Bryan, Pendleton, Swats & McAllister, LLC — *July/August 2014*

Developments

RECENT DEVELOPMENTS IN EMPLOYEE BENEFITS

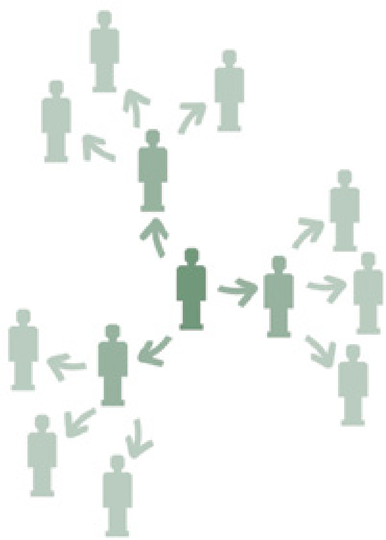
Six Key Steps to Success

Implementing an Effective Benefits Communication Campaign

by Katherine Tange-duPré, CEBS and Whitney Coppinger

Over the past years, BPS&M and Wells Fargo have conducted several retirement plan sponsor surveys, most recently in 2013. Every year, plan sponsors have listed participants' appreciation for and use of the plan as a top concern.

Understandably, having employees appreciate and use the benefits provided is important; but how can plan sponsors express this to participants? Plan sponsors can increase appreciation for the plan and enrollment in the plan with an effective benefits communication campaign.



Simply defined, a communication campaign is a structured, timed rollout of important information in advance of a critical date.

Simply defined, a communication campaign is a structured, timed rollout of important information in advance of a critical date. Not only will a campaign increase appreciation and use of the plan, a good communications campaign can help determine whether the dollars the company invests in benefit plans is a good return on investment. Campaigns should be part of every company's overall approach to supporting employer-sponsored benefit programs. Regularly scheduled campaigns help ensure that employees understand their benefits, are aware of their value, have current information about plan provisions, and know when and how to use their benefits to their greatest advantage.

Campaigns are particularly useful during events such as an annual enrollment, increasing participation in a defined contribution plan, special situations such as offering a lump sum window, freezing or terminating a plan defined benefit plan, or announcing / following a significant change in the company.

It's not as simple as saying we have 100 employees we will need to send 100 letters; a campaign should be thought out, organized, and timely. The type of campaign and the communication medium used will depend on the size, structure, and culture of the company. The following steps detail how to plan and produce an effective campaign.

Step 1: Planning ahead

As a first step, an employer needs to determine the campaign's goals and objectives, target audience, and overall theme of the campaign. Plan sponsors should ask several questions such as:

- What does the audience need to learn from this campaign?
- After the campaign is over, what is the desired outcome?

Also in this issue:

• What will determine whether this campaign is a success?

After determining the goals of the campaign, the employer should determine who to include in the target audience:

- All employees, plan eligible employees, plan participants only, non-participants, or selected employees
- Employees who fall within a certain age range
- Employees with a certain number of service years

Determining the audience will determine the media channels that will be used to reach employees. If employees do not receive the message, how will they ever understand it? Rarely will one media channel fit all employees. Generation Y is more prone to reading emails but Baby Boomers like face-to-face meetings and printed materials.[1] An effective campaign will use more than one medium.

Plan sponsors should then establish the overall theme or message of the campaign. All communication materials will need to have an underlying theme to tie them together, such as a slogan, tagline, or catch phrase. Employers should go ahead and decide what the general idea is that employees need to know. Working out further details such as actual wording, colors, photos and graphics can come later.

Finally, plan sponsors should set a timeline. How long should this campaign be? Is there a deadline that must be met? A timeline does not have to be permanent but needs to have firm deadlines. Plan sponsors should be realistic when determining the timeline, do not expect to have a campaign idea on Monday and to roll out the campaign on Thursday.

> ***Do:*** **Be honest and upfront if the change involves something employees may view as negative.**

Step 2: Ask the employees

Employees' opinions can help determine what media channels to use and how to target certain groups of employees. An employee focus group can advise a plan sponsor on media preferences, what needs to be communicated, and if employees will accurately understand what is being sent to them. Perhaps the most important part of this step is narrowing down what media to use. With a variety of media out there, it is important to focus on employee preferences. Printed materials such as posters and flyers, emails, personalized statements, audio-visual pieces, and even social media can all be used to reach employees; therefore, employee opinion can help narrow down the field. This step is a great way to cater the campaign to employees' specific needs.

Make it Personal

Personalized statements drive participant behavior

Our research has shown that employee response rates to personalized communications are significantly higher than response rates to generic materials. Personalized statements are customized to fit each employee individually, providing personal information such as compensation, benefit plan participation, and the value of their retirement benefits. When employees can see their own figures instead of a fictional example, they are more inclined to read and pay attention to the message.

An organization's communications arsenal should contain personalized statements such as retirement readiness statements, total compensation statements, or statements that include both features.

Retirement readiness statements contain easy to read graphs and tables that illustrate how much an employee needs to save to reach his or her retirement savings goal. Total compensation statements contain each employee's direct and indirect wages including salary, employer-sponsored retirement and health and welfare benefits, voluntary benefits, as well as a gamut of other employer-provided benefits, such as tuition reimbursement, adoption benefits, uniforms, and gym memberships. They can be as simple as a list of benefits with their associated costs or as complex as multi-page booklets that include overviews of the specific benefits an employee participates in, the benefit level, and the cost of each benefit. Graphs can be used to illustrate the cost sharing between the employee and the company.

The content and design of personalized statements can be targeted to specific employee demographics, ensuring that the message is pertinent whether the recipient is 25, 45, or nearing retirement. The statements can also be highly customized based on the unique characteristics of the organization, and can incorporate different employment categories (union/nonunion, management/nonmanagement), complex match formulas, benefits from a pension plan, estimated Social Security income, and much more.

Personalized statements are designed to drive actions by employees. They can include simple ways—such as tear-off cards, toll-free numbers, and web addresses—that make it easy for employees to enroll in their defined contribution plan or increase their contributions. They can be extremely effective during open enrollment by reminding employees of what their current benefits provide and cost. As an added benefit, total compensation statements that include employee and employer costs increase employees' appreciation for their benefits, as they are a handy reminder of the value of the "hidden pay check" that employer-sponsored plans represent.

Whether the goal is increasing enrollment in the plan, increasing contributions, diversifying investments, or simply reminding employees of the many benefits they receive, a message that is clear, concise, and specific to each employee will produce a better response rate than a generic overview.

Do: **Get employee input as you plan the campaign. By involving even a small percentage of employees in a preliminary written survey and follow-up focus group, employees feel valued as individuals and may even develop a sense of ownership regarding the success of the communication campaign.**

Step 3: Develop your materials

After developing the message and determining how it will reach employees, plan sponsors should evolve and finalize the theme for all materials. For example, if a plan sponsor is doing a health and welfare campaign, it may want to use posters, flyers, table tents, emails, personalized statements, or even audio-visual pieces; all of these pieces need to incorporate the theme. Perhaps this campaign is establishing a wellness program; the slogan or tagline could be used on all materials. The posters could contain only the tagline and the start date, while things like emails and printed statements would go more in depth on the subject. Depending on the type of campaign, the plan sponsor may also want to include a Frequently Asked Questions (FAQ) brochure or guidebook. Plan sponsors should then draft all communication pieces, design a brochure and any necessary forms, and script, film, and edit audio-visual pieces. Once every piece is finalized and produced, the campaign is ready to roll out.

Do: **Use a variety of different communications pieces and roll out materials. People learn in different ways and at different rates.**

Step 4: Announce the campaign

Once the communication materials are produced, the initial campaign announcement is next on the agenda. Employees will be more receptive if they have a chance to anticipate the campaign. Let them know about the upcoming launch through emails, letters, and word of mouth. Announce what the campaign is for, what materials employees should expect, and how they will receive those materials. Getting management involved is crucial to getting employees involved. Have managers announce the upcoming campaign in office or team meetings, have them hang posters on their office doors, and get them to email their supervisees about the upcoming campaign.

Do: **Publicize the campaign in advance.**

Step 5: From education to action

Kickoff the campaign with email blasts, hang posters throughout the office, and put table tents in the break room. After all materials have reached employees, plan sponsors should hold employee meetings. Here, plan sponsors should distribute the FAQ brochure (if there is one) and address employees' questions and concerns. If the campaign includes some sort of enrollment, plan sponsors can explain in more detail what the employees need to do and how the plan sponsor will collect those forms either at the meetings, through mail, or online. Employee engagement can sometimes prove difficult; plan sponsors could offer incentives to motivate the employees to action. Continuing with the wellness program example, plan sponsors could offer awards or prizes to those who sign up, such as free t-shirts, pedometers, water bottles, sun screen, hats, or other items to encourage active participation.

Do: **Consider including fun activities or giveaways to encourage employee participation.**

Step 6: Follow-up

After the campaign, plan sponsors should ask employees how they felt it went. Campaigns are a two-way street and employee feedback can help make a future campaign more successful. Plan sponsors should survey employees asking the following questions:

- Did they understand what was given to them?
- What was the most effective media channel?
- Did the materials provide sufficient information?
- Can the employee explain to a friend what the campaign encompassed?
- Were there any concerns or questions not answered during the campaign?

All of these questions will help craft a more effective campaign for the future. Plan sponsors should also ask managers how they felt it went.

- Did any of their supervisees come to them with problems?
- Did they notice any particular media channel that worked really well?
- What types of questions did supervisees ask?

Not only will doing a follow-up greatly improve future campaigns, it will send employees the message that their opinions are important and appreciated.

Do: **Follow-up with employees on how they feel about the campaign.**

Putting it to work

While many communication campaigns are fairly routine, such as an open benefits enrollment, there are times when an employer is faced with a campaign that is anything but. Recently, our client, ABC Company needed assistance communicating an early retirement incentive plan (ERIP) to its employees. Please note that this case study is an overview; the full details involved in communicating an ERIP extend beyond the scope of this case study.

Background

An ERIP is a program that is designed to encourage employees who are approaching or have reached retirement age to voluntarily retire earlier than they might have otherwise. Note the key word is voluntary; when designing the plan, (1) the incentives must be attractive enough to encourage employees to voluntarily accept the program, and (2) the communications surrounding the program must be clear, concise, and maintain a positive tone while being completely honest about the pros and the cons of accepting the plan.

> ...the communications surrounding the program must be clear, concise, and maintain a positive tone while being completely honest...

An ERIP can help an employer achieve a variety of organizational goals including: reducing the workforce while avoiding involuntary layoffs and increased unemployment costs; aligning labor needs with workloads; reducing the number of high-pay employees and replacing them with low-pay employees; de-risking the pension plan; reducing future Pension Benefit Guaranty Corporation (PBGC) premiums. In this situation, the organization hoped to:

- Achieve a high acceptance rate to avoid involuntary terminations
- Align the workforce to better meet its current labor needs
- Avoid age discrimination / wrongful termination claims
- Maintain a culture where employees felt highly valued
- Manage the organization's reputation, both internally (employees) and externally (the general public)

While an effective communication campaign is essential to a successful ERIP, it is only the tip of the iceberg. Before the campaign was formulated, ABC Company had to answer a number of questions, including:

1. What organizational goals are we trying to achieve?
2. Which employees will be eligible?
3. What incentives will the plan include?
4. How much will the program cost?
5. What is the effective retirement date for employees who accept the ERIP?
6. How much time will employees have to make a decision?
7. Will the required rescission period extend beyond the minimum seven days?

The campaign

Once these decisions were made, it was time to start the campaign. Due to the nature of the situation, information was on a need-to-know basis, and only a handful of people knew about the ERIP. All email exchanges were sent via secure email, and all materials were password protected. We were also working on a very tight deadline, with only eight weeks from the time of our first communications planning meeting to the scheduled announcement.

To be sure that communication materials provided sufficient information, we created a general guide that spelled out the incentives, payment options, available employment transition assistance, the effects of accepting the ERIP on benefits and taxes, contact information for voluntary benefit providers, factors to consider before making a decision, several pages of Q&A, and instructions on how to rescind an affirmative decision. The guide included scenarios depicting hypothetical employees and the factors that would be important in their decision-making process. The decision to accept or decline an ERIP is driven by many factors, and we knew that we would also need to provide a great deal of personalized information to eligible employees to aid them in the process.

Once we finalized content for the guide, we built a visually attractive package to present to employees. As part of the process, we closely reviewed the existing dozen or so forms used by the plan that would be required for the ERIP. Unnecessary elements were removed, text was reworked to improve comprehension and readability, and the overall look was redesigned to mirror the guide.

ABC Company's workforce consists of well-educated, tech-savvy employees; therefore, materials were created for both print and web. Employees were able to access materials through a secure website.

In addition to the materials that would be provided to eligible employees, we prepared an internal announcement for all employees and a press release for the general public.

To minimize speculation and employee concerns, the initial announcements were made the day of the rollout. Shortly before ERIP-eligible employees were notified, Human Resources staff members notified their managers and provided them with background information and copies of the materials. Eligible employees were asked to attend a meeting, where they were told about the plan. Announcements were made to all employees at the same time. The initial group meetings were followed by one-on-one meetings between HR and the eligible employees.

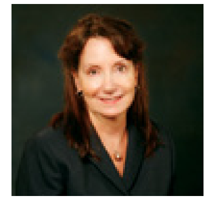
Measuring results

With any communications campaign, it's important to measure results. ABC Company hoped that at least half of ERIP-eligible employees would accept the package. The final acceptance rate was 70%. Needless to say, ABC Company was pleasantly surprised.

In perspective

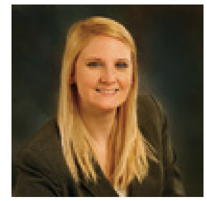
Each step outlined plays an integral part in the success of a benefits communication campaign; all focus on two points: employee education and feedback. Any successful campaign must be tailored for its intended audience and leave employees with a clear understanding of the campaign's goal, steps they need to take, and where to go with questions.

[1] *From Boomers to Millennials: "Managing different generations," April 24, 2014. http://www.bizjournals.com/houston/blog/2014/04/from-boomers-to-millennials-managing-different.html?page=all, accessed August 1, 2014.*



Katherine Tange-duPré, CEBS

Kathie, has more than 25 years of experience in the writing, design, and production of effective employee communications. She has won gold, silver, and bronze awards for BPS&M from the International Association of Business Communicators. She has published articles in the "Journal of Commerce and Industry," "Healthline," and "American Society of Healthcare Risk Management." Kathie is a consultant in our Nashville, TN office.



Whitney Coppinger

Since joining the firm in 2013, Whitney has effectively designed, written, and edited employee benefit communications. She also writes and edits marketing materials for BPS&M. She is a member of the Editorial Board. Whitney received a B.A. in Public Relations, cum laude, from the Austin Peay State University. She also received her Master's in Corporate Communications from Austin Peay State University. Whitney works in our Nashville, TN office.

Could Your DC Plan Benefit from Automatic Features?

by Susan Lozanov, ERPA, CPC

BPS&M's *2013 Retirement Plan Sponsor Survey: Plan Sponsor Strategies and Attitudes* found that respondents' two greatest unmet or unresolved concerns are (1) participants' appreciation for and use of the plan and (2) providing participants with the financial ability to retire.

Perhaps the simplest way to address these concerns in a defined contribution plan is through the use of automatic plan features, including automatic enrollment, automatic contribution increases (aka automatic escalation), and an appropriate default investment fund; yet, among survey respondents who chose participant appreciation for and use of the plan as their greatest concern, only 45% use automatic enrollment. Of those who listed participants' ability to retire as their greatest concern, only 60% use automatic enrollment, and only 31% use automatic contribution increases.

The key to a financially secure retirement is having an adequate nest egg. Automatic enrollment is the first step in setting those employees who don't—or won't—enroll in their retirement plan on the path to a more financially secure retirement. Automatic contribution increases improve average deferral rates, especially if the escalation rates are robust (2% or more per year). Both automatic enrollment and automatic contribution increases have the potential to improve nondiscrimination testing results and allow certain key employees to defer more into the retirement plan.

> Automatic enrollment, automatic contribution increases, and default investment funds overcome the all-too-human trait of inertia...

Automatic default investments, such as target date funds, can make investment options simpler for participants to understand. If the default investment is a qualified default investment alternative (QDIA), it can also provide safe harbor relief from fiduciary liability for investment outcomes. In addition, plans may offer automatic rebalancing to keep investment portfolios in line for individuals who are not in target date funds or managed accounts.

Automatic enrollment, automatic contribution increases, and default investment funds overcome the all-too-human trait of inertia, and they are relatively easy to implement; however, before automating your plan, be aware that while adding automatic features to your plan can be beneficial to your employees and to the plan (in the form of improved testing), these features come with their own set of challenges.

Addressing common misconceptions

While automatic features do have a number of valid drawbacks, which we address later in this article, many sponsors eschew automatic features simply because of concerns that arise from common misconceptions.

One misconception among some plan sponsors is that employees resent being automatically enrolled; however, 64% of respondents with automatic enrollment report that less than 5% of employees opt out, with another 13% of respondents reporting only 5% to 10% opt out.

Overall, plan sponsors' fears about employee reactions to automatic features are unfounded. A recent study indicates that employees want a simpler and more automatic way to save—60% of respondents would have liked to have had a fully automated retirement savings plan.[1]

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A common—and unfortunate—misconception among employees is that the introductory automatic enrollment amount is enough to provide adequate retirement savings. The most common automatic enrollment percentage is 3%; most experts agree this amount is not sufficient to provide a financially secure retirement. Again, the Scarlett O'Hara (as in *Gone with the Wind*) syndrome often comes into play, with participants saying, "I'll think about that tomorrow." Plan sponsors can overcome this natural inertia by implementing an annual 1% or 2% automatic contribution increase feature that caps at a more beneficial level, such as 10% or 15%. Among survey respondents with automatic contribution increases, the majority offer it as an opt-out feature.

Best practices

Sponsors should consider the following best practices when adding automatic features to their plans.

1. Automatically enroll employee salary deferrals at a minimum 3% rate (preferably higher). Consider enrolling existing employees (without an affirmative election), too.
2. Automatically increase salary deferrals at least 1% per year to a contribution rate of 10% or more (automatic increases for Qualified Automatic Contribution Arrangement (QACA) plans cannot extend beyond 10% of compensation; however, the 10% contribution cap does not apply to non-QACA plans). This will overcome employees' inertia, since studies show that employees who are automatically enrolled without the benefit of automatic contribution increases tend to stay at the initial enrollment rate.
3. Take a holistic approach when adding automatic features to a plan—think beyond simply getting employees into the plan to getting employees to save at a rate sufficient for a financially secure retirement.
4. Make automated features an opt-out rather than an opt-in choice. Many employees don't enroll due to inertia and procrastination—many employees won't opt out for the same reasons.
5. Use target date funds or some other professionally managed investment portfolio as the default investment option.
6. If using target date funds, make them an all or nothing option. For example, a participant who invests in a target date fund wouldn't be able to invest in non-target date funds simultaneously (the participant could, however, split the account between two target date funds).
7. Establish a schedule to re-enroll nonparticipants who have opted out of the plan. This could be annually, biannually, or a more extended time period (sooner or later, they may get the message that they need to save).

Drawbacks of automatic features

If your data is perfect, then you can skip this paragraph; however, if you are like most plan sponsors, it isn't. Bad data, in the form of incorrect hire dates, miscoded rehires, or other data entry errors can result in failure to notify and/or enroll employees timely. Correcting missed deferrals generally requires the employer to contribute funds on the affected employee's behalf. For example, if there are fewer than nine months in the year remaining in which to make offsets, an employer must make a contribution equal to 50% of missed deferrals, 100% of missed matching contributions, and reasonable investment returns for missed deferrals. To avoid errors that lead to potentially expensive corrections, data management is critical. If rehires are a particular concern, the plan document can stipulate that rehires will not be automatically re-enrolled.

Another drawback can be additional administrative costs associated with small account balances that are the result of employees stopping deferrals shortly after being automatically enrolled in the plan. These balances must still be tracked (possible recordkeeping fees) and reported (printing/postage costs). Additionally, organizations with high turnover may expend significant time, energy, and money tracking down terminated employees who join the ranks of lost participants.

One way to avoid these issues is by allowing *permissible withdrawals,* which refund deferrals if the employee opts out of the automatic contribution arrangement within the first 90 days of the first default deferral being withheld (note that the plan must meet certain design requirements in order to offer this feature). Sponsors should consider their hiring practices and employee demographics, as rehired employees present a particular problem when it comes to permissible withdrawals. The final regulations provide special rules that apply to rehired employees regarding the treatment of periods during which no default contributions were made. One alternative to avoid small balances, particularly for organizations with high turnover, is to use a waiting period before participants are allowed to enter the plan, instead of immediately enrolling new employees.

Another drawback is the increased cost of providing all those extra matching contributions. If this is a concern, a plan sponsor may want to consider changing its match formula. Employee contributions typically cluster around the maximum matched contribution rate. Raising the contribution rate matched while lowering the match percentage can increase overall employee contributions without significantly increasing cost. For example, to reduce the cost of matching automatic enrollment contributions (and to encourage higher contribution rates at the same time), an employer could change its match formula from 50% of the first 6% of pay contributed to 25% of the first 10% of pay contributed.

In perspective

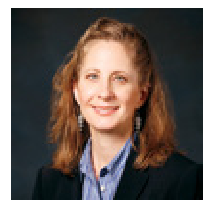
Automatic plan features benefit employees and plan sponsors. Many employees (both participating and nonparticipating) think their retirement plans are too complicated and would appreciate a fully automated plan. Fully automated—autopilot—plan designs can counteract participants' inertia not to enroll or increase their contribution rates, and default investment options lessen the "analysis paralysis" and stress that participants face when making investment choices.

For plan sponsors, automatic features, accompanied by communication and education, can counteract two of the biggest challenges and concerns they face. Automatic enrollment is proven to increase participation rates and plan use, and automatic contribution increases help participants save enough for retirement. Both features can also help nondiscrimination test results.

While there was a frenzy of activity surrounding automatic plan features following the Pension Protection Act of 2006, the implementation of automatic plan features in the last few years has plateaued. With sponsors voicing concerns about plan use and their employees' ability to have a financially secure retirement, perhaps it's time for a revival.

[1] *The New Economic Reality and the Workplace Retirement Plan, 2010. http://www.prudential.com/media/managed/New_Economy_WorkPlace_Retirement.pdf, accessed June 26, 2014.*

Susan Lozanov, ERPA, CPC



Susan has been providing administration and consulting on defined contribution plans at BPS&M since 1998. Before transitioning into company retirement plans, Susan was a registered stock-broker with Charles Schwab. Susan specializes in advanced compliance testing for her clients and provides consulting and administration for ESOPs. She is an Enrolled Retirement Plan Agent, a Certified Pension Consultant, Qualified Pension Administrator, and Qualified 401(k) Plan Administrator. Susan works in our Nashville, TN office.

ESOPS: Life After *Dudenhoeffer*

by John Lucas, CPA, CPC and Jacob Guinn

Editor's note: the Dudenhoeffer case deals **exclusively** *with publicly traded stock, and it is the authors' belief that Dudenhoeffer does not impact privately held ESOPs.*

If you work with a qualified retirement plan that offers employer stock as a 401(k) investment option, you have probably heard something about the recent U.S. Supreme Court decision in the case of *Fifth Third Bancorp v. Dudenhoeffer*. This article summarizes the decision and provides some comments on the impact it could have on plan sponsors and fiduciaries' actions going forward.

History and background

To understand the *Dudenhoeffer* decision you must first know a little about the history of employer stock plans and something called the *Moench Presumption.*

First adopted by the Third Circuit in 1995, the Moench Presumption provides that an ESOP fiduciary is entitled to a "presumption of prudence" with respect to company stock investments when the terms of the plan require or encourage the fiduciary to invest primarily in employer stock.

ERISA grants ESOPs special advantages and rules that are not applicable to other qualified retirement plans. One important advantage for ESOP sponsors and fiduciaries is that ESOPs are not subject to the investment diversification requirements of ERISA. It is important to note that the majority of publicly traded companies that have employer stock within their 401(k) plans have structured those stock investment option funds to be an ESOP.

> One important advantage for ESOP sponsors and fiduciaries is that ESOPs are not subject to the investment diversification requirements of ERISA.

Clearly, investing in a single company stock fund creates a "putting all your eggs in one basket" risk that does not occur when you diversify your investments. Over the years, this lack of diversification has spurred many court cases, which are commonly referred to as *stock drop* cases. As you may have guessed, the Great Recession spurred several stock drop cases, but these types of lawsuits have been prevalent for years.

The *Dudenhoeffer* case is a classic example of a stock drop case. In *Dudenhoeffer,* the plaintiff (a participant) alleged that ESOP fiduciaries breached their fiduciary duty by failing to sell company stock despite knowing the stock was overvalued due to market indicators and the fiduciaries' own insider information.

Before *Dudenhoeffer*, no fewer than seven federal circuit courts had followed the Moench Presumption, which provided a security blanket for ESOP fiduciaries.

The *Dudenhoeffer* case

The district court, following the Moench Presumption, dismissed the plaintiff's claim at the pleading stage, which enabled Fifth Third to get the case dismissed without having to go through costly evidentiary hearings. Upon appeal, however, the Sixth Circuit reversed the

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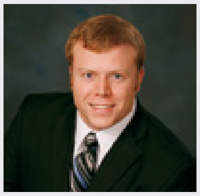
Matthew Widick has earned the Enrolled Actuary designation by passing exams and demonstrating his actuarial experience to the Joint Board.

Matthew Widick

Adam Gray has earned the CERA designation. CERA stands for Chartered Enterprise Risk Analyst. This is a new designation within the Society of Actuaries that requires an Enterprise Risk Management (ERM) module and an ERM essay exam in addition to the ASA designation.



Adam Gray

Noel Whitehurst has earned the Enrolled Actuary designation by passing exams and demonstrating his actuarial experience to the Joint Board. Noel has also earned the CERA designation. CERA stands for Chartered Enterprise Risk Analyst. This is a new designation within the Society of Actuaries that requires an Enterprise Risk Management (ERM) module and an ERM essay exam in addition to the ASA designation.

Noel Whitehurst

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district court's decision in an attempt to move the Moench Presumption from being assessed at the pleadings stage to being assessed at the evidentiary stage. This ruling represents a break from the rulings of the other federal circuit courts, thus setting the stage for Fifth Third to appeal to the Supreme Court. In appealing to the Supreme Court, Fifth Third was hoping to restore the Moench Presumption to the pleading stage; what it got was something much different.

The Supreme Court decision

The Supreme Court completely rejected the Moench Presumption, finding that ESOP fiduciaries are subject to the same duty of prudence as all other ERISA fiduciaries—with one exception: ESOP fiduciaries have no duty to diversify investments.

The decision was not all bad news for Fifth Third and other fiduciaries. In fact, depending on how this decision is ultimately interpreted by lower courts, it is reasonable to conclude that fiduciaries may have received something more important than the presumption of prudence. Keep in mind that what Fifth Third was really trying to accomplish was to have this case dismissed at the pleading stage to avoid an expensive evidentiary process.

By eliminating the Moench Presumption, the Supreme Court provides two very clear principles to help plan sponsors and fiduciaries fill the void. These two principles are:

1. *Fiduciaries are not acting imprudently, absent special circumstances, in relying on a major stock market to provide a reasonable valuation for its company stock.*

   The Court specifically stated that " . . .where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone, that the market was over or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances. . ."

   What are these "special circumstances?"

   While the Supreme Court did not elaborate, it stated that the significant decline in the price of Fifth Third stock as a result of the housing market collapse and the Fifth Third fiduciaries' knowledge of Fifth Third's exposure to risk from subprime loans did not result in special circumstances that would render reliance on the market price imprudent.

2. *An ERISA fiduciary's duty of prudence will not require a fiduciary to break securities laws (i.e., require a fiduciary to remove the company stock from the plan based on insider information).*

The Supreme Court detailed that to state a viable claim for breach of fiduciary duty of prudence when inside information is involved, a plaintiff must offer a feasible alternative that the fiduciary could have performed that would abide by securities laws and that a prudent fiduciary in the same circumstances would be perceived not to cause more harm to the plan than good.

The Supreme Court also encouraged the Securities and Exchange Commission (SEC) to weigh in on whether an "ERISA-based obligation either to refrain on the basis of inside information from making a planned trade or to disclose inside information to the public could conflict with the complex insider trading and corporate disclosure requirements imposed by the federal securities laws or with the objectives of those laws."

In the long run, this guidance may make it more difficult for plaintiffs to make fiduciary claims and easier for plan sponsors to design processes that make the plan less susceptible to this type of lawsuit.

Takeaways from *Dudenhoeffer* for plan sponsors & their fiduciaries

Previously, the presumption of prudence allotted to ESOPs allowed plan fiduciaries to be less diligent with their fiduciary responsibilities than ERISA plan fiduciaries whose plans did not contain employee stock as an investment option. Post-*Dudenhoeffer*, this is no longer the case.

That being said, *Dudenhoeffer* did not necessarily overly burden ESOP plan fiduciaries but merely brought ESOP plan fiduciary requirements into alignment with other ERISA plan fiduciary requirements. ESOP plan fiduciaries must keep a watchful eye on their company stock going forward and formulate a plan of action to monitor that stock's performance as a plan investment, just as they do with other investments.

In formulating such a plan, plan sponsors should consider the following items:

1. **Assess current plan fiduciaries.** Plan sponsors may want to consider appointing plan fiduciaries that do not have access to material, nonpublic information. In addition, plan sponsors may benefit from hiring an independent fiduciary to manage employer stock investments in an attempt to minimize their litigation risk.
2. **Update fiduciary training.** All plan fiduciaries should acknowledge their new responsibilities post-*Dudenhoeffer,* and a decision should be made whether current fiduciaries are capable of properly monitoring company stock or if new fiduciaries or

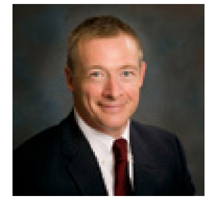
possibly outside consultants should be brought on to ensure compliance.

3. **Create procedures to handle stock volatility / material nonpublic information.** If the company stock becomes volatile, the plan should have procedures in place on how to handle sizable losses in stock value. If your plan's fiduciaries have access to or knowledge of material, nonpublic information, the plan should develop a process for evaluating whether to freeze future employer stock investments and/or publicly disclose material nonpublic information if it is determined that no prudent fiduciary could conclude that doing so would cause more harm to the plan than good.

In perspective

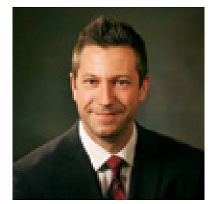
Post-*Dudenhoeffer,* many conservative publicly traded plan sponsors may feel the loss of the presumption of prudence is enough to remove employee stock as an investment option from their 401(k) plans. While that may be the best outcome for some plan sponsors, the majority should realize that with adequate plan fiduciary training and proper stock monitoring procedures, *Dudenhoeffer* does not significantly increase the risk involved in maintaining company stock as an investment option in qualified retirement plans.

John Lucas, CPA, CPC



John Lucas has been working with employee benefit programs since 1988. He has been instrumental in bringing new BPS&M clients into compliance with ERISA and the Internal Revenue Code and keeping clients up to date with changes in laws and regulations. He is a frequent public speaker on matters relating to employee benefit programs. John received his B.A. from Marshall University and his J.D. from the University of Akron. John is an attorney licensed to practice in Ohio. He is also a Certified Public Accountant and a Certified Pension Consultant. He is a member of the American Bar Association, the American Institute of Certified Public Accountants, and the American Society of Pension Actuaries.

Jacob Guinn



Jacob, a consultant in BPS&M's technical and research department, specializes in regulatory compliance and design consultation for clients with retirement and health and welfare benefit plans. Jacob received his B.B.A. in Accounting from East Tennessee State University, his M.B.A. from Middle Tennessee State University, and his J.D. from the University of Tennessee. He is a consultant in our Nashville, TN office.

The BPS&M Pension Liability Index

Updated as of July 31, 2014

by Jeffrey Thornton, ASA, EA, MAAA

Interest rates are arguably the primary driver of the volatility in pension plan liabilities. BPS&M has established a set of liabilities and applied the yield curves to those liabilities in order to create the indices used to demonstrate the effect of interest rates on plan liabilities. The BPS&M Pension Liability Index tracks the percentage change in liabilities for a typical defined benefit plan under the following four interest rate standards, which are in general use:

1. The Full Yield Curve published by the IRS for minimum funding purposes under IRS Code §430.
2. The 24-month Averaged Yield Curve published by the IRS for minimum funding purposes under IRS Code §430.
3. The Adjusted Average Yield Curve reflects the impact of the Moving Ahead for Progress in the 21st Century Act (MAP-21) and the Highway and Transportation Funding Act of 2014 (HATFA). HATFA extended the funding relief, which was introduced by MAP-21 in 2012. In the graph below, the Pension Liability Index for the Adjusted Average Yield Curve is shown under the MAP-21 rates before the application of HATFA as well as the rates under HATFA. Originally, under MAP-21, the funding relief began to diminish in 2013. HATFA extends the funding relief, such that it does not begin to diminish until 2018.
4. A Corporate Financial Yield Curve used for financial statement pension liability determinations. Prior to

January 1, 2014, this was measured using the Citigroup Pension Discount Curve. Beginning January 1, 2014, this will be measured using the Wells Fargo Pension Discount Curve (AA-rated or higher). For more information about the Wells Fargo Pension Discount Curve, please read the article titled "Introducing the Wells Fargo Pension Discount Curves" in the Jan/Feb 2014 issue of Developments.

The BPS&M Pension Liability Index uses a hypothetical plan for benchmarking purposes based on "typical" pension plan features. The duration of the liabilities under this hypothetical plan is 15 years. The benchmark period for the Index starts with the effective date of the Pension Protection Act (January 2008), and the graph shows the rise and fall in liabilities due to changes in interest rates relative to that date. All other factors remain constant throughout the benchmarking period; ergo, the change in liabilities is due solely to the interest rate environment.

The trends demonstrated in the graph will generally hold true for most pension plans, but the magnitude of the percentage changes will vary depending on a given plan's demographics and benefit accrual patterns.

The following table shows the percentage changes in the indices over various periods.

Indices Changes

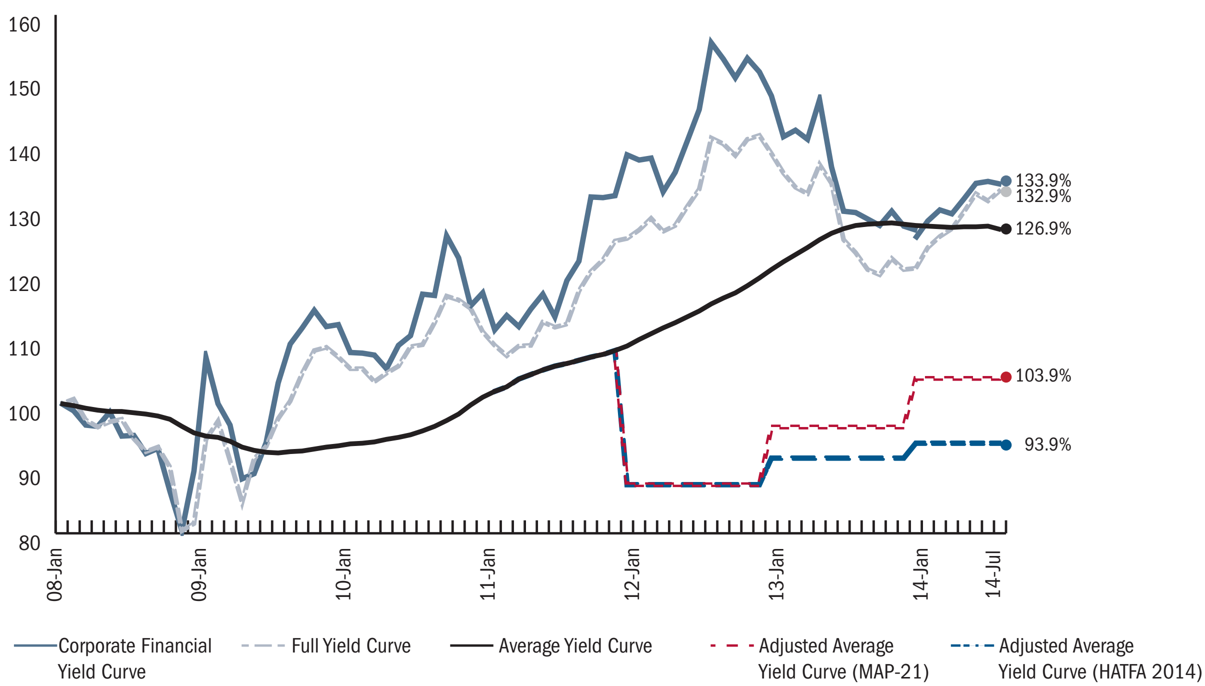
Indices	*Since Inception (1/1/08)*	*2014 Year to Date*	*Last 12 months*
Full Yield Curve	+32.9%	+9.9%	+7.8%
Averaged Yield Curve	+26.9%	-0.5%	-0.5%
Adjusted Average Yield Curve	-6.1%	0.0%	+2.5%
Corporate Financial Yield Curve	+33.9%	+6.6%	+3.4%

The BPS&M Pension Liability Index is updated regularly. If you have questions or comments concerning the BPS&M Pension Liability Index, please contact your BPS&M consultant or jeffrey.p.thornton@bpsm.com.

Jeffrey Thornton, ASA, EA, MAAA

Jeff has 10 years of actuarial experience in defined benefit plan administration. He specializes in liability studies and has provided plan-specific analyses for clients of various sizes and diverse industries. Jeff is a consulting actuary in our Louisville, KY office.

DB Liability Index Since Inception



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RECENT DEVELOPMENTS IN EMPLOYEE BENEFITS

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