

The background of the entire slide is a photograph of a business meeting. Several people are seated around a long white table in a modern office with large windows. The image is partially obscured by teal and yellow graphic overlays.

Webinar

*Using 401(k) Plan Committee Fiduciaries
to Minimize Your Fiduciary Responsibility*

**THURS, FEB 10
10:00AM PST**

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The image features a dark blue background with a large, light blue arc on the left side. The word "OPPENHEIMER" is written in a white, serif font, with the "O" being a large, stylized circle. A thin white horizontal line is positioned below the text. The entire logo is centered horizontally on the right side of the image.

OPPENHEIMER

401(k) Retirement Committee

*Understanding Your Fiduciary Roles,
Responsibilities and Risk*



FIDUCIARY TRAINING

Oppenheimer & Co. Inc. Retirement Services

Oppenheimer & Co. Inc.

Oppenheimer is a securities brokerage, investment advisory, and investment banking company wholly owned by Oppenheimer Holdings, Inc. Oppenheimer Holdings, Inc. is a publicly traded company whose Class A non-voting shares trade under the ticker symbol OPY. Advising on over \$28 Billion in retirement investor assets, Oppenheimer Retirement Services is a collaboration of experts in our Retirement Services Department and Oppenheimer Financial Advisors who provide services to our qualified and non-qualified retirement plan sponsor clients.

Jeremy Deleski, Managing Director, Retirement Services

Jeremy has over 30 years of experience coordinating the design and implementation of retirement and benefit plans for diverse employers with differing business concerns, plan designs, and employee demographics. He is a speaker on retirement plan related issues and has conducted many participant enrollment seminars and individual counseling sessions. He has been an instructor in qualified plan design and retirement planning seminars for continuing education for Series 7 Registered Representatives and State Licensed Life Insurance Agents.

Steve Baaden, Managing Director, Investments

Steve brings over 32 years of experience in the financial services business to private client portfolio management and corporate retirement plans. Steve works closely with plan sponsors to help them develop a sound investment policy, fund lineup, and plan process to ensure that they are in compliance with current ERISA regulations. Steve is a designated 3(21) fiduciary with respect to corporate retirement plans and may also be retained as an ERISA 3(38) investment manager, which allows him to assume direct responsibility for selecting and monitoring plan investment options.

Sean Meier, Director, Investments

At Oppenheimer, Sean works with corporate executives and their employees to help with their individual and family investment needs. In addition, he also works with companies on tailored corporate cash management solutions and facilitates introductions to our investment banking group for capital raising needs when appropriate.

FIDUCIARY TRAINING

What is a Fiduciary?

fiduciary adjective

fi·du·cia·ry | \ fə-ˈdū-shē-, er-ē , -shə-rē, -ˈdyü-, fī-\

Definition of *fiduciary*

: of, relating to, or involving a confidence or trust: such as

a : held or founded in trust or confidence

// a *fiduciary* relationship

// a bank's *fiduciary* obligations

b : holding in trust

c : depending on public confidence for value or currency

// *fiduciary* fiat money



- **A fiduciary is a person or organization who has the highest legal duty owed to another party and is bound ethically to act in the other party's best interests, putting the other party's interests in front of the fiduciary's own**
- **An ERISA fiduciary must act for the exclusive purpose of providing benefits to the employee benefit plan and its participants and beneficiaries**

FIDUCIARY TRAINING

Decoding ERISA's Fiduciary Standards

ERISA holds plan fiduciaries to certain standards of care:

- **Fiduciaries owe a duty of loyalty to plan participants and beneficiaries**
 - Act solely in the interests of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits and paying only reasonable plan expenses
 - “exclusive benefit rule”

- **Fiduciaries owe a duty of care to plan participants and beneficiaries**
 - Act with the care, skill, prudence, and diligence that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of a like character and with like aims
 - “prudent expert rule”

- **Fiduciaries must act consistent with the plan documents and diversify the plan's investments to minimize the risk of large investment losses**

FIDUCIARY TRAINING

Types of Fiduciaries

Anyone who exercises discretion or control with regard to the plan may be a fiduciary:

- **Plan sponsors**
- **Plan trustees**
- **Plan administrators**
- **Investment committees**
- **Investment consultants (if they render investment advice)**
- **Investment managers (if they have control over the management and of the assets)**
- **Functional fiduciaries (e.g. brokers)**
- **Deemed fiduciaries**
- **Named fiduciaries**

Every plan must have a named fiduciary identified in the plan document

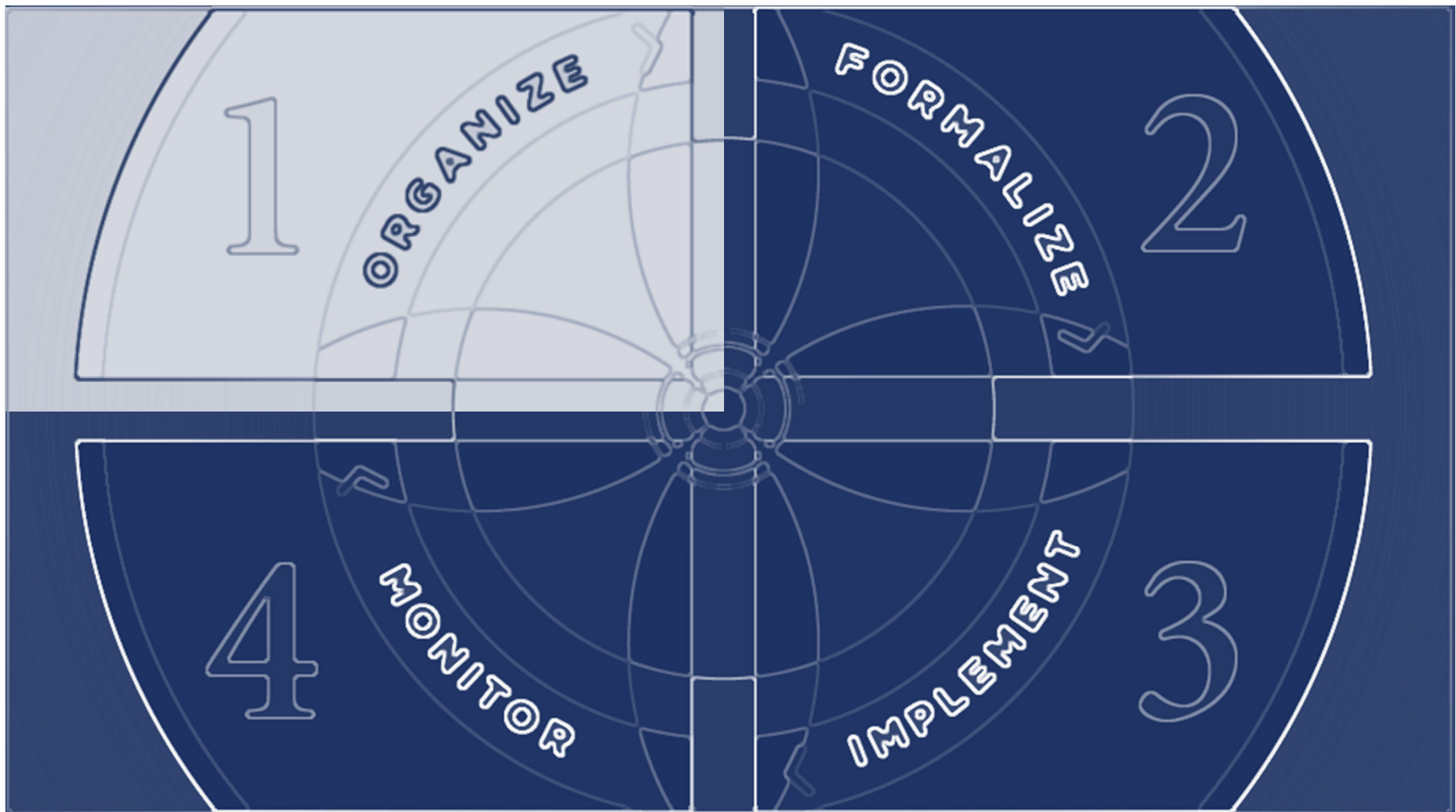
FIDUCIARY TRAINING

Examples of Fiduciary Activities

- **Selecting plan fiduciaries**
- **Selecting plan service providers**
- **Monitoring fiduciaries and outside service providers**
- **Providing investment advice for a fee**
- **Selecting plan investments**
- **Monitoring plan investments**
- **Interpreting plan provisions**
- ***Exercising discretion* when making plan decisions and when approving or denying benefit claims or appeals**

FIDUCIARY TRAINING

Prudent Fiduciary Steps: Organize



FIDUCIARY TRAINING

Form the Committee

Committee Demographics – selected by the Board or business management committee; generally individuals with administration, finance and operations backgrounds experienced with implementing decisions and processes within the company

Size of Committee – generally, an odd number from 3-7 is best, one person as chairman

Understand Responsibilities – fiduciary duties, committee role, plan procedures, investment guidelines and plan documents

Formalize the Process – document various guidelines and procedures

Delegate responsibilities as appropriate:

- Select other fiduciaries or delegate duties to fulfill certain responsibilities
- Ensure that those charged with fulfilling duties understand the importance of their role
- Hire experts for certain roles through a prudent process

Forming a prudent process is key – fiduciaries are not judged on hindsight/results if acted prudently

FIDUCIARY TRAINING

Determine Roles & Responsibilities

Regularly Review:

- Minutes of previous meeting
- Cash flow
- Employee participation and investment allocation
- Investment performance and watch list
- Employee services (enrollment, education and advice)
- Testing results
- Administration services
- Regulatory, legislative and industry updates

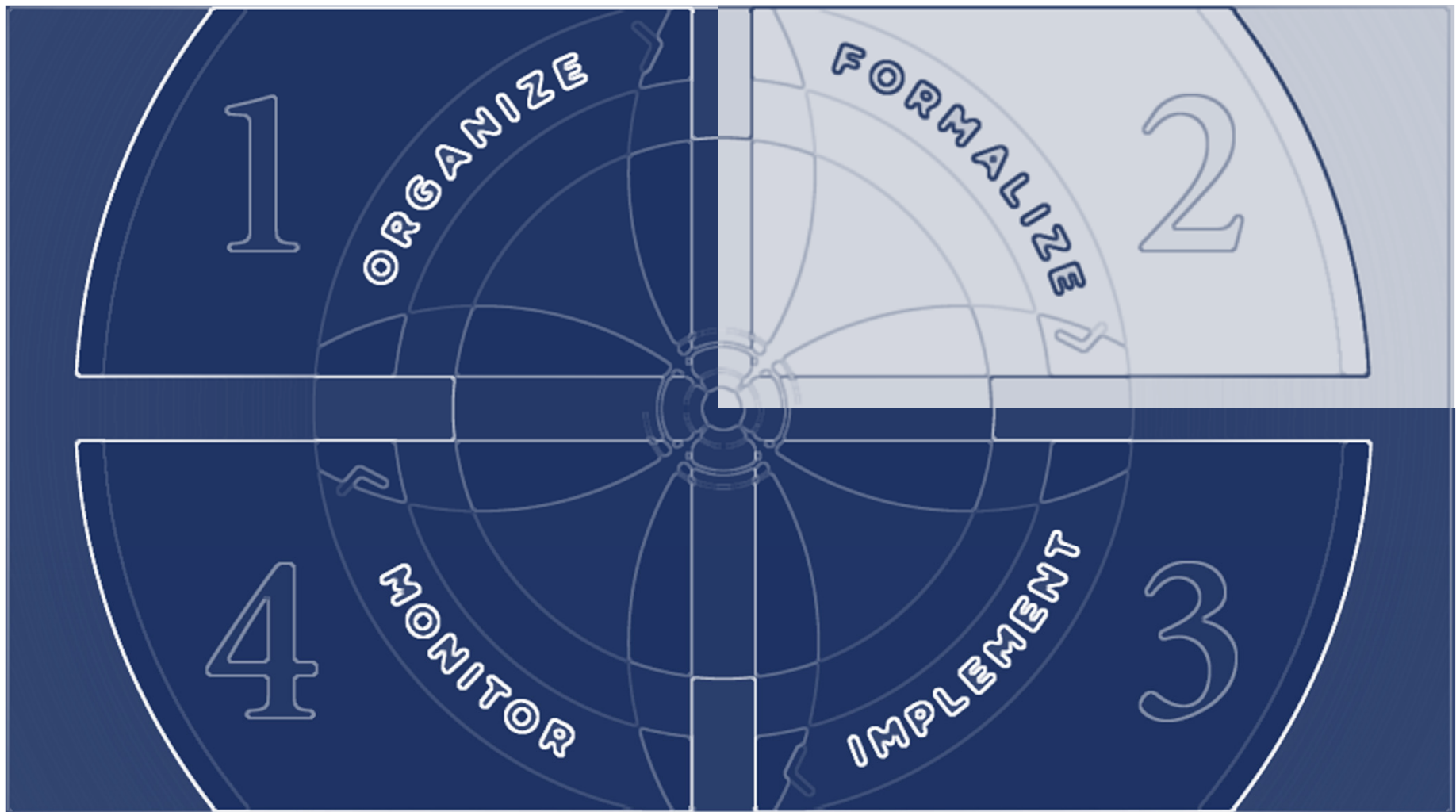
Periodically Review

- Service provider fees
- Plan design
- Investment policy

Follow the Plan Document

FIDUCIARY TRAINING

Prudent Fiduciary Steps: Formalize



FIDUCIARY TRAINING

Investment Committee Documentation

- **Committee Charter; member acceptance and ongoing training**
- **Meet quarterly; annually at minimum**
- **Follow an agenda**
- **Document meetings through minutes**
- **Investment policy**
- **Fee and education policies**
 - 408(b)(2)
 - 404(c)

FIDUCIARY TRAINING

Plan Investment Structure and Process

Investment Policy Statement (IPS)

- Goals of plan and purpose of IPS
- Investment committee, advisor and manager responsibilities
- Investment philosophy, asset classes and benchmarks
- Quantitative and qualitative investment standards for selection and monitoring
- Watch list management for investments that do not meet IPS standards
- Qualified Default Investment Alternatives (QDIA)

FIDUCIARY TRAINING

Maintain Fiduciary File

Plan fiduciaries should be able to quickly access written files and records that relate to fiduciary responsibilities in these three areas of plan operation:

Service Providers

- 408(b)(2) disclosures/service agreements
- Contact information for all service providers
- Due diligence and selection criteria
- Benchmarking/RFP reports
- Committee notes (basis for selection/retention/replacement)
- Fee schedules

Investments

- Investment Policy Statement
- Investment review documentation (basis for selection/retention/replacement)
- Monitoring reports
- Prospectuses
- Fees

Administration and Reporting Compliance calendar

- Plan documents and summary plan description
- Plan audit and documentation of contributions (for plans with more than 100 employees)
- Proof of ERISA bond/fiduciary liability policy
- Annual compliance testing documentation
- Form 5500
- Employee communications
- Participant notices (such as automatic enrollment/QDIA, 404(c), 404a-5, etc.)
- Fee schedule
- Retirement plan review
- Analysis of participant outcomes

FIDUCIARY TRAINING

IRS/DOL Audits

- **IRS may audit**

- Determine if the plan complies with the tax code, e.g. 401(a), 401(k) and related regs
- Handled by qualified plan specialists; not business auditors
- If errors are found, consequences could be serious, up to and including plan disqualification
- Most errors can be corrected
- EPCRS and VCP programs voluntary allow error corrections if you find them before the IRS

- **DOL may Audit**

- Timely and accurate deposit of employee contributions
- Compliance with reporting and disclosure requirements
- Timely and accurate filing of Form 5500s
- Potential conflicts of interest
- Fee and expenses
- May be random, triggered by participant complaint or 5500 filing information

FIDUCIARY TRAINING

Fiduciary Liability and Potential Litigation

- **Pressure on plan performance has led to increasing ERISA based litigation from plan participants regarding plan fees and investments**
- **Some plan sponsors have paid in excess of \$20 million to settle claims of excessive fees**
- **Engaging in a documented prudent process is best line of defense**
- **DOL has made clear that while cost is a factor, fiduciaries not required to select lowest cost provider – quality and experience and other factors should be considered also**

FIDUCIARY TRAINING

You're (Probably) a Fiduciary

- **Each committee member is a fiduciary**
- **As a fiduciary, you're subject to legal requirements of federal law under ERISA**
- **A breach of your fiduciary duties may result in:**
 - Personal liability
 - Co-fiduciary liability
 - Penalties up to 20% of amounts recovered as a result of violations
 - Removal as fiduciary
 - Investigation and litigation costs
 - Criminal liability
- **Reduce responsibility and offload fiduciary responsibility to third party experts**

FIDUCIARY TRAINING

Potential Service Providers

- **Administration**
 - Plan documents
 - Government filings
 - Testing
- **Recordkeeping**
 - Plan assets
 - Participant information
- **Approval and/or processing of:**
 - QDROs
 - Loans
 - Hardship withdrawals
- **Investment advisory services**
- **Investment management**
- **Trustee and custodial services**
- **Auditor and legal counsel**
- **Monitor Service Providers and Document Your Review!**

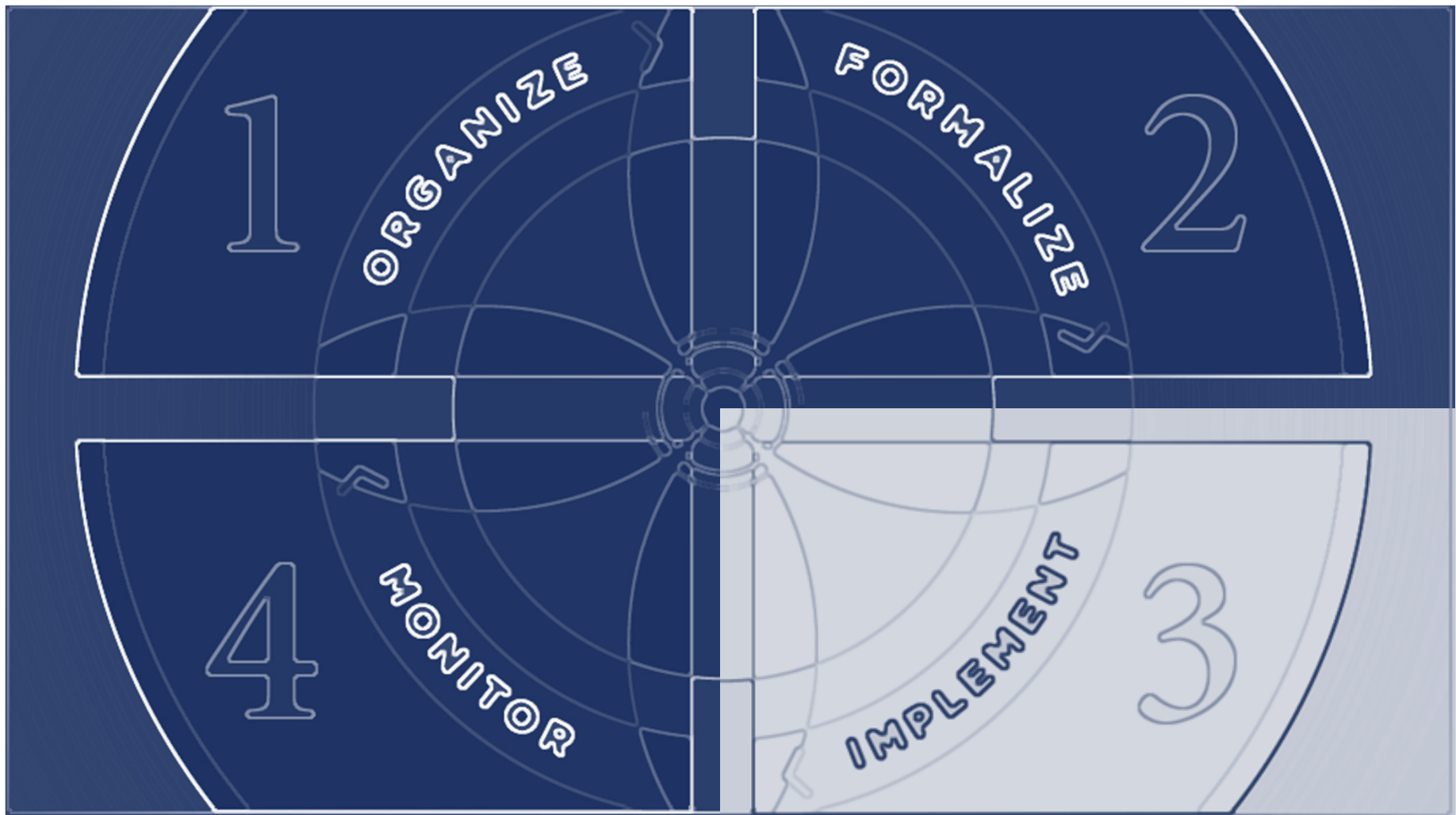
FIDUCIARY TRAINING

Select, Monitor and Replace Service Providers

- **Utilize a prudent and documented process of service provider selection**
- **Monitor fees to ensure they remain reasonable and quality of services provided**
- **To be reasonable, fees must be appropriate for the services provided, must not be duplicative or excessive, and pay for services necessary for the proper operations of the plan; generally a marketplace standard**
- **ERISA 408(b)(2) requirements provide fee transparency**
- **Periodic Benchmarking, Request for Information (RFI) or Request for Proposal (RFP)**
 - Confirm reasonableness
 - Every 3-5 years
 - Earlier if material changes to plan
 - Increase in number of participants or assets
 - M&A

FIDUCIARY TRAINING

Investment Implementation



FIDUCIARY TRAINING

A Third Party Plan Administrator as a Fiduciary

- Acts as a fiduciary of the plan as described in **Section 3(16) of ERISA**
- **May involve anything from daily operations to annual testing and filings**
- **May be responsible for selecting other service providers, or simply handle administrative functions**
- Various levels of 3(16) Plan Administrator fiduciaries
 - Administrative
 - Enrollment, Payroll and other related functions
 - Disclosures
 - **Further reduce** your fiduciary responsibility and liability

Limits fiduciary responsibility, but to what extent? Different 3(16) administrators may perform different tasks!

FIDUCIARY TRAINING

A Third Party Plan Administrator as a Fiduciary

- **Administrative**

- Plan document: adopt, maintain and interpret
- Non-discrimination and testing: corrective actions, refunds, and corrective amendments
- Distribution, Loans and QDROs: receive and authorize withdrawal requests, instruct payroll provider to remove loan payments, communicate directly with participants
- **Fiduciary status might not be accepted**

- **Enrollment, Payroll and related functions**

- Determine eligibility, provide enrollment materials, and election forms
- Receive, review and retain election forms
- Communicate directly with employees/participants, payroll service and plan sponsor
- Ensure auto procedures are followed, proper transmission of payroll files and timely remittance of salary deferrals and loan payments

- **Provide Disclosures**

- Participant statements, quarterly/annual notices, 404(c) compliance
- Summary Plan Description, annual report and material modifications
- Locate missing participants

FIDUCIARY TRAINING

Oppenheimer as an Investment Advisor Fiduciary

- Acts as a fiduciary of the plan as described in **Section 3(21) of ERISA**
- Accepts fiduciary and investment advisory responsibilities in a written agreement that fully discloses our compensation and describes the services provided
- **Investment advisor** and governed by the Investment Advisers Act of 1940 ('40 Act)
- Under ERISA and the '40 Act, owe a duty of loyalty to the plan
 - Make recommendations in the best interests of the plan and its participants placing their interests in front of ours
 - Avoid conflicts of interest and prohibited transactions
 - Liable for the services we provide
 - Fully disclose any compensation we receive, and must be a reasonable amount
 - Reduce your fiduciary responsibility and liability
- Act in a **non-discretionary role**

FIDUCIARY TRAINING

Oppenheimer as an Investment Manager Fiduciary

- Act as a fiduciary of the plan as described in **Section 3(38) of ERISA**
- Accepts fiduciary, investment advisory **and investment management** responsibilities
- **Discretionary role for selecting plan investments based on plan's investment policy**
- Under ERISA and the '40 Act, owe a duty of loyalty to the plan
 - **Proactively select, monitor and replace plan investments** in the best interests of the plan and its participants placing their interests in front of ours
 - Avoid conflicts of interest and prohibited transactions
 - Liable for the services we provide
 - Fully disclose any compensation we receive, and must be a reasonable amount
 - **Further reduce** your fiduciary responsibility and liability

FIDUCIARY TRAINING

Time Horizon & Risk

- An expected risk/reward to meet each investment objective for the asset class
- Selected assets classes provide each participant the ability to diversify their portfolio appropriately give their time horizon and risk/return profile
- The methodology and tools used to establish appropriate portfolio diversification are prudent and consistently applied

Morningstar Style Box™ Breakdown

Equity

Market Capitalization	Large	2	5	2
	Mid		2	5
	Small		2	
		Value	Blend	Growth

Company Style

Fixed Income

Credit Quality	High			1
	Mid	1	2	
	Low	1		
		Ltd	Mod	Ext

Duration

International Equity

Market Capitalization	Large	3	5	4
	Mid			1
	Small	1		
		Value	Blend	Growth

Company Style

FIDUCIARY TRAINING

QDIA

- **A Qualified Default Investment Alternative (QDIA) provides protection for fiduciaries of participant-directed plans that default participants into certain investments if they fail to make an investment election**

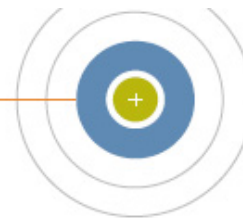
- **Must be one of three types of investment:**
 - Age-based lifecycle or targeted-retirement-date funds or accounts; or
 - Risk-based balanced funds; or
 - A professionally-managed account

- **Other requirements:**
 - Must be a registered mutual fund, professionally managed, or managed by plan official
 - Any type of QDIA may be selected, but ongoing due diligence required
 - Participant notices
 - Liquidity

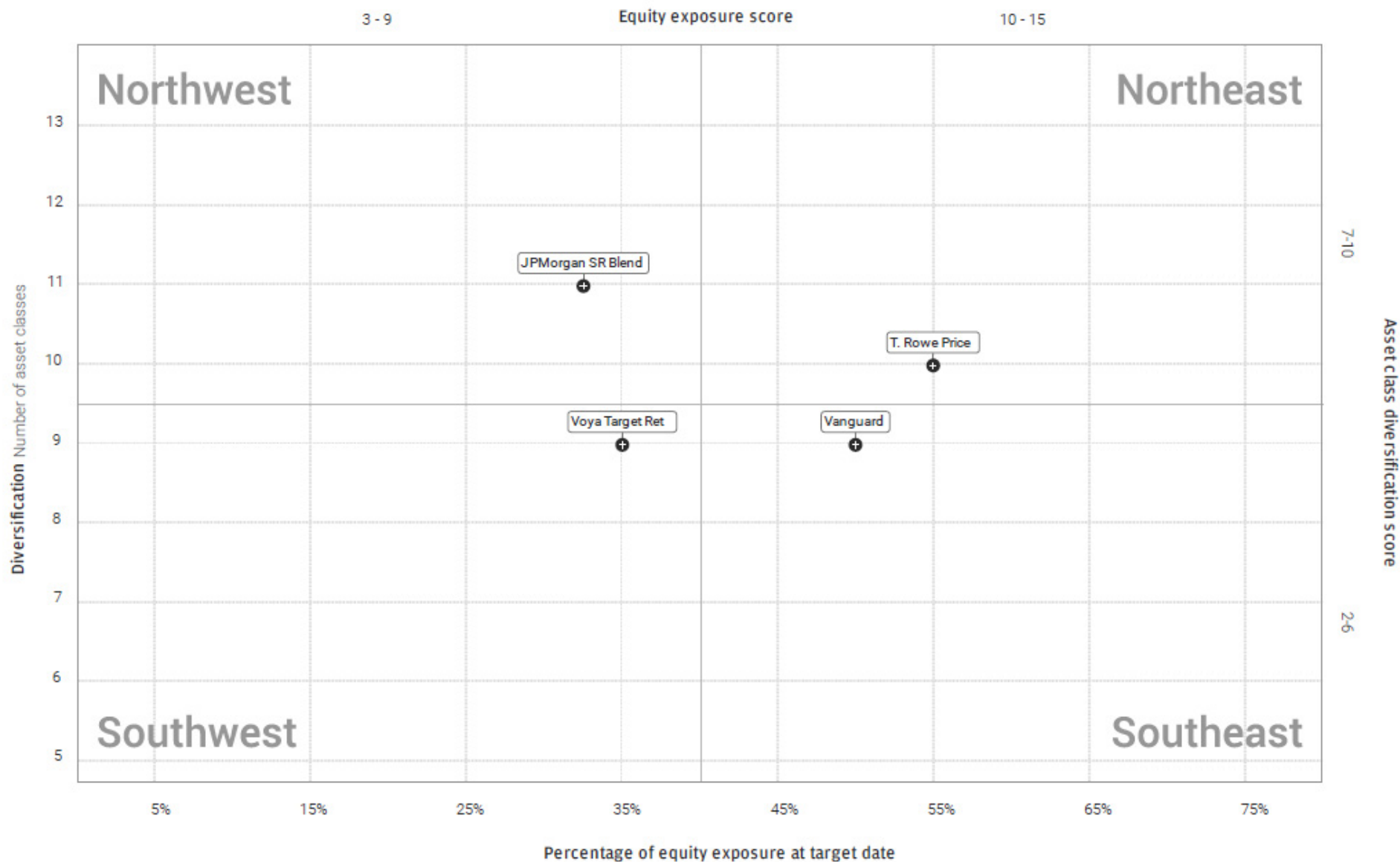
FIDUCIARY TRAINING

Target Date Investments

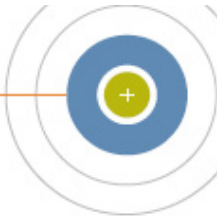
- **Funds with a mix of different asset classes with risk allocations that decline over time to a targeted date**
- **Frequently offered in plans and selected as QDIA**
- **Maintained by investment management companies with divergent views on asset allocation and appropriate target date based on age**
- **Selection of appropriate investment manager should be based on plan's participants and consider:**
 - Asset allocation – conservative, moderate or aggressive
 - Glide path – “to” versus “through”
 - Underlying investment management
 - Fees
 - Availability of custom solutions



Quadrant Map

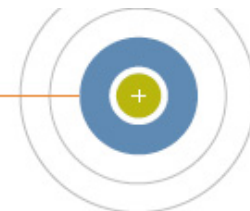


As of 03/31/2021, with the exception of Diversification (# of asset classes), which is as of 12/31/2020. © 2021 Morningstar, Inc. All Rights Reserved. Percentage of equity exposure at target date: Strategic allocation to non-fixed income asset classes at target date, typically age 65. Asset class diversification: Calculated using the target date funds' asset allocation breakdown to 12 J.P. Morgan-defined separate asset classes. The 12 asset classes include: U.S. large cap equity, U.S. mid cap equity, U.S. small cap equity, International equity, Emerging markets equity, REITs, Commodities, U.S. fixed income, High yield, U.S. TIPS, International fixed income and Emerging markets debt. If a selected mutual fund has less than 5 asset classes, the fund will not be depicted in the above chart. Please see Target Date Compass Methodology for additional information. Commingled fund information not shown due to lack of data availability. See Disclosure page for commingled fund details.



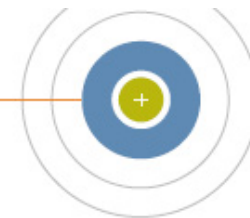
Asset Class Summary

Asset class	JPMorgan SmartRetirement Blend	T. Rowe Price Retirement	Vanguard Target Retirement	Voya Target Retirement
U.S. large cap	✓	✓	✓	✓
U.S. mid cap	✓	✓	✓	✓
U.S. small cap	✓	✓	✓	✓
International equity	✓	✓	✓	✓
Emerging markets equity	✓	✓	✓	✓
U.S. fixed income	✓	✓	✓	✓
U.S. TIPS	✓	✓	✓	✓
High yield fixed income	✓	✓	✓	✓
International fixed income	✓	✓	✓	✓
Emerging markets debt	✓	✓		
REITs	✓			
Commodities				
Total # of asset classes	11	10	9	9

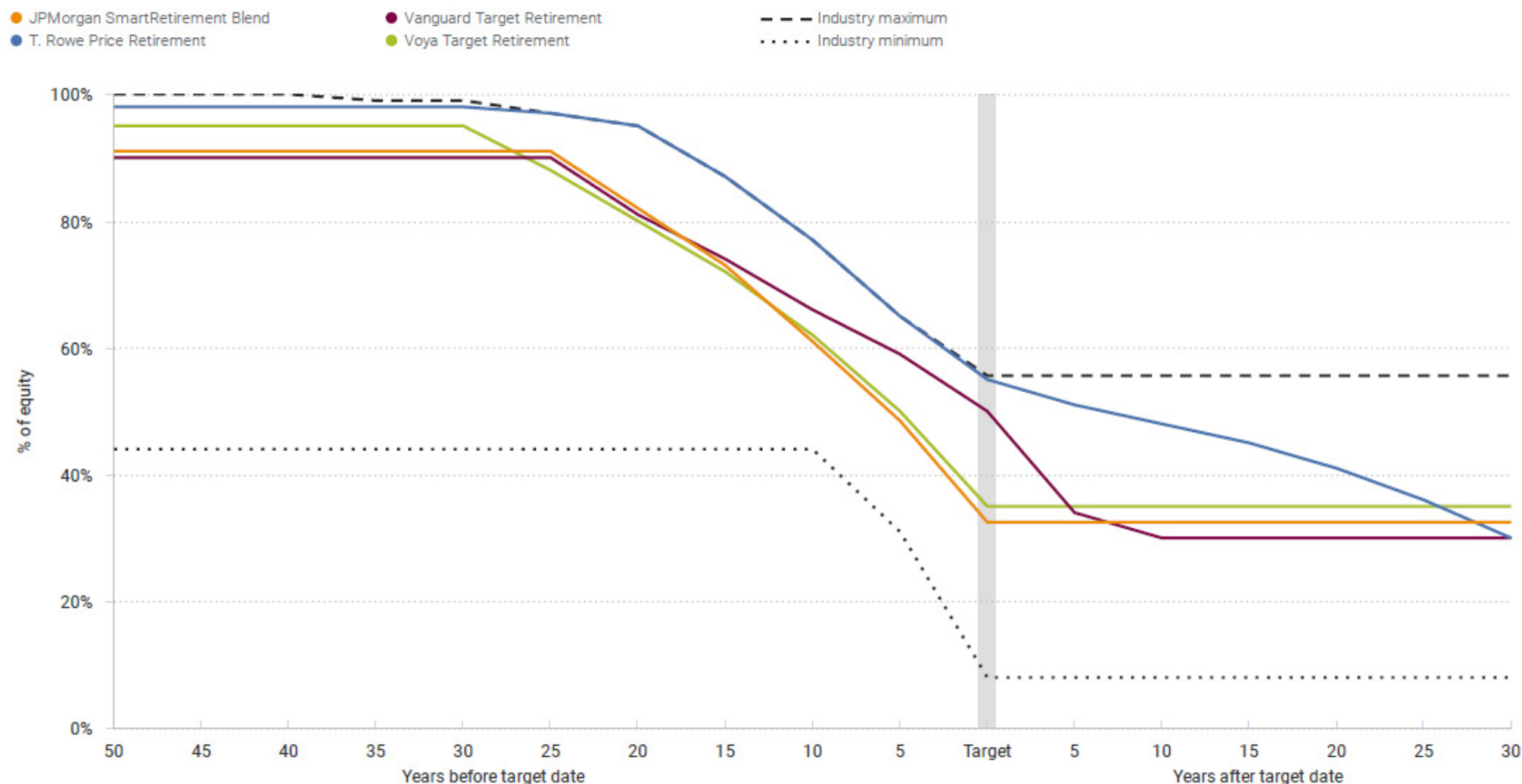


Target Date Series Snapshot

	JPMorgan SmartRetirement Blend	T. Rowe Price Retirement	Vanguard Target Retirement	Voya Target Retirement
MUTUAL FUND ASSETS				
(\$mm) as of 03/31/2021	\$14,930	\$174,168	\$614,483	\$307
Earliest inception date	07/02/2012	09/30/2002	10/27/2003	12/20/2012
GLIDE PATH				
% of equity at target date	32.5%	55.0%	50.0%	35.0%
% of equity at landing point	32.5%	30.0%	30.0%	35.0%
Glide path end (age)	65	95	75	65
# of asset classes	11	10	9	9
Tactical	Yes	Yes	No	N/A
FUND STRUCTURE				
Fund of funds	Yes	Yes	Yes	Yes
Open architecture (%)	3%	0%	0%	N/A
Active exposure (%)	36.50%	86.18%	0%	57.50%
UNDERLYING FUND INFORMATION				
# of underlying funds	21	24	6	22
Average manager tenure (years)	8.85	7.67	17.39	11.34
Longest manager tenure (years)	22.23	28.60	26.10	26.10

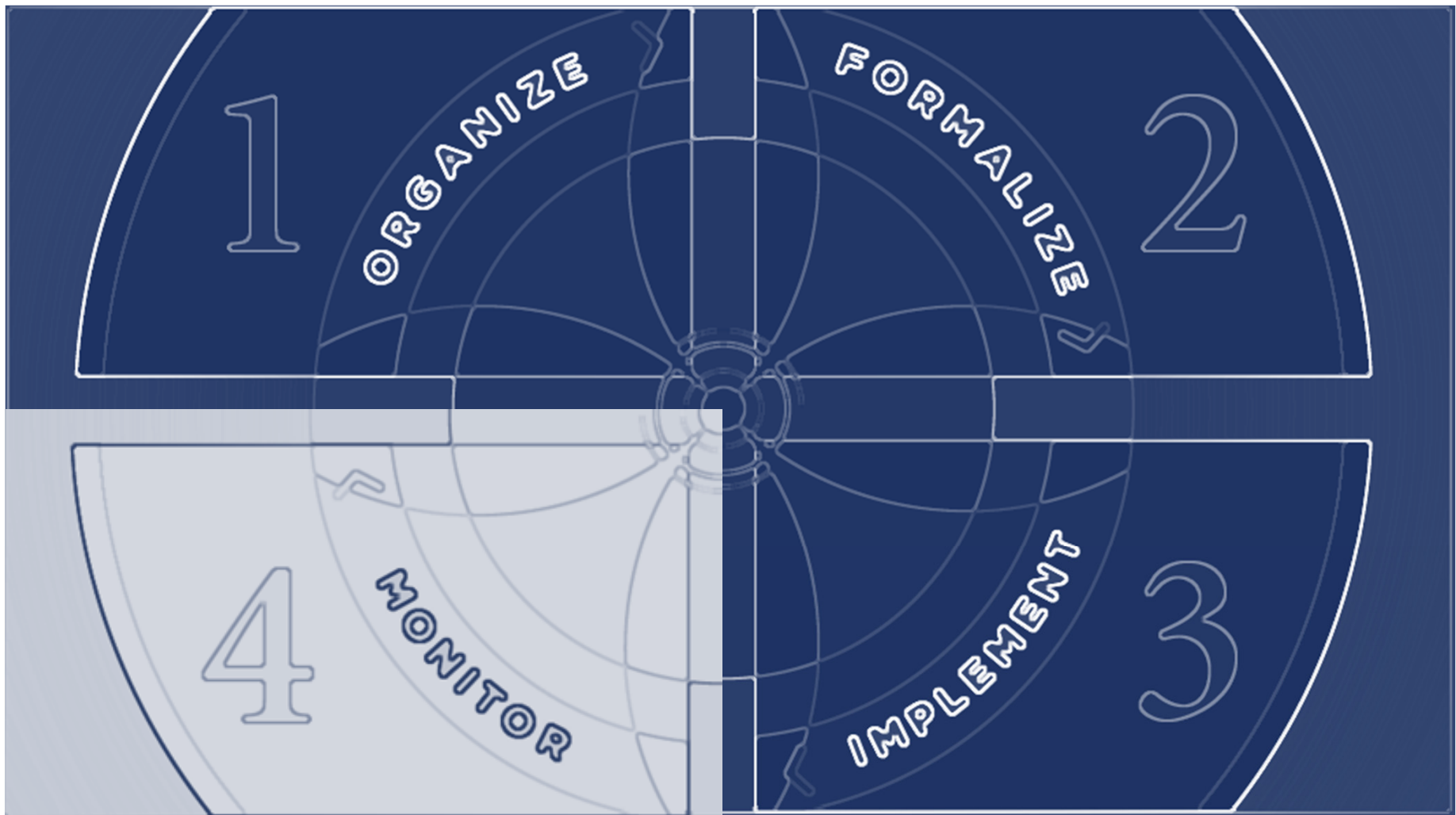


Equity Glide Path Comparison



FIDUCIARY TRAINING

Prudent Fiduciary Steps: Monitor



FIDUCIARY TRAINING

Investment Review

Fi360 Fiduciary Score Criteria

1	Inception Date: The investment must have at least a 3 year track history.
2	Manager Tenure: The investment manager must have at least a 2 year track history. (Most senior manager's tenure)
3	Assets: The investment must have at least 75 million under management. (Total across all share classes for funds/etfs)
4	Composition: The investment's allocation to its primary asset class should be greater than or equal to 80%. (Not applied to all peer groups)
5	Style: The investment's current style box should match the peer group. (Not applied to all peer groups)
6	Prospectus Net Exp Ratio: The investment must place in the top 75% of its peer group.
7	Alpha: The investment must place in the top 50% of its peer group.
8	Sharpe: The investment must place in the top 50% of its peer group.
9	1 Year Return: The investment must place in the top 50% of its peer group.
10	3 Year Return: The investment must place in the top 50% of its peer group.
11	5 Year Return: The investment must place in the top 50% of its peer group.

Calculation Methodology

The Fi360 Fiduciary Score is a peer percentile ranking of an investment against a set of quantitative due diligence criteria selected to reflect prudent fiduciary management. The criteria include total returns, risk-adjusted returns, expenses, and other portfolio statistics. Investments are ranked according to their ability to meet due diligence criteria every month. The rank becomes the Fi360 Fiduciary Score. The Fi360 Fiduciary Score Average is a one-, three-, five- or ten-year rolling average of an investment's Fi360 Fiduciary Score. The Fi360 Fiduciary Score represents a suggested course of action and is not intended, nor should it be used, as the sole source of information for reaching an investment decision. Visit the Glossary or fi360.com/fi360-Fiduciary-Score for more information.

Legend

- ✓ Investment meets the criterion
- X Investment does not meet the criterion
- N/Av Investment data is not available
- N/S Investment doesn't have the history to be scored
- N/App Investment is not screened on the criterion

Investment Name	Fi360 Fiduciary Score					Fi360 Fiduciary Score Criteria											Action
	Score	1 Yr	3 Yr	5 Yr	10 Yr	1	2	3	4	5	6	7	8	9	10	11	
Large-Cap Equity																	
American Funds Washington Mutual R5 (RWMFX) Large Blend	0	7	23	28	23	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-
JHancock Blue Chip Growth 1 (JIBCX) Large Growth	0	2	3	3	3	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-
American Funds Invmt Co of Amer R5 (RICFX) Large Blend	84	43	32	27	30	✓	✓	✓	X	X	✓	X	X	X	X	X	Watch
Mid-Cap Equity																	
JHFunds2 Mid Cap Stock 1 (JIMSX) Mid-Cap Growth	0	11	21	29	36	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	-
AMG Managers Fairpointe Mid Cap N (CHTTX) Mid-Cap Value	60	71	59	55	34	✓	✓	✓	✓	✓	✓	X	X	X	✓	X	Watch

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ANNUAL COST SUMMARY

\$ 15,480,459

TOTAL ASSETS

353

NUMBER OF PARTICIPANTS

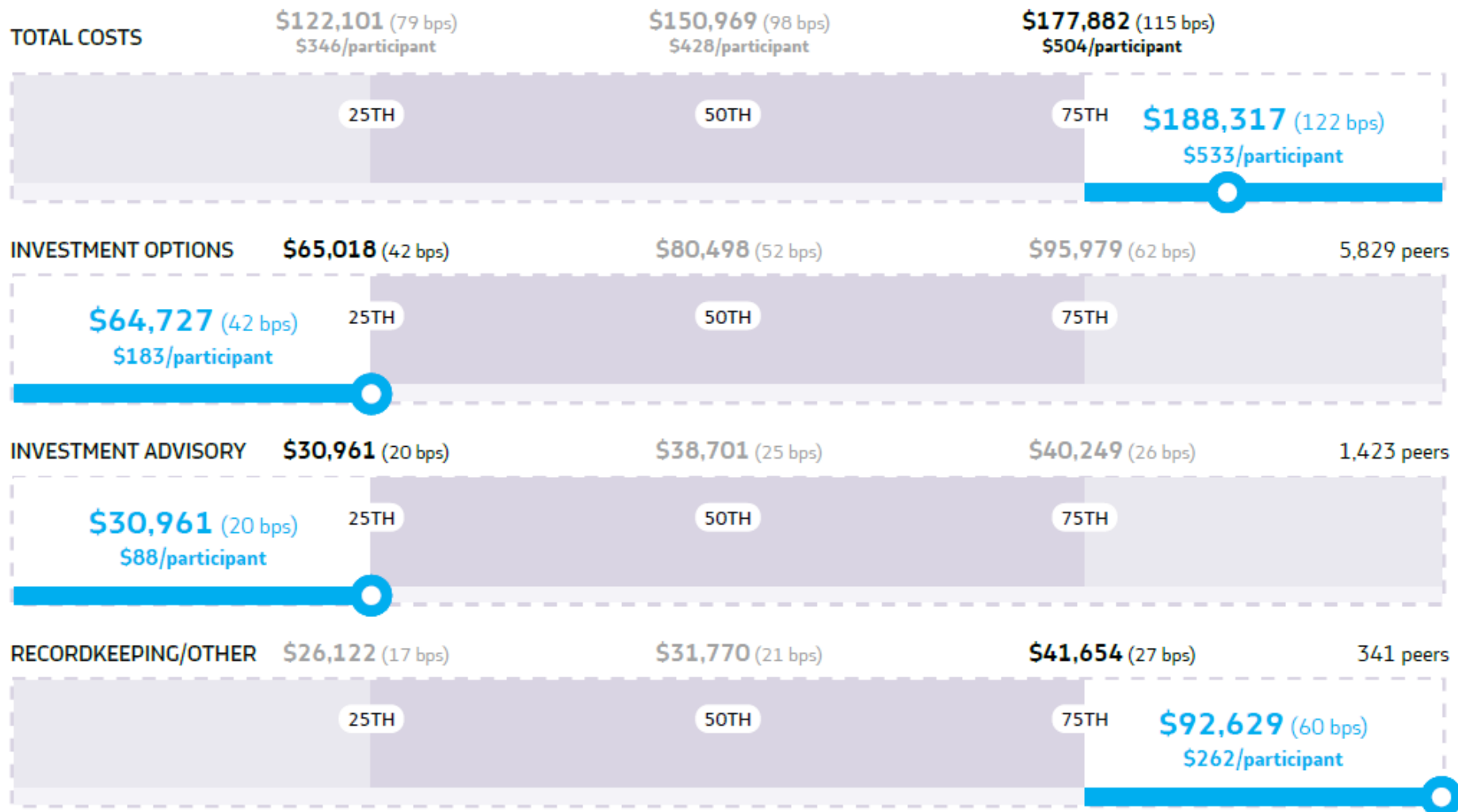
\$ 188,317

TOTAL COSTS

122 BPS

TOTAL COSTS IN BASIS POINTS

PLAN COSTS COMPARED TO BENCHMARK



For Illustrative Purposes Only

FIDUCIARY TRAINING

10 steps to manage Risks & Responsibilities

Understand your role and responsibilities as a Fiduciary, delegating responsibilities where appropriate

Establish a formal fiduciary governance process

Document the investment process in a formal investment policy statement (IPS)

Conduct regular reviews of the plan's investments

Take advantage of 404(c) protection and follow the rules to comply; consider advisor managed models

Maintain written records of plan documents and procedures, delegating responsibilities where appropriate

Educate participants to help them make informed decisions

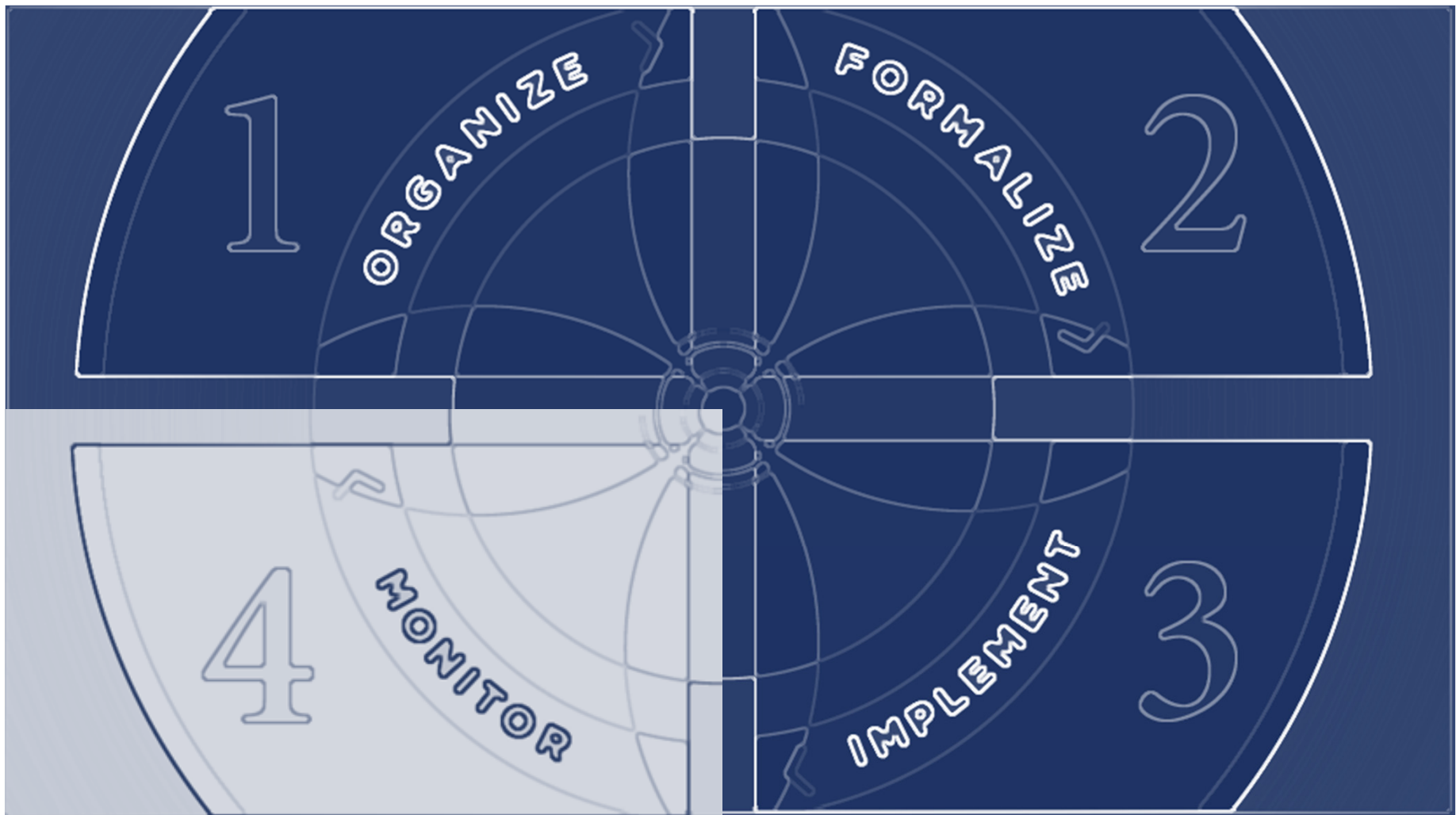
Monitor provider fees and services for reasonableness

Comply with government reporting requirements

Have adequate insurance coverage

FIDUCIARY TRAINING

Current Fiduciary Issues



FIDUCIARY TRAINING

Cybersecurity

DOL Guidance

■ Tips for Hiring a Service Provider

- Confirm that the provider is properly insured against participant account theft
- Inquire about past security breaches and the provider's response to them
- Seek contractual confirmation of the plan sponsor's notification timeframe in the event of a breach
- Not just for hiring a new provider; also for existing

■ Cybersecurity Program Best Practices

- Implement a formal and documented cybersecurity program
- Ensure that assets or data managed by a third party is subject to independent security reviews and assessments
- Encrypt sensitive data

■ Online Security Tips for Plan Participants and Beneficiaries

- Registering their online accounts, regularly checking account status, using strong and unique passwords, avoiding free Wi-Fi, and reviewing information on identifying and avoiding phishing attacks

FIDUCIARY TRAINING

ESG Investments; Proxy Voting

- **Trump DOL issued formal guidance that plan fiduciaries must use only pecuniary, or financial factors, in the selection of plan investments and when voting proxies**
 - Followed the DOL's deliberations on issuing guidance for the selection of environmental, social, and governance (ESG) investments
 - Deterred the use of ESG investments within retirement plans
 - Proxy voting could not be based on ESG factors, financial only

- **Biden DOL issued a notice it will not enforce Pecuniary Factors requirements**
 - Rules were finalized and still technically in place, cannot simply be ignored.
 - Does not open the door for plan fiduciaries to select investments based on objectives other than providing retirement benefits for plan participants and beneficiaries
 - Fundamental ERISA rule that plan assets must be used only for the exclusive benefit of plan participants remains unchanged
 - Plan participants could sue

- **Biden Administration directed DOL to consider changing pecuniary requirement**

FIDUCIARY TRAINING

Litigation

■ Hedge Funds in Target Date Funds and Fees

- Intel Corporation’s 401(k) plan used a custom target date solution that included hedge fund investments
- Plan fiduciaries were sued because their high fees were viewed by the plaintiffs as a significant drag on performance as compared to the performance of target date funds that did not use hedge funds
- District court dismissed the claim, making the following key observations:
 - Allegations of poor performance, standing alone, are insufficient to support a fiduciary breach claim
 - ERISA prudence standard focuses on a fiduciary’s conduct in arriving at an investment decision, not on its results
 - On its own, the failure to select the investment with the lowest fees is not sufficient to plausibly state a claim for breach of the duty of prudence
 - Inappropriate to compare distinct investment vehicles solely based on cost, since their essential features differ so significantly

FIDUCIARY TRAINING

Litigation

■ Investment Performance and Fees

- Vail Corporation 401(k) plan fiduciaries sued
- Plaintiffs alleged improper use of expensive mutual funds and overpaying for recordkeeping fees
- No allegations of imprudence in the fiduciaries' process; claims were based on comparisons of the plan's investments and fees to others in the marketplace
- Case dismissed with the judge making (similar to Intel case) the following key points:
 - ERISA does not impose on fiduciaries a duty to take any particular course of action if they reasonably decide another approach seems preferable
 - Not enough to simply allege that an investment did poorly and, therefore, a plaintiff was harmed
 - Relative underperformance is insufficient
 - Plaintiff must show that no reasonable fiduciary would have retained the challenged investments if they had engaged in proper monitoring

FIDUCIARY TRAINING

Litigation

- **One-year Limit for Filing Suit Prevails in Fee Suit**
 - Cumulus Media’s 401(k) plan fiduciaries sued
 - Plaintiffs alleged that plan fiduciaries improperly used expensive mutual funds and paid excessive compensation to the plan recordkeeper
 - Plan’s summary plan description provides that any lawsuit must be brought within 12 months of the date of the conduct at issue
 - Significantly shortened the ERISA limitations period of 6 years
 - The lawsuit was filed on February 24, 2020
 - Court concluded that the plan’s shortened limitations period of 12 months was enforceable
 - Any allegations in the case related to actions that took place before February 24, 2019, were barred; case dismissed

FIDUCIARY TRAINING

Focus on Missing Participant

- Internal Revenue Service's (IRS) missing participant initiative and Field Directive
 - Focused on missing plan participants who must receive required minimum distributions, which now begin at age 72

- DOL issued informal guidance on missing participants; identifies a series of red flags:
 - More than a small number of missing or nonresponsive participants
 - More than a small number of terminated vested participants who have reached normal retirement age but have not yet started receiving benefits
 - Missing, inaccurate, or incomplete contact information, census data, or both
 - Absence of sound policies and procedures for handling returned mail marked return to sender, wrong address, addressee unknown, or otherwise undeliverable mail
 - Absence of sound policies and procedures for handling uncashed checks.

- Plan fiduciaries should ask third party plan administrators and recordkeepers about their processes for dealing with missing participants

FIDUCIARY TRAINING

DOL Fiduciary PTE

- DOL Prohibited Transaction Exemption (PTE) 2020-02
- Applies to financial institutions, financial advisor, and financial professionals for the receipt of compensation from IRAs and ERISA plans
- Advice must meet impartial conduct standards
- Acknowledge fiduciary status in writing and describe in advance:
 - The services to be provided
 - Material conflicts of interest
- If recommended, document reasons that a rollover recommendation is in the best interest of the retirement investor; factors must be considered and documented:
 - Alternatives to a rollover
 - Fees and expenses of the employer retirement plan and the IRA
 - Whether the employer pays for some or all of the plan's administrative expenses
 - The different levels of services and investments available in plan and IRA
- Adopt policies and procedures prudently designed to ensure compliance with the impartial conduct standards and that mitigate conflicts of interest

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