The Best Asset Allocation Solution for Retirement Plan Participants: Model Portfolios, Managed Accounts or CIFs?

A White Paper Prepared by The Wagner Law Group
On Behalf of
Hand Benefits & Trust Company
a BPAS Company

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IMPORTANT INFORMATION

The Wagner Law Group has prepared this paper on behalf of Hand Benefits & Trust Company (a BPAS Company). It is intended for sponsors of 401(k) plans and other types of defined contribution retirement plans with participant-directed investments that are subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA) as well as financial services firms that advise such plans. This guide is intended for general informational purposes only, and it does not constitute legal, tax or investment advice on the part of The Wagner Law Group or Hand Benefits & Trust Company (a BPAS Company).

EXECUTIVE SUMMARY

Sponsors of 401(k)-style plans often ask their Advisors to assist participants who are uncomfortable making their own asset allocation decisions. Although "all in one" mutual funds offer one possible approach, many Advisors believe they can provide a better asset allocation solution through Educational Model Portfolios, Non-discretionary Model Portfolios or Discretionary Model Portfolios with strategic allocations across the Plan's investment menu; retail investment programs with Managed Accounts accessing thousands of fund options; or collective investment funds (CIFs) whose assets are held in trust and invested by a bank trustee in accordance with the Advisor's advice.

Does ERISA Section 404(c) Offer Fiduciary Protection To All 5 Approaches?

- For "Section 404(c) Plans," fiduciaries are protected against personal liability for any investment loss that arises due to the participant's own allocation decision. This protection extends to all of the Plan's investment alternatives, including any CIFs.
- It does not extend to Educational or Non-discretionary Model Portfolios. It also does not extend to Discretionary Model Portfolios or Managed Accounts if the participant selects a particular portfolio or account type based on the Advisor's advice.

Does ERISA Impose Participant Disclosure Requirements On All 5 Approaches?

- Under new participant disclosure rules, Plan sponsors must provide a comparative chart with fee and performance data for the Plan's designated investment alternatives (DIAs) and make other investment data available on a website (Website Posting).
- CIFs are DIAs, and Discretionary Model Portfolios and Managed Accounts appear to be DIAs. Thus, these 3 investment vehicles would be subject to the disclosure requirements.
- CIF Advisors should consider relying on the CIF's bank trustee to help prepare the required disclosures and Website Posting. Advisors with Discretionary Model Portfolios or Managed Accounts would need to develop their own compliance strategy.
- The Advisor's fee is subject to explicit quarterly fee disclosures in the case of Educational Model Portfolios (with a separate fee) and Non-Discretionary Model Portfolios. They also apply to Discretionary Model Portfolios and Managed Accounts (if fees are debited from participant accounts and not unitized).

Are All 5 Approaches Eligible To Serve As Qualified Default Investment Alternatives (QDIAs)?

- QDIAs only include mutual funds and investment vehicles for which the Advisor has discretion. Thus, Educational and Non-discretionary Model Portfolios are ineligible.
- Because Managed Accounts customarily invest in securities that are not DIAs and typically do not offer target date retirement strategies, Managed Accounts are ineligible.
- Discretionary Model Portfolios and CIFs that use either a target date retirement strategy or a balanced investment strategy are eligible to serve as a Plan's QDIA.

How Are Each of the Five Approaches Affected by the New DOL Conflicts of Interest Rule?

- Providing Educational Model Portfolios will not be a fiduciary act if certain conditions are met.
- Providing Non-Discretionary Model Portfolios entails fiduciary responsibilities, but advisors providing services in connection with these models may qualify to receive either variable or level compensation.
- Providing Discretionary Model Portfolios, Managed Accounts also involves fiduciary responsibilities, but in these cases, the discretionary nature of the investment management services limits advisors and investment managers to the receipt of level compensation.
- CIFs also involve discretionary fiduciary responsibilities, but the CIF trustee and the trust's subadvisors generally have the option of restricting themselves to level compensation or relying on the statutory exemption under Section 408(b)(8) of ERISA or similar administrative relief.

Model Portfolios, Managed Accounts and CIFs can all provide a multi-asset class investment solution for Plan participants, but Advisors and Plans should consider the regulatory advantages and disadvantages of each to determine which approach is the best one for them.

Introduction: Five Different Approaches For Advisors and Plan Participants

Sponsors of 401(k) plans and other similar plans with participant-directed investments (Plans) often engage financial advisors and investment firms (Advisors) to assist them. Plan sponsors routinely seek help managing the Plan's investment menu. They also ask Advisors to help participants who are uncomfortable making their own asset allocation decisions. Although "all in one" mutual funds, such as target date funds, may serve as a possible investment solution, many Advisors feel that they can provide a superior and less expensive solution.

Some Advisors offer model portfolios (Model Portfolios) to participants based on their risk profile with strategic allocations across the Plan's available investment alternatives. Model Portfolios by their nature only cover the investment fund options available under the Plan. They may include strategic allocations for all fund options, or just a portion of them. For example, certain Plans offer index funds for the convenience of participants, without formally designating them as fiduciary-approved options. Thus, a Model Portfolio might include strategic allocations for the index funds only, the fiduciary-approved options only or both sets of options.

Model Portfolios can generally be offered in three different forms. They can be provided to participants in the form of non-personalized investment education (Educational Model Portfolios). Alternatively, they can be used to provide non-discretionary investment advice where the actual investment decisions are left to participants (Non-discretionary Model Portfolios). Neither of these Model Portfolio forms can easily accommodate the rebalancing of investments, and therefore, must include special asset allocation formulas and timing rules in their program agreements for the implementation of these formulas in order to achieve rebalancing.

A third way to deliver Model Portfolios is the provision of discretionary investment management services, where the Advisor is responsible for the initial allocation and rebalancing of participants' investments on an ongoing basis (Discretionary Model Portfolios). Unfortunately, as will be discussed below, if and when the new DOL fiduciary rule and the associated Best Interest Contract Exemption become effective, possessing or exercising discretionary investment authority will force providers of Discretionary Model Portfolios to limit their compensation to a level fee. In order to avoid this, discretion can be removed by requiring plan sponsor or participant approval for rebalancing on a case by case basis for periodic reallocations.

A number of Advisors also sponsor retail investment programs providing managed accounts for individual investors (Managed Accounts), which are typically offered by broker-dealers through their brokerage platforms. These firms are also registered as investment advisers for securities law purposes, enabling them to charge an asset-based fee (rather than commissions) for their discretionary investment services. Managed Accounts are typically invested in accordance with a "model portfolio" of investments. But unlike Discretionary Model Portfolios (which are limited to the Plan's fund options), Managed Accounts customarily have access to thousands of different investment funds as well as individual securities through their brokerage

platforms.[1] They are popular investment vehicles for individual retirement accounts, and they can also provide a multi-asset class investment solution to Plan participants.

Advisors can also provide asset allocation assistance to participants through collective investment funds (CIFs). A CIF is a trust fund maintained by a bank or trust company (Bank Trustee), which pools the investments of Plans. Similar to a mutual fund, each investor in a CIF has a proportionate interest in the CIF's underlying assets. Although these trust assets by their nature must be held by a Bank Trustee, Advisors can partner with a Bank Trustee to create customized CIFs that are invested in accordance with the Advisor's advice.

Educational, Non-discretionary and Discretionary Model Portfolios, as well as Managed Accounts and CIFs, can all provide an asset allocation solution for Plan participants. However, Plan sponsors and Advisors should be aware of how these five different investment vehicles are viewed for purposes of the Employee Retirement Income Security Act of 1974, as amended (ERISA). In fact, the distinct regulatory advantages and disadvantages of each of them should inform Advisors on which approach is the best one for them, as well as the Plans who will rely on them.

Does ERISA Section 404(c) Offer Fiduciary Protection to All Five Approaches?

Plan sponsors and any service provider acting in a fiduciary capacity are automatically subject to the stringent fiduciary standards imposed under ERISA. A fiduciary must discharge its duties solely in the interest of the Plan's participants.[2] Furthermore, a fiduciary must act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person 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.[3] This duty of prudence is sometimes referred to as the "prudent expert" standard, because investment fiduciaries are expected to act with the skill of a hypothetical fiduciary who is already "familiar" with investment matters.

This "prudent expert" standard is especially onerous, in light of the fact that fiduciaries are personally liable for any losses that are due to investment decisions made imprudently.[4] However, in the case of a Plan that permits participants to direct the investment of their individual accounts, all Plan fiduciaries are insulated from liability for investment losses that are the direct and necessary result of the participants' exercise of control over their accounts. To qualify for this fiduciary liability protection, the Plan must satisfy the requirements of a "Section 404(c) Plan" as defined under Section 2550.404c-1(b) of the applicable regulations (Section 404(c) Rules) issued by the U.S. Department of Labor (DOL).

[1] The terms "Model Portfolios" and "Managed Accounts" are sometimes used interchangeably to refer to similar types of investment arrangements. However, these terms have particular legal significance as further discussed below. To avoid confusion, the term "Discretionary Model Portfolio" for purposes of this paper will refer to an arrangement in which the Advisor manages participant accounts by investing in the Plan's available fund options. Conversely, the term "Managed Account" will refer to an arrangement in which the Advisor has the flexibility to invest participant accounts in securities that are not necessarily part of the Plan's available fund options.
[2] ERISA Sections 403(c) and 404(a)(1)(A).
[3] ERISA Section 404(a)(1)(B).
[4] ERISA Section 409(a).

Requirements for Section 404(c) Plan. To qualify as a Section 404(c) Plan, the Plan must provide to participants an "opportunity to exercise control" over the assets in their accounts. Under the Section 404(c) Rules, this condition is satisfied if the Plan provides sufficient information to participants so that they can make informed decisions with regard to the Plan's menu of investment alternatives. The Plan must also give participants a reasonable opportunity to provide their investment instructions. Furthermore, to be deemed a Section 404(c) Plan, the Plan's menu must include a broad range of investment alternatives, giving participants a reasonable opportunity to create appropriate investment portfolios.

Scope of Fiduciary Protection for CIFs. Assuming a Plan qualifies as a Section 404(c) Plan, the fiduciary protection against personal liability for an individual participant's losses would extend to all investment alternatives available under the Plan, including any CIFs included in the Plan's menu. CIFs by their nature are investment products and, in this regard, they are similar to any other investment alternative offered to Plan participants. Thus, the fiduciary protection afforded to a Section 404(c) Plan would clearly extend to CIFs as well as any other investment funds that are selected by participants from the Plan's menu.

However, this fiduciary protection is not absolute. The Plan sponsor would remain responsible for prudently selecting and maintaining the various investment alternatives for the Plan's menu. In addition, the Advisor serving as an investment advisor to the CIF (CIF Advisor) would be viewed as a fiduciary for ERISA purposes and it would be responsible for prudently investing the CIF's assets. By virtue of its role as trustee, the Bank Trustee for the CIF would also be a fiduciary to any Plan investing in such CIF. Thus, even though the Plan sponsor and Advisor would be subject to certain ongoing fiduciary duties, they would be able to draw comfort from the fact that the Bank Trustee was also serving the Plan as a co-fiduciary with trustee responsibilities.

To illustrate how these various responsibilities are allocated among the various parties, let us assume that a Plan sponsor has prudently decided to add three risk-based CIFs for aggressive, moderate and conservative participants. Assuming that the Plan is a Section 404(c) Plan, participants alone would be responsible for selecting the most appropriate CIF based on their risk profile. Neither the Plan sponsor nor the CIF Advisor could be held liable for any investment losses arising because the participant selected the wrong risk-based CIF (e.g., risk-averse participant mistakenly selects aggressive CIF). The CIF Advisor would only be responsible for any investment losses arising as result of investing the underlying assets of a CIF imprudently (e.g., conservative CIF is mistakenly invested 100% in equity securities).

Scope of Fiduciary Protection for Managed Accounts and Discretionary Model Portfolios. The DOL Rules are less clear as to whether this fiduciary protection would extend to discretionary investment management services like Discretionary Model Portfolios and Managed Accounts (as opposed to investment products). The Section 404(c) Rules state that the individual investment decisions of an investment manager designated by a participant are not the "direct and necessary results" of the participant's actions. Thus, ERISA Section 404(c) will not insulate the investment manager from fiduciary liability for its own investment decisions.[5]

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[5] It is our understanding that an Advisor sponsoring a Managed Account program may hire one or more subadvisors to manage various sleeves of a Managed Account, such as an asset manager specializing in fixed income securities.

However, the Section 404(c) Rules favorably state that the Plan sponsor (and any fiduciaries other than the investment manager) would be protected against any liability for the investment manager's imprudent decisions if the Plan is a Section 404(c) Plan.

Based on this reading of the Section 404(c) Rules, discretionary investment management services, including Managed Accounts and Discretionary Model Portfolios, potentially may have equal footing with investment products in terms of the scope of fiduciary protection under ERISA Section 404(c). This view is supported by the preamble to the DOL's original set of regulations issued in 1992[6] under ERISA Section 404(c) (Original 404(c) Rules), which states that the term "investment alternatives" refers to both look-through investment vehicles (*e.g.*, CIFs) as well as investment managers (*e.g.*, Managed Accounts, Discretionary Model Portfolios).[7]

However, it is customary for some Advisors that offer Discretionary Model Portfolios to participants, to also advise or otherwise direct participants to a particular Model Portfolio. In this case, the Advisor would be responsible for both the selection of the particular Model Portfolio as well as its allocation discretion as manager for the selected Model Portfolio. In other words, the fiduciary protection under ERISA Section 404(c) would not apply.

To illustrate how the fiduciary protection under ERISA Section 404(c) would apply to Discretionary Model Portfolios, let us assume that a Plan sponsor has prudently engaged an Advisor to provide discretionary advice in the form of three risk-based Model Portfolios for aggressive, moderate and conservative participants. If the Discretionary Model Portfolios are presented as investment alternatives that participants must independently select under a Section 404(c) Plan, the Plan sponsor and the Advisor would be insulated from liability for any losses due to participant's selecting the wrong risk-based Model Portfolio (e.g., risk-averse participant mistakenly selects aggressive Model Portfolio). However, the Advisor would remain responsible for any investment losses that are due to any allocation advice made imprudently for a particular Model Portfolio (e.g., 100% allocation to equity funds for conservative Model Portfolio). On the other hand, if a participant selects a Discretionary Model Portfolio based on the Advisor's fiduciary recommendation, the liability protection under ERISA Section 404(c) would not be available.

The ERISA Section 404(c) analysis described above for Discretionary Model Portfolios would also apply to Managed Accounts. Consistent with the analysis above, if a participant independently selects the Managed Account type (balanced, all equity, all fixed income, etc.),

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Under these arrangements, the Advisor's fiduciary responsibility over the selection of the underlying securities for the Managed Account would vary, based on the manner in which responsibilities are delegated to the subadvisor.

[6] The 404(c) Regulations were substantially revised in connection with the DOL's issuance of its final regulations for participant-level disclosures on October 20, 2010.

[7] "[T]he act of designating *investment alternatives (including look-through investment vehicles and investment managers*) in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable. All of the fiduciary provisions of ERISA remain applicable to both the initial designation of *investment alternatives and investment managers* and the ongoing determination that such *alternatives and managers* remain suitable and prudent investment alternatives for the plan" (emphasis added). Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 FR 46906 (October 13, 1992).

404(c) relief would be available if the Plan is a Section 404(c) Plan. But if the Managed Account type is selected based on the Advisor's fiduciary advice to the participant, such relief would not be available.

Scope of Fiduciary Protection for Educational and Non-discretionary Model Portfolios. As noted in the preamble, ERISA Section 404(c) protection extends to "investment managers" only, which is defined to include providers of discretionary investment advice under ERISA Section 3(38). It would not apply to providers of non-discretionary advice or mere investment education. Thus, neither Educational Model Portfolios[8] nor Non-discretionary Model Portfolios would be viewed as investment alternatives eligible for fiduciary protection under ERISA Section 404(c).

Does ERISA Impose Participant Disclosure Requirements On All Five Approaches?

In 2012, the DOL issued new regulations imposing a fiduciary duty on Plan sponsors to provide participant-level investment disclosures.[9] Under Section 2550.404a-5 of the DOL regulations (Disclosure Rules), Plan sponsors must automatically provide certain quarterly and annual disclosures concerning the Plan's services and fees. Detailed disclosures concerning the Plan's investment alternatives (Investment Disclosures) are also required. The new Disclosure Rules become effective with the first Plan year that began after October 31, 2011.[10] For Plans with a calendar Plan year, initial participant-level disclosures had to be provided by August 30, 2012.

Investment Disclosures for DIAs. The Investment Disclosures must include the relevant information for every designated investment alternative (DIA) under the Plan. Under the relevant provisions, a DIA is defined to include "any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts." However, brokerage windows and similar arrangements that enable participants to select investments beyond those designated by the Plan are specifically excluded from consideration as a DIA.

The Investment Disclosures for participants under the Disclosure Rules must provide standardized performance information for each DIA, and it must be presented in the format of a comparative chart (Comparative Chart).[11] It must generally also provide performance information for each DIA's benchmark index. Such Comparative Chart would need to be included in both the initial and annual disclosures to participants.

The "Total Annual Operating Expenses" of each DIA, which includes its investment fees and any other expenses (excluding certain brokerage costs) that reduce its rate of return, must

[8] Although an Educational Model Portfolio itself could never qualify as an investment alternative for ERISA Section 404(c) purposes, the Plan's actual menu of investment fund options could, of course, qualify for such protection so long as only non-fiduciary investment education is provided to participants.
[9] Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Final Rule, 75 FR 64910 (October 20, 2010).
[10] Section 2550.404a-5 of the DOL regulations also requires the sponsoring employer to disclose certain information concerning the Plan's operation and administrative expenses on an annual and quarterly basis.
[11] The DOL included a detailed "model" Comparative Chart in its Disclosure Rules.

also be disclosed in the Comparative Chart. Specifically, each DIA's Total Annual Operating Expense must be expressed both as a percentage of investment assets (*e.g.*, 0.79%) as well as a dollar amount for a $1,000 investment (*e.g.*, $7.90 per $1,000 investment).

In addition to delivering the Comparative Chart to participants, the Plan sponsor must also post (or arrange for the posting of) certain investment information on an internet website (Website Posting). The Website Posting must include each DIA's investment objectives, principal strategies, portfolio turnover ratio, and quarterly updates for performance data and fee and expense information. This information must be presented in a manner consistent with the prospectus disclosure rules for mutual funds. A glossary of investment terms must also be included with either the Comparative Chart or the Website Posting. The Plan sponsor must also provide, upon request by a participant, a statement of the value of a share or unit of each DIA, a list of the assets comprising the portfolio of each DIA (and the proportion of the investment which it comprises), and certain other related items.

Required Investment Disclosures for CIFs. Given their investment product nature, any CIF included in a Plan's menu would be viewed as a DIA for purposes of the Disclosure Rules. Thus, the relevant performance and fee information for the CIF would need to be reflected in the Comparative Chart and the relevant investment strategy and data would need to be included in a Website Posting.

The Disclosure Rules are especially favorable to mutual funds, in that the fund disclosures already required under the Investment Company Act of 1940 will typically also satisfy the Investment Disclosure requirement under the Disclosure Rules. Many CIF providers, which compete with mutual fund families, have developed comparable types of disclosures over the years. Thus, an Advisor that wishes to offer its asset allocation solution to participants in the form of CIFs may wish to consider partnering with a Bank Trustee, which has already developed the capacity to produce the types of disclosures required under the Disclosure Rules.

Under the Disclosure Rules, the Comparative Chart furnished to participants must include standardized performance information. Specifically, it must include each DIA's average annual total return for 1-, 5- and 10-calendar year periods (or for the life of the DIA, if shorter). Although capturing this type of performance data may be challenging for Advisors that do not have systems with such capabilities, many Bank Trustees can readily calculate performance on a single pricing basis (NAV to NAV) for CIFs. In addition, due to the popularity of CIFs on Plan platforms, Bank Trustees are typically also able to track the ownership of interests in the CIF through "unitized" accounting, and strike daily valuations for such CIF ownership units. For Advisors that choose to provide their assets allocation solution to participants though CIFs, partnering with a qualified Bank Trustee could greatly reduce the burden of complying with these Disclosure Rules.

Required Investment Disclosures for Discretionary Model Portfolios and Managed Accounts. The Disclosure Rules are unclear as to whether investment management services, including Discretionary Model Portfolios and Managed Accounts, would be viewed as DIAs subject to the Investment Disclosures requirement. As discussed above, the relevant provisions ambiguously define a DIA to include any investment alternative designated by the plan into

which participants may direct the investment of assets held in their accounts. The 404(c) Rules similarly define a DIA as "a specific investment identified by a plan fiduciary as an available investment alternative under the plan." However, also as discussed above, both the operation of the 404(c) Rules and the preamble to the Original 404(c) Rules view and treat "investment alternatives" and "investment managers" in identical fashion.

Given the close relationship between the two sets of rules, any DIA for purposes of the 404(c) Rules should also be viewed as a DIA under the Disclosure Rules. The regulatory framework in which the two sets of rules operate, reveals how interconnected they are. Prior to the DOL's issuance of the Disclosure Rules on October 20, 2010, participant-level disclosures concerning a Plan's DIAs were optional. The Original 404(c) Rules required participant-level disclosures only for those Plans that voluntarily elected to qualify as a Section 404(c) Plan. Only with the issuance of the new Disclosure Rules are Plan sponsors now subject to an actual duty to provide DIA-related disclosures to participants. The new Section 404(c) Rules, which were substantially revised in connection with the DOL's issuance of the new Disclosure Rules, now merely require the Plan sponsor to provide the same disclosures otherwise required under the Disclosure Rules (and an explanation of the Plan's status as a Section 404(c) Plan). In light of the fact that the 404(c) Rules would treat Discretionary Model Portfolios and Managed Accounts like any other DIA, these investment vehicles should also be treated as DIAs for purposes of the Disclosure Rules.

It should also be noted that Discretionary Model Portfolios and Managed Accounts[12] are clearly eligible to qualify as qualified default investment alternatives (<u>QDIAs</u>) for purposes of Section 2550.404c-5 of the DOL regulations (<u>QDIA Rules</u>), as further discussed below. Under these rules, if a Discretionary Model Portfolio or Managed Account were to be used a Plan's QDIA, certain investment disclosures concerning the QDIA would need to be included in the initial and annual QDIA notices to participants. Although the QDIA Rules do not define the meaning of a DIA, it would be highly unlikely for the DOL or any court to hold that these QDIAs were not also DIAs for purposes of the Disclosure Rules.

The DOL issued the Disclosure Rules out of a "growing concern" that participants may not have access to "critical" information concerning the Plan's investment alternatives.[13] Given the high importance the DOL has placed on the Disclosure Rules from a policy standpoint, as well as the fact that the 404(c) Rules and the QDIA Rules treat Discretionary Model Portfolios and Managed Accounts as "investment alternatives" available under a Plan, they should be similarly viewed as DIAs for purposes of the Disclosure Rules.

<u>Special Performance Disclosure Issues for Discretionary Model Portfolios and Managed Accounts</u>. An issue arises as to how the required performance information (*i.e.*, average annual total return for 1-, 5- and 10-calendar year periods or for the life of the DIA, if shorter) should be disclosed in the Comparative Chart in the case of Discretionary Model Portfolios and Managed Accounts, in light of the fact that these services involve individual participant accounts with

[12] On the face of the QDIA Rules, Managed Accounts are clearly eligible to qualify as a Plan's QDIA. However, to qualify, the Managed Accounts' investments must be limited to the Plan's available investment options, as further discussed below.
[13] Preamble to Disclosure Regulations, 75 FR 64910 (October 20, 2010).

potential variances (although presumably slight variances) in the rates of investment returns across accounts. In addition, because these services are specific to an individual Plan and their participants, actual performance data for any period that precedes the commencement of these services would be unavailable.

Unfortunately, the Disclosure Rules appear to contemplate the use of actual returns to calculate the average annual total return.[14] The fact that the relevant provisions expressly require the use of performance data for the "life of the DIA, if shorter" (instead of the standardized 1-, 5- and 10-calendar year periods) affirms this view. But other than stating that the average annual total return should be calculated in accordance with the disclosure rules for mutual funds, the DOL provides little guidance on how actual returns would be calculated in the case of Discretionary Model Portfolios and Managed Accounts. In the case of Discretionary Model Portfolios, it may be reasonable to use the performance for a "typical" Plan participant (or the performance that a typical Plan participant is expected to have experienced). In the case of Managed Accounts, it may be reasonable to rely on performance data for a composite of Plan participant accounts.

Although the use of actual returns is contemplated, it should be noted that the DOL does not prohibit supplementing this information with historical performance data for a hypothetical model portfolio or a composite of historical client accounts. Thus, Advisors that wish to provide their asset allocation solution to participants in the form of Discretionary Model Portfolios or Managed Accounts should consider developing an appropriate disclosure approach that incorporates such historical performance data. For example, if an Advisor has been providing Discretionary Model Portfolios to Plan participants for only a 4-year period, the performance data in the Comparative Chart could be reflected as follows:

Name/Type of Option	**Average Annual Total Return**			
	1yr.	**5yr.**	**10yr.**	**Since Inception**
Aggressive Model Portfolio	a.aa%	N/A	N/A	b.bb%
(Hypothetical Model Results)	*(c.cc%)*	*(d.dd%)*	*(e.ee%)*	*(f.ff%)*

Advisors that are investment advisors registered under the Investment Advisers Act of 1940 (Advisers Act) would need to present any hypothetical model results or composite performance data in accordance with Rule 206(4)-1(a)(5) of the Advisers Act. Thus, they may need to include additional disclosures and other explanations to satisfy the relevant restrictions, which generally prohibit the use of any performance advertising that is fraudulent, deceptive or manipulative. In its 1986 no-action letter to Clover Capital Management, Inc. (Clover No-Action Letter), the U.S. Securities and Exchange Commission (SEC) established guidelines on how an investment advisor may advertise its actual and hypothetical model results without violating this standard for performance advertising.[15]

[14] "Average annual total return" is defined under the Disclosure Rules to mean the average annual compounded rate of return that would equate an initial investment in a DIA to the ending redeemable value of that investment as calculated in in accordance with the disclosure rules for mutual funds.

[15] Any Advisor that claims compliance with the standards under the Global Investment Performance Standards program (GIPS) would need to present its composite performance data in accordance with such standards, in addition to complying with the requirements of the Clover No-Action Letter.

No Required Investment Disclosures for Educational and Non-discretionary Model Portfolios. Because the Investment Disclosures requirement only covers DIAs, Investment Disclosures would not be necessary for Educational Model Portfolios or Non-discretionary Model Portfolios. Similar to the Section 404(c) Rules, the Disclosure Rules only contemplate imposing the Investment Disclosures requirement on investment alternatives "into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts." Thus, they would apply to investment products and investment managers, but not to providers of mere education or non-discretionary advice.

Explicit Quarterly Fee Disclosures. In addition to requiring Investment Disclosures for the Plan's DIAs, the Disclosure Rules also require the Plan sponsor to arrange to provide certain quarterly disclosures (Explicit Quarterly Fee Disclosures) to participants concerning the Plan's fees and expenses (Operational Fees) that are charged against the individual accounts of participants. The Explicit Quarterly Fee Disclosures must state the actual dollar amount of the Plan's Operational Fees charged in the most recent quarter to each participant's account as well as a description of the related services. Fortunately, any fees that are reflected in the Total Annual Operating Expenses of the Plan's DIAs (which are disclosed in the Comparative Chart) do not have to be disclosed to participants as part of the Plan's Explicit Quarterly Fee Disclosures.

In the case of an Advisor utilizing CIFs, the Advisor's fee for advising the CIFs would be reflected in the CIF's Total Annual Operating Expenses and disclosed in the Comparative Chart. Therefore, the Advisor's fee would not have to be included in the Plan's Explicit Quarterly Fee Disclosures.

However, an Advisor's Non-discretionary Model Portfolios would not qualify as DIAs under the Disclosure Rules. Thus, the Advisor's advisory fee for providing these participant services would have to be reflected in the Explicit Quarterly Fee Disclosures. To the extent that an Advisor charged a specific fee for providing Educational Model Portfolios to participants (in addition to fund-based compensation, such as 12b-1 fees, for providing Plan services generally), such fee would also need to be reflected in the Plan's Explicit Quarterly Fee Disclosures.

Although we believe Discretionary Model Portfolios and Managed Accounts should be treated as DIAs for purposes of the Disclosure Rule, the fees associated with these DIAs may not necessarily be viewed as "Total Annual Operating Expenses" depending upon the manner in which such fees are charged. As referenced above, "Total Annual Operating Expenses" are defined to include only those expenses that reduce the rate of return of the DIA. For example, if an Advisor's $25 quarterly fee for providing Discretionary Model Portfolio were debited from a participant's account (requiring units or shares in the various DIAs held by the participant to be sold), such fee would reduce the account's overall rate of return but it would not reduce the rate of return of the individual DIAs.

For these types of Discretionary Model Portfolio or Managed Account arrangements in which the fees are debited at the account level (Debited Fees), such Debited Fees would have to

be reflected in the Explicit Quarterly Fee Disclosures.[16] On the other hand, if the fees for the Discretionary Model Portfolios or Managed Accounts are unitized by the Plan's recordkeeper (Unitized Fees), effectively embedding these expenses into the value of a participant's ownership interest in each individual DIA (and thus its rate of return), such Unitized Fees would not have to be reflected in the Explicit Quarterly Fee Disclosures.

Are All 5 Approaches Eligible To Serve As QDIAs?

Overview of QDIA Rules. ERISA Section 404(c)(5) offers fiduciary liability protection to Plan fiduciaries when participants are "defaulted" into an investment alternative under the Plan. This protection is intended to mirror the fiduciary relief provided to participants when they affirmatively elect their investments under the Plan in accordance with ERISA Section 404(c). The QDIA Rules provide that the relevant liability protection will only be available if the default investment constitutes a QDIA. The applicable provisions generally contemplate two types of QDIAs:

- An "investment fund product or model portfolio" (*e.g.*, Discretionary Model Portfolios, CIFs) that has either a target date retirement strategy or a balanced investment strategy, or

- An "investment management service" (*e.g.*, Managed Accounts) under which the assets of a participant's account are allocated to achieve a mix of equity and fixed income exposures, offered through investment alternatives available under the Plan, in accordance with a target date retirement strategy only.

Additionally, the "investment fund product or model portfolio" or the "investment management service," as applicable, must be either (i) a mutual fund or (ii) another type of investment vehicle managed by an investment manager, a Plan trustee that satisfies the substantive requirements of an investment manager, or the Plan sponsor. The QDIA Rules also require the fund or other investment vehicle to apply generally accepted investment theories, provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures, and be diversified so as to minimize the risk of large losses.[17] Furthermore, it must not hold or permit the acquisition of employer securities (subject to certain limited exceptions).[18] Defaulted participants must also be given the opportunity to transfer, in whole or in part, to any other investment alternative available under the Plan.

Educational and Non-Discretionary Model Portfolios Are Ineligible for QDIA Status. As noted above, unless the QDIA is a mutual fund, the Advisor advising the QDIA must be an investment manager. As defined under ERISA Section 3(38), an investment manager is a fiduciary who (i) has the power to manage, acquire or dispose of Plan assets, (ii) is either a bank,

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[16] Although Discretionary Model Portfolios and Managed Accounts with Debited Fees would not have any "Total Annual Operating Expenses," based on a good faith reading of the Disclosure Rules, they would still needed to be included in the Comparative Chart and all other relevant information (excluding Total Annual Operating Expenses) would need to be disclosed in such chart.
[17] DOL Regulation Section 2550.404c-5(e)(4)(i), (ii) and (iii).
[18] DOL Regulation Section 2550.404c-5(e)(1).

insurance company or an investment adviser registered under the Advisers Act or state law, and (iii) has acknowledged in writing that it is a Plan fiduciary. Thus, the Advisor must have discretionary investment authority over the QDIA's assets. Advisors that use Model Portfolios to provide investment education or non-discretionary investment advice would not be able to satisfy this requirement, due to a lack of discretionary investment authority. Accordingly, neither Educational Model Portfolios nor Non-discretionary Model Portfolios would be permitted to be utilized as a Plan's QDIA.

Discretionary Model Portfolios and CIFs Are Eligible for QDIA Status. In contrast to Non-discretionary Model Portfolios, Discretionary Model Portfolios may be utilized as a QDIA for a Plan since the Advisor providing such Discretionary Model Portfolios would have the required discretion over participant accounts. This same favorable analysis applies to CIFs, since the CIF provider also has full discretionary authority over the CIF's underlying assets.[19] Therefore, both Discretionary Model Portfolios and CIFs may be utilized as a QDIA. Moreover, because Discretionary Model Portfolios and CIFs constitute an "investment fund product or model portfolio" within the meaning of the QDIA Rules, Advisors would have the flexibility to design them with either a target date retirement strategy or a balanced investment strategy.

Managed Accounts Typically Ineligible for QDIA Status. The QDIA Rules expressly state that Managed Accounts are an example of an "investment management service" that may be used as a QDIA. However, the QDIA Rules explicitly state that the mix of equity and fixed income exposures for a participant's account must be achieved through the investment alternatives available under the Plan. This regulatory requirement is inconsistent with industry practice, since Managed Accounts typically invest in a wide array of funds and other securities (and are not limited to a Plan sponsor's DIAs). We also note that, to the extent an Advisor is willing to offer Managed Accounts that are limited to the Plan's DIAs, such Managed Accounts would be indistinguishable from an offering of Discretionary Model Portfolios.

It should also be noted that an "investment management service" is eligible to serve as a QDIA only if it has a target date retirement strategy. It is our understanding that many Managed Account programs do not offer such strategy. Thus, for multiple reasons, it appears that the Managed Accounts customarily offered by Advisors would not be eligible to serve as a QDIA.

How Are the Five Approaches Affected by the DOL's New Conflicts of Interest Rule?

On April 8, 2016, the DOL finalized and published its new "Conflicts of Interest" Rule which is actually a set of rules that consists of an expansion of the definition of fiduciary investment advice and a number of related releases providing new and modified exemptions from ERISA's prohibited transaction rules for fiduciary advisors. This new rule will go into effect on April 10, 2017, unless it is delayed by the Department of Labor pursuant to its review of the rule, as ordered by President Trump.

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[19] In the case of a CIF, either the Bank Trustee or the CIF Advisor would need to have the necessary investment discretion over the CIF's underlying assets for purposes of the QDIA Regulations. (When a Plan's assets are invested in a CIF, the Bank Trustee for the CIF is generally also deemed to be a trustee of the Plan.)

The new rule extends the scope of fiduciary investment advice so that virtually all recommendations with respect to investing in or managing securities or other investment property will cause an advisor to be treated as a fiduciary. This includes guidance with respect to investment policy statements, investment strategies or portfolio composition, as well as recommendations concerning the selection of other persons to provide investment management services. However, one of the new rule's six exclusions from fiduciary status applies to investment education, and this exclusion can cover asset allocation models provided to both plan sponsors and participants.

Requirements for Education Model Portfolios. In order to qualify for the investment education exclusion, the DOL has made it clear that non-fiduciary asset allocation models and interactive materials must not recommend or reference any specific investment options unless these educational tools are being provided for a defined contribution plan with investment options subject to the oversight of and approved by the plan sponsor. Additionally, all similar investment options with similar risk-return characteristics must be identified, and a statement explaining how more information on these investment options can be obtained must also be provided. Assuming these conditions are met, but only if an Advisor avoids any recommendation or suggestion to a plan participant as to the appropriateness or inappropriateness for the participant of a particular model, Advisors furnishing Educational Model Portfolios would not have fiduciary status imposed on them as a result of this service.

Compliance with New Best Interest Contract Exemption Needed in Order to Receive Variable Compensation. Except when providing Educational Model Portfolios that qualify for the fiduciary exception, Advisors would generally be acting in a fiduciary capacity by rendering advice with respect to Non-discretionary and Discretionary Model Portfolios, as well as Managed Accounts. In addition, Model programs and Managed Accounts may have one or more model providers that create the model portfolios of securities. Even though the model providers may not know the identities of the individual clients, they too could conceivably be viewed as fiduciaries under the new rule's broadened definition. An Advisor's recommendation to a client to use a particular model provider could also be viewed as fiduciary advice under the new rule.

One of the restrictions imposed on these fiduciaries is ERISA's prohibition on their receipt of variable compensation, such as commissions or any other type of compensation that varies based on the particular investment recommended to a retirement client unless an exemption from the prohibited transaction rules applies. On the other hand, a level fee (*i.e*., a flat dollar amount or a percentage of the client's assets being managed by an Advisor) does not give rise to a prohibited transaction, because the fee will not be affected by the Advisor's recommendations. Accordingly, level fee Advisors will generally not need to comply with the BICE, except for the single recommendation to enter the level fee advisory relationship.

Because of the broadened scope of the new fiduciary definition under the Conflicts of Interest Rule, the DOL recognized that exemptive relief would be necessary for Advisors who had not previously held themselves out as fiduciaries but would be deemed to be fiduciary Advisors after the rule change. For this reason, the DOL has issued a new prohibited transaction exemption called the Best Interest Contract Exemption ("BICE").

The BICE is a complicated exemption, because it includes four alternative sets of conditions that apply based on the type of retirement investor to whom fiduciary advice is rendered, as well as other circumstances. In its most onerous version, qualifying for the exemption requires a written agreement between a fiduciary Advisor and an IRA or retirement plan not subject to ERISA that must be executed no later than a recommended transaction's execution. The agreement must contain certain mandatory provisions and warranties, including a promise to adhere to a new standard of conduct requiring an Advisor to base recommendations on the client's best interest and to disregard the Advisor's own financial interests. The agreement must reflect general disclosures concerning the Advisor's compensation and any related conflicts and include a warranty that the Advisor's firm has adopted compliance policies designed to mitigate the conflicts. In addition to the written contract, the Advisor's firm must also provide transaction and compensation disclosures for each recommended investment when requested by the client.

Trustees of CIFs in which a plan subject to ERISA owns an interest have, since the enactment of ERISA, been acknowledged to have fiduciary status, given that CIF assets are deemed to be plan assets.[20] Fiduciary status would also apply to CIF subadvisors possessing or exercising authority over the allocation of CIF assets. Nevertheless, CIF trustees stand on a separate footing from other model providers, because of Congress' expressed desire to preserve the "more efficient investment management" offered by CIFs, as well as the heavy regulation of banks and trust companies by regulators other than the DOL.[21] These policy considerations led to the inclusion of an exemption under ERISA Section 408(b)(8) from ERISA's self-dealing prohibitions for a plan's purchase or sale of an interest in a CIF. The exemption has also been applied to fees payable for investment management by the CIF.[22]

This means that a CIF trustee should not have to rely on the BICE to avoid the prohibited transaction rules, provided the conditions of the statutory exemption are satisfied.[23] These conditions include the requirement that the transaction be specifically permitted by the plan, or if a plan fiduciary (other than the CIF trustee or an affiliate) who has the authority to manage and control plan assets specifically permits investment in the CIF. In addition, the plan may pay no more than reasonable compensation for investment management by the CIF.

CIF trustees can also provide additional non-fiduciary services, such as recordkeeping and administration, without the need to comply with the BICE, although the trustee's status as an ERISA fiduciary would necessitate obtaining the approval of an independent plan fiduciary for the provision of such additional services by the trustee or its affiliates where fees or expenses in addition to those specified in the CIF investment management agreement would be paid.[24]

Eliminating Discretion That Prevents BICE Compliance. One of the BICE's major drawbacks is that it does not provide relief for discretionary advice. Therefore, Advisors

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[20] See ERISA Conference Committee Report, House Report 93-1280, p. 316.
[21] Id.
[22] Id. See also DOL Advisory Opinion 96-15A.
[23] Although the statutory exemption does not specifically apply to a CIF subadvisor, in DOL Advisory Opinion 96-15A, the exemption was extended to a trust subadvisor that was an affiliate of the CIF trustee.
[24] See, e.g., DOL Advisory Opinions 1982-22A and 1982-41A.

providing Discretionary Model Portfolios or Managed Accounts, each of which endow Advisors with considerable flexibility in managing their underlying investments, will be forced to levelize their compensation. As discussed below, this may require considerable effort.

Even Non-discretionary Advisors will be unable to qualify for relief under the BICE if their programs contain discretionary elements. Such firms that want to rely on the BICE will need to remove the discretionary aspects of their programs. An Advisor's ability to change the program strategist or subadvisor of a Model Portfolio is an example of discretionary authority likely to make reliance on the BICE untenable. Requiring the client's written consent whenever an Advisor believes such a change is needed is an approach being used to eliminate such discretion.

Another advisory service from which discretionary power must be removed in order to enable reliance on the BICE is the act of rebalancing investments within a Model Portfolio. Some firms will try to accomplish this by including a formula in the program agreement that controls the asset allocation methodology as well as the times when rebalancing will be implemented. Alternatively, discretion can be removed by obtaining plan sponsor approval on a case by case basis for periodic reallocations.

As previously noted, because of the statutory exemption under Section 408(b)(8) of ERISA, CIF trustees will not need to contend with the requirements of the BICE. This is fortunate, since the CIF trustee would likely possess full discretionary investment authority over the CIF's underlying assets, which would make the BICE inapplicable.

It is likely that a CIF subadvisor would also possess or exercise full discretionary asset allocation authority. Where the subadvisor is an affiliate of the CIF trustee, the trustee will generally share its fee with the subadvisor consistent with the factual circumstances in Advisory Opinion 1996-15A in which the DOL sanctioned the subadvisor's fee under the statutory exemption.[25]

The Section 408(b)(8) statutory exemption does not apply, however, with respect to a subadvisor that is not affiliated with the CIF trustee. But in that circumstance, Prohibited Transaction Exemption ("PTE") 91-38 permits arm's length transactions between the CIF and a party in interest to a plan unrelated to the CIF trustee, such as an independent subadvisor. In some situations, this exemption is limited by the requirement that the subadvisor not have discretionary authority, so that final investment allocation decisions will need to be made by the trustee.[26]

Level Compensation as An Alternative to The BICE. Generally speaking, the alternative to complying with the BICE is forgoing variable compensation by the individual Advisor, as

[25] Where the CIF trustee's investment management fee is split with an affiliated subadvisor, the amount received by both parties will generally qualify as a level fee, so that even if the statutory exemption were not available, the trustee and its affiliate would not be in violation of ERISA's prohibited transaction rules.
[26] In certain situations, the exemption of a party in interest unaffiliated with the CIF trustee under PTE 91-38 will be conditioned on the plan's interest in the CIF not exceeding 10% of the fund's total assets or the fund's investment of all its assets in short term obligations. PTE 91-38's restriction on the subadvisor's discretionary authority will not apply in these cases.

well as his or her firm. As noted above, this means that an Advisor (and his/her firm) can only receive a level fee, such as a flat dollar amount or a percentage of the client's assets under the Advisor's management. It also requires eliminating or restructuring revenue sharing paid to an Advisor's firm by sponsors of turnkey managed accounts or providers of other investment products. Variable compensation that would need to be similarly addressed could also arise from sub-transfer agent fees, 12b-1 fees or revenue sharing paid by mutual funds or a clearing firm to the Advisor's firm in its capacity as the sponsor of a proprietary Managed Account or model program.

It had been thought that revenue sharing payments could be restructured by changing them to flat dollar amounts that do not vary based on sales or assets. Although levelizing third party payments in this manner seemed to be contemplated by the wording of the BICE, the DOL has created doubt as to whether this will be permitted by stating that all third-party payments are "transaction-based fees and vary on the basis of a particular investment," thus implying that their presence will require compliance with the BICE.[27] This interpretation would eliminate the ability of discretionary advisors and their firms, for whom the BICE is not available, to receive any third party payments. As of this writing, this issue remains unresolved. CIF providers, however, may be in a unique position with respect to restructuring third-party payments, since special classes of trust interests can be created for specified pools of assets, the investment management of which is compensated only from plan assets or the fund itself.

Even if a client pays a level fee in order to participate in a Managed Account program or Model program, another potential source of variable compensation that would need to be levelized arises from the ability of an advisory firm sponsoring one of these programs to increase its net profit by selecting a less expensive strategist or subadvisor to construct the models. In addition, if an advisory firm sponsors a proprietary Managed Account or Model program, variable compensation could arise because the firm could earn more under its proprietary programs than under an independent turnkey program. In other words, this would create an incentive to recommend the in-house program resulting in larger fees.

To deal with these situations, some firms are considering strategies which would levelize their net profit by charging the client an incremental amount to cover the particular compensation rate of the chosen strategist or subadvisor. Thus the gross fee paid by the client would vary depending on which strategist or subadvisor is selected. Other firms are exploring levelization of their gross fees while net profit would vary. However, there is no indication from the DOL as to whether this approach would be appropriate.

Conclusion

Advisors generally have the flexibility to offer their asset allocation solution to Plan participants in the form of Educational, Non-Discretionary and Discretionary Model Portfolios, as well as Managed Accounts and CIFs. However, although these various approaches substantively provide a similar investment option for participants, they are treated differently under ERISA's 404(c) Rules, Disclosure Rules and QDIA Rules.

[27] DOL Frequently Asked Question No. 18, issued October 27, 2016.

Since Educational and Non-discretionary Model Portfolios do not qualify as "investment alternatives" (in light of the fact that participants must ultimately decide their own allocations), the fiduciary protection under ERISA Section 404(c) would not apply to such participant guidance. Because they are not DIAs, they would not be subject to the Investment Disclosures requirement. However, Non-discretionary Model Portfolios and Educational Model Portfolios (if a separate fee is charged) would be subject to the Explicit Quarterly Fee Disclosures requirement. In no event may any type of Educational or Non-discretionary Model Portfolio be utilized as a QDIA.

ERISA Section 404(c) protection would not be available to Discretionary Model Portfolios to the extent the participant relied on the advice of the Advisor to select a particular portfolio. It also appears that Advisors utilizing Discretionary Model Portfolios would need to comply with the Comparative Chart and Website Posting requirement under the DOL's new Disclosure Rules. They would also be subject to the Explicit Quarterly Fee Disclosures if they feature Debited Fees (rather than Unitized Fees). However, Discretionary Model Portfolios with either a target retirement date strategy or a balanced investment strategy would be eligible to serve as a Plan's QDIA.

CIFs would be similarly eligible to serve as a Plan's QDIA, and the fiduciary protection available to Section 404(c) Plans would also extend to CIFs. Advisors that utilize CIFs should also consider relying on the Bank Trustee to help Plan sponsors comply with the Investment Disclosures requirement.

In contrast to CIFs, Managed Accounts would typically be ineligible to serve as a Plan's QDIA. In addition, the fiduciary protection available under ERISA Section 404(c) could only extend to a participant's decision to invest through a Managed Account if the participant selected the account type without relying on the fiduciary advice of the Advisor. Furthermore, any Advisor that utilizes Managed Accounts would need to comply with the Comparative Chart and Website Posting requirement under the DOL's Disclosure Rules. Similar to Discretionary Model Portfolios, Managed Accounts would also be subject to the Explicit Quarterly Fee Disclosures if they featured Debited Fees.

Plan and IRA fiduciaries, particularly those who are investment Advisors, need to be aware of how the DOL's Conflicts of Interest Rule uniquely affects each of the five investment vehicles. Assuming the applicable conditions are met, furnishing Educational Model Portfolios, is not a fiduciary act and will not give rise to restrictions on the types of compensation Advisors may receive. Non-discretionary Model Portfolios may generate variable compensation if the terms of the BICE are met, including the elimination of discretionary elements from these programs. Otherwise, Advisors and other fiduciaries with respect to Non-discretionary Model Portfolios must limit themselves to level compensation. Discretionary Model Portfolios and Managed Accounts, by their nature, involve discretionary fiduciary functions so that fiduciary Advisors can only receive level compensation. Although CIF trustees and subadvisors also provide investment management on a discretionary basis, CIFs have more flexibility than other investment options, because they can rely on the 408(b)(8) statutory exemption to avoid prohibited transactions, and they have the ability to create classes of trust interests under which third party payments cannot be a source of compensation for investment management services.

All five types of investment vehicles (*i.e.*, Educational, Non-discretionary and Discretionary Model Portfolios as well as Managed Accounts and CIFs) can be utilized to provide an "all in one" investment solution to Plan participants. However, Advisors and Plan sponsors should be sure to consider the varying regulatory advantages and disadvantages of each to determine which approach is most appropriate for them.

APPENDIX A

Regulatory Treatment of Asset Allocation Solutions for 401(k) Plan Participants

Asset Allocation Solution	Is it a 404(c) investment alternative, protecting plan fiduciaries?	Are 404a-5 investment disclosures required?	Explicit quarterly fee disclosures required?	Is it eligible to qualify as plan's QDIA?
1. Educational Model Portfolios	NO	NO	YES (if separate fee is charged to plan client)	NO
2. Non-discretionary Model Portfolios	NO	NO	YES	NO
3. Discretionary Model Portfolios	NO (unless participant selects portfolio without advice from advisor)	YES	YES (unless fee is unitized and reflected in investment returns)	YES
4. Managed Accounts (investments not limited to plan's funds)	NO (unless participant selects account type without advice from advisor)	YES	YES (unless fee is unitized and reflected in investment returns)	NO
5. Collective Investment Funds	YES	YES	NO	YES

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