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# Fiduciary implications: Using re-enrollment to improve target date fund adoption

A white paper  
by  
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C. Frederick Reish and Bruce Ashton are partners in the Employee Benefits & Executive Compensation Practice Group of Drinker Biddle & Reath LLP. The firm has been compensated by J.P. Morgan Asset Management to provide advice and to give an opinion regarding the ERISA fiduciary implications of using a re-enrollment strategy when adding target date funds to an investment line up.

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## Introduction

An assumption underlying most 401(k) plans is that participants know how to invest their funds. Based on that assumption, most plan sponsors offer their participants an array of prudently selected mutual funds, provide investment education and conclude that they have fulfilled their responsibilities. Unfortunately, the assumption isn't correct – as either a matter of fact or a matter of law.<sup>1</sup>

What plan sponsors<sup>2</sup> don't realize is that they are responsible – and thus potentially liable – for participant investing, even when the plan has delegated that authority to the participants and they have exercised control over the investments. (By “participant investing,” we mean the allocation of the money in a participant's account among the plan's investment options.) There are a few exceptions (or “safe harbors”) that we will discuss later. But, unless a plan satisfies these exceptions, plan sponsors and their fiduciaries (such as the committee members) are still on the legal “hook.”

The marketplace has developed solutions for this problem, including participant investment advice and professionally designed portfolios, such as managed accounts, risk-based portfolios and target date funds (TDFs). The last of these, TDFs, has proven to be the most popular with both fiduciaries and participants.<sup>3</sup> When TDFs are coupled with an ERISA<sup>4</sup> safe harbor, plan sponsors and fiduciaries will be shielded from potential liability for participant investing.

Plan sponsors and fiduciaries have a number of ways to introduce TDFs into a plan:

- Add them to the plan's investment line-up and allow participants to choose for themselves
- Use the mapping or investment reset process to move the funds from existing investments to the TDFs
- Adopt a “re-enrollment” strategy to take advantage of the ERISA safe harbor for default investments under the qualified default investment alternative (QDIA) rules.

In light of the benefit to participants of using TDFs and the fiduciary protections offered by the QDIA rules (discussed later in this white paper), fiduciaries are well advised to add TDFs to the investment line-up and to take steps to cause as many participants as possible to be invested in those funds. One of the most effective ways of doing so is through the “re-enrollment” process – because it enables fiduciaries to rely on the default investing rules that provide a fiduciary safe harbor from liability for imprudent participant investing. (Re-enrollment refers to a process where participants may re-direct the investment of their plan accounts or, alternatively, be defaulted into a QDIA.)

In the remainder of this white paper, we discuss legal principles and industry practices, and then illustrate the advantages of using the re-enrollment process to provide the greatest protection for plan fiduciaries.

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## Discussion of legal principles and industry practices

This section discusses the fiduciary obligations of plan sponsors and fiduciaries for plan investments, the options for improving participant investing outcomes and the QDIA safe harbor, with emphasis on the concept of re-enrollment.

### **Fiduciary obligation for plan investments**

Under ERISA, fiduciaries have the obligation to act prudently in managing a plan's investments.<sup>5</sup> This includes both (i) the prudent selection and monitoring of the investment options offered by the plan and (ii) the investing of participant accounts.<sup>6</sup> The latter obligation applies to accounts of participants who fail to direct the investment of their accounts and to accounts of participants who direct their investments, but the plan fails to comply with all of the 404(c) conditions (explained below). That is, fiduciaries may be responsible for both imprudent participant investing as well as the investment of the accounts of participants who fail to direct their investments.

In addition, fiduciaries have the duty to operate the plan for the exclusive purpose of providing retirement benefits.<sup>7</sup> In participant-directed plans, fiduciaries face a dilemma: plan assets, including participant accounts, must be invested according to generally accepted investment theories, such as modern portfolio theory,<sup>8</sup> and in a manner that meets the needs of the participant and is designed to avoid large losses. In other words, the participant accounts must be prudently invested; but, for the most part, participants don't have the ability to do this....because of lack of investment expertise, time or interest. As a result, fiduciaries may turn to professionally designed investment options, including managed accounts, risk-based investments or age-based investments (target date funds). For purposes of this discussion, we assume that the fiduciaries have selected a TDF suite.

### **Fiduciary safe harbors**

To provide a context for the discussion that follows, we should review the fiduciary safe harbors for participant investing:

1. The first is found in ERISA Section 404(c).<sup>9</sup> Under this section, if a plan complies with a number of disclosure and other requirements, fiduciaries are relieved of liability for investment decisions made by the participants. In our experience, based on audits we have conducted of a large number of plans, few actually comply with all of the conditions; as a result, the fiduciaries remain responsible for the investing decisions made by the participants.<sup>10</sup>
2. The second arises when an investment advisor (a bank, insurance company or registered investment advisor) is given discretion over the management of investments.<sup>11</sup> In the context of participant investing, to obtain this protection, fiduciaries must select an investment advisor who, if used by a participant, is given discretionary control of the participant's account and manages it on an ongoing basis.
3. The third is available when a participant fails to exercise control over his account – that is, when the participant “defaults.” In that situation, the fiduciaries have an obligation to prudently invest the participant's account. For this safe harbor to apply, the plan must comply with specific requirements.<sup>12</sup> They include the selection of an appropriate default investment option, referred to as a “qualified default investment alternative” or QDIA. Once these are met, the defaulting participant is deemed to have exercised control over his account, so that the fiduciaries are not responsible for whether the investment is otherwise appropriate for the participant (e.g., whether the QDIA suffered losses compared to the result of a risk-free investment). The key to obtaining this safe harbor, however, is that there be a default by the participant – which can occur in a number of ways. We will discuss this safe harbor in more detail later in this paper.

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## **Investing participant accounts in professionally designed investments**

What can fiduciaries do to increase the likelihood that participant accounts are invested in one of these options?

One approach is to include professionally designed investments as core options, with the goal that participants will select them on their own. This may be more effective than offering only individual asset class investment options, but the experience is not encouraging – particularly for participants who have already directed their investments. Several studies reveal that participants tend to stick with their initial investment choices and, due to inertia, do not later modify their investment elections, even if more choices become available.<sup>13</sup> Based on the experience of at least one provider, this is also the case when participants are defaulted into an investment option.<sup>14</sup>

The fiduciary protection can be expanded if the plan complies with the requirements of the regulation under ERISA section 404(c)(1), which provides that fiduciaries are not responsible for participant investment decisions if they are given the opportunity to exercise control over their accounts and actually do so. In order for this protection to apply, the plan must be a “404(c) plan”; that is, it must offer a “broad range” of investment options and meet approximately 20 disclosure requirements.<sup>15</sup> As previously noted, many plans have not satisfied these requirements, making this safe harbor somewhat illusory.

### **The mapping or investment reset approach**

Another approach is to “map” or “reset” all the participant accounts into age-appropriate TDFs.<sup>16</sup> This strategy is commonly known as “investment reset.” Studies have shown that a substantial percentage of participants will leave their funds in the TDF once this occurs. But there are limitations on the protections afforded by the mapping approach because, at best, it is a limited safe harbor. That is because, in order for the mapping protection to be available, the plan must be a 404(c) plan before the mapping occurs. And there are other requirements that make the mapping protection of questionable value in moving funds into TDFs.

Mapping is sometimes used when a plan (i) changes providers (and thus investment options), (ii) changes investment options without changing the provider or (iii) there is a fiduciary decision to take control over participant accounts and move the funds to age-appropriate TDFs. But in order for the limited safe harbor to apply, the fiduciaries must, among other things, move the participants’ funds to a “reasonably similar” investment.<sup>17</sup> While the Department of Labor has not issued guidance on the meaning of “reasonably similar,” it seems certain that moving from a money market account or stable value fund or even a risk-based investment to TDFs will not satisfy this requirement; other than another TDF, no other investment is “reasonably similar” to a target date fund, so this approach is not a viable option.

Even though mapping or resetting all participant accounts to TDFs would be helpful in increasing the number of participants investing in TDFs, it will not provide the protections afforded by an ERISA fiduciary safe harbor. This is because the decision to map a participant’s funds to a TDF would not be viewed as participant direction, but as a fiduciary decision for which there is no safe harbor. Having said that, most – if not all – TDFs are based on the investing theories that underlie ERISA’s fiduciary rules, such as modern portfolio theory and strategic asset allocation. Nevertheless, the mapping or investment reset approach does not provide the fiduciary protections afforded under the QDIA default approach.

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## The default approach

ERISA provides a safe harbor for fiduciaries if participants are given the opportunity to invest their accounts but fail, for whatever reason, to do so.<sup>18</sup> The reason for this safe harbor is to improve investing of defaulted participant accounts.<sup>19</sup> If fiduciaries comply with the QDIA requirements, they will not be liable for any loss that occurs as a result of the default investments, though they remain responsible for the prudent selection and monitoring of the qualified default investment alternative itself. In essence, once a plan sponsor has identified the type of QDIA that will be used by the plan, the fiduciary must engage in a prudent process to select the particular investment fund, portfolio or managed account service and monitor that selection to ensure that it remains a prudent choice, but will not be liable for how defaulted participants are invested.<sup>20</sup>

While there are several requirements that must be met for the safe harbor to be available, the key elements are that there be a default and that the participant's account be invested in a QDIA.<sup>21</sup> There are three types of QDIAs: a managed account service, a balanced (risk-based) portfolio or a TDF suite.

How does a "default" – as defined for QDIA purposes – occur? There are several ways:

- a newly eligible employee enrolls in a plan but fails to elect how his account is invested;
- an employee is automatically enrolled in a plan and fails to make an investment election; or
- a default occurs through a process called "re-enrollment" (described in the next section).

## Re-enrollment

Re-enrollment allows fiduciaries to exercise a degree of control over participant investing and, at the same time, enjoy the protection of the QDIA safe harbor. The concept applies to participants who have previously made an affirmative election about how to invest their accounts. In many cases, it may be beneficial for the participants, and thus for the plan sponsor, to utilize the re-enrollment process to improve the quality of participant investing. Because of participant inertia, even if new TDFs are made available in a plan, most participants who have already directed their investments are unlikely to act to obtain the benefits of improved investing through the TDFs. Thus, for fiduciaries who want to improve the quality of the investing of current participants, re-enrollment, together with the QDIA rules, affords that opportunity.

By going through a re-enrollment process, QDIA safe harbor protection will be available to fiduciaries if they provide the participants who have previously made affirmative investment elections with the opportunity to make a new investment decision or, if not, to be defaulted into a QDIA. In other words, if participants are defaulted into a QDIA after re-enrollment and the QDIA conditions are satisfied, the fiduciaries will be entitled to the QDIA safe harbor protection. While this conclusion is not directly addressed in the QDIA regulation for plans remaining with the same provider, we have reached this conclusion based on certain provisions in the regulation, together with expansive language in the preamble to the regulation and statements by DOL officials.<sup>22</sup>

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First, we consider the expansive language in the preamble. There, the DOL explains that if the plan sponsor cannot tell whether participants were defaulted into the plan's prior default investment or affirmatively elected that investment, it may default participants into a QDIA, including those who affirmatively selected that investment.<sup>23</sup> In the preamble, the DOL also discusses several situations in which a participant who previously made an affirmative investment election may be defaulted into a QDIA. Under the heading "Application of the Final Rule to Circumstances Other Than Automatic Enrollment," the DOL states:

The failure of a participant or beneficiary to provide investment direction following the elimination of an investment alternative or a change in service provider, the failure of a participant or beneficiary to provide investment instruction following a rollover from another plan, and **any other failure of a participant to provide investment instruction. Whenever a participant or beneficiary has the opportunity to direct the investment of assets in his or her account, but does not direct the investment of such assets**, plan fiduciaries may avail themselves of the relief provided by this final regulation, so long as all of its conditions have been satisfied. [Emphasis added.]<sup>24</sup>

The preamble makes it clear that there are at least four situations in which a participant who previously made an affirmative investment election may nevertheless be defaulted into a QDIA:

1. Where the plan sponsor is unable to determine whether participants were defaulted into the plan's default investment or affirmatively selected it;
2. When a participant fails to provide investment direction after an elimination of an investment alternative;
3. When a participant fails to provide investment direction after a change in a service provider; and
4. The "catch-all," where there is *any other failure* of a participant to provide investment instruction.

The catch-all language, read in conjunction with the quote above ("whenever a participant or beneficiary has the opportunity to direct the investment ...but does not... the fiduciaries may avail themselves of the relief provided by this final regulation"), leads to the conclusion that plan sponsors may be entitled to the safe harbor protections afforded by the QDIA regulation in any situation where a participant fails to provide investment instructions, including re-enrollment (so long as the plan otherwise satisfies the conditions in the regulation).

This interpretation is further supported by statements made by one of the primary drafters of the QDIA regulation, as reflected by her response to a question at a benefits conference:

Question: Is it okay to use a QDIA with a fresh start approach (i.e., you are not changing fund families but everyone is required to make a new affirmative election; if they don't, it goes to the QDIA, assume all notice and other requirements are satisfied)?

Answer: **I think the short answer is yes.** The scope of our rule would cover this situation. **I've heard this referred to as re-enrolling...**where you sort of say we're going to start over here – we've maybe, perhaps, changed our investment line-up based on the reg, we've picked new products, gone through a prudence analysis, we think this is a good way to go and we kind of want to reach out to everybody again and have them re-direct their investments or make sure they are still comfortable where they are...if they don't get back to you we are going to put you into the QDIA. [Emphasis added.]<sup>25</sup>

As a result, re-enrollment is a viable option for improving participant investing through the use of TDFs and at the same time providing the fiduciaries with the QDIA safe harbor protection.

The next section of this white paper discusses the re-enrollment process and the advantages it provides to fiduciaries.

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## Advantages of re-enrollment

In light of the fiduciary responsibility for managing plan investments and for participant investing, fiduciaries are well advised to consider the fiduciary protections, especially the safe harbors, offered by ERISA. Adding TDFs to a plan's investment line-up helps by providing a professionally designed alternative for participants to choose; but this alone does not provide fiduciary safe harbor protection. Further, based on industry experience, only a limited number of participants, and very few of those who previously decided how to invest their accounts, opt to use the TDFs. Using the mapping or investment reset strategy may help, although the fiduciary protection is limited because of the requirements that the plan already be a 404(c) plan and that the new investment be "reasonably similar" to the one it replaces.

The QDIA safe harbor is especially valuable because of the simplicity of complying and the breadth of the protection. The fiduciaries' responsibility extends to the prudent selection and monitoring of the investment vehicle, but not to whether the TDF is appropriate for the particular participant. Absent a re-enrollment process, however, the QDIA safe harbor protection may not cover many participants and, therefore, may afford only limited protection to the fiduciaries. Consider the following example:

### **Add target date funds to investment menu**

Apex Industries sponsors a 401(k) plan. Over time, the fiduciaries have added new investments, including a line-up of TDFs. Reflecting the well-documented inertia of participants, even though TDFs were added to the plan, most of the existing participants left their funds invested in the same manner as they selected at enrollment. Unfortunately and consistent with industry data, most were poorly invested and not well diversified.

As new participants enter the plan, some select the TDFs and some fail to designate investments and are defaulted into TDFs as QDIAs. As a result, the fiduciaries have ERISA safe harbor protection, but only for the limited number of participants who were defaulted into the TDFs.

Automatic enrollment may offer a slightly better alternative in that it may increase the number of participants who are defaulted into a TDF. For example:

### **Add target date funds along with automatic enrollment**

Baker Enterprises is a rapidly growing firm specializing in the environmental clean-up business. Baker's 401(k) plan provides for automatic enrollment, and the plan committee has selected a suite of TDFs as the QDIA for the plan. Most of the automatically enrolled participants default and are invested in the TDFs.

Unfortunately, despite a robust education campaign, few of the pre-existing participants elected to move their funds to the TDFs. As a result, while the newly defaulted participants are in TDFs (and the fiduciaries have the QDIA safe harbor), many of the pre-existing participants continue to be poorly invested, and the fiduciaries are exposed to potential claims.

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Now, consider the example of changing providers and using the investment reset approach to move participant funds into the TDFs. (Note that this approach is different from combining a change in providers with a re-enrollment process, discussed in the example that follows this one.)

**Use investment reset approach while converting to a new provider**

Consolidated Corporation decides to change providers. As a part of the conversion, the committee decides to transfer all participant accounts into age-appropriate TDFs. This approach will be used for participants who directed the investment of their accounts and for those who previously defaulted and have their funds invested in an existing default investment.

With respect to the latter group – those who previously defaulted – the fiduciaries will obtain the safe harbor QDIA protection. With respect to the former group – those who previously directed their accounts – they will not. While the decision to move the assets of this group into TDFs may be a prudent fiduciary decision, it does not afford the fiduciaries any safe harbor protection because the fiduciaries will be considered to have exercised control over the accounts of non-defaulting participants and thus remain responsible for the fiduciary decision on how to invest their assets.

Changing providers, combined with a re-enrollment, may be helpful in improving participant investing and provide significant safe harbor protection to the fiduciaries. The following illustrates the concept:

**Engage in re-enrollment while converting to a new provider**

Delta Company decides to change providers and decides that, as a part of the conversion, all participants will be defaulted into TDF QDIAs unless they opt out or actively make a new investment election. During the conversion, 70% of the participants do not submit new investment elections and, as a result, are defaulted into QDIAs (that is, age-appropriate TDFs). (Based on the experience of one provider, the default rate typically ranges between 65% and 85% on a plan conversion.) As a result, the committee members are entitled to the fiduciary protection for the investing of 70% of the participants' accounts.

If the committee for the Delta Company 401(k) plan desired a similar level of protection but was satisfied with the plan's provider, they could opt to engage in a re-enrollment process while staying with the current provider as well.

**Engage in re-enrollment while staying with current provider**

To implement that process, once a prudently selected TDF suite has been added to the plan, the committee would determine a re-enrollment date (that is, an effective date when accounts would be re-invested according to new participant instructions or, if none, to the default investment – in this case, an age-appropriate TDF). Then, re-enrollment notices, along with information about the TDFs and other investments, would be given to all affected participants.

COMMENT: The initial notice is commonly given about 60 days before the re-enrollment date. Then, reminder notices are often given 30 days and again 7 to 10 days before that date. The first notice is to satisfy legal requirements,<sup>26</sup> and the subsequent notices are to ensure that no participant is inadvertently defaulted.

On the effective date, the participant instructions are implemented for those who gave new directions; for those who did not, the accounts are placed (or “defaulted”) into the QDIAs. Based on our experience, 50% to 80% of the participants will default, resulting in significant fiduciary protections for the committee members.

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## Conclusion

Fiduciaries are legally responsible (1) for prudently selecting and monitoring the investments offered under the plan and (2) for how their participants use those investments. For new participants, plan sponsors can obtain fiduciary protections with respect to the participants who are defaulted into QDIAs. For existing participants, fiduciaries – such as plan committee members – can obtain the safe harbor protection by utilizing the re-enrollment strategy either when going through a plan conversion to a new provider or while staying with the existing provider. In both scenarios, participants must be given the opportunity to make a new investment election or they will be defaulted into the plan's QDIA.

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## Endnotes

- <sup>1</sup> See, e.g., Gary R. Mottola and Stephen P. Utkus, “Red, Yellow, and Green: Measuring the Quality of 401(k) Portfolio Choices,” (August 2007, prepared for inclusion in “Improving the Effectiveness of Financial Education and Saving Programs,” published by University of Chicago Press; “The Financial Engines National 401(k) Evaluation,” Financial Engines (2010), which points out that “only about one third of participants (32%) have efficient portfolios with the appropriate amount of risk....”
- <sup>2</sup> Throughout this white paper, we refer to the responsible plan fiduciary to a plan as the plan sponsor. This is based on the fact that in most cases, the plan sponsor undertakes this role rather than delegating the duties and responsibilities to third parties. While a committee may be established to carry out the fiduciary duties, the plan sponsor – the employer—has the ultimate responsibility.
- <sup>3</sup> See, e.g., Jean A. Young, “Target Date Fund Adoption in 2010,” The Vanguard Group, Inc. (March 2011).
- <sup>4</sup> The Employee Retirement Income Security Act of 1974, as amended.
- <sup>5</sup> ERISA §404(a)(1)(B) and ERISA Regulation §2550.404a-1.
- <sup>6</sup> ERISA §409(a). See also, Department of Labor’s Amicus Brief in *Hecker v. Deere*: “It is the fiduciary’s responsibility to choose investment options in a manner consistent with the core fiduciary duties of prudence and loyalty. If it has done so, section 404(c) relieves the fiduciary from responsibility for the participants’ exercise of authority over their own accounts. If, however, the funds offered to the participants were imprudently selected or monitored, the fiduciary retains liability for the losses attributable to the fiduciary’s own imprudence.”
- <sup>7</sup> ERISA §404(a)(1)(A).
- <sup>8</sup> See, e.g., the preamble to the DOL’s final regulation on qualified default investment alternatives, 72 FR 60451, 60461 (2007) (the “QDIA Regulation”).
- <sup>9</sup> Technically, this is not a safe harbor but a defense to a claim of breach of fiduciary duty. Since it is commonly referred to as a “safe harbor,” however (except by the Department of Labor), we have elected to use that term here as well.
- <sup>10</sup> See ERISA Regulation §2550.404a-5.
- <sup>11</sup> See ERISA §§3(38), 402(c)(3) and 405(d).
- <sup>12</sup> ERISA §404(c)(5).
- <sup>13</sup> Preamble to QDIA Regulation, 72 FR 60475, FN 40. Cites to studies showing that “Participants have been found to exhibit inertia in their investment choices, being slow to rebalance or to respond to changes in the investment options offered to them (see, e.g., Olivia S. Mitchell, Gary R. Mottola, Stephen P. Utkus, and Takeshi Yamaguchi, *The Inattentive Participant: Portfolio Trading Behavior in 401(k) Plans*, Pension Research Council Working Paper 2006-5 (2006) at 16, which finds a lack of rebalancing; see also Jeffrey R. Brown and Scott Weisbenner, *Individual Account Investment Options and Portfolio Choice: Behavioral Lessons from 401(k) Plans* (Dec. 2004).”
- <sup>14</sup> Based on a study of 92 mid- and large-size plan conversions, T. Rowe Price determined that approximately 81% of the participants were defaulted into TDFs on conversion to a new provider. After three months, 96% of these participants remained invested in the TDFs and after 18 months, the percentage remained at about 93.8% (we refer to this as the rate of persistency). While similar statistics are not available for re-enrollments, we believe the persistency rates could be somewhat lower (inasmuch as, in the re-enrollment context, participants have the option of leaving their accounts invested as they previously directed, whereas this option is not available in a conversion); but at least one provider reported that after one year “87% of participants maintained a full or partial position in the target-date approach and that re-enrollment had boosted plan diversification substantially.” See “Research report: Reenrollment and target-date funds: A case study in portfolio reconstruction,” Vanguard 09/22/09.
- <sup>15</sup> ERISA Regulation 2550.404c-1(b)(3) provides that this requirement is met only if the investment options offered by the plan offer the participant an opportunity to “Materially affect the potential return on amounts in his individual account with respect to which he is permitted to exercise control and the degree of risk to which such amounts are subject; [and] Choose from at least three investment alternatives: (1) Each of which is diversified; (2) Each of which has materially different risk and return characteristics; (3) Which in the aggregate enable the participant or beneficiary by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary; and (4) Each of which when combined with investments in the other alternatives tends to minimize through diversification the overall risk of a participant’s or beneficiary’s portfolio....”
- <sup>16</sup> ERISA §404(c)(4).

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<sup>17</sup> The section provides that “the stated characteristics of the remaining or new investment options ..., including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.” ERISA Section 404(c)(4)(A)(ii).

<sup>18</sup> ERISA §404(c)(5)

<sup>19</sup> Preamble to QDIA Regulation, 72 FR 60463

<sup>20</sup> Preamble to QDIA Regulation, 72 FR 60453 and ERISA Regulation §2550.404c-5(b)(1) and (2).

<sup>21</sup> ERISA Regulation §2550.404c-5 provides six requirements: (1) assets are invested in a qualified default investment alternative; (2) the participant had the opportunity to direct the investment of the assets in his account but did not do so; (3) the participant is furnished a notice regarding his right to direct his account, his right to move his account out of the QDIA and the other investment options available under the plan; (4) the participant receives certain information regarding the features of the QDIA; (5) the participant is given the right to transfer out of the QDIA to any other investment alternative available under the plan with appropriate frequency and without penalty; and (6) the plan offers a broad range of investment alternatives.

<sup>22</sup> This conclusion is supported in a recent case, *Bidwell v. University Medical Center, Inc.*, 2011 WL 995944 (W.D.Ky.).

<sup>23</sup> Although not discussed in the preamble, presumably if the plan sponsor knows that the participant made an election to invest in the fund used as the prior default investment, it cannot rely on this approach. That is, if the plan sponsor can tell whether the participant was defaulted or not, this approach is not available.

<sup>24</sup> Preamble to the QDIA Regulation, 71 FR 60453.

<sup>25</sup> Statement by Kristen Zarenko at the 2008 Los Angeles Benefit Conference Workshop 7, “QDIA Update” (January 25, 2008).

<sup>26</sup> ERISA Regulation §2550.404c-5(c)(3).

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## About C. Frederick Reish

**C. Frederick Reish** is a partner in the Drinker Biddle & Reath Employee Benefits & Executive Compensation Practice Group and Chair of the Financial Services ERISA Team. He has specialized in employee benefits law since 1973 and works with both private and public sector entities and their plans and fiduciaries; representation of plans, employers and fiduciaries before the governing agencies (e.g., the IRS and the DOL); consulting with banks, trust companies, insurance companies and mutual fund management companies on 401(k) investment products and issues related to plan investments; and representation of broker-dealers and registered investment advisers on issues related to fiduciary status and compliance, prohibited transactions and internal procedures.

Fred serves as a consultant on ERISA litigation and FINRA arbitration, with a focus on cases involving broker-dealers, registered investment advisers, financial service companies and other service providers. He also has been engaged to serve as an expert witness in state courts, federal courts and FINRA arbitration proceedings involving issues as diverse as fiduciary liability, fiduciary status of advisors, prohibited transactions, plan interpretation and bankruptcy issues for ERISA plans.

### Professional recognition and awards

Fred has received a number of awards for his contributions to benefits education, communication and service, including:

- In 2011, selection by *PLANSPONSOR* magazine as one of the 5 “Legends” of the retirement industry and with retirement advisors.
- The 2009 American Society of Pension Professionals & Actuaries (ASPPA)/Morningstar 401(k) Leadership Award for directly and positively influencing the ability of Americans to build successful retirements.
- Selection by *PLANSPONSOR* magazine as one of the 15 Legends in the development of retirement plans.
- Recognition by *401kWire* as the 401(k) Industry’s Most Influential Person for 2007 (and has, for every year of that survey, been in the top 10).
- The IRS Director’s Award and the IRS Commissioner’s Award for his contributions to employee benefits education.
- 2006 Lifetime Achievement Award from *PLANSPONSOR* magazine.
- The 2006 Lifetime Achievement Award from *Institutional Investor* for his contributions to the benefits community.
- The 2004 Eidson Founder’s Award from ASPPA for his significant contributions to that organization and to the benefits community.
- Recognition as one of “The Best Lawyers in America.”
- The Alumni Service Award from Arizona State University.

On behalf of ASPPA, he has co-authored amicus curiae briefs with the Supreme Court of the United States in the case of *Patterson v. Shumate* and with the Tax Court in the case of *Citrus Valley Estates v. Commissioner of Internal Revenue*.

### Publications

Fred has written four books and more than 350 articles on fiduciary responsibility, prohibited transactions, IRS and DOL audits and pension plan disputes. He authors a monthly column on 401(k) fiduciary responsibility for *PLANSPONSOR* magazine and has written a quarterly column on that subject for the *Journal of Pension Benefits*. Fred has authored or co-authored most of the IRS plan correction articles published by the *Journal of Taxation* and the *Journal of Pension Benefits*.

As an experienced lawyer on benefits matters, Fred is frequently quoted by both professional and public publications, including *The Wall Street Journal*, *Fortune*, *Forbes, Inc.*, *CFO Magazine*, *New York Times*, *Washington Post*, *Los Angeles Times*, *USA Today*, *Institutional Investor*, *PLANSPONSOR* and *Pensions & Investments*.

### Speaking engagements

Fred is a nationally known speaker on fiduciary responsibility, technical compliance matters and litigation issues. He has spoken at the annual conferences of the American Bar Association, the American Society of Pension Professionals and Actuaries, the Western Pension and Benefits Conference, the Enrolled Actuaries Conference, the International Foundation of Employee Benefit Plans and the National Institute of Pension Administrators.

### In general

Fred received a J.D. from the University of Arizona James E. Rogers College of Law and B.S. from Arizona State University.

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## About Bruce Ashton

**Bruce L. Ashton** is a partner in the Drinker Biddle & Reath Employee Benefits & Executive Compensation Practice Group. With more than 35 years of practice, Bruce has gained wide experience representing businesses in sophisticated business transactions and employee benefits matters. Bruce's practice focuses on all aspects of employee benefits issues, including representing public and private sector plans and their sponsors; negotiating the resolution of plan qualification issues under IRS remedial correction programs; advising and defending fiduciaries on their obligations and liabilities; structuring qualified plans, non-qualified deferred compensation arrangements and health care arrangements; and representing plan service providers (including RIAs, independent record-keepers, third-party administrators, broker-dealers and insurance companies) in fulfilling their obligations under ERISA. Combining his employee benefits and transactional expertise, Bruce is also active in the installation and funding of employee stock ownership plans (ESOPs).

Bruce served as president of the American Society of Pension Professionals and Actuaries (ASPPA) for the 2003-2004 term. From 1998 through 2002, he served as the co-chair of ASPPA's Government Affairs Committee and was a member of its board of directors from 1997 to 2007. He was a member of the Board of Directors of the American Academy of Actuaries during 2003-2004, was the president of the Western Pension & Benefits Conference Los Angeles Chapter from 2008-2009 and currently serves as a member of the leadership council of the National Tax Sheltered Accounts Association (NTSAA). He will serve as president of NTSAA during the 2013-2014 term.

He has been recognized as one of "The Best Lawyers in America" and as a "Super Lawyer" in Southern California. Bruce is listed in the California edition of *Who's Who Legal* and has been recognized by *401kWire* as one of the Most Influential People in the 401(k) Industry.

Bruce has co-authored four books on employee benefits issues and a quarterly column in the *Journal of Pension Benefits* on IRS remedial programs and is a frequent contributor to various tax and pension publications, including *Journal of Taxation*, *CCH Pension Plan Guide*, *Journal of Pension Benefits* and *The ASPPA Journal*. He is a frequent speaker on employee benefits issues ranging from fiduciary responsibility to ESOPs. Bruce is a regularly featured speaker at conferences of ASPPA, the Western Pension & Benefits Conference and various other organizations.

### **In general**

Bruce earned his J.D. from Southern Methodist University, where he was a member of the Order of the Coif, Phi Alpha Delta and a Roy R. Ray Scholar. He was a recipient of the Johnson, Bromberg, Leeds & Riggs Award and the Arthur Stedley Hansen Consulting Actuaries of Dallas Award. He was a member (1968-1970), note and comment editor (1969-1970) and acting index editor (1970) of the *Journal of Air Law & Commerce*. He received his B.A. from Rice University.

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C. Frederick Reish and Bruce Ashton are partners in the Drinker Biddle & Reath Employee Benefits & Executive Compensation Practice Group. The firm has been compensated by J.P. Morgan Asset Management to provide advice and to give an opinion regarding the ERISA fiduciary implications of using a re-enrollment strategy when adding target date funds to an investment line up.

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