



2024 Encore Fiduciary Recordkeeping Benchmark Webinar

A Meaningful Benchmark for Large-Plan
Recordkeeping Fees

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About our Speaker



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Daniel Aronowitz is the President of Encore (formerly Euclid) Fiduciary, a leading Fiduciary Liability insurance underwriting company for America's employee benefit plans. He has over thirty years of experience in the professional liability industry as a coverage lawyer and underwriter and is a widely recognized fiduciary liability expert and thought leader. He is the author of the **FID Guru Blog**, **Encore's Fiduciary Liability Insurance Handbook**, and the fiduciary liability insurance chapter of the **Trustee Handbook** published by the International Foundation of Employee Benefit Plans. He is a graduate of The Ohio State University and Vanderbilt University School of Law and has achieved the RPLU+ designation from the Professional Liability Underwriting Society.



Introduction – Exposing the Excess Recordkeeping Fee Con Game

- Several plaintiff law firms have filed hundreds of fiduciary imprudence lawsuits based on the claim that plan fiduciaries of large defined contribution plans have been “asleep at the wheel” and have allowed recordkeepers to charge excessive recordkeeping fees to plan participants.
- Most of these lawsuits are challenging fees that are reasonable and within the normal range of recordkeeping fees for large plans, but plan sponsors are put on the defensive to disprove a negative.
- There are at least **two recurring flaws** in these excess recordkeeping fee claims:
 - **First, most of these lawsuits are based on inaccurate and inflated claims** of the actual recordkeeping fees being charged to plan participants, because they are typically based on using Form 5500 fee information that is inflated with transaction fees that do not constitute plan recordkeeping fees. The only reliable proof of what plans actually pay is the recordkeeping contract or the quarterly fee disclosure provided by the plan recordkeepers to plan participants as required by the Department of Labor under Rule 404(a)(5).
 - **Second, the lawsuits contain misleading benchmarks** that do not accurately reflect what large plans actually pay for plan recordkeeping – creating the misimpression that most large plans pay \$20-30 for recordkeeping fees.

If these cases are false, why have they largely succeeded?

- Some courts have dismissed these cases for failure to compare recordkeeping services between plans for lack of a “meaningful benchmark” [See *Smith v. CommonSpirit* and *Albert v. Oshkosh*], but most – well over 70 percent - of the fiduciary imprudence cases have survived a motion to dismiss and succeeded in creating settlement leverage.
- **Why have these cases mostly succeeded?** Because there is no reliable and publicly available national benchmark to provide a meaningful benchmark to debunk the premise that large plan fiduciaries are overpaying for recordkeeping services.
- **Until now:** the Encore Fiduciary Benchmark is a **meaningful benchmark** for plan sponsors to defend against unfair fiduciary imprudence lawsuits.
 - Our comprehensive data provides proof that most excess recordkeeping fee claims of fiduciary malpractice are wrong.



Agenda

The Formula: False Fees + False Benchmarks Meets Encore's Meaningful Benchmark

- Background of Excess Recordkeeping Fee Cases
 - False Fees Compared to False Benchmarks
- **False Fees**: How Excess Fee Complaints Exaggerate What Participants Pay
- **False Benchmarks**: The type of misleading benchmarks that are being used in excess fee and imprudence cases;
- **The Need for a Meaningful Benchmark**: We created the Encore Recordkeeping Benchmark to address the need for a meaningful, publicly available, benchmark.
- **Fee Results**: The results of the Encore Fiduciary recordkeeping benchmark survey.
- **Applying the Meaningful Benchmark**: How can the Encore benchmark survey statistics be applied to debunk pending excess recordkeeping imprudence cases.




Background on Defined Contribution Plans

- Defined contribution plans are tax-advantaged savings vehicles in which individuals typically select the asset allocation of their accounts given the range of investment options offered by their plans.
- Fees can be paid directly by employers to cover all costs, but most plans are structured so that employers have no expense to offer the plan. In these plans, the fees to operate the plan are asset-based fees that come out of investments and/or recordkeeping fees that are charged against participant accounts.
- Plan participants pay these investment fees as they are deducted from retirement savings. These fees are often invisible to employees because they are included with investment expenses or they are not visible as line-item transactions.
- In addition, many plans have individual participant fees that are charged to participant accounts. These fees appear as transactions on participant statements along with a description of the service.



401(k) Plan Fees

- **Plan administration** — Administrative support services of the plan are provided to the employer and participants in the form of recordkeeping (see below), consulting, legal, regulatory, compliance, communication and education services. This includes the process of designing, launching, monitoring, and terminating 401(k) plans. Plan administrators are responsible for developing a plan document that lays out the plan's rules. They also make sure the plan follows its own rules and any relevant laws.
 - **Recordkeeping** — Recordkeeping fees are the specific type of plan administrative costs that involve tracking plan assets. The plan recordkeeper accounts for how much assets you have, and what type of money it is (pre-tax or after-tax, and employer matching). Recordkeeping services include posting payroll contributions, plan payments, earnings and adjustments; plan and participant servicing and communications; compliance testing and other regulatory requirements; and educational materials and services. Recordkeeping services are performed by a variety of service providers, including mutual fund companies, insurance companies, banks or third-party administrators (TPAs).
 - **Investment management** — These are the fees for investing plan assets in stocks, bonds, and other instruments. Most 401(k) plans use mutual funds for this service. These asset-based fees are reported as an expense ratio of the mutual fund, separate account, commingled account, or other investment product in the plan.
 - **Financial advice** — Some plans provide help with plan investments. The financial advisor is often a primary point of contact on small retirement plans, spending time with employers and plan participants and acting as an intermediary and translator between other service providers.
 - **Consulting and other services** — 401(k) plans are complex, requiring specialized skills and guidance to keep the plan in good working order and to avoid taxes and penalties.
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What is Recordkeeping?

- A 401(k) recordkeeper is the bookkeeper of the 401(k) plan.
- The recordkeeper tracks who's in the plan, what investments they own, and what money is going in or out. The recordkeeper also typically owns the website employees use to access their 401(k) details.
- Generally, the plan's recordkeeper performs these essential functions:
 - Process employee enrollment
 - Manage and track employee investments
 - Log the origins of contributions (pre-tax, Roth, employer pre-tax match, etc.)
 - Manage and record 401(k) loans and hardship withdrawals.
 - Issue account statements to participants
 - Provide customer support
 - Monitor employee eligibility


Source: ForUsAll.com



How Recordkeeping is Paid

- Payment for administrative services is generally handled through one or more of the following methods:
 - Per participant fees that are paid for by the employer, participant or both;
 - Per plan fees that are paid by the employer, participant, or both;
 - Asset-based fees (based on a percentage of plan or investment assets) that are paid by the employer, participant or both; and
 - Compared to Transaction Fees: Specialized participant activity-related fees, most often paid for by participants engaging in the activity (e.g. loans).
 - These fees are compensation to the recordkeeper, and included in the Form 5500 disclosure as recordkeeper compensation – but it constitute transaction fees.

Revenue Sharing

- Revenue sharing is another fee component of some plans, and very common in plans under \$250m in assets.
 - A confusing and controversial concept, **revenue sharing** within defined contribution plans is when the manager of an investment option agrees to pay a portion of its investment fee to a service provider to perform certain tasks. In the case of 401k plans, this is generally the recordkeeper.
 - The revenue sharing amount is used to help offset the cost of administrative services which would otherwise be charged directly to the plans and/or participants. The investment providers' payment to the recordkeeper helps cover the costs of recordkeeping multiple accounts, while the investment provider services one large account.
 - The Supreme Court ruled in *Hecker v. Deere* that "it did not violate ERISA to use revenue-sharing for plan expenses." But this has not stopped the excess fee plaintiff bar from asserting that revenue sharing demonstrates actionable negligence.
 - **Encore Risk Management Note:** The key problem with revenue sharing from a liability perspective is that it is not clear what participant pay in Form 5500 disclosures – allows plaintiff lawyers to create misleading claims.
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The Original Excess Recordkeeping Claim Template

Uncapped, Asset-Based Fees Compared to \$35 Fictitious Benchmark

- The Original Excess Fee Model Against University Plans with Asset-Based Fees and Multiple Recordkeepers:
 - In 2016, the Schlichter Bogard law firm and other law firms sued twenty universities simultaneously with the same excess fee claims.
 - **EXAMPLE: The Northwestern Case:** In the Northwestern excess fee case, plaintiffs alleged that the Northwestern plan fiduciaries acted imprudently in a \$2.34B plan with 21,622 participants by hiring two recordkeepers, equivalent allegedly to \$153-213 per participant.
 - Fee-based recordkeeping fee
 - Uncapped
 - Multiple recordkeepers – failure to leverage high level of assets
 - **The \$35 Benchmark:** Without proof or comparison, the complaint alleges that a reasonable recordkeeping fee would be \$1.05m in total or \$35 per participant.
 - The complaint alleges several other universities consolidated recordkeepers and reduced fees, but no concrete numbers provided to validate the comparisons.
 - **The Model Worked:** Out of the 20 original cases filed against university plans from 2016-18, fifteen cases have settled for a total of **\$152.9M – over \$10m average**. 4 cases still pending [Yale trial on appeal; Northwestern and NYU (after trial victory remanded; Georgetown SJ win on appeal; one case [Rochester] voluntarily dismissed.



How Excess Recordkeeping Fee Claims Have Evolved – Copycat Claims

Most Excess Fees Cases Allege False Fees Compared to False Benchmarks – Against Lower and Lower RK Fees

○ Excess Fee Claims Against Plans with Revenue Sharing:

- **Trader Joes** – \$1.75b/35,474 – complaint alleges a “roughly \$140 per participant” fee when the RK contract had a \$11,650 plus \$48 per participant charge.
- **O’Reilly Auto Parts** – \$2.6b/53,184 – complaint alleges a \$49.55 RK fee when the participant fee disclosure showed a \$31 per participant fee.

○ More recent claims against plans with low per-participant recordkeeping fees, compared to lower and lower purported benchmarks:

- **Morales v. Capital One Fin. Corp.** (E.D. Va. 12/31/2021) [\$7.8B/XXX] - \$30 RK fee compared to seven large plans.
- **Winkelman v. Whole Foods Market, Inc.,** (W.D. Tex Nov. 6, 2023) - \$31 RK fee compared to \$14 Fidelity stipulation and unverified fees from seven random out-of-context comparator jumbo plans
- **Sigetich v. The Kroger Co.** (W.D. Ohio 11/5/2021)- \$30 recordkeeping fee with defense evidence that portion paid by employer [down to \$23.09] alleged to be 50% too high.
- **Kena Moore v. Humana, Inc.** – in \$5.3b plan, complaint alleges a \$59.01-64.75 RK fee when actual RK fee was \$23-28 after two competitive RFPs for RK services
- **Bugielski v. AT&T** – initial complaint alleged a \$61 RK fee when the plan had a \$20 Recordkeeping Fee with Most Favored Customer Guarantee

Recent Recordkeeping Fee Claims

The Typical Excess Recordkeeping Fee Formula: False Fees Compared to False Benchmarks

- **Dionicio v. U.S. Bancorp**, No. 0:23-cv-00026-PJS-JFD (D. Minn. Jan. 5, 2023) [\$9.8B/86,195] – low-cost plan with \$29 recordkeeping fee and menu of low-cost Vanguard index funds, including 4.5 bps Vanguard TDFs as the QDIA:
 - Initial complaint asserted a false RK \$41 fee, that was rebutted by plan fee disclosures that confirmed a \$29 RK fee [which was below some of the initial plaintiff comparator funds]
 - Amended complaint then asserted the correct RK fee, but with lower purported benchmarks [Fidelity \$14-21 stipulation; and new comparator plans purportedly between \$19-25]
- **Ruebell v. Tyson Foods, Inc.**, (W.D. Ark. Nov. 11, 2023) [\$2.3B/67,276] – plaintiffs claim that the Tyson Foods plan fiduciaries failed to leverage the “mammoth size” of the \$2.3B plan to timely negotiate lower fees from Northwest Plan Services, Inc.
 - Complaint acknowledges reviewing plan fee disclosures, but still alleges that Northwest charged participants between \$40 and \$46 annually for RK fees = \$41 Average.
 - \$41 fee includes plan administration fees that are not recordkeeping fees.
 - Compared to six large plans with much higher assets [\$4.5B to \$17.5B]



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How Complaints Use False Fees

The Proper Source of Accurate Recordkeeping Fees

- (1) Participant Account Statements
- (2) Rule 404a5 Participant Fee Disclosure – example of U.S. Bancorp participant account statement:

1. About fees and expenses

Several types of fees (which may change from time to time) are charged against your account under the Plan:

- You (as a participant in the Plan) are charged a **monthly fee** to pay your share of the Plan's administrative expenses. The monthly fee of \$2.40, is deducted from participant accounts on the first business day of each month. The deduction is taken on a pro-rata basis (i.e., equal basis) from all funds in an account (other than the self-directed brokerage window). The monthly fee is the same for all participants with accounts in the Plan on the date charged and does not vary based on the size of a participant's account. The monthly fee charged to your account will not exceed your account balance, and no monthly fee will be charged if you do not have an account in the Plan on the first business day of the month.
- You also may have **individual fees** that result in charges due to activity you have requested. See below to learn about individual fees that may apply to your account.

- (3) Rule 408b2 Plan Fee Disclosure
- (4) Recordkeeping Contract with Plan Recordkeeper



Sample Plan Fee Disclosure From Challenged Plans

Client Name: [REDACTED]		Plan Name: [REDACTED]					
Total Plan Assets: \$1,745,525,971							
Total Plan Participants: 117,549							
As of 03/31/2023							
		Recordkeeping		Investment Management and Other		Total	
		% Assets	\$	% Assets	\$	% Assets	\$
Investment Option-Related	Asset-based	0.00%	\$22,272	0.10%	\$1,796,293	0.10%	\$1,818,565
Administrative and Other	Billable Recordkeeping	0.20%	\$3,426,147			0.20%	\$3,426,147
	Transaction			0.03%	\$542,667	0.03%	\$542,667
	Other billable			0.03%	\$523,961	0.03%	\$523,961
	Float ¹	0.01%	\$177,241			0.01%	\$177,241
Total Amount		0.21%	\$3,625,660	0.16%	\$2,862,921	0.37%	\$6,488,581

Pricing Information	% Assets	\$	Per Participant
Total Amount for Recordkeeping	0.208%	\$3,625,660	\$30.84
Additional Value for Fidelity Products ²	0.001%	\$18,359	\$0.16
Contractual Rate	0.209%	\$3,644,019	\$31.00

How Complaints Use the Form 5500 – Davita Example

The Form 5500 contains all compensation to the Recordkeeper – including transaction fees

2. Information on Other Service Providers Receiving Direct or Indirect Compensation. Except for those persons for whom you answered "Yes" to line 1a above, complete as many entries as needed to list each person receiving, directly or indirectly, \$5,000 or more in total compensation (i.e., money or anything else of value) in connection with services rendered to the plan or their position with the plan during the plan year. (See instructions).

(a) Enter name and EIN or address (see instructions)

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04-3516284

(b) Service Code(s)	(c) Relationship to employer, employee organization, or person known to be a party-in-interest	(d) Enter direct compensation paid by the plan. If none, enter -0-.	(e) Did service provider receive indirect compensation? (sources other than plan or plan sponsor)	(f) Did indirect compensation include eligible indirect compensation, for which the plan received the required disclosures?	(g) Enter total indirect compensation received by service provider excluding eligible indirect compensation for which you answered "Yes" to element (f). If none, enter -0-.	(h) Did the service provider give you a formula instead of an amount or estimated amount?
37 49 65	RECORD KEEPER	3345172	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	0	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>

(a) Enter name and EIN or address (see instructions)



Plaintiffs Use the Form 5500 Total Compensation

- Plaintiffs take the Form 5500 total compensation amount and divide it by the number of participant: **EXAMPLE: *Teodosio v. Davita, Inc. (D. Colo. 07/08/2022)***: court accepted as “true” for purposes of a motion to dismiss that the plan paid between \$50-96 for recordkeeping services worth between \$14-21:

	Participants	Direct Payments	Indirect Payments ⁷	Total	Compensation per Participant
2016	56707	\$1,570,477	\$789,422	\$2,359,899	\$41.62
2017	61109	\$2,276,645	\$651,696	\$2,928,341	\$47.92
2018	65189	\$5,079,213	\$1,187,892	\$6,267,105	\$96.14
2019	66162	\$3,365,876		\$3,365,876	\$50.87
2020	67104	\$3,386,630		\$3,386,630	\$50.47

- **Reality:** Named plaintiffs with tiny accounts of less than \$750 paid between 12 cents and \$10.56 for recordkeeping services – nowhere close to the alleged plan fees.
- **The fees alleged were false:** In the motion to dismiss, the defense provided evidence that the from the plan’s recordkeeping contract and fee disclosures that the plan’s RK fee was \$37 per participant, until 2020 when the fee was reduced to \$34.50; the RK fee was paid for through a combination of revenue sharing from certain plan investment options and direct participant charges, with Voya refunding any “excess” revenue sharing it received to the plan above the maximum fee [in other words, the fee to Voya was capped at \$37.00, and then \$34.50 – not the \$50-96 alleged in the complaint];
- **But strategy of alleging inflated RK fees worked:** Case settled for \$2 million.



Capital One – What’s in Your 401(k) Plan?

Super low-cost BlackRock Index Target-Date Funds and low per-participant recordkeeping fees

Year	Form 5500 RK Per Participant Alleged in the Complaint	Fidelity Fee Disclosure RK Fees
2015	\$81.15	Not disclosed on Fidelity participant fee disclosure
2016	\$64.08	Not disclosed on Fidelity participant disclosure
2017	\$51.59	\$33.00 per year
2018	\$45.45	\$33.00 per year
2019	\$44.81	\$33.00 per year
2020	\$38.59	\$30.00 per year

Why the Form 5500 is not a proper source for per-participant RK Fees

- The Form 5500 is the total compensation paid to recordkeepers.
- It includes transaction fees and other administrative expenses paid to the recordkeeper that do not constitute recordkeeping, including:
 - QDROS
 - Loan fees
 - Legal and accounting services
- It is not intended to calculate the per-participant recordkeeping fees
 - The Department of Labor mandates per-participant and plan fee disclosures that contain the amount that participants pay.
 - Plaintiff lawyers often claim that they do not have accurate information available to them, but that is not correct: their participant clients get quarterly account statements and participant fee disclosures from the plan recordkeeper.

Other examples of how the Form 5500 is misused

Many Cases of False RK Fees From Form 5500 Data – Easily Disproven by Fee Disclosures

- **Dukes v. Amerisource Bergen Corporation** (W.D. Ky. 07/19/2023) [\$700.4m/4656]: Plaintiff-participant received a fee disclosure with a \$48 RK fee from 2017-2021, which was reduced to \$36 in 2022. But the complaint alleged from Form 5500 that the recordkeeping fee was \$61 per participant – a purported 96% premium from the \$30 benchmark.
- **Dionicio v. U.S. Bancorp**, No. 0:23-cv-00026-PJS-JFD (D. Minn. Jan. 5, 2023) [\$9.8B/86,195]: Initial complaint alleged a \$41 RK fee based on dividing participant count by recordkeeping fee total in the Form 5500. Defense produced participant fee disclosure with accurate \$29 RK fee.
- **Adams v. Dartmouth Hitchcock Clinic** (March 18, 2022): Plaintiffs alleged \$133-144 RK fee from Form 5500 calculations when plan fee disclosures from T. Rowe Price = \$35 actual RK fee.
- **Kena Moore v. Humana, Inc.**, [\$5.35b/46,000+]: Plaintiffs estimated the recordkeeping fees at \$59.01-\$64.75 compared to \$40 average in the NEPC survey.
 - **The Truth – the RK fee was \$23-37 after robust RFPs:** plaintiff counsel had been given the results of two separate RFPs for recordkeeping services – in 2014, the RFP led to \$37 RK fee with Charles Schwab [when plan was \$3.5b/46,000]; and in 2019, when second RFP led to reduced RK fees to \$23 per participant [plan was \$5b/50,000]; in 2021, the RK fee increased to \$28 per participant because Schwab added some low cost index funds that reduced the RK fee offset.
 - But after plaintiffs were given the correct RK fees that were much lower than the NEPC \$40 benchmark, Capozzi Adler moved the goal posts and filed two successive amended complaints alleged a new benchmark of four random plans in the low “\$20 range” [Deseret 401(k) Plan: \$3.4b/34,357 = \$25; Danaher: 35,357/\$4.6B = \$28; Publicis 401k: 42,316/\$2.5B; Kaiser Permanente: 47,358/\$3.1B].
 - The court held that the “[t]hese allegations are enough to survive a motion to dismiss because, if true, they could establish that the Committee failed to act as a prudent fiduciary.”

O'Reilly Defined Contribution Recordkeeping Fees

2020 Form 5500 Data versus DOL-Mandated Disclosures – over \$900,000 in unrelated transaction fees

Form 5500 Direct Recordkeeping Fees	Indirect Recordkeeping*	Per Participant recordkeeping fees using Form 5500 data	408b2 plan fee disclosure aggregate recordkeeping amount	408b2 plan fee disclosure recordkeeping amount per participant	404a5 fee disclosure recordkeeping amount per participant
\$2,609,734	\$48,714 in Capozzi Complaint, but \$53,184 on the 408b2 plan fee disclosures and the total amount rebated [so the true indirect recordkeeping = \$0]	\$49.56	\$1,684,323	\$31.00	\$7.75 each quarter = \$31.00

The Prejudice of Using the Form 5500 Fee Data


***Matousek v. Mid-Am. Energy Co.*, 51 F.4th 274 (8th Cir. 2022) [\$560m/4,858]**

- A prime example of the prejudicial impact of allowing plaintiff law firms to misrepresent recordkeeping fees from the Form 5500 is *Matousek v. Mid-Am. Energy Co.*, 51 F.4th 274 (8th Cir. 2022).
- In that case, plaintiffs alleged – based on Form 5500 total compensation data – that the plan recordkeeper for the MidAmerican Energy plan charged an “unreasonable” fee ranging “between \$326 and \$526 per plan participant.” The representation was false.
- Rather than relying on the plaintiff law firm, the court took judicial notice of the plan fee disclosures, which provide the truthful recordkeeping fee.
- The Form 5500 was not correct: The court observed that Merrill Lynch performed both recordkeeping and non-recordkeeping services, the latter of which included compensation for loan origination, individual trades, and check services. The fees paid to Merrill Lynch also included elective-services fees charged against the account of individual participants for participant-initiated transactions. For these reasons, the Form 5500 recordkeeping fee number alleged in the complaint was not an accurate representation of the recordkeeping fee charged to participants.
- **The actual recordkeeping fees paid by participants was only \$32 – not the false representation by plaintiffs that the fee was \$300-500 higher.**

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**THE THREE TYPES OF FALSE
BENCHMARKS USED IN EXCESS
RECORDKEEPING FEE CLAIMS**

Misleading “Benchmarks” Used in Excess Recordkeeping Fee Cases

- No comprehensive and reliable benchmark of large-plan recordkeeping fees exists outside of the NEPC annual survey, which is limited to less than 200 company datapoints. Plaintiff law firms have exploited this deficiency by creating their own “benchmarks” to support opportunistic and often false excess fee claims.
 - The most commonly used plaintiff law firm benchmarks:
 - 1) **Distorting small-plan recordkeeping statistics from the 401k Averages Book:** Plaintiff law firms repeatedly allege that that the 401k Averages Book shows a \$200m plan with recordkeeping fee of \$5 or \$13, intentionally leaving out the truth that the same plans use indirect revenue sharing of over \$150 per participant on average to fund recordkeeping fees. The Encore database conclusively proves that large plans pay significantly **less** than smaller plans for plan recordkeeping fees.
 - 2) **Allege that Fidelity has stipulated that its recordkeeping services are only worth \$14-21 per participant.** The Fidelity discovery stipulation was never intended to reflect what large plans actually pay, but this has not stopped plaintiff law firms from misusing this stipulation. The Encore database conclusively proves that most large plans, including \$1B+ jumbo plans, pay more than \$21 per participant for recordkeeping fees.
 - 3) **Comparing the fees from large plans with low fees.** Excess fee complaints commonly include a chart of five to ten large plans with low recordkeeping fees. These cherry-picked, random plans give a misleading perspective as to what the actual universe of large plans pay for recordkeeping fees.
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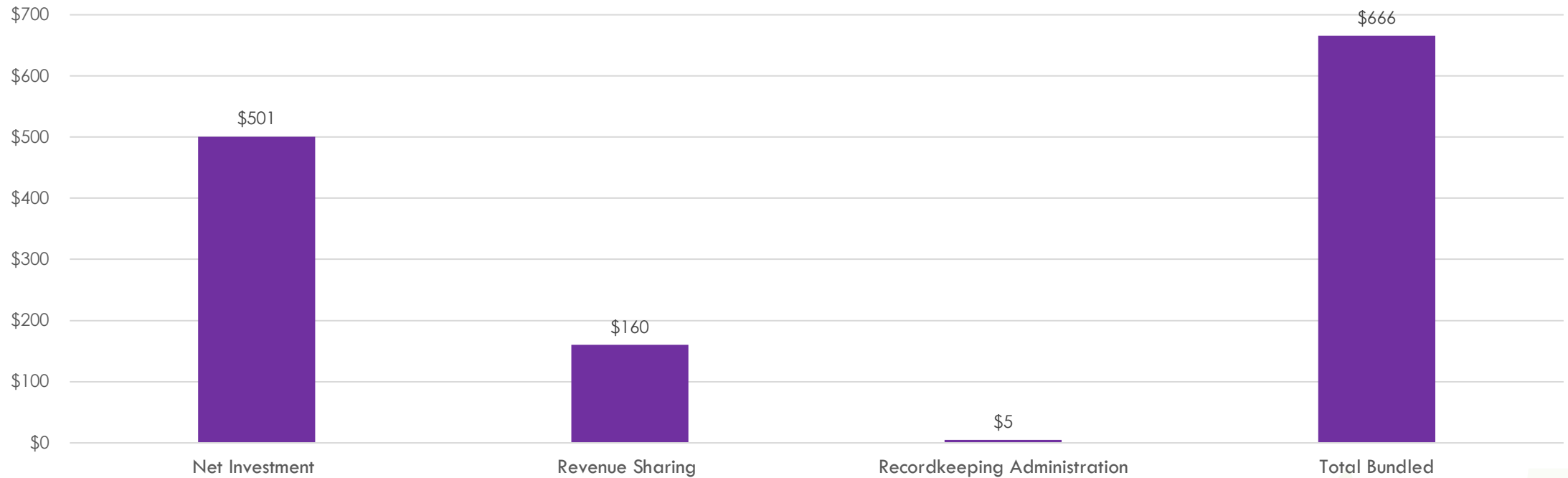
Plaintiff Benchmark #1

Distorting the small-plan recordkeeping statistics from the 401k Averages Book

- Complaints claim that \$200m pay only \$5-12 per participant – intentionally leaving out the survey results that the same plan pays \$160 per participant in revenue sharing:
 - Barrick Gold Complaint paragraph 122: “By way of comparison, we can look at what other plans are paying for recordkeeping and administrative costs. One data source, the *401k Averages Book* (20th ed. 2020)¹⁶ studies Plan fees for smaller plans, those under \$200 million in assets. Although it studies smaller plans than the Plan, it is nonetheless a useful resource because we can extrapolate from the data what a bigger plan like the Plan should be paying for recordkeeping. That is because recordkeeping and administrative fees should **decrease** as a Plan increases in size. For example, a plan with 200 participants and \$20 million in assets has an average recordkeeping and administration cost (through direct compensation) of \$12 per participant. *401k Averages Book* at 16 “Published since 1995, the *401k Averages Book* is the oldest, most recognized source for non-biased, comparative 401(k) average cost information.” *401k Averages Book* at p. 95. A plan with 2,000 participants and \$200 million in assets has an average recordkeeping and administration cost (through direct compensation) of \$5 per participant. *Id.*, at p. 108. Thus, the Plan, with half a billion dollars in assets and over 4,500 - 5,000 participants throughout the Class Period, should have had direct recordkeeping costs below the \$5 average, which it clearly did not.”
 - **NOTE:** the chart from the *401k Averages* is never cited – see next slide for that actual chart showing a \$165 RK fee for the \$200m-asset sample plan

The 401k Averages Book Example that is distorted in Excess Fee Complaints

2,000 Participants and \$200,000,000 in Assets
Chart 24.8
Average Plan Cost Per Participant
(Illustrating Net Investment and Revenue Sharing Split)



Source: The 401K Averages Book, 20th Edition

Plaintiff Benchmark #2 - the \$14 Fidelity Benchmark

Allege the Fidelity has stipulated that its RK services are only worth \$14-21 per participant

- **EXAMPLE: *Winkelman v. Whole Foods Market, Inc.*** (W.D. Tex. 11/06/2023): Plaintiffs allege \$31 recordkeeping fee is imprudent compared to \$14 contrived benchmark from Fidelity discovery stipulation in the *Moitoso* case involving Fidelity's internal 401k plan.
- **EXAMPLE: *Williams v. Centene Corporation***, filed on February 22, 2022, the Capozzi Adler law firm used this tactic in the excess fee complaint:
 - “Let’s start with what Fidelity itself would pay if it were in Defendants’ shoes. In a recent lawsuit where Fidelity’s multi-billion plan with over 58,000 participants was sued, the parties [] stipulated that if Fidelity were a third party negotiating this fee structure at arms-length, the value of services would range from \$14-21 per person per year over the class period, and that recordkeeping services provided by Fidelity to this Plan are not more valuable than those received by other plans of over \$1,000,000,000 in assets where Fidelity is the recordkeeper.” Citing *Moitoso et al. v FMR, et al*, 451 F.Supp.3d 189, 214 (D. Mass 2020) [paragraph 89 of the Complaint].



Plaintiff Benchmark #2 (cont.)

***Teodosia v. Davita, Inc.*, 1:22-cv-00712-WJM (D. Colo 03/22/2022)**

- Paragraph 87. Specifically, Fidelity stipulated as follows: The value of the recordkeeping services that Fidelity provided to the Plan in 2014 was \$21 per participant; the value of the recordkeeping services that Fidelity provided to the Plan in 2015 and 2016 was \$17 per participant, per year; and the value of the recordkeeping services that Fidelity has provided to the Plan since January 1, 2017 is \$14 per participant, per year. Had the Plan been a third-party plan that negotiated a fixed fee for recordkeeping services at arm's length with Fidelity, it could have obtained recordkeeping services for these amounts during these periods. The Plan did not receive any broader or more valuable recordkeeping services from Fidelity than the services received by any other Fidelity record kept plan with at least \$1 billion in assets during the Class Period (November 18, 2014 to the present). *Moitoso*, No. 1:18-cv-12122-WGY, ECF 138-67, ¶ 2 (emphasis added).



How Fidelity Defends the *Moitoso* Discovery Stipulation

The *Moitoso* Discovery Stipulation Was Not Intended as an Admission that Fidelity RK Services are Worth only \$14-21

- The argument that Fidelity has somehow conceded that its recordkeeping services are only worth \$14-21 per participant in a large plan is used in many excessive fee cases. Nevertheless, it is a false and prejudicial narrative.
- The *Moitoso* case alleged excessive fees in Fidelity's own plan. The parties in that case entered into a stipulation for the limited purpose of resolving a discovery dispute. Like many stipulations, the *Moitoso* stipulation reflected a compromise between the parties to that case about the value of the recordkeeping services that Fidelity provided to its own plan.
- The stipulation stated on its face that it was “offered for the purposes of the [*Moitoso*] litigation only,” and the parties agreed not to “contest the validity of the stipulation[] in the context of this litigation only.” It is not relevant to the allegations in any other case, and it does not reflect the value of the recordkeeping services that Fidelity provides to different plans pursuant to different recordkeeping contracts for a different set of services.

Plaintiff Benchmark #3: Chart of Random Large Plans

○ Chart of Random Large Plans with Purportedly Low Recordkeeping Fees.

- The chart in *Ulch v. Southeastern Grocers* (M.D. Fla. 09/27/2023) alleges that the \$1.4B/10,070 Netflix 401(k) Plan only pays \$4.17 per participant; and the \$1.3b/10,039 RPM International Inc. 401(k) Plan only pays \$9.23 per participants.
- The chart in *Winkelman v. Whole Foods Market, Inc.* (W.D. Tex GET DATE/2023) – complaint compares \$31 recordkeeping fee to what the defense in the motion to dismiss described as a “handful of out-of-context comparators.

Plaintiff Benchmark #3: Chart of Random Large Plans (cont.)

Plan Name	Record-keeper	Total # participants w/ account balances	Dollar value of plan assets	Total reported recordkeeping and administrative service costs paid in 2021	Direct Record-keeping and administrative service costs per-participant basis ¹
Southeastern Grocers 401k Savings Plan	Fidelity	12,174	\$1,050,695,424	\$897,469.00	\$73.72
RPM International Inc. 401(k) Plan	Fidelity	10,039	\$1,256,018,208	\$92,649	\$9.23
Netflix 401(k) Plan	Fidelity	10,070	\$1,374,726,213	41,969	\$4.17
Optum Care Mgt. LLC 401(k) Plan	Fidelity	13,078	\$1,341,037,601	284,537	\$21.76
Simplot Retirement Savings Plan	T. Rowe Price	11,277	\$1,296,880,259	\$143,923	\$12.76
Ralph Lauren Corp. 401(k) Plan	T. Rowe Price	8,703	\$841,127,245	\$186,445	\$21.42

The Comparator Chart in the Whole Foods Excess Fee Case

Seven Plans with Two to Fifteen Times Larger than Whole Foods Plan with Unverified Fees

Comparable Plans' R&A Fees Paid in 2021 ¹⁷					
Plan Name	Number of Participants	Assets Under Management	Total R&A Costs	R&A Costs on Per-Participant Basis ¹⁸	Record-keeper
Lowe's 401(k) Plan	158,184	\$9,462,731,858	\$1,465,466	\$10	Prudential and Wells Fargo
Kaiser Permanente 401k Retirement Plan	149,636	\$18,614,838,105	\$1,805,723	\$12	Vanguard
Apple 401(k) Plan	131,476	\$16,718,024,180	\$1,801,830	\$14	Great-West
Google 401(k) Plan	124,725	\$30,556,649,022	\$2,054,930	\$17	Vanguard
Thermo Fisher Scientific Inc. 401(k) Retirement Plan	51,325	\$7,716,754,000	\$687,000	\$14	T. Rowe Price
Deseret 401(k) Plan	36,079	\$5,437,144,766	\$773,365	\$22	Great-West
Publicis Benefits Connection 401K Plan	48,148	\$4,316,917,479	\$1,303,091	\$27	Fidelity



Key Issues in Excess Recordkeeping Claims

- **(1) Key determinant is whether the court will allow evidence outside the MTD, including fee disclosures and account statements that include the actual fees or revenue-sharing credits.**
 - False Recordkeeping and Investment Fee Claims – Can the Defense Use Fee Disclosures and Account Statements to Rebut False Fee Claims?:
 - **EXAMPLE: *Matousek v. Mid-Am. Energy Co.*, 51 F.4th 274 (8th Cir. 2022):** Complaint alleged that the plan recordkeeper for the MidAmerican Energy plan charged an “unreasonable” fee ranging “between \$326 and \$526 per plan participant,” but the truth was that the actual recordkeeping fee was only \$32 per participant – an over 1000% exaggeration of actual fees.
- **(2) What are Proper Benchmarks?**
 - Plaintiffs are taking advantage of the lack of a comprehensive benchmark for what large plans actually pay for recordkeeping services. **But see** the Encore Fiduciary Benchmark.
- **(3) Is Recordkeeping for large plans commoditized, or are there differentiation in services?**
 - In 2023, complaints starting citing Form 5500 service codes: *Cina v. CEMEX, Inc.* (S.D. Tex (02/21/2023) – complaint against a \$877.8m plan alleges a \$74 recordkeeping fee from the plan fee disclosure, which is compared to four comparator plans with the same Form 5500 service codes [37, 60, 64, 65, 71].
 - *Carrillo v. Amy’s Kitchen* (N.D. Cal. 06/16/2023): complaint alleges that plaintiff attorneys sent the Form 5500 of the Amy’s Kitchen plan and received lower bids of \$44 and \$60 per year.

Are Recordkeeping Services Commoditized?

The Primary Defense Position is to Demand Apples-to-Apples Comparison, But is it Justified?

- The primary defense of plan sponsors to an excess recordkeeping fee imprudence claim is to argue that the complaint should be dismissed because it fails to compare actual recordkeeping services.
- Some courts have dismissed cases based on failure to plead that *similar plans* paid less for *similar recordkeeping services*, led by the Sixth Circuit in *Smith v. CommonSpirit* and the Seventh Circuit in *Albert v. Oshkosh*:
 - ***Perkins v. United Surgical Partners Int'l Inc.***, Civ. Action No. 3:21-CV-0973-X (N.D. Tex. Mar. 10, 2023): conclusory allegations cannot circumvent plaintiff's burden to allege a specific comparison of services and costs to state a claim;
 - ***Young v. GM Inv. Mgmt. Corp.***, 325 F. App'x 31, 33 (2d. Cir. 2009): affirming dismissal of claims premised on excessive recordkeeping fee because the plaintiffs "fail[ed] to allege that the fee were excessive related to the services rendered."
 - ***Krutchen v. Ricoh USA, Inc.***, No. 22-678, 2023 U.S. Dist. LEXIS 68942, at *6 (E.D. Pa. Apr. 20, 2023) ("[V]aguely alleging recordkeeping services are fungible does not plausibly allege a breach."
- **BUT** if put to the test, can plan sponsors back up the premise the recordkeeping services for large plans are offered in a differentiated way, beyond service quality?



New Theories of Liability

○ Failure to Monitor Float Income:

- Imprudence claim that plan fiduciaries failed to monitor float interest in the clearing accounts of the plan's recordkeeper.
- Original float claims brought in 2016 against Fidelity, but this is the first time that float claims have been brought against plan sponsors.
- Example: *Barner v. McLane Company, Inc.*, No. 6:23-00301 (W.D. Tex filed 04/24/2023), the complaint alleges that Merrill Lynch was permitted under its recordkeeping contract to allow participant deposits or money withdrawn from the plan from individual accounts to first pass through a Merrill Lynch clearing account. McLane allegedly agreed that any investment returns and/or interest earned on plan participant money in the clearing account – typically 2-3 days – belongs to Merrill Lynch. The complaint asserts that this additional compensation of even a 1% return on \$263,000,000 would account for \$2,630,000 in indirect float compensation. Plaintiffs allege that McLane imprudently permitted Merrill Lynch “to siphon millions of dollars from the Plan.”

○ Plan Forfeitures

- A California law firm has filed six cases to date challenging the widespread practice of using plan forfeitures – the nonvested portion of a former employee's account balance – to offset employer contributions.
- The lawsuits allege that using plan assets to offset employer contributions is self-dealing that violates ERISA's prohibited transaction rules and ERISA's fiduciary requirement that plan assets be “for the exclusive purpose” of paying benefits or plan expenses.
- In all five cases, plan documents allowed the plan sponsor to offset employer contribution. Question is whether plan document that allow any discretion or choice as to whether to offset contribution turns this into a fiduciary function that must be made in the sole interest of participants.

The background features a complex geometric pattern of overlapping triangles. On the left side, there is a cluster of triangles in various shades of blue, ranging from light sky blue to deep navy blue. On the right side, there is a cluster of triangles in various shades of green, ranging from pale lime green to vibrant forest green. The central area of the image is a plain, light cream or off-white color, providing a clear space for the text.

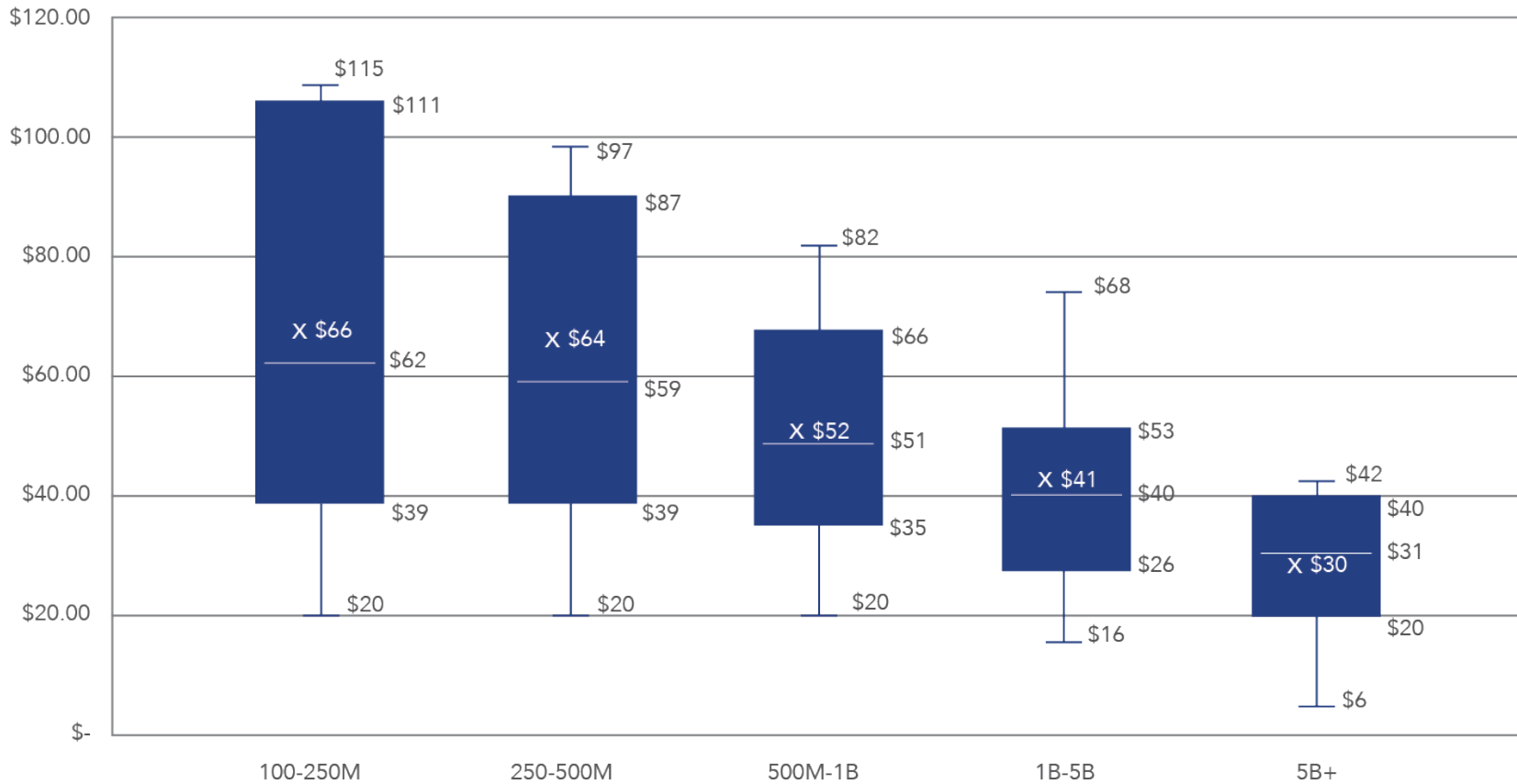
Encore Fiduciary Benchmark

How We Developed Reliable Recordkeeping Statistics

- As one of the leading providers of fiduciary insurance to large plans across America with over 3,000+ fiduciary policies in force for plan sponsors that sponsor plans with assets over \$100m, Encore annually reviews thousands of rule 408(b)2 and 404(a)5 fee disclosures. We have a unique perspective to analyze what large plans actually pay for recordkeeping fees.
- We tracked over 2,500 plans with \$100m or more in plan assets in 2020, 2021, and 2022.
- We tracked recordkeeping fees based on both plan assets and the number of plan participants.
- We recorded the fees disclosed by the plan recordkeeper. If the plan included revenue sharing, we totaled the revenue sharing charged from investment fees, and divided that amount by the total number of plan participants in order to arrive at the average recordkeeping fee paid by plan participants.
- The charts isolate the lowest and highest 10% of fee charged, and then indicate both the median and average recordkeeping fee for each plan or participant size.

2022 RK Fee By Plan Asset Size

2022 RK Fee By Plan Asset Size



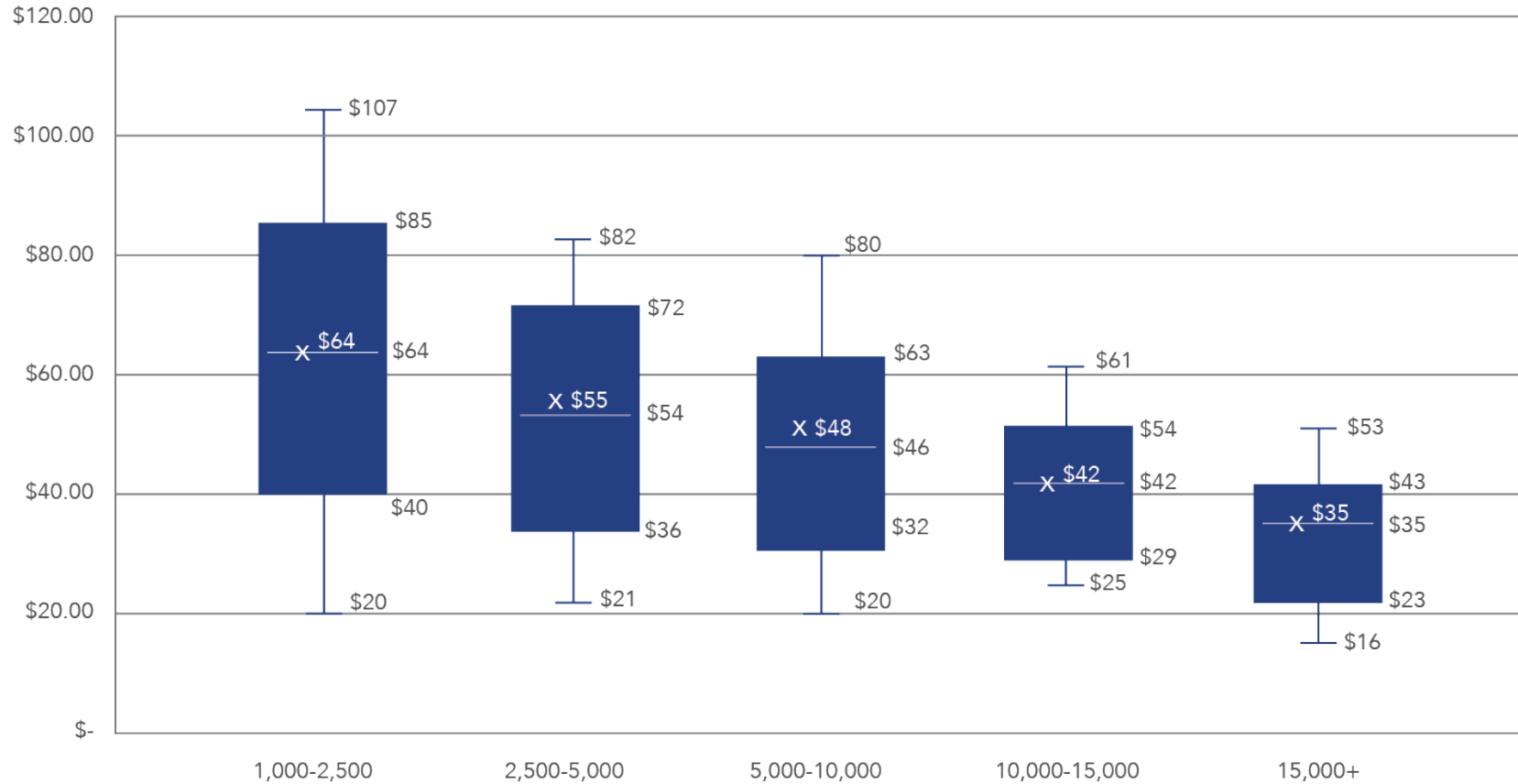
Note: the Mean or average is denoted by the "x" in each asset category.

Median is denoted by the line inside the asset category.

Total Assets

2022 RK Fee By Plan Participant Size

2022 RK Fee By Plan Participant Size



Note: the Mean or average is denoted by the "x" in each participant category.

Median is denoted by the line inside the participant category.

Number of Participants

What the Encore Recordkeeping Database Reveals

- Fee compression for large-plan recordkeeping continues. Fees continue to decline over the last five years and have continued from 2020-2022.
- The vast majority of plans with over \$500m in assets have a per-participant recordkeeping fees with revenue sharing eliminated or minimal.
- Plans under \$250m continue to use revenue sharing as the primary method of paying recordkeeping fees, but the percentage of plans without revenue sharing continues to decline as large plans move to fixed per-participant recordkeeping fees.
- Very few plan sponsors of large plans pay recordkeeping fee on behalf of plan participants.
- The premise of many, if not the vast majority of excess fee cases that most large \$500m+ asset plans pay \$35 or less is false.

What the Encore Recordkeeping Database Reveals (cont.)

The following is what the average large plan pays for recordkeeping services:

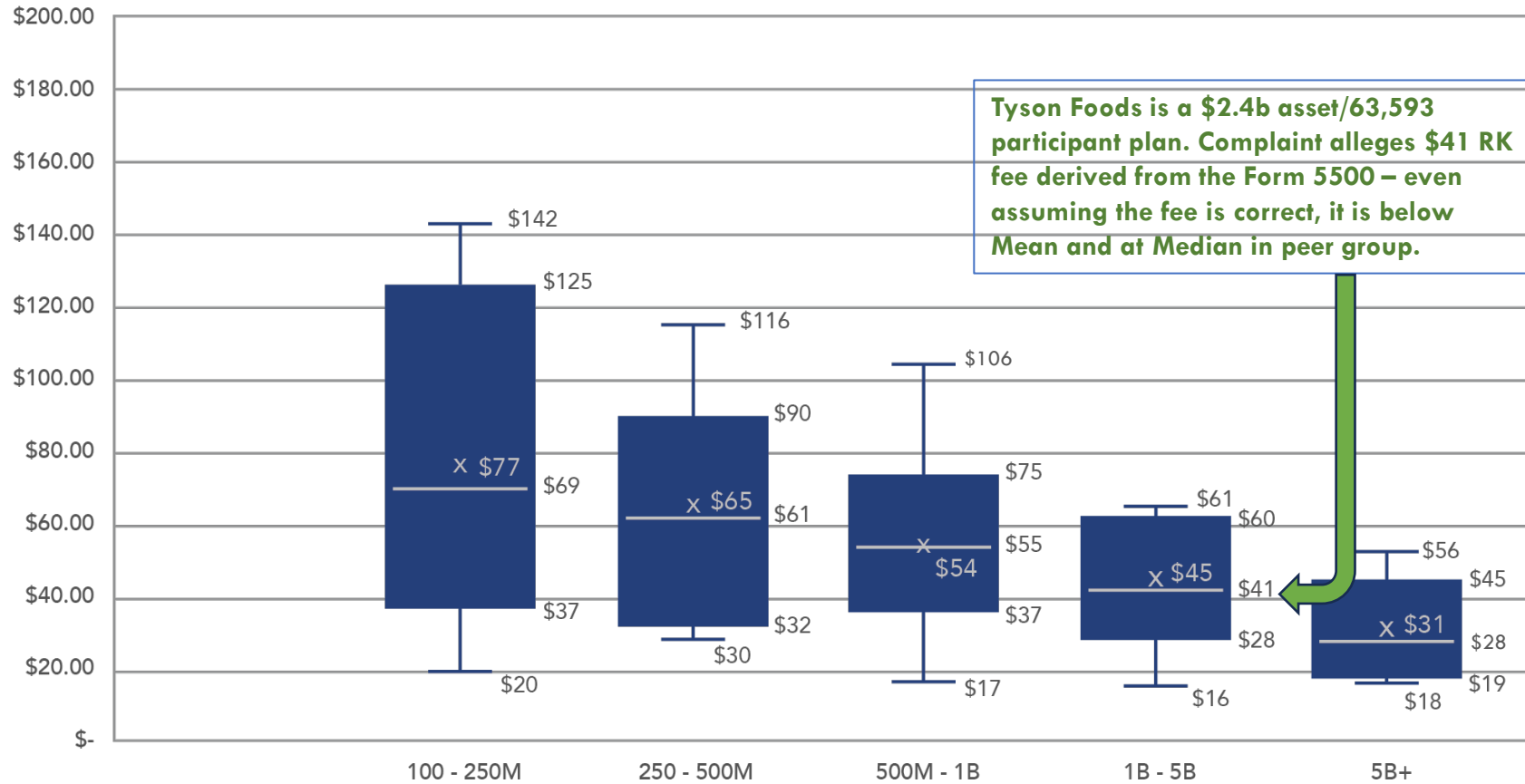
- **\$500m-1b Plans:** In 2022, 90% of plans with assets between \$500m and \$1b in assets paid over \$35 per participant, with 80% of plans paying between \$35 and \$66 per participant.
- **\$1b-5b Plans:** In 2022, 90% of all plans with assets between \$1b and \$5b paid more than \$26 per participant, and 80% of all such plans paid between \$26 and \$53 per participant.
- **\$5b+ Plans:** In 2022, 90% of all plans with assets over \$5b paid \$20 or more per participant, and 80% of plans of this size paid between \$20 and \$40 per participant.

The background features a complex, abstract geometric pattern composed of numerous overlapping triangles. The left side of the image is dominated by shades of blue, ranging from light sky blue to deep navy blue. The right side is dominated by shades of green, ranging from pale lime green to vibrant forest green. The triangles vary in size and orientation, creating a dynamic, crystalline effect.

Comparing the Encore Benchmarking Database to Excess Recordkeeping Fee Lawsuits

Tyson Foods: Compare Inflated \$41 RK Fee in Complaint

2020 RK Fee By Plan Asset Size



Tyson Foods is a \$2.4b asset/63,593 participant plan. Complaint alleges \$41 RK fee derived from the Form 5500 – even assuming the fee is correct, it is below Mean and at Median in peer group.

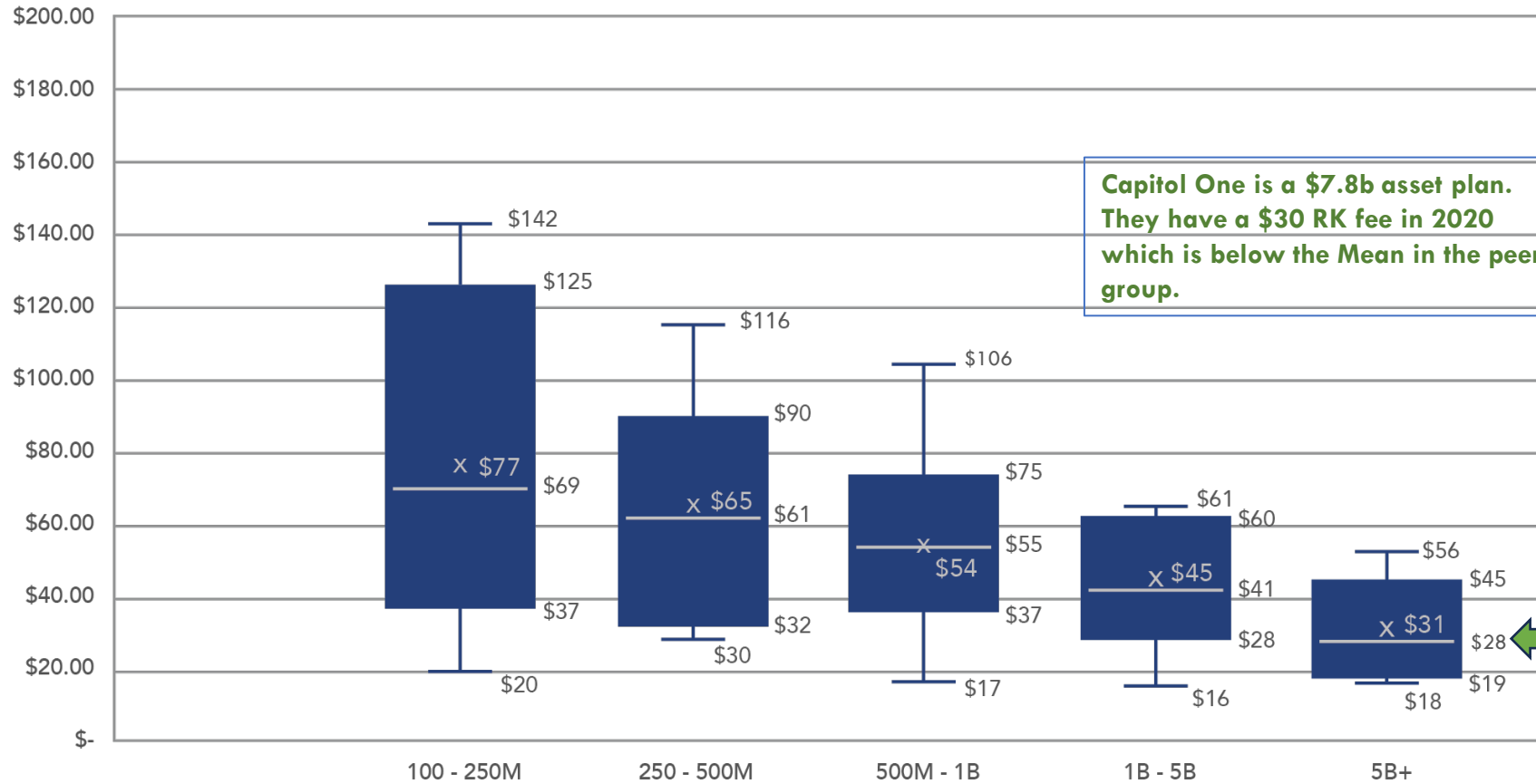
Note: the Mean or average is denoted by the "x" in each asset category.

Median is denoted by the line inside the asset category.

Total Assets

Capitol One: Compare \$30 RK Fee to Peer Group

2020 RK Fee By Plan Asset Size



Capitol One is a \$7.8b asset plan. They have a \$30 RK fee in 2020 which is below the Mean in the peer group.

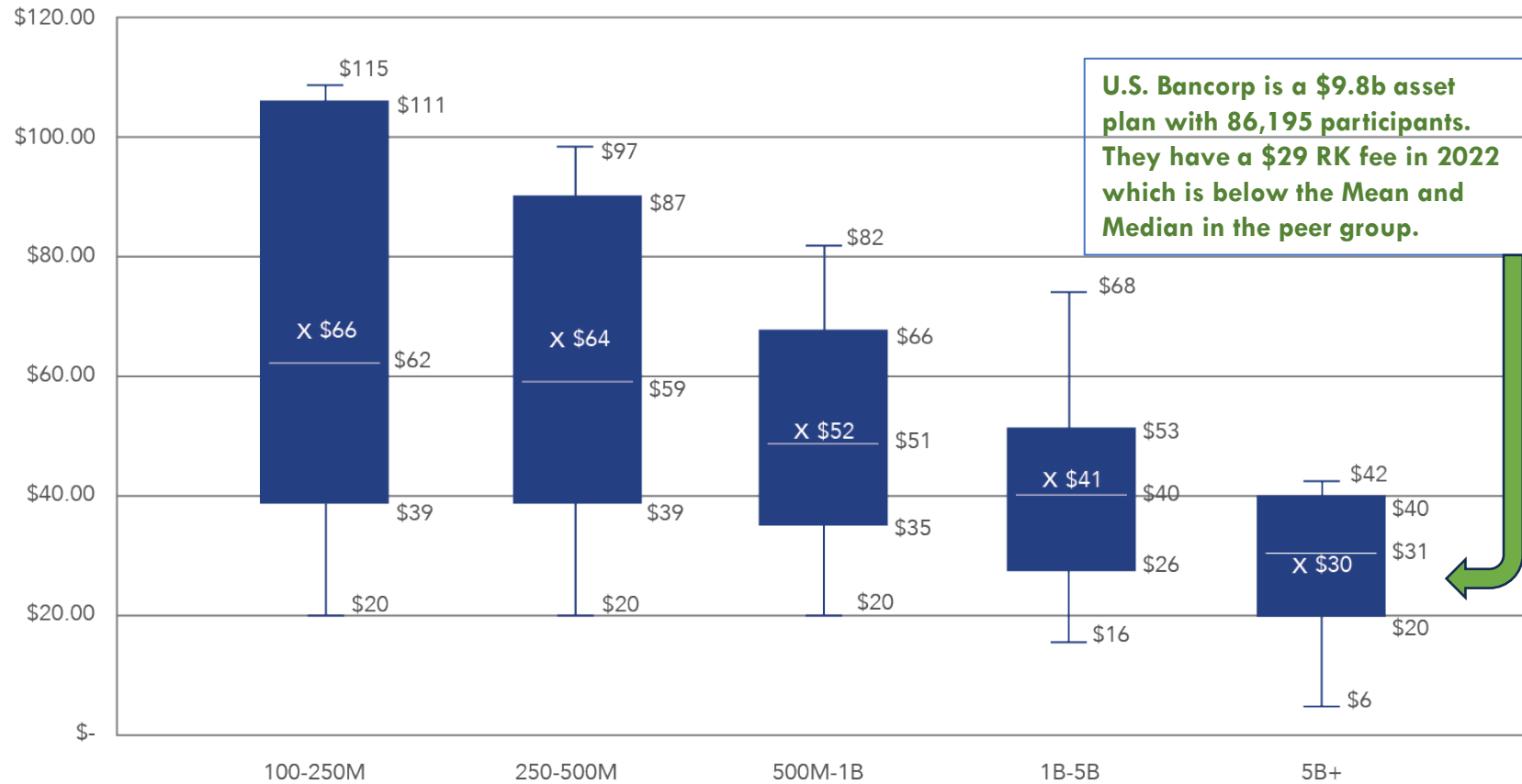
Note: the Mean or average is denoted by the "x" in each asset category.

Median is denoted by the line inside the asset category.

Total Assets

U.S. Bancorp: Compare \$29 RK Fee to Peer Group

2022 RK Fee By Plan Asset Size



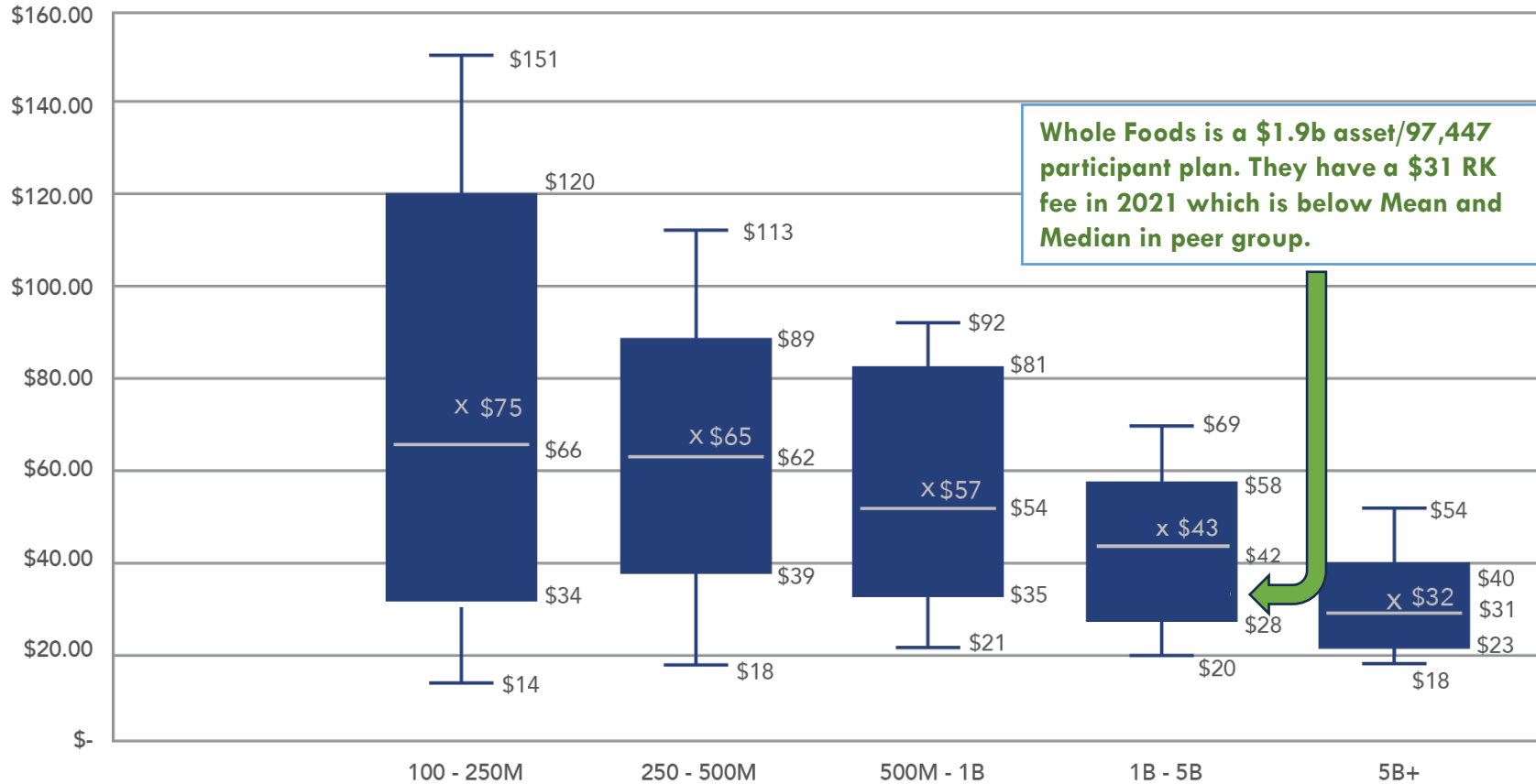
Note: the Mean or average is denoted by the "x" in each asset category.

Median is denoted by the line inside the asset category.

Total Assets

Whole Foods: Compare \$31 RK Fee to Peer Group

2021 RK Fee By Plan Asset Size



Whole Foods is a \$1.9b asset/97,447 participant plan. They have a \$31 RK fee in 2021 which is below Mean and Median in peer group.

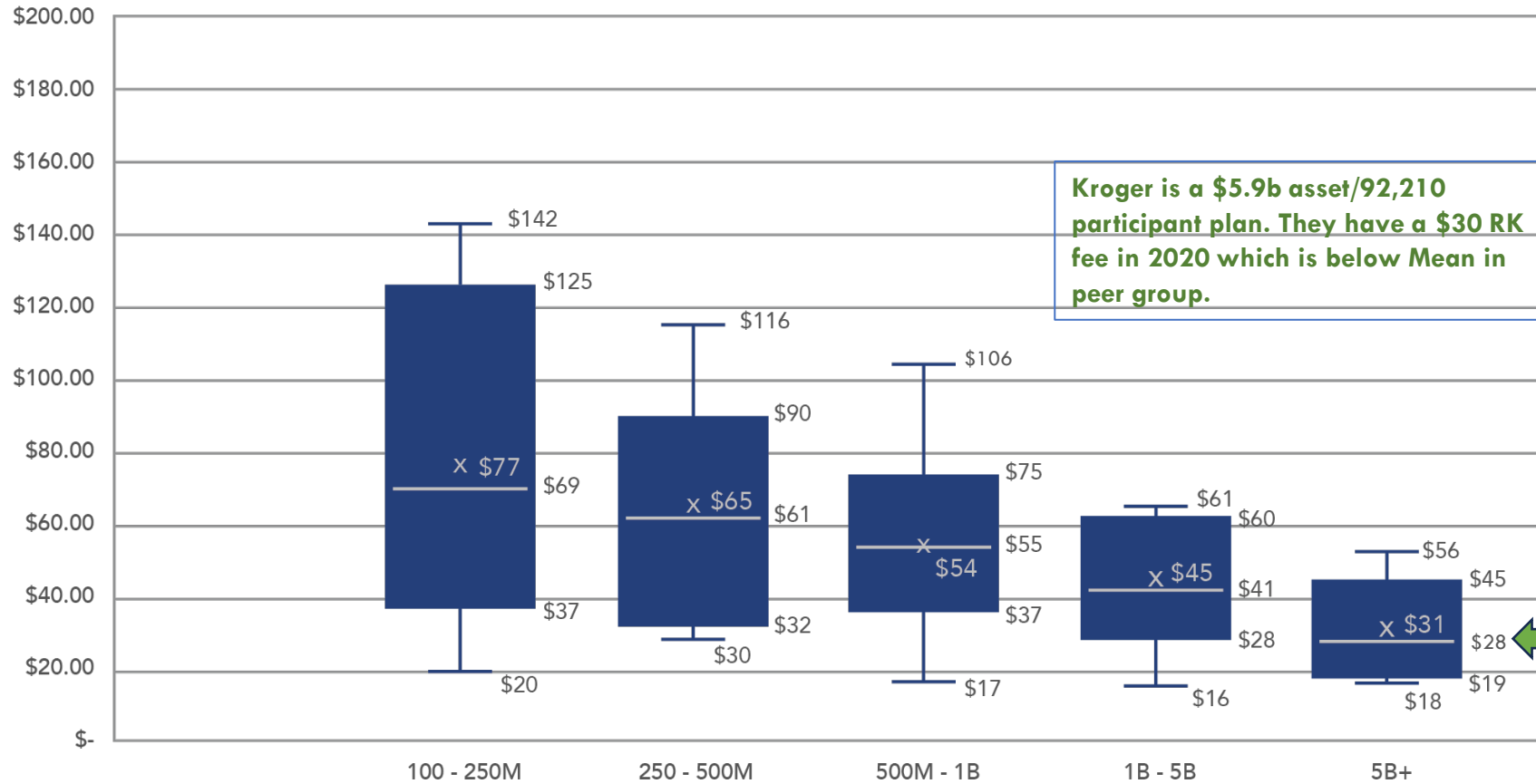
Note: the Mean or average is denoted by the "x" in each asset category.

Median is denoted by the line inside the asset category.

Total Assets

Kroger: Compare \$30 RK Fee to Peer Group

2020 RK Fee By Plan Asset Size



Kroger is a \$5.9b asset/92,210 participant plan. They have a \$30 RK fee in 2020 which is below Mean in peer group.

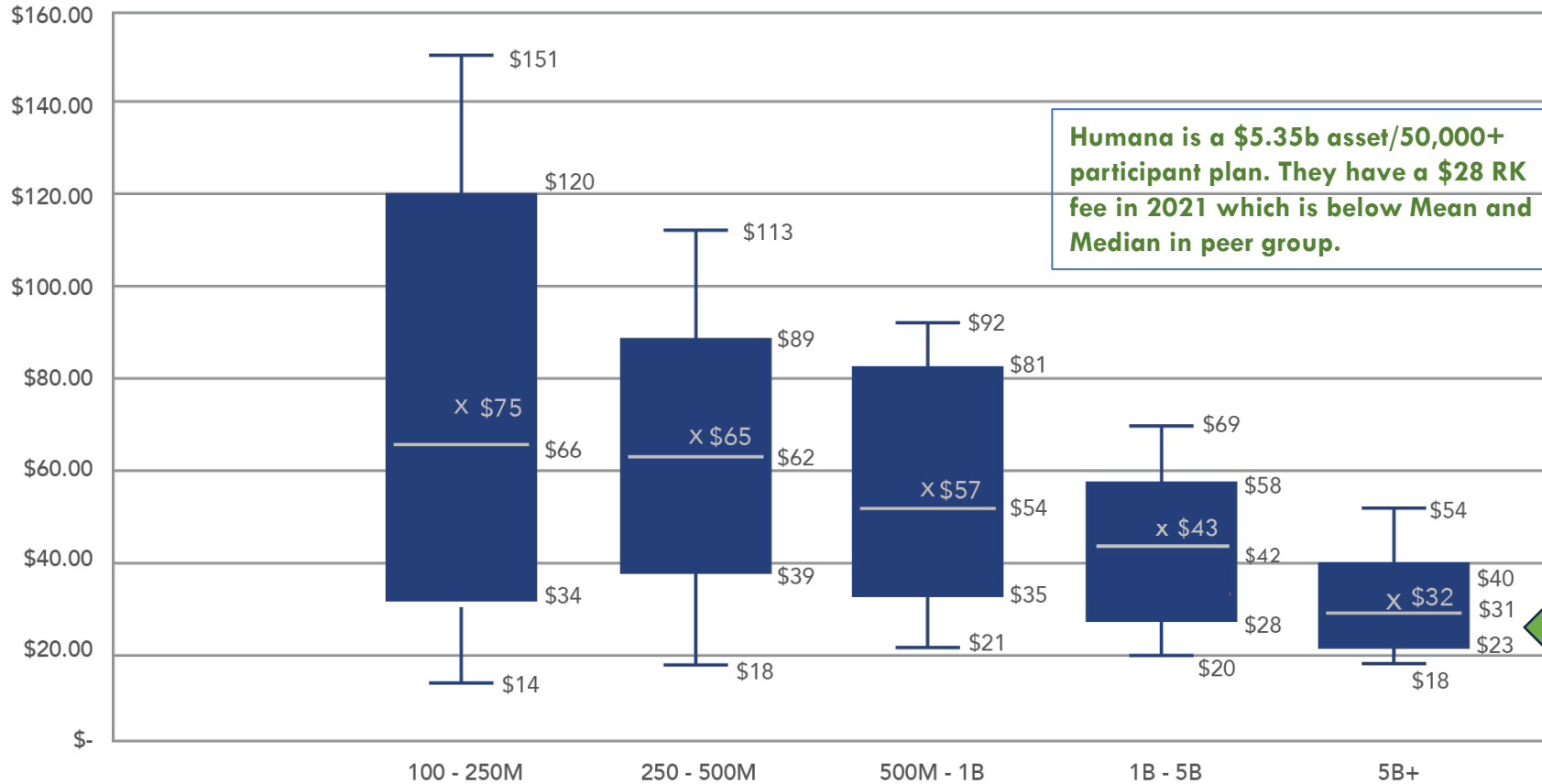
Note: the Mean or average is denoted by the "x" in each asset category.

Median is denoted by the line inside the asset category.

Total Assets

Humana: Compare \$28 RK Fee to Peer Group

2021 RK Fee By Plan Asset Size



Humana is a \$5.35b asset/50,000+ participant plan. They have a \$28 RK fee in 2021 which is below Mean and Median in peer group.

Note: the Mean or average is denoted by the "x" in each asset category.

Median is denoted by the line inside the asset category.

Total Assets

Conclusion - A Meaningful Recordkeeping Benchmark

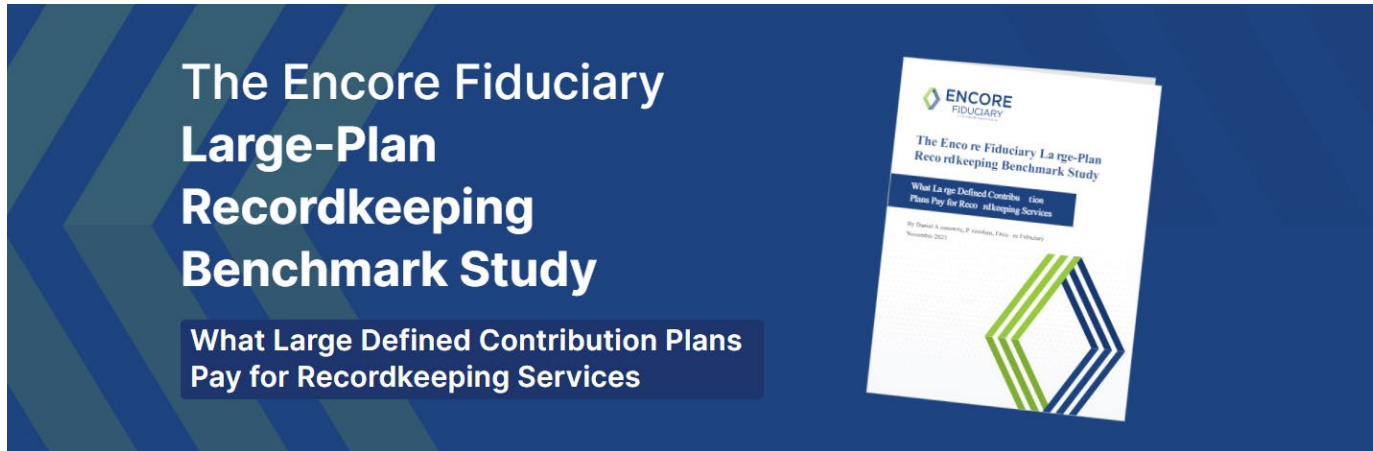
The First Publicly Available, Meaningful Benchmark for Large-Plan Recordkeeping Fees

- For years, the trial bar has indiscriminately targeted plan sponsors of large defined contribution plans and claimed that the fiduciaries are “asleep at the wheel” by not properly negotiating low recordkeeping fees.
- The complaints often allege the same formula of **false fees compared to false benchmarks**.
 - Most large plans pay recordkeeping fees well in excess of the false and contrived benchmarks in these fiduciary imprudence cases.
 - But the fees alleged as imprudent in most cases are well within the range of reasonable recordkeeping fees paid by comparable plans – as proven by the Encore Benchmark.
- Nevertheless, over 70% of these complaints have succeeded in driving settlements because there is no publicly available, meaningful benchmark of what large plans actually pay for recordkeeping services.
- Encore [formerly Euclid] Fiduciary has created the nation’s first publicly available, **meaningful benchmark** that shows what large plans actually pay for recordkeeping services.
 - With few exceptions, it provides reliable data proving that most plans being sued pay within the reasonable range of the market for large-plan recordkeeping fees.
 - Let us help your plan sponsor clients use this resource to benchmark their fees and protect against capricious class action litigation.



Encore Fiduciary Risk Management

The Encore Large Plan Recordkeeping Database



- **The Encore Fiduciary Large-Plan Recordkeeping Benchmark Survey – What Large Defined Contribution Plans Pay for Recordkeeping Services** is designed to provide a reliable benchmark for plan fiduciaries to defend against imprudence lawsuits that are based on false and misleading comparisons.
- <https://encorefiduciary.com/recordkeeping-benchmark-study/>

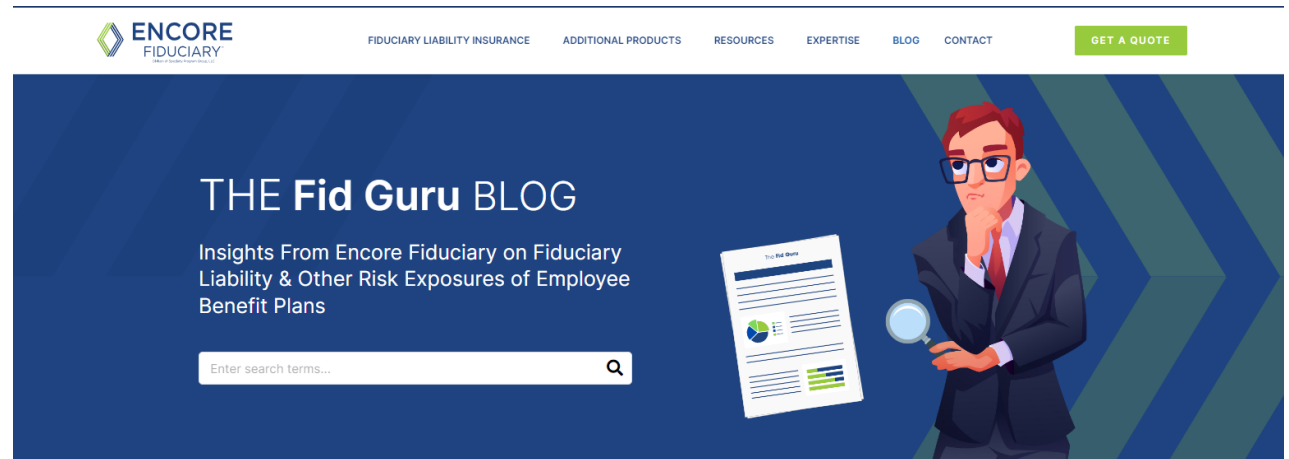
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- Insights From Encore Fiduciary on Fiduciary Liability & Other Risk Exposures of Employee Benefit Plans
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[United Behavioral Health In the Supreme Court – When is Residential Treatment Covered as Medically Necessary?](#)

[The Paradox of The Yale Jury Finding Breach of Fiduciary Duty for Managing Recordkeeping Fees, But No Damages – The “Could Have” Versus “Would Have” Causation Standard](#)

[Debunking the Tyson Foods Excess Recordkeeping Fee Case](#)



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<https://encorefiduciary.com/blog/>
- Rebrand Euclid Fiduciary is now Encore Fiduciary & FAQ's:
<https://encorefiduciary.com/euclid-is-now-encore/>

Euclid Fiduciary is Now Encore Fiduciary

A Few Notes about our Rebrand

Encore Fiduciary, formerly **Euclid Fiduciary**, is a division of **Specialty Program Group** that serves as a leading provider of fiduciary liability insurance for America's employee benefit plan sponsors and fiduciaries. The Encore Fiduciary team is known for its fiduciary expertise, thought leadership, and advocacy for America's plan sponsors.

- The Fid Guru Blog: <https://encorefiduciary.com/blog/>
- Rebrand & Website Page & FAQ's : <https://encorefiduciary.com/euclid-is-now-encore/>
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- **Important:** Please have your IT department whitelist our new @encorefiduciary.com email address we are implementing. Incoming to @encorefiduciary.com already works. We will implement outgoing soon.



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