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Proposes Broad Framework for Plan Investment Selectionâ??Including Alternatives

Implementing Executive Order 14330, the U.S. Department of Labor (DOL) has issued a proposed regulation creating a framework for retirement plan fiduciaries to meet ERISAâ??s prudence requirements when selecting investments. The executive order was limited to making alternative investments, such as private market debt and equity and digital assets, available in retirement plans. Even so, the DOLâ??s guidance broadly addresses the selection of all investments for 401(k), 403(b), and other individual account plans.

Importantly, the proposed regulation does not endorse the use of any particular types of investments. It also leaves undisturbed the fundamental rule that plan fiduciaries are responsible for curating an investment menu appropriate for their plans and for monitoring plan investments over time. The proposed regulation identifies six factors that should be included in the consideration of plan investments:

1. Investment performance
2. Fees and expenses
3. Benchmarking
4. Liquidity
5. Valuation
6. Complexity

The first three factors will be familiar to fiduciaries whose plans offer investments commonly used in 401(k), 403(b), and other individual account plans. The other three are more relevant to consideration of alternative investments and are rarely an issue with more traditional investments.

The proposed regulation sets out real-life examples, demonstrating how these factors should be used, and characterizes following the examples as creating a safe harbor for plan fiduciaries. The proposed

regulation says that if plan fiduciaries demonstrate they have dutifully considered these factors, courts should defer to their decisions. However, the DOL cannot mandate how courts interpret ERISA. Therefore, while courts may consider the DOLâ??s guidance, they are not bound by it. For plan fiduciaries considering whether alternative investments are appropriate for their plans, and their plan participants, some practical considerations include the following.

- In recent decades, some guidance from the DOL has changedâ??sometimes dramaticallyâ??depending on who is in the White House. Some commentators have suggested this particular proposed regulation is less likely than others (e.g., use of ESG investments in retirement plans) to be reversed. Even so, a few changes of presidential administration will test the durability of the proposed or final regulation.
- The litigation risk for ERISA fiduciaries continues to be significant. The outcome of anticipated litigation will demonstrate the extent to which courts embrace the DOLâ??s safe harbor.
- Self-directed brokerage windows can provide broad access to non-core investments. It is generally believed that plan fiduciaries are not responsible for specific offerings in a self-directed brokerage window, and the proposed regulation specifically states it does not apply to self-directed brokerage windows. If plan fiduciaries feel compelled to make alternative investments available, they may want to consider a self-directed brokerage window. Needless to say, plan fiduciaries are still responsible for monitoring other aspects of self-directed brokerage windows.

Lawsuits Challenging 401(k) Plan Fiduciaries: New Developments

Cases continue to be filed against the fiduciaries of 401(k) and other individual account plans. Many lawsuits make what are now garden-variety claims of overpayment for investments or services or for retaining underperforming investments. However, there were also some less common claims and outcomes this quarter.

- The U.S. Court of Appeal for the Fourth Circuit, located in Richmond, Virginia, vacated the certification of a class of plaintiffs in a case challenging the selection and retention of particular investments in a Genworth Financial 401(k) plan. Until this decision, it had become routine for courts to conclude that participants in a 401(k) plan are all in the same position with respect to claims challenging that planâ??s investments, so those cases could proceed as class actions. However, the Fourth Circuit Court of Appeals concluded that, in an individual account plan, like a 401(k) plan, individual participants and their accounts are all different. In this case, the lower court did not conduct a rigorous analysis of the commonality of the proposed class members to determine whether the case should proceed as a class action. *Trauernicht v. Genworth Financial* (4th Cir 3.10,2026). The case will return to the district court for further consideration. If the result holds, it could create a challenge for plaintiffsâ?? lawsuits in this area.
- Turning the tables on how environmental factors are considered in 401(k) plan investments, plaintiffs have sued Cushman & Wakefield, alleging they offered an investment in their 401(k) plans with significant exposure to climate risk, which could result in losses to plan participants. According to the complaint, the challenged fund expressly disclaimed climate-risk analysis, and it underperformed. Although the complaint suggests a link, past underperformance is not alleged

to be a result of overexposure to climate risk. Little is alleged in the complaint about the process the Cushman & Wakefield fiduciaries used when selecting the challenged fund. *Kevek v. Cushman & Wakefield, U.S., Inc.* (W.D. Wash., filed 3.03.2026.) The case is pending.

- Lawsuits frequently allege that plan fiduciaries have erred by not taking advantage of collective investment trusts (CITs) that are less expensive than their mutual fund counterparts. However, a new lawsuit alleges it was a breach to use the CIT version of mutual funds. This complaint alleges collective trusts provide less access to information about investments. However, no specific losses are alleged. *Ventura v. Lithia Motors, Inc.* (C.D. Cal., filed 2.29.2026)

Is Reasonableness Required? Cases Challenging Pension Actuarial Assumptions Reach Opposite Results

Since 2018, a number of lawsuits have been filed alleging that certain pension plans paid improperly low benefits to some pensioners and their survivors by using incorrect actuarial assumptions.

When an alternate benefit is elected (which frequently means an early or joint and survivor benefit) rather than a standard lifetime benefit, participants and their beneficiaries are entitled to benefits with a value that is actuarily equivalent to the planâ??s standard benefits. *Actuarily equivalent benefits* are calculated using mortality tables and interest-rate assumptions. The lawsuits in this area allege that either outdated mortality tables or incorrect interest-rate assumptions were used to calculate the alternate benefits, resulting in benefits that are not actuarily equivalent to the standard benefit.

Two district court decisions in the Seventh Circuit were decided in favor of their respective plan sponsors, holding that ERISA does not require the use of reasonable assumptions in the calculation of actuarily equivalent benefits. Rather, those courts decided that the assumptions built into the respective plan documents should be followed, regardless of their reasonableness. The U.S. Court of Appeals for the Seventh Circuit recently reversed those decisions, finding that the phrase â??actuarily equivalentâ?• implies reasonable assumptions must be used. This was a 2-to-1 decision. The dissenting judge noted ERISA does not specifically require the use of a reasonable assumption in this area, although it does in others. *Reichert v. Kellogg* (6th Cir. 3.16.2026).

Underscoring the uncertainty in this area, four days after *Reichert v. Kellogg* was decided, a district court in Missouri (in the Eighth Circuit) came to the opposite decision: that reasonable assumptions are not required in the calculation of actuarily equivalent benefits*. Landel v. Olin Corp.* (E.D. Mo., 3.20.2026).

Plan sponsors with questions about actuarial equivalence should contact their attorneys and actuaries.

DOL Announces Enforcement Priorities

In an unusual move, the DOL has issued Field Assistance Bulletin No. 2026-01, directed to internal DOL personnel and DOL field offices, updating its enforcement priorities. Consistent with other recent

initiatives, this bulletin appears to favor fiduciaries who employ a thorough and diligent governance process. The stated priorities are as follows:

1. *Focusing on the most egregious conduct and most significant harm.* The DOL intends to focus primarily on fiduciary loyalty breaches, targeting individuals and organizations that act in bad faith by enriching themselves or others at the expense of plan participants. Suspected breaches of prudence will take a back seat to suspected breaches of loyalty.
2. *The DOL will not regulate through enforcement actions.* Instead, it will give clear advance notice of its interpretations of ERISA and of fiduciary responsibilities. Novel legal theories or ERISA interpretations of ERISA should not be first articulated through enforcement actions.
3. *A centralized review of all significant enforcement activities.* This will help ensure coordinated nationwide positions that are consistent with DOL leadershipâ??s views. This will be implemented through advance reporting to DOL leadership of significant enforcement activities, including settlements and corrective actions.
4. *Responsive and timely enforcement.* This will be implemented through the imposition of an 18-month timeline to conduct enforcement activities, unless complexity warrants a longer (30-month) timeline. Investigations taking longer than the target timelines will be reviewed quarterly by the Director of Enforcement.

Beneficiary Changes Must Follow the Planâ??s Proceduresâ??No, Really

A plan participant was divorced and sent a fax to his employerâ??s human resources department directing that his former wife should be removed as the beneficiary of his 401(k) plan account. In the fax, the participant asked that the human resources department send him any paperwork he would need to complete in order to make the change. No additional action was taken by the participant.

Following the participantâ??s death, a dispute arose over whether his former wife or the participantâ??s estate should receive the plan benefits. The district court awarded the benefits to the participantâ??s estate, finding that the fax directing the beneficiary change was in *substantial compliance* with the planâ??s beneficiary-election procedure. On appeal, the district court decision was reversed.

Although the appellate court agreed that the substantial compliance doctrine exists under ERISA, it found that sending a fax, rather than completing the planâ??s change of beneficiary form, did not substantially comply with the planâ??s required procedure. In its decision, the court cited several other cases where the correct form had been used but improperly or incompletely completed, and substantial compliance was found. *Packaging Corporation of America Thrift Plan for Hourly Employees v. Langdon* (7th Cir. 2026).

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