

Navigating a New Landscape:

Post-COVID Retirement Plan
Design and Administrative Issues

October 8, 2020

Seyfarth Shaw LLP

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Speakers



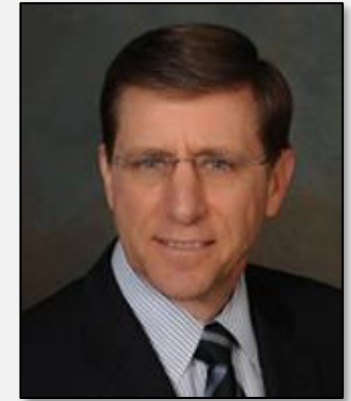
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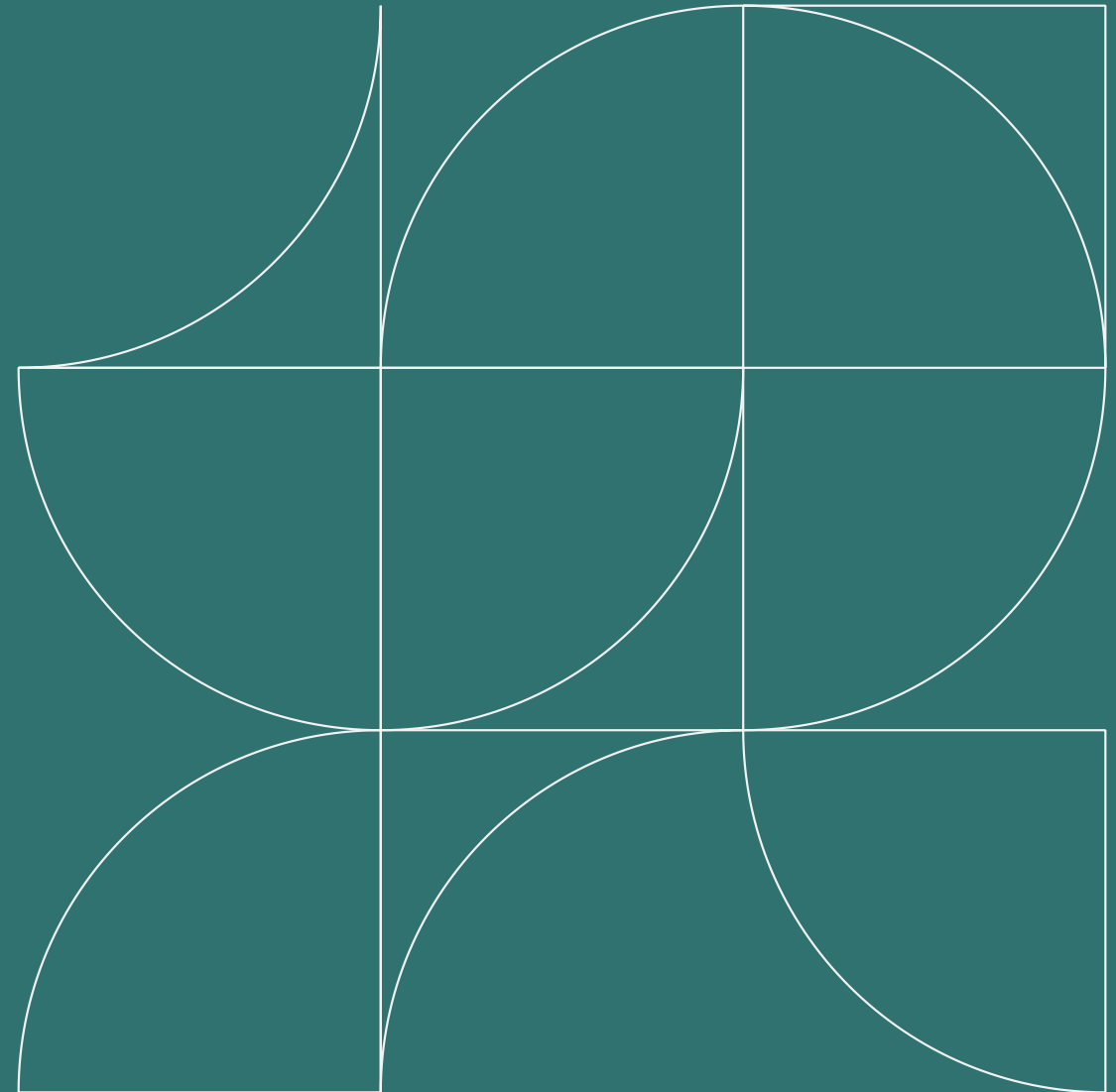


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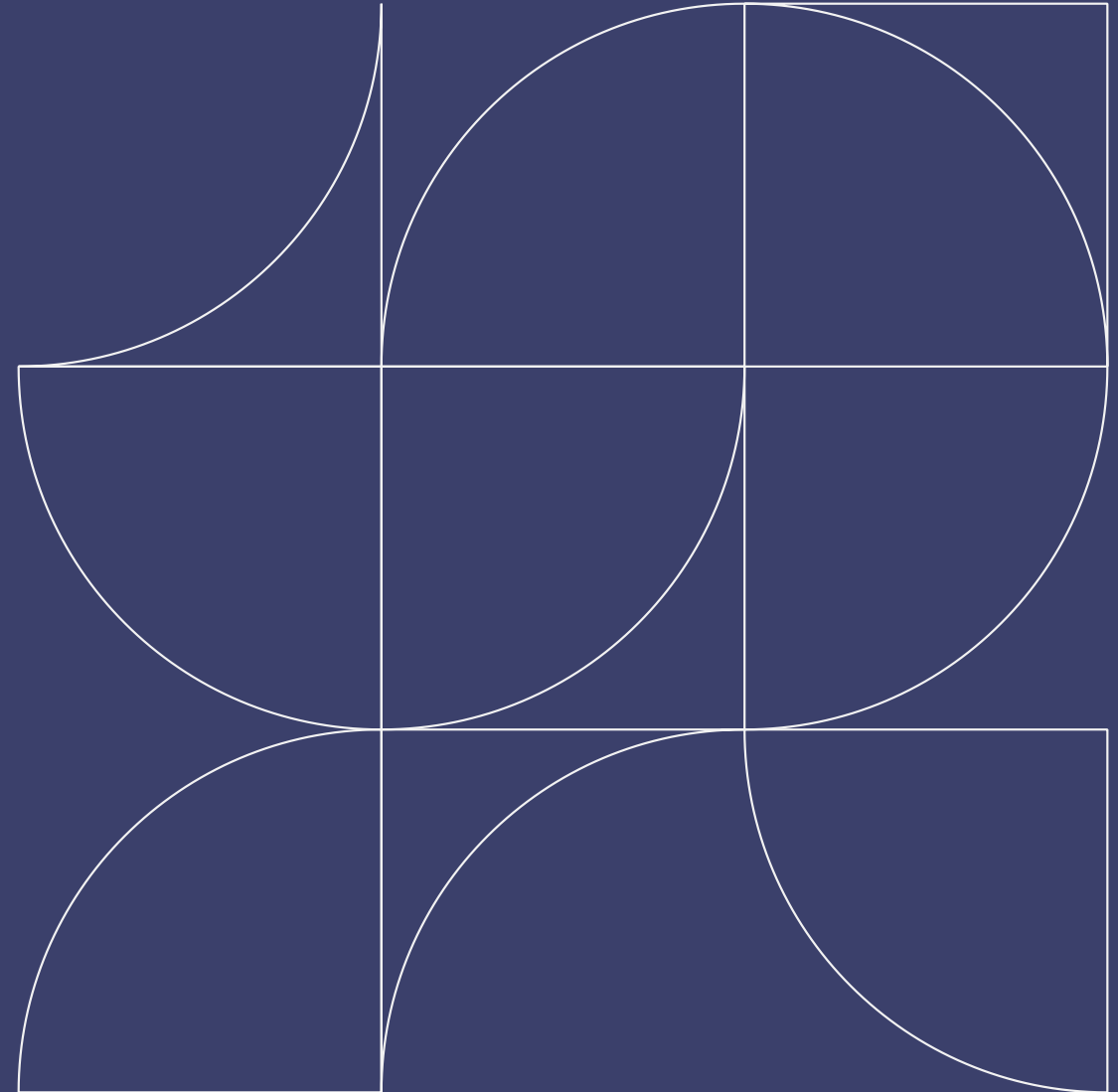
Overview of Presentation



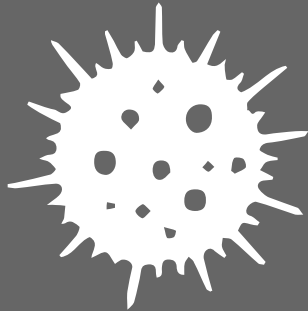
Agenda

- 01** Overview of Presentation
- 02** Defined Contribution Plan Issues
- 03** Defined Benefit Plan Issues
- 04** Other Retirement Plan Issues
- 05** Remote Notarizations / Electronic Communications
- 06** Cyberattacks and Fraudulent Plan Distributions
- 07** ERISA Fiduciary Concerns Surrounding Cybersecurity

Defined Contribution Plan Issues



Access to Account Balance - Coronavirus-Related Distributions



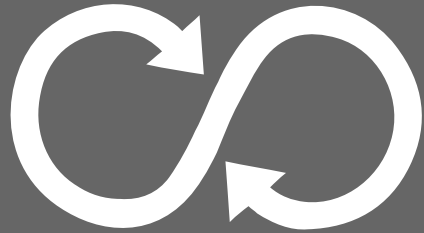
A coronavirus-related distribution (CRD) is a distribution from an **“eligible retirement plan”** made:

1. on or after January 1, 2020, and before December 31, 2020
2. to a **“qualified individual”**
3. in amount not in excess of **\$100,000**
4. **Optional in-service provision in 401k**



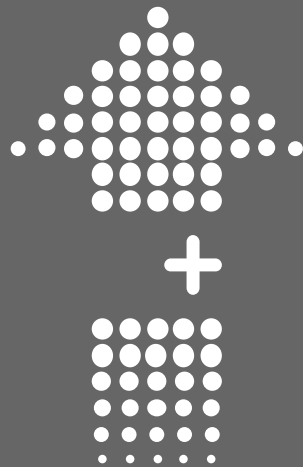
Tax Relief

- CRDs are eligible for the following tax relief:
 - An exemption from the 10% tax for early distributions under §72(t)
 - A 3-year ratable federal income inclusion option
 - A 3-year rollover period (including re-contribution)



Access to Account Balance - The CARES Act Increases the Loan Limit and Provides an Extension of Certain Loan Repayments

- Only to “qualified individuals”
- These provisions are optional



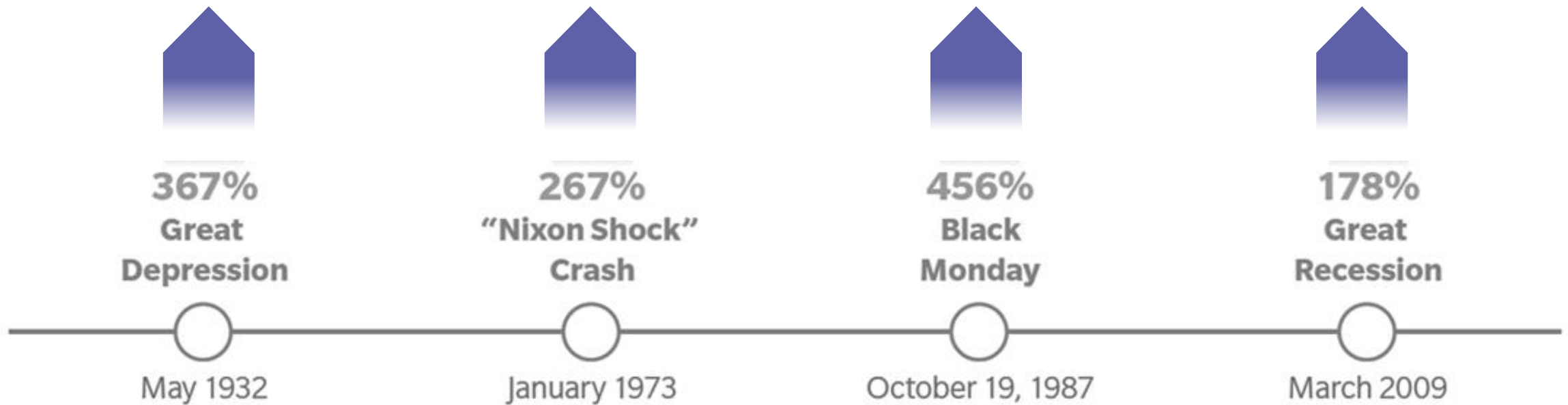
Increase In Loan Limits and Delayed Payments

- The increased loan limit is the lesser of:
 - \$100,000 (instead of \$50,000), or
 - 100% (instead of 50%) of the participant’s vested account
- Applies only to loans issued during applicable 180-day period beginning on the date of enactment.
 - March 27, 2020 — September 22, 2020
- The due date for any repayment of a loan to a “qualified individual” is extended for one year if the repayment with respect to such loan occurs during the period beginning on March 27, 2020, and ending on December 31, 2020.

Defined Contribution Plan Issues – MMA Securities Thoughts

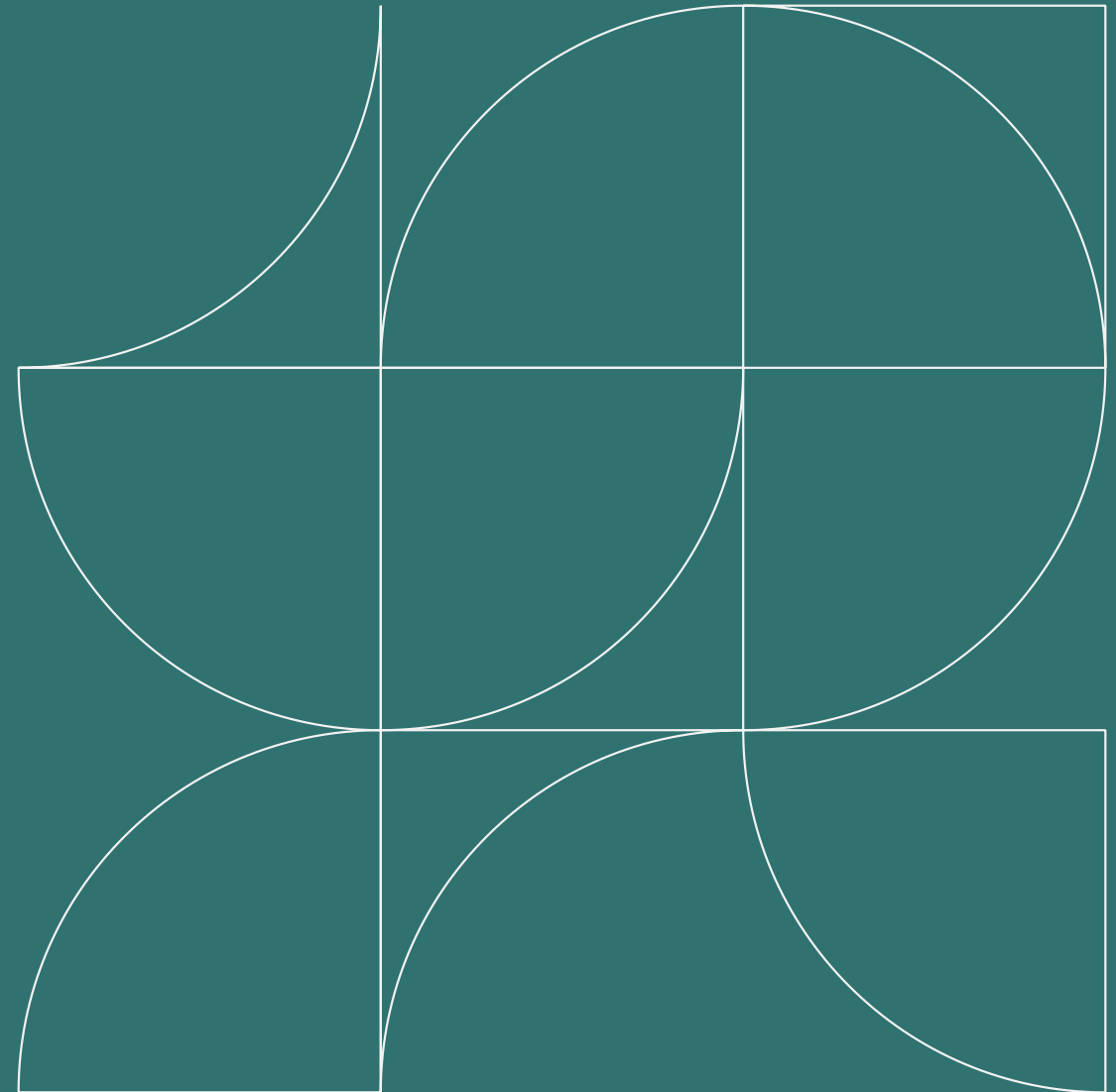
- Plan level decision
- Proof of Qualified Individual
- Distribution timing matters
- Large loan amount
- Short repayment window
- Tax complexities
- Stress on other financial resources
- Retirement readiness

It has paid to stay invested in US Stocks during troubled times



U.S. stock market returns represented by total return of S&P 500 Index. Past performance is no guarantee of future results. It is not possible to invest in an index. First three dates were determined by best five-year market return subsequent to the month shown. Sources: Ibbotson, Factset, FMR Co., Fidelity Asset Allocation Research Team (AART), as of 7/1/18.

Defined Benefit Plan Issues



Defined Benefit Pension Plans



- Anticipate significant funding challenges in 2021/2022 because
 - Continued historically low interest rates
 - Significant asset depreciation
- Shutdowns and RIFs could create additional vesting (partial termination), PBGC reporting and, in the case of multi-employer pension funds, contribution requirements
- Potential increase in PBGC distress terminations and corresponding stress on system

Relief for Defined Benefit Pension Plans



Funding Relief

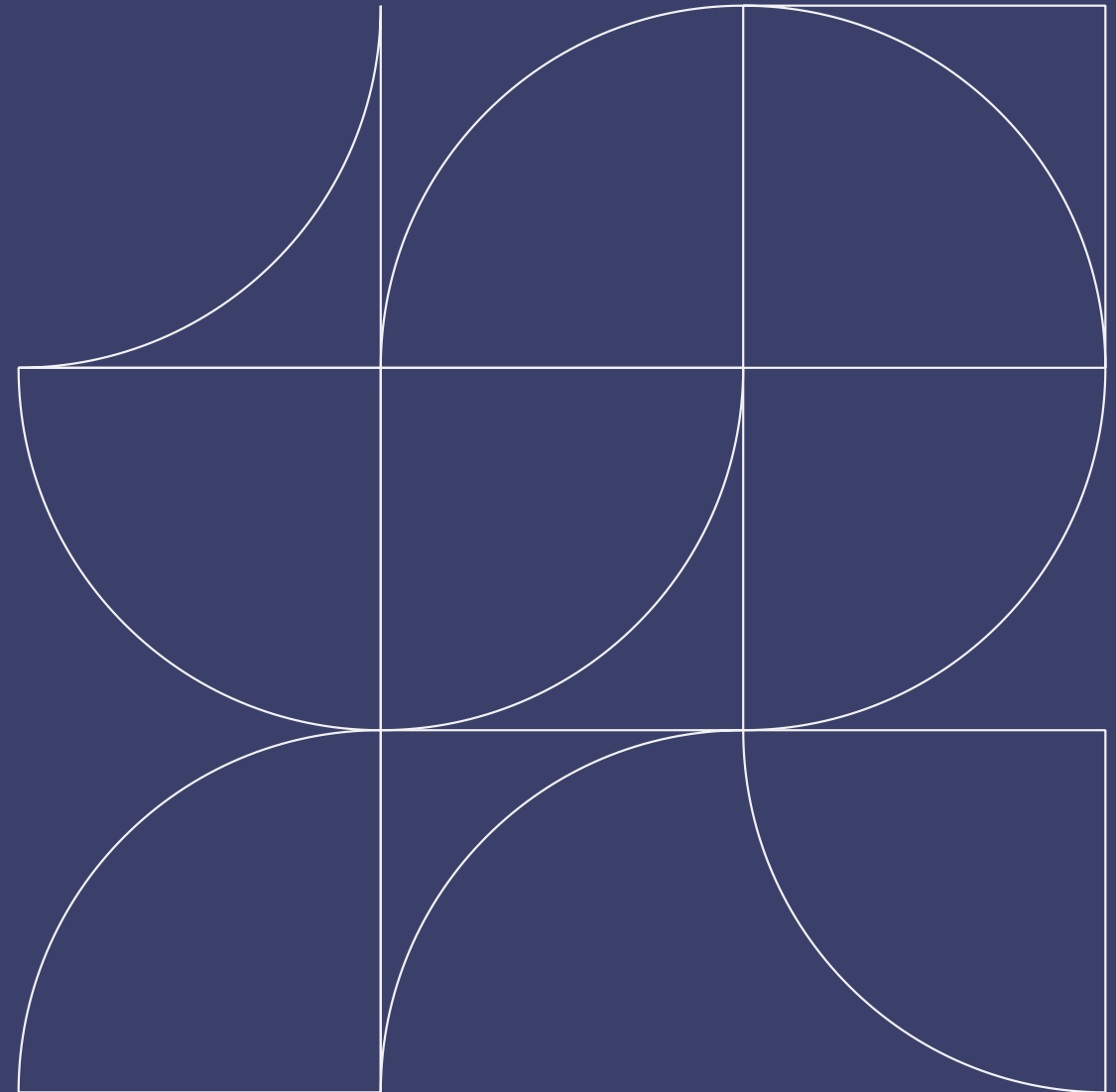
- The Cares Act extends, to January 1, 2021, the due date for any minimum required contributions that would otherwise be due during 2020
- If the contribution is delayed, then interest accrues for the period between original due date for the contribution and the payment date
- No change to deduction timing rules
- For 436 benefit restrictions, the 2019 AFTAP can be used for 2020



Defined Benefit Plans – Marsh Thoughts

- Expect increased challenges in DB plan freezing and termination
- Certain programs in distress can call for further support from employers
- What will be the state of these programs 5 to 10 years from now if contributions fall short?

Other Retirement Plan Issues



Vigilance I

Who Is A Fiduciary?

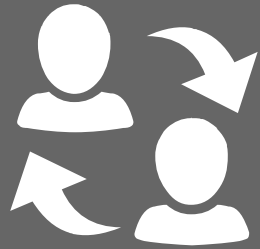


Fiduciary Primer

- A person is a fiduciary if he or she:
 - exercises any discretionary authority or control with respect to the management of the plan;
 - exercises any authority or control with respect to management or disposition of plan assets;
 - renders investment advice for a fee with respect to any plan assets, or has any authority to do so; or
 - has any discretionary authority or responsibility in the administration of the plan.
- Can be a de facto fiduciary

Vigilance II

What Are Your Fiduciary Duties?



Fiduciary Duties

- #1 The Exclusive Benefit Rule
- #2 The Prudent Person Rule
- #3 The Plan Document Rule
- #4 The Diversification Rule

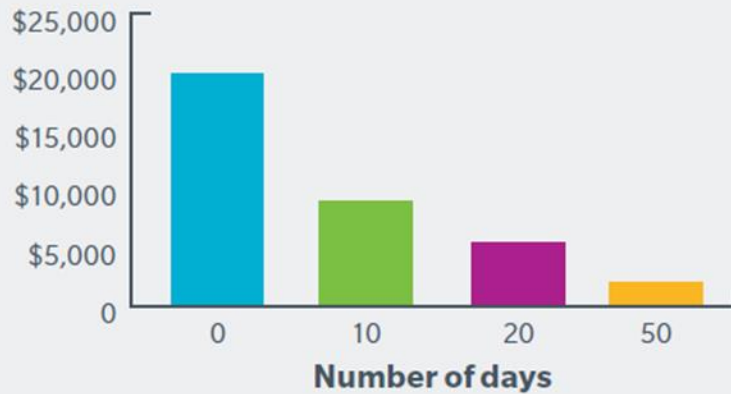


Marsh Thoughts on Plan Investments

- Process continues to be the number # 1 defense
- Formal fiduciary processes and documentation
- During COVID, employers need to be cognizant of timing
- During times of uncertainty, priorities should be carefully addressed

Missing the market's best days

(initial investment of \$10,000)



A difference that matters

Staying invested over the past 10 years would have earned you \$10,020 more than if you had missed the market's 10 best days.

BEST DAYS MISSED	VALUE OF \$10K INVESTMENT
0	\$20,242
10	\$10,222
20	\$6,674
50	\$2,484

Source: Bloomberg

This chart illustrates the value of a 10,000 investment in the S&P 500 made on December 31, 2006 assuming the investment remained invested the whole time (first bar) and then assuming the investor missed the market's 10, 20 and 50 best days, respectively.

For illustrative purposes only. Past performance is not a guarantee or prediction of future results.

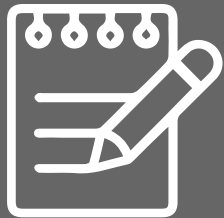
ESG Investing



The History of DOL Guidance under ERISA

- Interpretive Bulletin 1994-01
- Interpretive Bulletin 2008-01
- Interpretive Bulletin 2015-01
- Field Assistance Bulletin 2018-01

DOL Proposed ESG Regulations



ESG Investing

- Identifies items an ERISA fiduciary must consider when reviewing a proposed investment or investment strategy to satisfy the fiduciary's duties of loyalty and prudence under ERISA
 - Evaluate the investment based **solely** on pecuniary factors that have a material impact on the risk and return of the investment
 - Cannot subordinate financial interests to unrelated objectives, sacrifice returns or take risk to promote non-financial interests of the plan
- Fiduciaries must use “all things equal” test to adequately document decision-making process in order to avoid decisions being made based on non-pecuniary factors without analysis
- Special defined contribution plan guidance

DOL Proposed ESG Regulations



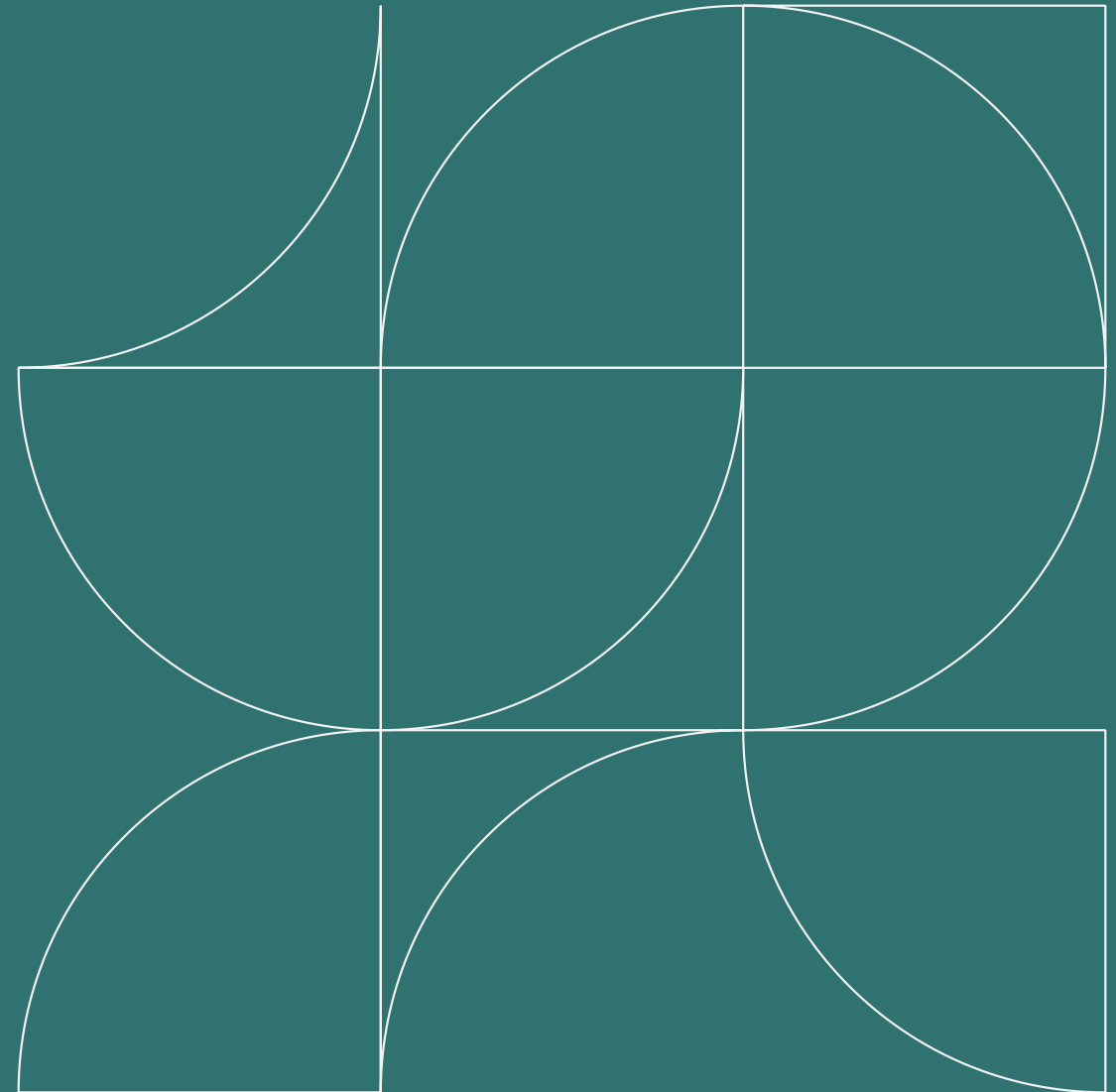
Marsh Thoughts

- The Formation of ESG funds
- In Style
- Good Intentions – A Deeper Dive
- Process and Investment Policy Alignment

Top Holdings

Company	Symbol	% of total net assets	YTD
Comcast Corp. Cl A	CMCSA	0.8	0.67
Cisco Systems Inc.	CSCO	0.83	-15.83
Merck & Co. Inc.	MRK	0.84	-7.47
Intel Corp.	INTC	0.84	-17.44
Netflix Inc.	NFLX	0.86	47.19
AT&T Inc.	T	0.87	-25.44
Tesla Inc.	TSLA	0.88	481.54
Walt Disney Co.	DIS	0.88	-9.25
Pfizer Inc.	PFE	0.89	-5.54
Adobe Inc.	ADBE	0.89	47.33

Remote Notarizations/ Electronic Communications



Temporary Relief from In- Person Notarizations for Spousal Waivers and Loan Approvals

IRS Notice 2020-42



- For 2020 only:
 - A spouse waiver or participant election can be witnessed by a notary public remotely (audio-video technology) if state allows it
 - Plans can witness remotely if:
 - Signer shows photo ID during the audio-video conference
 - Parties must have direct interaction
 - Copy of the signed document sent electronically to the plan on date signed
 - Written plan acknowledgement of the witnessing must be returned with the signed document to the individual using a system that the individual can access

Final DOL Regulations

Provide Alternative for
Distributing Retirement
Plan Notices
Electronically



DOL Enters the 21st Century

- Only to “covered individuals”
 - Any participant, beneficiary or other individual who provides an email address or mobile computing device (e.g., smartphone) number to the plan administrator; or
 - Any employee who is assigned an email address by his or her employer for employment-related purposes
- Only for “covered documents”
 - Retirement plan documents that the plan administrator must to furnish (except for documents or information furnished only upon request)
 - E.G., retirement benefit statements, safe harbor notices, summary annual reports, SPDs, summaries of material modifications and blackout notices

Initial Paper Notice



- Before using give paper notice that documents will be provided electronically, of ability to opt out and explanation of how to do so
- Identify the email address or mobile device number that will be used, any needed instructions, a statement regarding the length of time the document will be available online, and a statement regarding the individual's right to request and obtain documents, free of charge
- Provided one time to all individuals covered by the new method and new employees that will be covered

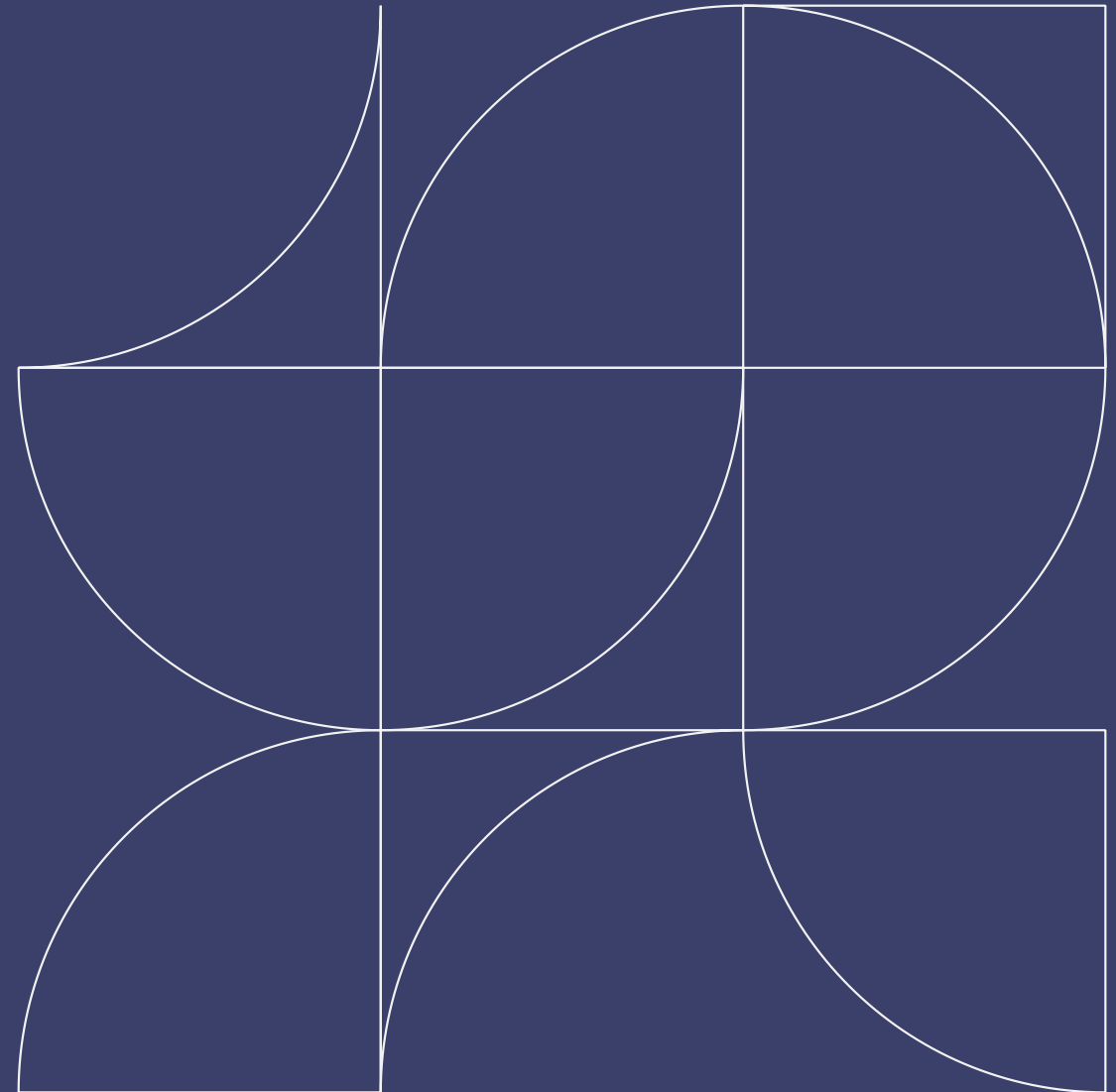
Notice of Internet Availability

Website Delivery



- Provide to covered individuals every time a disclosure is made available
- Delivered electronically to the email address or smartphone number provided to the plan administrator (or assigned by the employer)
- Combined notice of internet availability may be used for some disclosures, such as SPDs, SMMs, summary annual reports and investment-related disclosures that do not require action by the covered individual by a specific deadline
 - Not blackout period notices, claims determinations or QDRO determinations

Cyberattacks and Fraudulent Plan Distributions



Cybersecurity - 2020 megatrends

- Cybersecurity and Retirement Plans
- Ransomware attacks
- Business Email Compromise
- COVID-19 induced stresses

Cybersecurity and Retirement Plans



Cyber attacks on retirement accounts are increasing

- Online electronic information and electronic distribution increase cyber exposure.
 - Identity theft (security breach).
 - Fraudulent distributions.
- Cybersecurity adds cost in retirement plans.
 - Protections.
 - Losses.
- Are plan providers responsible for cybersecurity?
 - Still no definitive guidance on responsibilities of ERISA plan fiduciaries and service providers.
 - GLBA, DOL, SEC, FTC regulations for protection of information.

The Ransomware Pandemic



- Ransomware is malicious software that:
 - Enters a network (often through a phishing event).
 - Encrypts all the data files it can find.
 - Demands a ransom for unlocking the data.
- Growing in frequency, sophistication, and financial impact.
- Potential losses of a ransomware event:
 - Destruction of data.
 - Business Interruption.
 - Cost of restoration.
 - Reputational impact.

Business Email Compromise (BEC)



BEC is a social engineering effort to get funds transferred to an unauthorized party.

- Hacker successfully compromises email account of CEO, other C-Suite, General Counsel, etc.
 - A fraudulent email is sent from the compromised account.
 - Email directs immediate transfer of funds (or payment of invoice).
- Uneven playing field: Hackers have the advantage
 - Hackers engage lawyers, linguists, hackers, and social engineers.
 - Carefully planned and executed attacks.



Cybersecurity Impacts of COVID-19

- Increased “attack surface” due to expanded work-from-home.
 - Hackers are using COVID-19 as hooks in phishing attempts.
 - Personal and family use of company equipment introduces risk.
 - Corporate privacy and VPN policies may have been relaxed.
 - Cyber incident recognition & response is more difficult with a distributed workforce.
- ***These factors will stay with us after the pandemic is over.***

Suggested steps - Cyber risk mitigation

Cyber and Retirement Plans

- Understand your responsibilities.
- Strengthen service agreements.
- Embrace SPARK guidelines.
- Consider risk transfer (cyber, fiduciary insurance).

Business Email Compromise

- Technical improvements.
- Strengthen internal controls.
- Educate and train the workforce.

Ransomware

- Build data backup capability.
- Enhance phishing awareness.
- Be ready to quickly respond.

COVID-19

- Adapt your cybersecurity to post-COVID reality.
- Improve security of remote access.
- Enhance cyber event detection and response.



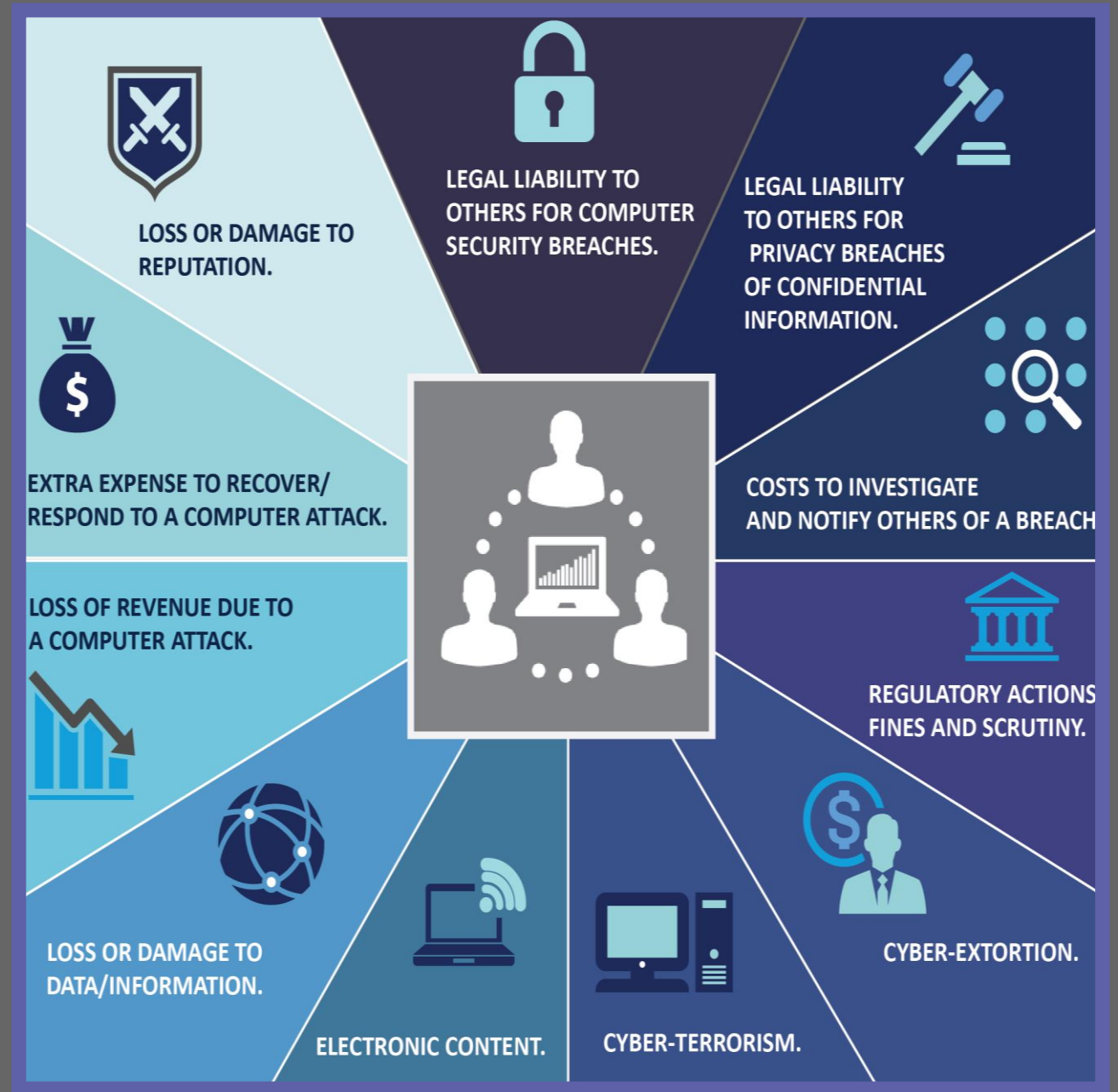
**Protecting your
balance sheet
and responding**

- Understanding Exposure and Potential Loss
- Financial Consequences and Partner Relationships
- Balance Sheet Protection

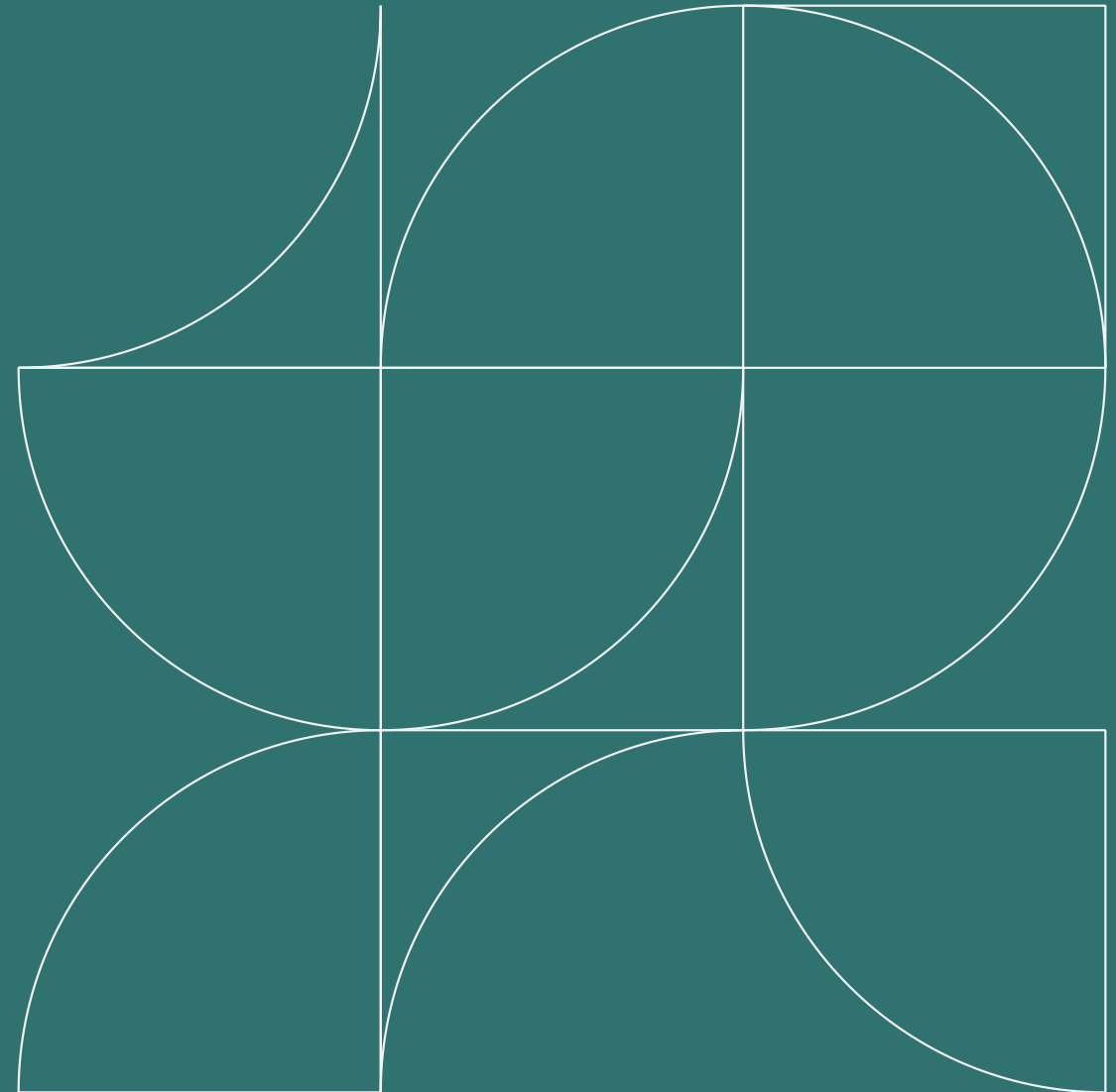
NEXT STEPS:

- Understand
- Measure
- Manage

Insurable Cyber Risks



ERISA Fiduciary Concerns Surrounding Cybersecurity



Fiduciary Concerns

- Theft of participant retirement plan confidential personal information including financial data is significant target for identity theft and fraudulent transactions.
- Recent wave of ERISA (Employee Retirement Income Security Act) class action lawsuits allege fiduciary breaches involving cross-selling confidential participant personal data.
- Emerging ERISA litigation includes allegations of increased use of confidential participant plan data by record keepers for cross-marketing without participants' knowledge or approval (i.e. plan participants contact information, financial information, investment preferences, age, date of retirement, etc.).
- Allegations of breaches of ERISA fiduciary duties of loyalty and prudence for failing to safeguard confidential information.

What Can Plan Fiduciaries Do?



- No federal statute specifically addresses retirement plan cyber security obligations.
- ERISA (which was enacted in 1974) is silent on data protection in the form of electronic records.
- Plan fiduciaries have strict fiduciary duties and ERISA class action litigation challenges continue.

What Can Plan Fiduciaries Do?



- ERISA Advisory Council recommends that due diligence about plan data security in the selection and monitoring of service providers should include at least the following topics:
 - What are the service provider’s processes and systems for dealing with cybersecurity threats and protection of personally identifiable information?
 - Is there a privacy and security policy, and does the policy apply to data held by benefit plans?
 - Is the policy clear with respect to storing personally identifiable information on laptops and portable storage devices? What is that policy?
 - Is advanced authentication used? Can the service provider explain the process? Can you explain it?

What Can Plan Fiduciaries Do?



- Continued...
 - Are technology systems regularly updated?
 - Does the service provider have policies on storing personally identifiable information including where it is stored, how long it is stored, and how it is eliminated?
 - Are all personnel who come in contact with personally identifiable information trained on adequate protection of the information?
 - Does the provider carry cybersecurity insurance?
 - Has the provider experienced any security breaches?

What Can Plan Fiduciaries Do?



- Fiduciary action steps to protect participant data and safeguard electronic access:
 - Be Educated. Safeguard confidential data. Mitigate risk of data breaches.
 - Negotiate Cybersecurity protection in service providers' contract.
 - Monitor Service Providers.
 - Determine if service provider(s) are cross-marketing participant data.
 - Limit use of participant(s) data for non-plan products and services.
- Understand internal risks of transmitting data.



Questions?

Thank you

Visit our COVID-19 Resource Centers:

[Seyfarth's COVID-19 Resource Center](#)
www.seyfarth.com/returntobusiness

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