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Key Risks in the Retirement Plan Products and Services

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Major Provisions

ERISA: Title 29 of USC

DOL (Title I)

- Reporting and Disclosure ---------> Part 1 (ERISA 101 – 111)
- Vesting & Participation ---------> Part 2 (ERISA 201 – 211)
- Funding ---------> Part 3 (ERISA 301 – 305)
- Fiduciary Conduct ---------> Part 4 (ERISA 401 – 411)
- Administration and Enforcement -> Part 5 (ERISA 501 – 515)

ERISA by its terms does not apply to

- Governmental plans
- Church plans
- Plans maintained outside of the USA where the benefits of non-resident aliens
- Non-funded excess benefit plans or
- Non-qualified plans

Non-qualified plans are covered under IR Code 409A

Governmental plans are subject to state laws which often include varies provisions on fiduciary responsibilities that are very similar to ERISA.

Major Provisions

ERISA: Title 29 of USC

DOL (Title I)

- Reporting and Disclosure
- Vesting & Participation
- Funding
- Fiduciary Conduct
- Administration and Enforcement

IRS (Title II)

- Primary responsibilities
  - Participation
  - Vesting
  - Contribution Limits
  - Distribution Limits
  - Distribution Rules

Section 501 (Tax Exempt)

Provides that a trust holding retirement plan assets will qualify for favorable tax treatment **only if it meets all of lengthy requirements mentioned in Section 401(a).**

Major Provisions

ERISA: Title 29 of USC

DOL (Title I)

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IRS (Title II)

- Primary responsibilities
  - Participation
  - Vesting
  - Contribution Limits
  - Distribution Limits
  - Distribution Rules

Interagency (Title III)

Coordination of enforcement and regulatory activities by the U.S. DOL and IRS

Interagency (Title III) –

Extended beyond the DoL and IRS

- In February 2006, DOL signed Interagency Agreements with:
  - Governors Federal Reserve Bank (FRB)
  - Federal Deposit Insurance Corporation (FDIC)
  - National Credit Union Administration (NCUA)
  - Office of Comptroller of the Currency (OCC)

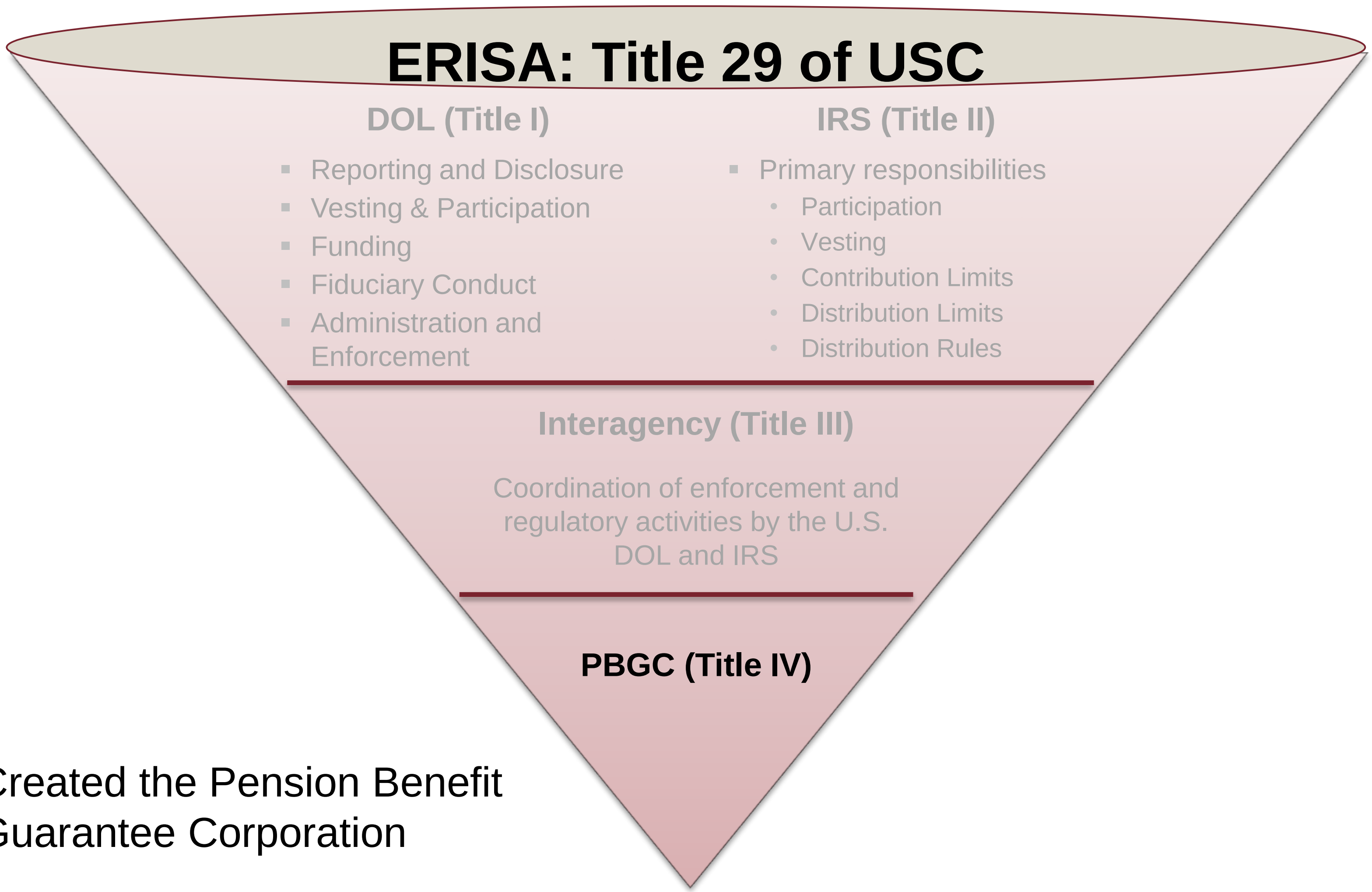
- Concerning possible violations of:
  1. Title I, Part 4, Section 404: Fiduciary Duties (including transactions by named fiduciary of qualified investment managers above $100,000)
  2. Title I, Part 4, Section 405: Relating to a liability for breach of co-fiduciary responsibility (including transactions by named fiduciary of qualified investment managers above $100,000)
  3. Title I, Part 4, Section 406 & 407(c): relating to prohibited transactions
  4. Title I, Part 4, Section 411: prohibition against certain persons holding certain positions
  5. Title I, Part 4, Section 412: relating to bonding requirements of the financial institution itself

Interagency (Title III) –

Extended beyond the DoL and IRS

- On July 25, 2013, DOL entered into a memorandum of understanding (MoU) to share information with the Securities Exchange Commission (SEC)

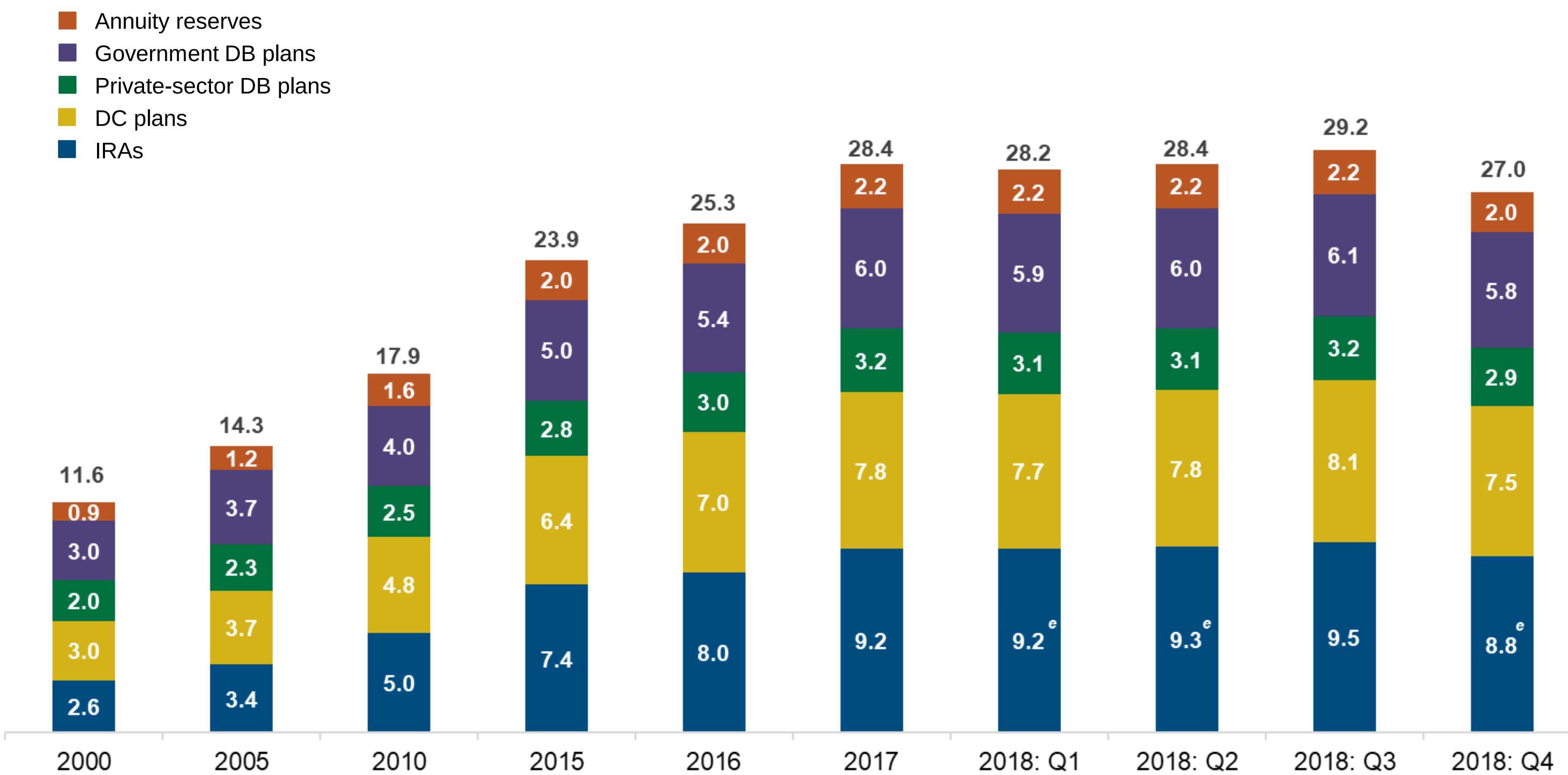
Major Provisions



Created the Pension Benefit Guarantee Corporation

U.S. Total Retirement Market

Trillions of dollars, end-of-period, selected periods



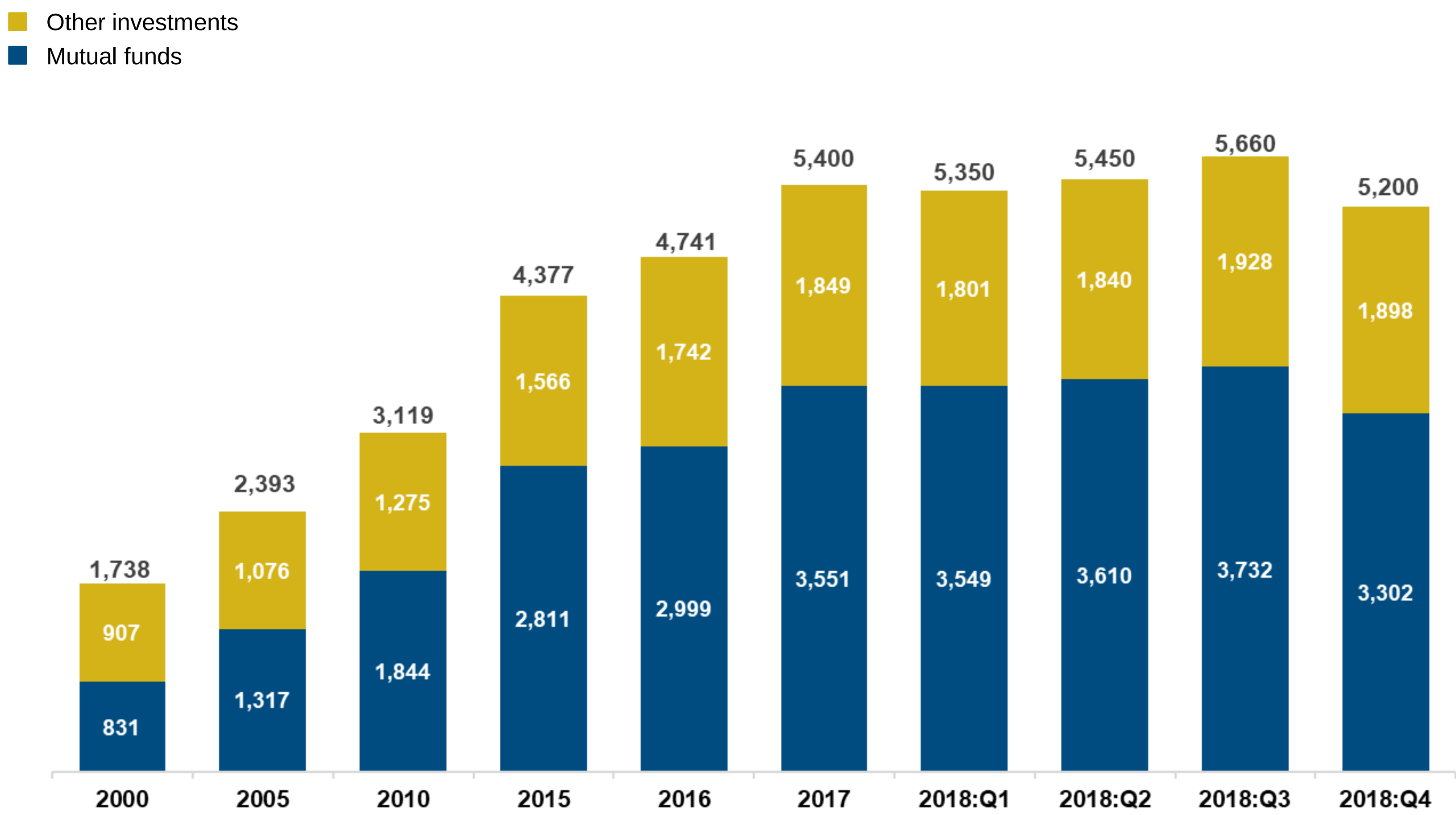
eData are estimated.

Note: For definitions of plan categories, see Table 1 in "The US Retirement Market, Fourth Quarter 2018." Components may not add to the total because of rounding.

Sources: Investment Company Institute, Federal Reserve Board, Department of Labor, National Association of Government Defined Contribution Administrators, American Council of Life Insurers, and Internal Revenue Service Statistics of Income Division. As of 3/28/19

401(k) Plan Assets

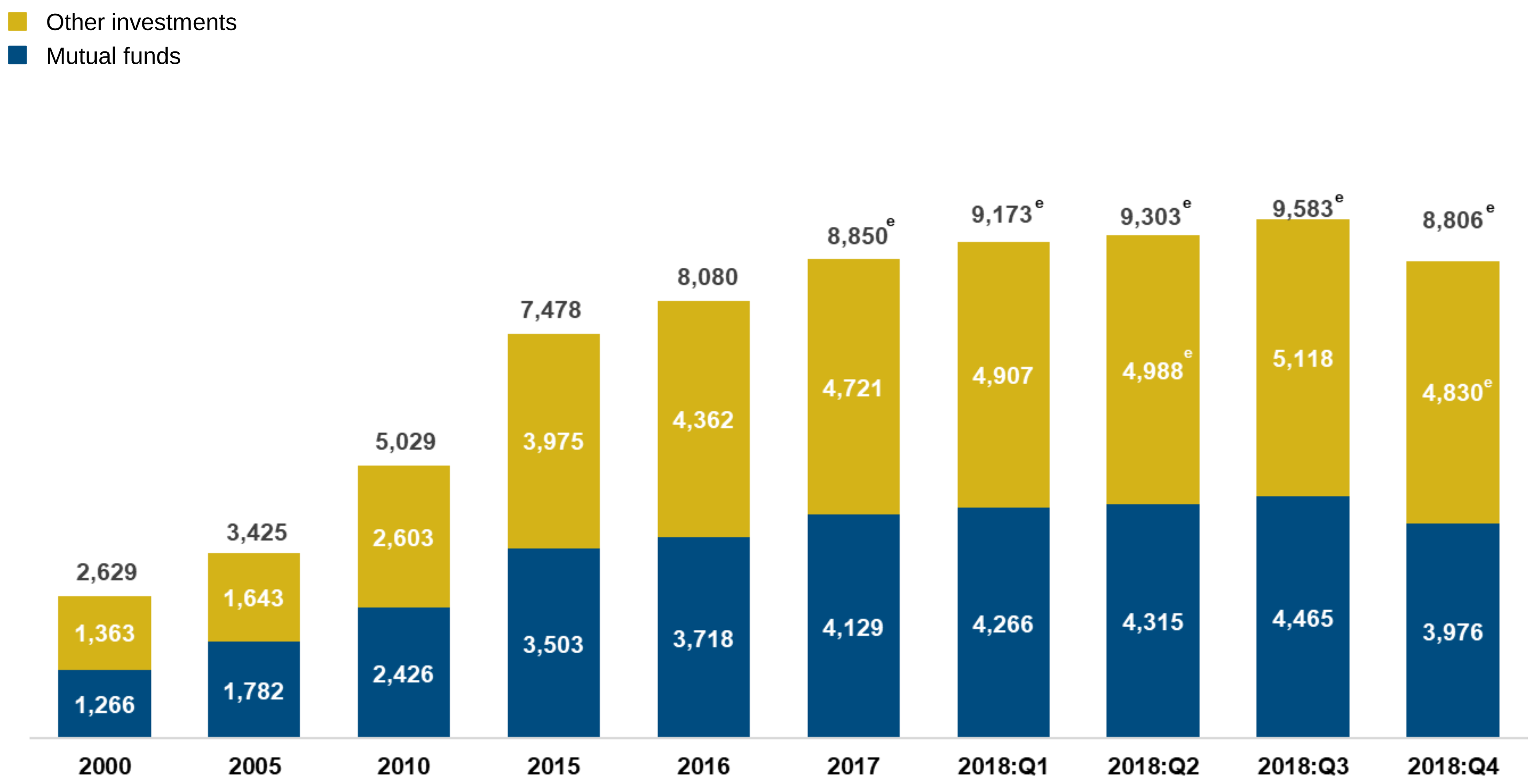
Billions of dollars, end-of-period, selected periods



Sources: Investment Company Institute, Federal Reserve Board, and Department of Labor

IRA Market Assets

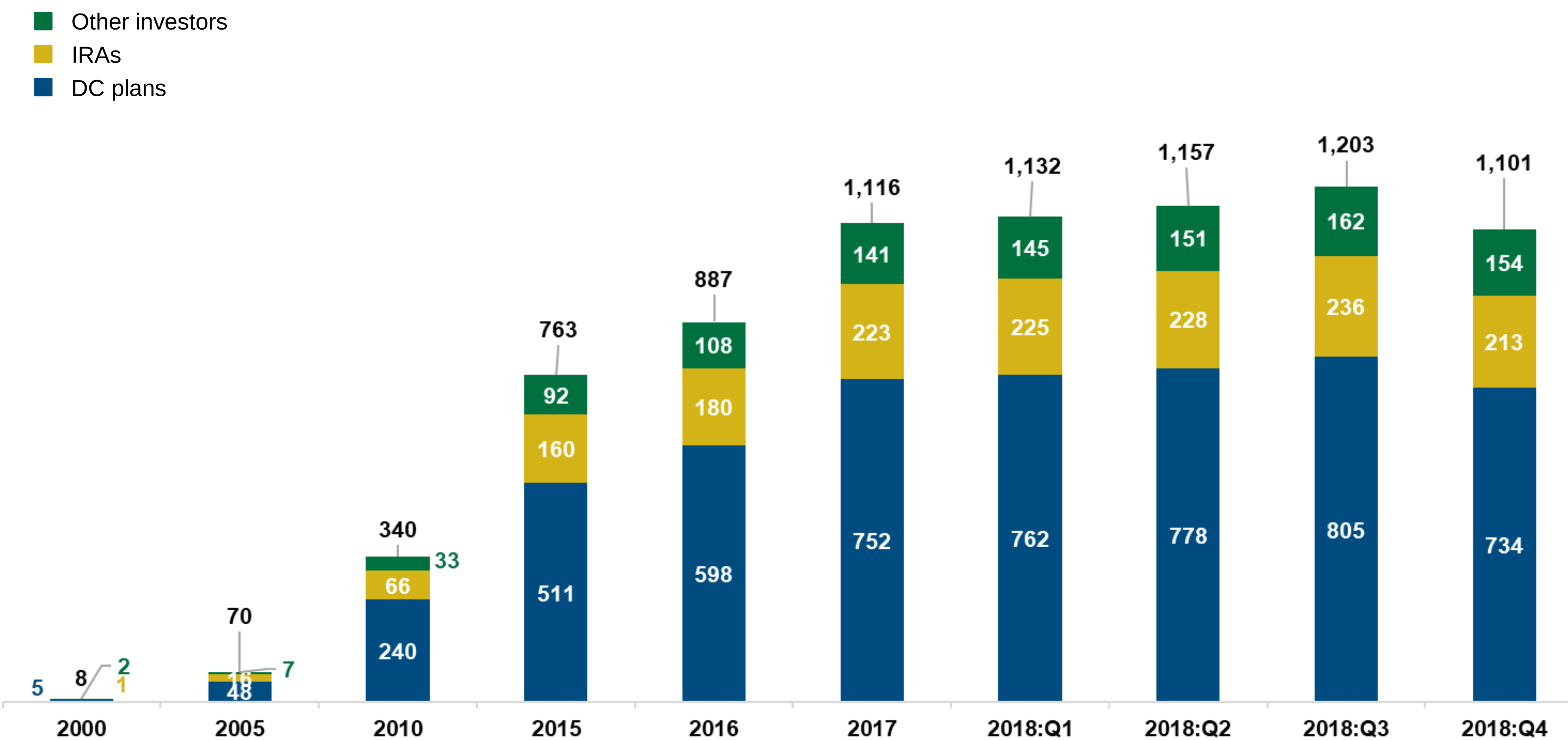
Billions of dollars, end-of-period, selected periods



e Data are estimated.
Note: Components may not add to the total because of rounding.
Sources: Investment Company Institute, Federal Reserve Board, American Council of Life Insurers, and Internal Revenue Service Statistics of Income Division

Target Date Mutual Fund Assets

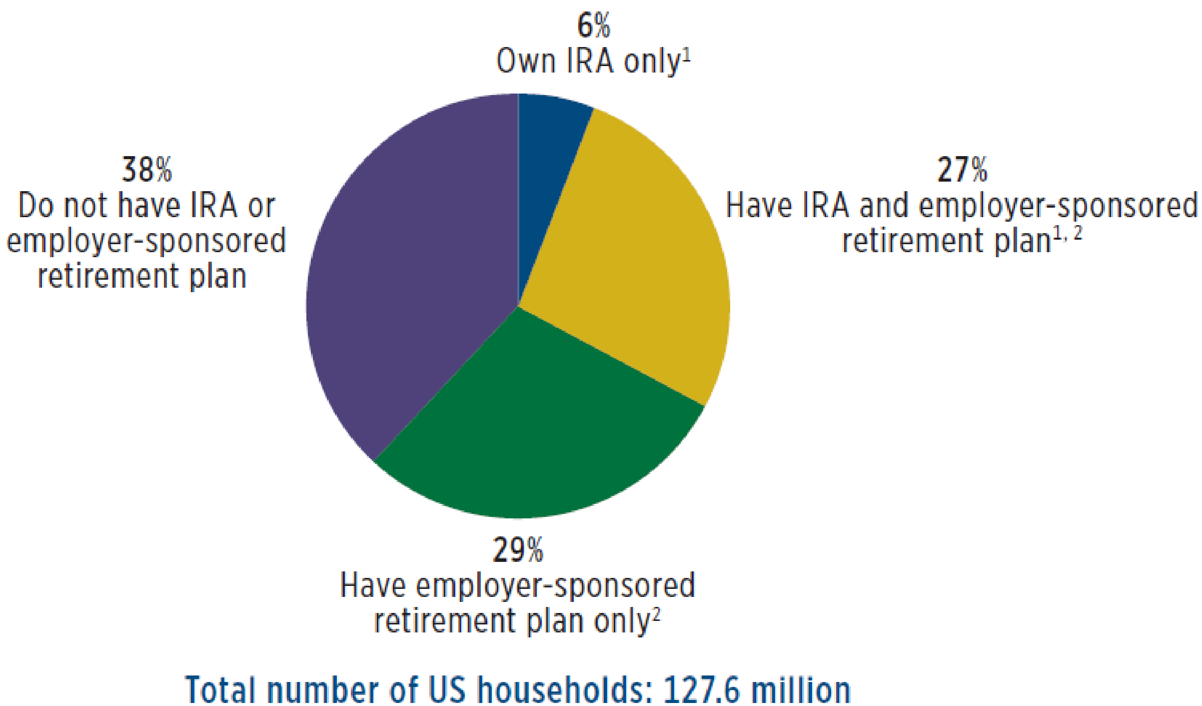
Billions of dollars, end-of-period, selected periods



Note: Components may not add to the total because of rounding.
Source: Investment Company Institute

Many U.S. households had tax-advantaged Retirement Savings

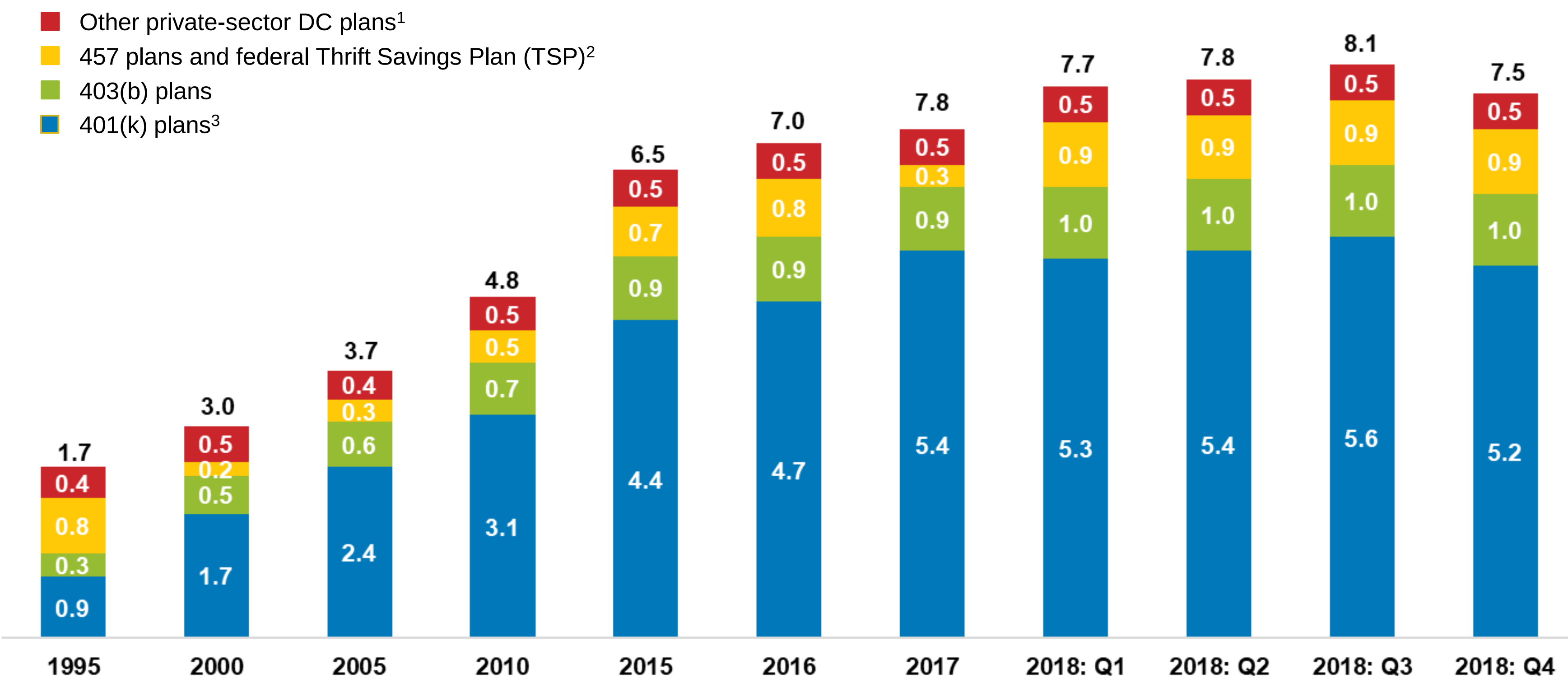
Percentage of U.S. households, 2018



1 IRAs include traditional IRAs, Roth IRAs, and employer-sponsored IRAs (SEP IRAs, SAR-SEP IRAs, and SIMPLE IRAs).
2 Employer-sponsored retirement plans include DC and DB retirement plans.
Sources: Investment Company Institute and U.S. Census Bureau. See *ICI Research Perspective, "The Role of IRAs in U.S. Households' Saving for Retirement, 2018." December, 2018*

Defined Contribution Plan Assets by Type of Plan

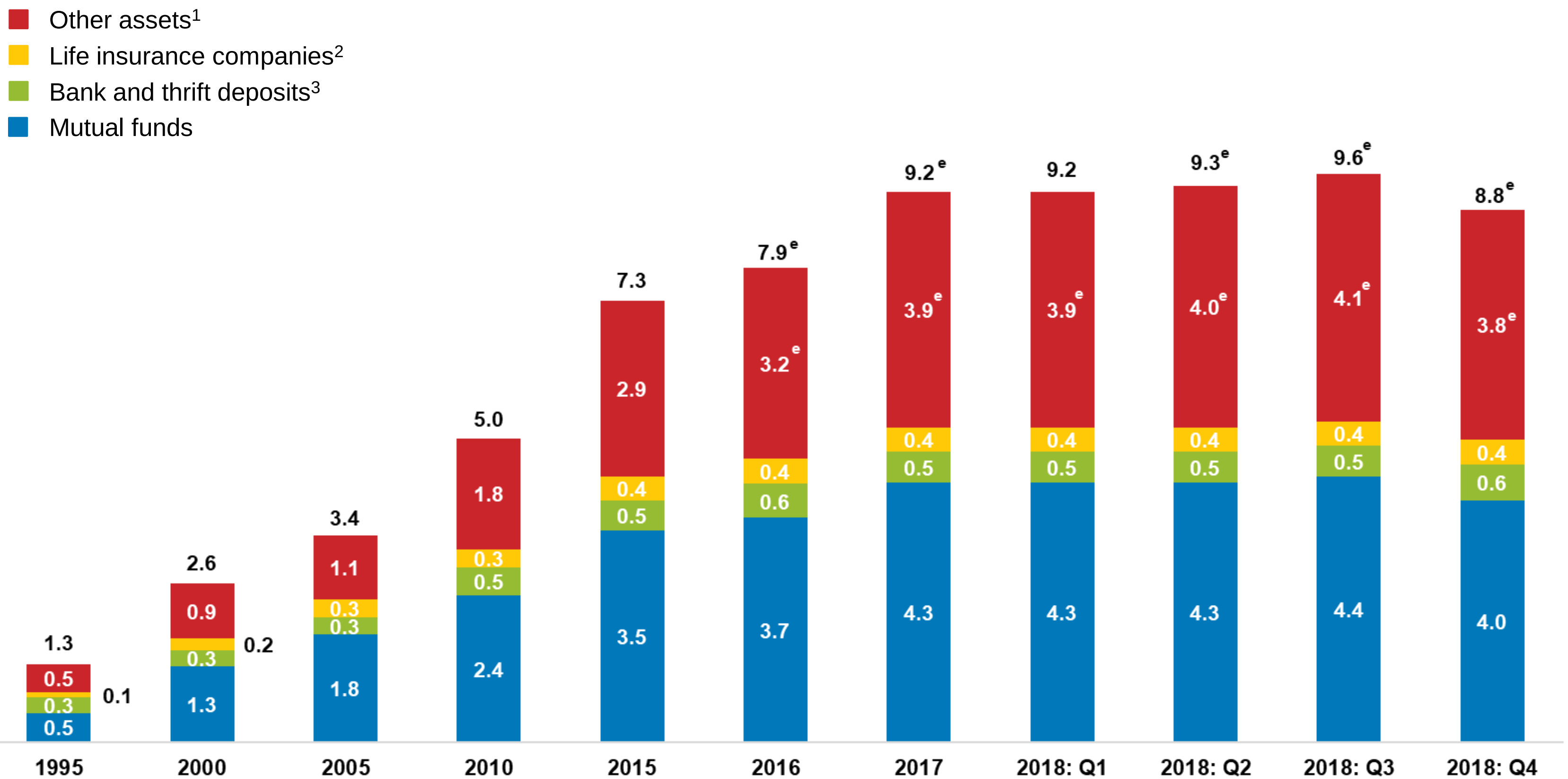
Billions of dollars, year-end, selected years



[1] This category includes Keoghs and DC plans (profit-sharing, thrift-savings, stock bonus, and money purchase) without 401(k) features.
[2] This category is the Federal Employees Retirement System (FERS) Thrift Savings Plan (TSP) as reported by the Federal Reserve Board.
[3] Total 401(k) plans and Other private-sector DC plans asset data through 2014 are from ICI tabulations of Form 5500 data from the US Department of Labor. See Retirement Data Methodology.
Note: Components may not add to the total because of rounding.
Sources: Investment Company Institute, Federal Reserve Board, Department of Labor, National Association of Government Defined Contribution Administrators, and American Council of Life Insurers. See Investment Company Institute, "The U.S. Retirement Market, Fourth Quarter 2018."

IRA Assets

Billions of dollars, year-end, selected years



1 Securities held in brokerage accounts exclude mutual fund assets held through brokerage accounts, which are included in mutual funds.
2 Life insurance company IRA assets are annuities held by IRAs, excluding variable annuity mutual fund IRA assets, which are included in mutual funds.
3 Bank and thrift deposits include Keogh deposits.
e Data are estimated.
Note: Components may not add to the total because of rounding.
Sources: Investment Company Institute, Federal Reserve Board, American Council of Life Insurers, Internal Revenue Service Statistics of Income Division, and Government Accountability Office. See Investment Company Institute, "The U.S. Retirement Market, Fourth Quarter 2018." ICI Factbook

Millions of US Households Owned IRAs

	Year created	Number of US households with type of IRA,[1] 2018	Percentage of US households with type of IRA,[1] 2018
Traditional IRA	1974 (Employee Retirement Income Security Act)	33.2 million	26.0%
SEP IRA[2]	1978 (Revenue Act)	7.5 million	5.9%
SAR-SEP IRA[2]	1986 (Tax Reform Act)		
SIMPLE IRA[2]	1996 (Small Business Job Protection Act)		
Roth IRA	1997 (Taxpayer Relief Act)	22.5 million	17.6%
Any IRA[1]		42.6 million	33.4%

1 Households may own more than one type of I RA.
2 SEP IRAs, SAR-SEP IRAs, and SIMPLE IRAs a re employer-sponsored IRAs.
Sources: Investment Company Institute Annual Mutual Fund Shareholder Tracking Survey and U.S. Census Bureau. Investment Company Institute and U.S. Census Bureau. See *ICI Research Perspective, "The Role of IRAs in U.S. Households' Saving for Retirement, 2018." December 2018* - 2018 ICI Factbook

Total Assets, Plans and Participants by Plan Type

	Assets ($MM)	Plans	Participants
401(k)	$4,268,986	531,801	60,288,569
403(b)	$877,971	161,788	16,367,558
457	$315,532	39,374	6,930,981
Profit-sharing	$96,256	9,378	1,544,293
Money	$134,092	7,985	2,394,732
NQDC[1]	$98,690	7,763	682,153
ESOP[2]/KSOP[3]	$73,480	1,444	915,791
All other	$220,748	72,395	5,405,940

1 Nonqualified deferred compensation. 2 Employee stock ownership plan. 3 Combines the features and benefits of an ESOP and a 401(k) plan.
Source: http://www.plansponsor.com/2017-Recordkeeping-Survey/

Total Assets, Plans and Participants by Plan Size

	Assets ($MM)	Plans	Participants
<$5MM	$572,183	739,881	16,045,505
$5MM – $50MM	$978,456	79,028	19,809,005
>$50MM – $200MM	$790,147	8,542	14,286,550
>$200MM – $1B	$1,286,839	3,082	18,450,542
>$1B	$2,455,003	752	25,527,204

Source: http://www.plansponsor.com/2017-Recordkeeping-Survey/

Fiduciary Responsibility

1. ERISA imposes a variety of specific duties and responsibilities on institutions and individuals who are fiduciaries, as defined under ERISA 3(21)(A).
2. A person <u>does not need to be named as a fiduciary in order to be a fiduciary</u>. The determining factor is the actions that have been taken by that party.

3(21) Defined

- Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent
  i. he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
  ii. he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
  iii. he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

3(38) Defined

- The term “investment manager” means any fiduciary (other than a trustee or named fiduciary, as defined in section 402(a)(2))—
  A. who has the power to manage, acquire, or dispose of any asset of a plan;

3(38) Defined

B. who

i. is registered as an investment adviser under the Investment Advisers Act of 1940;

ii. is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary;

iii. is a bank, as defined in that Act; or

iv. is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

C. has acknowledged in writing that he is a fiduciary with respect to the plan.

The Fiduciary Standard Of Care

ERISA 404(a)(1) establishes the following standards of care:

Exclusive Purpose Rule

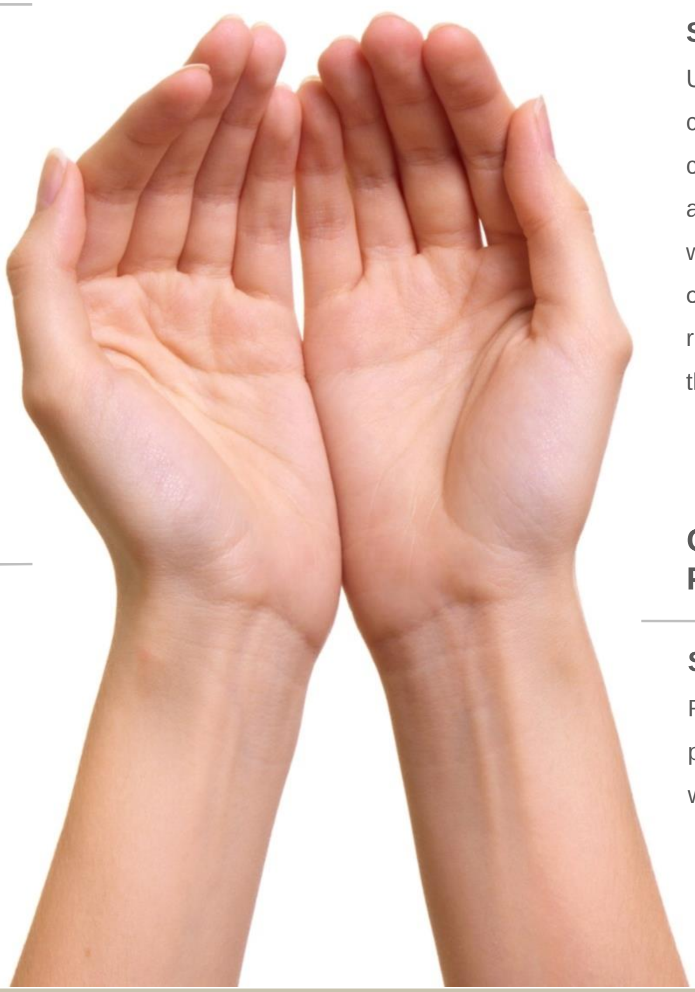
Section 404(a)(1)(A)

Part of ERISA's codification of the IRC's "exclusive benefit" rule. Fiduciary must act for the exclusive purpose of **providing benefits** to participants and their beneficiaries, and to defray **reasonable expenses.**

Diversification

Section 404(a)(1)(C)

Requires fiduciaries to diversify the investments of the plan unless it is clearly prudent not to do so.



Prudent Expert Rule

Section 404(a)1(B)

Under this provision, a fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of a like enterprise of like character and with like aim." ERISA's "prudent expert" rule establishes a standard of care that is higher than that of a common law trust fiduciary.

Compliance with Plan Documents

Section 404(a)(1)(D)

Requires fiduciaries to act in accordance with plan documents, insofar as they are consistent with ERISA.

What Does it Mean to be a Fiduciary?

Fiduciary Standards of Care

ERISA 404(a)(1) establishes the following standards of care:

1 The Exclusive Purpose Rule.

- Section 404(a)(1)(A) is part of ERISA's codification of the IRC's "exclusive benefit" rule.
  - Fiduciary must act for the exclusive purpose of providing benefits to participants and their beneficiaries, and to defray reasonable expenses.

2 The Prudent Expert Rule.

- Section 404(a)(1)(B) is ERISA's codification of the common law duty of care.
  - Under this provision, a fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aim."
  - ERISA's "prudent expert" rule establishes a standard of care that is higher than that of a common law trust fiduciary.

What Does it Mean to be a Fiduciary?

Fiduciary Standards of Care

ERISA 404(a)(1) establishes the following standards of care:

3 Diversification.

- Section 404(a)(1)(C) requires fiduciaries to diversify the investments of the plan
  - unless it is clearly prudent not to do so.

4 Compliance with Plan Documents.

- Section 404(a)(1)(D) requires fiduciaries to act in accordance with plan documents,
  - insofar as they are consistent with ERISA.

NOTE: ERISA imposes a variety of specific duties and responsibilities on both institutions and individuals who are fiduciaries as defined under ERISA 3(21)(A).

Fiduciary Breaches

- Plan fiduciaries that breach any of their fiduciary responsibilities, obligations, or duties imposed by ERISA are personally liable to the plan for any losses the plan suffers because of such breach
  - The fiduciary must restore to the plan any profits that he or she has made through the use of any plan asset (ERISA 409).
    - Fiduciaries are also subject to other equitable or remedial relief as a court may find appropriate, including removal.
- In addition to the previously mentioned broad fiduciary standards of care, ERISA prohibits plan fiduciaries from engaging in very specific transactions referred to as "prohibited transactions."

Fiduciary Breach Penality

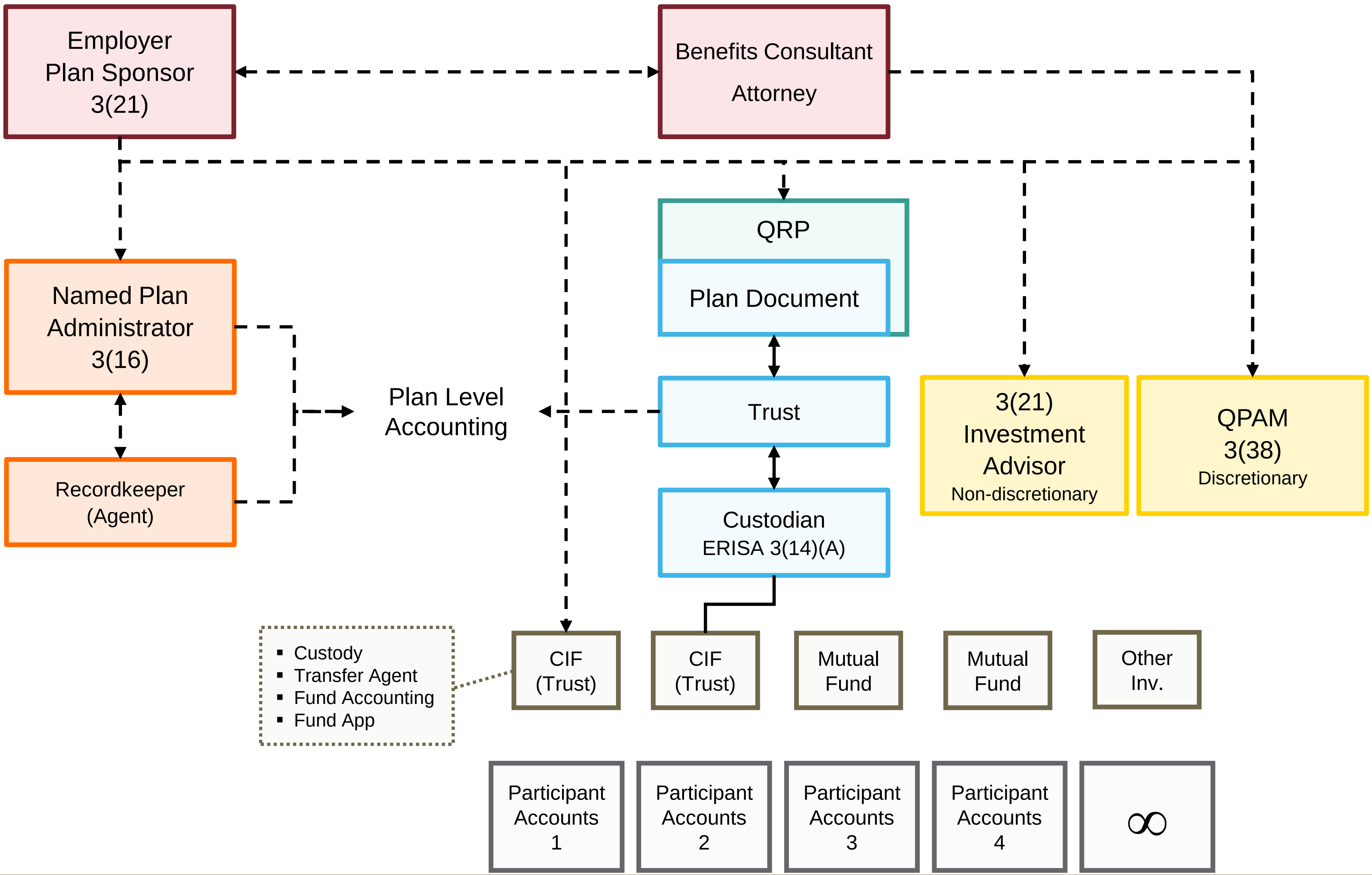
- ERISA 406 contains the prohibited transaction rules.
  - Under ERISA 502(i), the DOL may assess a civil penalty against a fiduciary that breaches a fiduciary responsibility, such as engaging in a prohibited transaction.
    - The penalty under 502(i) is equal to 20 percent of the applicable recovery amount paid pursuant to any settlement agreement with the DOL or ordered by a court.
    - The DOL, at its sole discretion, may waive or reduce the penalty (29 CFR 2570.80-88).
    - There is a criminal penalty under ERISA 501 for any person who willfully violates any of the reporting and disclosure provisions under part 1 of ERISA.
    - Upon conviction, the criminal penalty can be a fine of not more than $100,000 or imprisonment for no more than 10 years, or both If the violation is not by a person, the fine may not exceed $500,000.

Fiduciary Breach IRS Penality

- IRC 4975 includes virtually identical prohibited transaction rules, except that it uses the term "disqualified person" rather than "party in interest."
  - The IRC imposes a two-tiered penalty tax.
    - There is a 15 percent penalty tax on the amount involved in the transaction, and
    - A 100 percent penalty tax on the amount involved if by a certain date, there is no correction of the prohibited transaction.
      - IRC 4975 applies to IRAs as well as qualified plans.

For more information, refer to appendix D, "Prohibited Transactions" in the Comptroller's Handbook on Retirement Plan Products and Services

Overview of the Institutional Relationship



Results of Title II Violations found by the IRS

Employee Plans Division

Common Plan Errors

1. Failure to timely amend the plan for changes in the law
2. Failure to follow the terms of the plan:
   - Not properly applying the definition of plan compensation
   - Matching contribution errors
3. Excluding eligible employees and including ineligible employees
4. Not properly administered loan programs
5. Nondiscrimination testing problems (ADP/ACP)
6. Exceeding IRC 402(g) limits
7. Timely deposit of employee elective deferrals
8. Hardship Distributions

1. Failure to timely amend the plan for changes in the law

- Documents to maintain:
  - Original plan document
  - All subsequent amendments or restatements
  - All adoption agreements
  - Any opinion letter or advisory letter issued by the IRS
  - Any determination letter issued by the IRS
  - Board of Director’s resolutions and minutes related to the plan

2. Failure to follow the terms of the plan

- Plan definition vs. plan operation not consistent
    - What is your plan's definition of compensation?
    - Are there multiple definitions included in the plan?
    - Who determines the participants compensation amount for plan purposes from the payroll records?
    - Who verifies that participants' compensation used for all plan purposes is according to the definitions in the plan document?
- Avoiding Matching Contribution Errors
    - Review plan document annually to verify the plan terms are being followed and that the plan is
        - Properly counting hours of service
        - Correctly identifying plan entry dates
        - Using correct "Compensation" definition
        - Payroll periods vs. plan terms
            - Annual amounts and percentages
        - Compare to operational procedures
            - Timing of the match

3. Excluding eligible employees and including ineligible employees

- Excluding eligible employees/Including ineligible employees caused by:
  - Misunderstanding plan's "eligibility" and "entry dates" definitions
  - Different requirements for different contributions
  - Operating the same as the prior year-without reviewing the plan document for changes
  - Not considering part-time employees
  - Not including employees who elect not to make deferrals

4. Not properly administered loan programs

- Loans in excess of the $50,000 maximum allowed.
- Treatment of outstanding loan balances when participant terminates employment and account balance is distributed.
- Plans that limit number of loans to a participant and violate the plan provisions by providing more than the limit.
- Loan terms longer than 5 years – and loan found not to be for purchase of primary residence.
- Plans that allow loans – but the plan document does not allow loans.
- Avoiding the error
  - Develop loan procedures and systems to ensure
    - Five year plan limits
    - Reasonable interest rate
    - Meet dollar limit of IRC 72(p)
    - Repayments being made
    - According to plan terms
    - Repayments at least quarterly

5. Nondiscrimination testing problems (ADP/ACP)

401(k) testing and/or contribution errors

- Causes include:
  - Not properly identifying Highly Compensated Employees
  - Excluding those who elect not to defer salary from the test
  - Not using the correct "compensation" definition
  - Not using the testing method defined by the plan document (current or prior year)

6. Exceeding IRC 402(g) limits

- Failure to limit elective deferrals to IRC 402(g) limits
  - This can be a costly error
  - If not timely returned -will be taxed twice
  - Plan document may have define limits below the maximum under 402(g)

  - **Note: IRS 402(g) limits for 2018 – 100% of compensation not to exceed $18,500. Catch-up 50+ = $6,000**

7. Timely deposit of employee elective deferrals

Failure to timely deposit elective deferrals caused by:

- Misunderstandings about DOL rules regarding the timing requirements.
- For plans with less than 100 participants, there is a 7 business day safe harbor rule for contributions.
- If the plan contains specific language stating when the deposits will be made, for example, weekly with payroll, the terms of the plan must be followed.

8. Hardship Distributions

- Failure to follow the Plan’s terms regarding **hardship distributions**
  - Failure to follow the rules for hardship distributions
  - No procedures in place to review hardship applications
  - Allowing participants to apply for a hardship electronically without understanding the rules

Employee Benefits Security Administration (EBSA)

Through its enforcement of the Employee Retirement Income Security Act (ERISA), the Employee Benefits Security Administration (EBSA) is responsible for ensuring the integrity of the private employee benefit plan system in the United States.

Total Monetary Results

Year	Total Results	Prohibited Transactions Corrected/ Plan Assets Protected	Plan Assets Restored/ Participant Benefits Recovered	Voluntary Fiduciary Correction Program
2013	$1.69 B	$911.3 M	$423.6 M	$72.1 M

Year	Total Recoveries	Plan Assets Restored/Participant Benefits Recovered	Voluntary Fiduciary Correction Program	Abandoned Plan Program	Monetary Benefit Recoveries from Informal Complaint Resolution
2014	$599.7 M	$204.9 M	$20.2 M	$18.4 M	$356.2 M
2015	$696.3 M	$265.3 M	$14.3 M	$13.8 M	$ 402.9 M
2016	$777.5 M	$352.0 M	$9.5 M	$21.8 M	$ 394.2 M
2017	$1.1 B	$682.3 M	$10 M	$27.9 M	$418.7 M

Year	Total Recoveries	Recoveries from Enforcement Actions	Voluntary Fiduciary Correction Program	Abandoned Plan Program	Monetary Benefit Recoveries from Informal Complaint Resolution
2018	$1.6 B	$1.1 B	$10.8 M	$33.4 M	$443.2 M

Quantity of Risks

Compliance

Operational

Strategic

Reputation

Overview

Summary of Risks Associated With Retirement Plan Products and Services				
Risk category	Quantity of risk (Low, moderate, high)	Quality of risk management (Weak, satisfactory, strong)	Aggregate level of risk (Low, moderate, high)	Direction of risk (Increasing, stable, decreasing)
Operational				
Compliance				
Strategic				
Reputation				

Compliance Risk

- **Objective:** The quantity of each associated risk is to determine the quantity of **compliance risk** associated with retirement plan products and services.
  1. Analyze the types and level of policy exceptions, internal control deficiencies, and legal violations in relation to retirement plan products and services. Consider the level of compliance with
     - plan documents and other governing instruments.
     - ERISA, the IRC, and related DOL issuances.
     - 12 CFR 9 for national banks and 12 CFR 150 for federal Savings associations.
     - other federal law.
     - bank’s policies and operating procedures.
     - statutory exception from definition of “broker” in section 3(a)(4) of the Securities Exchange Act of 1934 and 12 CFR 218.721-723.
     - bank’s BSA/AML/OFAC compliance program.

Operational Risk

- **Objective:** The quantity of each associated risk is to determine the quantity of **<u>operational risk</u>** associated with retirement plan products and services.

  2. Determine whether the bank has properly identified and measured the risks associated with the following:
     - Employer securities or real property.
     - Asset concentrations.
     - Nonpublicly traded assets and tangible assets.
     - Open brokerage windows in participant-directed, defined contribution plans.
     - Affiliated mutual funds.
     - Target date and life cycle collective funds.
     - Participant recordkeeping.

Operational Risk

- **Objective:** The quantity of each associated risk is to determine the quantity of **operational risk** associated with retirement plan products and services.

  3. Analyze management information reports relating to transaction processing and reporting within the retirement plan products and services line of business. Consider the following structural factors:
     - Volume, type, and complexity of transactions, products, services, and investment vehicles offered through the bank.
     - Condition, security, capacity, and recoverability of systems.
     - Complexity and volume of conversions, integrations, and system changes.
     - Development of new markets, products, services, technology, and delivery systems to maintain competitive position and gain strategic advantage.
     - Volume and severity of operational, administrative, and accounting control exceptions and losses from fraud and operating errors.

Strategic Risk

- **Objective:** The quantity of each associated risk is to determine the level of **<u>strategic risk</u>** associated with retirement plan products and services.

    4. Analyze the bank's strategic and business plans for retirement plan products and services. Consider the following factors:
        - Magnitude of change in projections related to income and earnings from retirement plan products and services.
        - Quantity and quality of management and staff in relation to current or projected retirement plan products and services.
        - Resources dedicated to training, improvements in technology, and marketing.
        - Past performance in offering new retirement products and services.
        - Risks associated with implementing innovative or unproven retirement plan products or services (including new delivery channels or technologies).

Strategic Risk

- **Objective:** The quantity of each associated risk is to determine the level of **strategic risk** associated with retirement plan products and services.
  5. Assess the effect of external factors, including economic, industry, competitive, and market conditions.

Strategic Risk

- **Objective:** The quantity of each associated risk is to determine the level of **strategic risk** associated with retirement plan products and services.
    6. Assess the effect of recent legislative, regulatory, accounting, and technological changes.

Reputation Risk

- **Objective:** The quantity of each associated risk is to determine the level of **reputation risk** associated with retirement plan products and services.

  7. Analyze the types and volume of litigation and customer complaints by
     - discussing significant litigation and complaints with bank management.
     - determining the risk to capital and the appropriateness of corrective action and follow-up processes.

Reputation Risk

- **Objective:** The quantity of each associated risk is to determine the level of **reputation risk** associated with retirement plan products and services.
  8. Review the most recently completed OCC examination activity of the bank's asset management operations by
     - discussing the findings and recommendations relating to retirement plan products and services with bank management.
     - determining whether management has taken corrective action to address previous concerns or to implement OCC recommendations.

Quality of Risk Management

1. Policies
2. Processes
3. Personnel
4. Control Systems

Overview

Summary of Risks Associated With Retirement Plan Products and Services				
Risk category	Quantity of risk (Low, moderate, high)	Quality of risk management (Weak, satisfactory, strong)	Aggregate level of risk (Low, moderate, high)	Direction of risk (Increasing, stable, decreasing)
Operational				
Compliance				
Strategic				
Reputation				

1. Policies

Policies

1. **Evaluate** relevant policies to determine whether they provide appropriate guidance for managing the bank's retirement plan products and services and are consistent with the bank's mission, values, and principles.

2. **Determine** whether policies
   - establish risk limits or
   - positions and delineate prudent actions to be taken
     - if the limits are exceeded.

3. **Verify** that the board of directors or a designated committee
   - periodically reviews and approves the bank's retirement plan products and services policies.

Policies

4. **Verify** that policies adequately address applicable law,
   - ERISA,
   - 12 CFR 9 for national banks and
   - 12 CFR 150 for federal savings associations, and
   - the statutory exceptions to the definition of “broker” in the Securities Exchange Act of 1934, and Regulation R.

5. **Determine** whether the bank has appropriate policies to address
   - potential prohibited transactions and
   - conflicts of interest.

6. **Verify** that policies adequately address
   - customer complaint resolution procedures.

Policies

7. **Verify** that policies include appropriate account acceptance and administration guidelines that address the following:
   - Pre-acceptance reviews.
   - Administration of accounts (including acceptance of contributions, payment of plan expenses, and distributions to participants and beneficiaries).
   - Identifying, preventing, correcting, and reporting prohibited transactions.
   - High-risk accounts (e.g., ESOPs) and high-risk assets (e.g., employer securities).
   - Use of proprietary products in discretionary accounts.
   - BSA/AML/OFAC compliance.
   - Customer information privacy.
   - Account closing.
   - Client account statement guidelines.

2. Processes

Processes

Quality

1. Evaluate whether are
   a) effective,
   b) consistent with underlying polices, and
   c) effectively communicated to appropriate staff.

Processes

Internal Controls

2. Determine whether appropriate internal controls are in place and functioning as designed. Consider:
   - the effectiveness of periodic administrative account reviews for coding, governing
   - instruments, list of those with distribution authority, and other administrative matters.
   - provision of investment advice or investment education materials.
   - avoiding or managing prohibited transactions.
   - for directed trustee accounts - documentation regarding whether directions are in accordance with the plan and not contrary to ERISA.
   - compliance with section 3(a)(4) of Securities Exchange Act of 1934 and 12 CFR 218.721-723 (Regulation R). Exceptions for Insurance, Mutual Funds and Broker Dealer
   - documentation and handling of account complaints and litigation.

Processes

- disclosure to plan fiduciaries and reporting of compensation such as 12b-1, subtransfer, and other fees from mutual funds; use of float; overdrafts; sweep fees; and gains from the correction of trading errors.
- timeliness of employer and employee contributions.
- payment of plan expenses.
- processing of plan loans.
- valuation of plan assets.
- accuracy of information for Form 5500 reporting.
- escheatment provisions.
- accuracy of account statements.

Processes

Account Acceptance

3. Determine whether appropriate internal controls are in place and functioning as designed regarding retirement plan account acceptance. Consider:
    - pre-acceptance reviews.
    - use of account checklists.
    - proper deposit and continued accounting of plan assets.
    - review for conflicts of interest.
    - compliance with BSA/AML/OFAC requirements.

Processes

Investments

4. Determine whether appropriate internal controls are in place and functioning as designed for retirement plan investments. Consider:
   - existence of investment policy statement.
   - investment review of plan assets for discretionary accounts.
   - proxy voting.
   - accurate valuation of plan assets particularly for unique and hard to value assets.
   - plan's use of employer securities.
   - cross-trades.
   - use of bank's deposit products.
   - use of bank's collective investment funds.

Processes

Distributions

5. Determine whether appropriate internal controls are in place and functioning as designed for retirement plan distributions. Consider:
   - authorization of distributions.
   - processing lump sum or periodic participant distributions.
   - hardship or other in-service withdrawals.
   - QDRO distributions.
   - distribution at termination of employment.
   - early withdrawals.
   - rollover distributions.
   - proper federal tax withholding.
   - appropriate OFAC checks.

Processes

Operational Functions

6. Determine whether appropriate internal controls are in place and functioning as designed for operational functions, using as references any independent tests of the control structure, such as internal or external audits. Consider:
   - data input and balancing functions.
   - participant's use of voice response units or Internet to provide transaction instructions.
   - appropriate authorization to release funds or assets.
   - logical (ID and password) access to automated systems.
   - high-risk processes (e.g., participant recordkeeping, payment of plan expenses, plan contributions, participant distributions, and tax reporting).
   - data security.
   - independent reconcilement.
   - exception monitoring.

Processes

Recordkeeping

7. If the bank (or an affiliate) is a recordkeeper, determine whether the bank has effective procedures in place to balance the recordkeeping system to the core trust accounting system.
   - Procedures should include the following:
     - Reconciling between the two systems.
     - Verifying that transactions, pricing, and other information received through system interfaces are processed timely and accurately.
     - Verifying that transactions, such as changes to investment allocations, contribution levels, and pricing updates received through system interfaces or direct input are processed timely. This often involves reviewing reports reflecting voice response unit or Internet activity and rejects from daily processing.
     - Evaluating procedures for resolution of reconciling differences. Outstanding items should be aged and escalated.
     - Ensuring that there is a process for balancing participant statements to core accounting statements.

3. Personnel

Personnel

- Definition
  - The bank staff and managers who execute or oversee processes.
    - Personnel should be qualified and competent and should perform appropriately.
  - Banks should design compensation programs to attract, develop, and retain qualified personnel.
    - In addition, compensation programs should be structured in a manner that encourages strong risk management practices.
- Objective
  - To determine management's ability to supervise retirement plan products and services in a safe and sound manner.

Personnel –

- To determine management’s ability to supervise retirement plan products and services in a safe and sound manner.

Personnel

1. Given the scope and complexity of the bank's retirement plan products and services, assess the management structure and staffing. Consider
   - training.
   - the number of accounts administrative personnel are responsible for.
   - whether reporting lines encourage open communication and limit the chances of conflicts of interest.
   - level of staff turnover.
   - capability and authority to address identified deficiencies.
   - responsiveness to regulatory, accounting, industry, and technological changes.

Personnel

- experience of management and staff based on the complexity of the bank’s retirement plan products and services.
- adequacy of staffing levels.

Personnel

2. Assess performance management and compensation programs. Consider whether these programs measure and reward performance that aligns with the bank's strategic objectives and risk appetite.
   - If the bank offers incentive compensation programs, ensure that they are consistent with OCC Bulletin 2010-24, "Incentive Compensation: Interagency Guidance on Sound Incentive Compensation Policies," including compliance with its three key principles:
     - (1) provide employees with incentives that appropriately balance risk and reward;
     - (2) be compatible with effective controls and risk management; and
     - (3) be supported by strong corporate governance, including active and effective oversight by the bank's board of directors.

4. Control Systems

Control Systems – Objective

- To determine whether the bank has systems in place to provide accurate and timely assessments of the risks associated with its retirement plan products and services.

Control Systems

1. Assess the scope, frequency, effectiveness, and independence of the internal and external audits of the bank's retirement plan products and services. Consider
   - frequency and scope of audits performed,
     - including whether all significant activities and controls are covered.
   - level of the audit staff's expertise in retirement plan products and services.
   - quality of audit reports and supporting work papers.
   - board and senior management
     - information reports,
     - escalation plans, and
     - actions taken in response to deficiencies.

Control Systems

2. Determine whether the management information systems provide timely, accurate, and useful information to evaluate risk levels and trends in the bank's retirement plan products and services. Consider
   - whether the management information system is timely, accurate, and useful for measuring performance of administrative and operational functions.
   - management's use of earnings reports, risk assessments, audit reports, compliance reports, committee reports, and litigation reports.
   - whether the management information system is timely, accurate, and useful for identifying and managing risk in the bank's retirement plan products and services.

Control Systems

3. Evaluate fiduciary committee structures, responsibilities, and performance.

4. Evaluate the effectiveness of monitoring systems to **identify**, **measure**, and **track** exceptions to policies and procedures.

Control Systems

5. When the bank contracts with third parties (**including affiliates**) to provide retirement plan products and services, determine the adequacy of the bank's **selection and monitoring processes.**

   Refer to OCC Bulletin 2013-29, "Third-Party Relationships: Risk Management Guidance," for guidance.

- For data-processing services, determine whether the board or a designated committee reviews the vendor's financial information annually.

  Refer to the "Outsourcing Technology Services" booklet of the FFIEC IT Examination Handbook for guidance.

  - *Consider the bank's processes for*
    - vendor due diligence reviews.
    - contract negotiations and approvals.
    - vendor monitoring, including the frequency and quality of information reviewed.
    - identifying personnel to serve as the point of contact with the vendor and to conduct ongoing monitoring.

Control Systems

6. Evaluate the effectiveness of formal compliance and risk management functions. Consider
   - formal and informal structures.
   - reporting lines—whether independent or within the line of business.
   - quality of risk assessment (identification of high-risk processes).
   - control self-assessments.
   - reporting procedures.
   - follow-up on weaknesses identified by compliance and risk management reviews, audits, regulatory examinations, etc.
   - litigation and complaint processes.
   - training and expertise in the retirement services area.

Wrap-Up

Sample Language You May See in Documents

Sample Language of a 3(21) Advisor

- **Fiduciary Services Under ERISA § 3(21).** If Plan initials here ____ bank will perform the following Fiduciary Services under ERISA § 3(21):

  1) **Fiduciary Responsibility**. In performing its Fiduciary Services for the Plan, bank will act as a fiduciary in accordance with the "prudent man rule" set forth in ERISA § 404(a)(l)(B). Bank will have a fiduciary duty to the Plan solely for the purpose of providing non-discretionary investment advice to the Plan.
  2) **Investment Options**. Bank will assist the Plan with the selection of a broad range of investment options consistent with ERISA § 404(c) and the regulations thereunder.
  3) **Investment Review and Recommendations**. Bank will assist the Plan in the initial and ongoing monitoring and review of the Plan's investment options and will recommended changes/additions when appropriate. The Investment Committee will have the ultimate decision whether to implement any fund change, deletion, or addition.

Sample Language of a 3(21) Advisor

4) **Investment Policy Statement**. Bank will assist the Plan in designing an investment policy statement ("IPS"). The IPS will act as a framework for the Plan's investment selection and monitoring process. The IPS guidelines will be consistent with the regulations issued pursuant to ERISA § 404(c) dealing with participant-directed plans. Plan shall have the ultimate responsibility and authority to establish such policies and objectives and to adopt and amend the IPS.

5) **Investment Monitoring and Reporting**. Bank will assist in monitoring the Plan's investment options by preparing periodic investment reports that document investment performance, the consistency of fund management, and the Plan's conformance to the guidelines set forth in its IPS. bank will make recommendations to maintain or remove and replace investment options, but such maintenance, removal, or replacement will be in the Plan's sole discretion.

Sample Language of a 3(21) Advisor

6) **Investment Advice**. Bank will provide non-discretionary investment advice to the Plan with respect to the selection of a qualified default investment alternative (“QDIA”) for participants who are automatically enrolled in the Plan or who otherwise fail to make an investment election. The Plan retains sole responsibility to provide to participants all notices required under ERISA § 404(c)(5).

Sample Language of a 3(21) Advisor

7) **Investment Education**. Bank will assist in the education of the participants in the Plan regarding general investment principles and the investment alternatives available under the Plan. The Plan understands that bank's assistance in participant investment education shall be consistent with and within the scope of the definition of "investment education" set forth in Department of Labor Interpretive Bulletin 96-1, paragraph (d) (the "Bulletin"). In accordance with the Bulletin's guidance, bank will provide investment education to participants regarding Plan information, general financial and investment information, asset allocation models, and interactive investment materials. In providing such investment education, bank will not be providing fiduciary advice (as defined in ERISA) to the Plan's participants.

8) **Periodic Meetings**. Bank will meet with Plan on a periodic basis to discuss bank's reports and investment recommendations.

Sample Language of a 3(38) Advisor

- **Fiduciary Services Under ERISA § 3(38).** If Plan initials here ____ bank will perform the following Fiduciary Services under ERISA § 3(38):
  1) **Fiduciary Responsibility**. In accordance with the requirements of ERISA § 3(38), bank will serve as a fiduciary with responsibility and accountability for the selection of the investments in the Plan.
  2) **Investment Review and Recommendations**. Bank will be solely responsible for the selection of a broad range of investment options consistent with ERISA § 404(c) and the regulations thereunder. Bank will monitor and review the Plan's investment options and will have sole discretion as to implementing any fund change, deletion, or addition.
  3) **Investment Policy Statement**. bank will design an investment policy statement ("IPS") . The IPS will act as a framework for the Plan's investment selection and monitoring process. The IPS guidelines will be consistent with the regulations issued pursuant to ERISA § 404(c) dealing with participant-directed plans. bank shall have the ultimate responsibility and authority to establish such policies and objectives and to adopt and amend the IPS.

Sample Language of a 3(38) Advisor

4) **Investment Monitoring and Reporting**. Bank will prepare periodic investment reports for the Plan's convenience. The reports will document investment performance, the consistency of fund management, and the Plan's conformance to the guidelines set forth in its IPS. bank will have sole discretion to maintain or remove and replace investment options in the Plan.

5) **Investment Advice**. Bank will provide discretionary investment advice to the Plan with respect to the selection of a qualified default investment alternative ("QDIA") for participants who are automatically enrolled in the Plan or who otherwise fail to make an investment election. The Plan will be responsible for providing to participants all notices required under ERISA § 404(c)(5).

6) **Investment Education**. Bank will assist in the education of the participants in the Plan regarding general investment principles and the investment alternatives available under the Plan.

7) **Periodic Meetings**. Bank will meet with the Plan on a periodic basis to discuss bank's reports and investment performance.