Assistant Secretary Aronowitz Keynote Address
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On behalf of the Secretary of Labor Chavez-DeRemer and Deputy Secretary Sonderling and all of the professionals at the Employee Benefits Security Administration (EBSA), thank you for the opportunity to kick off the 2026 NAPA Summit.

EBSA is the steward of the retirement system in America, which is the greatest retirement system in the world. Plan advisors, like all of you, also play an important role in the stewardship of retirement plans. We are all pivotal players on the stage of this great retirement system.

Today I want to discuss a significant threat to that system, and what the President tasked DOL to do about it. I am referring, of course, to litigation abuse by the ERISA plaintiffs' bar and regulatory overreach of the prior administration.

I want to start with a summary of a high-profile ERISA class action lawsuit alleging fiduciary imprudence that exposes the problem; and then talk about DOL's new groundbreaking proposed Investment Selection Safe Harbor Rule.

Intel Imprudent Investment Case

In October 2015, Intel Corporation was sued by participants in its company-sponsored 401(k) plan, alleging that plan fiduciaries had breached their fiduciary duties by offering bad investment choices.

In January 2016, a second class-action lawsuit was filed. And in August 2019, yet a third-class action lawsuit piled on. All three lawsuits asserted the same fiduciary breach claims relating to the same plan investments in alternative investments.

According to plaintiffs, Intel fiduciaries had engaged in a "market defying strategy" and "novel experiment" gone bad, by heavily investing nearly $14 billion of workers retirement money in risky hedge funds and private investments.

According to plaintiffs, Intel fiduciaries had ignored all warnings: "Regulators, investment experts and financial press all warned that these investments were ill-suited for defined contribution plans like Intel's"; that "hedge funds and private equity are less regulated and riskier than traditional investments like stocks and bonds, which is why they are off-limits to nearly all retail investors"; "And they are far more costly – the fees charged by hedge-fund and private-equity fund managers can be ten times those charged by mutual funds."

Plaintiffs continued: "almost all [other] large defined-contribution plans and retirement funds invested *no* assets in hedge funds and private equity. And even the small number that did so allocated only a tiny fraction to these non-traditional investments."

According to the class-action complaint, "this novel asset-allocation approach [of around 30% to Intel's target-date funds] amounted to 'institutional gambling' with employees' assets." The complaints alleged hundreds of millions of dollars of losses based on this allegedly "radical asset-allocation strateg[y]."

Now gambling with retirement assets sounds really bad; and it would be even worse to lose hundreds of millions of dollars of retiree money. Therefore, let me make something clear, so there is no misunderstanding: the leader of EBSA is not recommending that you gamble with your client's plan assets. That would be bad.

What I am here to tell you is that anyone with experience in ERISA class action litigation understands that you need a healthy dose of skepticism before believing this type of hyperbolic rhetoric. Many of these lawsuits are fantasy tales that would make Harry Potter cringe. There are two sides to every story.

And if you read the decision of the district court granting the motion to dismiss, you would learn that the Court found Intel fiduciaries had no desire to gamble with their employees' retirement savings. In fact, they intended the exact opposite.

The Intel fiduciary investment committee redesigned their 401(k) plan in 2009 with a strategy of risk-mitigation strategy expressly designed to learn from the lessons of the 2008 financial crisis. They wanted to protect their plan participants from a 2008-type huge market loss.

In adopting this risk-mitigation strategy, the Intel fiduciaries asserted that they looked to modern portfolio theory, which recognizes that while investment risk cannot be eliminated, it can be reduced through diversification: the goal was to reduce volatility and earn stable risk-adjusted returns that would better cushion participants against the risk of precipitous market drops.

The Intel fiduciaries, therefore, charted a course to broadly diversify the Funds' investments to include not only stocks and bonds, but also "non-traditional assets," including hedge funds and private equity, all with the goal of reducing volatility and achieving stable, risk-adjusted returns.

Intel's plans had two funds available to participants that contained alternative investments: (1) a 30% allocation of custom target-date funds to non-traditional investments; and (2) more than half of its customized global diversified fund allocated to hedge funds and private equity. Intel asserted that it looked at models showing 41% investment losses in the 2008 crisis could be reduced to only 17% losses with the addition of these market hedges.

Plan fiduciaries engaged in a cost-benefit analysis: their risk mitigation strategy would deliver slightly lower returns during a bull market than equity-laden funds and would carry higher fees typically charged for actively-managed investments. But the payoff would be reduced volatility and downside protection if the market experienced another 2008-type of stock market decline.

According to Intel, the risk mitigation strategy performed as disclosed to participants, cushioning participants against stock-market volatility while yielding positive returns. For example, their global diversified fund with a 50% allocation to alternative investments outperformed 80% of the largest funds in the Morningstar World Allocation Category between 2008 and 2018. But that was not what the fiduciary breach lawsuits judged Intel fiduciaries against.

The lawsuits sought hundreds of millions of dollars in damages by claiming it was a *per se* breach of fiduciary duty to use alternative asset hedges in the plan. The lawsuits were a broadside attack on the use of private equity or any other alternative investments in retirement plans.

And instead of an apples-to-apples comparison of the Intel funds to other risk-mitigation strategy funds with volatility hedges, the $100 million-plus damages model compared the lower-risk Intel target-date funds and global diversified fund to other popular TDFs available in the market that had a higher equity allocation in each glide path and corresponding higher risk.

Here is the irony: Notwithstanding the institutional gambling rhetoric in the lawsuits that "private equity is [categorically] risky," Intel's conservative strategy was unfairly compared to a *riskier* strategy. Properly read, the lawsuits alleged that Intel fiduciaries should have taken *more risk* in the stock market – in other words, plaintiffs' benchmark was target-date funds with a higher allocation to the volatility of the stock market.

Ultimately, after eight years of litigation and a trip to the Supreme Court on a statute of limitations issue, the federal district court granted Intel's motion to dismiss in 2022; and the dismissal was upheld on appeal in the Ninth Circuit three years later in 2025. The courts rejected a fiduciary-malpractice claim without facts supporting an inference of a deficient process; and the courts did not allow an unfair comparison to the results of investments that had a different and riskier strategy.

But it took an eleven-year odyssey – and it is still not over. Even Odysseus would have made it back to Ithica by now. The case is now before the Supreme Court. This time the Court will decide whether a meaningful benchmark standard applies to claims of imprudence relating to private equity investments.

Intel has still not been able to vindicate the discretionary investment decisions of its plan fiduciaries. Its conservative investment strategy – maligned in three lawsuits as institutional gambling – is still on trial.

By contrast, most American companies cannot afford to litigate for over a decade. Most companies choose to settle these cases to make the lawyers go away. Plaintiff law firms have significant settlement leverage in ERISA class action litigation because it costs millions of dollars to defend these cases with asymmetrical discovery burdens and exaggerated damages models.

And that is why the ERISA class action model works – even when many cases are based on misleading claims of fiduciary malpractice. Intel is not alone in being sued for fiduciary malpractice in its company-sponsored 401(k) plan. Hundreds of excessive fee and performance malpractice cases have been filed against America's plan fiduciaries in the last 15 years by an enterprising and ever-growing ERISA plaintiffs' bar.

Many of these lawsuits allege false and inflated claims of excessive fees that are objectively untrue, and these incorrect fees are then often compared to misleading purported benchmarks. Many lawsuits attack well-established fiduciary practices, like the over 75 lawsuits challenging how plan forfeitures are applied to contribution obligations; or the 13 lawsuits challenging pension risk transfers.

The private retirement system has been swamped with lawsuits challenging fee and investment decisions – with over half of jumbo plans sued in the last ten years – litigation that has almost exclusively benefited plaintiff lawyers: who have secured well over $500 million in fees in these cases, whereas most plan participants take home only a token $25-100 of the recovery. This is a scam. While plaintiff lawyers take outsized credit for the overall decline in retirement fees over the last decade, these lawsuits are not about helping participants in any meaningful way. They are about enriching lawyers on both sides of the lawsuits.

Intel is not the only company sued for adopting a conservative investment strategy, only to face a damages model that compares their risk-mitigation strategy to hindsight results of target-date funds that took more risk by including a higher-percentage of stock in the glide path during a 10-year-plus bull market. Intel is also not the only fiduciary committee to be sued when they tried an innovative investment strategy in a 401(k) plan.

In fact, some companies who chose low-cost, plain-vanilla index target-date funds, have been sued just because they offered a single actively managed stock fund in the plan lineup. These purported fiduciary-breach cases have weaponized ERISA to create unfair risk and second-guessing of plan fiduciary decisions.

This type of litigation abuse is that it deters conscientious plan sponsors from trying innovative strategies that could protect their employees. When the system allows lawsuits attacking thoughtful fiduciary investment strategies, innovation dries up.

We end up with a smaller and smaller subset of potential investments in retirement plans – with most plans relying on the S&P 500 as the primary investment vehicle, which itself is highly dependent on the success of ten dominant technology company stocks with trillion-dollar-plus valuations. This is how abusive litigation hurts American workers.

DOL's Investment Selection Rule

To fix this mess, President Trump issued an Executive Order last August to democratize investments in 401(k) plans to achieve the best possible risk-

adjusted returns and retirement security for America's workers and their families. A key tenant of the President's Executive Order is the recognition that innovation in retirement plans has been stymied by litigation abuse such as the Intel case.

Alternative investments used in 99% of governmental plans are not available to private-sector workers – not because they do not work or add value to retirement benefits – but primarily because of the fear factor of class-action litigation. The President wants DOL to restore balance and fairness to the voluntary benefit system. President Trump wants to advance the Golden Age of retirement security for the American worker by unlocking the full potential of the system. But we cannot do this until unfair litigation risk is curtailed.

On March 30, EBSA answered the President's call to action. We issued a Notice of Proposed Rulemaking on the investment selection of designated investment alternatives. The first part of the rule gives a history lesson of pre- and post-ERISA fiduciary law, and the decades of DOL investment guidance which form the bedrock of our proposed rule. The three fundamentals of ERISA investment selection are Process, Discretion, and Deference.

The second part of the proposed rule gives six factors and twenty examples of how to perform an objective, thorough and analytical investment selection process. The proposed rule is asset-neutral and applies to all types of investments – not just alternative investments. It is not an "Alts-rule"; it is an investment selection rule with safe harbors so that plan fiduciaries can do their jobs without undue fear of being sued.

So, let me put on my professor hat, and start with the ERISA history lesson in the first part of the proposed rule. Our dedicated team was determined to

issue a durable rule that will provide long-lasting guidance to plan fiduciaries to create regulatory certainty. We understand in post *Loper-Bright* world that agency guidance needs to be right on the law. To achieve optimal *Skidmore* deference, we need to be consistent, thorough, and rigorously hew to the statute's text.

And that is what we did: we followed the law. We didn't make up our own scheme. We constructed a proposed rule that followed the text and intent of the ERISA statute.

To start, ERISA was designed as a law of process and not results. The foundation of ERISA is that it "requires prudence, not prescience." Everything starts from this focus on process. Accordingly, claims for breach of fiduciary duty must focus on a fiduciary's conduct in arriving at an investment decision, not on its results.

Under this framework, the proper question is not whether the investment results were unfavorable, but whether the fiduciary engaged in an objective, thorough and analytical, process to investigate the merits of the transaction. In other words, fiduciaries are judged not by the outcome of their decisions, but by the process by which those decisions were made.

The consistent guidance from the Department of Labor since ERISA's founding fifty-two years ago has been that the decision to offer a particular investment fund must involve what the EBSA team calls "OTA" for short: "an objective, thorough, and analytical process that consider all relevant facts and circumstances."

I have heard some criticism that we are allowing a check-the-box exercise that excuses fiduciaries from real diligence. Absolutely not. Read the proposed

rule. We require a rigorous objective, thorough, and analytical fiduciary process that must be documented.

The mere fact that ERISA does not prohibit a plan fiduciary to invest in funds with a private equity component could not reasonably suggest fiduciary wrongdoing -- any more than the mere fact that a plan fiduciary elects to make available a stable-value fund, a passively managed target-date fund, an equity fund, or any number of other funds under ERISA.

A contrary rule would turn ERISA's process-based focus on its head, allowing entirely permissible choices to serve as a proxy for a deficient process. To this point, DOL has previously noted that "[t]here may be many reasons why a fiduciary may properly select an asset allocation fund with a private equity component as a designated investment alternative for a participant directed individual plan."

If the foundation of ERISA is process, therefore, what are the implications for investment selection by plan fiduciaries?: (1) ERISA was not designed to allow participants to challenge or police every investment decision made by plan fiduciaries without plausible cause of actual wrongdoing. And (2) ERISA does not allow for federal courts – including judges with no experience or expertise in complex investment decisions – to serve as the referees of plan investment choices from the perspective of hindsight**.**

I hear critics to the contrary and look forward to hearing all of the comments received. **Here is the critical point:** No participant loses any right to sue if there is legitimate wrongdoing, including a flawed fiduciary investment selection process.

Now that we understand that ERISA is a law of process, let's move to the second foundation of selecting investments for ERISA plans, and that is discretion. The hallmark of ERISA is discretion to make a range of fiduciary judgments. Stated differently, ERISA prioritizes flexibility and discretion for plan sponsors and fiduciaries.

The law was designed to give fiduciary discretion and flexibility to plan fiduciaries so that they could do their job without unfair second-guessing and micro-management. When Congress enacted ERISA, it did not require employers to establish benefit plans.

It was – and remains – a voluntary system. ERISA's legislative history demonstrates that ERISA represented an effort to strike a balance between the interests of employers and labor organizations in:

> (1) maintaining flexibility in the design and operation of employers' pension programs; and
>
> (2) the need for the workers for a level of protection which will adequately protect their rights and just expectation.

Stated differently, Congress crafted a statute intended to encourage employers to offer benefit plans, while also protecting the benefits promised to employees. The key principles are flexibility and balance.

Congress knew that plan sponsors and fiduciaries must make a range of decisions and accommodate competing considerations, often during periods of considerable market uncertainty. Congress knew that if it adopted a system that was too complex, then administrative costs or litigation expenses would unduly discourage employers from offering benefit plans in the first place.

The key point is this: ERISA created a higher level of discretion and flexibility than the common law, which already allowed discretion to fiduciaries as noted in the 1959 Restatement of Trusts, which is cited in our proposed rule. Building on trust law, Congress designed a statutory scheme that prioritizes flexibility and discretion for plan sponsors and fiduciaries. This is nothing novel. The Department recognized this early in ERISA's history.

DOL stated in a 1981 advisory opinion that Congress designed a statutory scheme that affords plan sponsors and fiduciaries "greater flexibility, in the making of investment decisions . . . than might have been provided under pre-ERISA common and statutory law in many jurisdictions."

This discretion is critical to the entire investment framework, because there is never a single "right" answer to the questions fiduciaries must answer given the almost innumerable options available to them. With the thousands of potential investment options and services that might be appropriate for inclusion in a defined contribution plan, the need for fiduciaries to tailor solutions to their participants, and the widely diverse nature of those participants, fiduciaries are best positioned to weigh the pros and cons of various choices – often with assistance from consultants and other investment professionals – like the plan advisors in the audience today.

If you apply the process and discretion principles of ERISA to fiduciary investment decisions, several things are true:

First, ERISA does not allow *per se* attacks on novel investment strategies, because ERISA prioritizes flexibility and discretion in making decisions. With a myriad of potential investment choices in defined contribution plans, plan fiduciaries – sometimes with the aid of third party professional – are the ones that need to be empowered to make those important decisions. Subjecting a fiduciary to constant Monday-morning quarterbacking over their decisions,

with the benefit of 20/20 hindsight, would eviscerate the discretion that is at the core of the statutory framework.

Second, no investment or investment strategy is off limits in a retirement plan. There is no *per se* investment that is off limits under ERISA, other than illegal investments. This includes digital assets or any other alternative investment category. Neither Congress nor DOL has ever provided a list of required investment options or investment strategies. In fact, Congress considered requiring an index fund in every plan, but backed away from any prescriptive plan menu.

No legal investment or investment strategy is off limits in a retirement plan if it is reasonable and based on a thoughtful fiduciary investment process. That is why our proposed rule is **asset-neutral**.

Plan fiduciaries should decide what belongs in retirement plans, not regulators, Article III judges, or plaintiff lawyers. Fiduciaries may need to rely on the advice of experts to help in selecting investments, especially with complex investments, or investments with liquidity or valuation issues. But our proposed rule empowers plan fiduciaries to be plan fiduciaries – without looking over your back that your decision will immediately be second-guessed in a class-action lawsuit.

Third, innovative and customized strategies by fiduciaries are a virtue under ERISA, not a vice indicative of a fiduciary breach. The plaintiffs in the three Intel imprudent investment lawsuits alleged that the allocation to private equity in the plan's target-date fund and stock fund were unacceptable because they were unusual or novel for defined contribution plans.

But DOL expressly noted in its 2013 guidance that while off-the-shelf, or "pre-packaged" TDFs are available – often at a very low fee – "custom" TDFs crafted specifically for a particular plan, based on the specific needs of the plan, and

often composed of investment options already in the plan line-up "may offer advantages" for plan participants.

Now, let's complete our history lesson.

If ERISA is a law of process first, and second a law that gives discretion and flexibility to plan fiduciaries to choose from thousands of potential investments, the third and key factor is what happens if and when your discretionary fiduciary decisions are challenged in court. And that is where **Deference** comes in.

Fiduciaries making discretionary investment decisions deserve deference when those decisions are challenged so long as they follow a prudent process to choose the investments. The current lawsuit abuse in which plaintiff lawyers are second-guessing plan investment decisions and investment performance in class-action fiduciary breach lawsuits is paralyzing fiduciary decisions to expand into alternative investments.

This in turn is stifling innovation in investment options for 401(k) plans. This is in sharp contrast to the evolution and innovation in defined benefit plans, which often include a significant allocation to alternative investments.

That is why our proposed rule makes clear that plan fiduciaries who follow an **objective, thorough, and analytical** fiduciary process in selecting investments for the 401(k) plan menu are entitled to a presumption of prudence if and when their fiduciary judgments are challenged in court. They are entitled to the maximum deference allowed under the law.

This is based on multiple Supreme Court precedents, including the famous *Firestone* decision that holds that discretionary plan decisions on benefits should be reviewed under an abuse of discretion standard if the plan document gives the plan administrator such discretion if the plan document

gives the plan administrator such discretion. And *Conkright v. Frommert*, in which the Supreme Court clarified that plan administrators still get that deference even if they make mistakes in plan interpretation.

Now that is the history lesson in the first part of rule, and how the rule is grounded in decades of fiduciary law. Let's now turn to the second part of the proposed rule, in which we describe investment selection as a fiduciary process in which plan fiduciaries must conduct an objective, thorough, and analytical process that considers all relevant factors. And that includes getting help from plan advisors like you all when necessary.

We discuss six non-exhaustive factors for considering any plan investment, but particularly when an investment is more complex.

The first factor is Performance: I am not about to tell this audience – which includes the nation's leading plan advisors – how to evaluate the performance of investment options. But I hope the main take-away for this sophisticated audience is that we make clear that analysis of investment performance is subjective and needs to be nuanced. For example, there are times when selecting the hottest performing fund is not the best choice. We all know that past performance is not always an indication of future return.

The key insights we make for the performance factor is that fiduciaries should not focus solely on expected returns. When evaluating performance, fiduciaries must take into account the risks that investors are exposed to with respect to the designated investment alternative. Plan fiduciaries must also consider the time horizon of the plan's participants when evaluating performance.

We give an example of a target-date fund that offers lower expected returns, but corresponding lower expected risk. The example illustrates that fiduciaries need not select an investment strategy with the highest returns but

rather should seek to maximize returns for a given level of appropriate risk consistent with the needs of participants.

The second factor involves Investment Fees: We explain that fees are to be evaluated in the context of expected return on investment. The process should be designed to select products that maximize risk-adjusted return on investment, net of fees and expenses.

Plan fiduciaries are not required to select the lowest-fee product. Instead, a diligent selection process requires obtaining value for fees charged. This confusion on value for fees has historically been an obstacle to the selection of new and innovative products, including alternative assets. We make clear that it is prudent for plan fiduciaries to pay a reasonable additional amount for increased value or services, including customer service, increased return, better risk mitigation, or lifetime income.

The third factor is Liquidity: While it is true that a fiduciary must appropriately consider and determine that an investment has sufficient liquidity to meet the anticipated needs of the plan at both the plan and individual levels, liquidity needs to be balanced against other considerations such as potential return on investment, risk mitigation, or ability to provide valuable services like lifetime income. This is intended to alleviate the perception that some liquidity may never be sacrificed for other kinds of value or higher returns. We provide examples of a prudent process for evaluating liquidity issues and balance them against other considerations without providing any per se exclusions of potential new products.

The fourth factor is Valuation: We emphasize the importance of a regular, rigorous, transparent, independent, and conflict-free valuation process. At the same time, we recognize, as has been proven with alternative investments in defined benefit pension plans, publicly traded assets are not the only assets that can be subjected to such a process.

Drawing on best practices from the defined benefit world, we provide concrete examples of how to perform a conflict-free third-party valuation of complex assets. In so doing, we confirm that, by following a prudent process, nonpublic assets may be held within defined contribution plans.

The fifth factor is Performance Benchmarking: We emphasize that plan fiduciaries must compare the risk-adjusted returns, net of fees and expenses, of each investment to a meaningful benchmark.

We defined "meaningful benchmark" as an "investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative." The key point is to ensure sufficient likeness between the comparator and DIA. The S&P 500 index is not a meaningful comparator for all investments.

A meaningful benchmark is an apples-to-apples comparison. This isn't green apples to red apples. Or a Fuji apple with a sugary-sweet flavor to a Honeycrisp apple with sweet-tart flavor. It is McIntosh to McIntosh. Granny Smith to Granny Smith. Hopefully I made my point: the investment strategy must have the same investment strategy or objective to serve as a meaningful comparison. We also point out that the use of comparisons in some cases does not foreclose a fiduciary from choosing a new or innovative investment strategy. We describe how a plan fiduciary can construct a simulated or composite benchmark comparison for novel products.

The sixth factor is Complexity: We explain that complexity is not necessarily a downside to investment options. Instead, we emphasize that through the intermediation of experts, including experts willing to assume fiduciary duties, plans can offer sophisticated investment strategies with potential upsides to their participants.

At bottom, fiduciary experts must understand complex products and evaluate their appropriateness for their participant population. Sometimes that means hiring a discretionary or non-discretionary investment advisor like many in the crowd today.

But contrary to the suggestion of many imprudent investment lawsuits, individual plan participants do not need to understand all of the nuts and bolts of the financial instruments that will provide for their retirement—that's what fiduciaries do.

Conclusion

To conclude, that is a summary of our proposed new rule. I appreciate your bearing with me, but the details matter. Team EBSA is proud of our effort. But now it is your turn to comment on the record – I am sorry, but LinkedIn hot takes don't count, nor do Nevin & Fred podcasts – and tell us how we can make the proposed rule better before we work on the final rule.

I have seen dozens, if not hundreds, of opinions on the rule. Everyone has an opinion – some registered before the critic could possibly have read the entire 164-pages, and all of its footnotes with nuggets of wisdom. [I learned that a certain Senator from Massachusetts must be a speed reader].

Ending with the Intel litigation story that I chronicled at the start, DOL's investment selection rule is not about reckless institutional gambling with fiduciary plan assets. It is about potential diversification and maximizing risk adjusted returns. We are not dictating any investment selection or strategy.

The proposed rule is about ensuring that American workers have an opportunity to retire in comfort and dignity. We are empowering responsible fiduciaries to make responsible investment decisions from a larger share of

potential investment opportunities. We are helping plan advisors like you all do your jobs to help improve the retirement security of American workers.

President Trump's goal is to unlock innovation and creativity in plan investments that has been stifled by fear of getting sued. It is about unleashing the full potential of the voluntary employee benefit system.

I oversee the best EBSA ever, and we are just getting started.

Thank you.