

TARGET DATE FUNDS

Economic, Regulatory, and Legal Trends

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Target Date Funds (TDFs), which presently account for over \$1 trillion dollars in assets, have experienced significant growth over the past decade, and are becoming an increasingly important part of the retirement investment universe.

These funds are often thought of as holding a mix of debt and equity investments, with the equity proportion declining over time following a predetermined glide path. In reality, current TDFs are far more complex. New regulations, including the recent Department of Labor's (DOL) Fiduciary Rule, are creating uncertainties for TDFs going forward. Given these dynamics and the sheer size of the TDF market, the current docket of TDF-related litigation is likely to grow.

In this series of whitepapers, The Brattle Group reports on key economic, regulatory, and legal issues and trends related to TDFs. In this first paper, we provide background on TDFs, reporting on significant market trends, and summarizing recent litigation.

I. WHAT IS A TARGET DATE FUND?

In most cases, a TDF is a fund of funds—used primarily for retirement wealth management.¹ TDFs are often touted as providing a “one-stop” or a “set it and forget it” retirement portfolio solution as they are designed to dynamically allocate across a variety of investment classes based on designated target retirement dates. Professional investment managers of TDFs who allocate and re-allocate assets over time into various investment classes (e.g., equities, bonds, various funds) may be viewed as replacing the investment allocation/diversification decisions (or non-decisions) of individual investors or paid advisors.

The standard naming convention for an individual TDF includes the target retirement year as part of a fund’s name. For example, the “Vanguard 2035 Fund Investor Shares” or the “Fidelity Freedom 2030 Fund” explicitly state their target years within their names. Large fund management companies typically offer TDF families with individual TDFs spaced into 5-year increments. Investors are generally expected to choose a TDF with a year closest to their targeted retirement.² “Lifecycle” or “age-based” funds are generally synonymous with TDFs.

Most TDFs exist in the form of open-end mutual funds, though TDF portfolios are also employed without a mutual fund wrapper in pooled investment vehicles such as Collective Investment Trusts (CITs). TDFs are currently available as an option in the majority of employer 401(k) plan offerings as well as other employee-sponsored defined contribution (DC) plans. According to Vanguard, approximately 90% of the DC plan sponsors it works with offered TDFs to their constituents at year-end 2015.³ TDFs are also widely held within Individual Retirement Arrangements (IRAs)⁴ and are available for purchase in non-tax-advantaged investment accounts.

At its core, a TDF’s portfolio composition is set and adjusted by a fund manager primarily based on one key factor: the target date.⁵ Almost universally, TDFs are designed to re-allocate into more conservative portfolios as the target date is approached and is passed.⁶ Generally, fund managers’ efforts to reduce risk over time are operationalized through a reduction in the portion of equity investments held in a TDF portfolio, as explained later.



Because TDF professional managers make investment allocation decisions meant to be generally appropriate for a cohort of investors with the same approximate target retirement date, a single TDF may be viewed as an alternative to:

- DC investment allocations selected by employees with no paid professional guidance;
- DC investment allocations selected by employees with paid professional guidance from a financial adviser/planner or robo-adviser;⁷
- IRA investment allocations selected with no paid professional guidance;
- IRA investment allocations selected with recommendations or paid professional guidance from a Registered Representative (RR) of a broker-dealer or a Representative of a Registered Investment Advisor (RIA), respectively; and
- Investment allocations selected with or without paid professional guidance in non-tax-advantaged investment accounts.

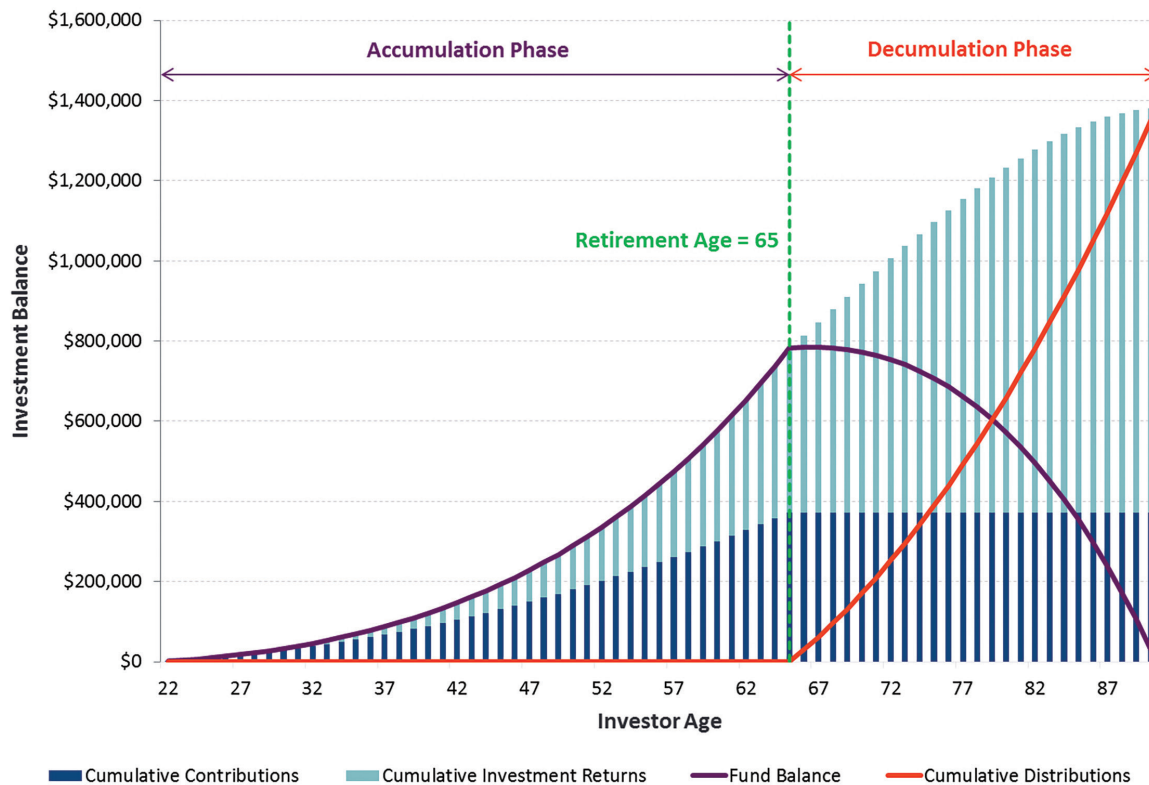
Though many discuss TDFs as an efficient way for retirement investors to obtain professional management of their retirement savings, others point out that a TDF may not be the best match for an individual's unique circumstances, particularly with off-the-shelf TDFs,⁸ where the target date is often the only investor-specific parameter considered by the fund manager. In an effort to go beyond managing solely to a target date, some fund administrators offer employees one or more custom TDFs in an effort to provide alternative investment options that may align more closely with individual employee attributes and/or preferences. The asset management areas of many large financial institutions offer services that assist employee fund administrators with more custom TDF offerings. Of course, even these more tailored programs cannot be designed for the specific preferences of every eligible individual investor.

II. ACCUMULATION AND DECUMULATION PHASES OF RETIREMENT ASSETS

In retirement planning, the period of time beginning from when an individual starts working and saving for retirement up until the retirement date is termed the "accumulation phase." In this period, an individual accumulates wealth in investments that can be relied upon after employment income ceases. Conversely, during the "decumulation phase," those accumulated investments can provide retirement income through periodic income paid directly by the investments as well as conversion of the investments into cash (through sale/liquidation).

Figure 1 below provides a stylized illustration representing an employee who accumulates retirement funds from the age of 22 through the age of 64 and withdraws, or decumulates, those funds from the age of 65 through the age of 90. The gray colored “fund balance” line shows the investment balance growing until the retirement age and then declining until age 90 when it is fully depleted.⁹

FIGURE 1 Accumulation and Decumulation (\$)



An investor can generally control his/her retirement date and thus the length of the accumulation phase.¹⁰ However, the length of an investor’s decumulation phase, as well as withdrawal preferences, depend on numerous factors specific to an individual, some of which are unknown. Clearly, cohorts of TDF investors with the same targeted retirement date will have different ages and life expectancies at the time of retirement. Additionally, in terms of withdrawal preferences, one investor may choose to withdraw a large portion of funds just past the target date (e.g., to purchase a vacation home), while another investor may seek to conserve as much principal as possible (e.g., to meet bequest goals). TDF investment allocations are not customized for such idiosyncratic issues associated with an individual’s decumulation phase.¹¹



III. MANAGING “TO TARGET DATE” VS. “THROUGH TARGET DATE”

Some TDFs only adjust fund asset class allocations up “to the target date,” while others adjust allocations “through the target date.” In the latter class, targeted fund allocations continue to change past the target date, typically becoming more conservative. Historically, one rationale for managing only “to the target date” was that it would not be possible for a manager to align one fund with the varied investor choices associated with the decumulation phase (as discussed above). However, most TDFs offered by large providers are currently managed “through the target date.”¹² In order to take a quantitative approach to managing “through the target date,” general assumptions about investor life expectancy must be made.

Some TDFs state directly that an asset allocation policy extending up to 30-years into retirement is assumed, while other TDFs disclose no explicit assumption.¹³ For example, TIAA materials indicate that it designs its Lifecycle (TDF) portfolios considering a 30-year retirement period,¹⁴ while Vanguard TDF prospectuses refer to the retirement period as “many years.”¹⁵

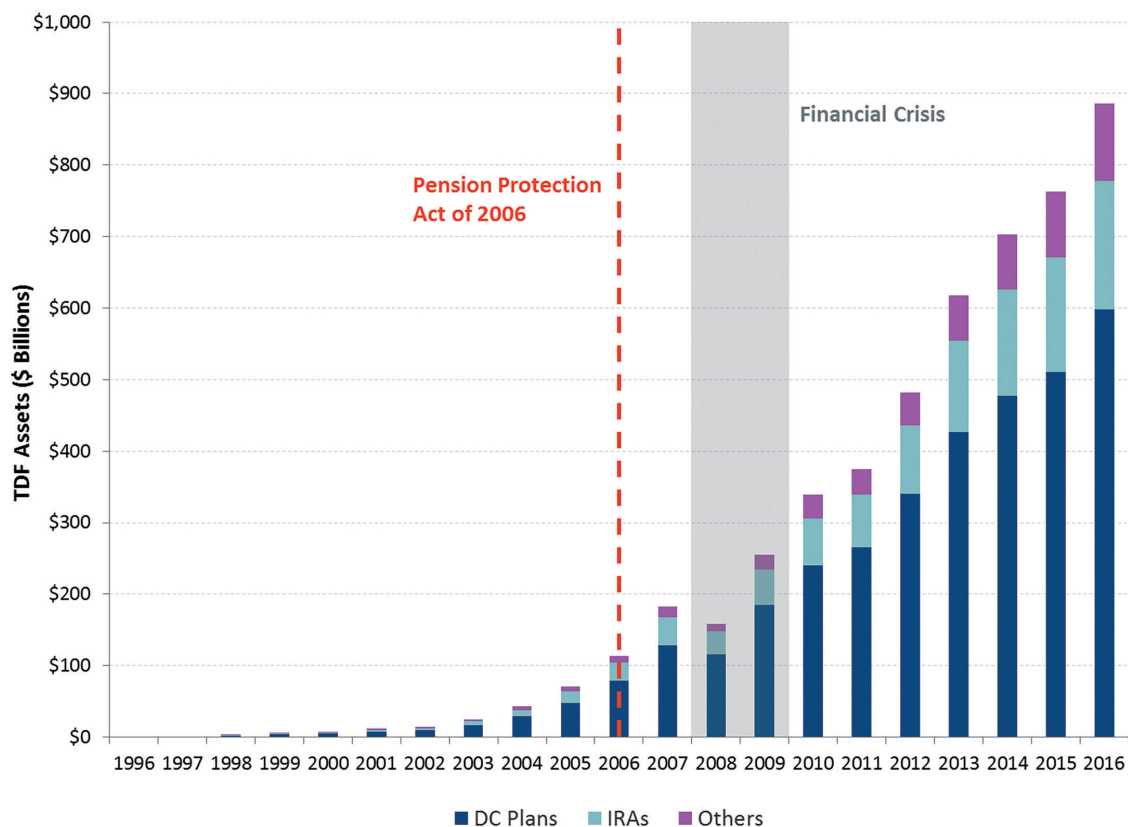
IV. TDF GROWTH TRENDS

Though TDFs were first introduced in the early 1990s,¹⁶ TDF assets have seen extraordinary growth over the past decade and currently exceed \$1 trillion.¹⁷

Morningstar reports that TDF assets it tracked reached an all-time high of \$880 billion in 2016.¹⁸ Similarly, the Investment Company Institute reported that as of December 2016, there were \$887 billion in TDF mutual fund assets (see Figure 2) and estimated that TDF assets held solely within reported DC plans (that include 401(k)s and IRAs totaled approximately \$778 billion, approximately 12-times the level reported at year-end 2005.¹⁹

FIGURE 2

Target Date Mutual Fund Assets (\$ Billions)



Source: "Report: The U.S. Retirement Market, Fourth Quarter 2016," Investment Company Institute, March 2017, Table 21, "Target Date Mutual Fund Assets," accessed June 15, 2017, at www.ici.org/info/ret_16_q4_data.xls.

Beyond TDF nominal growth, data shows that TDFs have become widely used by investors saving for retirement.²⁰ Vanguard, the funds company with the largest amount of TDF assets under management, reports that 70% of Vanguard DC plan participants that were offered TDFs were invested in a TDF(s) at the end of 2015.²¹ This is up more than 200% from the 2006 level of 22%.²²

The proportion of aggregate retirement savings invested in TDFs has also consistently increased over time. A Plan Sponsor Council of America (PSCA) survey reported that TDF assets comprised approximately 19.8% of 401(k) participant assets in 2015,²³ ranking second amongst all fund types. This is up from the 12.4% reported by the PSCA survey for 2011.²⁴ Similarly, in terms of TDF growth as a portion of retirement investments, Vanguard reported that at year-end 2015, 26% of its administered DC plan assets were invested in TDFs. This level is up from 14% in 2011, 9% in 2009, and 5% in 2007.²⁵

TDF's share of the retirement investment pie is expected to continue to increase. Consistent with this view, Vanguard reports that 46% of all 2015 contributions made to its DC plans were directed to TDFs.²⁶ Further, one research firm has predicted that 88% of all new 401(k) contributions will be directed into TDFs by the end of 2019.²⁷

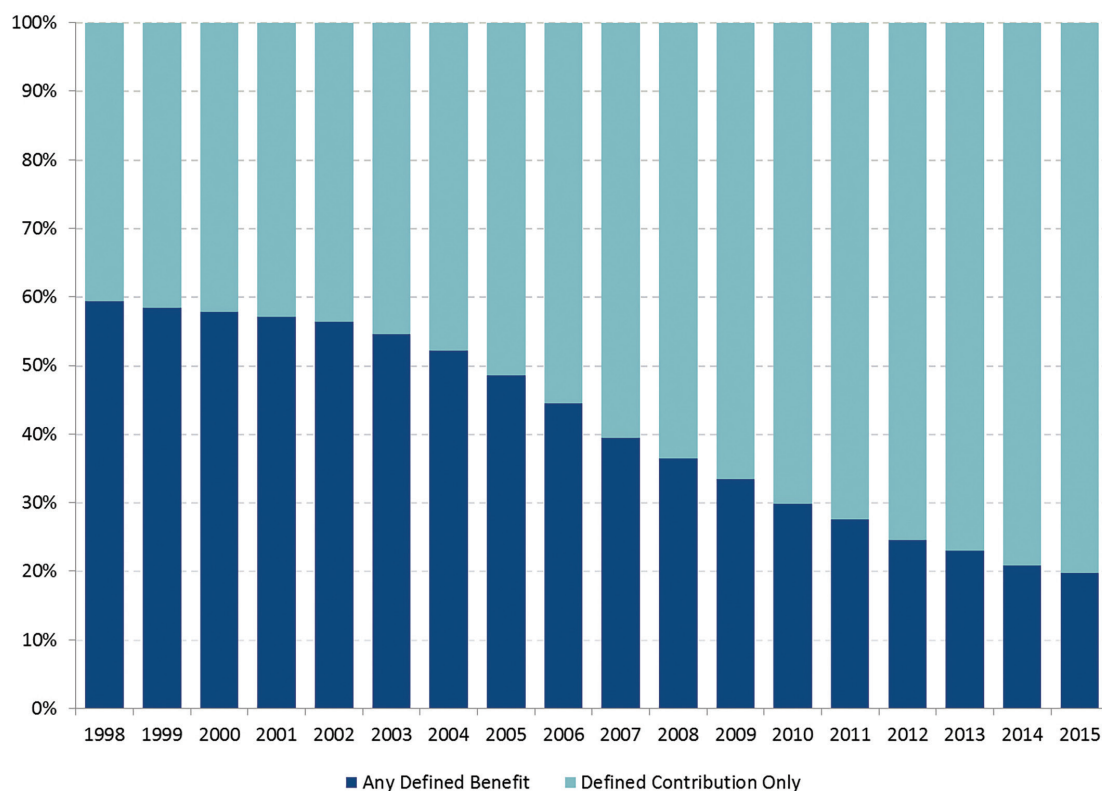


V. TDF GROWTH DRIVERS

A few key drivers have spurred the growth in TDFs assets. The first is the well-known shift by both private and public employers away from offering defined benefit (DB) (e.g., pension plans), to offering DC plans. The chart below illustrates the magnitude of this shift based on data from Willis Towers Watson. By 2005, DB plans were being offered by less than half of Fortune 500 companies, and by 2015, that percentage had fallen to 20%. Assets for DC plans have consequently grown.

FIGURE 3

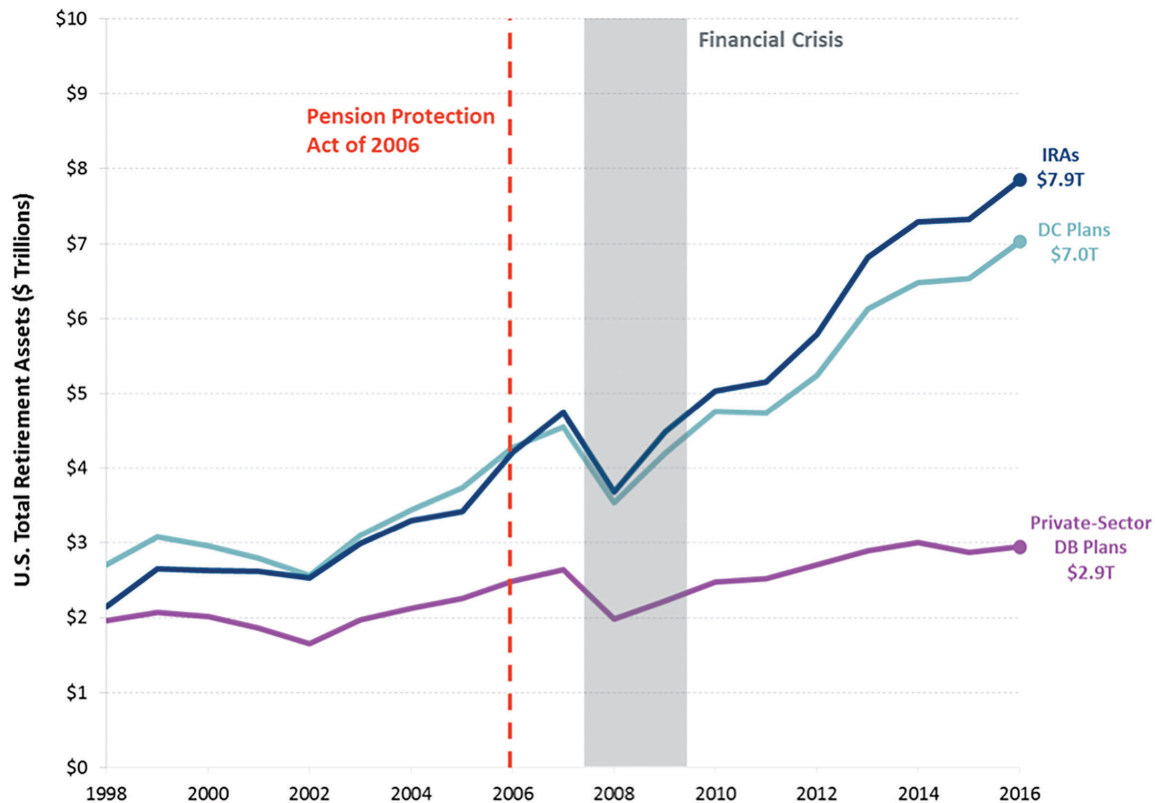
Retirement Plans Offered to New Hires by Fortune 500 Companies



Source: Brendan McFarland, "A Continuing Shift in Retirement Offerings in the Fortune 500," Willis Towers Watson Insider 26(2) (February 2016), Figure 1, p. 2, accessed January 25, 2017, www.towerswatson.com/en-US/Insights/Newsletters/Americas/insider/2016/02/a-continuing-shift-in-retirement-offerings-in-the-fortune-500.

As a greater percentage of employees have, by necessity or choice, become DC plan investors, it is not surprising that the nominal amount of DC assets, including TDF assets, have increased substantially as shown in Figure 4. As of the fourth quarter of 2016, Americans reportedly held \$7.0 trillion in employer-based DC retirement plans, of which \$4.8 trillion were 401(k) plans.²⁸ Outside of employer sponsored retirement plans, IRA assets totaled an even larger \$7.9 trillion.²⁹

FIGURE 4 U.S. Total Retirement Assets (\$ Trillions)



Source: "Report: The US Retirement Market, Fourth Quarter 2016," Investment Company Institute, March 22, 2017, Table 1, "US Total Retirement Assets," accessed June 15, 2017, www.ici.org/info/ret_16_q4_data.xls.

Even beyond general growth in non-DB retirement assets, TDF assets have grown significantly relative to other investment options. The Pension Protection Act of 2006 (PPA 2006) served as the most significant catalyst for this growth. Specifically, under the federal regulations implementing the Qualified Default Investment Alternative (QDIA)³⁰ provisions of the PPA 2006, TDFs were explicitly identified as a default alternative or "safe harbor" investment class where un-allocated employee DC contributions could be directed.³¹ The identification of TDFs as a default alternative allowed employer fund administrators, who are fiduciaries under the Employee Retirement Income Security Act (ERISA),³² to limit potential fiduciary liability associated with choosing investments for employees.³³ As a result of the safe harbor status, many fund administrators began directing significant amounts of unallocated employee contributions into the TDF investment class. Prior to the QDIA delineation of "safe harbor" investments, fund administrators had typically directed unallocated employee investments into money-market mutual funds or other ultra-safe funds in order to avoid potential fiduciary liability for potential investment losses.



According to Vanguard, a significant portion of DC contributions continue to be automatically directed into TDF funds by fund administrators.³⁴ Among plans that designated a QDIA, 95% designated a TDF as the default alternative in 2015,³⁵ up from 80% in 2009.³⁶ Though the QDIA clearly jump-started TDF growth around 2006 and continues to help bolster TDF asset totals, recent surveys indicate that the majority of retirement investors who are now knowledgeable about TDFs appear to understand the fundamental TDF objectives and design features and many purposefully choose to invest in TDFs.³⁷

VI. TDF MANAGEMENT COMPANY TRENDS

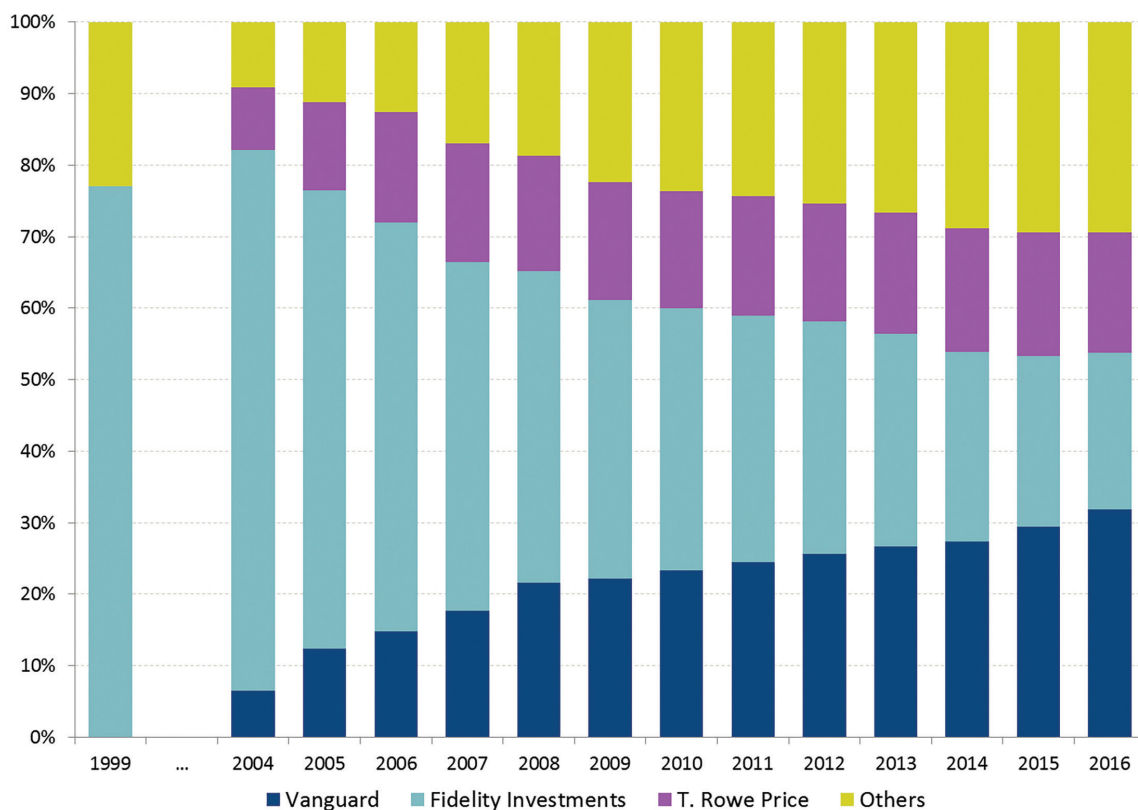
Given the massive growth in TDFs, it is not surprising that numerous fund management companies have entered the TDF space. As of 2016, at least 22 fund companies managed TDF assets exceeding \$1 billion.³⁸

In recent years, some fund companies have gained market share, however three companies continue to dominate the sector: Vanguard, Fidelity Investments, and T. Rowe Price. These three fund companies were early TDF market entrants and offer relatively low-fee TDFs. Though their aggregate market share has declined from around 90% prior to the PPA 2006, they continue to maintain over 70% of the TDF mutual fund market, as shown in Figure 5.³⁹

When considering both mutual fund and CIT TDFs, Vanguard reportedly has the highest market share of any company. According to Sway Research from year-end 2015, "Vanguard, which boasts low cost passively managed Target-Date portfolios, is the most dominant Target-Date player, managing nearly a third of the \$1.1 trillion of Target-Date mutual fund and CIT assets within its proprietary offerings."⁴⁰

FIGURE 5

Firm Market Share of Target Date Mutual Funds



Notes and Sources: Data between 2000 and 2003 are not available. "Target-Date Fund Landscape," Morningstar Annual Reports, 2009-2017.

VII. CLOSED ARCHITECTURE VS. OPEN ARCHITECTURE TDFS

Rather than creating new pools of investments from scratch, most TDF management companies simply make investment allocations among existing funds in proportions that they believe create an appropriate risk/return portfolio for a given target date. This is consistent with TDFs typically existing as a fund of funds product. Some TDF managers only purchase underlying funds managed by their own fund management company (e.g., a Vanguard TDF might invest only in existing Vanguard equity and bond funds). Such TDFs are known as having a "closed architecture." Alternatively, a TDF manager may employ an "open architecture" approach, where at least some investment allocations are made to underlying funds offered by third-party fund management companies. An open architecture structure is common and often necessary for smaller fund management companies that do not offer every type of sub-fund desired by the TDF fund manager (e.g., a commodity fund).

VIII. TDF ASSET ALLOCATION: “GLIDE PATHS”

Though there are many investment categories and approaches utilized by current TDF managers, a general axiom within the TDF universe is that the portion of a portfolio invested in equity (e.g., common stock) is reduced as the target date approaches. This declining exposure to equity over time is known as the equity glide path. Each family of target date funds chooses an equity glide path for each target date fund.

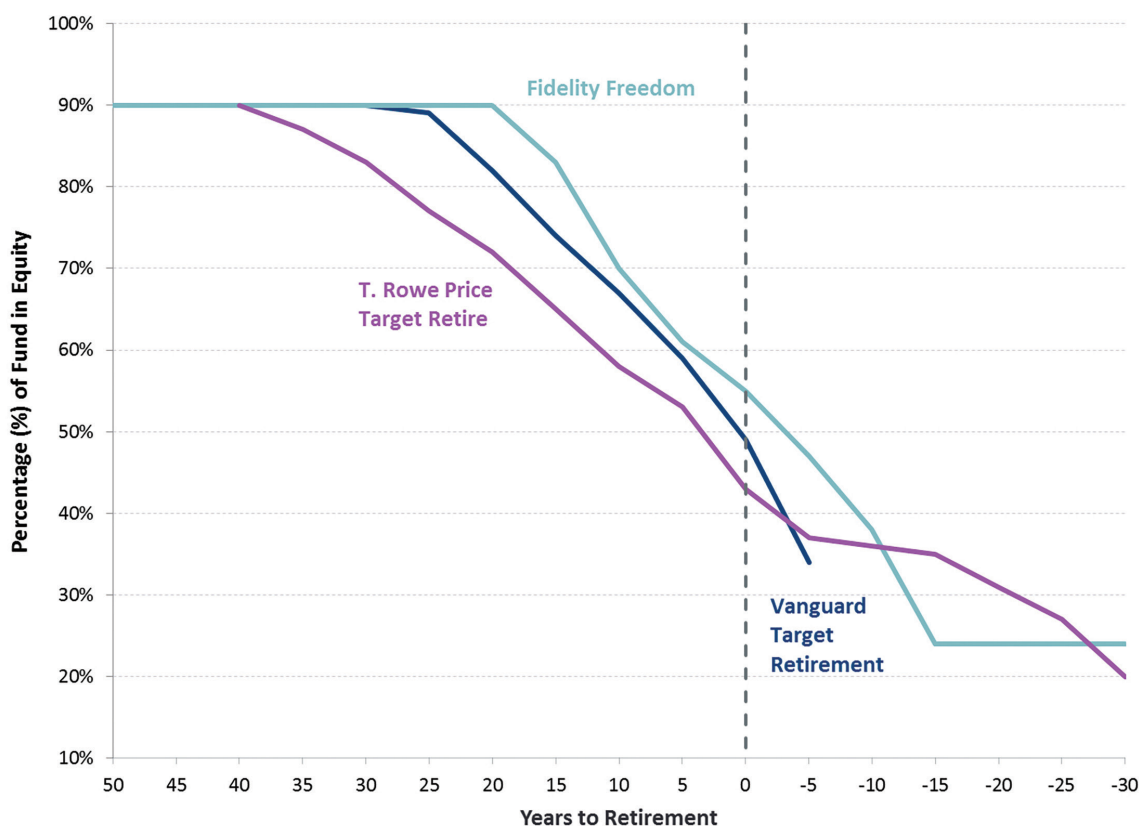
As stated in the Vanguard Target Retirement Funds Prospectus:

The Fund’s asset allocation will become more conservative over time, meaning the percentage of assets allocated to stocks will decrease while the percentage of assets allocated to bonds and other fixed income investments will increase.⁴¹

As indicated in the Vanguard disclosure, TDFs generally attempt to take on a more conservative risk posture as the target date is approached or passed. This is because investors who are nearing or are already in retirement are generally viewed as being less willing to bear significant downside risk. The targeted equity glide paths of the largest three TDF management companies are shown below. Though the paths are similar, there are meaningful differences in targeted equity exposure over time, which can create significant performance differences.

FIGURE 6

Glide Paths of Top Three TDF Providers

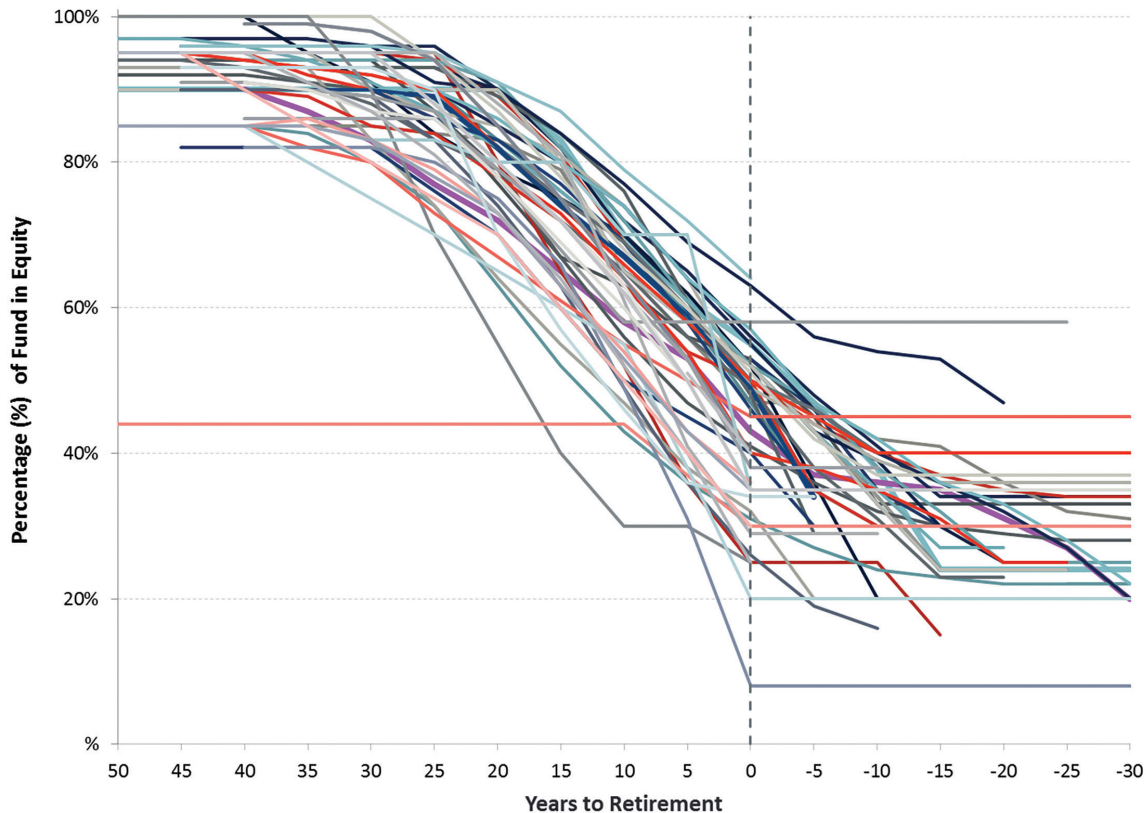


Source: Jeff Holt et al., “2016 Target-Date Fund Landscape,” Morningstar, April 12, 2016, Appendix 2, “Complete Glide-Path Equity Allocations by Target-Date Series %,” pp. 83-84.

The next chart depicts the glide paths of a wider range of TDF offerings, illustrating much greater variations in the target equity percentage. Clearly different views are espoused by fund management companies as to the appropriate portion of equity relative to a given target date. The variation in target equity percentage coupled with differences in the level of fees charged to investors can lead to meaningful differences in performance across TDFs. The impact of fees on the performance of TDFs will be a topic of a future whitepaper in this series.

FIGURE 7

Glide Paths of Various Funds



Source: Jeff Holt et al., “2016 Target-Date Fund Landscape,” Morningstar, April 12, 2016, Appendix 2, “Complete Glide-Path Equity Allocations by Target-Date Series %,” pp. 83-84.

A standard equity investment is typically an ownership interest in a company (e.g., common stock) that does not contractually require payments (e.g., dividends, return of investment). As such, equity is generally viewed as having higher financial risk than, for example, a high quality debt security, which contractually requires defined payments and is higher in a company’s capital structure than equity.⁴²

The reduction in equity exposure over time by most TDFs as a risk-reducing mechanism is generally supported by historical performance statistics of asset classes.⁴³ Over long historical periods, the volatility or risk of U.S. stock returns as expressed by the standard deviation of returns tends to be higher than that of bond returns.



Of course, the average (mean) return of stocks is also higher than bonds, reflecting the typical trade-off between risk and return. Table 1 below shows the average monthly returns and standard deviations of U.S. large capitalization stocks and intermediate-term government bonds in the post-World War II era, based on data from Ibbotson.

TABLE 1

Average Monthly Investment Returns and Standard Deviation, 1945-2015

	Mean Total Return	Standard Deviation of Returns
Large Capitalization Stocks	0.97%	4.17%
Intermediate-Term Government Bonds	0.45%	1.36%

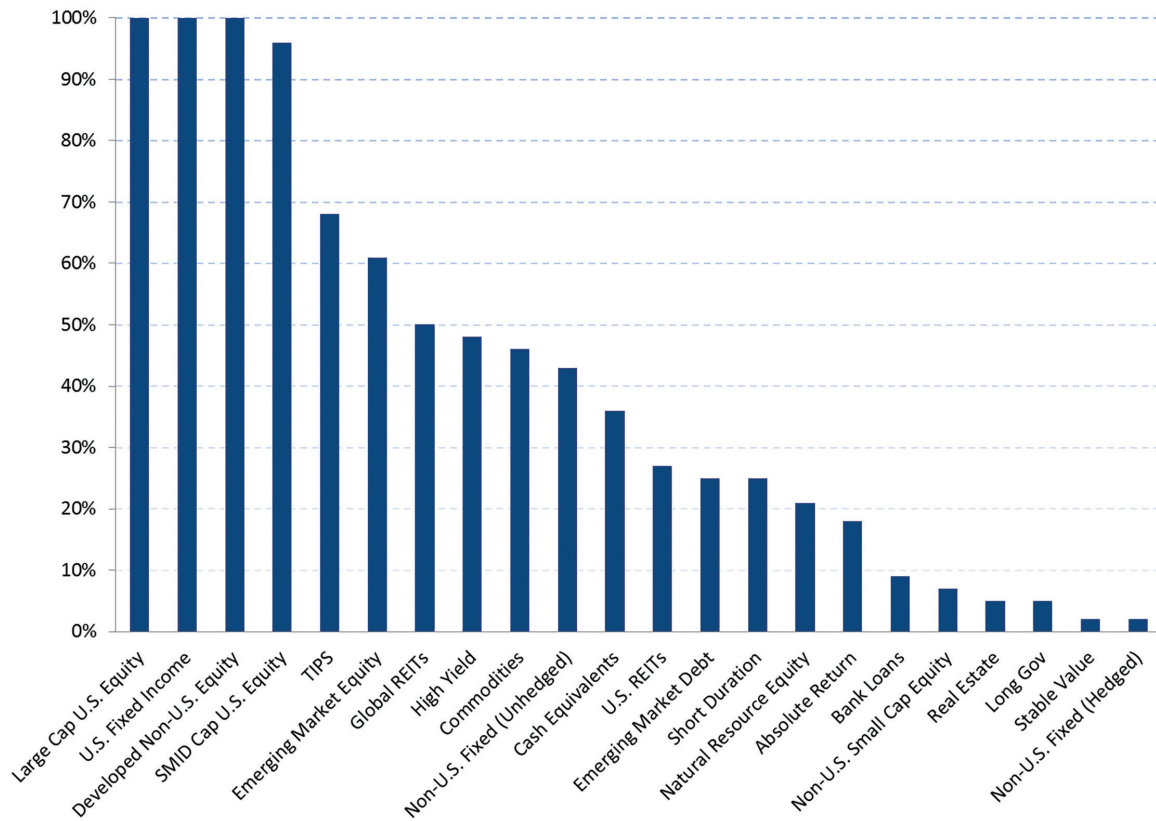
Notes and Sources: Roger G. Ibbotson, 2016 SBBI Yearbook: Stocks, Bonds, Bills, and Inflation: U.S. Capital Market Performance by Asset Class 1926–2015, (Hoboken, New Jersey: John Wiley & Sons, Inc., 2016), Appendices A-1 and A-10. Calculations are done by Brattle.

Despite TDF managers' common practice of reducing equity exposure to a relatively low level as the target date is approached or passed, this is not optimal for every individual. Academic papers and our own research indicate that if the amount of periodic income required by a retiree is relatively large in relation to the total value of invested retirement assets, there is often a higher probability of successfully meeting such income requirements by maintaining larger equity allocations well into retirement.⁴⁴ This research implicitly and quantitatively highlights the issue raised earlier: due to idiosyncratic differences among individuals, particularly differences in attributes and preferences during the decumulation phase, a standard TDF asset allocation may not be in the best interest of an individual.

Beyond simple equity glide paths, in recent years, more granular asset class target allocations have been reported by many TDFs.⁴⁵ Broadly, the number of investment classes utilized by TDFs has grown, consistent with a general increase in the availability/liquidity of non-traditional asset classes and strategies. The asset classes employed go well beyond traditional long debt and equity investments. For example, commodities, which are often viewed as a diversifying asset class (from equity and debt) and also an inflation hedge, have become more prevalent within some TDFs in recent years.⁴⁶ Further, some fund management companies, including TIAA, also make allocations to direct holdings of real estate.⁴⁷ Figure 8 highlights that traditional long debt and equity investments are ubiquitous in TDFs and are supplemented by additional assets with varying degrees of prevalence.

FIGURE 8

Prevalence of Various Asset Classes across Glide Paths



Source: James Veneruso, "Target Date Funds: Finding the Right Vehicle for the Road to Retirement," Callan Investments Institute, September 2015, Exhibit 7, "Prevalence of Various Asset Classes Across Glide Paths," p. 6, accessed June 20, 2017, www.callan.com/wp-content/uploads/2017/02/Callan-TDF.pdf.

As recently noted by the authors of an article appearing in *The Center for Retirement Research at Boston College*:

The typical TDF invests in 17 funds on average. These holdings include emerging markets, real estate, and commodities... And the prevalence of these specialized assets has increased over time.⁴⁸

The article further notes:

Analysts have suggested three possible reasons for the growing popularity of specialized asset classes. First, some TDFs may be trying to stand out from their competitors. Second, these asset classes were identified as hot areas by the financial community in general. Third, fund managers may believe that adding such investments will lower risk through diversification.⁴⁹



Consistent with the third point above, a custom TDF marketing brochure from J.P. Morgan’s asset management area notes:

Efficient diversification can increase expected return, while actually lowering risk. This level of diversification generally requires a much broader range of asset classes than what is typically found in many TDF strategies, with traditional stocks and bonds serving as a portfolio core and extended and alternative asset classes used to enhance return and reduce overall risk.⁵⁰

Despite the growth in the number of investment classes used by many TDFs in recent years, adding too many classes can reduce net returns. Research indicates that so-called “over-diversification” may have a negative impact on fund of fund returns.⁵¹

Though any given TDF is meant to be appropriate for many individuals with similar target dates, the types and number of asset classes employed by TDF managers can vary significantly, as illustrated in Figure 7. This is another feature highlighting TDF heterogeneity.

In this regard, Morningstar states:

Target-date funds are by no means a uniform investment type. Depending on the glide-path philosophy, the subasset classes used, the nature and quality of the underlying investments, and a host of other factors, target-date funds can display markedly different risk and return characteristics.⁵²

During the financial crisis that began in 2007, TDFs with the same common target date exhibited striking differences in annual returns.

In Table 2, we document the dispersion in TDF returns for a subset of funds with target dates within 15 years of the financial crisis. It is notable that each of the funds' large declines in value exhibited in 2008 was followed by large percentage gains in 2009. This is at least partly due to successful Federal Reserve and government intervention and reflation efforts. However, it is important to remember that the order of returns matters, and that a percentage decline in a fund followed by an even larger percentage gain may not result in the full recovery of the dollar amount of value lost. For example, a \$100 investment in T. Rowe Price's 2020 Fund at the start of 2008 would have dropped to \$66.5 by year-end, a 33.5% decline. Though the fund gained an even larger 34.2% during 2009, that gain on the \$66.5 base would only result in a 2009 year-end balance of \$89.24.

TABLE 2

Returns of Selected TDFs, 2007 – 2010

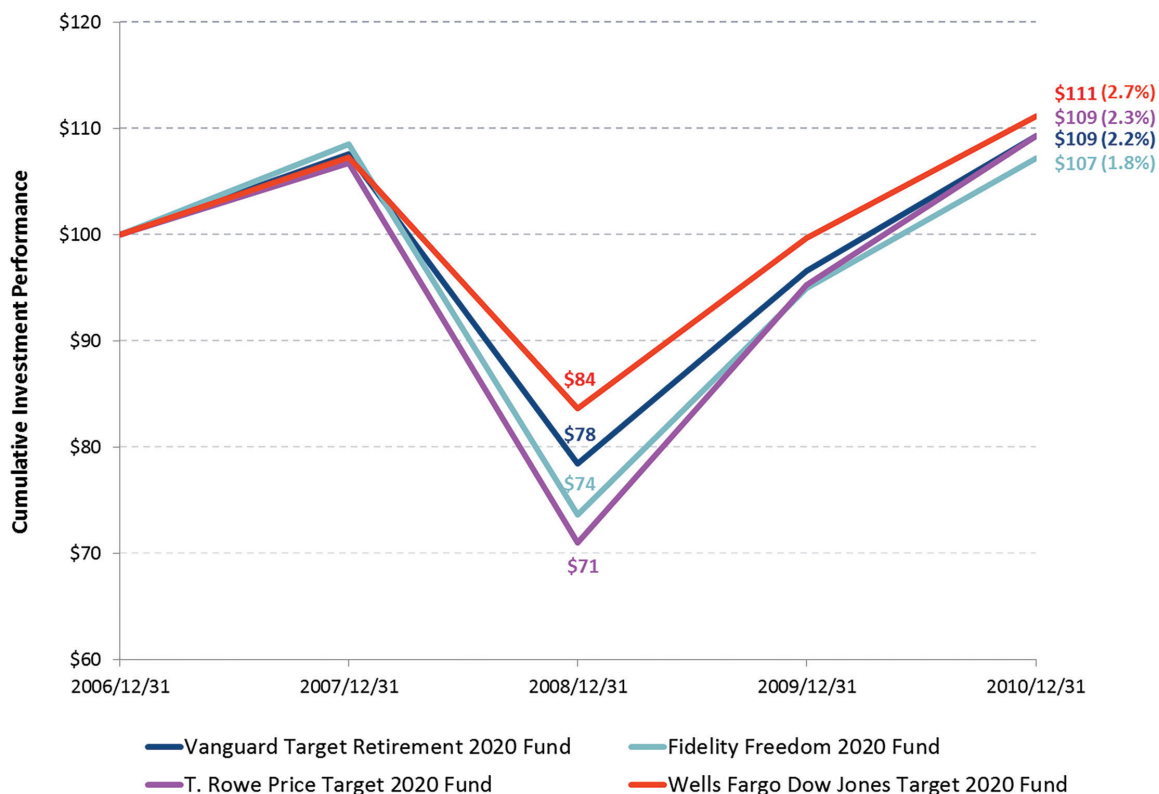
	2007	2008	2009	2010
2010 Funds				
Fidelity Freedom 2010 Fund	7.4%	-25.3%	24.8%	11.7%
Vanguard Target Retirement 2010 Fund	7.7%	-20.7%	19.3%	11.4%
T. Rowe Price Target 2010 Fund	6.7%	-26.7%	28.0%	12.7%
Wells Fargo Dow Jones Target 2010 Fund	6.9%	-11.0%	12.6%	8.8%
2015 Funds				
Fidelity Freedom 2015 Fund	7.8%	-27.2%	25.6%	11.8%
Vanguard Target Retirement 2015 Fund	7.6%	-24.1%	21.3%	12.5%
T. Rowe Price Target 2015 Fund	6.8%	-30.2%	31.4%	13.8%
Wells Fargo Dow Jones Target 2015 Fund		-16.5%	15.8%	10.0%
2020 Funds				
Fidelity Freedom 2020 Fund	8.5%	-32.1%	28.9%	12.9%
Vanguard Target Retirement 2020 Fund	7.6%	-27.0%	23.1%	13.1%
T. Rowe Price Target 2020 Fund	6.7%	-33.5%	34.2%	14.7%
Wells Fargo Dow Jones Target 2020 Fund	7.3%	-22.1%	19.2%	11.5%

Notes and Sources: Bloomberg and Morningstar. Returns shown are historical total returns based on the net asset value (NAV) of each fund.

Figure 9 illustrates as an example the change in value of 100 dollars invested in the 2020 subject funds at the start of 2007 through the end of 2010 (similar but less volatile patterns appear in the 2010 and 2015 subject funds). Primarily as a result of the financial crisis, the funds dropped sharply during 2008 and did not recover to and exceed their 2007 initial values until sometime in 2010. The 4-year annualized returns for each of the funds during this period was less than 3%.

FIGURE 9

Select 2020 TDF Cumulative Investment Values and Annualized Returns, 2007 – 2010



Notes and Sources: Bloomberg and Morningstar. This chart shows the 4-year cumulative investment performance of selected 2020 TDFs assuming a \$100 investment in each fund at the beginning of 2007. Annualized returns for the period, shown in parentheses, are calculated based on the net asset value (NAV) of each fund.

IX. TARGET ALLOCATIONS VS. ACTUAL INVESTMENT ALLOCATION

Individual TDFs generally detail their investment class targeted allocations (by percentage of total) in prospectuses. The granularity of the class targets may vary, but many funds use quantitative approaches to arrive at very specific targeted percentages which may be reported at the 1/10th of one percent level (0.1%). Despite

this and the fact that TDFs rebalance portfolios on an ongoing basis, many TDFs have leeway to migrate away from their listed target allocations. The amount of these so-called “tactical allocations” can vary by fund and may be at the discretion of the portfolio manager.⁵³

For example, TIAA-CREF Lifecycle Funds literature states:

At most, we anticipate tactical asset allocation to account for about 10% to 20% of the relative performance of the Lifecycle Funds versus their composite benchmark in any given year. The remaining 80% to 90% of relative performance of the Lifecycle Funds remains a function of the performance of the portfolio managers of the underlying funds relative to their respective sub-asset categories, as well as the strategic glidepath decision.⁵⁴

Some level of natural variation from investment class targets may occur in an effort to reduce costs and turnover associated with perfect rebalancing to targets. However, many TDFs report using tactical allocations to opportunistically deviate from specified targets. For example, in a rapidly rising equity market, a TDF with a 90% equity target and sufficient tactical leeway could move to 100% equity. Some view the tactical allocations as a positive, in that they can allow managers to take advantage of unusually high returns or avoid perceived losses. A number of studies show that broad asset allocation decisions determine a large portion of fund return differences.⁵⁵ However, given competitive pressures among TDFs and required disclosures that are focused on short-term performance, the ability to tactically allocate away from targets may lead some TDF managers to chase returns in hot markets or “market-time.”

X. EMERGING TDF FIDUCIARY ISSUES

ERISA sets out various standards required of DC plan fiduciaries. The Act defines “fiduciary” not in terms of formal title but rather in functional terms of control and authority over the plan. DC plan fiduciaries normally include plan trustees, plan administrators, members of a plan’s investment committee, or anyone who provides investment advice to a plan for compensation.⁵⁶

A fundamental fiduciary duty under ERISA is the duty of care or prudence, sometimes known as the prudent man rule.

This duty, from ERISA’s section on “Fiduciary Duties,” states:

...a fiduciary shall discharge his duties with respect to a plan... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.⁵⁷

Though TDFs are designated as a “safe-harbor” investment-type under the PPA 2006, plan administrators continue to have fiduciary responsibilities, and as such, cannot blindly include particular TDFs within DC plan offerings. Under ERISA, the investment manager of an externally sourced TDF (e.g., a 2035 TDF offered by Vanguard), who is effectively an outsourced service provider, is generally not a plan fiduciary.⁵⁸ As such, DC plan sponsors retain the responsibility to evaluate relevant aspects of TDFs, such as underlying investments and



future targeted allocations. Consistent with this point, in 2013 the DOL issued guidance to assist plan fiduciaries in their selection and monitoring of plan TDFs.⁵⁹ One key point within the guidance is that plan fiduciaries should establish a process for the comparison and selection of TDFs in relation to the plan's goals, considering TDF performance, fees, and expenses.⁶⁰


Within ERISA there is a potential tension between the “prudence” duties on the one hand and diversification and reasonable expense expectations on the other.

If the majority of fiduciaries offering TDFs to their employees offer TDFs that primarily invest in long holdings of traditional equity and debt securities whose transaction costs are relatively small, then another fiduciary offering non-standard TDFs (that is, TDFs that do not primarily invest in long holdings of traditional equity and debt securities) could be viewed as failing ERISA's prudence standard. In fact, the prudence standard, if interpreted as requiring plan fiduciaries to select TDFs similar to those selected by most other seemingly prudent plan fiduciaries, could hinder the use of potentially superior TDF strategies for concern of being viewed as “outliers,” increasing legal and compliance risks.

For example, offering employees a TDF designed to avoid potentially significant downside risk by sacrificing some upside (e.g., purchasing options) or by diversifying beyond the most common and liquid long asset classes/strategies may provide superior “through-the-cycle” performance. Yet such a TDF could be subject to criticism as a high-cost imprudent outlier.

XI. DOL'S FIDUCIARY RULE AND IMPACT ON TDFS

While there is still some uncertainty with respect to the ultimate fate of the DOL's Fiduciary Rule, on May 22, 2017 the DOL, after a 60-day delay and review, reported that implementation would begin on June 9, 2017. Even prior to the final rule's approval and implementation date, some major financial firms had begun to alter their processes and fee structures related to retirement investment products and advice.



Broadly, the Fiduciary Rule moves broker-dealers and affiliated registered representatives or RRs to a fiduciary “best interest” standard from the less strict suitability standard, with respect to their investment recommendations on non-ERISA retirement accounts, such as IRAs.

As stated in Law360:

The fiduciary rule, promulgated under the Obama administration in April 2016, requires financial professionals who advise retirement account holders to act in the best interests of their clients when recommending investment products, a higher standard than the current approach of promoting products that are merely suitable to an investor.

Advisers and broker-dealers that fall under the expanded definition of a fiduciary will largely be prohibited from collecting commissions unless they take advantage of the so-called best interest contract, or BIC, exemption by entering into a contract with clients affirming they will uphold the clients’ best interests.⁶¹

ERISA has long required fiduciary standards with respect to any party with control or authority over an employer-sponsored retirement plan, such as a 401(k). Furthermore RIAs have long been held to a fiduciary standard, promulgated under the Investment Advisers Act of 1940,⁶² with respect to any investment advice. However, the DOL’s Fiduciary Rule effectively holds RRs who provide recommendations on non-ERISA retirement investment accounts, such as IRAs, to a fiduciary standard. As detailed above, IRAs represent a multi-trillion dollar market with hundreds of billions invested in TDFs.⁶³

Initial reports indicate that the new Fiduciary Rule has led to reductions in brokerage account types where customers are charged on transactions. Such accounts, where brokers are typically compensated through sales commissions, are viewed as more subject to conflicts of interest, as there may be broker incentives to recommend frequent trading or to recommend relatively high fee products, both of which may be viewed as inconsistent with the client’s best interest.

Conversely, non-commission accounts such as fee-based accounts and self-directed brokerage accounts have increased.

The Wall Street Journal reported:

Fee-based accounts are favored under the fiduciary rule because they don’t give a broker incentive to push one product over another for a commission. Self-directed brokerage accounts also have benefited from the rule because they allow investors who trade infrequently to minimize costs.⁶⁴

In terms of TDF recommendations by brokers handling retirement accounts, a broker would have no direct commission-based incentive in a fee-based account to recommend a particular TDF; however, even fee-based accounts may entail certain indirect or firm-level incentives that influence broker behavior.



A simple example involving a TDF recommendation potentially meeting the RRs suitability standard but failing the new best interest standard would be one recommending the purchase of a TDF that is generally suitable for an investor, but whose cost is higher than another virtually identical TDF. Proponents of the DOL rule argue that it protects investors from RRs who may have an incentive to recommend higher-cost products that pay RRs higher commissions, but provide no offsetting advantages to the investor.

One major argument against the DOL's Fiduciary Rule is that it could result in a large increase in the number of lawsuits, as it creates a new private right of action for investors. Specifically, plaintiffs who realize sub-optimal investment results after some subjective period could, with the benefit of hindsight, file lawsuits complaining that investment recommendations were not in their best interest at the time, even if these recommendations were reasonable.

Given the wide dispersion of TDF glide paths, investment strategies, and expense ratios detailed in this paper, significant performance differences have and will continue to exist across TDFs, particularly through market cycles.

It is not difficult to imagine IRA account holders', who receive a purchase recommendation via a brokerage firm for a specific TDF investment, filing lawsuits a few years later if the subject TDF realized lower returns than other available TDFs. In such cases, maintaining documentation as to why the particular TDF was viewed at the time to be in the best interest of the client will be important for brokerage firms seeking to mitigate legal risk.

Beyond the obvious issues in the example of identical TDFs that involve different investor fees, the analysis of the value provided from a TDF versus its costs can be complex and multi-faceted. Though one may easily show, with the benefit of hindsight, that a more expensive investment option provided relatively poor performance, this does not mean that the more expensive product was a sub-optimal choice.

The value of important features including investment manager experience, risk management systems, and the implementation of hedging strategies may not show benefits in terms of relatively higher investment returns in certain time periods. However, such features, which can serve as insurance, may be prudent and valuable, particularly in turbulent markets. Just because a car owner pays for car insurance for five years and never has an accident or claim does not mean the insurance had no value; it may be that the insurance more than pays for its cost given a major crash in year six. Given the long-term nature of TDFs and potential litigation that may be sparked by the Fiduciary Rule, the quantification and valuation of proper risk management, experience, and other less tangible factors is likely to become an increasingly important area of expertise for fiduciaries and experts.

XII. SELECTED RECENT LITIGATION INVOLVING TDFS

A. JACOBS V. VERIZON COMMUNICATIONS, INC.

TDFs have been the subject of recent lawsuits alleging breaches of fiduciary duties under ERISA. For example, in *Jacobs v. Verizon Communications, Inc.*, plaintiff alleges that the “Verizon Defendants designed an investment structure for the Verizon Plans that was overly complex, overly risky, and inappropriate for the average Verizon employee.”⁶⁵ According to the Complaint, defendants violated their fiduciary duties to plan participants under ERISA given the inappropriate nature of the investment options, which involved excessive risks as well as excessive fees.⁶⁶ The Complaint further alleged that the defendant’s provision of Verizon TDFs “added a second layer of investment management fees”⁶⁷ and that the addition of certain “specialty” asset classes, including a global high yield bond fund, to the asset allocation of the Verizon TDFs “added significant levels of risk and complexity to the Verizon TDF series.”⁶⁸ The plan fiduciaries allegedly violated their fiduciary duties of disclosure under ERISA by failing to provide plan participants with “the opportunity to obtain sufficient information to make informed decisions” regarding their investment alternatives under the plan.⁶⁹ The Complaint also alleged that the plan fiduciaries breached their duty of prudence in the design and management of the Verizon TDFs, and by failing to adequately monitor the performance of certain funds included in the Verizon TDFs.⁷⁰

B. MEINERS V. WELLS FARGO & COMPANY

In another matter, *Meiners v. Wells Fargo & Company*, the plaintiff filed suit alleging that defendants violated their fiduciary duties of loyalty and prudence under ERISA by engaging in “a practice of self-dealing and imprudent investing of Plan assets by funneling billions of dollars of those assets into Wells Fargo’s own proprietary funds.”⁷¹ The Complaint specifically alleged that the defendants “designed and maintained a system to maximize the amount of plan assets invested into” TDF mutual funds.⁷² The Complaint further alleged that the Wells Fargo TDFs “cost on average over 2.5 times more than comparable target date funds while... substantially and consistently underperforming those comparable funds.”⁷³ On May 25, 2017, district court Judge David S. Doty granted defendants’ motion to dismiss, with prejudice, thereby barring plaintiff from re-filing any amended complaint in the case.⁷⁴ Plaintiff has filed an appeal, which is currently pending with the Eighth Circuit Court of Appeals.⁷⁵

C. SULYMA V. INTEL CORPORATION INVESTMENT POLICY COMMITTEE

The tension between the “prudence” and “reasonable expense” responsibilities on the one hand and the “diversification” responsibility of a plan fiduciary was the focus in a recent ERISA case in the Northern District of California.

In Sulyma v. Intel Corporation Investment Policy Committee, plaintiff claimed:

Defendants breached their fiduciary duties by (a) investing a significant portion of the [Intel 401(k) Savings Plan’s and the Intel Retirement Contribution Plan’s] assets in hedge fund and private equity investments which presented unconventional, significant and undue risks and unduly high fees and costs, and (b) adopting asset allocation models and asset allocations for participant accounts that departed dramatically from prevailing standards employed by professional investment managers and plan fiduciaries.⁷⁶

The Intel Retirement Plans Investment Policy Committee, the fiduciary for both plans at issue, tailored a suite of target date portfolios consisting of allocations in nine underlying funds. Among these nine funds were various funds consisting of “alternative investments,” including the Alternative Investment Fund, which invested heavily in private equity partnerships, and a hedge fund.⁷⁷ Plaintiff alleged that the Investment Committee “dramatically altered the asset allocation model” and significantly increased the at-issue funds’ exposure to hedge fund and private equity investments, from 2009 through 2014, consequently resulting in high fees and performance inferior to that of “peer TDFs.”⁷⁸

In the Motion to Dismiss, defendants outlined several defenses, including contending that “[Plaintiff’s] claims fail because they rely on generalized allegations unconnected to the Plans’ actual investments and on hindsight comparisons to mutual funds that are not comparable.”⁷⁹ They explained that, in response to the 2008 financial crisis, the fiduciaries “diversified Intel’s retirement portfolios by increasing the asset allocation to alternative investments such as selected hedge funds and private equity partnerships” in order to “generate optimal long-term, risk-adjusted returns and steadier performance while protecting the Plans’ participants against excessive equity market volatility and sharp fluctuations in the value of retirement assets.”⁸⁰

The defendants argued that this downside protection comes at the price: “such diversification could cause portfolios to lag behind equities during a sustained market run-up” and “would entail higher costs because the alternative investments are actively managed strategies.”⁸¹

On March 31, 2017, the Court issued an Order granting summary judgment in favor of Defendants.⁸² All claims were dismissed based on the statute of limitations, as the court found the plaintiff had “actual knowledge” of the underlying facts (due to financial disclosure documents) more than three years prior to their filing of the lawsuit. Plaintiff has filed an Appeal, which is currently pending with the Ninth Circuit Court of Appeals.⁸³

D. TUSSEY V. ABB, INC.

Another recent matter has focused on the responsibilities of plan fiduciaries to monitor plan investments which included TDFs and assess and re-assess the reasonableness of fees. In *Tussey v. ABB, Inc.*,⁸⁴ the Eighth Circuit initially affirmed a determination that ABB violated ERISA by failing to consider the reasonableness of fees charged by its fund record-keeper.⁸⁵ The district court judge had originally ruled in favor of plaintiff, finding in part that “ABB never calculated the dollar amount of the recordkeeping fees the Plan paid... via revenue sharing arrangements,”⁸⁶ even after an outside consulting firm told ABB that it was overpaying for recordkeeping fees.⁸⁷ In determining the \$13.4 million that the plan overpaid for recordkeeping costs, the district court credited plaintiffs’ expert witness, who used fees paid by a similarly sized retirement plan for Texas employees as the comparator, and that this was in line with trends as to what were reasonable revenue-sharing earnings for other plans.⁸⁸ Subsequent case proceedings have focused on the issue of whether Plaintiffs were capable of proving damages against the defendant plan fiduciaries. While the district court originally found that Plaintiffs had failed to satisfy their burden of proof as to the issue of damages,⁸⁹ the Eighth Circuit found that the district court incorrectly limited itself in assessing the damages question, and therefore has vacated and remanded the case back to the district court to re-assess Plaintiff’s damages.⁹⁰

XIII. CONCLUSION

The size, heterogeneity, and complexity of the TDF market have clearly increased over recent years. This backdrop along with the evolving regulatory frameworks and legal decisions make TDFs an important area to monitor going forward.

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ENDNOTES

1. Some target date funds are designed to be used for 529 Plan education savings programs, and thus their target dates aren't retirement-based.
2. As an example, in the year 2017, a 2035 TDF may be chosen by an investor with approximately 20 years until her targeted retirement date. In concept, this investor would be able to allocate her entire existing retirement savings balance and any future contributions to a single 2035 TDF. In this example, an investor may also elect to allocate her retirement savings into two funds – 60% into a 2035 TDF and 40% into a 2040 TDF. As touted, an investor may only need to reallocate (to other TDFs) if she changes her target retirement date.
3. See "How America Saves 2016: Vanguard 2015 Defined Contribution Plan Data," Vanguard, June 2016, p. 54, accessed March 29, 2017, pressroom.vanguard.com/nonindexed/HAS2016_Final.pdf (How America Saves 2016).
4. "2017 Investment Company Fact Book," 57th edition, Investment Company Institute, Figure 7.20, "IRA Asset Allocation Varied with Investor Age" and Figure 7.25, "Target Date and Lifestyle Mutual Fund Assets by Account Type," pp. 155 and 161, accessed June 15, 2017, www.ici.org/pdf/2017_factbook.pdf.
5. As with any U.S. open-end mutual fund, objectives and constraints of the fund are described in the offering documents.
6. Some TDFs only adjust fund allocations up "to the target date," while others adjust allocations "through the target date."
7. In recent years, DC plan sponsors, often through their recordkeeping firms, have begun offering a range of advice programs from online advice, to managed accounts, to broad financial planning.
8. Managing solely to the target date is especially true in the case of off-the-shelf mutual fund TDFs that have no specific customization.
9. "Figure 1: Accumulation and Decumulation" review assumptions: We assume an annual Rate of Return of 4.1% for the fund. We assume the individual saves \$2,000 at age 22 and that their annual savings increase by \$300 each year while working (i.e. the individual saves \$2,300 in their second year of working). We assume the individual retires at age 65. We assume that the individual withdraws \$30,000 in their first year of retirement and that their annual withdrawal increases by \$2,000 each year until they die at age 90 (i.e. they withdraw \$32,000 in their second year of retirement). There is \$30,179 left in the individual's retirement account when they die.
10. The underlying assumption is that an investor controls the length of the accumulation phase setting aside unexpected events outside her control like involuntary unemployment, health issues, or other emergencies.
11. In theory, it is possible to construct TDFs that target the length of both an investor's accumulation period and decumulation period. For example, a "2035/2045 TDF" could represent a target retirement date of 2035 with a 10 year life expectancy after retirement, whereas a "2035/2065 TDF" would allocate for a 30 year life expectancy. Of course, introducing a life expectancy assumption would significantly increase complexity and fund costs and could increase potential litigation risk.
12. Hans Erickson and John Cunniff, "'To' Versus 'Through': The Great Glidepath Debate," TIAA Global Asset Management, August 2016, p. 2, accessed May 19, 2017, www.nuveen.com/Home/Documents/Default.aspx?fileId=67237.
13. *Ibid.*
14. *Id.* at 4 (specifying savings assumptions including "Begin working/saving at age 30; retire at age 65; 30-year retirement period (to age 95)").
15. See, e.g., "Vanguard Target Retirement Fund Prospectus," Vanguard, January 27, 2017, p. 38, accessed May 19, 2017, personal.vanguard.com/pub/Pdf/p308.pdf (The Fund is designed for an investor who plans to withdraw the value of an account in the Fund over a period of many years after the target year.).
16. See, e.g., "Industry's First Target-Date Fund Celebrates 15 Years Since Groundbreaking Launch," Barclays Global Investors press release, November 7, 2008, accessed May 19, 2017, at www.marketwired.com/press-release/industrys-first-target-date-fund-celebrates-15-years-since-groundbreaking-launch-918094.htm (discussing the first TDFs introduced in November 1993 as "LifePath Portfolios").
17. See, e.g., "Target-Dates Top \$1 Trillion, Yet Remain Largely Out of Reach for Most Asset Managers," Sway Research press release, March 22, 2016, accessed April 2, 2017, static1.squarespace.com/static/5661aba4e4b0c3b0ea70a07a/t/56f3ee4f20c647752991f97b/1458826848955/State_of_T-D_Market_Mar_2016.pdf.
18. Jeff Holt *et al.*, "2017 Target-Date Fund Landscape," Morningstar, April 20, 2017, p. 1.
19. "Retirement Assets Total \$25.3 Trillion in Fourth Quarter 2016," Investment Company Institute, March 22, 2017, accessed June 15, 2017, www.ici.org/research/stats/retirement/ret_16_q4 and "2017 Investment Company Fact Book," 57th edition, Investment Company Institute, Figure 7.25, "Target Date and Lifestyle Mutual Fund Assets by Account Type," p. 161, accessed June 15, 2017, www.ici.org/pdf/2017_factbook.pdf.
20. See generally, How America Saves 2016. See also "The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2014," BrightScope and Investment Company Institute, December 2016, p. 7, accessed February 6, 2017, www.ici.org/pdf/ppr_16_dcplan_profile_401k.pdf (In 2014, the average 401(k) plan offered 28 investment options, of which about 14 were equity funds, four were bond funds, and seven were target date funds, based on analysis of the audited Form 5500 reports in the BrightScope Defined Contribution Plan Database for nearly 30,000 401(k) plans. Nearly all plans offered at least one equity and bond fund, and about three-quarters of plans offered a suite of target date funds.). See also, *Id.* at Exhibit 2.11, p. 40.

21. See *How America Saves 2016*, Figure 72, “Participant use of target-date funds,” p. 66.
22. *Ibid.*
23. See “PSCA Releases Results of 59th Annual Survey of Profit Sharing and 401(k) Plans,” PCSA press release, December 19, 2016, accessed May 19, 2017, www.psc.org/psca-releases-results-of-59th-annual-survey-of-profit-sharing-and-401-k-plans. “PSCA’s 59th Annual Survey reflects the 2015 plan-year experience of 614 DC plan sponsors.” According to this press release, TDF assets (which made up 19.8% of respondents’ 401(k) assets) were second only to “actively managed domestic equity index funds,” which comprised 21.4% of respondents’ 401(k) assets.
24. See “PSCAs Annual Survey Shows Company Contributions are Bouncing Back,” PCSA press release, October 11, 2012, accessed May 22, 2017, www.psc.org/psca-s-annual-survey-shows-company-contributions-are-bouncing-back.
25. See *How America Saves 2016*, Figure 51, “Plan asset allocation summary,” p. 49.
26. *Id.* at Figure 52, “Plan contribution allocation summary,” p. 50.
27. See, e.g., “Customization Comes to Target-Date Funds,” *CPA Client Bulletin*, September 2016, accessed February 6, 2016, www.danielratliff.com/wp-content/uploads/2016/11/AICPA-Client-Newsletter-September-2016.pdf; see also Robert Steyer, “Cerulli: Target-Date Funds Snagging Larger Share of 401(k) Assets,” *Pensions & Investments*, November 24, 2014, accessed May 22, 2017, www.pionline.com/article/20141124/ONLINE/141129936/cerulli-target-date-funds-snagging-larger-share-of-401k-assets.
28. See “Report: The US Retirement Market, Fourth Quarter 2016,” Investment Company Institute, March 22, 2017, Table 5, “Defined Contribution Plan Assets by Type of Plan,” accessed June 15, 2017, www.ici.org/info/ret_16_q4_data.xls.
29. *Id.* at Table 7, “IRA Assets by Type of Institution.”
30. See 29 CFR § 2550.404c-5 (Fiduciary relief for investments in qualified default investment alternatives).
31. Only two other types of investments are deemed default investments, where unallocated funds can be directed and invested indefinitely. See, e.g., DOL Employee Benefits Security Administration, “Automatic Enrollment 401(k) Plans for Small Businesses,” November 2013, p. 5, accessed May 22, 2017, www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/addingautoenroll.pdf.
32. Employee Retirement Income Security Act of 1974, Public Law 93-406, 88 Stat. 829.
33. Automatic enrollment for 401(k) plans has existed since at least the 1990s and has become increasingly more common in recent years since the passage of the PPA 2006, which encourages the use of automatic enrollment in 401(k) plans. It is not uncommon that employee DC plan investors, particularly auto-enrollees, fail to specify an investment allocation, leaving them with the default allocation and contribution rates set by the sponsor. See Jack VanDerhei, “The Impact of Automatic Enrollment in 401(k) Plans on Future Retirement Accumulations: A Simulation Study Based on Plan Design Modifications of Large Plan Sponsors,” Employee Benefit Research Institute, No. 341, April 2010, pp. 4 and 6, accessed August 2, 2017, www.ebri.org/pdf/briefspdf/EBRI_IB_04-2010_No341_Auto-Enroll.pdf. “Employers can choose to automatically enroll employees in 401(k) plans, choosing a default initial contribution rate and a default investment, unless the employee indicates otherwise.” See “The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2014,” BrightScope and Investment Company Institute, December 2016, pp. 17-18, accessed February 6, 2017, www.ici.org/pdf/ppr_16_dcplan_profile_401k.pdf. According to Aon Hewitt, in 2010 approximately 57% of DC plans automatically enrolled new employees, up from 24% in 2006. See “2011 Hot Topics in Retirement: A Changing Horizon,” Aon Hewitt, p. 10, accessed April 2, 2017, www.aon.com/attachments/thought-leadership/2011%20Hot%20Topics_Final.pdf.
34. See *How America Saves 2016*, p. 58.
35. *Ibid.*
36. See “How America Saves 2014: A Report on Vanguard 2013 Defined Contribution Plan Data,” Vanguard, June 2014, Figure 1, “Highlights at a glance,” p. 6, accessed June 20, 2017, institutional.vanguard.com/iam/pdf/HAS14.pdf.
37. See, e.g., “Investor Comprehension and Usage of Target-Date Funds: 2010 Survey,” Vanguard, January 2011, accessed May 22, 2017, personal.vanguard.com/pdf/s204.pdf.
38. Jeff Holt *et al.*, “2017 Target-Date Fund Landscape,” Morningstar, April 20, 2017, Exhibit 4, “2016 Target-Date and Firm Assets and Net Flows,” p. 10.
39. *Id.* at Exhibit 5, “2016 Firm Market Share of Target-Date Mutual Funds,” p. 11 and Josh Charlson *et al.*, “Target-Date Series Research Paper: 2009 Industry Survey,” Morningstar, September 9, 2009, “Net Assets, Target-Date Funds, in \$ millions,” p. 5.
40. “Target-Dates Top \$1 Trillion, Yet Remain Largely Out of Reach for Most Asset Managers,” Sway Research press release, March 22, 2016, accessed April 2, 2017, static1.squarespace.com/static/5661aba4e4b0c3b0ea70a07a/t/56f3ee4f20c647752991f97b/1458826848955/State_of_T-D_Market_Mar_2016.pdf; see also “TDFs Top \$1 Trillion, Still Concentrated,” NAPA Net, March 23, 2016, accessed May 22, 2017, www.napa-net.org/news/managing-a-practice/industry-trends-and-research/tdfs-top-1-trillion-still-concentrated/; Rebecca Moore, “TDF Mutual Funds and CITs Dominated by Proprietary Holdings,” *Plan Sponsor*, March 22, 2016, accessed July 21, 2017, www.plansponsor.com/TDF-Mutual-Funds-and-CITs-Dominated-by-Proprietary-Holdings/.
41. See, e.g., 2010 Fund in “Vanguard Target Retirement Funds Prospectus,” Vanguard, January 27, 2017, p. 14, accessed March 31, 2017, www.vanguard.com/pub/Pdf/p308.pdf. Similar language appears in the same prospectus for funds with different target dates.
42. In terms of corporate capital structure, bonds payments have priority above equity.

43. Despite the baseline points, it should be clear that not every portfolio with “less equity” should be considered less risky than one with “more equity” and vice versa.
44. James M. Poterba *et al.* report that “[a]t modest levels of risk aversion, or when the household has access to substantial non-401(k) wealth at retirement, the historical pattern of stock and bond returns implies that the expected utility of an all-stock investment allocation rule is greater than that from any of the more conservative strategies.” James M. Poterba, Joshua Rauh, Steven F. Venti, and David A. Wise, “Life-cycle Asset Allocation Strategies and the Distribution of 401(k) Retirement Wealth,” in *Developments in the Economics of Aging*, ed. David A. Wise (Chicago: University of Chicago Press, March 2009), p. 48, accessed July 12, 2017, www.nber.org/chapters/c11308.pdf. Robert Shiller observes that “the results are disappointing for the life cycle portfolios, especially when we use the more realistic assumption about future returns that they should match world experience rather than the experience of the U.S. One is tempted to say that workers should eschew the life cycle portfolio altogether, and participate only in the 100% stocks portfolio.” Robert J. Shiller, “The Life-Cycle Personal Accounts Proposal for Social Security: An Evaluation,” NBER Working Paper No. 11300, April 2005, p. 24, accessed July 11, 2017, aida.wss.yale.edu/~shiller/pubs/nber11300.pdf.
45. See Edwin J. Elton, Martin J. Gruber, Andre de Souza, and Christopher R. Blake, “Target Date Funds: Characteristics and Performance,” *Review of Asset Pricing Studies* 5(2) (December 2015): 258-260.
46. *Ibid.*
47. See “TIAA-CREF Lifecycle Funds: Methodology and Design,” TIAA Global Asset Management, 2017, Exhibit 1, “TIAA-CREF Lifecycle Funds Glidepath,” p. 2, accessed May 22, 2017, www.nuveen.com/Home/Documents/Default.aspx?fileId=67235.
48. Edwin J. Elton, Martin J. Gruber, Andre de Souza, and Christopher R. Blake, “Target Date Funds: What’s Under the Hood?,” Center for Retirement Research at Boston College, 17(2) (January 2017), p. 2, accessed May 22, 2017, crr.bc.edu/wp-content/uploads/2017/01/IB_17-2.pdf.
49. *Id.* at endnote 8, p. 6.
50. “Decoding Target Date Fund Design,” J.P. Morgan Asset Management, February 2014, p. 6, accessed May 22, 2017, am.jpmorgan.com/blobcontent/1383175812596/83456/RI_Decoding-TDF-Design-Brochure.pdf.
51. Stephen J. Brown, Greg N. Gregoriou, and Razvan C. Pascualu, “Diversification in Funds of Hedge Funds: Is It Possible to Overdiversify?,” July 7, 2011, accessed July 12, 2017, papers.ssrn.com/sol3/papers.cfm?abstract_id=1436468.
52. “Fact Sheet: Morningstar Target-Date Fund Series, Rating and Research Reports,” Morningstar, 2009, p. 1, accessed June 15, 2017, admainnew.morningstar.com/directhelp/FactSheet_TargetDateRating.pdf.
53. See, e.g., Dynamic Target Date Funds Prospectus for Class R6, Wells Fargo Asset Management, October 1, 2016, p. 22, accessed May 23, 2017, www.wellsfargofunds.com/assets/edocs/regulatory/prospectus/dynamic-target-date-r6-pro.pdf. (At their discretion, the Fund’s portfolio managers may make changes to the Fund’s asset allocation. At any point, as a result of the utilization of the futures overlay and changes otherwise implemented by the portfolio managers, there may be significant divergences between the effective asset allocation of the Fund and its strategic target allocation.)
54. See “TIAA-CREF Lifecycle Funds: Methodology and Design,” TIAA Global Asset Management, 2017, p. 16, accessed May 22, 2017, www.nuveen.com/Home/Documents/Default.aspx?fileId=67235.
55. See, e.g., Robert G. Ibbotson and Paul D. Kaplan, “Does Asset Allocation Policy Explain 40, 90, or 100 Percent of Performance?” *Financial Analysts Journal* 56(1) (January/February 2000): 26-33, accessed July 12, 2017, www.mangustarisk.com/doc/pdf/Does_Asset_Allocation_Explains_40_90_100_Performance.pdf.
56. See, e.g., “Fiduciary Responsibilities,” U.S. Department of Labor, accessed May 23, 2017, at www.dol.gov/general/topic/retirement/fiduciaryresp. (Fiduciary duties are owed under ERISA by “persons or entities who exercise discretionary control or authority over plan management or plan assets, anyone with discretionary authority or responsibility for the administration of a plan, or anyone who provides investment advice to a plan for compensation or has any authority or responsibility to do so are subject to fiduciary responsibilities” including “plan trustees, plan administrators, and members of a plan’s investment committee.”)
57. See ERISA § 404(a)(1)(B), codified at 29 U.S. Code § 1104(a)(1)(B).
58. See U.S. Department of Labor, Employee Benefits Security Administration, Advisory Opinion 2009-04A, December 4, 2009, p. 2, accessed June 6, 2017, www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2009-04a; see also Wagner Law Group, “Fiduciary Guidebook for Target Date Funds,” Legg Mason Global Asset Management, 2011, p. 4, accessed May 23, 2017, www.wagnerlawgroup.com/documents/WPFiduciaryGuidebooktoTDFs.pdf.
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67. *Id.* at ¶ 14.
68. *Id.* at ¶¶ 17-18.
69. *Id.* at ¶¶ 99-101, 120.
70. *Id.* at ¶¶ 102-104.
71. Complaint, ¶¶ 1-2, *Meiners v. Wells Fargo & Co.*, 2017 U.S. Dist. LEXIS 80606 (D. Minn. May 25, 2017) (No. 16-cv-03981).
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75. Notice of Appeal, *Meiners v. Wells Fargo & Co.*, No. 17-cv-02397 (8th Cir. June 23, 2017).
76. See Consolidated Complaint, ¶ 1, *Sulyma v. Intel Corp. Inv. Policy Comm.*, 2017 U.S. Dist. LEXIS 49788 (N.D. Cal. Mar. 31, 2017) (No. 15-cv-04977).
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