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GOALS-BASED PERSONALIZATION IN MANAGED ACCOUNT INVESTING: CONSIDERATIONS FOR ERISA FIDUCIARIES

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GOALS OF THE WHITEPAPER

This legal white paper, commissioned by Franklin Templeton in connection with the introduction of its Personal Retirement Path powered by Goals Optimization Engine (GOE), is intended to help fiduciaries considering the use of a personalized goals-based solution to understand how such a solution might fit within ERISA's fiduciary rules governing their conduct and process. But this paper will not tell you that fiduciary duties force you to choose any particular investment model for a managed account or advice service, or to select one investment over another. No investment decision is either a necessary or sufficient condition to meeting your responsibilities or avoiding fiduciary liability, nor is there only one "prudent" approach to plan investments or solutions. The best a fiduciary can do is work hard on a prudent fiduciary decision-making process. Rather, this paper hopes to explain, using the language of ERISA, why fiduciaries will already have the natural inclination to consider a managed account service that drives towards a participant's personalized goals.

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Introduction

This white paper takes a fresh look at an old topic—how should a plan fiduciary of a 401(k) or similar defined contribution plan think about achieving success for plan participants? Employers, who typically serve as the plan's fiduciary, have long understood the need to offer a variety of diversified investments at a reasonable cost, to provide investment education so participants can make informed choices, and designate an appropriate default investment in the case of a plan with automatic enrollment. Plan fiduciaries are also increasingly thinking creatively about ways to help a participant achieve their goals, which are highly personal. We now have managed account solutions, interactive online tools to estimate retirement income, financial wellness education that helps participants consider their entire financial picture, and innovative nudge techniques to get employees to increase contribution rates over time.

This paper focuses on the relationship between fiduciary oversight of a retirement plan and investment strategies *based on a participant's personalized goals.* In collaboration with Franklin Templeton, the paper explores how ERISA's flexible fiduciary standards support and even encourage fiduciaries to take into account a participant's retirement goals in deciding which investments and investment solutions to make available under the plan. Later in the paper we address a particular solution designed by Franklin Templeton, which manages personalized portfolios around the probability of achieving a participant's stated goals and periodically reallocates the portfolio to maximize the likelihood of reaching those goals. But the broader thrust of the paper is to explain how the law encourages goals-based personalization in 401(k) plans.

Regulating fiduciary conduct under a flexible goals-based standard

All plans subject to ERISA must assign responsibility for making investment decisions to one or more fiduciaries. In a typical 401(k) defined contribution plan, where participants have the right to allocate their own account among different investment options, the primary responsibility of the fiduciary with respect to plan investments is to select and monitor the investment menu. The fiduciary also arranges for investment education and, often, additional investment services such as investment advice, a managed account service, or a brokerage window. Further, because of the explosive growth of automatic enrollment, one of the most important decisions many fiduciaries make today is to determine which investment will serve as the plan's default, also known as the qualified default investment alternative (QDIA).

In fulfilling the duties of administering the plan, ERISA commands that fiduciaries must meet what is sometimes called the "prudent expert" standard. The following language, that has been in ERISA since 1974, will be very familiar but bears repeating to highlight how the flexible standard applies to the modern way that we offer retirement savings to workers:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; [and]

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims…[1]

Fiduciary training often emphasizes the parts of this standard that tell fiduciaries to act solely in the interests of participants, called the duty of loyalty, or the duty to act with care, skill, prudence, and diligence, called the duty of prudence. But just as important is *how* ERISA describes the duty of prudence.

Adapting to current circumstances and advances in investing. First, ERISA tells fiduciaries to focus "on the circumstances then prevailing." Congress intended a fiduciary to adapt plan administration to the current situation and anticipated that circumstances might change. Plan design, investment conditions, and participant needs are very different now than they were in 1974. This proved prescient: section 401(k) plans did not even exist in 1974 and certainly Congress did not anticipate the modern 401(k) design we have today, as the primary retirement vehicle for millions of Americans to supplement Social Security. Nonetheless, Congress created a flexible standard and deliberately rejected the notion of what are called "legal lists" of investments or investment solutions that are allowed (or not allowed) in a plan.[2]

Accordingly, regulation of fiduciary conduct in the more than 45 years since the passage of ERISA has adapted to advances in how we think about preparing participants for a secure retirement, whether that's harnessing new electronic disclosure technologies,[3] providing plans access to sophisticated investments like private equity, futures, or swaps,[4] or recognizing advances in technology-enabled account management.[5] It is part of a fiduciary's ongoing obligation to be aware of and consider new thinking and innovations that may be relevant to the plan or its participants. That's not to say, of course, that a fiduciary must buy every new shiny object in the marketplace, but rather, as part of a continuing process of monitoring the investment of plan assets, fiduciaries should be aware of changing circumstances, keeping in mind how a prudent person acting in a like capacity and familiar with such matters would act.

Asset allocation models and managed account solutions, which are common in various forms in 401(k) plans, typically rebalance a participant's account periodically to reflect market movement. ERISA's command to consider "the circumstances then prevailing" is also important for any managed account or investment strategy that rebalances assets periodically. At each reallocation, the "circumstances" that led to the initial asset allocation decision may have changed. Thus, the fiduciary—and any asset allocation model or managed account used under the plan—should adapt to market conditions and expectations not just when a participant first determines an asset mix but also as those conditions and expectations change.

Process, not outcome

ERISA's fiduciary standard is focused on the process used by fiduciaries to arrive at decisions, not the outcome of those decisions. A sound, prudent, and documented process based solely on the interests of participants will be respected by a regulator or a court. The process should, however, take into account the relevant facts and circumstances and consider what goal the plan or its participants are trying to achieve.

Focusing on the goals of the plan. Just as important as ERISA's command to take into account the current circumstances is the phrase *"an enterprise of a like character and with like aims."* ERISA is telling a fiduciary to ask: *what would a prudent person do if managing a plan with a similar character and aims?* Put another way, ERISA is directing fiduciaries to think about the goals of the plan and its participants.

Back in 1974, defined benefit (DB) plans were more prevalent, and the objective of fiduciaries and their investment professionals was to ensure that the assets were invested consistently with the actuarial funding needs of the plan. The goal of a DB plan is to provide annuity payments for many years for participants based solely on a benefit formula in the plan. The investment strategy was therefore designed to meet that goal, which need not be personalized in any way to a particular employee. The Department of Labor (DOL) has confirmed that it would be appropriate to invest the assets of a DB plan by taking into account the liability obligations of the plan and the risks associated with such liabilities, with the goal of reducing volatility in the plan's funding requirements.[6]

But the modern 401(k) plan has very different "character and aims." Each participant has an account from which to generate retirement income, and the account value is based solely on the contributions made and the earnings or losses from investments. The "character" of the plan is largely driven by decisions that must be made by participants; these participants are directly impacted by the investment solutions within the plan. And the "aim" of the plan, at least in part, is to have participants invest in ways that will provide adequate income security in retirement. That is not to say that the plan *guarantees* such an outcome, but that is its *aim*.

Employers place on their participants the responsibility to invest in their own account, in part, because it permits a participant to make investment decisions that meet his or her goals and individual circumstances. Empowering participants to invest in their own retirement account was contemplated even back when ERISA was enacted, and Congress included a specific provision—section 404(c) —which relieves fiduciaries of responsibility for losses resulting solely from decisions made by participants in allocating their account among the investments available. This relief is very limited, however. Fiduciaries are responsible, and thus liable, for deciding which investments are available under the plan, and if a managed account or investment advice service is offered, ensuring the service is prudent.

Department of Labor Views on investment goals. This notion that investment strategies should focus on the goals of the plan are enshrined in some of the earliest guidance for fiduciaries. DOL's regulation on investment responsibilities, published in 1979 and still in effect today, directs fiduciaries to give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties."[7] The regulation also states that appropriate consideration involves a "determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further ***the purposes of the plan,*** taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action."[8]

Although neither ERISA nor the early DOL regulations use the words "modern portfolio theory," that's exactly what ERISA baked into fiduciary conduct: the relationship between risk and reward, the value of diversification in portfolio construction, and the importance of understanding tolerance for volatility given an investor's goals.

Interestingly, this same regulation recognizes that an investment manager may only have responsibility for a portion of the plan's portfolio. The regulation states that the investment manager may rely and act upon information provided to the manager for the stated purpose of assisting the manager in performance of its investment duties with respect to that portion of the portfolio.[9] Although DOL was thinking in 1979 about an investment manager assigned to a single investment class (such as large cap equities), the regulation implements an important principle relevant to today's 401(k) plan: *Participants may have different goals based on their individual needs, preferences, outside assets, etc. and may provide that information to the plan fiduciaries so that the fiduciaries or the service providers can help the participant invest his or her account as part of an overall financial picture.*

On June 30, 2020, DOL proposed amendments to the 1979 regulation.[10] These amendments are intended to reiterate the need for plan fiduciaries, when making investment decisions, to act solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to their participants and beneficiaries and defraying reasonable expenses of administering the plan. The proposal would also place additional burdens on a fiduciary who decides to consider environmental, social, and governance (ESG) factors in investment decisions. The proposed regulatory amendments are not relevant to the issues discussed in this white paper. In fact, the parts of the 1979 regulation that DOL is proposing to *retain* are the parts discussed above, that is, the need to focus on the goals of the plan when making investment decisions. In other words, in this proposal DOL has reiterated the importance of goals-based investment courses of action.

Increasing focus on personalization for participants

The prior section focuses on how ERISA's general fiduciary standard encourages fiduciaries to think about the *goals* of the plan and its participants, which in the modern 401(k) plan we think of as finding ways to allow participants to *personalize* their investing to meet their individual goals and circumstances. Personalization of the participant experience is not new. In fact, in putting together this paper we were surprised to discover just how many ways the law already promotes and supports personalization. This section provides just a few examples of how Congress and regulators already encourage plan sponsors and fiduciaries to personalize the participant experience.

- **Integration with Social Security.** Most Americans' employment-based retirement plan is only a part of their retirement solution. Social Security benefits form an important income base, and in fact most 401(k) plans serve as a supplement to Social Security. Social Security replaces a much higher percentage of pre-retirement income for individuals with lower lifetime earnings, and thus higher earners must save much more, as a percentage of their compensation, to ensure an adequate replacement income in retirement.[11] The tax law recognizes this fact by allowing plans to be "integrated" with Social Security, meaning employer contributions for compensation above the Social Security wage base may be significantly higher than contributions based on compensation below the Social Security wage base.[12] This helps personalize the plan design for each participant's needs once Social Security is considered.

- **Importance of offering investments along the full risk/return spectrum.** ERISA section 404(c) plans, which provide participants the opportunity to exercise control over the assets in their accounts, must meet certain requirements to ensure that participants can achieve a portfolio suited to their needs. One of the requirements is that the plan must offer at least three diversified investments which have materially different risk and return characteristics and which, taken together, enable the participant to "achieve a portfolio with aggregate risk and return characteristics *at any point* within the range normally appropriate for the participant."[13] In other words, the section 404(c) regulation recognizes that there is a spectrum of investing needs and the investment menu must allow a participant to pinpoint the risk level appropriate for that participant.

- **QDIA regulations.** One of the most consequential regulations of the past 20 years is the QDIA regulation, which sets forth the types of default investments that can qualify for the fiduciary relief in ERISA section 404(c). The regulation envisions default investments such as a target date fund (which is personalized based on age) or a managed account (which must be personalized based on at least age and can be personalized based on other factors). Even if the plan fiduciary decides to use a single balanced fund as the default, DOL requires that the balanced fund chosen is personalized to the overall demographics of the plan.[14] The QDIA regulation is discussed in more detail below.

- **PPA investment advice.** In 2006, as part of the Pension Protection Act, Congress created a new exemption allowing for the furnishing of investment advice, including through use of a computer model. Both the statute and the implementing regulations require that the computer model take into account personalized information from the participant, including age, time horizons (e.g., life expectancy, retirement age), risk tolerance, current investments in designated investment options, other assets or sources of income, and investment preferences.[15]

- **Personalized investment education.** DOL rules that describe investment education encourage educating participants about personalized goals and needs, including estimating future retirement income needs, determining investment time horizons; and assessing risk tolerance. Even more, the education rules facilitate asset allocation models and interactive investment materials that consider specific personal facts about the participant, including the existence of other accounts, income or investments.[16]

- **Personalizing the plan menu for participant preferences and values.** The subject of economic, social and governance (ESG) factors in investing has been the subject of significant guidance over the years. Because fiduciaries must act solely in the interest of the plan and its participants, DOL's long-standing view is that plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk as a means of using plan investments to promote collateral social policy goals. In 2018, DOL confirmed, however, that a plan's menu may include a prudently selected, well managed, and properly diversified ESG-themed investment alternative in response to participant requests for an investment alternative *that reflects their personal values.*[17]

The notion that a plan fiduciary should "meet participants where they are" pervades many other aspects of fiduciary conduct. For example, if a substantial portion of employees are literate in a language other than English, DOL regulations provide that the summary plan description must be adapted to meet the needs of those employees.[18] Similarly, various court cases have confirmed that fiduciaries sometimes have a duty to volunteer information when the fiduciary knows or should know that a participant or beneficiary has unique circumstances that might make silence harmful.[19]

Franklin Templeton Personal Retirement Path

Personal Retirement Path powered by Goals Optimization Engine (GOE)™ is a proprietary personalized goal optimization solution developed by Franklin Templeton to be used with retirement plans and individual plan participants, among other applications. The solution is designed to be highly customizable and flexible and to be deployed in a variety of products and settings. Thus, for example, Personal Retirement Path could be used as a managed account solution personalized for a particular individual that is designated as a plan's QDIA. GOE could be the engine behind a third-party set of front-end inputs. GOE could also be used to design model portfolios based around individuals that share certain characteristics.

Like most personalized investment models, Personal Retirement Path provides a significant advantage over a target date fund (TDF). A TDF allows for one and only one input: the participant's expected retirement date. Target date funds assume that every participant invested in a particular TDF vintage has the same ability to tolerate volatility and the same goals and financial circumstances. Personalized investment models are able to deal with a far greater range of inputs, such as a participant's current plan and outside assets, expected Social Security income, contribution rate, salary, employer match, spouse's pension and savings, risk tolerance and aversion to large market swings, and, perhaps most importantly, the participant's target wealth or income replacement rate.

Like other personalized investment models, Personal Retirement Path will generally determine a higher investment risk allocation early in a participant's savings career, and this risk will generally taper down over time. Also like many models, Personal Retirement Path can be used to provide recommendations within a set of predetermined investment options on a plan's investment menu. It can be deployed either with funds managed by Franklin Templeton or non-proprietary funds.

What makes Personal Retirement Path different from other personalized investment approaches is a focus on the likelihood of meeting a participant's goals.

With Personal Retirement Path, the goal will be to achieve a certain level of target wealth. Personal Retirement Path then creates an investment path based on the starting wealth, target wealth, loss threshold, investment tenure and capital market expectations to provide a probability of success to meet the target wealth goal.

What makes Personal Retirement Path different from other personalized investment approaches is a focus on the likelihood of meeting a participant's goals. The standard approach to asset allocation is to target a specific risk/return level and then to adjust the investments to match that risk/return level. The standard approach then manages an account over time to the original risk/return level and the volatility expected from such a risk/return level based on market expectations.

Thus, as market conditions change, standard approach rebalances the portfolio to the risk/return level that the solution recommends. The standard approach will only indirectly manage toward the participant's goals, and only insofar as the risk tolerance is correlated with the participant's goals for retirement.

Personal Retirement Path's approach to changing market conditions is different. For Personal Retirement Path, *the probability of goal success* drives the risk and asset allocation decisions of the initial investment path and at each reallocation. Put another way, the probability of success is a key determinant of the asset allocation and not simply a byproduct of the investment process.

A very simplified example will illustrate this difference. Imagine a 35-year-old participant with a target wealth goal of $800,000 at age 65. Imagine a standard asset allocation approach that has determined, based on inputs from the employer and the participant, that a mix of 70% equities and 30% fixed income will maximize the chance of success. Then imagine that a market event such as the severe downturns in 2008 or 2020 occurs, which results in a shift from the target allocation. The standard approach would simply rebalance the portfolio back to this 70/30 mix.

Personal Retirement Path, on the other hand, does not manage the portfolio to a predetermined risk level. It might initially evaluate the asset mix at a similar level but, with changing conditions, it will respond differently. At the next reallocation, it would reevaluate the portfolio based on the stated goal: the probability of having a target wealth of $800,000 at age 65. This might result, at least temporarily, in a higher allocation to equities, depending on market conditions and capital market expectations. This higher allocation is necessary to maximize the probability of meeting the participant's goals.

Another way to look at how Personal Retirement Path will differ from other approaches is to consider an initial asset allocation that is expected to earn 8% but that actually earns, for a period of years, a 12% return. This higher-than-expected account return *changes the probability* of meeting the participant's goal. Personal Retirement Path would, at the next reallocation, reduce investment risk that is no longer necessary to achieve the desired probability of success. And the opposite is true: if the portfolio experiences a lower-than-expected return, Personal Retirement Path will reallocate the portfolio—taking on additional risk—to maximize the chance of meeting the participant's goal.

The above examples are very simplified, of course. For example, Personal Retirement Path not only shifts the portfolio based on broad asset categories correlated with historical risk/return characteristics, but also within the individual portfolio investments, as markets evolve. The Franklin Templeton Investment Solutions (FTIS) investment team determines and reevaluates the capital market expectations, which provide inputs into the engine driving Personal Retirement Path. Personal Retirement Path can, however, accept capital market expectations from other sources as an input.

In addition to changing market conditions, Personal Retirement Path can automatically adjust to reflect other changes in the participant's circumstances, including an increase or decrease in contributions, unexpected loans or withdrawals prior to retirement, or changes to goals.

The inputs for the engine behind Personal Retirement Path are not static. They can be customized by a plan during implementation. For example, the inputs can be adjusted based on:

- Source of capital market expectations
- Frequency of reallocation
- Triggers for off-cycle reallocation
- Products used for portfolio construction
- Investor risk profile definitions
- How loss thresholds are defined and used

Many institutional users of Personal Retirement Path may not have the need or desire to customize the inputs to the underlying engine in this way. Regardless of how the engine is customized, the driving force behind Personal Retirement Path remains the same: dynamically managing the investment allocation to maximize the probability of meeting the participant's goals.

Applying Personal Retirement Path to ERISA's fiduciary principles

ERISA's statutory and regulatory investment rules are, at their heart, an expression of the value of modern portfolio theory, which recognizes the relationship between risk and return, the historic performance of different asset classes, and the importance of diversification. Personal Retirement Path is not a major rethinking of modern portfolio theory; it continues to reflect those long-standing investment strategies.

An investment or investment solution driven by Personal Retirement Path, does, however, pick up on a key piece of ERISA's embedded fiduciary obligations: the requirement to consider the "character and aims"—i.e. the goals—of a participant. As stated above, under Personal Retirement Path the probability of *goal success* drives the risk and asset allocation decisions of the initial investment path and at each reallocation. Personal Retirement Path keeps in focus, at all times, the participant's goal for his or her retirement savings, and adjusts allocation decisions to reflect changes in circumstances.

In addition, as noted earlier, a fiduciary must be careful to consider the "circumstances then prevailing," meaning that as conditions change, so must the investment strategy. Personal Retirement Path's response to changed conditions is not to modify the *goals* of the participant—as these typically won't change just because of market movement—but rather to adjust the investments upon reallocation based on those changed market conditions and expectations to maximize the probability of meeting the participant's goals.

And that's the key point to take away from this white paper. Personal Retirement Path is consistent with long-standing fiduciary principles to give attention to the goals of the plan and its participants in making decisions, and to reflect current circumstances. A fiduciary that chooses to offer participants an investment or investment solution like Personal Retirement Path will be continuing a long line of developments, both in the marketplace and in regulatory guidance, to increase attention on personalization in driving towards retirement outcomes and to adapt dynamically to changing circumstances. Personal Retirement Path is not the only tool available to fiduciaries to help their participants to achieve retirement security, but it is one that can be considered consistent with the ERISA fiduciary standard.

> No plan participant would describe his or her retirement goal as "having 25% of my account invested in equities." Rather the participant would say: "Given where I am now, I would like to have $500,000 saved by age 65 to supplement Social Security." This is the **character and aim** of the plan which a fiduciary should consider in decision-making.

Of course, before choosing to offer to participants an investment or investment solution, or any other investment algorithm, plan fiduciaries should consider all the facts and circumstances, including the role that it will play in the overall *menu of investment options offered to participants* and the fees associated with the investment solution. As with any service or investment provider, a fiduciary should ensure that the services are necessary for the operation of the plan, the arrangement with the plan is reasonable, and no more than reasonable compensation is paid for the service.[20]

Prudence focuses on the process for making fiduciary decisions. In evaluating any investment or investment solution, a fiduciary that lacks expertise to perform the necessary evaluation will want to hire someone with that professional knowledge to assist. Finally, it is also good advice in any fiduciary process to document the basis for decisions.[21]

Using Personal Retirement Path as part of the plan's QDIA

In 2006, Congress directed DOL to promulgate rules for what have become known as QDIAs, namely default investments used in plans subject to ERISA section 404(c). If the plan's default investment qualifies as a QDIA, a participant who is defaulted into the investment is treated as having exercised independent control over the assets in his or her account, and the plan's fiduciaries are entitled to the relief of ERISA section 404(c). As stated above, Personal Retirement Path can be deployed as the default investment solution.

Personal Retirement Path is not an investment *per se* but rather a solution that can be used to create a personalized asset allocation based on a stated goal. For purposes of this discussion, it is assumed that other requirements of the QDIA regulation are satisfied.[22]

Because of the ability to consider information beyond just a participant's age, if Personal Retirement Path will be deployed as part of a QDIA, it would likely be as a managed account. In contrast to target date funds, managed accounts that use personalized investment models are typically able to consider much more than just the age of the participant, including a participant's current plan and outside assets, expected Social Security income, contribution rate, salary, employer match, spouse's pension and savings, risk tolerance and aversion to large market swings, and the participant's target wealth or income replacement rate.

Permitted QDIAs

The QDIA rules require that the default investment be one of the following:

Target date fund. These funds are often used as QDIAs, but it is widely recognized that their simplicity is also a disadvantage because they cannot consider *any* personalized information other than the participant's age.

Balanced fund. This is the least popular QDIA because it lacks any personalization except as to the plan demographics as a whole.

Managed account. Managed accounts are generally more flexible and dynamic than target date funds, because they are designed and able to consider information beyond just a participant's age or expected retirement date.

The QDIA regulation makes clear that, to qualify as a QDIA, a managed account is not *required* to take into account risk tolerances, investments or other preferences of an individual participant.[23] This is important because some participants may be defaulted into the managed account having provided very little individualized information, so the minimum the managed account must consider is the participant's age.[24] But the DOL also made clear in the preamble to the final QDIA regulation that a managed account that functions as the plan's QDIA might also be used by participants who provide additional information about their circumstances and goals.[25] Personal Retirement Path can take into account information that the employer or the plan's recordkeeper already knows, such as a participant's contribution rate, salary, and level of employer matching or nonelective contribution without a participant engaging.

In short, so long as a managed account that is designed to achieve a desired goal (a) applies generally accepted investment theories and (b) takes into consideration, at a minimum, the participant's age or target retirement date, the managed account would qualify as a QDIA if the other requirements of the QDIA regulation are met.

IMPORTANT DISCLOSURES

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ENDNOTES

1. ERISA § 404(a)(1)(A), (B).

2. Private Welfare and Pension Plan Legislation: Hearings Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor, 91st Cong. 476 (1970) (statement of Hon. George P. Schultz, Sec. of Labor) ("In recognition of the dynamic character and development of welfare and pension plans, the [prudent person standard] attempts to strike a reasonable balance between the need for additional safeguards and the desirability of maximum freedom from governmental interference."); id. at 773 (statement of Preston C. Bassett, Council on Employee Benefits); Rules and Regulations for Fiduciary Responsibility, Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37221, 37225 (June 26, 1979); James D. Hutchinson & Charles G. Cole, Legal Standards Governing Investment of Pension Assets for Social and Political Goals, 128 Pa. L. Rev. 1340 (1980).

3. 83 Fed. Reg. 31884 (May 27, 2020).

4. ERISA Information Letter 2020-06-03 (private equity); Advisory Opinion Letter 2013-01A (Feb. 7, 2013) (cleared swaps); Advisory Opinion Letter 82-49A (Sept. 2, 1982) (futures contracts).

5. ERISA § 408(g); ERISA Advisory Opinion Letter 2001-09A (Dec. 14, 2001).

6. ERISA Advisory Opinion Letter 2006-08A (Nov. 3, 2006).

7. 29 C.F.R. § 2550.404a-1(b)(1).

8. Id. at -1(b)(2)(i) (emphasis added).

9. Id. at -1(b)(3).

10. 85 Fed. Reg. 39113 (June 30, 2020). At the time of writing, the proposal has not been issued in the form of a final regulation.

11. *See* Brady, Peter J., and Steven Bass. 2020. "Who Participates in Retirement Plans, 2017." ICI Research Perspective 26, no. 3 (May), available at www.ici.org/pdf/per26-03.pdf.

12. IRC § 401*(l)*.

13. 29 C.F.R. § 2550.404c-1(b)(3)(i)(B) (emphasis added).

14. *See* 72 Fed. Reg. 60452, 60461-61 (Oct. 24, 2007).

15. ERISA § 408(g); 29 C.F.R. § 2550.408g-1.

16. *See* Interpretive Bulletin (IB) 96-1, 29 C.F.R. § 2509.96-1(d)(3), (4). *See also* prior 29 C.F.R. § 2510.3-21(b)(2)(iv)(C), (D). This regulation was vacated *by Chamber of Commerce v. Department of Labor,* 885 F.3d 360 (5th Cir. 2018) and then removed by the DOL (*see* 85 Fed. Reg. 40589 (July 7, 2020)), but the portion cited here, related to investment education, was not challenged in the ligation and is substantially similar to IB 96-1.

17. DOL Field Assistance Bulletin 2018-01 (Apr. 23, 2018).

18. *See* 29 C.F.R. § 2520.102-2(c).

19. *See,* e.g., Van Loo v. Cajun Operating Company, No. 14-cv-10604, 2014 WL 675043 (E.D. Mich. Dec. 1, 2014); Krohn v. Huron Mem' Hosp., 173 F.3d 542, 550 (6th Cir. 1990).

20. 29 C.F.R. § 2550.408b-2(a).

21. Department of Labor, *Meeting Your Fiduciary Responsibilities* (Sept. 2017).

22. Thus, for example, participants are provided all required notices and information, the participant may take withdrawals from the investment within the time frames required by the QDIA regulation, and there are no restrictions, fees, or expenses during the 90-day period beginning on the participant's first elective contribution. 29 C.F.R. § 2550.404c-5(c). In addition, it is assumed that the QDIA is either managed by an investment manager or trustee meeting the requirements of ERISA section 3(38). Id. at -5(e)(3)(i).

23. Id. at -5(e)(4)(iii).

24. 71 Fed. Reg. 56806, 57810 (Sept. 27, 2006).

25. 72 Fed. Reg. 60452, 60462 (Oct. 24, 2007); *see also* 71 Fed. Reg. at 56811 n. 12 (connecting managed accounts in which participants play an active role in preparing an investment profile with managed accounts that are QDIAs).

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