Trust as their trustee, reports provided by Unified Trust will help the primary fiduciaries with their oversight responsibility. Unified Trust provides detailed fiduciary and actuarial outcome "dashboard reports" that display a detailed analysis of a plan's performance. The trustee services also include overall plan-level fiduciary reviews such as investment selection and replacement. In addition, participant-level detailed fiduciary metrics such as individual efficient frontier analysis and portfolio risk measurements are conducted.

The primary fiduciaries can also be confident that financial conflicts of interests are not adversely impacting Unified's decisions. (In that regard, ERISA requires that the fiduciaries of a plan who select the plan's providers must understand and evaluate any conflicts of interest.[37] Unfortunately, many providers do not offer assistance--or even disclosure--to help fiduciaries with that job.) Unified Trust charges a flat fee and offsets its fee by any payments it receives from mutual fund companies. Additionally, Unified Trust's fee for UnifiedPlan[SM] does not vary based on participant usage. Thus, Unified Trust does not have self-serving financial incentives to encourage participants to use the Program.

Unified Trust further helps the primary fiduciaries and the plan sponsor manage their oversight responsibilities for the plan by coordinating with them in the development of an Investment Policy Statement, or IPS, for the plan. The IPS describes, in writing, the investment policy decisions made for the plan and serves as evidence of a prudent process for that purpose. In addition, the implementation and monitoring of the IPS are further evidence that the plan was invested in a manner consistent with that process and with the terms of the documents governing the plan.

Additional Protections

Additional protections are available for the primary fiduciaries through the use of an investment manager.

Investment Managers

Fiduciaries are relieved of responsibilities for their plans' investments to the extent an investment manager is used. ERISA section 402(c) provides that the named fiduciaries of a plan may appoint one or more investment managers to "to manage (including the power to acquire and dispose of) any assets of a plan."

ERISA defines the term "investment manager" as:

> [A]ny fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2)—
>
> (A) who has the power to manage, acquire, or dispose of any asset of a plan;
>
> (B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940; (ii) …is registered as an investment adviser under the laws of the State … in which it maintains its principal office and place of business…; (iii) is a bank, as defined in that Act; or (iv) is an insurance company…; and
>
> (C) has acknowledged in writing that he is a fiduciary with respect to the plan.

ERISA explains that fiduciaries are relieved of liability for the actions of investment managers. ERISA section 405(d) states:

> If an investment manager or managers have been appointed under section 402(c)(3), then, notwithstanding subsections (a) (2) and (3) and subsection (b), no [fiduciary] shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

Interpretive Bulletin 75-8 also states that "authority and discretion may be delegated to persons who are investment managers as defined in section 3(38) of [ERISA]."[38]

Primary fiduciaries that use investment managers, such as Unified Trust, for participants' accounts, will be entitled to additional protections under ERISA. Consequently, companies that use Unified Trust as a participant investment manager provide protection for the fiduciaries for any claims that the participants were improperly invested.

Protection for Participants Who Select Investments

The primary fiduciaries can also be protected from losses that result from participant investment decisions if the plan complies with ERISA section 404(c). In order to obtain the protection under section 404(c), the plan must comply with approximately 20 to 25 requirements specified in a DOL regulation. These include providing participants with: (1) certain types of documentation, information and disclosures; (2) the ability to give investment instructions with sufficient frequency given the market volatility of the investment options; and (3) the ability to choose from a range of investment options that is broad enough to provide them with the reasonable opportunity to materially affect the potential returns in their accounts and to diversify their accounts so as to minimize the risk of large losses.[39]

Fiduciaries will generally only be relieved of liability for accounts where a participant actually exercises control over the account. Merely providing a participant with the opportunity to exercise control is not enough. If participants do not direct the investment of their accounts, the fiduciaries remain responsible for prudently investing those plan assets. The Preamble to the final regulation to ERISA section 404(c) explains "until a participant or beneficiary exercises control with respect to assets contributed on his behalf, plan fiduciaries are subject to all of the fiduciary duties and obligations set forth in…ERISA with respect to such assets."[40]

Unified Trust helps plans obtain the fiduciary protections of ERISA section 404(c). Unified Trust works with plan sponsors to help the plan comply with the regulation's 20 to 25 conditions.

Protection for Participants Who Do Not Direct Their Accounts

Fiduciaries may also have protection under ERISA section 404(c) for participants who do not direct the investment of their accounts. The Pension Protection Act of 2006 (PPA) added ERISA section 404(c)(5) to include protection for fiduciaries who invest these participants in default accounts.[41] This protection is sometimes referred to as a fiduciary "safe harbor." The PPA states:

> ***[A] participant in an individual account plan*** meeting the notice requirements of subparagraph (B) ***shall be treated as exercising control over the assets in the account*** with respect to the amount of contributions and earnings ***which, in the absence of an investment election by the***

> ***participant, are invested by the plan in accordance with regulations prescribed by the Secretary.*** The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both. [42]

To obtain this relief, plans must satisfy with the following requirements:

- ***Notices***. Each affected participant must receive a notice "explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant, such contributions and earnings will be invested." The notice must be provided a reasonable period of time before each plan year.

- ***Right to Select Investments***. The participant must have a reasonable period of time after receiving the notice and before the beginning of the plan year to select the investments for his account.

The DOL has issued a regulation that also requires:[43]

- ***Additional Notice Requirements***. The notice must also contain:

  - A description of the qualified default investment alternative (called a QDIA), including a description of the investment objectives, risk and return characteristics, if applicable, and fees and expenses of the QDIA;

  - A description of the right of the participants and beneficiaries to direct the investment of their money to any other investment under the plan, without financial penalty; and

  - An explanation of where the participants and beneficiaries can obtain investment information about the other investments under the plan.

- ***Timing of Notice***. The regulation provides that the notice must be given at least 30 days before the date the participant's assets are invested in the QDIA and then at least 30 days before each plan year.

- ***Plan Provisions***. The plan must provide that any materials given to the plan about a participant's investment in a QDIA, such as prospectuses, and proxy voting materials, will be given to the participant.

- ***Broad Range***. The plan must offer participants the ability to invest in a "broad range of investment alternatives." [44]

- ***Use of a QDIA***. The QDIA must be a mutual fund, managed account or model portfolio that is based on the participant's anticipated retirement date or a target level of risk appropriate for participants of the plan as a whole.

The retirement industry is quickly adopting retirement date QDIAs based upon a "theoretical" average participant and a retirement date based upon their age. In most cases, the retirement date is selected whether or not the individual participant is adequately funded at that date.

In contrast, the UnifiedPlan[SM] manages a retirement date for each participant with the goal of a fully funded benefit and the least amount of risk. Based on analysis prepared by Unified Trust and reviewed by us, it appears that, under this approach, many over-funded participants can obtain a fully funded benefit with less risk. That is, they will have an adequate benefit and a less volatile portfolio mix that allows them to "sleep at night" during difficult market conditions.

The regulation provides that the QDIA must be managed by an investment manager or an investment company registered under the Investment Company Act of 1940. Additionally, for an investment to be a QDIA, it may generally not hold employer securities unless they are held in a mutual fund or similar pooled investment vehicle that is regulated by a state or federal agency. The investment may not impose penalties or restrict the participant's ability to transfer out of the investment. Additionally, in order to be a QDIA, the investment must be diversified in order to minimize the risk of large losses.

Unified Trust's managed accounts are designed to satisfy the requirements for QDIAs as described in the regulation issued by the DOL. As a result, and with Unified Trust and the plan sponsor working together to provide participants with the required notices and information, any participant who "defaults" (that is, who do not direct their investments) will be placed into a QDIA, resulting in fiduciary protections for the plan sponsor.

The combined effect of:

- Unified Trust serving as the discretionary trustee for the selection and monitoring of the plan's investments;
- Unified Trust managing the accounts of both electing and defaulting participants;
- Unified Trust and the plan sponsor working together to satisfy the QDIA notice and information requirements; and
- Unified Trust and the plan sponsor working together to satisfy the 404(c) requirements;

will be to afford plan sponsors multiple fiduciary safe harbors which, in combination, will protect plan sponsors for any claims that the investments were improperly selected at the plan level or were improperly used by participants.

V. CONCLUSIONS

Fiduciaries who evaluate the needs of participants for plans (like 401(k) plans) that are primarily funded and invested by participants, are likely to conclude that some—and perhaps many--participants need help in making decisions about the plan. In order to support participants' goals for retirement adequacy--and the legal requirement to act for the exclusive purpose of providing retirement benefits, the primary fiduciaries should evaluate the types of services available in the marketplace.

Services such as UnifiedPlan^{SM} offer significant help to participants for accumulating adequate retirement benefits. Additionally, Unified Trust, as a discretionary trustee and investment manager, materially reduces the responsibilities and potential liabilities of fiduciaries.

The UnifiedPlan^{SM} Investment Policy Statement and Benefit Policy Statement provide a defined procedural framework to help the trustee make decisions to improve the outcome of the participants.

The trustee services include overall plan-level fiduciary reviews such as investment selection and replacement. In addition, participant-level detailed fiduciary metrics such as individual efficient frontier analysis and portfolio risk measurements are conducted.

VI. ENDNOTES

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[1] Unified Plan℠ Concepts: A Mixture of Trustee Discretion, and Participant Actions to Complete This Process, p. 1.
[2] *Id.*
[3] Prop. Reg. §2550.404c-5.
[4] While the investments selected by a plan may come in different forms—*e.g.*, mutual funds, collective trusts, separate accounts—for simplicity, we refer to all of the investments as "mutual funds" or "funds."
[5] Measuring and Monitoring: The Long-Term Success of Defined Contribution Plan Participants, Sample Plan Sponsor Dashboard, Plan Summary.
[6] Stephen P. Utkus & Jean A. Young, *Lessons from Behavioral Finance and the Autopilot 401(k) Plan*, (Vanguard Center for Retirement Res.) April 2004; Sarah Holden & Jack VanDerhei, *The Influence of Automatic Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement*, 283 Employee Benefit Res. Inst. Issue Brief (2005). The issue brief indicates that the "EBRI/ ICI model shows that prior to automatic enrollment, 66 percent of eligible workers at year-end 2000 were participants in 401(k) plans, while immediately after adding automatic enrollment to the model, the participation rate rises to 92 percent of eligible employees." *Id.* at 4. See also James J. Choi, David Laibson, & Brigitte C. Madrian, Plan Design and 401(k) Savings Outcomes, 57 National Tax J. 275 (2004); see also James J. Choi, David Laibson, Brigitte Madrian, & Andrew Metrick, *For Better or For Worse: Default Effects and 401(k) Savings Behavior* (Pension Research Council, Working Paper No. 2002-2, 2001), available at http://prc.wharton.upenn.edu/prc/PRC/WP/WP2002-2.pdf.
[7] 71 Fed. Reg. 56805, 56806 (09/27/2006).
[8] Benartzi, Shlomo, Peleg, Ehud and Thaler, Richard H., "Choice Architecture and Retirement Saving Plans" (July 2007).
[9] Gary R. Mottola and Stephen P. Utkus, *Managed accounts and participant portfolios*, Vanguard Center for Retirement Research, Vol. 24 (July 2006).
[10] *Id.*, at 1.
[11] *Id.*, at 1.
[12] Gary R. Mottola and Stephen P. Utkus, *Red, Yellow, and Green: A Taxonomy of 401(k) Portfolio Choices*, PRC WP2007-14, Pension Research Council Working Paper (June 2007).
[13] *Id.*, Abstract.
[14] *Defined-Benefit Pension Is a Huge Contributor to Financial Security in Retirement*, August 30, 2008, Scott Burns, New York Times.
[15] *The Relative Performance Record and Asset Allocation of Public Defined Benefit Plans*, A Morningstar, Inc. project in conjunction with the National Conference on Public Employee Retirement Systems (NCPERS) 12-17-2007, ©2007 Morningstar, Inc.
[16] *Id.*, at 5.
[17] ERISA § 404(a)(1).
[18] *Id.*
[19] *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982).
[20] ERISA § 404(a)(1)(B).
[21] *Riley v. Murdock*, 890 F.Supp. 444, 458 (E.D.N.C. 1995) (citation omitted).
[22] *U.S. v. Mason Tenders District Council of Greater New York*, 909 F.Supp. 882, 886 (S.D.N.Y. 1995) (citations omitted).
[23] *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994).
[24] *Fink v. National Savings and Trust Co.*, 772 F.2d 951, 957 (D.C. Cir. 1985).
[25] *United States v. Mason Tenders Dist. Council of Greater New York*, 909 F.Supp. 882, 887 (S.D.N.Y. 1995).
[26] Stephen P. Utkus & Jean A. Young, *Lessons from Behavioral Finance and the Autopilot 401(k) Plan*, (Vanguard Center for Retirement Res.) April 2004; Sarah Holden & Jack VanDerhei, *The Influence of Automatic Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement*, 283 Employee Benefit Res. Inst. Issue Brief (2005). The issue brief indicates that the "EBRI/ ICI model shows that prior to automatic enrollment, 66 percent of eligible workers at year-end 2000 were participants in

401(k) plans, while immediately after adding automatic enrollment to the model, the participation rate rises to 92 percent of eligible employees." *Id.* at 4. See also James J. Choi, David Laibson, & Brigitte C. Madrian, Plan Design and 401(k) Savings Outcomes, 57 National Tax J. 275 (2004); see also James J. Choi, David Laibson, Brigitte Madrian, & Andrew Metrick, *For Better or For Worse: Default Effects and 401(k) Savings Behavior* (Pension Research Council, Working Paper No. 2002-2, 2001), available at http://prc.wharton.upenn.edu/prc/PRC/WP/WP2002-2.pdf.

[27] Gary R. Mottola and Stephen P. Utkus, *Managed accounts and participant portfolios*, Vanguard Center for Retirement Research, Vol. 24 (July 2006). Gary R. Mottola and Stephen P. Utkus, *Red, Yellow, and Green: A Taxonomy of 401(k) Portfolio Choices*, PRC WP2007-14, Pension Research Council Working Paper (June 2007).

[28] *Lanka v. O'Higgins*, 810 F.Supp. 379, 387 (N.D.N.Y. 1992) (citations omitted).

[29] ERISA § 404(a)(1)(B).

[30] *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983).

[31] *GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 10 EBC 2290, 2301 (S.D. Ga. 1989) (emphasis added).

[32] *Liss v. Smith*, 991 F.Supp. 278, 300 (S.D.N.Y. 1998) (emphasis added).

[33] *Whitfield v. Tomasso,* 682 F.Supp. 1287, 1304 (E.D.N.Y. 1988) (emphasis added).

[34] *Lanka v. O'Higgins*, 810 F.Supp. 379, 388 (N.D.N.Y. 1992).

[35] ERISA § 404(a)(1)(B) (emphasis added).

[36] 29 CFR §2509.75-8, Q&A, FR-17.

[37] *See*, *e.g.*, DOL Field Assistance Bulletin 2007-01.

[38] 29 CFR §2509.75-8, Q&A, FR-15.

[39] ERISA § 404(c); 29 CFR § 2550.404c-1.

[40] 57 FR 46906, 46907 (Oct. 13, 1992).

[41] PPA § 624.

[42] PPA § 624 (emphasis added).

[43] Prop. Reg. § 2550.404c-5.

[44] DOL Reg. § 2550.404c-1(b)(3).

The law and our analysis contained in this White Paper are current as of December 2008. Changes may have occurred in the law since this paper was drafted. As a result, readers may want to consult with their legal advisers to determine if there have been any relevant developments since then.