ARTICLES

The Dichotomy Between Investment Advice and Investment Education: Is No Advice Really the Best Advice?

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I.
INTRODUCTION

Imagine a nation where the structure of securities law discourages individuals who are responsible for investing more than $1 trillion from obtaining necessary investment advice. That legal regime would cause investors to earn lower investment returns than they could if they had access to needed investment advice. The systemic ramifications, however, would be even more troubling. Economists would abhor the implications for the efficient allocation of capital. Market experts would be concerned about the long-term stability of markets where investors engage in irrational decision making.

As incredible as it may seem, that is exactly the nature of the legal regime that governs the investment of more than $1 trillion of retirement plan assets in the United States.\(^1\) One reason often proffered to explain why

\[^{1}\] Approximately $1.7 trillion in assets are held in 401(k) plans. Sarah Holden & Jack
the domestic system of retirement support relies so heavily on employersponsored plans is that specialization enhances investment returns. As repeat and sophisticated players, employers have the ability and the economies of scale to obtain appropriate investment expertise. However, for most people now, this old model of investing retirement assets is no longer reality. Over the past twenty-five years, employers have increasingly transferred the responsibility for investment decision making to employees. This change has been praised for giving employees flexibility and control over the ways in which their retirement assets are invested. With flexibility and control, though, comes individualized risk.

As a matter of positive law, in this Article I show that federal law operates to discourage employers from providing individual employees who make investment decisions for their retirement accounts with investment advice. Most narrowly, this is the result of an affirmative decision by the Department of Labor ("DOL") to differentiate investment education from investment advice. More broadly, it is a reflection of inconsistent positions within various layers of DOL regulation on the extent to which individuals can be expected to make reasonable investment decisions on their own behalf. Moreover, because of the division of regulatory authority between the DOL and the Securities and Exchange Commission ("SEC"), the specific legal standards evidence very different views of the appropriate provision of investment advice depending on whether the very same individual investor is investing assets held in a pension plan or in a non-pension investment account. Counterintuitively, the legal regime imposes stronger disincentives for the provision of advice regarding the investment of the pension plan assets, which typically should be invested for the long-term, than it does for the investment of non-pension assets.

Part I provides some explanatory background on trends in benefit plan

2. Regina T. Jefferson, Rethinking the Risk of Defined Contribution Plans, 4 FLA. TAX REV. 607, 636 (2000). In order to simplify the terminology, this article uses the word "employer" in place of "plan sponsor."
3. Id.
5. Jefferson, supra note 2, at 627.
6. See infra Part II.
sponsorship in general, and 401(k) plans specifically. It also discusses the reasons underlying the increasing popularity of 401(k) plans and the delegation of plan investment choices to individual participants. Part II considers research by behavioral economists, which indicates that participants' actual investment decision making departs from theoretical economic models of efficient utility-maximizing behavior. It then evaluates empirical data on the ways in which participants currently invest their plan assets. Part III analyzes the ways in which the current regulatory regime discourages the provision of investment advice to plan participants. It shows that the negative incentives affect all three classes of parties involved in the provision of investment advice: the employers who sponsor the plans, the advisers who provide the advice, and the participants who need the advice. In order to focus the discussion and emphasize the investment responsibilities borne by plan participants, I refer to them in this Article as "plan investors" when discussing them in that role.

Having established the background and the nature of the problem, I then discuss resolution of the problem. Part IV evaluates a variety of proposals that have been offered to address the need for investment advice, including one current legislative initiative, and concludes that none of the proposals offers an optimal solution for the provision of investment advice. Part V provides a proposal for the regulation of investment advice that would appropriately balance the competing interests of employers, investment advisers, and plan investors.

II. THE SHIFT OF RESPONSIBILITY TO EMPLOYEES

A. Retirement Plan Typology

In many discussions of employer-sponsored retirement plans, the most basic distinction is between a defined benefit and a defined contribution plan. One primary difference between defined benefit and defined contribution plans is who bears the investment risk. The traditional employer-sponsored retirement plan in the United States is known as a defined benefit (DB) plan. DB plans promise benefits based upon a
formula, components of which often are years of service and employee salary.\textsuperscript{11} For example, a DB plan might provide for benefits of 1.5\% per year of service multiplied by the employee's salary averaged over the final five years of employment, payable beginning at age 65. At retirement, an employee with thirty years of service and a final average salary of $50,000 per year would be entitled to an age sixty-five pension benefit of $22,500 per year.\textsuperscript{12} Most DB plans pay benefits in the form of an annuity; thus, the retiree receives monthly benefits for her lifetime.\textsuperscript{13} Many DB plans also provide early retirement incentives once employees reach an age and service threshold, such as age fifty-five and thirty years of service.\textsuperscript{14} The employer bears the first tier of risk in a DB plan because, regardless of the performance of the plan's investments, the employer must sufficiently fund the plan to provide the promised benefits.\textsuperscript{15} The Pension Benefit Guarantee Corporation (PBGC), which is funded with premiums paid by DB plan sponsors, bears the second tier of risk because it guarantees payment of certain plan benefits in case the employer defaults.

A second type of plan is known as a defined contribution (DC) plan. A DC plan is made up of individualized plan accounts established on behalf of each participating employee, who is also the plan investor.\textsuperscript{16} Employers can avoid liability for investment decisions by delegating investment choices to the individual account holders.\textsuperscript{17} The plan investor's ultimate benefit is the value of that plan investor's account—the sum of all contributions and investment gains and losses.\textsuperscript{18} Thus, the plan investor bears the investment risk. Because of the way benefits are calculated, the plan's assets always equal the plan's liabilities. Therefore, DC plans are not insured by the PBGC.\textsuperscript{19} DC plans typically provide for payment of benefits in the form of a lump sum.\textsuperscript{20} In DB plans, the sponsoring employer must contribute to the plan whatever funds are necessary to pay a promised benefit to the employee.\textsuperscript{21} In DC plans, the sponsoring employer contributes a fixed

\begin{itemize}
\item \textsuperscript{11} MICHAEL J. CANAN, QUALIFIED RETIREMENT PLANS § 3.51 (1998).
\item \textsuperscript{12} (1.5\% x thirty years of service) x $50,000 final average salary = $22,500.
\item \textsuperscript{13} CANAN, supra note 11, at § 3.52. Spouses also have rights in determining the form of payment of DB plan benefits. \textit{Id.} at § 7.16.
\item \textsuperscript{14} DAN M. MCGILL & DONALD S. GRUBBS, JR., FUNDAMENTALS OF PRIVATE PENSIONS 131 (1989).
\item \textsuperscript{15} IRC § 412 (1994). For a thorough review of minimum funding standards, see CANAN, supra note 11, at §§ 12.1 - 12.9.
\item \textsuperscript{16} CANAN, supra note 11, at § 3.11.
\item \textsuperscript{17} KPMG, RETIREMENT BENEFITS IN THE 1990S: 1997 SURVEY DATA 35-36 (1997).
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} But see generally Jefferson, \textit{supra} note 2, at 617 (advocating protection of a minimum investment return in DC plan accounts).
\item \textsuperscript{20} AMERICAN ACADEMY OF ACTUARIES, FINANCING THE RETIREMENT OF FUTURE GENERATIONS 14 (1998).
\item \textsuperscript{21} VanDerhei & Copeland, \textit{supra} note 4, at 3-4.
\end{itemize}
amount to plan investor accounts.\textsuperscript{22}

Since the early 1980s, the number of DC plans has exploded.\textsuperscript{23} According to DOL estimates, more than four-fifths of all workers covered by employer-sponsored pension plans are participants in DC plans.\textsuperscript{24} Perhaps the most significant event contributing to the popularity of DC plans came in late 1981 when the Treasury Department issued regulations establishing the boundaries of what have come to be known as “401(k) plans.”\textsuperscript{25} The defining quality of a 401(k) plan is that the plan investor has the right to choose to contribute, or not to contribute, pre-tax earnings to the plan investor’s own plan account.\textsuperscript{26} In most other types of DC plans, the employer determines the rate of contribution.\textsuperscript{27} Typically, the plan investor’s contribution election in a 401(k) plan is an affirmative one.\textsuperscript{28} However, in 1998 the Internal Revenue Service (IRS) determined that 401(k) plans may automatically enroll plan investors for an assumed election so long as the plan investor has the right to revoke the deemed election at any time.\textsuperscript{29}

\textbf{B. The Increasing Popularity of 401(k) Plans}

While provisions permitting 401(k) plans were added to the Employee Retirement Income Security Act of 1974 (ERISA)\textsuperscript{30} and the Internal Revenue Code (IRC) in 1978, the IRS did not issue regulations on the plans until November 1981.\textsuperscript{31} Once employers had relatively clear guidance though, the new plan format proved to be extremely popular. Between 1984 and 1993 employer sponsorship of 401(k) plans grew by almost 900%.\textsuperscript{32} Of course, starting from a base of essentially no plans, some might argue that expressing the early rates of growth in percentages is misleading.

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} at 3-4.
\item \textsuperscript{24} Retirement Security Advice: Hearings Before the Employer-Employee Relations Subcommittee of the House Education and the Workforce Committee, 107th Cong. 2 (2001) [hereinafter Combs Testimony] (statement of Ann L. Combs, Assistant Secretary Pension and Welfare Benefits United States Department of Labor).
\item \textsuperscript{25} Langbein & Wolk, supra note 9, at 50.
\item \textsuperscript{26} Id.; Colleen Medill, The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality, 49 Emory L.J. 1, 86 n.23 (2000).
\item \textsuperscript{27} Langbein & Wolk, supra note 9, at 47-50.
\item \textsuperscript{28} Canan, supra note 11, at § 3.91.
\item \textsuperscript{31} Langbein & Wolk, supra note 9, at 51.
\item \textsuperscript{32} Id.
Yet, sponsorship, asset growth, and participation in 401(k) plans all continue to expand at a rapid pace. According to the DOL’s most recent statistics, the assets held in 401(k) plans grew at an annual rate of 23%, more quickly than any other type of pension plan. In fact, 401(k) plans now hold approximately 34% of all assets held by qualified pension plans. Approximately one-third of the existing employer-sponsored pension plans are 401(k) plans, and 45% of the active participants in pension plans are members of 401(k) plans.

Several reasons have been offered to explain the shift from DB to DC plans, and, in particular, the popularity of 401(k) plans. As a general matter, many commentators believe that younger and more mobile workers prefer DC plans. Another factor affecting plan sponsorship decisions is a business environment that requires employers to compete on an international basis. Because costs of DC plans are more predictable for employers, such increased competitive pressures militate for DC plans. Similarly, DC plans that are structured as profit sharing plans permit employers to align employee and shareholder interests. Another factor is a shift in employment from the manufacturing sector, where DB plans traditionally have been offered, to the service sector, where DC plans are more common.

A recent survey, summarized in Table 1, inquired into the primary motivations reported by employers who switched from a traditional DB plan to a type of DB plan that, in many ways, mirrors a DC plan. The three top factors all reflect employer frustration based upon the long-held belief that employees tend not to understand and properly value their employee benefit plans, particularly pension plans. According to the survey, employers believe that: (a) lump sum values, which are the typical

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34. Id.
35. Id.
36. See VanDerhei & Copeland, supra note 4, at 5-6.
37. Id. at 6.
38. Id.
39. ADVISORY COUNSEL STUDY, supra note 23.
40. The survey related to cash balance plans. Those plans have engendered substantial controversy because of the negative effect some of the plans have on older workers. For an explanation of cash balance plans and one debate on their legality, see Edward A. Zelinsky, The Cash Balance Controversy Revisited: Age Discrimination and Fidelity to Statutory Text, 20 VA. TAX REV. 557 (2001); Richard C. Shea et al., Age Discrimination in Cash Balance Plans, 19 VA. TAX REV. 763 (2000); Edward A. Zelinsky, The Cash Balance Controversy, 19 VA. TAX REV. 683 (2000).
way of reporting DC assets, but not DB assets, are easier to communicate to employees than annuity values; (b) employees understand large lump sum balances better than they understand the value of a future annuity stream; and (c) employees place a higher value on lump sum balances than on annuity streams.42

Table 1: Top Four Factors Identified as Important by Employers Who Have Undertaken Plan Conversions

<table>
<thead>
<tr>
<th>Factors</th>
<th>Percentage of</th>
</tr>
</thead>
<tbody>
<tr>
<td>Improves employees' appreciation of plan</td>
<td>96.0</td>
</tr>
<tr>
<td>Facilitates communications</td>
<td>93.0</td>
</tr>
<tr>
<td>Ability to show lump sum values</td>
<td>93.0</td>
</tr>
<tr>
<td>Aids in recruitment</td>
<td>80.8</td>
</tr>
</tbody>
</table>

Finally, the regulation of DB and DC plans varies tremendously. Commentators have criticized the requirements imposed upon 401(k) plans as overly complex and burdensome.44 DB plans, however, face much more extensive governmental reporting, insurance, and funding requirements than do 401(k) plans.45 One economist estimated that in 1981 a DB plan cost approximately 140% more than a 401(k) plan to administer.46 By 1996, the differential in administrative costs grew to approximately 210%.47

C. Delegation of Investment Selection

Typically, 401(k) plans delegate to participants the choice of investments in those plans.48 One reason for this delegation may be to provide individual plan investors with flexibility and respect their different tolerances for investment risk.49 However, another reason is that

42. Id.
43. Id.
45. *See Advisory Counsel Study, supra* note 23.
47. *Id.*
48. *See Medill, supra* note 26, at 11.
49. *See Jefferson, supra* note 2, at 627.
regulations, issued in 1992, permit an employer to avoid liability for poor investment choices if the employer meets specified criteria in delegating decision making to plan investors. The regulations were issued under ERISA section 404(c), and, hence, are known as the 404(c) regulations. Plans that delegate investment choices in compliance with the regulations are known as 404(c) plans.

In the absence of section 404(c) compliance, an employer or investment adviser bears the risk of fiduciary liability for inappropriate investment decisions. Under ERISA, a fiduciary includes any person or entity who has control over asset management, as well as anyone who "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . ." Under the first prong of that definition, any employer who makes decisions about the investment of plan assets is an ERISA fiduciary. Because of the perceived importance of professional investment advice, however, the statute permits an employer who engages a professional investment manager to delegate investment decisions, and the corresponding fiduciary liability, to the investment manager. In such a case, the employer retains fiduciary liability for the selection and monitoring of the investment manager. This is typically how investment decisions are made in DB plans.

Whether the person or entity with control over plan assets is the employer that sponsors a benefit plan or an appointed investment manager, ERISA imposes a number of specific fiduciary obligations on that person or entity. First, under what has come to be known as ERISA's exclusive benefit rule, investment decisions must be made in the best interest of participants and beneficiaries. One court, in a case where the employer was found to have violated its fiduciary obligation by using employee benefit plan assets to fend off a hostile tender offer, explained this duty by

50. Perun & Steuerle, supra note 4, at 13.
52. See Perun & Steuerle, supra note 4, at 13-14.
58. Daniel Fischel & John H. Langbein, ERISA's Fundamental Contradiction: The Exclusive Benefit Rule, 55 U. CHI. L. REV. 1105, 1108 (1988) ("ERISA's exclusive benefit rule, . . . imports into pension fiduciary law one of the most fundamental and distinctive principles of trust law, the duty of loyalty.").
stating that "decisions must be made with an eye single to the interests of the participants and beneficiaries." 60 Second, ERISA requires fiduciaries to 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 . . . ." 61 This language has been construed to set a high standard of prudence—one that looks to the practices of investment professionals. 62 Third, ERISA fiduciaries must diversify plan investments. 63 Exceptions, meant to accommodate workplace incentives, permit plans to hold large percentages of assets in some employer securities. 64

An employer may avoid the fiduciary obligations associated with plan investments and the selection of an investment manager by delegating investment decision making to participants in compliance with the 404(c) regulations. 65 While the details of these regulations are complex and beyond the scope of this Article, the three basic requirements are worthy of note. First, the plan must provide plan investors with at least three investment alternatives. 66 Those alternatives must encompass a variety of risk and return characteristics so that each plan investor can select a portfolio with risk and return characteristics appropriate for that investor. 67 Second, the plan must provide plan investors with enough information about the alternatives to ensure that they are able to make informed investment choices. 68 Third, plan investors must have the right to change investments with reasonable frequency. 69 While compliance with 404(c) is not required by ERISA, plans that delegate investment decision making to plan investors in compliance with the 404(c) requirements protect the sponsoring employer from fiduciary liability associated with poor investment choices. 70

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60. Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982). When LTV Corporation offered a significant per share premium in a hostile tender offer for Grumman Corporation stock, the Grumman pension plan fiduciaries rejected the offer without engaging in any significant analysis of the potential benefit to the plan. In addition, in an attempt to defeat the hostile tender offer, the fiduciaries arranged for the plan to purchase more than one million additional shares of Grumman stock. Id. at 264.
64. Robinson, supra note 57, at 133.
67. Id.
68. 29 C.F.R. § 2550.404(c)-1(b) (1992).
70. Hennessy & Daniele, supra note 65, at 176.
III.
ACTUAL INVESTMENT BEHAVIOR

The increasing delegation of responsibility for investment allocations raises the question of whether plan investors make appropriate investment choices. The question is a difficult one to answer because, in one sense, "appropriateness" of individual investment choices must be viewed from the perspective of the individual making those investment decisions. As such, it would be reasonable to assume that the plan investor viewed the choice as appropriate at the point she made the choice. However, this section will utilize two other ways of evaluating plan investor asset allocation decisions. The first approach is that of the behavioral economists, and the second considers studies using empirical data on 401(k) plan investment choices.

A. Insights from Behavioral Economics Research

Behavioral economics has generated academic controversy for a number of years. More recently, the popular press, and self-help investment books have brought behavioral economics into the mainstream. Simply stated, behavioral economists look to psychology to explain anomalies that are inconsistent with established theories of neoclassical economics. For example, traditional economic modeling assumes that economic actors are unboundedly rational. In contrast, behavioral economists recognize that humans have limited cognitive abilities, and as a result, adopt heuristics to solve problems.

Given the challenges it poses to long-standing economic theory, behavioral economics has its detractors. There are signals, though, that the field is making inroads. Law and economics scholars have begun to examine its import. Professor Cass Sunstein has said, "If Thaler [a

73. GARY BELSKY & THOMAS GILOVICH, WHY SMART PEOPLE MAKE BIG MONEY MISTAKES AND HOW TO CORRECT THEM (1999).
74. See Sendhil Mullainathan & Richard H. Thaler, Behavioral Economics, 1 NAT’L BUREAU OF ECON. RESEARCH, WORKING PAPER NO. 7948 (2000); Uchitelle, supra note 72, at 1C; Whalen, supra note 72, at 76.
75. Mullainathan & Thaler, supra note 74, at 5.
76. Id.
77. Lowenstein, supra note 72; Mullainathan & Thaler, supra note 74, at 1.
78. Samuel Issacharoff, Can There Be a Behavioral Law and Economics?, 51 VAND. L. REV.
prominent behavioral economist] is right, it makes the current dogmatic antipaternalism really doubtful." And, in 2001, the American Economics Association awarded the prestigious John Bates Clark Award to Matthew Rabin, a behavioral economist at the University of California, Berkeley. Behavioral economists believe that their discipline has implications for a broad array of fields. The decision-making process of benefit plan investors is no exception.

In a famous economics paper, Professor Paul Samuelson described a troubling fallacy associated with repetitive gambles. As the story goes, Professor Samuelson asked a colleague whether he would accept the following offer: "flip a coin, heads you win $200, tails you lose $100." The colleague refused to accept the offer, but said he would accept a series of 100 such bets. Scholarly economists have spent forests of trees and years of research arguing whether Professor Samuelson's colleague acted inconsistently. The latest spin on the arguments has been undertaken by Professors Shlomo Benartzi of the Anderson School at the University of California, Los Angeles and Richard Thaler of the University of Chicago Business School. They use the fundamental concepts of behavioral economics to analyze benefit plan asset allocation choices.

Professors Thaler and Benartzi conducted a series of experiments with two groups of university employees enrolling in benefit plans. In one instance, their study group consisted of staff employees. In the other, the group consisted of faculty. Members of the study were asked to allocate their retirement contributions between stocks and bonds. All employees were presented with equivalent information on historic equity premiums, but the way in which the information was presented differed. Two groups received charts showing the distribution of annual rates of return on a thirty-year investment. Another group received charts showing actual

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79. Lowenstein, supra note 72.
82. Id.
83. See id. at 367.
84. Id.
85. Id. at 374, 377.
86. Id.
87. Id. at 375.
distributions of historic returns in one-year increments. The subjects who received the charts with the distribution of one-year incremental rates invested less in equity securities than did the subjects who viewed the charts showing the distribution of annual returns on a thirty-year investment. While the difference was less in the faculty group than in the staff group, the results were statistically significant in both groups.

As a result of the study, Professors Thaler and Benartzi argue that the way in which information is provided to benefit plan investors will influence their selection of investment vehicles. This is true even if the different presentations of information reflect equivalent rates of return over time. They theorize that, consistent with Professor Samuelson’s challenge to his colleague, individuals suffer from what is known as “myopic loss aversion.” More specifically, plan investors have an aversion to short-term losses and limited “gambles.”

In a more recent study, Professors Benartzi and Thaler studied the effect of the $1/n$ heuristic on plan investor decisions. The $1/n$ heuristic is a decision-making shortcut in which an investor divides her assets evenly among the available investment choices. As an example, Benartzi & Thaler cite the Fourth Century advice given in the Talmud to divide one’s money “a third into land, a third into merchandise, and ... a third at hand.”

In a series of three experiments using questionnaires designed to elicit hypothetical retirement plan investment decisions, the authors found that as the number of equity funds offered increased, so did the percentage of assets the study participants chose to invest in equity funds. The simplest experiment is the easiest to explain briefly. One group of employees had the option of allocating hypothetical pension plan investments between a stock fund and a bond fund. A second group’s options were a stock fund and a balanced fund, which invested half in stock and half in bonds. A third group’s choices were a bond fund and a balanced fund. The authors
found that the employees’ allocation decisions were heavily dependent upon the available fund alternatives. The group whose choices were the stock and the balanced fund allocated the largest percentage of assets to stock, followed by the group with the stock and bond fund. The group offered the bond and balanced fund allocated the lowest percentage of assets to stock. In this and in its other reported experiments, the study supports the hypothesis that investors loosely follow a 1/n heuristic and, thus, tend to vary asset allocations depending upon the available investment alternatives.

The findings in both of these studies raise serious questions about the actual decision making of benefit plan investors. If investment selection is affected by the way in which investment returns are presented or the number of equity funds offered, are investors truly making informed choices? What is it that is informing those choices? Participants in one of the Benartzi and Thaler studies spent on average less than an hour making asset allocation decisions and few of those participants reviewed any material other than that supplied by the investment providers. This alone calls into question the nature of plan investor decision making. And, if, as the difference in results between faculty and staff may indicate, the decision making of more sophisticated investors is less likely to be affected by the format of information than is the decision making of less sophisticated investors, does that militate in favor of increasing the amount of investment advice available to plan investors?

In a very different vein from Professors Bernatzi and Thaler’s academic work, the authors of a recent financial decision making self-help book have mined the broader field of behavioral economics. Drawing on an array of research, Gary Belsky and Thomas Gilovich discuss numerous ways in which flawed decision making negatively affects investment behavior. For example, they utilize the behavioral economics theory of mental accounting to explain why, in contrast with the assumptions of traditional economics, people do not view all dollars as being equal. The authors point to the tendency people have of being much more willing to spend “found money,” such as a gift or a surprise federal tax rebate, than money they are paid in salary. Similarly, people may be more willing to

101. Id.
102. Id.
103. Id.
104. Id. at 92.
105. Benartzi & Thaler, supra note 94, at 375.
106. Id.
107. BELSKY & GILOVICH, supra note 73.
108. Id.
109. Id. at 31-49.
110. See id. at 36.
buy a fancy car stereo system at the point in time they purchase a car (after all, the stereo is such a small percentage of the expenditure), than they would be to buy even a less expensive system at another point in time.\textsuperscript{111}

Whether presented as academic research or a self-help financial technique, behavioral economics does not offer a foolproof method of choosing the ideal investment portfolio. Nor does it even purport to find that all or most investors are making poor decisions. However, the research does indicate that investors are making incoherent decisions based upon heuristics that may be inconsistent with the actual risk tolerances and retirement strategies of those investors.

\textbf{B. General Empirical Data on Plan Investment Choices}

Empirical data from a large sample of participant-directed 401(k) plans also indicate that the availability of specific investment choices affects the percentage of plan assets held in various categories of investments.\textsuperscript{112} For example, plans that offer guaranteed investment contracts (GICs) tend to have lower rates of equity investments than plans that do not offer GICs.\textsuperscript{113} In an apparent anomaly, plan investors direct more of their elective contributions to employer stock in plans where the employer mandates that its matching contributions be held in employer stock than in plans where matching contributions are held in other investment vehicles.\textsuperscript{114} Traditional economic principles predict that a rational investor will determine how best to allocate investments based upon risk and return. Once investor X evaluates employer stock as an investment, she should not vary the total amount of her portfolio invested in employer stock on the basis of whether an employer match is made in employer stock or not. Instead, if the employer match is in employer stock, then a rational investor would decrease the amount of her discretionary investment in employer stock. Similarly, when a plan offers its investors the option of investing in company stock, it is anomalous that investors actually make substantially lower allocations to all other investment choices, particularly to mutual funds that hold equities.\textsuperscript{115} This tendency may reflect confirmation bias, as investors convince themselves that the employer stock their employer

\begin{itemize}
  \item \textsuperscript{111} \textit{Id.} at 38.
  \item \textsuperscript{112} Holden & VanDerhei, \textit{supra} note 1, at 4.
  \item \textsuperscript{113} \textit{Id.} Insurance companies developed and offer GICs as investment vehicles that purport to offer a guaranteed rate of return. Roberta Romano, \textit{Public Pension Fund Activism in Corporate Governance Reconsidered}, 93 COLUM. L. REV. 795, 844 (1993). A spate of lawsuits followed the demise of Executive Life Insurance Company, which had sold GICs to numerous pension plans. See, \textit{e.g.}, In re Unisys Sav. Plan Litig., 173 F.3d 145, 160 (1999) (ruling that the decision to purchase GICs from Executive Life Insurance Company did not violate ERISA’s fiduciary standards).
  \item \textsuperscript{114} \textit{Id.} at 13.
  \item \textsuperscript{115} \textit{Id.} at 11.
\end{itemize}
requires them to hold is a good investment.\textsuperscript{116} Traditional financial theory, however, discourages overinvestment in employer stock;\textsuperscript{117} asset diversification helps offset the diversification lost through job dependence.\textsuperscript{118}

A variety of plan investor demographic factors are correlated with the extent to which an investor will invest plan assets in equity securities. For example, the higher the family income, the more likely that both 401(k) and IRA assets will be allocated to equities.\textsuperscript{119} Similarly, more net worth and greater education both are predictors that a plan investor will allocate more assets to equity securities.\textsuperscript{120} Not surprisingly, empirical studies on the investment patterns of 401(k) holders are not conclusive. One of the particularly interesting open questions is the extent to which asset allocations in 401(k) plans are dependent upon the age of the plan investor.\textsuperscript{121}

Women face unique challenges in pension asset accumulation. Historically women have accumulated far less pension wealth than men.\textsuperscript{122} The same factors of lower compensation, more part-time work, and more breaks in work history that contribute to gendered disparities in private pension plans also cause women, on average, to accumulate fewer personal assets\textsuperscript{123} and to have lower Social Security entitlements than do men.\textsuperscript{124} But, because women have significantly longer life expectancies than do

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\item \textsuperscript{116} Belsky \& Gilovich, supra note 73, at 129-35 (discussing confirmation bias). Confirmation bias theory predicts that once people develop a belief or opinion, they will interpret new data to best support the prior belief or opinion. Richard A. Posner, An Economic Approach to the Law of Evidence, 51 Stan. L. Rev. 1477, 1495 (1999).
\item \textsuperscript{117} Jeffrey N. Gordon, Employees, Pensions, and the New Economic Order, 97 Colum. L. Rev. 1519, 1552 (1997); Medill, supra note 26, at 16; Deborah M. Weiss \& Marc A. Sgaraglino, Prudent Risks for Anxious Workers, 1996 Wis. L. Rev. 1175, 1178 (1996).
\item \textsuperscript{118} Gordon, supra note 117, at 1552; Medill, supra note 26, at 16; Weiss \& Sgaraglino, supra note 117, at 1178.
\item \textsuperscript{120} Copeland, supra note 119.
\item \textsuperscript{121} Compare Copeland, supra note 119, at 7 (finding allocations to be relatively consistent across age groups), with Lori Lucas, Under the Microscope: A Closer Look at the Diversification and Risk Taking Behavior of 401(k) Participants and How Plan Sponsors Can Address Key Investing Issues, BENEFITS Q., Fourth Qtr. 2000, at 29 (finding that, if company stock holdings are excluded, younger plan investors appear to choose riskier portfolios than do older plan investors); Mitchell \& Moore, supra note 119, at 387 (discussing a survey showing older plan investors to invest in equities at lower rates than younger investors).
\item \textsuperscript{124} Karen C. Burke \& Grayson M.P. McCouch, Women, Fairness, and Social Security, 82 Iowa L. Rev. 1209, 1217-18 (1997).
\end{enumerate}
men, women actually have greater needs for longer streams of retirement income. Their longevity past normal retirement age also results in greater inflationary pressures on them. As a result of all of these factors, women aged sixty-five and over are more than twice as likely as men in that age group to subsist below the poverty level. In fact, the United States allegedly has the greatest percentage of elderly women in poverty of all the major industrialized nations.

But, even if everything else were equal across genders, investment choices risk furthering the problem of low asset accumulation for women. Studies of plan investor behavior uniformly find that women have a lower tolerance for risk than do male investors. Although there are some indications that women's progress in the workforce is narrowing the differential in retirement assets, women put this progress at risk to the extent that they choose overly conservative benefit plan investment strategies.

Not all commentators believe that the empirical data indicate problems with plan investor allocation decisions. Evidence shows that plan investors have been increasing the percentage of their account balances invested, directly or indirectly, in equity securities. One large data study showed that in 1999, just over three-quarters of plan assets were invested in equity securities. The president of the Investment Company Institute stated that "in general 401(k) plan participants are making informed and reasonable investment decisions regarding asset allocation as they approach retirement age." Professors Benartzi and Thaler argue, however, that the increase in the proportion of plan accounts held in equity investments is more likely due to the increased numbers of equity investment alternatives offered by plans than to more sophisticated allocation decisions by plan investors.

128. Lucas, supra note 121, at 27; Mitchell & Moore, supra note 119, at 387.
129. Johnson, supra note 122, at 5-6.
130. Mitchell & Moore, supra note 119, at 386-87.
131. Holden & VanDerhei, supra note 1, at 10.
133. Benartzi & Thaler, supra note 94, at 97. Research indicates that the average number of investment vehicles offered by 401(k) plans increased from eight in 1997 to eleven in 2000. Lucas, supra note 121, at 24.
In sum, both behavioral economics theory and plan investment data indicate that individual employees face numerous challenges in making investment allocation decisions. As discussed further below, the current regulatory scheme discourages employers and plans from providing employees with investment advice. Instead, the current system relies on the belief that investment education will enable employees to maximize their retirement savings. But, the existing plan data raise serious questions about the efficacy of that approach, particularly for groups such as women who may face special challenges. The behavioral economics literature also calls into doubt the traditional approach. The literature shows that a variety of subtle factors impede the ability of individuals to pursue a cohesive investment strategy to maximize retirement assets.

IV. CURRENT STATUS OF INVESTMENT ADVICE UNDER ERISA

This part begins by examining the difference between investment advice and investment education, and why that distinction is a critical one for liability purposes. It then turns to a specific examination of the potential liability for the primary parties involved in the provision of investment advice: employers, investment advisers, and plan investors. The broad sweep of possible liability for investment advice acts as a deterrent to the provision of that advice through the medium of employee benefit plans.

A. The Tension Between Investment Advice and Investment Education

Although the relevant data and theoretical research indicate that plan investors often do not invest their retirement plan assets in ways that are consistent with current financial investment theory, few benefit plans offer investment advice to plan investors. However, all 404(c) plans offer some level of investment education, at least in the sense of providing information about investment options. The reason for the all-or-nothing dichotomy is attributable to the relevant DOL regulations and a 1996 DOL interpretative bulletin. As explained above, one of the basic requirements under 404(c) is that the plan must provide plan investors with enough information about the plan's investment options that the investors are able to make informed investment choices. However, ERISA also provides that anyone who, for a fee, provides investment advice regarding plan assets becomes an ERISA fiduciary with respect to that advice. After the 404(c)

134. Actual numbers of plans offering investment advice are impossible to obtain. The proposed legislation and other commentary on this problem indicate that the availability of investment advice remains a problem. See infra text accompanying Part IV; Medill, supra note 26, at 4.
135. See supra text accompanying note 68.
136. See supra text accompanying note 54.
regulations were first issued in 1992, employers were stuck between the proverbial Scylla and Charybdis.

According to Greek mythology, Scylla and Charybdis were both sea monsters that forced sailors into the no-win situation of risking a disastrous encounter with one of the monsters. Between Scylla and Charbydis was a narrow strait. According to one source:

Scylla was a horrible creature with 12 feet and 6 long necks, each bearing a head with 3 rows of teeth, with which she devoured any prey that came within reach; she lived in a cave on a cliff. Across the strait, opposite her, was a large fig tree under which Charybdis, the whirlpool, dwelt, sucking in and belching forth the waters of the sea three times daily, engulfing anything that came near.¹³⁷

On the one hand, in order to avoid the Scylla, an employee benefit plan must provide a reasonable amount of investment information to plan investors. This will qualify the plan as a 404(c) plan and protect the employer from fiduciary liability. On the other hand, steering far enough away safely to avoid the Scylla risks a disastrous encounter with the Charybdis. If the plan provides too much information on investments, the sponsoring employee will be deemed an investment adviser and will have fiduciary liability for the investment advice.

In response to employers who were seeking more certainty in this area, the DOL issued an interpretative bulletin in 1996 that attempted to distinguish between investment advice and investment education.¹³⁸ The guidance established four safe harbors for plan investor education and indicated that other activities also might fall within the parameters of education as opposed to advice, but that such other activities would not receive safe harbor protection.¹³⁹ Activities defined as education range from providing basic informational materials about the plan, at one end of the spectrum, to interactive materials that permit plan investors to estimate retirement income needs and alternative investment routes to meeting those needs, at the other end of the spectrum.¹⁴⁰ If an employer chooses to hire an outside service provider to provide the investment education, then the employer retains liability for the appropriate selection and monitoring of the service provider.¹⁴¹

¹³⁹. Id. at § 2509.96-1(d).
¹⁴⁰. Id. The details of the safe harbors are reasonably complex, but can be summarized briefly. Communications constitute investment education if they (1) provide information about the plan or its investment alternatives, (2) explain general information about financial and investment decision making, (3) make available a variety of potential asset allocation models, or (4) supply plan investors with interactive investment materials that meet the limitations specified in I.B. 96-1. Id.
¹⁴¹. Id. at § 2509.96-1(d).
The DOL's guidance on the difference between investment education and investment advice has raised at least as many questions as it answered. One commentator argues that the burden imposed upon employers by the interpretive bulletin is so heavy that "participants are likely to receive less assistance in making investment decisions."\textsuperscript{142} Even a member of the investment industry recently admitted that the guidance has left employers "wary" of liability associated with investment communications to plan investors.\textsuperscript{143} Professor John Langbein's view is that "ERISA is terrifying employers from taking part in assisting their workers in getting the most out of their investments."\textsuperscript{144}

**B. Employers—Risks and Issues**

Of the three relevant categories of actors with an interest in investment advice, employers, investment advisers, and plan investors, perhaps the most important category is employers. It typically is the sponsoring employer that establishes the terms of an employee benefit plan.\textsuperscript{145} In a trilogy of recent cases, the Supreme Court has made it clear that employers have no fiduciary liability for the choices they make in constituting plans.\textsuperscript{146} Rather than being fiduciary decisions, such decisions are the equivalent of those made by trust settlors and are beyond the scope of ERISA regulation.\textsuperscript{147} Thus, employers have no fiduciary obligation to provide plan investors with investment advice. Concomitantly, there are a number of ways in which an employer faces potential liability for offering investment advice through an employee benefits plan. Thus, under the current legal regime, rarely will an employer intentionally offer investment advice to plan investors. The barriers to investment advice are unfortunate because there are a number of reasons why employers might wish to provide advice under the benefit plans they sponsor. First, and most importantly, employers configure benefit plans to respond to the desires and needs of their workforces. Significant data indicate that employees want increased access to investment advice.\textsuperscript{148} In the absence of the hurdles posed by current regulation, employers could react to that employee sentiment and

\textsuperscript{142} Medill, \textit{supra} note 26, at 66.


\textsuperscript{145} In theory, an employer's choice of a benefit plan and its terms will be affected by the value employees place upon the offered benefits. But, in the end, for single employer plans, the choice is the employer's to make.


\textsuperscript{147} \textit{Id.} at 210-11.

\textsuperscript{148} See \textit{infra} note 257.
provide investment advice within their benefit plans on a tax-favored basis. Second, it is in the interest of employers to ensure that employees have the tools to maximize their earnings in 401(k) plans. To the extent that employees enjoy high investment returns, that may decrease the pressure on employers to provide a company match or to provide other types of pension plans.

1. Affirmative Decision to Offer Advice or Limit the Plan to Education

As discussed above, if an employer directly provides investment advice through a plan that it sponsors, the employer will become a fiduciary as to the giving of that advice. Fiduciary status means that the employer is subject to ERISA’s fiduciary obligations. The possible violations of those obligations are almost endless. For example, imprudent advice would violate ERISA’s prudence requirement. Investment advice that convinced plan investors not to tender shares to a hostile tender offeror would violate the exclusive benefit rule if the advice was given for the purpose of entrenching management. Management typically has many reasons, ranging from personal stock options to shareholder oversight, to support the price of the company’s securities. One strategy to maximize share price would be for management to convince plan investors to purchase and hold large quantities of company securities. Such a strategy, though, risks violating both the exclusive purpose rule and the diversification requirement.

An employer that opts to provide only education still may not be entirely safe from the dangers of Scylla and Charybdis. Even after the DOL’s 1996 guidance, in order to enjoy the protective benefits of section 404(c), plans still must provide plan investors with information about their investment options. If the plan provides too little information for the plan investors to make informed choices, then the sponsoring employer will lose the section 404(c) protections and will be liable for the plan investors’ investment selections. If an employer provides too much information to plan investors on how to select investments, the employer will cross the line from providing education to giving advice. Again, the sponsoring employer will have fiduciary responsibility for the investment advice. Thus, it is more than a myth that the employer must steer a perilous and narrow course through this area. The DOL’s advice has provided a map for that course,

149. See supra text accompanying notes 53-57.
150. See supra text accompanying notes 58-63.
but the shoals are not well-marked. And, it is up to the employer to keep
the ship on course through storms that might send the ship crashing into one
monster or the other. In this context, the storms that might drive the
employer’s ship off its intended course include plan investor questions,
well-meaning employee benefit counselors, and an increasingly
sophisticated set of investment choices. Imagine the employee benefit
counselor who is meeting with a new employee. As the employee asks
increasingly detailed and sophisticated questions about the plan’s
investment alternatives, the counselor may stray across the line into giving
investment advice. Or, consider the situation of a financially naïve
employee who asks his manager for investment advice and she gives it. Or,
put yourself in the position of the employer that has just added a number of
investment options to the plans. Should that employer actively encourage
employees to consider the new investment vehicles?

2. Investment Advice Through an Outside Service Provider

One reasonable way for an employer to provide investment advice to
plan investors is to hire an outside service provider to provide the advice.
According to ERISA, such an adviser is the ERISA fiduciary as to the
provision of investment advice. It seems intuitive then that if an
employer hires an outside expert and establishes that expert as a potentially
liable fiduciary, the employer should receive some protection from liability.
However, if the adviser breaches its fiduciary duty to plan investors, the
employer still could face three potential types of liability.

First, the employer remains a fiduciary as to the selection and
monitoring of the investment adviser. If the employer does not engage in
adequate selection or monitoring procedures, then the employer may be
liable for any fiduciary violations by the investment adviser. Monitoring
advisers may impose more risk to employers than the initial selection of
those advisers. In monitoring the performance of other plan service
providers, employers typically can compare the service providers’
performance against objective criteria. For example, for DB plan
investment managers, returns from investments can be compared against
market averages, the performance of other similar investments, the plan’s
asset allocation requirements, and so forth. Similarly, the performance and
fees of the funds offered by a plan can be compared to market indices, other
funds, and the like. However, investment advice is far more subjective and

154. 29 C.F.R. § 2510.3-21(c) (1975).
155. Robinson, supra note 57, at 123.
156. Mark A. Vogel, Named Fiduciaries, in ERISA FIDUCIARY LAW 112-14 (Susan P. Serota ed.,
1995).
must be tailored to the unique goals and risk tolerances of individual plan investors. Therefore, it is unclear under current guidelines how employers could adequately monitor the ongoing provision of investment advice.

Second, the employer may have co-fiduciary liability for fiduciary breaches committed by the investment adviser. It is true as a general principle of ERISA fiduciary law that a fiduciary remains liable for delegated fiduciary duties if the delegating fiduciary knowingly participates in or conceals a breach by the lower-tier fiduciary. According to the DOL, in the context of a delegation of responsibility for investment advice, co-fiduciary liability might arise in either of two ways. First, the employer might fail "to act prudently and solely in the interest of plan [investors]" in its designation of the investment adviser. Alternatively, the employer might "knowingly participate in, conceal or fail to make reasonable efforts to correct a known breach by the investment advisor."159

Third, among other things, the 404(c) guidelines require that plan investors receive sufficient information from their plans to exercise informed investment control. Assume, however, that an investment adviser breaches its fiduciary duty to the plan investor by providing incompetent advice, and the plan investor suffers investment losses as a result. This raises the question of whether the adviser’s breach means that the plan investor did not exercise the informed investment control required under 404(c). If there were a failure to comply with the 404(c) standards, then arguably, the employer could be liable for the inappropriate investment decision.161

3. Erroneous Provision of Investment Advice

Assume that an employer intends to engage a service provider just for educational purposes, but the provider actually gives investment advice instead. The employer may be surprised to realize that it has potential fiduciary liability, as outlined above, for selection and monitoring of the provider, because that provider is actually acting as an investment adviser, as well as for co-fiduciary liability and 404(c) noncompliance. Thus, in addition to monitoring the service provider to ensure that it is providing appropriate investment education, the employer will want to monitor the provider to ensure it is not straying into the forbidden territory of investment advice. Given the lack of clarity in that distinction, as well as

157. Id. at 115.
158. 29 C.F.R. § 2509.96-1(c) (1996).
159. Id.
160. See supra text accompanying note 68.
161. See Medill, supra note 26, at 67.
the stakes, it becomes easy to see why employers would be conservative in
the direct and indirect provision of investment education.

On a separate note, employers also should be expected to consider the
costs associated with offering investment advice. Even if offering advice
does not increase an employer’s fiduciary risk, there still will be some costs
associated with the provision of advice. While survey data is not available,
it is reasonable to assume that employers would prefer that plan investors
have the ability to pay investment advisers out of plan assets or that
cafeteria plans be permitted to offer investment advice. The Economic
Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) clarified
that cafeteria plans may offer qualified retirement planning services, which
includes “any retirement planning advice.”¹⁶²

C. Investment Advisers—Risks and Issues

The second category of benefit plan actors affected by the existing
dichotomy between investment advice and investment education is that of
professional investment advisers. This section evaluates the disincentives
that discourage investment advisers from providing services to benefit plan
investors by looking at the liability risks for advisers.

I. The Provision of Inappropriate Advice

Advisers face potential legal liability for the provision of inappropriate
investment advice. Of course, advisers cannot be guarantors of success in
the securities markets. The wisdom of the following statement applies as
clearly to investment advisers as it does to brokers who render advice.
“Regarding trading advice, brokers[advisers] cannot be liable for honest
opinions that turn out to be wrong. Otherwise brokers[advisers] would
refuse to take discretionary accounts and would refuse to advise on
nondiscretionary accounts.”¹⁶³

On the other hand, federal and state law provides the only protection to
investors who rely on advisers. Investment advisers are not covered by any
self-regulatory structure.¹⁶⁴ In contrast, the National Association of
Securities Dealers is active in working with the SEC to establish
appropriate regulation of broker-dealers,¹⁶⁵ and has a significant

¹⁶². See EGTRRA § 665 (codified as IRC § 132(a)(7) and § 132(m) (defining, in conjunction with
§ 125(f), benefits that may be provided under a cafeteria plan); 26 C.F.R. § 1.125-2T Q&A-1 (1986)
(listing specifically benefits that may be provided under a cafeteria plan).
¹⁶⁴. CLIFFORD E. KIRSCH, INVESTMENT ADVISER REGULATION: A STEP-BY-STEP GUIDE TO
COMPLIANCE AND THE LAW 1-2 (1998); James H. Walsh, Federal Regulation of Financial Planners
enforcement branch.\textsuperscript{166} This subsection evaluates the three primary substantive categories of legal claims against advisers: (1) ERISA, (2) federal securities law, and (3) state law.

\textit{a. ERISA}

As explained above, when an adviser provides investment advice for a fee, the adviser becomes an ERISA fiduciary as to the giving of that advice.\textsuperscript{167} Thus, the adviser becomes subject to liability for breaching ERISA’s fiduciary standards, which subjects the investment adviser to ERISA’s civil enforcement scheme. Statutory provisions establish remedies to redress fiduciary breaches in the investment and administration of plan assets.\textsuperscript{168} As a general matter, those provisions permit monetary awards that flow to plans,\textsuperscript{169} removal of fiduciaries who violate their duties,\textsuperscript{170} and even injunctions barring wanton fiduciaries from providing any further fiduciary services to benefit plans.\textsuperscript{171} Some cases against investment advisers to pension plans that do not contain participant-directed assets have involved significant liability, including criminal sentences, for advisers.\textsuperscript{172}

The limitation of these provisions, however, is that they provide only for relief that flows to a plan. As a result, relief is not available under these
provisions to a former employee who no longer is a plan participant. Similarly, an employer might have terminated the plan after a fiduciary breach occurred. In the absence of an existing plan, these provisions do not provide for redress.

Given the limitations just discussed, plaintiffs sought other theories of recovery under ERISA that would permit relief to flow directly to individuals. For a period of time, the availability of such relief was the subject of considerable controversy. Then, in 1996, the Supreme Court confirmed the right of plan participants and beneficiaries to bring individual actions on their own behalves in cases of fiduciary breach, at least where no other available relief exists. The bottom line for investment advisers is that they may be sued by plan investors for breach of fiduciary duty. Awards now may flow either to plan accounts or directly to the harmed plan investor.

However, the scope of any recovery that flows directly to a plan investor will be limited to what the statute terms "other appropriate equitable relief." According to the Supreme Court, "other appropriate equitable relief" means only traditional equitable relief— injunction, mandamus, and restitution. While restitution is the only form of relief that might afford a wronged plan investor any monetary relief, the Court has been very clear that restitution does not include monetary damages. In recent years, lower courts have struggled with what remedies are included in the Court's definition of traditional equitable relief. The Supreme Court has granted certiorari on the issue, and general guidance is expected in Great-West Life & Annuity Insurance Co. v. Knudson. If the Court defines restitution as narrowly in this context as it has under the relevant securities laws, then direct remedies will be limited to a return of advisory fees.

In summary, ERISA's fiduciary regulation of investment advisers

176. Compare In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig., 57 F.3d 1255 (3d Cir. 1995) (denying monetary damages but granting an injunction ordering specific performance of lifetime benefits and restitutinary reimbursement for past benefits), and Varity Corp., 36 F.3d 746 (denying compensatory damage, but awarding "restitution" for benefits that participants had lost), with Buckley Dement, Inc. v. Travelers Plan Adm'rs Inc., 39 F.3d 784, 788-89 (7th Cir. 1994) (denying recovery of the participant's medical bills because such relief would constitute "damages," not "appropriate equitable relief"), and McLeod v. Or. Lithoprint Inc., 102 F.3d 376 (9th Cir. 1996) (denying award of the amount of benefits that plaintiff would have been paid had she elected coverage under a cancer policy).
178. See infra text accompanying notes 189-97.
includes remedial provisions that protect wronged plan investors and pose some risk of liability to advisers. Injunctive relief may flow either to the benefit plan or to individual plan investors. The statute permits significant flexibility in monetary awards payable to plan accounts. The scope of direct monetary relief that may flow to individual plan investors, however, is less clear.

b. Federal Securities-Related Law

The most obvious source of potential liability under federal securities-related laws is the Investment Advisers Act of 1940 (Advisers Act or Act). The Advisers Act imposes a number of obligations on investment advisers by requiring state or federal registration, disclosures to clients as well as to the SEC, maintenance of books and records, and so forth. The Act does not, however, contain any credentialing requirement for advisers. Most importantly for our purposes, the Advisers Act contains an antifraud provision and regulates potentially problematic behaviors such as performance fees and advertising.

The language of the Act’s anti-fraud provision, section 206, is similar to section 10(b)-5 of the Securities and Exchange Act of 1934 and section 17(a) of the Securities Act of 1933, both well-known anti-fraud provisions. The Advisers Act’s fraud provision contains two components.

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180. CLIFFORD E. KIRSH, INVESTMENT ADVISER REGULATION: A STEP-BY-STEP GUIDE TO COMPLIANCE AND THE LAW 1-6 - 1-7 (Supp. 1998); Walsh, supra note 164, at 268-69.
181. KIRSH, supra note 180, at 1-7. In contrast, in order to become licensed as a broker-dealer, a candidate must (1) submit fingerprints and undergo a background check, (2) be sponsored by an existing NASD or exchange member firm, (3) complete a U-4 application, which includes disclosure of prior work history and any criminal background, and (4) demonstrate competency by passing relevant qualification examinations. This generally means passing the NASD Series 7 (General Securities Representative) and the Series 63 (Uniform Securities Agent State Law Examination), although not all states require the Series 63. Series 7/63 Information Page, at http://www.preparer.com/series7 (last visited Nov. 18, 2001). The North American Securities Administrators Association has developed a uniform examination for advisers. But, ERISA defines adviser so broadly that, even in the jurisdictions that do require the examination, there is no assurance that an ERISA adviser will have passed even this threshold of competency.
182. KIRSH, supra note 180, at 1-7; Walsh, supra note 164, at 268-69.
183. Section 10b of the Securities & Exchange Act of 1934 reads as follows:
   It shall be unlawful for any person, directly or indirectly, ... to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
important in this context.\textsuperscript{184} Under the first clause, only intentional fraud is actionable.\textsuperscript{185} Under the second clause, however, advisers are "not only prohibited from engaging in schemes or artifices to defraud, but also prohibited from engaging in practices or courses of business which operate as such."\textsuperscript{186} Thus, advisers must provide substantial disclosure of any conflicts of interest,\textsuperscript{187} as well as all material facts.\textsuperscript{188}

However, in a divisive five-to-four decision, the Supreme Court determined in 1979 that section 206 does not establish the basis for a private cause of action.\textsuperscript{189} The Court's construction of the Act was contrary to the decision of every circuit that had addressed the issue.\textsuperscript{190} In a separate provision, section 215, the Act declares investment advisory contracts to be void where those contracts would violate the Act.\textsuperscript{191} The Supreme Court accepted that section 215 sufficiently implies a private cause of action.\textsuperscript{192} At the same time, the Court limited the remedies obtainable in a private action under section 215 to "a suit for rescission or for an injunction against

\begin{itemize}
\item (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
\item (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.
\end{itemize}

\textbf{15 U.S.C. § 77q(a) (1933)}

In comparison, section 206 of the Investor Advisers Act reads as follows:

\begin{itemize}
\item It shall be unlawful for any investment adviser . . . directly or indirectly –
\item (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
\item (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
\item (3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;
\item (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.
\end{itemize}

\textbf{15 U.S.C. §80b-6 (1994)}

\textsuperscript{184} Walsh, supra note 164, at 269.

\textsuperscript{185} Id.

\textsuperscript{186} Id.

\textsuperscript{187} Id. at 270-72.


\textsuperscript{190} 444 U.S. at 25 (White, J., dissenting).


\textsuperscript{192} 444 U.S. at 18-19.
continued operation of the contract, and for restitution.\textsuperscript{193} Given the Court’s clarification in a footnote that rescission does not include “compensation for any diminution in the value of the rescinding party’s investment alleged to have resulted from the adviser’s action or inaction,” the available relief may fall far short of compensating a defrauded advisory client.\textsuperscript{194} And, by limiting available damages to rescission, the Court also limited the possible defendants to those who were parties to the contract, thus negating any aiding and abetting claims.\textsuperscript{195}

In order to understand the scope of the limitation that the Supreme Court imposed on remedies, consider the following hypothetical. Chris, an investment adviser, but not a broker-dealer, convinced Terry to invest $250,000 in securities of X Corp. Chris failed to disclose that she had no reasonable basis for the recommendation or that she was accepting money from X Corp. for touting its stock. The securities turned out to be virtually worthless. Chris’ actions appear to violate the Act’s prohibition on fraud.\textsuperscript{196} But, while Terry appears to be entitled to rescission, he is not entitled to any relief for the loss in the value of his investment in X Corp. stock.\textsuperscript{197} As a

\textsuperscript{193} Id. at 19 (footnote omitted).

\textsuperscript{194} Id. at 25 n.14.


result, it appears that Terry's actual financial recovery under the Advisers Act would be minimal.

There are mixed indications regarding the extent to which SEC oversight is effective in constraining investment advisers from engaging in inappropriate behaviors. As the advisory industry experienced rapid growth during the 1980s and 1990s, the SEC became very concerned that it lacked adequate resources to oversee the industry.\textsuperscript{198} The agency sought a variety of solutions, from industry self-regulation to an expansion of SEC resources, all without success.\textsuperscript{199} Ultimately, legislation in 1996 established that, with limited exceptions, only advisers with $25 million or more in assets under management must register with the SEC.\textsuperscript{200} Smaller advisers must register at the state level.\textsuperscript{201} Both the states and the SEC retain anti-fraud authority over all advisers.\textsuperscript{202}

In spite of the practical and regulatory constraints on the SEC's oversight abilities, in recent years the SEC has filed significantly larger numbers of cases alleging violations of the Advisers Act than it had filed in the past.\textsuperscript{203} The penalties imposed for violations have increased as well.\textsuperscript{204} The range of actions against which the SEC is bringing enforcement actions varies from conflicts of interest, to issues with custody of client funds, to failure of advisers to secure best execution on client trades.\textsuperscript{205}

Another indicator of SEC activity is its inspection program. In order to maximize the effect of that program, the SEC now engages in what it refers to as "smart" examinations of investment advisers.\textsuperscript{206} According to the SEC, that means it is targeting its attention on the advisory firms that pose the greatest risk to investors, and it varies the scope of the examination depending upon the internal controls established by the advisory firm being investigated.\textsuperscript{207} As a result of this focused approach, the SEC issues a deficiency letter in approximately 85% of its examinations, and refers the case for enforcement action in another 5% of examinations.\textsuperscript{208} Similarly, the SEC uses examination sweeps to target specific issues such as the extent

\begin{footnotesize}
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\item \textsuperscript{198} Walsh, supra note 164, at 276-77.
\item \textsuperscript{199} Id. at 277-80.
\item \textsuperscript{200} Id. at 281-83.
\item \textsuperscript{201} Id. at 282.
\item \textsuperscript{202} Id.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} Id.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} Id.
\end{itemize}
\end{footnotesize}
of disclosure made to clients regarding brokerage practices and soft dollar practices.

In sum, although ERISA's preemption provision does not preempt other federal law, such as the Advisers Act, the Act itself poses only a limited risk of liability to advisers. Although the Act contains broad anti-fraud provisions, its remedial provisions are very restricted. Even when defrauded, the relief available to private advisory clients is limited to restitution and rescission. The SEC's lack of enforcement resources limits, without totally defanging, the agency's regulatory power.

c. State Law

By way of comparison, state law often does subject investment advisers to substantial liability for inappropriate advice, fraudulent actions, and other related misfeasance. The specifics vary substantially from state to state, but, as a general matter, state law claims against investment advisers may be pursued under either state securities law or common law. This subsection briefly reviews the scope of coverage and liability under each of those categories.

Every state except Wyoming has adopted securities law provisions that require investment advisers to register with the state. There is, however, considerable non-uniformity among the states. Thirty-seven jurisdictions adopted all or part of the Uniform Securities Act of 1956 (1956 Act). A handful of other jurisdictions adopted the Revised Uniform Securities Act of 1985 (RUSA). Commentators regularly note the departures from the

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210. KIRSCH, supra note 180, at 13-12.


212. THOMAS L. HAZEN, THE LAW OF SECURITIES REGULATION 391 (3d ed. 1996) (There has been a major effort toward uniformity, promoted by the American Law Institute's Uniform Securities Act, from which there were significant departures in many states); Kenneth I. Denos, Comment, Blue and Gray Skies: The National Securities Markets Improvement Act of 1996 Makes the Case for Uniformity in State Securities Law, 1997 UTAH L. REV. 101, 126 (1997) ("Although a number of states have securities laws that are practically verbatim adoptions of the Uniform Securities Act, the interpretations given to these provisions have varied as much as the judges, regulators, and legislators who have attempted to interpret them.").


uniform acts made by the state securities laws of New York and California.\textsuperscript{215}

While the differences between the uniform acts are significant,\textsuperscript{216} for purposes of this Article, both acts can be considered at the same time. Both the 1956 Act and RUSA regulate securities registration\textsuperscript{217} and fraud.\textsuperscript{218} In each case, the uniform act’s enforcement provisions permit civil awards that include rescission, damages, prejudgment interest, costs, and attorney’s fees, but not punitive damages.\textsuperscript{219} The acts also provide for administrative enforcement\textsuperscript{220} and criminal penalties.\textsuperscript{221}

When a securities purchaser loses money, the resulting complaint tends to name the securities professional who provided advice on the transaction. That professional frequently is the broker who handled the securities transaction and who may, or may not, also meet the relevant state or federal definition of an investment adviser.\textsuperscript{222} Concomitantly, an investment adviser may, or may not, also meet the definition of a broker-dealer.\textsuperscript{223} One court explained the classic case as follows:

This case is of a type which has been referred to as the “common garden variety” suit by a customer against her stockbroker[adviser]... In such a case the plaintiff-customer (often a widow or orphan) typically invests a substantial amount in securities or commodities recommended by the defendant-broker. When the investment goes sour, the plaintiff alleges a wide variety of claims, state and federal, statutory and common law, in the hope of recouping the loss from the broker[adviser].\textsuperscript{224}

In referring to a “wide variety” of potential claims, the court may have understated actual practice. State law claims run the gamut, including

\textsuperscript{215} HAZEN, supra note 165, at 391 n.19; Branson, supra note 214, at 116.
\textsuperscript{216} See LOSS & SELIGMAN, supra note 166, at § 1-B-2.
breach of fiduciary duty,225 negligence,226 misrepresentation,227 fraud,228 breach of contract,229 churning,230 lack of disclosure,231 as well as statutory claims based upon specific state securities law provisions.232 Similarly, a plaintiff may rely on a range of legal principles to hold the employing firm vicariously liable along with, or instead of, the adviser.233 And, the firm may be independently liable for securities fraud or other related violations.234

Not only do plaintiffs enjoy an extensive menu of potential state law claims against investment advisers, the legal principles tend to be generous when it comes to damages. A court may order rescission of an advisory contract or a securities sale.235 Under the rubric of compensatory damages,


227. Hill, 790 F.2d at 821 (using misrepresentation to show violation of state law fiduciary duty); Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 770 (9th Cir. 1984) (alleging common law misrepresentation).

228. McAdam, 896 F.2d at 755 (alleging fraud); Hatrock, 750 F.2d at 770 (alleging common law misrepresentation); Silverberg, 710 F.2d at 687 (upholding jury finding of common law fraud); McCutcheon, 938 F. Supp. at 822 (alleging common law fraud).

229. McAdam, 896 F.2d at 755 (alleging breach of contract); Beckstrom, 730 So. 2d at 943 (same).

230. Hill, 790 F.2d at 821 (using churning to show violation of state law fiduciary duty).

231. Leboce v. Merrill Lynch, Pierce, Fenner & Smith, 709 F.2d 605, 606-07 (rejecting on the facts plaintiff's fiduciary claim based in lack of disclosure); see also Hill, 790 F.2d at 821 (implying use of lack of disclosure to show violation of state law fiduciary duty).

232. McAdam, 896 F.2d at 755 (alleging violation of New Jersey statutory securities law); Hatrock, 750 F.2d at 770 (alleging violation of Idaho securities laws); Silverberg, 710 F.2d at 690-91 (upholding jury determination of violation of fraud provision under Florida securities law); McCutcheon, 938 F. Supp. at 822 (alleging breach Florida statutory securities law); Shorrock v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 74-24, 1977 U.S. Dist. LEXIS 12872, at *19 (D. Or. Nov. 18, 1977) (alleging negligence in violation of Oregon Blue Sky Law); Beckstrom, 730 So. 2d at 943 (claiming violation of Louisiana statutory securities law).


234. Martin v. Shearson Lehman Hutton, Inc., 986 F.2d 242, 243 (8th Cir. 1993) (alleging direct violation of state securities law and common law principles); McAdam, 896 F.2d at 755 (alleging direct liability of Dean Witter on basis of fraud, negligent supervision, and violation of New Jersey state securities law); De Kwiatkowski v. Bear Stearns & Co., 126 F. Supp. 2d 672, 677 (S.D.N.Y. 2000) (affirming award based on breach of fiduciary duty and negligence); Community Hosp., Inc., 81 F. Supp. 2d at 875 (holding breach of duty of disclosure to be grounds for liability).

235. McAdam, 896 F.2d at 756 (affirming punitive damages of $800,000 against Dean Witter and
a plaintiff might receive one or more of the following: return of the profits made by the adviser; recompense for a drop in the value of securities, or an award to compensate for expected investment gains. Punitive damages may be available under state securities laws. More frequently, plaintiffs seek punitive damages by pleading claims of fraud or fiduciary duty under the state common law or under non-securities laws. The availability of punitive damages under state law can be significant to plaintiffs as the awards are sometimes substantial. The availability of punitive damages helps explain the popularity of state law claims. Both pre-judgment interest and attorney's fees help to offset the costs of litigation and encourage representation of claimants with small losses. It is possible that ERISA's broad preemption clause may affect the availability of state claims against investment advisers who provide advice regarding benefit plan assets.


236. See Hatrock, 750 F.2d at 773-74 (noting that in a churning case an investor may recover "excessive commissions charged by the broker"); Community Hosp., Inc., 81 F. Supp. 2d at 873-74 (affirming $17.3 million compensatory award comprised, in part, of excess commissions); Beckstrom, 730 So. 2d at 952 (awarding the plaintiff the commissions charged by the defendants).

237. Hatrock, 750 F.2d at 773-74 (noting that in a churning case an investor may recover "the decline in value of the investor's portfolio resulting from the broker's fraudulent transactions"); Silverberg, 710 F.2d at 684-87 (affirming jury instruction resulting in $350,000 award based on drop in securities' value); Community. Hosp., Inc., 81 F. Supp. 2d at 873-74 (affirming $17.3 million compensatory award comprised, in part, of diminution in value of securities); Beckstrom, 730 So. 2d at 952 (amending damages to reflect loss in investment).


241. Hatrock, 750 F.2d at 772-73 (affirming award of $250,000 in punitive damages); Silverberg, 710 F.2d at 689-90 (affirming award of $75,000 in punitive damages); Dean Witter Reynolds, Inc. v. Bork, No. 91-0392, 1991 U.S. Dist. LEXIS 11907, at *6-11 (E.D. Pa. Aug. 21, 1991) (affirming award of $500,000 in punitive damages).

evaluated below as part of the discussion of investment advice from the perspective of plan investors.\textsuperscript{243}

From a practical perspective, the typical investment advisory contract currently requires clients to arbitrate their claims against advisers.\textsuperscript{244} While there appears to be a dearth of data regarding arbitration against investment advisers, the NASD compiles substantial information as part of its dispute resolution program in the brokerage industry. Significant scholarly work, and disagreement, addresses the fairness and efficacy of arbitration in the securities field.\textsuperscript{245} One commentator's analysis of the empirical data found that claimants in small cases are less likely to recover in arbitration than claimants with larger cases.\textsuperscript{246} Other factors that may affect arbitration outcomes include the retention of lawyers by claimants and the number of arbitrators used to hear the case.\textsuperscript{247} But, when surveyed, more than 90% of the participants in the NASD arbitration program reported that the process is "fair[] and without bias."\textsuperscript{248}

2. **Prohibited Transactions Complications**

Most entities that provide services, other than investment advice, to an ERISA plan do not become ERISA fiduciaries.\textsuperscript{249} Non-fiduciary status permits those providers to be paid reasonable fees from plan assets for their services. However, ERISA specifically defines investment advisers as ERISA fiduciaries.\textsuperscript{250} This, in turn, subjects any entity that provides investment advice to the stringent prohibited transactions provisions that

\textsuperscript{243}. See infra text accompanying notes 274-92.
\textsuperscript{244}. Margo E.K. Reder, *Securities Law and Arbitration: The Enforceability of Predispute Arbitration Clauses in Broker-Customer Agreements*, 1990 COLUM. BUS. L. REV. 91, 92 (1990) ("Customer agreements in virtually all instances contain a predispute arbitration clause providing that any controversy relating to the account shall be settled by arbitration, in accordance with the rules of an agreed upon exchange or association.").
\textsuperscript{247}. Id. at 379-80.
\textsuperscript{249}. See Stanley, supra note 55, at 722 n.44.
\textsuperscript{250}. See supra text accompanying notes 53-64.
apply to ERISA fiduciaries.251 The prohibited transactions provisions forbid fiduciaries from providing other services to the plan to which they owe a fiduciary duty.252

In effect, the prohibited transactions provisions will preclude an entity that provides mutual funds from also providing investment advice to plan investors unless the entity obtains an exemption from the DOL. The expenses of seeking such an exemption can be significant. One company has cited costs of $60,000 to $100,000 per exemption and a wait of between twelve and eighteen months for DOL approval.253 Furthermore, to date, the DOL appears willing to grant exemptions only when the financial terms are structured to eliminate any potential conflict of interest.254 This limits the fees an adviser can charge and precludes service providers from structuring services in innovative ways.

D. Plan Investors—Risks and Issues

The prior subsection looked at regulation of investment advice from the perspective of advisers. The goal was to determine the extent to which current law discourages investment advisers from providing advice to individual benefit plan investors. This section examines the issue from the perspective of the plan investors. Advocates of investment advice for plan investors believe that such advice would be useful to those investors as they make asset allocation decisions. The remaining question, however, is whether there is a dark side to investment advice, and, if so, its scope.

1. Viability of Disclosure as a Cure for Self-Interested Investment Advice

All interested observers, from the DOL255 to academics256 to plan investors themselves,257 appear to agree that many plan investors both need and want investment advice. Testimony before the House Employer-

254. See Medill, supra note 26, at 57-63.
256. White, supra note 144 (discussing Professor John Shoven’s support of investment advice for benefit plan investors).
257. See Elizabeth A. White, Boehner Subcommittee Plans Hearings for March 9-10 on ERISA Modernization, Pens. & Ben. Daily (BNA), Mar. 6, 2000 (“As defined contribution plans gain popularity and participants are afforded more options, they are asking for more specific information. . . .”)).
Employee Relations Subcommittee of the Committee on Education and the Workforce in both 2000 and 2001 indicated strong support for increasing benefit plan investors' access to investment advice. The complexity of investment choices, as well as the importance of those choices to plan investors' retirement security, reinforces the need for increased access to investment advice. And, because substantial private retirement programs relieve the pressure on the Social Security system, Congress has yet another reason to address the barriers that currently discourage employers from providing investment advice in their benefit programs.

While there is extensive agreement on the need for increased advice, one major area of disagreement continues to divide those with an interest in this topic. Most investment advisers have some level of self-interest that inheres in the advice they provide. For example, if the adviser also is a member of the firm whose mutual funds are offered as plan investments, there may be explicit or implicit pressure to steer plan investors to funds that generate high fees for that mutual fund company. The battle that will be fought in the legislative arena is whether disclosure can suffice to offset potential conflicts of interest on the part of advisers.

The DOL's shifting positions on the issue offer a window onto the controversy. As presidential administrations changed in the last year, so did the agency's official position on whether disclosure is an appropriate way to resolve conflicts of interest. Specifically, under the Clinton administration, the DOL took the position that plan investors who lack the financial sophistication to make their own investment decisions also lack the ability properly to evaluate and react to disclosures of conflicts of interest. As a result, in the Fall of 2000, the DOL opposed legislation intended to expand access to investment advice. That legislation would have provided for an.


262. Gilroy, supra note 255.

263. Id.
automatic exemption from the prohibited transaction standards for investment advice so long as the adviser complied with specific disclosure requirements. In contrast, the SEC traditionally has taken the position that appropriate disclosure suffices to offset the conflict of interest, and its concern is with the necessary scope of disclosure.

The legislation intended to encourage the provision of investment advice was reintroduced with only minor changes in June 2001. In July, the DOL announced its support of the legislation. According to Ann L. Combs, who had recently been appointed as the Assistant Secretary for Pension and Welfare Benefit Administration, “Investment Education, while important, is simply not enough.” In a dramatic change from the Department’s prior position, Assistant Secretary Combs did not express any concern regarding the ability of plan investors to evaluate potential conflicts of interest by advisers. In fact, she stated, “We believe the bill creates a strong, protective framework for the provision of investment advice to participants . . .”

2. Availability of Sufficient Remedies to Protect Against Inappropriate Investment Advice

A related issue is whether benefit plan investors who receive unprofessional, fraudulent, or self-interested advice from an adviser will have access to sufficient remedies. The reputation of the investment advisory industry has not been above reproach over the years. Nor has the lack of a self-regulatory organization helped public perceptions. As discussed above, state common and statutory law typically provides an array of causes of action for investors who suffer losses at the hands of incompetent or fraudulent investment advisers, and available remedies range from rescission to punitive damages. The issue for benefit plan investors who suffer damages at the hands of investment advisers, however, will be whether ERISA’s preemption clause nullifies their state law claims. It will soon become clear why a full analysis of ERISA’s possible preemptive effect is beyond the scope of this Article, but the basic outlines

265. See infra text accompanying notes 326-33.
270. Id.
271. Id.
272. See supra Part III.C. (discussing litigation against and regulation of investment advisors).
273. See supra Part III.C.iii.
of the issue are fairly easy to sketch.

ERISA's preemption language was once described as the "most expansive preemption clause found in any federal statute." The provision itself states that ERISA preempts all state laws that "relate to any employee benefit plan." Thus, for a number of years, courts struck down a great many state laws as preempted by ERISA. The tide began to turn in 1995. In a pivotal ERISA preemption case, Justice Souter wrote for the unanimous Court that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for 'really, universally, relations stop nowhere.'" Recognizing that ERISA preemption has limits, however, has proven easier than establishing the parameters of those limits. The Supreme Court has continued to struggle with the scope of ERISA preemption, as have the commentators.

The issue is further complicated when evaluating ERISA's effect on state securities laws. In addition to its broad preemption clause, ERISA contains what is known as its "savings clause," which provides that it does not preempt "any law of any State which regulates insurance, banking, or securities." In discussing the potential liability of those who provide investment education, one commentator ignored the potential import of the exemption for state securities law and asserted that ERISA would preempt any relevant state law. While case law on the question is sparse, at least

277. Id. at 12-13.
279. Here one example should suffice. In a most unlikely pairing, Justices Scalia and Ginsburg concurred in one ERISA preemption case, but, after noting that between 1974 and 1996, the Supreme Court had decided 14 ERISA preemption cases and the stream of cases continued unabated, wrote that they thought it "would greatly assist our function of clarifying the law if we simply acknowledged that our first take on this statute was wrong . . ." Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316, 336 (1997) (Scalia, J., concurring).
283. See Medill, supra note 26, at 27, 62, 77-78.
one court has gone the other way and denied a state securities law claim associated with a benefits plan on substantive grounds, rather than finding the state statute to be preempted.284

The extent to which ERISA's savings clause will permit state law actions by benefit plan investors against investment advisers will most likely depend upon the construction of ERISA's language, which saves from preemption the "law of any State which regulates ... securities."285 In order to give some meaning to the statutory language, at least some state statutory securities law should survive. However, significant precedent indicates that ERISA will preempt many of the general common law claims, such as fiduciary duty, negligence, misrepresentation, and fraud, that permit expansive recoveries in cases alleging problematic investment advice.286 In another of ERISA's most prominent preemption cases, the Supreme Court held that the savings clause did not ensure the survival of a plaintiff's state common law bad faith claim against an insurance company.287 According to the Court, "[a] common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry."288 Because the state law of bad faith had its "roots ... in the general principles of ... tort and contract law,"289 the Court determined that the state law did not regulate insurance within the scope of the savings clause. The same analysis could easily be applied to the state common law principles often relied upon for claims against investment advisers, and if so, those claims would be preempted. On the other hand, because statutory securities laws are "specifically directed toward that industry,"290 ERISA should not be read to preempt those state laws.

In sum, while federal remedies are available under ERISA and the Investment Advisers Act, those remedies are limited.291 Similarly, under state law, general common law claims often provide the widest latitude for recoveries.292 Nevertheless, it is likely that ERISA would preempt any state common law claims brought by plan investors who have received problematic advice about the investment of their benefit plan assets. Given the limited nature of ERISA's remedial scheme, its preemption of state

286. For a discussion of those claims, see supra text accompanying notes 225-32.
288. Id. at 50.
289. Id. at 51.
290. Id. at 50.
291. See supra text accompanying notes 173-75, 191-96.
292. See supra text accompanying notes 223-41.
common law may leave some investors without access to appropriate forms of relief.

V.
EVALUATION OF EXISTING PROPOSALS TO REGULATE INVESTMENT ADVICE

This part evaluates three proposals intended to increase the availability of investment advice. If adopted, each proposal would result in an improvement over the status quo, but each suffers from shortcomings that would undermine benefit plan investors' access to quality investment advice.

A. Revision of DOL Prohibited Transaction Exemption Process

In a carefully written and thorough article, Professor Colleen Medill suggests that the DOL take a number of administrative actions to increase the availability of investment advice to plan investors. Specifically, Professor Medill makes five recommendations for DOL action. First, she would require that in order to qualify for protection from liability under section 404(c): (a) employers be required to provide specified levels of investment education, (b) plan investors not be permitted to invest more than 10% of their elective salary deferrals in employer stock or real property, and (c) plans be required to inform plan investors of their right to decline to make their own investment decisions. In addition, Professor Medill would seek amendment of the 404(c) regulations to clarify when an employer providing investment advice would be liable for a plan investor's investment losses. Second, she suggests establishing new class exemptions similar to the individual exemptions the DOL has granted to investment advisers, as well as updating existing class exemptions. Third, she would require the DOL to revise the guidance it outlined in Interpretive Bulletin 96-1 to provide that the more extensive levels of communications, which the DOL classified as investment education, are actually classified as investment advice. Fourth, Professor Medill believes the DOL should issue guidance to provide comfort to employers on the scope of their fiduciary duty in the monitoring of investment advisers.

293. Medill, supra note 26, at 5.
294. Id. at 74-77.
295. Id. at 74-75.
296. Id. at 75.
297. Id. at 76.
298. Id. at 77.
299. Id. at 77-80.
300. Id. at 80-81.
and their potential co-fiduciary liability.\textsuperscript{301} Specifically, her proposal would permit employers to "rely in good faith upon the representations of the investment adviser that its advice is consistent with its duties as an ERISA fiduciary."\textsuperscript{302} Fifth, Professor Medill's regulatory scheme would subject all individuals and entities who provide investment advice regarding ERISA benefit plan assets to financial solvency requirements.\textsuperscript{303}

As a package, Professor Medill's suggested regulatory changes would address some of the roadblocks that currently prevent employers from providing plan investors with investment advice. To put her proposal in context, she specifically sought ways to increase the provision of investment advice without the necessity of statutory amendments. Given that limitation, Professor Medill's suggestions are remarkably thorough in addressing issues faced by employers, investment advisers, and plan investors. It appears, however, that the current political climate may support legislative change in this arena. If so, broader changes than those proposed by Professor Medill can be made.

The suggestions that Professor Medill does make raise three specific concerns. First, the new requirements that she would impose on employers, such as the obligation to provide plan investors with investment education,\textsuperscript{304} would inappropriately subject qualified benefit plans to increased regulation. Second, her proposal to establish class exemptions that mirror the existing individual exemptions\textsuperscript{305} would not provide sufficient incentive to investment providers to engage in the provision of advice because the existing exemptions so strictly regulate the receipt of fees. Even the DOL now recognizes that the exemptions put affiliated advisers "at a competitive disadvantage,"\textsuperscript{306} and prevent them from being "at the forefront of any market innovations."\textsuperscript{307} Third, the comfort that Professor Medill would grant to employers regarding their duty to monitor goes too far by protecting employers so long as they do not have actual knowledge of wrongdoing.\textsuperscript{308} This type of liability standard would encourage an employer to take a "head in the sand" approach once it had selected an investment adviser.

\textbf{B. A Phased Exemption Approach}

In testimony before the Education and Workforce Committee,
Professor Joseph Grundfest advocated varying the level of regulation of investment advisers depending on the potential for conflicts of interest. In sum, Professor Grundfest suggested a trifurcated approach. At one end of this spectrum, so long as the investment adviser is independent of the plan’s mutual fund provider, the adviser would be exempt from the prohibited transaction requirements. The adviser would be classified as independent if it is not affiliated with the fund provider, its compensation is not contingent on the advice given, and the advice “satisfies specified objectivity and competence criteria consistent with the modern finance literature.” The mutual fund provider would be permitted to pay all or part of the adviser’s fees without affecting the adviser’s independence.

At the intermediate level, an exemption would still be available to any adviser who is affiliated with the plan’s mutual fund provider. But, the adviser would be permitted to provide investment advice only if (1) “the funds adopt a level fee structure within the plan,” (2) “the compensation paid to the adviser is not contingent on the advice provided,” and (3) “the advice satisfies objectivity and competence criteria that are consistent with the modern finance literature.” At the other end of the spectrum, no relief from ERISA’s prohibited transaction provisions would be available to an affiliated investment adviser who does not meet these requirements.

Professor Grundfest’s proposal may be more administratively efficient for investment advisers than Professor Medill’s proposal. Instead of needing to fit their investment programs within the generally narrow terms of a class exemption, under Professor Grundfest’s approach even affiliated investment advisers have substantial latitude in configuring a program of investment advice. This may encourage innovation and adoption of advisory programs to specific plan investor groups. And, the proposal’s trifurcated structure, with more stringent requirements for investment advisers that are affiliated with a plan’s mutual funds provider, recognizes and addresses some of the concerns regarding conflicts of interest.

On the other hand, Professor Grundfest’s proposed definition of independence is of concern. It would permit the mutual fund provider, whose funds the adviser may be recommending, to pay the adviser’s fees. In such a situation, the adviser would qualify as independent and, so long as

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309. Grundfest Testimony, supra note 261.
310. Id.
311. Id.
312. Id.
313. Id.
314. Id.
315. Id.
316. Id.
317. Id.
it met the other two criteria, would receive an exemption from ERISA's prohibited transaction requirements. Yet, it is unusual for a definition of "independence" to ignore fee arrangements. Furthermore, whether Professor Grundfest would require disclosure of the fee relationship is unclear from his testimony.

The intermediate level of regulation, which would apply to advisers affiliated with the plan's mutual fund provider, raises another concern. Many mutual fund families charge different fees for different funds within the family. Thus, Professor Grundfest's proposal would either exclude many affiliated advisers or require substantial changes to the internal financial mechanisms of many funds. As a result, the proposal may effectively leave significant barriers in place as to the provision of investment advice by any entity that does not meet the proposal's definition of independence. And, again, Professor Grundfest's testimony did not discuss any disclosure requirements.

Whether the advisers are affiliated or not, Professor Grundfest's proposal would preclude the availability of a prohibited transaction exemption when the investment advice given is not consistent with modern finance literature. Professor Grundfest says the provision is intended to "deter the use of techniques that have no established basis in the financial or economic literature ...." However, this may generate substantial amounts of litigation as the federal courts struggle to determine whether specific advice meets this standard. The true beneficiaries of this standard could be the finance experts who would be testifying on the boundaries of finance theory in all the cases of disputed investment advice.

Finally, with respect to the employers that sponsor benefit plans, Professor Grundfest appears to take the opposite approach of Professor Medill. Professor Medill proposed a blanket exemption from liability for employers so long as they have no actual knowledge of wrongdoing. In contrast, Professor Grundfest's proposal does not offer any comfort whatsoever for an employer that relies upon an investment advice provider.

C. H.R. 2269

Representative John A. Boehner has introduced almost identical bills on the subject of investment advice for benefit plan investors in the 106th and 107th Congresses. In 2000, the Subcommittee on Employer-Employee Relations of the House Education and the Workforce held hearings and a mark-up session on H.R. 4747, but the bill failed to progress beyond that

319. Grundfest Testimony, supra note 261.
320. Medill, supra note 26, at 81-82.
Representative Boehner reintroduced the legislation, with minor changes, in June 2001 as H.R. 2269. The bill, known as the “Retirement Security Advice Act of 2001” (RSAA), proposes a statutory exemption from ERISA’s prohibited transaction provisions for: (a) the provision of investment advice, (b) transactions in plan assets as a result of that advice, and (c) fees received for that advice.

A significant number and variety of interested parties, from the DOL to TIAA-CREF, have announced their support for RSAA. Encouraging as it may be that Congress is devoting serious attention to the issues associated with the provision of investment advice to benefit plan investors, RSAA, in its attempt to encourage the provision of advice, fails to resolve three significant concerns. First, it appears that RSAA will delegate substantial regulatory authority for disclosures to the DOL. Given the complexity of these disclosures and the existing SEC regulations, making DOL responsible for this oversight is inefficient and would likely cause confusion among investors. Second, RSAA provides some protection to employers who select investment advisers for their participant-directed benefit plans, but that protection may be insufficient. If so, RSAA will fail because employer plans will not offer investment advice. Third, ERISA’s preemption of state law may result in inadequate remedies for plan investors who suffer injury as a result of inappropriate or fraudulent investment advice. This subsection evaluates each of these concerns.

RSAA attempts to achieve a balance between encouraging employers and advisers to provide investment advice, on the one hand, and ensuring that plan investors receive sufficient disclosure to evaluate the advice in the context of who is providing it, on the other hand. As such, RSAA permits fiduciary advisers operating under a conflict of interest to provide advice. It attempts to protect plan investors from conflicts by imposing specific disclosure requirements on the fiduciary adviser. RSAA pursues its disclosure goals, however, by integrating them into ERISA, where they will be interpreted and enforced by the DOL. Furthermore, RSAA’s

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323. Id. § 1.
324. Id. § 2.
327. See id. at § 2(1)(1)(A).
328. See id. at § 2; H.R. REP. NO. 107-262, at 28 (2001) (“The Committee expects the Department
provisions grant a prohibited transaction exemption to any party who meets its definition of "fiduciary adviser." That definition extends significantly beyond those individuals who must register as an investment adviser under federal or state law, by also encompassing advice givers associated with banks, insurance companies, and broker-dealers.330

Regulating the provision of investment advice through ERISA raises a number of concerns because of the states’ and the SEC’s existing authority over, and expertise with, investment advisers. RSAA does require that fiduciary advisers provide plan investors with disclosure “in connection with any . . . acquisition or sale, in accordance with all applicable securities laws.” However, it separately defines, quite specifically, the disclosure that an adviser must make at the time of first providing advice. Those disclosures include information about fees, compensation, affiliations, limitations on the scope of advice, and related services. Therefore, it appears that RSAA intends to set the standard for conflict of interest disclosure separately from existing securities law. And, given the DOL’s regulatory authority over exemptions from prohibited transactions and language in the committee report, it appears that the DOL would have responsibility to define and oversee the conflict of interest disclosures. The specificity of RSAA’s conflict of interest disclosure requirements and delegation of authority to the DOL is odd given the SEC’s recent and substantial efforts on equivalent advisory disclosures outside of qualified plans.

As noted above, the Advisers Act requires investment advisers with $25 million or more under management to register with the SEC.335 In April 2000, the SEC proposed substantial revisions to Uniform Form ADV, of Labor to implement the changes to the law . . .

329. Id. at § 2(g)(4).
330. Id. at § 2(g)(1)(A).
331. Id. at § 2(g)(1)(C).
332. Id. at § 2(g)(1)(A).
333. Id.

334. It is true that investment advisers who manage assets of less than $25 million typically would be precluded from registering with the SEC. However, the SEC permits pension consultants who provide investment advice to pension plans to register so long as they provide advice on at least $50 million worth of plan assets as well as multi-state advisers who must register in at least thirty states. 17 C.F.R. §§ 275.203A-2(b)(1) & (e)(1) (1998).

335. Committee on Education and the Workforce Investment advisers with less than $25 million must register at the state level. Amendments to the prohibited transactions requirements could make either of two provisions for them and for others who meet ERISA’s definition of providing investment advice but are not required to register with the SEC. One alternative is to preclude from the statutory exemption any investment advisers who do not meet the SEC’s standards for federal registration. A second possibility is to provide a prohibited transaction exemption to any investment adviser registered with the appropriate state or federal authority. However, becoming comfortable with the level of disclosure required at the state level would require substantial effort in evaluating and continuing to track the requirements of each state.
the adviser registration form.\textsuperscript{336} In discussing its recommended changes of Part II, which contains the client disclosure requirements, the SEC stated, “Our experience over the 15 years since Uniform Form ADV was adopted has convinced us that we need a better approach to client disclosure.”\textsuperscript{337} Specific problems with the old approach include: technically accurate but misleading disclosures, the need for clients to draw sophisticated inferences from reported facts, a lack of information about the advisers themselves, and insufficient updating requirements.\textsuperscript{338}

The SEC’s suggested revisions of Part II of Form ADV turned out to be so controversial that the SEC deferred making any changes to Part II when it adopted the final rule.\textsuperscript{339} Critical commentary continued in 2001,\textsuperscript{340} and the SEC decided it would wait until a new Chairperson was in place before revisiting the issue.\textsuperscript{341} For present purposes, the point is not to consider the details of the final version of Part II of Form ADV. Instead, it is that the SEC has more than fifteen years of experience in regulating the disclosures that investment advisers make to clients and has made substantial efforts to improve the quality of those disclosures. The scope of the controversy associated with the SEC’s proposed revisions indicates the complexities inherent in this type of disclosure. Once the SEC finally resolves the content and form of investment adviser reporting outside of the benefit plan context, it seems inefficient for Congress to write, and the DOL to interpret and enforce, separate standards for disclosure when advice is provided regarding benefit plan assets. In the committee report on RSAA, the Committee on Education and Workforce finally acknowledged, albeit indirectly, the potential for inter-agency problems on disclosure. The report states: “The disclosure requirements are intended to be consistent with those required under applicable securities laws. Accordingly, it is intended that the disclosure provisions be construed in a manner that assures consistency between the statutory exemption and existing securities laws, ...”\textsuperscript{342} As noted by the minority, however, this is the first and only

\textsuperscript{336} Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV, Advisers Act Release No. IA-1862, 72 S.E.C. Docket 200 (Apr. 5, 2000).

\textsuperscript{337} Id.

\textsuperscript{338} Id.


\textsuperscript{340} Investment Advisers: ICAA Recommends Major Modifications to SEC’s Proposed Adviser Registration Form, Sec. L. Daily (BNA) (May 30, 2001).

\textsuperscript{341} Investment Advisers: SEC Staff Probes Online Advisers for Unregistered Investment Companies, Sec. L. Daily (BNA) (Mar. 27, 2001).

reference to an important issue that was never discussed in committee. Reconciling this guidance with the separate requirement that advisers also comply with the securities laws' disclosure provisions undoubtedly will be a problem for the relevant agencies and the courts.

It is difficult to see why benefit plan investors would be so different from the population of investors that the SEC normally seeks to protect that the benefit plan investors would require a different level of disclosure. It also seems likely that investors would find it confusing to receive multiple disclosure statements from their investment adviser—one disclosure designed to meet the SEC standards and another to meet the DOL standards. Similarly, the extension of the prohibited transaction exemption to individuals who are not registered with a state or the SEC as an investment adviser further complicates the regulatory scheme. In sum, there would be significant economies in regulatory effort, in investment adviser compliance, and in investor understanding, if compliance with SEC standards also fulfills the requirements for an ERISA prohibited transaction exemption.

A second problem with RSAA arises when one considers the bill from the perspective of employers who sponsor benefit plans. RSAA provides employers with two types of protection from liability. First, it specifies that an employer that provides investment advice, directly or indirectly, will not be "treated as failing to meet the requirements of [Part 4 of ERISA, which contains the fiduciary responsibility provisions] solely by reason of the provision of investment advice ...." This language appears to protect the employer from liability for causing the plan to engage in a prohibited transaction if it turns out that the fiduciary adviser does not meet RSAA's requirements. Second, RSAA confirms that an employer must meet ERISA's fiduciary requirements in the selection and monitoring of advisers. It does, however, provide some comfort to employers by clarifying that there is "no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of such advice."

As with disclosure, a balance needs to be achieved between protecting plan investors from investment advisers, who are subject only to limited oversight, and protecting employers from the fear of liability under monitoring standards that are too onerous or too vague. Exempting

343. Id. at 39.
344. Id. at 19.
347. Id. at § 2(g)(3)(B).
348. Id.
employers from all monitoring obligations so long as the employer has no actual knowledge of wrongdoing, as Professor Medill suggests, would inappropriately provide employers with an incentive to avoid any oversight, investigation, or involvement that might lead to knowledge of wrongdoing. On the other hand, RSAA may fail to provide sufficient protection for employers. Evaluating whether RSAA does, in fact, achieve the right balance must be done in the context of an employer's possible liability from providing investment advice.

As we have seen, the DOL has stated that when an employer engages an advice provider, the employer might be liable for co-fiduciary liability. That occurs if the employer fails to meet ERISA's prudence and exclusive benefit requirements or if it knowingly takes part in a fiduciary breach. It appears that RSAA intends to protect employers from this type of liability. But, if an employer knowingly takes some part, even in failing to correct, a fiduciary breach, then the employer should be held liable. Any other outcome would deprive plan investors of protection against intentional fiduciary wrongdoing. To the extent that RSAA eliminates this liability, it encourages employers to engage in intentional wrongful behavior.

The two types of potential employer liability that are more troubling are monitoring liability and loss of the section 404(c) protection. While RSAA exempts employers from having to monitor specific advice given to individual plan investors, it does require monitoring. It remains unclear what is expected of employers in this regard. Will they be expected to compare the returns on an adviser's average or general recommendations to market averages? That does not make sense given the individualized nature of advice. Will employers be expected to compare an adviser's recommendations to techniques "consistent with the modern finance literature," as suggested by Professor Grundfest? Such a standard is likely to result in a battle of academic experts in any disputed cases. In short, the criteria for monitoring is far more amorphous in this context than in the monitoring of other plan service providers whose results typically can be compared to plan policy requirements or market averages. The risk to employers of being found to have ineffectively monitored an investment adviser is that the employer might become liable for investment losses that result from poor advice. Given the ambiguity of the standards and the scope of the liability risk, many employers may choose not to test these

349. See Medill, supra note 26, at 82-83.
350. Supra Part III.B.2.
351. See supra text accompanying notes 157-59.
354. Grundfest Testimony, supra note 261.
waters. In addition, RSAA does not appear to insulate employers against the loss of the 404(c) protections. If an adviser’s breach is so egregious as to mean that plan investors did not exercise informed investment control, as required by 404(c), then the employer may be held liable for the plan investors’ investment selections. But, an employer cannot evaluate whether an adviser’s recommendations are exposing the employer to liability for noncompliance with 404(c) without monitoring the specific advice given to individual participants. Effectively, then, RSAA does not alleviate the necessity of an employer monitoring specific investment advice.

In sum, unless employers can become comfortable that they are able, with reasonable efforts, to meet their fiduciary obligations in monitoring the provision of investment advice, they will almost certainly be unwilling to retain entities to provide that advice. Similarly, if employers risk the loss of the 404(c) protections by providing investment advice through their plans, then the true risk is that the employers may become liable for poor advice. If employers remain unwilling to provide, or arrange for the provision of, investment advice, then such advice will remain unavailable to the vast majority of benefit plan investors.

Finally, RSAA does not explicitly address the availability of remedies for benefit plan investors who receive inappropriate investment advice. The committee report indicates that RSAA’s amendment to ERISA would not affect existing state securities law. This, however, ignores the probable application of ERISA preemption to state common law, which often provides the basis for investor claims. Furthermore, the scope of available remedies under ERISA is currently so ambiguous that it is not clear whether plan investors might be left with inadequate remedies against fraudulent or negligent advisers. If so, the net result will be (1) a failure to establish proper economic incentives for investment advisers to provide appropriate advice; (2) plan investors who experience investment losses due to inappropriate advice but who are unable to recover for those losses; and (3) pressure on the courts, the relevant administrative agencies, and Congress to provide some measure of relief from the horror stories that are sure to occur.

355. See supra text accompanying notes 160-61.
356. H.R. REP. NO. 107-262, at 16 (2001) (“The Committee intends existing state and federal law to continue to govern the qualifications and actions of the entities subject to the exemption. . . .”).
357. Supra text accompanying notes 273-88.
358. Compare H.R. REP. NO. 107-262, at 15 (stating the majority’s position that ERISA’s original legislative history called for “the full range of legal and equitable remedies”), with id. at 41-43 (stating the minority’s position that, in spite of the wording in past legislative history, the jurisprudence has looked to the statutory text and significantly constrained the availability of ERISA remedies). See supra text accompanying notes 173-78 & 273-89.
VI.
A PROPOSAL FOR A NONEXCLUSIVE SAFE HARBOR

So long as employers remain unwilling to provide investment advice through the benefit plans they sponsor, many plan investors will likely lack access to investment advice. Currently, employers face the specter of significant liability resulting from ill-defined obligations. In this Part, I suggest that a nonexclusive safe harbor would provide appropriate protections to employers while also balancing the interests of plan investors.

A properly configured safe harbor would provide employers with certainty in limiting liability exposure associated with a program of investment advice. At the same time, the use of a nonexclusive safe harbor would provide employers who are willing to accept increased liability risk with flexibility in configuring advice programs. Furthermore, the safe harbor should focus on the selection and monitoring of investment advisers. From the employers’ perspective, those are the actions that currently pose the most uncertainty, both in terms of obligation and risk. From the plan investors’ perspective, the integrity and skill of the advice provider will be critical in determining the value of the advice. Finally, in the long term, mechanisms that enhance regulatory efficiency and the professionalism of advice will benefit the advisory industry.

The goals to be met by a safe harbor must be drawn from these considerations. A successful safe harbor will provide the following: (a) increased certainty of obligation and the opportunity for decreased liability for employers that sponsor benefit plans; (b) protections for plan investors against fraud and incompetence on the part of advisers; and (c) efficiency in regulatory oversight for investment advisers.

To accomplish these objectives, I propose a nonexclusive safe harbor that would provide employers with an exemption from liability for ERISA’s fiduciary selection and monitoring requirements, as well as from 404(c) noncompliance, so long as the following requirements are met. First, the plan must offer at least two choices of investment advisory firms, and at least one of the choices must qualify as an independent adviser. Second, the plan fiduciary must possess a good faith belief based upon a reasonable investigation that every investment advisory firm providing services through the plan is registered as an investment adviser with the SEC at the time of selection. Third, the plan fiduciary must undertake an annual review sufficient to maintain a good faith belief that each investment advisory firm providing advice to plan investors remains registered with the SEC.

359. The current definition of independence used for purposes of ERISA’s prohibited transactions requirements may be retained for this purpose.
The requirement that each benefit plan offer at least two investment advisers will ensure that plan investors have some choice in the selection of an investment adviser. Establishing a competitive market for advisers within plans should enhance the quality of advice. The requirement that at least one advisory firm be independent also should militate to increase the quality of advice given by both independent and related advisers. The potential for competition from related advisers will provide incentives for independent advisers to become as knowledgeable as related advisers about a plan’s investment alternatives. The presence of independent advisers should serve as a check on the self-interest of related advisers.

Requiring registration with the SEC in order to qualify for the safe harbor is probably the most controversial portion of this proposal. The requirement of federal level registration will exclude from the safe harbor all firms that do not have national practices and have less than $25 million under advisement. While the requirement will certainly disadvantage small advisory firms, the recommendation is important for three reasons. First, once employers comply with the safe harbor, they will largely be exempt from liability for self-interested or inappropriate investment advice. It is, therefore, critical that advisory firms qualified for selection under the safe harbor possess the internal controls to discourage fraud and other problematic behaviors related to the provision of investment advice. Second, given the general lack of any significant credentialing requirement for investment advisers, it is important that the safe harbor exclude wholly incompetent advisory firms. In order to register at the federal level, advisers must have either a national practice or $25 million under management. In each of those circumstances, the adviser has at least established some credibility in the marketplace. Third, advisory firms must have the financial resources to meet any liability the firms might face as a result of the provision of self-interested or inappropriate investment advice. It is rational to believe that firms with a national practice or with at least $25 million under management are more likely than smaller, more local firms to have sufficient financial assets available to fulfill a significant judgment of liability.

Admittedly, in the immediate term, federal registration alone will not necessarily ensure that every investment advisory firm meets these three criteria. Potential liability and market forces, however, should provide incentives for advisory firms to provide professional and honest advice that enhances plan investors’ returns. At the same time, the exclusion of small advisory firms from the safe harbor serves some significant purposes. Consider the situation of the small business owner whose cousin has been struggling professionally in a variety of careers and now decides to open a financial planning and advisory practice. Though the cousin faces few barriers to entry in the financial advisory industry, the small business owner cannot provide the cousin with a ready-made clientele of plan investors and


still receive the protection of the safe harbor. Given the nonexclusive nature of the safe harbor, however, the business owner could still select the cousin as the plan investors' advice provider, consistent with current law. In that case, the small business owner would accept the risk associated with the selection of the cousin and the monitoring of her advice.

The example is a narrow and simple one, but avoiding this type of situation is a serious concern. In many states, there are few constraints on the ability of any individual to open an advisory practice. The low barriers to entry very well may attract incompetent or unethical individuals, especially if the market expands to include the more than $1.7 trillion held in 401(k) accounts. It follows that potential advice providers may be a friend, relative, business associate, fellow union member, or other affinity group member of the employer who selects investment advisers for an employee benefit plan. The risk to plan investors increases if employers are able to select inexperienced planners and still receive the protections of the safe harbor. Some screening mechanism is necessary, and while federal registration is not the only possible mechanism, it is one that will reach this concern.360

The nonexclusive safe harbor approach offers a number of advantages to employers that sponsor benefit plans. First, it provides clear standards for the selection and review process. This will avoid RSAA's problem of ambiguous obligation, which would leave employers with fiduciary responsibility in selecting and monitoring advisers, yet would fail to provide any guidance on how to meet those responsibilities. Second, employers can easily ascertain whether specific advisory candidates meet the safe harbor's eligibility requirements. This will decrease the transaction costs in selecting and monitoring advisers. Finally, the existence of specific standards provides employers and plan fiduciaries with clear justification for rejecting many incompetent advisers, whether those advisers are relatives of company officers, friends of union officials, promoted by a supplier company, or are otherwise well positioned, but poorly qualified.

From a disclosure standpoint, I propose that all advisers to plan investors be required to meet the SEC's standards for investment adviser disclosure as reflected in Form ADV. As discussed above, the SEC has considerable expertise in the development of advisory disclosure obligations. It is difficult to see why a plan investor should receive different types of disclosures for investments made through a benefit plan than the same investor would receive for investment advice on non-plan investments. From the perspective of regulatory efficiency and advisory compliance, a single disclosure system should minimize costs and

360. To the extent the investment advisory industry is able to develop appropriate credentialing and self-regulatory practices, the safe harbor could be expanded to include individuals who meet the industry standards.
maximize compliance.

The last issue to be considered is that of appropriate remedies for plan investors. ERISA needs to clearly provide "make-whole" relief for plan investors who experience losses as a result of an investment adviser's breach of its fiduciary duties. That relief should not be contingent upon the continuing existence of a benefit plan, the status of a former plan investor's plan account, or any other artificial limitations. The need for legislation on this point will depend upon the Supreme Court's decision on the scope of ERISA remedies in Great-West Life & Annuity Insurance Co. v. Knudson.361 The availability of exemplary damages is a much more difficult question, but some level of capped exemplary damages may be appropriate in cases of egregious wrongdoing.362 In order to protect employers who choose to make investment advice available through the services of a professional provider of that advice, the statutory liability should be clearly limited to the direct provider of the advice and should not extend to the employer so long as the employer has met the terms of the safe harbor and does not intentionally aid in a fiduciary breach.

VII.
CONCLUSION

Plan investors need investment advice, and legislative changes must be made to remove the current roadblocks that discourage employers from providing that advice. At the same time, it is important to ensure that plan investors are well informed not only about their investment choices, but also about the provider of investment advice. Any legislative changes that are made need to consider the issues from the perspective of all three relevant parties: employers, investment advisers, and plan investors. Unless employers are protected sufficiently from liability, they will refuse to offer investment advice directly or indirectly through the benefit plans they sponsor. Unless investment advisers receive sufficient relief from ERISA's prohibited transactions requirements, many advisers will be precluded from offering advice through benefit plans even if employers wish to engage advisers to provide such advice. But, while both advisers and employers require reasonable protections, those protections must be balanced with the


362. In 1996 a task force established by the NASD recommended capping punitive damages in arbitrations at the lesser of two times the compensatory damages or $750,000. David S. Ruder, Securities Arbitration in the Public Interest: The Role of Punitive Damages, 92 NW. U. L. REV. 69, 69 (1997).
needs of benefit plan investors. After all, accessibility to investment advice may exacerbate the challenge of retirement asset accumulation if investment advisers provide incompetent, self-interested, or fraudulent advice.