No. 15-2792

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RONALD C. TUSSEY, CHARLES E. FISHER, TIMOTHY PINNELL,
Plaintiffs-Appellants,

v.

ABB INC.; JOHN W. CUTLER, JR.; PENSION REVIEW COMMITTEE OF ABB INC.; PENSION & THRIFT MANAGEMENT GROUP OF ABB, INC.; EMPLOYEE BENEFITS COMMITTEE OF ABB, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION (SIFMA) AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES SUPPORTING AFFIRMANCE OF JUDGMENT

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Dated: December 18, 2015

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae states that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

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<u>STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*</u>

The Securities Industry and Financial Markets Association (SIFMA) is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

As the leading voice for the U.S. securities industry, SIFMA has a strong interest in promoting complete and accurate information about the nature of securities products, including target-date funds like the funds involved in this case. SIFMA submits this brief in support of Defendants-Appellees to address several misunderstandings about target-date funds that are reflected in the district court's opinion, to clarify how target-date funds work, and to explain how the Department of Labor treats target-date funds.

STATEMENT OF COMPLIANCE WITH RULE 29

All parties have consented to the filing of this brief. *Amicus curiae* states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

1. The district court's decision failed to take into account fundamental attributes of target-date funds ("TDFs") that make them dynamic investment options requiring a low level of participant involvement.

First, TDFs are a type of balanced fund whose asset allocations dynamically shift over time according to a "glide path," moving from a heavier emphasis on growth-oriented equity investments when the investor is younger to a more conservative portfolio of fixed-income investments as the investor nears retirement age. Glide paths make it easier for people to invest for retirement, and, because they differ from TDF to TDF, constitute a key distinguishing feature of any particular fund.

Second, TDFs differ from "traditional" balanced funds. Unlike TDFs, traditional balanced funds maintain relatively fixed percentages of equity and fixed-income investments and do not change over time as investors age. Because of the difference in the two funds' asset-allocation models, they are subject to different regulatory requirements. This distinction also renders difficult meaningful comparison of the performance of a TDF against that of a traditional balanced fund.

2. The district court also failed to give weight to the value of TDFs in retirement plans.

First, Congress and the Department of Labor ("DOL") have endorsed TDFs as "qualified default investment alternatives" ("QDIAs"). DOL rules posit that TDFs can play a pivotal role in ensuring that employees' investments generate sufficient savings for a secure retirement.

Second, insofar as it precludes plan fiduciaries from transferring assets of discontinued funds to TDFs, the district court's ruling ignores ERISA "fund mapping" principles, sits in tension with TDFs' status as QDIAs, and may prevent plan fiduciaries from satisfying their statutory duty of prudence in accordance with ERISA.

ARGUMENT

ABB, Inc. maintained two retirement plans (the "Plans"), for unionized and non-unionized employees, respectively. Both Plans were subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and were "participant-directed" in that participants were responsible for determining their own investment strategies from a range of options. That menu of options was selected by the fiduciaries of the Plans (the "ABB Fiduciaries").

In 2000, the ABB Fiduciaries adopted an Investment Policy Statement, which called for the creation of a three-tiered investment strategy; each tier would offer investment alternatives tailored to a different level of participant involvement. Tier 1 was to offer a "dynamic" investment option for "participants unwilling or unable to make personal asset allocation decisions," while Tiers 2 and 3 presented various passively and actively managed fund alternatives. Tussey v. ABB, Inc., No. 2:06-cv-04305-NKL, slip op. at 6 (W.D. Mo. July 9, 2015).

Consistent with the Investment Policy Statement, the ABB Fiduciaries began to offer, in 2001, a suite of TDFs called the "Fidelity Freedom Funds" as the Tier 1 option. The ABB Fiduciaries also removed the Vanguard Wellington Fund -- a traditional balanced fund -- as an investment alternative, and transferred the Wellington assets of participants who had not designated a replacement into the

Freedom Funds -- or, in other words, "mapped" the Wellington assets to the Freedom Funds.

Although the district court observed that plan fiduciaries may include TDFs in a plan as a general matter, Tussey, slip op. at 18, the court held the ABB Fiduciaries abused their discretion in mapping the assets of the Wellington Fund to the Freedom Funds. Id. at 22. While the ruling was based in part on the determination that the Fiduciaries' relationship with Fidelity rendered it conflicted, the district court failed to appreciate key features of TDFs -- as compared to traditional balanced funds -- that made them particularly well-suited to fulfilling the role of a Tier 1 investment option. The district court's opinion also gave short shrift to TDFs' role in enhancing Americans' retirement savings, a role that statutory and administrative authority confirms.

Accordingly, Part I of this brief discusses the fundamental differences between TDFs and traditional balanced funds that made TDFs particularly appropriate for inclusion in Tier 1, which was designed to require a low level of participant involvement. Part II explains the value of including TDFs as investment alternatives in retirement plans, as recognized by Congress and the Department of Labor.

I. THE DISTRICT COURT FAILED TO RECOGNIZE THAT KEY FEATURES OF TARGET-DATE FUNDS MADE THEM APPROPRIATE TIER 1 INVESTMENT ALTERNATIVES

The district court acknowledged that plan fiduciaries generally may include TDF options in a retirement plan, Tussey, slip op. at 18, and also correctly recognized that TDFs differ from traditional balanced funds in several important respects, id. at 7-8, 18. The district court nevertheless held that the ABB Fiduciaries abused their discretion in removing the Wellington Fund -- a traditional balanced fund -- as an investment alternative and populating Tier 1 with a complement of Fidelity TDFs. Id. at 18. This holding failed to appreciate how the unique attributes of TDFs -- in particular, their shifting asset allocations and their defined "glide paths" -- aligned with the ABB Fiduciaries' strategy of offering dynamic funds as Tier 1 investment alternatives, as opposed to funds with static investment allocations. This misunderstanding was exacerbated by the district court's inappropriate comparison of TDFs with traditional balanced funds.

A. Target-Date Funds Are Defined By Asset Allocations That Change Automatically According To A Distinctive "Glide Path"

1. Target-Date Funds' Asset Allocations Shift Over Time

TDFs are long-term investment vehicles whose asset allocations shift over time as the investor's retirement date, or "target date," nears. "They operate by investing in a diversified mix of investments and automatically shifting that mix away from riskier investments to more conservative investments . . . as the target date approaches. That shift is referred to as a fund's glide path." U.S. Sec. & Exch. Comm'n, U.S. Dep't of Labor, Public Hearing on Target Date Funds and Other Similar Investment Options 10 (June 18, 2009), http://www.sec.gov/spotlight/targetdatefunds/targetdatefunds061809.pdf [hereinafter Public Hearing] (statement of Seth Harris, Dep't of Labor). TDFs' assets are generally split between equity (such as stock, typically viewed as a riskier investment) and fixed income (such as bonds, typically more conservative). See U.S. Dep't of Labor, U.S. Sec. & Exch. Comm'n, Investor Bulletin: Target Date Retirement Funds 1-2 (May 6, 2010), http://www.dol.gov/ebsa/pdf/TDFInvestorBulletin.pdf.

A TDF's investment strategy generally depends on the particular time horizon until retirement, which dictates the appropriate degree of risk. That risk level automatically adjusts over time as the TDF reduces its investment in equity and growth-oriented assets and simultaneously increases its holdings of assets focusing on capital preservation. For example, equity typically will comprise a relatively large percentage of a TDF with a target date of 2050, as younger investors can be expected to take on more risk in search of capital appreciation. In thirty-five years, however, as an investor's retirement approaches, the assets of that same TDF will have shifted to investments that are, on balance, more conservative (such as investment-grade bond funds and debt securities), since investors of retirement age are generally more risk-averse. See generally id.; Michael Hess, John Ameriks & Scott J. Donaldson, Evaluating and Implementing Target-Date Portfolios: Four Key Considerations, Vanguard Investment Counseling & Research (2008).

2. Target-Date Funds' Asset Allocations Change According To A Particular "Glide Path"

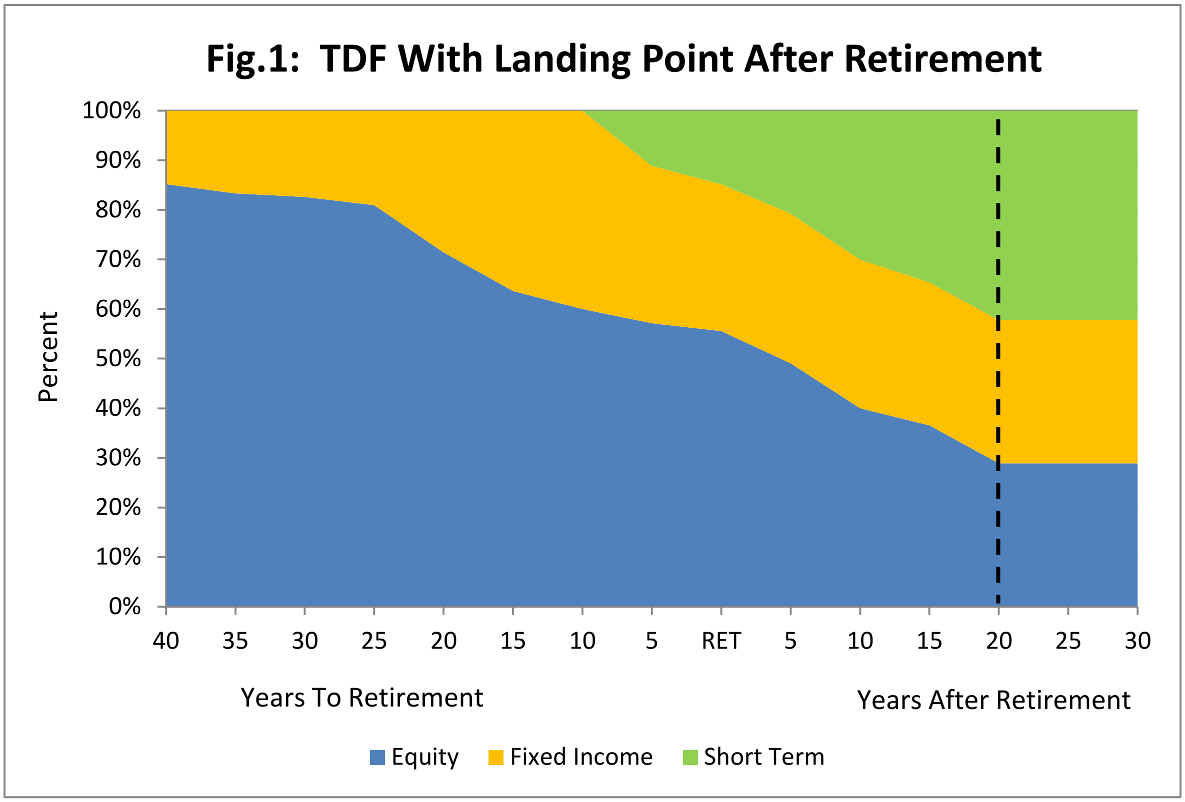
Glide paths constitute a key dynamic feature of TDFs, one that distinguishes them as a class from traditional balanced funds, and distinguishes individual TDFs from one another.

"The schedule by which a [TDF]'s asset allocation is adjusted is commonly referred to as the fund's 'glide path.' The glide path typically reflects a gradual reduction in equity exposure before reaching a 'landing point' at which the asset allocation becomes static." Investment Company Advertising: Target Date Retirement Fund Names and Marketing, 75 Fed. Reg. 35,920, 35,921 (proposed June 23, 2010).

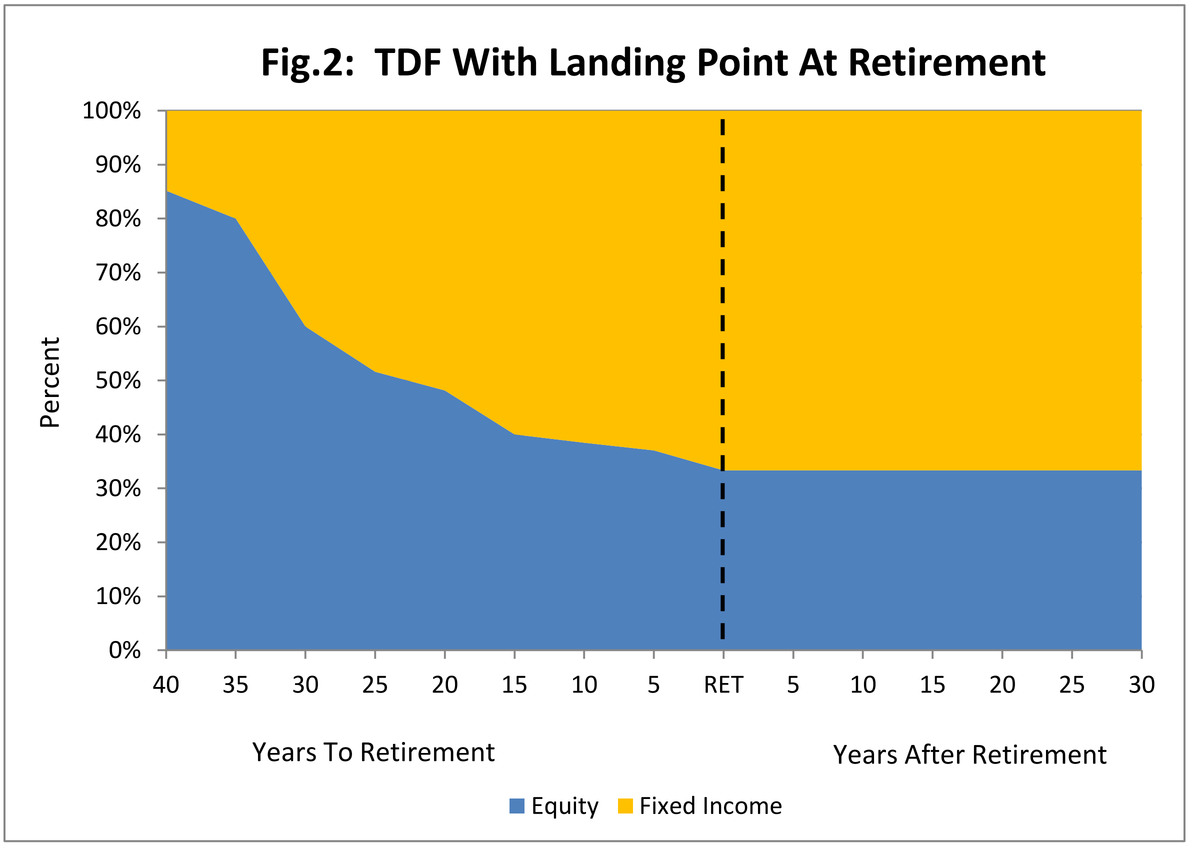
Funds with the same target dates might not have identical glide paths. See Public Hearing at 38 (statement of Jeffrey Knight, Putnam Invs.) (noting that "there are many different approaches or glide paths for managing the shift from higher to lower risk allocations"). Indeed, "the allocation of assets among stocks, bonds, [and] cash-equivalents [has been found to vary] greatly among target date funds with the same target retirement date . . . ." Staff of S. Special Comm. on

Aging, 111th Cong., Target Date Retirement Funds: Lack of Clarity Among Structures and Fees Raises Concerns 13 (Oct. 2009), http://www.aging.senate.gov/imo/media/doc/letters/targetdatecommitteeprint.pdf (summary of committee research prepared by Majority Staff) [hereinafter Senate Committee Report].

For example, TDFs with the same target date might have different landing points. In fact, "a significant majority [of TDFs] have landing points after the target date," Investment Company Advertising, 75 Fed. Reg. at 35,921, meaning that the fund continues to reduce equity exposure throughout an investor's retirement, U.S. Dep't of Labor, Target Date Retirement Funds -- Tips for ERISA Fiduciaries 1 (Feb. 2013), http://www.dol.gov/ebsa/pdf/fsTDF.pdf [hereinafter Tips for ERISA Fiduciaries]. An example of a TDF with a landing point after the retirement date is illustrated below at Figure 1. The dotted line represents the landing point.



By contrast, if the landing point is set at the target date, the fund will reach its most conservative asset mix at the time of retirement and will then stay constant. An example of a TDF with a landing point at the date of retirement is illustrated below at Figure 2. The dotted line represents the landing point.



The SEC has observed that "opinions differ on what an optimal glide path should be," and that what might be "[a]n optimal glide path for one investor may not be optimal for another investor," depending on that investor's "appetite for certain types of risk, other investments, retirement and labor income, expected longevity, and savings rate." Investment Company Advertising, 75 Fed. Reg. at 35,922. Accordingly, recent regulatory efforts have focused on facilitating investors' understanding of differences among glide paths. See Target Date Disclosure, 75 Fed. Reg. 73,987, 73,991 (proposed Nov. 30, 2010) (proposed DOL rule that would require disclosures to include "an illustration of the glide path that the TDF follows to reduce its equity exposure and become more conservative over time"); Investment Company Advertising, 75 Fed. Reg. at 35,923 (proposed SEC rule that would require, among other things, "enhanced disclosure in marketing materials for a [TDF] regarding the fund's glide path and asset allocation at the landing point").

3. The District Court Failed To Give Weight To TDFs' Unique Attributes In Assessing The ABB Fiduciaries' Decision To Set The Freedom Funds As The Default Tier 1 Investment Option

The district court failed to appreciate that, because of TDFs' changing asset allocation over time according to a set glide path, the Freedom Funds matched the profile of the dynamic funds that the ABB Fiduciaries sought to include in Tier 1 of the Plans' investment platform. According to the ABB Investment Policy Statement, "Tier 1 was designed for participants unwilling or unable to make personal asset allocation decisions." Tussey, slip op. at 6. TDFs' dynamic management means that little active decision-making is required; glide paths "make it easier for investors to hold a diversified portfolio of assets that is rebalanced automatically among asset classes over time without the need for each investor to rebalance his or her own portfolio repeatedly." Investment Company Advertising, 75 Fed. Reg. at 35,921.

The district court stated that "[e]ven with the elimination of the Wellington Fund, there were other investments that the Wellington assets could have been defaulted to, but there is no record of them even being discussed." Tussey, slip op. at 19 (footnote omitted). This observation reveals that the court was under the erroneous impression that the ABB Plan offered other investment options that would have been appropriate for inclusion in Tier 1. But the court failed to recognize that the Freedom Funds, as TDFs, were particularly suitable as a Tier 1 investment option due to their automatic reallocation of assets over time according to a participant's age and time horizon. The Plan did not offer other dynamic funds at the time.

The district court also overlooked the fact that, while all TDFs rebalance over time according to glide paths, those glide paths in fact differ from TDF to TDF. In its 2012 decision,[1] the district court found that:

> [T]he only reason provided to the Court as to why the [Pension Thrift Management] Group preferred the Fidelity Freedom Funds over other target-dated investment options was the Freedom Funds' "glide path" -- the changes to allocation over time as a participant nears retirement. However, such allocation changes are not unique to Freedom Funds, but rather is a characteristic embodied by [TDFs] generally.

Tussey v. ABB, Inc., No. 2:06-cv-04305-NKL, 2012 WL 1113291, at *19 (W.D. Mo. Mar. 31, 2012) aff'd in part, vacated in part, rev'd in part, 746 F.3d 327 (8th

[1] The district court stated in its decision on remand that "[a]ll facts previously found by the Court [Doc. 623] are incorporated by reference even if not expressly stated here. . . . To the extent any fact lacked clarity in its prior order [Doc. 623], the Court has attempted to provide clarification." Tussey, slip op. at 3 n.1.

Cir. 2014). But, as discussed above, it is not the case that a glide path is a generic feature that all TDFs share. In fact, variation in glide path composition is a "key factor" that explains "variations in returns among [TDFs] with the same target date," Investment Company Advertising, 75 Fed. Reg. at 35,922, and can be manipulated to achieve different goals. See, e.g., Public Hearing at 38 (statement of Jeffrey Knight, Putnam Invs.) ("At Putnam, we have prioritized wealth conservation in our glide path design as evidenced by our low allocation of 25 percent to equities at our funds' designated target date."); id. at 205 (statement of Chip Castille, Barclays Global Invs.) (stating that Barclays creates glide path with "stable consumption objective" in mind, to limit risk that "a retiree is forced to significantly alter their consumption pattern in retirement"). Because variations in glide paths "can significantly affect the way a TDF performs," the DOL has observed that "it is important that fiduciaries understand these differences when selecting a TDF as an investment option for their plan." Tips for ERISA Fiduciaries at 1.

Thus, while TDFs as a class are defined by their shifting asset allocations according to a predetermined glide path, that glide path is not a one-size-fits-all feature. Rather, glide paths are custom features that provide a sound basis for selecting one TDF over another. It was therefore reasonable for the ABB

Fiduciaries to consider the Freedom Funds' particular glide paths when they selected a default investment option.

B. **Target-Date Funds' Dynamic Asset Allocations Distinguish Them From Traditional Balanced Funds**

1. **Unlike Target-Date Funds, Traditional Balanced Funds Maintain A Static Mix Of Investments Over Time**

Whereas TDFs offer a "Crockpot" approach to investing (i.e., "set-it-and-forget-it"), traditional balanced funds are more like a stovetop meal, requiring constant attention and seasoning to make sure the result matches the chef's tastes and spice tolerance. See Public Hearing at 14 ("The set-it-and-forget-it approach of target date funds can be very appealing to investors."). Because "[traditional balanced] funds maintain a defined asset allocation for the life of the investment," they require investors to periodically reassess their desired risk levels and adjust their investments among funds accordingly. Scott J. Donaldson & Maria A. Bruno, Vanguard Research, Single-Fund Investment Options: Portfolio Construction Simplified for Investors, Vanguard Research 2 (April 2011), https://pressroom.vanguard.com/content/nonindexed/Single-fund_investment_options_portfolio_construction_simplified_for_investors.pdf; see Default Investment Alternatives Under Participant Directed Individual Account Plans, 72 Fed. Reg. 60,452, 60,462 (Oct. 24, 2007) (noting that "[traditional] balanced funds as a group hold approximately 60-65% . . . of their portfolios in equity investments" and do not adjust their allocations over time). While TDFs' asset allocations will become more conservative over time, traditional balanced funds will continue to invest in the same predetermined percentages of equity and fixed-income securities.

Figures 3 and 4 below depict TDFs' dynamic approach to asset allocation, as compared to traditional balanced funds' fixed approach. In particular, Figure 3 reflects an example of a TDF with a landing point at retirement. Figure 4 reflects an example of a traditional balanced fund with a sixty percent/forty percent split between equities and fixed income, respectively.

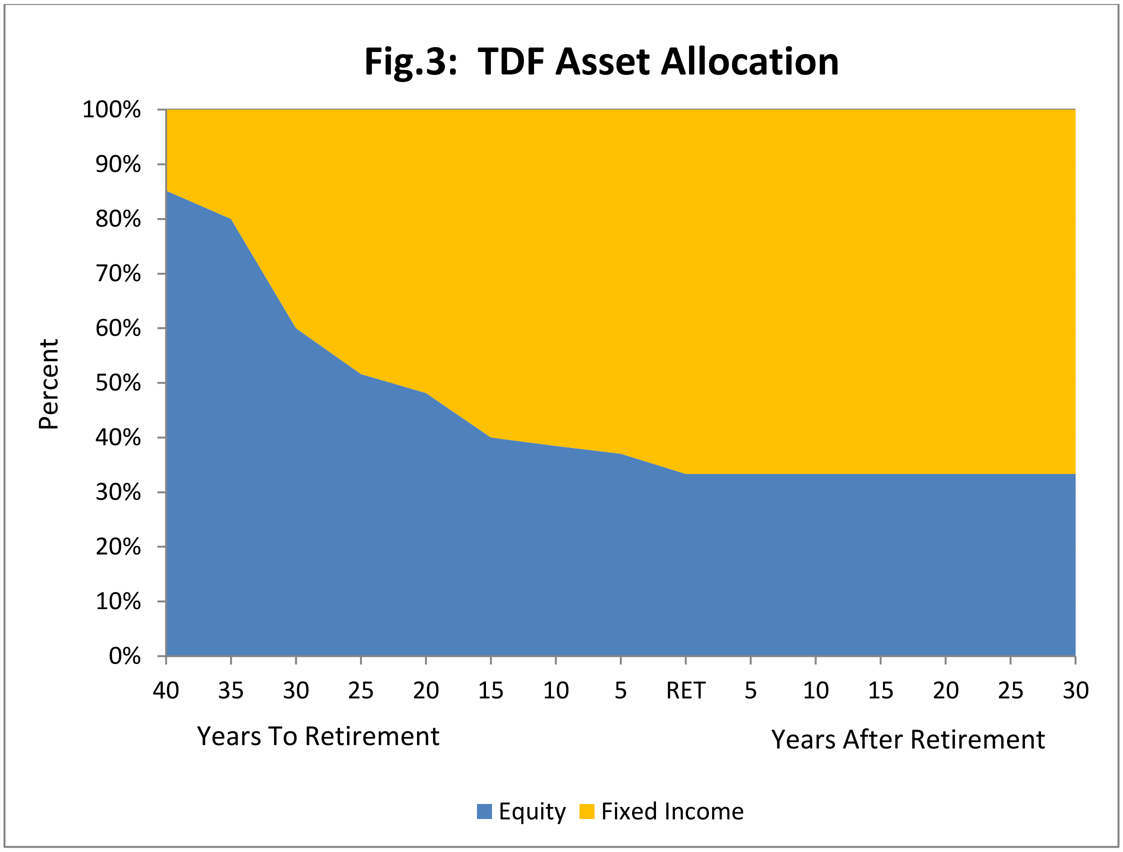


Fig.3: TDF Asset Allocation
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Percent
40
35
30
25
20
15
10
5
RET
5
10
15
20
25
30
Years To Retirement
Years After Retirement
Equity
Fixed Income

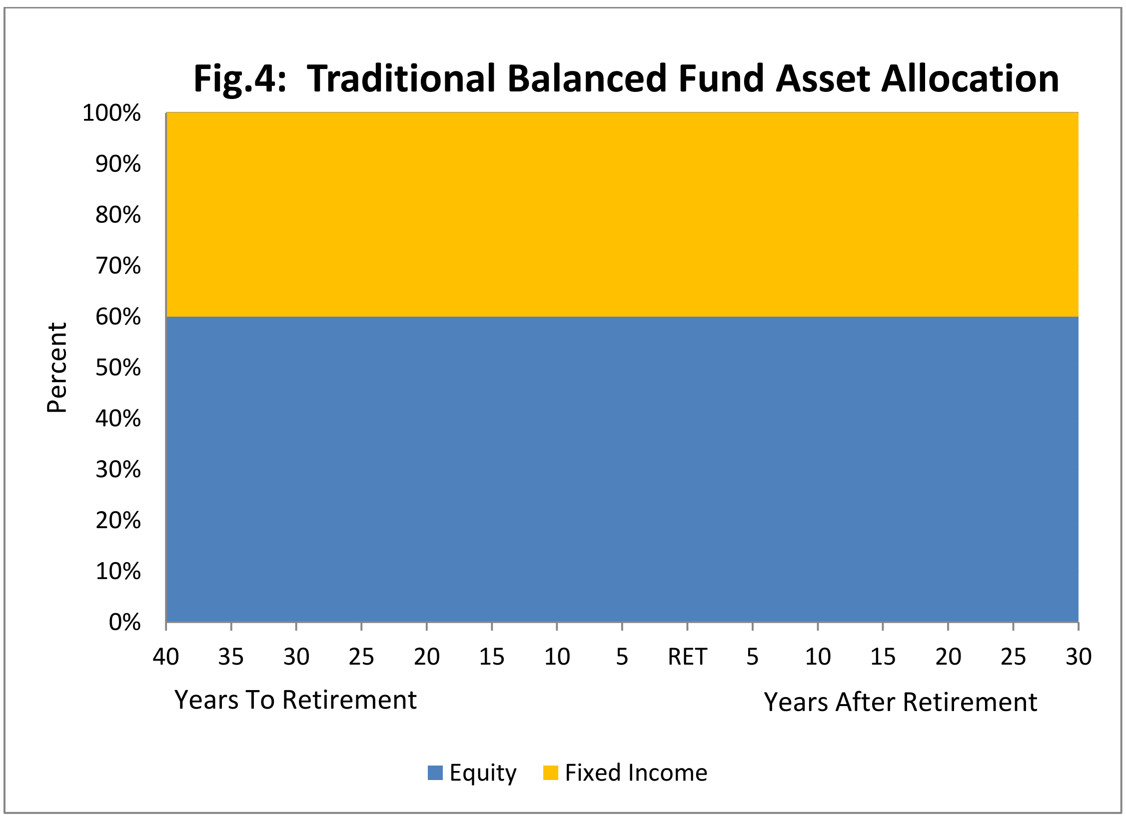


Fig.4: Traditional Balanced Fund Asset Allocation
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Percent
40
35
30
25
20
15
10
5
RET
5
10
15
20
25
30
Years To Retirement
Years After Retirement
Equity
Fixed Income

While the asset allocations of a TDF and a traditional balanced fund may be similar at one point in time, they will diverge before and after that point. For instance, in Figures 3 and 4, both the TDF and the traditional balanced fund have a sixty percent/forty percent split between equities and fixed income at thirty years to retirement. The TDF's equity exposure, however, is on a downward trajectory over time, while the traditional balanced fund's exposure remains constant.

2. In Recognition Of Their Distinct Approaches To Asset Allocation, Federal Law Regulates Target-Date Funds And Traditional Balanced Funds Differently

Due to TDFs' changing asset allocation over time, federal law regulates TDFs as distinct from traditional balanced funds. For example, in October, 2010, when the Department of Labor ("DOL") promulgated regulations governing disclosure requirements in participant-directed retirement plans, it reserved TDF-specific rules for later consideration. See 29 C.F.R. § 2550.404a-5(i)(4) (2015). The DOL then proposed new regulations aimed at TDFs in particular, noting that the tailored disclosure requirements would allow participants to weigh "the efficient way in which TDFs allow them to invest in a mix of asset classes and rebalance their asset allocation periodically" against cost considerations. Target Date Disclosure, 75 Fed. Reg. at 73,991 (requiring disclosure about elements such as initial asset allocation, glide path, and point at which fund reaches most conservative asset mix). Similarly, the Securities and Exchange Commission ("SEC") has proposed a TDF-specific rule that would require the funds to disclose the change in their asset allocation in graphical format.[2] Investment Company Advertising, 75 Fed. Reg. at 35,923. Thus, due to TDFs' dynamic nature, agency rulemaking has treated them separately from traditional balanced funds.

3. The District Court Inappropriately Compared The Wellington Fund And The Freedom Funds To One Another

The district court compared the relative performances and expense ratios of the Wellington Fund and the Freedom Funds, despite differences in the funds' asset-allocation models rendering such comparison inappropriate. The district court found that the "Plan sustained a loss because the Wellington Fund consistently outperformed the Freedom Funds after the mapping occurred until the six year statute of limitations ran." Tussey, slip op. at 15 (footnote omitted). The court attempted to qualify this finding by noting that "[t]he relative performance of the Freedom Funds and the Wellington Fund is only relevant to determine whether

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[2] On June 3, 2014, the DOL reopened the comment period on its proposed TDF disclosure regulation, in order to coordinate with the SEC, which had also reopened the comment period on its proposed TDF rule. Target Date Disclosure 79 Fed. Reg. 31,893, 31,894 (June 3, 2014). Neither regulation has been finalized yet.

a loss was sustained by the Plan," and that it was "not finding that ABB breached any fiduciary duty by choosing a fund which did not perform as well as the Wellington Fund." Id. at 15 n.10. However, comparing the performance of the two funds even for that purpose amounts to an apples-to-oranges exercise that does not yield meaningful results.

The performance of a fund is contingent, in part, upon the type of assets in which the fund invests, and the fund's ratio of equity to fixed-income assets. Comparing the performance of these two funds with different investment allocations is unlikely to reveal any useful information about the relative skill and efficiency of a fund's investment manager. Instead, performance comparisons will reflect differences that are largely a function of distinct asset allocations. See, e.g., Maneesh Sharma, Thomas Totten & John Czerniak, Soc. of Actuaries Pension Section, Back Testing of Investment Performance by Asset Class 9-15 (Jan. 2013), http://www.soa.org/Research/Research-Projects/Pension/Back-Testing-of-Investment-Performance-by-Asset-Class.aspx (studying relative performance over time of hypothetical portfolios with various asset allocations and finding that returns varied according to particular asset allocation).

For example, a TDF near its target retirement date that is heavily invested in relatively conservative fixed-income securities will likely perform much differently than will a traditional balanced fund that predominantly invests in equity securities. In a rising stock market, that TDF may have comparatively lower returns than will a fund more heavily invested in equities; the reverse is true in a declining stock market, owing to the TDF's greater allocation to fixed income and cash.

As discussed above, supra Part I.B.1, the asset allocations of TDFs and traditional balanced funds might converge at one point in time, but otherwise differ over the life of the respective fund. Because of these divergent allocations, the district court's comparison of the performance of the Freedom Funds against that of the Wellington Fund over the relatively short six-year limitations period does not yield useful information about the relative management of the two funds. Comparing the performance of these two funds is just as meaningless as comparing the performance of a fixed-income fund (invested purely in fixed-income securities such as bonds) and an equity fund (invested purely in stocks). Because of the fundamental differences in their underlying securities, the funds' performances over the same time period would likely diverge significantly. Accordingly, if a court were to find that plan fiduciaries imprudently selected a particular fixed-income fund, it would be inappropriate to calculate damages by comparing the performance of that fund against an equity fund. So, too, here. For the reasons articulated above, it does not make sense to compare the performance of a TDF against a traditional balanced fund. On this record, there is no evidence that any fund that satisfied the Tier 1 criteria, and that was available in 2000, would have performed differently than the Freedom Funds did.

The district court also inappropriately compared the expense ratios[3] of the two funds, noting that the Wellington Fund's fees were "low and competitive" compared to the Freedom Fund's "higher" fees.[4] Tussey, slip op. at 10 n.7. However, as discussed, TDFs and traditional balanced funds are different investment products with different objectives; lower fees do not guarantee that a particular investment product will fit with a particular investor's goals. TDFs' fees should be weighed against "the efficient way in which TDFs allow [participants] to invest in a mix of asset classes and rebalance their asset allocation periodically . . . ." Target Date Disclosure, 75 Fed. Reg. at 73,991.

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[3] "Expense ratios are fees and expenses incurred by mutual fund investors, such as the management fee (the amount the fund's investment adviser charges for managing the fund), the fund's other operating expenses (such as fund accounting or mailing expenses), as well as commissions to broker-dealers to execute trades for their fund." Senate Committee Report at 15 n.24. Expense ratios are calculated as a percentage of the fund's assets.

[4] While the expense ratios of the Freedom Funds ranged from 0.68% to 0.88%, "the average expense ratios [of TDFs] vary widely," with some as low as 0.19%. Senate Committee Report at 15; see also Target Date Disclosure, 75 Fed. Reg. at 73,991 n.23 (noting variation in TDF expense ratios from 0.19% to 1.50%).

II. THE DISTRICT COURT FAILED TO RECOGNIZE THE VALUE OF TARGET-DATE FUNDS IN PARTICIPANT-DIRECTED PLANS

The district court's analysis of the ABB Fiduciaries' transfer of assets from the Wellington Fund to the Freedom Funds did not consider the value of TDFs as default investment alternatives. Indeed, statutory and administrative authority supports the inclusion of TDFs in participant-directed plans as a way to boost employees' retirement savings. Furthermore, the district court's opinion might be read to discourage plan fiduciaries from selecting TDFs as default investments when another investment option is discontinued.

A. Target-Date Funds Are Qualified Default Investment Alternatives

When the district court faulted the ABB Fiduciaries for selecting the Freedom Funds as the default funds to receive assets from the discontinued Wellington Fund, the court failed to recognize that TDFs have been approved as "qualified default investment alternatives" ("QDIAs"). As discussed below, Congress provided certain liability protections to plan sponsors that invest participants' balance in QDIAs in order to stimulate investment in funds with higher returns.

In 2006, Congress enacted the Pension Protection Act ("PPA"), Pub. L. No. 109-280, 120 Stat. 780 (2006), which made a number of changes to ERISA and to participant-directed plans in particular. Section 624 of the PPA -- titled

"Treatment of Investment of Assets by Plan Where Participant Fails to Exercise Investment Election" -- added a new provision to ERISA, codified at 29 U.S.C. § 1104(c)(5) (2012). That section eliminates liability for fiduciaries who invest a participant's balance in a QDIA, where the participant has failed to make his or her own election and the fiduciary has complied with the applicable notice requirements. § 1104(c)(5)(A). Congress delegated to the DOL the responsibility to "provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both." Id.

In promulgating rules under the PPA, the DOL sought to address the persistent inadequacy of American workers' retirement savings. Default Investment Alternatives Under Participant Directed Individual Account Plans, 71 Fed. Reg. 56,806, 56,806 (proposed Sept. 27, 2006). The DOL observed:

> Part of the retirement savings problem is attributable to employees who, for a wide variety of reasons, do not take advantage of the opportunity to participate in their employer's defined contribution pension plan (such as a 401(k) plan). The retirement savings problem is also exacerbated by those employees who enroll in their employer's plan, but do not assume responsibility for investment of their contributions, leaving their accounts to be invested in a conservative default investment that over the career of the employee is not likely to generate sufficient savings for a secure retirement.

Id.

The DOL further noted that a "frequently cited impediment" to investment in funds with higher returns was "the assumption of fiduciary responsibility for the investment decisions that the plan fiduciary must make on behalf of the automatically enrolled participants." Id. at 56,807. The overly conservative nature of default investments was due in part to employers' "attempt[s] to minimize their fiduciary liability by limiting default investments to funds that emphasize preservation of capital and little risk of loss (e.g., money market and stable value funds)." Id.

The DOL therefore set forth proposed criteria for QDIAs -- investment in which would provide a safe harbor for plan fiduciaries -- with the objective of "increas[ing] plan participation through the adoption of automatic enrollment provisions, and increas[ing] retirement savings through the utilization of default investments that are more likely to increase retirement savings for participants and beneficiaries who do not direct their own investments . . . ." Id.

The final regulation authorized TDFs as one of three categories of QDIAs. 29 C.F.R. § 2550.404c-5(e)(4) (2015) (listing TDFs, traditional balanced funds and managed accounts as QDIAs). The DOL cited with approval TDFs' "provi[sion of] varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures . . . ." Default Investment Alternatives Under Participant Directed Individual Account Plans, 72 Fed. Reg. at

60,461. Other investment products focusing solely on capital preservation were considered but rejected, as the DOL was "concerned that, overall, the potentially adverse effect [of using such a product as a default investment] on long-term retirement savings may be significant." Id. at 60,463.

The DOL thus has supported the use of TDFs as default investment options in order to alleviate the problem of anemic retirement savings among American workers.[5] Due in part to this endorsement, TDFs have become increasingly popular among retirement-plan participants. Public Hearing at 10 (statement of Seth Harris, Dep't of Labor). As of 2012, seventy-two percent of all 401(k) plans nationwide offer TDFs, and forty-one percent of all participants have assets in a TDF. Inv. Co. Inst., 2014 Investment Company Fact Book: A Review

[5] The DOL and the SEC held a joint hearing in 2009 to address concerns regarding investor knowledge of variations among TDFs. See Public Hearing at 11 (statement of Seth Harris, Dep't of Labor). While witnesses at the hearing discussed possible regulatory interventions to increase transparency in the marketplace, they also reaffirmed the suitability of TDFs as default investment options. See, e.g., id. (statement of Seth Harris, Dep't of Labor) (stating that TDFs "are appropriate default investments for employees in their 401(k) plans"). As discussed above, supra Part I.A, the DOL and SEC are now in the midst of another round of rulemaking pertaining to TDF disclosure requirements, and have issued joint guidance to investors regarding TDF risk profiles. See Target Date Disclosure, 75 Fed. Reg. at 73,987; Investment Company Advertising, 75 Fed. Reg. at 35,920; see also U.S. Dep't of Labor, U.S. Sec. & Exch. Comm'n, Investor Bulletin: Target Date Retirement Funds 1-2 (May 6, 2010), http://www.dol.gov/ebsa/pdf/TDFInvestorBulletin.pdf. The DOL has also published a tip sheet for ERISA fiduciaries on investing in TDFs. See Tips for ERISA Fiduciaries at 1.

of Trends and Activities in the U.S. Investment Company Industry 133 fig.7.10 (54th ed. 2014), available at https://www.ici.org/pdf/2014_factbook.pdf. As of 2013, TDFs hold a total of $618 billion in assets. Id. at 212 tbl.53. TDFs, as QDIAs, have become fixtures of the retirement landscape.

B. The District Court's Decision Might Be Read To Restrict Plan Fiduciaries' Ability To Transfer Assets From A Discontinued Investment Option Into A Target-Date Fund

While recognizing that plan fiduciaries may include TDFs in a plan as a general matter, the district court determined that the ABB Fiduciaries abused their discretion in transferring the assets of the deselected Wellington Fund to the Freedom Funds by default. To the extent that the district court's decision might be read to discourage plan fiduciaries from selecting TDFs as a default investment option, it is at odds with the dictates of ERISA.

The district court faulted the ABB Fiduciaries for justifying the transfer from Wellington to Freedom on the basis of the "great similarity" between the two funds, citing this as evidence of pretext. Tussey, slip op. at 20. But ERISA's "fund mapping" rules contemplate that fiduciaries will do just that. Fund mapping occurs when:

> [a] plan sponsor simply decides to change investment fund offerings as the result of a due diligence review. In these situations, participants are given an opportunity to make new investment elections but default arrangements are also made in the event that a participant does not make new elections. These default arrangements involve the

"mapping" of the old investment options to the most nearly comparable new investment options.

Prudential Retirement Pension Analyst, Pension Protection Act of 2006 Makes Additional Changes to Defined Contribution Plan Rules for 2008 and Beyond 3 (June 2007), http://www.prudential.com/media/managed/PPA-DCEff2008-PruPA-0607.pdf. Section 404(c)(4) of ERISA creates a safe harbor for a fiduciary who reallocates participant assets from a discontinued fund into a new "reasonably similar" investment option, provided that the participant has not given the plan fiduciary contrary instructions after receiving notice.[6] 29 U.S.C. § 1104(c)(4) (2012).

While the Wellington Fund (a traditional balanced fund) and the Freedom Funds (TDFs) differed in the material respects described above, they were "reasonably similar" to one another in that they were both balanced funds invested in a mix of equity and fixed income. The Wellington Fund certainly was more closely related to the Freedom Funds than to another investment option that focused solely on capital preservation, such as a money-market fund. See Default Investment Alternatives Under Participant Directed Individual Account Plans, 71

[6] For the safe harbor to apply, the participant also must have made the initial decision to invest in the discontinued fund. 29 U.S.C. § 1104(c)(4)(C)(iii) (2012).

Fed. Reg. at 56,807 (noting that money-market funds "emphasize preservation of capital and little risk of loss").

The district court's holding is problematic insofar as it might be read to restrict plan fiduciaries' ability to consider TDFs as default replacements for discontinued investment options. ERISA contemplates that certain "change[s] in investment options" will occur from time to time. § 1104(c)(4) (providing that "qualified change in investment options" occurs when, inter alia, "the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change"). Indeed, in order to discharge their fiduciary duties, plan sponsors must retain flexibility to periodically evaluate the performance of plans' investment options and to recalibrate the offerings as needed. See § 1104(a)(1) (defining plan sponsor's fiduciary duty with respect to plan). Fiduciaries should not be discouraged from deselecting a given investment option and mapping those assets to a TDF in appropriate circumstances, § 1104(c)(4)(B)(ii), especially given the benefits of TDFs that the DOL has identified in approving them as QDIAs.

CONCLUSION

This Court should vacate the district court's decision that the ABB Fiduciaries breached their fiduciary duty and affirm the judgment entered in their favor.

Dated: December 18, 2015
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Respectfully submitted,

/s/ James R. Carroll

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. 29(d) because it contains 5761 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface limitation of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman, 14 point), using Microsoft Word 2010.

Dated: December 18, 2015

/s/ James R. Carroll
James R. Carroll

STATEMENT PURSUANT TO 8TH CIR. R. 28A

Pursuant to 8th Cir. R. 28A(h)(2), this brief has been scanned for viruses and is virus-free.

Dated: December 18, 2015

/s/ James R. Carroll
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CERTIFICATE OF SERVICE

I, James R. Carroll, hereby certify that on December 18, 2015 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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