

## ERISA SECTION 404(C) AND INVESTMENT ADVICE: WHAT IS AN EMPLOYER OR PLAN SPONSOR TO DO?

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### INTRODUCTION

Sally works at the ABC Chemical Company and is eligible to participate in the ABC 401(k) Plan. She is thirty-five years old, married with two children, and hopes to retire in thirty years. Although she has a Ph.D. in organic chemistry, she does not know the first thing about planning for her own retirement. The ABC 401(k) Plan offers fifteen different mutual funds. She collected all of the funds' prospectuses and read a few of them, but quickly grew frustrated—the material was dense and none of it explained what was the right asset allocation for her at this point in her life.

Sally discussed this problem with a few of her colleagues, only to discover that they had encountered the same difficulties. The group has now come to see you, the Vice President of Human Resources at the ABC Company. This is not the first time that ABC 401(k) Plan participants<sup>1</sup> have asked for retirement planning assistance. You know that the ABC Company wants participants to make the most of their 401(k) benefits. What do you do?

The above scenario depicts an all-too-common dilemma for defined contribution plan participants and human resources administrators. It has arisen gradually as defined contribution plans—particularly participant-directed individual account plans—have replaced defined benefit plans as the primary privately-sponsored vehicle for retirement income.<sup>2</sup> At the end

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1. For the sake of brevity and readability, I have used the term “participants” to reference both participants and beneficiaries.

2. THE HANDBOOK OF EMPLOYEE BENEFITS: DESIGN, FUNDING, AND ADMINISTRATION 634–35 (1996) (Jerry S. Rosenbloom ed., 4th ed. 1996) [hereinafter HANDBOOK OF EMPLOYEE BENEFITS]; PENSION & WELFARE BENEFITS ADMIN., U.S. DEP'T OF LABOR, PRIVATE PENSION PLAN BULLETIN, NO. 12, ABSTRACT OF 1999 FORM 5500 ANNUAL REPORTS 3 (2004); U.S. GEN. ACCOUNTING OFFICE, GOA/GGD-97-1, PRIVATE PENSIONS: MOST EMPLOYERS THAT OFFER PENSIONS USE DEFINED CONTRIBUTION PLANS 4–7 (1996); U.S. GEN. ACCOUNTING OFFICE, GOA/HEHS-96-176, 401(K) PENSION

of 2002, employers were sponsoring an estimated 400,000 401(k) plans with more than 42 million active participants and \$1.5 trillion in assets.<sup>3</sup>

The high cost of defined benefit plans provided one of the biggest incentives for this change. First, defined contribution plans are not as administratively burdensome as defined benefit plans.<sup>4</sup> Second, section 404(c) of the Employment Retirement Income Security Act (“ERISA”) allows plan sponsors<sup>5</sup> of participant-directed individual account plans to avoid fiduciary responsibility and liability for the negative results of plan participants’ investment decisions.<sup>6</sup> ERISA section 404(c) grants plan sponsors fiduciary relief because the plan participants are, in theory, exercising control over their accounts.<sup>7</sup>

To take advantage of ERISA section 404(c), plan sponsors must adhere to certain guidelines and provide plan participants with information that enhances their ability to exercise control over their accounts.<sup>8</sup> While

PLANS: MANY TAKE ADVANTAGE OF OPPORTUNITY TO ENSURE ADEQUATE RETIREMENT INCOME 3 (1996).

3. PROFIT SHARING/401(K) COUNCIL OF AMERICA, 46TH ANNUAL SURVEY OF PROFIT SHARING AND 401(K) PLANS (2002) (summary on file with the Chicago-Kent Law Review) (final 2003 total assets reported by the Federal Reserve, which include Federal Thrift Plans but not 403(b), 457, or SIMPLE 401(k) or IRA programs).

4. A defined benefit plan is more administratively burdensome and expensive than a defined contribution plan for two reasons. First, in a defined benefit plan, the plan sponsor promises its participants a retirement benefit equal to a certain dollar amount or a specific percentage of the participant’s pay. The plan sponsor must not only calculate the amount of this benefit upon a participant’s retirement, but also administer the payout of this benefit for the retiree’s or survivor’s remaining lifetime. Second, and more importantly, the plan sponsor must ensure that it has adequate funds to pay those retirement benefits. To have those funds, the plan sponsor contributes money to a pension trust, which is invested in stocks, bonds, real estate, or other assets. Each year, the plan sponsor must assess whether it has invested enough money in the pension trust to pay its current retirees’ benefits and to meet the needs of future retirees. Thus, with a defined benefit plan, a plan sponsor bears the full risk and responsibility of ensuring that a plan participant will receive the promised benefit on retirement. If there are insufficient funds in the pension trust to pay the accrued benefits, the plan sponsor is legally obligated to make up the difference by paying more money into the pension trust fund.

With a defined contribution plan, the plan sponsor does not promise the plan participant a specific benefit, but rather offers the plan participant a retirement account, into which the employer (not always) and participant will make contributions. The plan sponsor bears no risk as to the amount of the participant’s retirement benefit. In defined contribution plans, it is the participant who bears the risk that his or her retirement account will increase in value by an amount sufficient to provide adequate income during retirement. If the contributions made to the account by the plan sponsor and the participant are insufficient, or if the securities in which the account is invested lose value or increase in value too slowly, the participant risks having an income in retirement that is not sufficient to maintain his or her desired standard of living. PATRICK J. PURCELL, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS, PENSIONS AND RETIREMENT SAVINGS PLANS: SPONSORSHIP AND PARTICIPATION 3–4 (2002); HANDBOOK OF EMPLOYEE BENEFITS, *supra* note 2, at 635–36.

5. The term “plan sponsor” should be read to include both employers and plan sponsors.

6. 29 U.S.C. § 1104(c) (2000); HANDBOOK OF EMPLOYEE BENEFITS, *supra* note 2, at 637; PURCELL, *supra* note 4, at 3–4.

7. See 29 C.F.R. § 2550.404c–1(b)(2) (2003).

8. See *id.* § 2550.404c–1(b)(2)(B).

these technical requirements are complex, they can be satisfied. Compliance with the spirit of ERISA section 404(c) is another matter. There is debate as to whether plan participants are capable of exercising the degree of “control” required to trigger ERISA section 404(c) relief.<sup>9</sup> Empirical data have suggested that the majority of participant-directed individual account plan participants have limited investment expertise.<sup>10</sup> In fact, most are unwilling investors who fail to adequately invest for their own retirements.<sup>11</sup>

The questionable ability of most plan participants to meet ERISA section 404(c)’s control requirement raises serious concerns about the availability of ERISA section 404(c) relief. A simple solution would be hiring financial planners and investment advisors to assist plan participants in the allocation of their account balances. Doing so, however, would foreclose the possibility of ERISA section 404(c) relief because ERISA imposes fiduciary status on investment advisors.<sup>12</sup>

Faced with this statutory and regulatory riddle, the Department of Labor (“DOL”) and now, Congress, support various investment advice schemes that allow plan sponsors to seek fiduciary relief under ERISA section 404(c).<sup>13</sup> Although these schemes have the potential to resolve the ERISA section 404(c) dilemma, their structural flaws only create more problems—for example, they allow investment advisors to self-deal and operate despite conflicts of interest. And so the riddle of ERISA section 404(c) continues.

In this article, I will explore ERISA section 404(c)’s statutory and regulatory framework and explain why its underlying goals cannot be satisfied. Ultimately, I will suggest that plan sponsors must accept some fiduciary responsibility when it comes to the investment of funds in participant-directed individual account plans. The question, of course, is the extent of their potential liability.

9. See, e.g., Susan J. Stabile, *Freedom to Choose Unwisely: Congress’ Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*, 11 CORNELL J.L. & PUB. POL’Y 361, 378 (2002).

10. LEONARDO CANSECO ET AL., CERTIFIED FIN. PLANNER BD. OF STANDARDS INC., EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA): AN EVALUATION AFTER 25 YEARS, at 2 (Oct. 14, 1999), at <http://www.cfp.net/Upload/WhitePaperDocs/28.pdf> (last visited May 16, 2005); Shlomo Benartzi & Richard H. Thaler, *Naive Diversification Strategies in Defined Contribution Saving Plans*, 91 AM. ECON. REV. 79, 79 (2001); Jinhee Kim & E. Thomas Garman, *Financial Education and Advice Changes Worker Attitudes and Behaviors*, J. COMPENSATION & BENEFITS, Sept.–Oct. 2003, at 7, 10.

11. Richard D. Glass & Stan Marshall, *Investment Education for the 21st Century: Dispelling the Myths and Undoing the Errors*, EMPLOYEE BENEFITS J., June 2003, at 23, 25.

12. 29 U.S.C. § 1002(21)(A)(ii) (2000).

13. See *infra* Parts II and III of this paper for a discussion of the investment advice schemes.

In Part I, I will explore ERISA's fiduciary framework, specifically that of section 404(c), and suggest how that provision has given rise to this debate over investment advice. In Parts II and III, I will outline the DOL's current models and two Congressional proposals for the simultaneous provision of investment advice and the maintenance of ERISA section 404(c) fiduciary relief. Finally, in Part IV, I will conclude by explaining why the DOL models and Congressional proposals inadequately address the problem and then offer a more reasonable solution.

#### I. FIDUCIARY LIABILITY AND PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT PLANS

ERISA provides a broad and functional approach to defining employee benefit plan fiduciaries.<sup>14</sup> Generally speaking, in addition to an employee benefit plan's "named fiduciaries,"<sup>15</sup> a person or entity is a plan fiduciary to the extent that he, she, or it:

1. exercises any discretionary authority or control respecting management or disposition of plan assets;
2. renders investment advice for a fee or other compensation, directly or indirectly, with respect to any monies or other property of such plan or has any authority or responsibility to do so; or
3. has any discretionary authority or discretionary responsibility in the administration of such plan.<sup>16</sup>

A person's "rendering of investment advice" may give rise to fiduciary status if he or she:

1. advises the plan as to the value of securities or other property or makes recommendations about investing in, purchasing, or selling securities or other property; and
2. either directly or indirectly (e.g., through or together with any affiliate),
  - a. has discretionary authority or control with respect to purchasing or selling securities or other property for the plan; or

14. See *Bannistor v. Ullman*, 287 F.3d 394, 401 (5th Cir. 2002); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986); *Donovan v. Mercer*, 747 F.2d 304, 308 (5th Cir. 1984); *Brink v. DaLesio*, 496 F. Supp. 1350, 1374-75 (D. Md. 1980), *rev'd in part on other grounds*, 667 F.2d 420 (4th Cir. 1981).

15. Each employee benefit plan must name in its plan instrument the person or entities that shall jointly or severally have authority to control and manage the operation and administration of the plan. 29 U.S.C. § 1102(a)(1).

16. 29 U.S.C. § 1002(21)(A).

- b. renders any advice on a regular basis to the plan where such services will serve as a primary basis for investment decisions with respect to plan assets, and he or she will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as investment policies or strategy, overall portfolio composition, or diversification of plan investments.<sup>17</sup>

This broad and stringently imposed definition of a fiduciary can be traced to ERISA's historical underpinnings. According to its legislative history, ERISA was primarily enacted to protect plan participants, who had been promised certain retirement benefits, from a plan sponsor's failure to fulfill those promises, either through inadequate plan funding or outright theft of pension fund assets.<sup>18</sup>

A. *ERISA Section 404(c): Effect of Statutory and Regulatory Requirements*

ERISA section 404(c) provides an exception to fiduciary liability for plan sponsors involved in participant-directed individual account plans. It specifically provides that when a plan participant exercises control over the assets in his or her account:

1. the participant shall not be deemed a fiduciary by reason of the exercise of such control; and
2. no person who otherwise is a fiduciary shall be liable under Part 4 of Title 1 of ERISA for any loss, or by reason of any breach, that results from such participant's exercise of control.<sup>19</sup>

In other words, going back to our beginning example, when Sally determines how the money in her account is invested—by selecting the funds and choosing how much money to put into each one—neither Sally nor the ordinary plan fiduciaries will be held liable for the results of her investment decisions.<sup>20</sup>

Initially, this seems relatively simple—neither Sally as a participant nor her plan sponsor is held liable for what occurs as a result of Sally's exercise of control. But we all know this cannot be the case—someone is always left holding the bag.

17. 29 C.F.R. § 2510.3-21(c)(1) (2003).

18. See S. REP. NO. 93-383, (1973), reprinted in 1974 U.S.C.C.A.N. 4890, 4891-92; H.R. REP. NO. 93-533, at 17 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4655.

19. 29 U.S.C. § 1104(c)(1).

20. See 29 C.F.R. § 2550.404c-1(d).

Unfortunately, ERISA's legislative history does not shed any light on the drafters' intentions with respect to the scope or application of section 404(c). This can be attributed to two factors. First, ERISA's drafters were primarily concerned with defined benefit pension plans, not defined contribution plans.<sup>21</sup> Second, 401(k) plans, the major defined contribution vehicles that rely on section 404(c), were not even authorized until 1978, four years after ERISA was enacted.<sup>22</sup> ERISA's drafters, however, did realize that the phrase "exercises control over the assets in [one's] account" was ambiguous, but left it to the DOL to provide further guidance.<sup>23</sup>

Under the DOL's final regulations on ERISA section 404(c) ("DOL 404(c) regulations"), a participant has exercised control with respect to a particular transaction when he or she has acted affirmatively regarding the investment of account funds<sup>24</sup> and where the plan's fiduciary has provided the participant with the following:

1. at least three diversified "core" investment options representing a broad range of investment options, which permit the participant to achieve a portfolio with aggregate risk and return characteristics within the range normally appropriate for him or her;
2. the opportunity to transfer money among the funds with appropriate frequency in light of the funds' volatility (but in no event less frequently than quarterly); and
3. sufficient information to make informed decisions.<sup>25</sup>

The last requirement—providing participants with "sufficient information to make informed decisions"—partially underlies the current controversy over supplying investment advice to plan participants. It begs two questions: (1) how much and what kind of information plan sponsors must provide for plan participants to be able to make "informed decisions" and (2) what kinds of "investment-related" information and education constitute investment advice that cannot be provided under ERISA's current framework?

Recognizing the ambiguity of the phrase "sufficient information to make an informed decision," the DOL enunciated a list of plan and investment details that plan sponsors must disclose to satisfy this requirement and

21. Stabile, *supra* note 9, at 362.

22. Revenue Act of 1978, Pub. L. No. 95-600, § 135, 92 Stat. 2763, 2785-87 (codified as amended at 26 U.S.C. § 401(k) (2000)). This Act did not take effect until 1980. *See id.* § 135(c)(1).

23. *See* 29 U.S.C. § 1104(c)(1) (2000).

24. In automatic enrollment plans, there is no ERISA section 404(c) relief unless a participant acts affirmatively to invest differently from the default contribution and investment options selected by the plan sponsor. *See* 29 C.F.R. § 2550.404c-1(c).

25. *See id.* § 2550.404c-1(b)(2)-3.

be reasonably assured of ERISA section 404(c) protection. These disclosures are divided into two categories:

### **Disclosures Required in All Instances Before Section 404(c) May Be Applied**

- An explanation that the plan is intended to constitute an ERISA section 404(c) plan and that plan fiduciaries may be relieved of liability for losses that are the result of investment instructions given by the participant;
- A description of the investment alternatives available under the plan, including a general description of the investment objectives and risk and return characteristics of each alternative (including type and diversification of assets in the portfolio of the alternative);
- Identification of any designated investment managers;
- An explanation of how to give investment instructions;
- A description of any transaction fees or expenses charged to the participant's account (e.g., commissions, sales load, deferred sales charges, and redemption or exchange fees);
- A description of other information available on request (see next heading) and the name, telephone number, and address of the plan fiduciary who is responsible for providing that information; and
- Additional information, beyond the scope of this article, relating to plan sponsor security investments.<sup>26</sup>

### **Disclosures Required On Participant Request**

- A description of the annual operating expenses of each designated investment alternative (such as investment management fees, administrative fees, and transaction costs), which reduce the rate of return and the aggregate amount of such expenses as a percentage of average net assets of the investment alternative;
- Copies of any prospectuses,<sup>27</sup> financial statements and reports, and any other materials relating to the investment alternatives available under the plan;
- A list of the assets comprising the portfolio of each designated investment alternative which constitute plan assets, the value of such

26. *Id.* at § 2550.404c-1(b)(2)(i)(B)(1)(i)-(ix).

27. The Department of Labor has advised that, in certain circumstances, 401(k) plans may provide plan participants with a "profile"—that is, a special summary of a mutual fund's prospectus—and still be eligible for section 404(c) protection. DOL Advisory Opinion 2003-11A (Sept. 8, 2003), available at <http://www.dol.gov/ebsa/regs/aos/ao2003-11a.html> (last visited May 16, 2005).

assets, and—with respect to those assets that are fixed rate investment contracts issued by a bank, savings and loan association, or insurance company—the name of the issuer of the contract, the term of the contract, and the rate of return on the contract.<sup>28</sup>

The DOL further clarified its “sufficient information requirement,” noting that a fiduciary of an ERISA section 404(c) plan had no obligation to provide plan participants with investment advice.<sup>29</sup> Instead, the DOL instructed that, “[c]ompliance with this condition, [sufficient information to make an informed decision], does not require that participants be offered or provided either investment advice or investment education, e.g. regarding general investment principles and strategies, to assist them in making investment decisions.”<sup>30</sup>

The required disclosures, as well as subsequent DOL commentary, reveal that in attempting to draw a line for plan sponsors between achieving ERISA section 404(c) protection and eschewing fiduciary liability, the DOL has taken a very hands-off approach with respect to ensuring that participants have “sufficient information to make an informed decision.” Thus, once the plan sponsor satisfies the DOL 404(c) regulations and makes the required disclosures, the plan sponsors can no longer be responsible for the participant’s “exercise of control.” A participant, like Sally from our beginning example, is responsible for not only making her own investment decisions but also for any negative outcomes.

Given ERISA’s broad definitional approach to fiduciary status, it made sense for the DOL to firmly define what constitutes “sufficient information to make an informed decision” and to establish clear guidelines for compliance. If most plan participants were sophisticated, or even moderately knowledgeable investors, this approach would be justified.

*B Can plan participants really make “informed” investment decisions with the information provided to them under the DOL 404(c) regulations?*

But therein lies the problem—large numbers of participants do not understand even the most fundamental investment issues. For example: (1) 40% of participants will not meet their retirement savings goals<sup>31</sup> and will

28. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2)(i)-(v).

29. *Id.* at § 2550.404c-1(c)(4).

30. Interpretive Bulletin Relating to Participant Investment Education, 29 C.F.R. § 2509.96-1(b)n.1 (2003).

31. According to the Vanguard Group Inc. (“Vanguard”), a participant who earns \$50,000 must save approximately 15% of annual pay over a thirty year period to meet his or her target retirement

suffer a large drop in their standard of living at retirement;<sup>32</sup> (2) participants cannot or do not intelligently create their own asset allocations, as measured by the number of funds they use (44% use only one or two investment options)<sup>33</sup> and the fact that many participants never change their asset allocation after setting it up for the first time;<sup>34</sup> and (3) many participants “[h]ave little interest in obtaining a working knowledge of investing or, at least, investment issues.”<sup>35</sup> Moreover, a 1999 survey of white-collar insurance company employees (“Wisconsin Study”) asked plan participants to rate their investment knowledge on a scale of one to seven (one=beginner, seven=expert). Among those surveyed, 55.8% rated themselves as “beginners” or below the midpoint of the scale; 15.4% rated themselves at the midpoint; 28.3% rated themselves above the midpoint; and none rated themselves an expert.<sup>36</sup>

Women seem more adversely affected by this lack of investing self-confidence than their male counterparts. In its First Quarter 2003 Self-Directed Brokerage Account (“SDBA”)<sup>37</sup> Indicators Report, Charles Schwab & Co. Inc. (“Charles Schwab”) noted the following disparities

savings. This figure assumes that the participant’s only retirement vehicle is a defined contribution plan and that the participant will receive full Social Security benefits on retirement. Retirement savings rates need to increase if the participant opts for early retirement, if Social Security reform leads to reduction in Social Security benefits, or if both instances occur. THE VANGUARD GROUP, HOW AMERICA SAVES: A REPORT ON VANGUARD DEFINED CONTRIBUTION PLANS 76–77 (2002) [hereinafter VANGUARD], at [https://institutional4.vanguard.com/iip/pdf/CRR\\_HAS\\_2002.pdf](https://institutional4.vanguard.com/iip/pdf/CRR_HAS_2002.pdf).

32. *Id.* at 74. Here, it is important to note a few things. First, this statistic comes from just one survey of “pre-retiree” households. Second, according to Vanguard, many of the participants who fall into this category are “low income” (term undefined). *Id.* In order to meet their retirement income goals, they would have to start saving between 14% to 27% of annual earnings, which they cannot afford to do. *Id.* Third, 30% of pre-retiree participants are considered “potentially secure” with regard to their retirement income status. This means that although they have accumulated significant retirement wealth, they need to increase their savings to maintain their current standard of living upon retirement at age sixty-five. *Id.* These pre-retiree statistics were first gathered and assessed in a 1997 study by James Moore and Olivia Mitchell. JAMES F. MOORE & OLIVIA S. MITCHELL, PROJECTED RETIREMENT WEALTH AND SAVINGS ADEQUACY IN THE HEALTH AND RETIREMENT STUDY, (Nat’l Bureau of Econ. Research, Working Paper No. 6240, 1997).

33. VANGUARD, *supra* note 31, at 42. To put this in perspective, it must be noted that 60% of plans offer between eight and fifteen options, while about one in four (22%) offers more than fifteen investment choices to their participants. *Id.*

34. Todd Mason, *Fighting 401(k) Phobia: Workers Need Expert Advice, But Firms Fear Offering It*, PHILA. INQUIRER, Nov. 10, 2003, at C01.

35. Glass & Marshall, *supra* note 11, at 25.

36. Kim & Garman, *supra* note 10, at 10. This study attempted to assess workers’ demands for individual financial advice and to examine the impact of individual financial counseling advice sessions and financial education workshops. The approximately 500 plan participants who were engaged in the study received a ninety-minute financial education seminar and were asked to complete pre- and post-survey questionnaires on their investing self-confidence and desires in the area of investment advice and education. *Id.* at 9. See also CANSECO ET AL., *supra* note 10, at 3.

37. SDBAs are brokerage accounts within 401(k) plans that provide participants access to investments (stocks, mutual funds, and fixed income securities) outside of their plan’s core fund offerings.

between male and female investment patterns and results.<sup>38</sup> First, the average female's account balance was half that of her male counterpart (\$48,000 as compared with \$104,000).<sup>39</sup> Second, women tend to invest more conservatively.<sup>40</sup> On average, women held nearly 40% of their account assets in cash and cash equivalents, 17% in individual equities, and 38% in mutual funds.<sup>41</sup> Men, on the other hand, had 26% of their account assets in cash and cash equivalents, 22% in individual equities, and 44% in mutual funds.<sup>42</sup> Although the differences may be attributed in part to the fact that the accounts surveyed were SDBAs, the results are illuminating and probably reflective of male and female investment patterns in more traditional participant-directed individual account plans.<sup>43</sup>

To make a more realistic determination about the level of information participants need to make "informed decisions" within the context of the DOL 404(c) regulations, one must understand these shortfalls in investor knowledge and know-how. In addition, these shortfalls call into question the basis for ERISA section 404(c) relief—that most participants truly "exercise control" over the assets in their accounts.

Even if a person has little investment skill or understanding, that person is nonetheless technically deemed to exercise control with respect to asset allocation decisions. Practically speaking, however, this person is only arbitrarily designating the investment of his or her account balance. In a study entitled "Naive Diversification Strategies in Defined Contribution Plans," Professors Shlomo Benartzi and Richard H. Thaler examined how confused and ill-equipped participant-directed individual account plan participants devised their investment portfolio.<sup>44</sup> They discovered the following investment trends. First, when plan participants choose among the investment alternatives in their defined contribution plans, most adhere to the "1/n rule": they simply divide contributions evenly among the number ("n") of options offered by the plan, regardless of the particular mix of investment options. The result is that the quantity of funds offered by a

38. CHARLES SCHWAB & CO. INC., THE SCHWAB SELF-DIRECTED BROKERAGE ACCOUNT INDICATORS REPORT FOR THE FIRST QUARTER 2003, at 2, at <http://www.schwab.com/SchwabNOW/SNLibrary/SNLib090/SN090Q103.pdf> [hereinafter SCHWAB SDBA REPORT].

39. *Id.*

40. *Id.* The view that women invest more conservatively than men is also held by the General Accounting Office, which concluded that women not only invest their 401(k) account balances more conservatively but also that they are more likely to invest most of their 401(k) account balance in bonds. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-96-176, *supra* note 2, at 2, 24–25.

41. SCHWAB SDBA REPORT, *supra* note 38, at 2.

42. *Id.*

43. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-96-176, *supra* note 2, at 24–25.

44. Benartzi & Thaler, *supra* note 10, at 79–81. This study was sponsored by the DOL, TIAA-CREF, and the Center for International Business and Economic Research at UCLA.

plan has a strong influence on asset allocation—as the number of stock funds increases, the ratio of dollars to number of funds decreases.<sup>45</sup>

Second, the professors developed empirical support for the related theory of “context dependence”—the options people are presented with greatly affect the choices they make. For example, when participants are asked to choose one of many blends, (funds that combine stocks and bonds) “they make different choices than if they are allowed to compose their own blend (by allocating between a stock fund and a bond fund).”<sup>46</sup>

After evaluating the work of Professors Benartzi and Thaler, Professor Susan J. Stabile posited that participants never exercise independent control over their accounts.<sup>47</sup> In addition to citing the studies of Professors Benartzi and Thaler, she argued that even in the absence of affirmative attempts to manipulate participant choices, plan sponsors retain significant control over participant choices. They do so indirectly, by “controlling” the number and type of investment alternatives offered, how the options are presented, and the types of disclosures that are made about the investment alternatives.<sup>48</sup>

Further work by Professors Benartzi and Thaler has produced empirical support for several other hypotheses that cast doubt on the notion that plan participants ever truly exercise independent control over the investment of their accounts.<sup>49</sup> For example, they discovered evidence of “extremism aversion” in plan investor choices.<sup>50</sup> In other words, whether a particular portfolio option is framed as the middle choice or as an extreme choice affects the preference for that option.<sup>51</sup>

In addition, Professor Benartzi has observed that participants tend to direct a higher percentage of their self-directed funds into the investment option that the plan sponsor has designated for the employer’s matching contribution.<sup>52</sup> Benartzi has characterized this phenomenon as the “endorsement effect” because the participant interprets matches in “x fund,”

45. *Id.* at 81.

46. *Id.*

47. Stabile, *supra* note 9, at 378, 380–81.

48. *Id.* at 381.

49. SHLOMO BENARTZI & RICHARD H. THALER, HOW MUCH IS INVESTOR AUTONOMY WORTH?, 18–20 (Mar. 2001), at <http://gsbwww.uchicago.edu/fac/richard.thaler/research/Autonomy.pdf> (last visited May 16, 2005).

50. *Id.* at 20.

51. *Id.*

52. Shlomo Benartzi, *Excessive Extrapolation and the Allocation of 401(k) Accounts to Company Stock*, 56 J. FIN. 1747, 1752 (2001).

often employer stock,<sup>53</sup> as an endorsement or as implicit investment advice.<sup>54</sup>

Recognizing participants' confusion and reluctance in the areas of investing and retirement planning, plan sponsors have begun to offer investment "education." They thereby hope to provide information that would bring them closer to fulfilling the DOL 404(c) regulation's "sufficient information" requirement, but that will not rise to the level of investment advice and trigger fiduciary status.<sup>55</sup>

C. *But is investment education enough?—Investment Education v. Investment Advice*

Providing adequate information for investment decision-making purposes without offering investment advice has required walking a fine line. Alleviating matters somewhat, two years after the DOL had promulgated the DOL 404(c) regulations it issued Interpretive Bulletin 96-1 ("DOL Interpretive Bulletin 96-1").<sup>56</sup> In DOL Interpretive Bulletin 96-1, the DOL has delineated four categories of investment information that do not constitute investment advice under ERISA.<sup>57</sup> The demarcation between invest-

53. *Id.*; Participants are particularly in the dark as to the realities of investing in company or employer stock. According to a John Hancock Financial Services study released in May of 2002, many participants believe that investing in employer stock is actually safer than putting money in a well-diversified portfolio. CLIFTON LINTON, 401(K) TRENDS: EMPLOYERS RESPOND TO WORKERS' DESIRE FOR ADVICE, PERSONALIZED EDUCATION, IMPROVED PLANS (Oct. 17, 2002), at [http://www.mpowercafe.com/print-er.jsp?xml=retirement/features/features.1.3.1\\_10162002.xml](http://www.mpowercafe.com/print-er.jsp?xml=retirement/features/features.1.3.1_10162002.xml).

54. Benartzi, *supra* note 52, at 1752.

55. Interpretive Bulletin Relating to Participant Investment Education, 29 C.F.R. § 2509.96-1(b) (2003).

56. *Id.* at § 2509.96-1.

57. *Id.* at § 2509.96-1(d)(1)-(4). According to DOL Interpretive Bulletin 96-1, the following categories of investment information do not constitute investment advice under ERISA:

1. **Plan Information:** Information and materials about plan participation, operation, and investment alternatives, as allowed under the DOL 404(c) regulations (which also allow for descriptions of investment objectives, risk and return characteristics, historical return information, and related prospectuses).
2. **General Financial and Investment Information:** To fall within this category, the information must be general in nature and cannot directly reference any of the plan's investment options. Examples of this type of information include: general financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax-deferral; historic rates of return between different asset classes based on standard market indices; the effects of inflation; estimating future retirement income needs; determining investment time horizons; and assessing risk tolerance.
3. **Asset Allocation:** To help participants understand how to allocate their funds, plans may provide them with model portfolios showing different asset allocations for different time horizons and risk profiles. These model portfolios must be based on generally accepted principles of modern portfolio theory that take into account historic returns of different asset classes over defined periods. The models must be

ment education and investment advice has proven helpful to a certain extent, in that plan sponsors desiring ERISA section 404(c) relief have a clear pathway to compliance: simply adhere to the other DOL 404(c) regulations and provide only the materials and information listed in DOL Interpretive Bulletin 96–1, if anything at all. However, DOL Interpretive Bulletin 96–1 still left plan sponsors in the dark as to the kind of information or materials that would satisfy the DOL 404(c) regulation’s “sufficient information” requirement. The second footnote of DOL Interpretive Bulletin 96–1 provides, in pertinent part:

Issues relating to the circumstances under which information provided to participants and beneficiaries may affect a participant’s or beneficiary’s ability to exercise independent control over the assets in his or her account for purposes of relief from fiduciary liability under ERISA section 404(c) are beyond the scope of this interpretive bulletin. Accordingly, no inferences should be drawn regarding such issues.<sup>58</sup>

Since the promulgation of DOL Interpretive Bulletin 96–1, studies have been done to determine the efficacy of investment education with respect to participants’ perception of their investing acumen and participants’ account balances.<sup>59</sup> These surveys and participant questionnaires have revealed that, in providing DOL Interpretive Bulletin 96–1-type investment education, plan sponsors still fell far short of providing plan participants with “sufficient information to make informed decisions.”<sup>60</sup>

First, in the Wisconsin Study—which had been conducted to assess participants’ investment needs as well as the impact of advice and education on them—participants overwhelmingly responded that, despite sitting through several educational programs, they still did not know how to invest their account balances.<sup>61</sup> Second, despite plan sponsor excitement about online educational tools and advisory services, participants have been less than enthusiastic.<sup>62</sup> (Generally speaking, online tools generate suggested investment portfolios based on information a plan participant inputs—age, current account balance, current contribution level, etc.) One factor ex-

accompanied by all of the material facts and assumptions on which they are based and should not reference any specific investment options available under the plan.

4. **Interactive Investment Materials:** This category includes questionnaires, worksheets, software, and similar materials that provide participants with the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income.

*Id.*

58. *Id.* at § 2509.96–1(b) n.2.

59. See, e.g., CANSECO, ET AL., *supra* note 10, at 2–5; Kim & Garman, *supra* note 10.

60. 29 C.F.R. § 2550.404c–1(b)(2)(i)(B) (2003); CANSECO, ET AL., *supra* note 10, at 3; Kim & Garman, *supra* note 10, at 13.

61. CANSECO ET AL., *supra* note 10, at 3; Kim & Garman, *supra* note 10, at 10.

62. Glass & Marshall, *supra* note 11, at 30.

plaining the low utilization of Internet-based services is that the communication occurs via e-mail. Few participants are willing to take the time, let alone have the ability, to articulate their investment questions and concerns.<sup>63</sup> A second rationale for the low utilization of these Internet-based services may be that participants are hesitant to divulge personal financial information to strangers through a medium that they do not feel can guarantee privacy.

Ultimately, plan participants like Sally want personalized attention from someone who will meet with them and guide them through the investment decision-making process.<sup>64</sup> This translates into a desire for investment advice. The problem for plan sponsors, of course, is how to provide this advice without assuming additional fiduciary responsibilities.

## II. DOL MODELS FOR SIMULTANEOUSLY PROVIDING INVESTMENT ADVICE AND MAINTAINING ERISA SECTION 404(C) PROTECTION

Despite their fiduciary concerns, plan sponsors have begun to respond to plan participant requests for investment advice. The Profit Sharing/401(k) Council of America Inc. ("PSCA") has discovered that the number of plan sponsors providing investment advice has increased sharply within the last two years:<sup>65</sup>

Plan Year	Plans Surveyed	% of Plans Offering Investment Advice
2001	141	22%
2002	1,046*	51.9%

\*Of the 1,046 plans surveyed, 70 were profit sharing plans, 552 were 401(k) plans, and 424 were a combination of profit sharing and 401(k) plans.

The plan sponsors that have sought to provide investment advice to their plan participants have usually adopted a variant of the following investment advice scheme. The plan sponsor selects a financial-services firm, which we will call the "provider," to offer investment options for the plan's overall investment portfolio, as well as provide administrative services such as record keeping. Typical providers include Charles Schwab, Fidelity

63. *Id.*

64. CANSECO ET AL., *supra* note 10, at 4–5; Kim & Garman, *supra* note 10, at 12.

65. PROFIT SHARING/401(K) COUNCIL OF AMERICA INC., INVESTMENT ADVICE SURVEY 2001, available at <http://www.pzca.org/data/advice2001.html> (last visited May 16, 2005) (2001 results); PROFIT SHARING/401(K) COUNCIL OF AMERICA INC., *supra* note 3 (2002 results). Of the respondents to the PSCA's 2001 Investment Advice Survey who did not offer investment advice, 93.1% cited potential fiduciary liability for that advice, even if the advisor was competent and not subject to a conflict of interest, as the prime reason for not offering it.

Investments (“Fidelity”), Merrill Lynch & Co. Inc. and Wachovia Securities LLC.<sup>66</sup>

Then, the provider selects an independent investment management company, which we will call the “independent financial expert,” to provide investment advice to plan participants. Typical independent financial experts include Financial Engines Inc. (“Financial Engines”), GuidedChoice, Ibbotson Associates, and Morningstar Inc.<sup>67</sup>

The provider hires an independent financial expert, rather than offering investment advice itself, for two reasons. First, offering investment advice might constitute a prohibited transaction under ERISA section 406.<sup>68</sup> Second, the provider must avoid the conflict of interest that arises when it simultaneously performs the functions of offering investment options, advising plan participants on whether to invest in those options, and then collecting a transaction fee when the participant invests in one of those options.<sup>69</sup>

To advise participants, the independent financial expert collects individual investment information from participants, either by telephone, on the Internet, or in person. Then, the independent financial expert enters that information into its asset allocation formula, which usually relies on principles of generally accepted modern portfolio theory, to generate investment suggestions for the plan participant. To maintain its independence, the independent financial expert usually receives a fixed fee, not to exceed a fixed percentage of plan assets invested in the plan investment options.<sup>70</sup> Theoretically, this fixed fee prevents the independent financial expert from having a financial interest in particular recommendations.

66. John Hechinger, *Hiring a Pro to Pick Your Funds: Professional Management is Latest Option in Some 401(k) Plans, but Fees Can Be Steep*, WALL ST. J., Oct. 21, 2003, at D1.

67. *Id.* at D2.

68. Potentially, ERISA sections 406(a) and 406(b) are implicated. Under ERISA section 406(a), a plan fiduciary, i.e., the plan sponsor, cannot let the plan engage in certain transactions with a party in interest, like the provider. 29 U.S.C. § 1106 (2000). At issue here is the transaction restriction on sales or exchanges of property between a plan and a party in interest. *Id.* at § 1106(a)(1)(A). ERISA section 406(b) prohibits self-dealing between a fiduciary and the plan. *Id.* at § 1106(b). If the provider offers investment advice to plan participants, it becomes a plan fiduciary and cannot receive “consideration . . . from any party dealing with such plan in connection with a transaction involving the assets of the plan.” *Id.* at § 1106(b)(3).

69. The conflict of interest dilemma becomes particularly difficult when the provider offering the investment advice is just one of the financial-services firms offering investment funds to the plan. For example, let us say that the ABC Company 401(k) Plan offers participants the opportunity to invest in seven funds: three from Fidelity, two from Schwab, and two from Vanguard. If Fidelity provides investment advice to participants, with the knowledge that it will receive a transaction fee every time that a participant invests in a Fidelity fund, Fidelity will be hard-pressed to argue that it can provide participants with independent investment advice. Arthur M. Louis, *Getting 401(k) Investing Advice Online: A Couple of Privately Held Investment Consultants Offer the Service*, S.F. CHRON., Mar. 9, 1999, at E1.

70. DOL Advisory Opinion 2001-09A (Dec. 14, 2001).

Using this “provider” and “independent financial expert” framework, financial service providers have offered investment advice under the following schemes.

A. *No “Independent Financial Expert” Required*

Under Prohibited Transaction Class Exemption (“PTE”) 77–4,<sup>71</sup> a mutual fund’s investment advisor, who is also a plan investment manager, is allowed to make investment recommendations to plan participants.<sup>72</sup> The investment advisor can make recommendations about the fund he or she advises, under the following conditions: (1) the plan must not pay a commission in connection with its purchase of mutual funds; (2) the plan must not have to pay a redemption fee on the sale of mutual funds, unless the fee is paid to the fund only and the investment manager does not share in the fee; (3) the investment manager offsets the advisory fee it receives from the mutual fund against the fees it charges the plan participant for investment management services; and (4) an independent plan fiduciary (e.g., a plan committee) approves the selection of the investment manager as well as its compensation.<sup>73</sup>

Under the auspices of this protection, Fidelity Investments offers an investment advisory service, called the Fidelity Portfolio Advisory Services<sup>SM</sup>, to plan participants through its “Strategic Advisers Inc.” division.<sup>74</sup> An investment consultant assists plan participants in selecting from a plan’s investment alternatives, which usually include Fidelity funds, as participants construct their individual portfolios.<sup>75</sup> Interestingly, Fidelity is

71. Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans, PTE 77–4, 42 Fed. Reg. 18, 732, 18, 733 (Apr. 8, 1977). ERISA section 408 allows certain fiduciary-to-plan transactions, which would otherwise be prohibited under ERISA section 406, to take place. ERISA section 408 not only lists statutory exemptions to ERISA section 406, but also allows the DOL to grant individual or class exemptions under certain circumstances. Before the DOL will grant an exemption, the proponent must demonstrate that the exemption is in the interests of plan participants and that the exemption’s terms protect their interests. 29 U.S.C. § 1108 (2000); AM. BAR ASS’N SECTION OF LABOR & EMPLOYMENT LAW, EMPLOYEE BENEFITS LAW 752–53 (2d ed. 2000).

72. PTE 77–4, 42 Fed. Reg. at 18, 733. Although several individual prohibited transaction exemptions have been approved in this area, most notably PTE 97–60 (1997), I have focused on PTE 77–4 for two reasons. First, it is a class exemption and therefore provides relief to a greater number of plans and providers. Second, it provided much of the framework for the Pension Security Act of 2003, the Republican version of the investment advice bill, discussed in more depth in Part III.

73. *Id.*

74. Fidelity offers investment advice through two different models: (1) the Strategic Advisers service and (2) the provider-independent financial expert scenario. In the latter, it acts as the provider and uses Ibbotson Associates as its independent financial expert. For more information on the Fidelity Portfolio Advisory Services<sup>SM</sup>, visit the Fidelity website, [www.fidelity.com](http://www.fidelity.com), and type “Fidelity Portfolio Investment Advisors” into the search box. Hechinger, *supra* note 66, at D2.

75. *Id.*

the only financial-services firm to offer investment advice using the PTE 77–4 rubric.<sup>76</sup>

*B. When a provider hires an independent financial expert, it may collect investment advisory fees from a participant.*

SunAmerica Retirement Markets Inc. (“SunAmerica”), an indirectly wholly owned subsidiary of SunAmerica Inc., is a provider that hired an independent financial expert to provide advice to plan participants.<sup>77</sup> In DOL Advisory Opinion 2001–09A, the DOL concluded that providers like SunAmerica could collect investment advisory fees from participants who utilized the investment advice service without violating ERISA section 406(b), which prohibits self-dealing transactions between plans and fiduciaries.<sup>78</sup>

In its analysis, the DOL noted that SunAmerica was a plan fiduciary and was therefore responsible for the prudent selection and periodic monitoring of its investment advisory services. Nonetheless, in reaching its conclusion, which was predicated on SunAmerica fulfilling certain additional conditions,<sup>79</sup> the DOL placed great emphasis on the fact that SunAmerica did not exercise any control over either the independent financial expert’s investment recommendations or the participants’ responses to such advice.<sup>80</sup>

While DOL 2001–09A seems to have been a watershed for financial-service firms and investment management professionals, it is important to remember the limitations of a DOL advisory opinion. Unlike a PTE, which grants legal immunity to a particular transaction, an advisory opinion presents only the DOL’s opinion that the transaction is not prohibited.<sup>81</sup>

76. *Id.*

77. DOL Advisory Opinion 2001–09A (Dec. 14, 2001).

78. 29 U.S.C. § 1106(b) (2000).

79. SunAmerica may receive investment advisory fees from participants only if it fulfills the following conditions: (1) it must inform plan fiduciaries that choose the program of the relationship between the parties involved; (2) it must allow participants to disregard the advice they receive; (3) the asset allocation portfolios must be based on a methodology that is developed, maintained, and overseen by an independent financial advisor; (4) it must assure the plan fiduciaries that the independent financial expert’s compensation is not affected by the participants’ investment decisions; (5) the independent financial expert’s computer programs must be developed by programmers who are unaffiliated with the investment manager; (6) the investment manager who offers access to the advice product must have no discretion regarding the output of the program; and (7) the models must be developed in the best interests of participants. DOL Advisory Opinion 2001–09A.

80. *Id.*

81. Robert Stowe England, *Rules/Regulations: No Exemption Required?*, PLANSPONSOR, Mar. 2002, 74–76.

From the perspective of a plan sponsor interested in providing investment advice and considering the SunAmerica model, this is an important point to keep in mind. It is significant that although SunAmerica had originally applied for a PTE, the DOL opted instead to issue an advisory opinion. In a 2001 press release, Ann Combs, Assistant Secretary of Labor for the Employee Benefits Security Administration, explained that the opinion's classification as an advisory opinion and not a PTE was due to the fact that the proposed transaction was not illegal (it did not involve any self-dealing between a fiduciary and the plan) and therefore did not require a PTE.<sup>82</sup> The real reason, however, for the opinion's advisory status seems to be that a plan fiduciary cannot obtain a PTE for a transaction between itself and the plan that involves "services necessary for the establishment or operation of the plan."<sup>83</sup>

Thus, a plan sponsor should tread cautiously when opting to implement a version of the SunAmerica scheme. On the other hand, if Congress passes the Pension Security Act of 2003, discussed in Part III, plan sponsors will have the legal support they need to act on a SunAmerica-type arrangement.

*C. A provider may not be an investment advice fiduciary under ERISA if it: (1) hires an independent financial expert, and (2) provides the advice for free.*

Like SunAmerica, Schwab Retirement Plan Services ("Schwab") is a provider that has hired an independent financial expert, investment advisory firm, GuidedChoice, to provide plan participants with investment advice.<sup>84</sup> Unlike SunAmerica's arrangement, however, plan participants will have *free* access to investment advice. This is an important selling point given the high cost of such advice.<sup>85</sup>

Schwab is willing to provide free investment advice because a careful reading of ERISA,<sup>86</sup> coupled with DOL Advisory Opinion 2001-09A, would suggest that doing so may liberate Schwab from investment advice

82. *Id.*

83. 29 U.S.C. § 1108(b)(2). Stated more technically, PTEs cannot be issued under ERISA section 408(b)(2) for violations of section 406(b). AM. BAR ASS'N SECTION OF LABOR & EMPLOYMENT LAW, *supra* note 71, at 747.

84. *A Little Free Advice: It's Official—Here Comes Advice, and It's Free*, PLANSPONSOR, Sept. 2003, at 22.

85. While investment advisory fees run the gamut, most plans commonly levy an annual fee at 0.2% to 0.75% of assets—or between \$200 and \$750 on a \$100,000 account. Hechinger, *supra* note 66, at D2.

86. 29 U.S.C. § 1002(21)(A)(ii).

fiduciary status. First, as noted in Part I, a person or entity becomes an investment advice fiduciary under ERISA only when he or she provides such advice “for a fee or other compensation, direct or indirect, with respect to any moneys or property of such plan.”<sup>87</sup>

Second, DOL Advisory Opinion 2001–09A is grounded on the notion that providers such as SunAmerica and Schwab are not themselves providing investment advice, either directly or indirectly. Thus, Schwab seems to have concluded that where the provider neither assumes responsibility for the advice offered nor receives a fee in relation to it, the provider cannot be labeled an investment advice fiduciary. Whether the DOL will agree with Schwab’s interpretation remains to be seen. However, if DOL Advisory Opinion 2001–09A and the DOL’s support for the Pension Security Act of 2003, discussed below, are any indicators, Schwab’s solution may pass muster.

### III. CONGRESSIONAL EFFORTS TO AMEND ERISA AND EASE PLAN SPONSORS’ FIDUCIARY CONCERNS ABOUT INVESTMENT ADVICE

In Congress, two models have been proposed that would codify DOL PTE 77–4 and DOL Advisory Opinion 2001–09A. Most recently, Representative John Boehner (R-Ohio), chair of the House Education and Workforce Committee, has championed a bill entitled the Pension Security Act of 2003.<sup>88</sup> This bill would amend ERISA to include a statutory PTE (ERISA section 408(b)(14)) that combines aspects of PTE 77–4 and Advisory Opinion 2001–09A.<sup>89</sup>

In a nutshell, the bill allows a provider to offer investment advice to plan participants without the involvement of an independent financial expert, much like PTE 77–4. The catch is that the provider must accept fiduciary status with respect to the advice rendered<sup>90</sup> and make certain disclosures to plan participants.<sup>91</sup>

The bill follows DOL Advisory Opinion 2001–09A in two respects. First, the provider (termed a “fiduciary advisor” under the bill) is allowed

87. *Id.*

88. This bill, with slight variation, has been presented to Congress each year since 2001. Although it was passed by the House of Representatives each year, it was never passed by the Senate. In 2001, it was presented as “The Retirement Security Advice Act.” H.R. 2269, 107th Cong. (2001). In 2002 and 2003, it was presented as the “Pension Security Act.” H.R. 3762, 107th Cong. (2002); H.R. 1000, 108th Cong. (2003).

89. H.R. REP. NO. 108-43, pt. 1, at 12–13 (2003).

90. *Id.* at 11.

91. *Id.* at 10; SCARLETT UNGUREAN, MERCER INV. CONSULTING, 401(K) PLANS: ARE EMPLOYERS TAKING ON MORE RISK BY PROVIDING INVESTMENT ADVICE TO PARTICIPANTS? 6 (May 2004), at <http://www.mercerhr.com/attachment.dyn?idContent=1138620&idFile=131584&userId=1003871555>.

to collect fees for investment advisory services as well as for purchases and sales made by plan participants pursuant to the fiduciary advisor's advice.<sup>92</sup> Second, and taking a step beyond the requirements of DOL Advisory Opinion 2001-09A, the fiduciary advisor must disclose, in writing, certain facts to the plan participants including: (1) the fees or other compensation that it will receive in connection with the advisory services and participant investment transactions; (2) any material affiliation that it has in connection with a security or other property; (3) any limitations placed on the scope of its investment advice; (4) the types of services it provides in connection with the provision of investment advice; (5) that it is acting as a plan fiduciary in connection with the provision of investment advice; and (6) that a plan participant may arrange to receive investment advice from another, independent investment advisor.<sup>93</sup> This information must be disclosed when the fiduciary advisor first provides investment advice to the plan participant, on plan participant request, in the event of a material change, or at least once a year.<sup>94</sup>

If the fiduciary advisor fulfills all of its obligations and signs a written agreement acknowledging these responsibilities, the plan sponsor remains eligible for ERISA section 404(c) relief. More importantly, as long as the plan sponsor prudently selects the fiduciary adviser and periodically reviews the adviser's activity, it has no obligation to monitor the fiduciary advisor's investment advice to plan participants.<sup>95</sup>

The Democratic Party's version of the investment advice bill, entitled "Protecting America's Pensions Act," basically legislates DOL Advisory Opinion 2001-09A.<sup>96</sup> It differs from the Pension Security Act of 2003 in that it does not allow a provider to directly offer investment advice to plan participants. The bill, however, requires providers to hire *independent* financial experts to provide investment advice to plan participants, in order to avoid the inherent conflict of interest that arises when a provider offers investment options and then attempts to advise participants on their selections.<sup>97</sup>

92. H.R. REP. NO. 108-43, pt. 1, at 11-12.

93. *Id.* at 10.

94. *Id.* at 11.

95. *Id.*

96. S. 1992, 107th Cong. (2002); S. REP. NO. 107-226, at 20 (2002). This bill, sponsored by Edward Kennedy (D-MA), incorporates aspects of the "Independent Investment Advice Act of 2001." S. 1677, 107th Cong. (2001).

97. S. 1992; S. REP. NO. 107-226, at 20.

## CONCLUSION

Ultimately, any solution that attempts to provide plan participants with “sufficient information to make an informed decision” should attempt to achieve two goals: (1) provide plan participants with an adequate retirement income; and (2) clearly delineate the scope of plan sponsors’ fiduciary responsibilities so that they can act to minimize their exposure. Setting aside the providers’ potential conflicts of interest, neither the DOL’s current investment advice models nor the Congressional proposals (which are merely attempts to give greater legal credence to the DOL schemes) achieve the above goals of adequate retirement funds or circumscribed fiduciary liability. Instead, the DOL investment advice models and Congressional proposals create the possibility of greater losses for plan participants potentially at plan sponsors’ expense.

I agree with most commentators’ assessments that maintenance of the status quo will leave most plan participants with inadequate retirement income.<sup>98</sup> However, if ERISA itself has taught us anything, it is that closing—not widening—the gap on fiduciary conflicts of interest will help plan participants achieve an adequate retirement income. As noted in Part I, ERISA was originally enacted to protect plan participants’ retirement income from the corrupt and negligent practices of those who were in a position to access and manipulate retirement funds for their own purposes.<sup>99</sup> Particularly in light of the Enron collapse and the recent mutual fund scandals, we cannot ensure a sufficient retirement income to participants by ignoring plan fiduciaries’ conflicts of interest.<sup>100</sup>

As noted in Part I(B), most plan participants are unsophisticated investors. Accordingly, the best way for participants to achieve their retirement income goals is not, then, to require them to take on an even more sophisticated investment role—that of policing their investment advisors. The DOL schemes and Congressional proposals, however, would require this because they do not impose fiduciary liability on plan sponsors for the investment advice that plan participants receive.

From my perspective, there are only three ways to help plan participants retire with a realistic retirement income and simultaneously provide

98. See generally WILLIAM WOLMAN & ANNE COLAMOSCA, *THE GREAT 401(K) HOAX* 12 (2002).

99. S. REP. NO. 93-383 (1973), *reprinted in* 1974 U.S.C.A.N. 4890, 4892.

100. Vineeta Anand, *Fidelity Yanks Support for Boehner’s Advice Bill*, PENSIONS & INVESTMENTS, Mar. 4, 2002, at 1, 30; Press Release, Senator Ted Kennedy, Statement of Senator Edward M. Kennedy, Press Conference Announcing the Protecting America’s Pensions Act (Mar. 6, 2002), at <http://kennedy.senate.gov/~kennedy/statements/02/03/2002306751.html>.

plan sponsors with a better assessment of their fiduciary responsibilities and liabilities.

**Suggestion 1:** Maintain the status quo but require plan sponsors to take two additional steps: (1) provide plan participants with more realistic investment education that is tailored to participants' individual "money attitudes";<sup>101</sup> and (2) measure the results of plan sponsors' educational efforts.<sup>102</sup>

With regard to providing more realistic and tailored investment education, some have suggested that present plan sponsor investment communications focus on presenting participant-directed individual account plans favorably instead of realistically.<sup>103</sup> For example, during most investment education presentations, plan participants are told that the plan is a wonderful benefit, to invest as much as they can, and that stocks are a wonderful long-term investment.<sup>104</sup> These points are valid and were certainly reinforced by the bull market of the 1990s. And the effect of such presentations should not be discounted—simply making education available in the workplace has been shown to raise participation rates by 11.8%.<sup>105</sup> Moreover, when participants actively engage in workplace education programs, participation rates increase by 19.5%.<sup>106</sup>

However, where present plan sponsor investment education practices fall short is their failure to take into account the individual nature of the goal and the decision-making process involved. A more realistic and tailored approach to investment education would incorporate the following. First, participants would be made aware of any actual (not just theoretical) gaps between their projected retirement income needs and current holdings. Second, investment instruction would be approached more strategically. This would require tailoring investment informational sessions to the different attitudinal or psychological perspectives of the participants with respect to money and financial management. The Vanguard Group Inc. ("Vanguard"), for example, has categorized retirement plan participants into five "money attitudes": (1) "successful planners"; (2) "up and coming planners"; (3) "secure doers"; (4) "stressed avoiders"; and (5) "live-for-

101. VANGUARD, *supra* note 31, at 68, 85.

102. See Dennis Ackley, *Without Employee Knowledge, 401(k) Retirement Plans Don't Work*, EMPLOYEE BENEFIT NEWS, Dec. 1, 2002, at 42; Jill Elswick, *Retirement Education Pays Off for Participants*, EMPLOYEE BENEFIT NEWS, Apr. 15, 2004, at 48–49, 55.

103. Glass & Marshall, *supra* note 11, at 26, 30.

104. *Id.*

105. VANGUARD, *supra* note 31, at 49.

106. *Id.*; B. DOUGLAS BERNHEIM & DANIEL M. GARRETT, THE DETERMINANTS AND CONSEQUENCES OF FINANCIAL EDUCATION IN THE WORKPLACE: EVIDENCE FROM A SURVEY OF HOUSEHOLDS 31 (Nat'l Bureau of Econ. Research, Working Paper No. 5667, 1996).

today avoiders.”<sup>107</sup> According to Vanguard’s research, plan sponsor investment communications should be structured around the needs of avoiders (categories (4) and (5)), not planners or doers, because planners and doers usually seek out the information they need or are interested in learning. Among other things, structuring investment communications around the needs of avoiders requires narrowing and simplifying the topics of workplace investment educational programs.<sup>108</sup>

Few plan sponsors bother to measure the results of their investment educational efforts.<sup>109</sup> When plan sponsors do measure these results, they do not focus on the quality of the training or its efficacy. Instead, they usually make a superficial inquiry into whether the participants liked the instructor or the informational materials that were distributed.<sup>110</sup>

However, disseminating materials or hosting training sessions may not satisfy the DOL 404(c) regulation’s “sufficient information” requirement.<sup>111</sup> Arguably, a second step, beyond distributing the information, is contemplated within the language of those regulations. This second step requires the plan sponsor to ascertain whether the information relayed actually enables participants to make informed decisions. By not fulfilling this additional requirement, plan sponsors fall that much further short of satisfying the DOL 404(c) regulations.

Support for maintenance of the status quo can be found in the “random walk theory,” a stock market investment theory developed by Burton Malkiel, a Princeton University economics professor, in his investment classic, *A Random Walk Down Wall Street*.<sup>112</sup> In this tome, Malkiel concluded that random events, an intricate part of life and the business world, make it nearly impossible to predict short-term changes in stocks or the market in general. As a result, it is very difficult for investors, even professional investors, to predict earnings and find “winning” investments.<sup>113</sup> In

107. VANGUARD, *supra* note 31, at 68, 85.

108. *Id.* at 88.

109. Ackley, *supra* note 102, at 42; Elswick, *supra* note 102, at 48–49, 55. As Ackley noted in his article, many plan sponsors do not measure the results of their training efforts because once they know a problem exists, they cannot ignore it. Ackley, *supra* note 102, at 42. However, no responsible plan sponsor can argue ignorance, with regard to participants’ lack of investment acumen, given the breadth of coverage this topic has received, particularly in the last few years. *Id.*

110. *Id.*

111. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B) (2003).

112. BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET: INCLUDING A LIFE-CYCLE GUIDE TO PERSONAL INVESTING* 24, 170 (6th ed. 1996).

113. Malkiel noted that several academics have argued that taken to its logical extreme, the random walk theory would suggest that a blindfolded monkey throwing darts at a newspaper’s financial pages could select a portfolio that would do just as well as one carefully selected by experts. *Id.* at 24.

fact, Malkiel found that professionally managed portfolios as a group did not necessarily outperform randomly selected portfolios.<sup>114</sup>

Thus, the random walk theory suggests that plan participants will not necessarily come closer to achieving their retirement income goal with the assistance of a professional investment advisor. This greatly supports maintenance of the status quo—allowing plan sponsors to achieve ERISA section 404(c) relief and putting aside any notions that plan participants need investment advice. However, it is hard to adopt this philosophy because it requires one to be a little nonchalant with respect to the returns garnered by participant-directed individual account plans. It is one thing to hope for investment luck when dealing with money that a person has set aside for speculation. It is quite another when one gambles with money that is essential to plan participants' retirement years.

**Suggestion 2:** A second possible solution to the investment advice dilemma under ERISA section 404(c) is to utilize the framework of DOL 2001–09A but not allow the provider to hire the independent financial expert. This would require the plan sponsor to hire separate entities for each role. Under the current model, as laid out in DOL 2001–09A, the provider selects and hires the independent financial expert. The independent financial expert is then supposed to provide unbiased investment advice to plan participants. The theory is that the independent financial expert can do this, free of conflicts, because it is receiving a flat fee from the provider. (In the SunAmerica arrangement, the independent financial expert's fees were not to exceed 5% of its gross income.)<sup>115</sup> Thus, the independent financial ex-

114. In particular, one study revealed that security analysts came up with poorer one-year and five-year projections for certain securities than did several of what Malkiel called "naïve forecasting models." *Id.* at 167–71. In explaining security analysts' difficulties in making predictions, Malkiel noted the following factors, among others, that could and often did trigger unforeseeable consequences: the government's budgetary, contract, and regulatory decisions; the incapacitation of key members of an organization's management; the discovery of a major new product; the discovery of defects in a current product; industrial accidents; or natural disasters. *Id.*

Interestingly, in a study conducted over the last ten years, Watson Wyatt, a global human resources and consulting firm, found that professionally managed defined benefit plans tended to yield greater returns than participant-controlled individual account assets. WATSON WYATT WORLDWIDE, DEFINED BENEFIT V. 401(K) RETURNS: THE SURPRISING RESULTS (2002), at <http://www.watsonwyatt.com/us/pubs/insider/showarticle/asp?ArticleID=9378#top>. This study analyzed the Form 5500 filings, published by the DOL, of various sized firms for the years 1990 through 1998. *Id.* From 1990 through 1996, professionally managed defined benefit plans achieved higher returns, by approximately 1% per year, as compared with participant-directed plans. In 1997 and 1998, however, participant-directed plans yielded better returns, by 1% and 2%, respectively. *Id.* The study attributed the higher returns for participant-directed plans in 1997 and 1998 to several possible factors. *Id.* First, that plan sponsors' investment educational efforts with participants were beginning to have an effect. Second, while participants were "riding the wave" of the stock market boom in those years, defined benefit plans, pursuant to the advice of their professional advisors, had rebalanced their portfolios. *Id.*

115. DOL Advisory Opinion 2001–09A (Dec. 14, 2001).

pert has no incentive to steer plan participants' investment selections toward those investment options offered by the provider.

The problem with this, of course, is that the provider, which hires the independent financial expert, can always terminate its relationship with the independent financial expert. At first, this may not seem daunting because the provider only pays the independent financial expert a flat rate. Thus, at first glance, the threat of termination seemingly carries little influence on the independent financial expert's decisions. However, these fees can be quite substantial.<sup>116</sup> Furthermore, as more plan participants request advice, the provider will be paying the independent financial expert more in fees and requiring more of the independent financial expert's services. Depending on the independent financial expert's size or capacity, the provider may become its most important client or business relationship. Thus, it is possible that the independent financial expert may not feel or act so "independently" when rendering investment advice—particularly where the provider's investment funds are part of the plan's overall portfolio of investment selections.<sup>117</sup>

To avoid any such captive scenarios and to ensure the independence of the investment advice offered, the best variation on the DOL's current investment advice schemes would be one in which the independent financial expert was truly independent of the provider. However, given DOL 2001–09A's popularity, it is not surprising that this theory has received little attention.

**Suggestion 3:** The third and, arguably, best way to achieve the dual goal of adequate retirement incomes and clearly defined fiduciary responsibility is for plan sponsors to hire investment professionals to invest participants' accounts for them. This is called a "managed account" service. Basically, plan sponsors would present participants with a choice: (1) the participants can continue to direct the investment of the funds in their accounts, in which case ERISA section 404(c) and its regulations would govern; or (2) at their election, and for a fee, the plan sponsor's investment professional will assume the responsibility of investing and managing the

116. Interestingly, Schwab, a provider operating under a DOL 2001–09A type arrangement as discussed in Part III, will not disclose the fee it has paid to GuidedChoice, its independent financial expert. *A Little Free Advice*, *supra* note 84, at 22.

117. Although the Schwab-GuidedChoice arrangement does not fall necessarily into such a captive scenario, its elements suggest that it could: first, Schwab will not disclose GuidedChoice's fee; and second, GuidedChoice is the only independent financial expert Schwab is currently using. *Id.* As Schwab's book of investment advice clients grows, it will be interesting to see what sort of dynamics and negotiations occur between this provider and independent financial expert.

participant's account.<sup>118</sup> (The default option would be participant-direction.)

ProManage Inc.<sup>®</sup> is a Chicago-based company that offers this type of professional investment management service to participant-directed individual account plans.<sup>119</sup> Available since 1999, ProManage's Program<sup>™</sup> ("Program") makes all of the investment allocation decisions for what it terms "reluctant investors"—plan participants who prefer that a professional handle the investment allocation in their accounts.<sup>120</sup> Plan sponsors interested in implementing the Program can either automatically enroll plan participants or require plan participants to elect this feature.<sup>121</sup>

Unlike many of the investment advice schemes currently offered, ProManage does not interact with plan participants to discuss retirement goals or engage in psychological risk tolerance studies. Because it views the plan participants utilizing their service as "reluctant investors," ProManage relies instead on information it obtains from plan sponsors—such as: age, wages, account balance, present value of the accrued benefit, projected retirement date, and other employer-sponsored retirement benefits.<sup>122</sup>

Like other managed account services, ProManage invests participants' accounts among investment options that exist in the sponsored plan. But unlike other services, ProManage varies the asset allocation depending on each participant's "financial risk demographic." When ProManage assesses a participant's financial risk demographic, it takes account of the participant's other sources of retirement income, current and projected levels, and the gap between those sources and retirement needs. It attempts, via the

118. Currently, it is unclear whether managed account services qualify for ERISA section 404(c) protection. In a January 2002 Pensions & Investments article, Louis Campagna, Jr., chief of the division of fiduciary interpretations in the DOL's Employee Benefits Security Administration, was quoted as saying, "it would be difficult to imagine [that participants could exercise independent control over their accounts as required by ERISA section 404(c)] in a managed account situation." Arleen Jacobius, *404(c) Safeguards Imperiled*, PENSIONS & INVESTMENTS, Jan. 21, 2002, at 3. In response, several ERISA attorneys have espoused their belief that, despite Campagna's comments, a participant-directed individual account plan that offers managed account services may still qualify for ERISA section 404(c) protection. One theory is that a managed account service is just one of the plan's investment options. As long as the participant voluntarily elects the managed account service, the plan should retain its ERISA 404(c) protection. If, however, the plan automatically enrolls participants in the managed account feature, then the plan will not have ERISA 404(c) protection. UNGUREAN, *supra* note 91, at 6; Arleen Jacobius, *Official's Comments Spur 404(c) Uproar*, PENSIONS & INVESTMENTS, Feb. 4, 2002, at 6.

119. Carl Londe, Chairman & CEO of ProManage Inc., Optional Professional Management in Defined Contribution Plans, Address Before the ERISA Advisory Council (June 27, 2003), at <http://promanageplan.com/promanage/news/erisa.html>; Telephone Interview with Michael Falk, Vice President & CIO, ProManage Inc. (Apr. 13, 2004).

120. *Id.*

121. *Id.*

122. *Id.*

asset allocation it chooses for the participant's individual account, to fill the gap in financial retirement needs. For example, if ProManage is working with a participant who is age fifty and has an accrued benefit under a defined benefit plan, ProManage would first assess the amount of the participant's projected benefits under Social Security and the defined benefit plan. It would compare those numbers to what the participant needs to retire with an adequate income. If the plan participant had small projected benefits from Social Security and the defined benefit plan, ProManage would select a more aggressive asset allocation for the participant's individual account, in an attempt to fill the gap in his retirement income needs. ProManage will continue to reassess the other legs of the participant's retirement puzzle and adjust the asset allocation of the individual account plan accordingly.<sup>123</sup>

Although ProManage does not promise any type of return, its service is considered advantageous to plan sponsors from a fiduciary perspective. ProManage serves as a named cofiduciary, with the plan sponsor, for the plan participants' investment allocation.<sup>124</sup>

More plan sponsors are likely to offer a managed account service based on the positive results of the managed account pilot programs conducted at Motorola Inc. ("Motorola"), the communications and electronics company, and J.C. Penney Company Inc. ("J.C. Penney"), the retailer.<sup>125</sup> In 2003, Motorola and J.C. Penney each offered Financial Engines' <sup>126</sup> managed account service, "Personal Asset Manager," to approximately 1,000 of their 401(k) participants.<sup>127</sup>

Financial Engines has since documented the following pilot results: (1) within the first three months of the enrollment period, 10 to 15% of Motorola's test group enrolled in the Personal Asset Manager; and (2) within the first month of the launch, 15 to 25% of J.C. Penney's pilot participants made the same election.<sup>128</sup> In addition to these statistics, Financial Engines' pilot data also revealed some interesting insights into pilot participants' election behavior. First, pilot participants were willing to pay

123. *Id.*

124. *Id.*

125. Financial Engines, *Financial Engines Pilot Results Presentation*, May 2004 (on file with the Chicago-Kent Law Review); Jill Elswick, *Different Strokes: Online Advice Providers Try Harder to Engage 401(k) Investors*, EMPLOYEE BENEFIT NEWS, Dec. 1, 2003, at 28.

126. Financial Engines specializes in the provision of personalized investment advice, particularly within the defined contribution plan community.

127. In choosing participants for the pilots, both Motorola and J.C. Penney attempted to engage a representative microcosm of their respective companies. Their selection criteria included individual account balances, income, job function, gender, geography, and savings rates. Telephone Interview with Ken Fine, Financial Engines Vice President of Marketing, and Asma Emneina, Financial Engines Senior Public Relations Manager (May 25, 2004).

128. Financial Engines, *supra* note 125, at 19–20.

(fifty basis points annually)<sup>129</sup> for the use of the Personal Asset Manager. Second, Financial Engines found that 95% of the pilot participants who enrolled in the Personal Asset Manager were “reluctant investors.”<sup>130</sup>

Although some might argue that plan sponsors would never introduce a managed account option into their investment option mix, especially given the potential for greater fiduciary liability, I believe they have no choice for the following reasons.

First, many commentators have suggested that the majority of participant-directed individual account plans will not provide plan participants with an adequate retirement income.<sup>131</sup> When they retire, plan participants are likely to blame their plan sponsors. Plaintiffs’ attorneys are currently investigating plan participant remedies in this area.<sup>132</sup> One theory of plan sponsor liability is based on the premise that plan sponsors knew the current system was not going to meet participants’ retirement needs. They therefore had a fiduciary responsibility to take other, additional steps to help plan participants achieve a more adequate retirement benefit.<sup>133</sup>

This theory will probably not amount to much if plan sponsors fulfill the requirements of the DOL 404(c) regulations. This is because ERISA guarantees to participants of participant-directed individual account plans the retirement income they have earned—not an adequate retirement benefit.<sup>134</sup> Nevertheless, given that courts seem poised to impose greater fiduciary responsibility on employers and corporate officers, as evidenced by *Tittle v. Enron*,<sup>135</sup> it might behoove plan sponsors to act proactively to

129. Paying fifty basis points annually translates into a cost of one-half of 1% of the participants’ assets under management. If a person has \$10,000 in her account, she will have to pay \$4 per month to have her account managed by Financial Engines.

130. *Id.* at 15. Financial Engines defines “reluctant investors” as those who not only would prefer that a professional investment advisor direct the investment of their defined contribution plan account balance but who tend to have lower account balances, contribute less to the plan, and have not taken advantage of (if offered) their plan’s online advice offerings. *Id.* at 21. Of critical importance, Financial Engines found that 95% of the reluctant investors who opted to enroll in the Personal Asset Manager previously had carried “inappropriate risk” in their account portfolios prior to enrollment. *Id.* at 15. Financial Engines defines inappropriate risk as poor investment selection, diversification, or both, based on a participant’s age and income. *Id.* at 23–24. A typical participant carrying “inappropriate risk” in his or her account portfolio would be one of the following: (1) a participant, age sixty-one, with 100% of her portfolio invested in company stock; or (2) a twenty-six-year old participant with 51% of his account balance invested in short-term bonds, 49% in long-term bonds. *Id.*

131. WOLMAN & COLAMOSCA, *supra* note 98, at 12.

132. Glass & Marshall, *supra* note 11, at 25.

133. Elswick, *supra* note 102, at 48–49, 55; Glass & Marshall, *supra* note 11, at 26, 30.

134. S. REP. NO. 93-383, (1973), reprinted in 1974 U.S.C.C.A.N. 4890, 4892.

135. No. H-01-3624, 2003 U.S. Dist. LEXIS 7632 (S.D. Tex. Apr. 24, 2003). See generally Amended Brief of the Secretary of Labor as Amicus Curiae Opposing the Motion to Dismiss, *Tittle v. Enron*, 2003 U.S. Dist. LEXIS 7632 (2002) (No. H-01-3913), available at <http://www.dol.gov/sol/media/briefs/enronbrief-8-30-02.html>. In August 2002, the DOL filed an amicus brief in *Tittle v. Enron*. *Id.* The DOL supported the plaintiffs’ contention that Ken Lay, Enron, and the

minimize their own exposure and provide plan participants with a more adequate retirement income at the same time.

Second, the plan sponsor can limit its liability for investment oversight by promising a limited, but guaranteed, return on investments. (If there are shortfalls, the plan sponsor will cover them. If the plan sponsors' investments do better than projected, the surplus will be added to participants' accounts.) To compensate for this fiduciary liability, the plan sponsor would be able to deduct the associated expenses—for example, the cost of hiring an investment advisor or management team.

Third, as noted in Part II, and despite DOL Advisory Opinion 2001–09A, the DOL's current investment advice schemes not only violate ERISA section 406 but are also riddled with conflicts of interest. Because the DOL's investment advice schemes are plagued with these problems, a plan sponsor facing ERISA's unyielding fiduciary obligations<sup>136</sup> should steer a participant-directed individual account plan away from them.

If, despite the potential conflicts of interest, the plan sponsor does allow its plan to involve one of these DOL investment advice schemes, it is only a matter of time before conflicted providers act to the detriment of the plan participants. For example, it is not difficult to imagine a scenario in which a provider, who receives a fee every time a participant invests in one of its fund offerings, offers investment advice that is more advantageous to the provider than to the participant. Although the DOL schemes and the current Congressional proposals provide that plan sponsors do not have cofiduciary liability for the investment advice that plan participants receive,<sup>137</sup> plan sponsors' fiduciary duties to act in participants' best interests,<sup>138</sup> as well as to prudently select and monitor the providers,<sup>139</sup> should provide the gateway to additional exposure.

Enron Compensation Committee were fiduciaries of the Enron Corp. Savings Plan, Enron Corp. Employee Stock Ownership Plan, and Enron Cash Balance Plan. *Id.* at 3. It based this conclusion on, among other items, the fact that these people and entities, whether individually or in a smaller committee group, had the discretionary authority to appoint, retain, and remove plan fiduciaries. *Id.* at 8. Moreover, the DOL determined that these people had breached their fiduciary obligations by failing to adequately monitor the Administrative Committee, which had overall responsibility for managing the above plans. *Id.* In addition, they withheld critical information about Enron's financial condition from the Administrative Committee and failed to take appropriate action once they knew that the Administrative Committee was not adequately protecting the interests of the plans' participants. *Id.*

136. ERISA section 404(a) requires a fiduciary to:

Discharge his or her duties with respect to the plan, solely in the interest of the participants and beneficiaries and: (A) for the exclusive purpose of providing benefits to participants and their beneficiaries . . . and (B) 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.

29 U.S.C. § 1104(a) (2000).

137. DOL Advisory Opinion 2001–09A (Dec. 14, 2001).

138. 29 U.S.C. § 1104(a) (2000).

Ultimately, given the fact that plan participants are ill-equipped to tackle the investment of their own retirement savings, it is foolish for plan sponsors to believe that they can continue to hide behind ERISA section 404(c) relief or even the DOL or Congressionally proposed investment advice schemes. I recognize that my proposed suggestions—(1) having plan sponsors, as opposed to providers, hire independent financial experts; and (2) managed account services—are not ideal. Plan sponsors would prefer vehicles that would guarantee the avoidance of fiduciary investment liability via ERISA section 404(c).

However, the fiduciary obligations of plan sponsors do not allow them to ignore the needs of participants like Sally and her colleagues or the problems plaguing the DOL's current investment advice schemes. Since the DOL's investment advice schemes are problems in and of themselves, these schemes cannot resolve the investment education/advice dilemma. Instead, plan sponsors would be wise to explore investment advice from experts hired by the plan sponsor and not the provider, or managed account arrangements.