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ERISA Advisory Council
Qualified Default Investment Alternatives (QDIAs) – Start to Finish, Default to Payout

Written Statement of
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Issue Chair Mr. Towarnicky, Issue Vice Chair Mr. Ryan, and all other members of the 2024 ERISA Advisory Council, thank you for the opportunity to submit this written testimony. My name is Tom Clark and I am a Partner and the Chief Operating Officer in the Boston and Saint Louis offices of The Wagner Law Group, PC, a boutique law firm specializing in employee benefits issues for both plan sponsors and retirement industry service providers. I have been asked to address the litigation risk associated with the use of Qualified Default Investment Alternatives ("QDIAs") under the Employee Retirement Income Security Act of 1974 ("ERISA") as noted in the Council's issue statement. My written testimony today is complemented by that of my co-panelist, Ms. Bonnie Treichel of Endeavor Retirement, who is addressing, in part and in greater detail, the statutory and regulatory safe harbors addressed below.

My career trajectory is arguably unique in that I spent five years of my career working for a prominent plaintiff side law firm that has brought dozens of fiduciary breach lawsuits against plan fiduciaries and service providers. As an example, during my tenure there, I was heavily involved in litigating the *Tibble v. Edison Int'l* matter which ultimately made its way to the Supreme Court. One of my responsibilities while employed in this role was to look for new and novel theories for finding liability under ERISA.

In my current role, I regularly defend plan fiduciaries and service providers in ERISA fiduciary breach litigation as well as in investigations by the Department of Labor ("DOL") alleging fiduciary breaches. I have also taught ERISA Fiduciary Law as an adjunct professor since 2013 at my alma mater, Washington University in St. Louis School of Law. I am also regularly hired to translate the complex world of ERISA litigation in speaking to thousands of plan fiduciaries and service providers at industry events and conferences each year.

As evidenced from previously submitted testimony, the topic of litigation risk associated with the offering of QDIAs by plan fiduciaries is of great interest to the Council as well as the greater employee benefits community. As described in the issue

statement published by the Council, the increasing use of retirement income solutions as part of QDIA offerings only adds additional analysis and due diligence on the part of plan fiduciaries and those who support them. DOL and Congress have previously issued certain safe harbors associated with the offering of QDIAs as well as the selection of investments and products that include retirement income and/or annuity features. To my knowledge, a comprehensive review of existing complaints, briefing, and caselaw addressing the offering of QDIAs and the associated safe harbors has never previously been submitted to the Council. My testimony today attempts to fill this gap looking primarily at those cases filed since the last time the Council addressed QDIAs in 2018. My testimony is entirely my own and does not represent the opinion of my employer or any other organization to which I am professionally affiliated.

Specifically, my testimony will address litigation involving the following:

- the QDIA safe harbor found at 29 U.S.C. § 1104(c)(5) and 29 CFR § 2550.404c-5
- QDIA options such as target date funds ("TDFs"), both of the shelf and custom, and managed accounts
- the annuity safe harbors for defined contribution plans found at 29 C.F.R. § 2550.404a-4 and 29 U.S.C. § 1104(e)
- the fallout from the failure of Executive Life and Interpretive Bulletin 95-1 issued in the aftermath

I. Executive Summary

After engaging in the comprehensive research detailed below, I want to highlight the following:

- I am not here to advocate for or against any particular QDIA or retirement income product or approach. I am not here on behalf of anyone other than myself and my interest and commitment since law school to ERISA and employee benefits law in general.

- However, at my core, I believe in the appropriately regulated free market we strive for in this country. And after nearly twenty years in the industry, I especially believe in the employee benefits marketplace that seeks to serve the American worker. There are thousands upon thousands of individuals who wake up each day, striving to find workable solutions to benefit the hundreds of millions of American workers and their families and beneficiaries. Being the first person in my family to graduate from college and being raised by a single mother who worked, at times, three jobs to make ends meet, the reality facing

those on Main Street is never far from my mind when I am working with employers and service providers.

- To that end, the employee benefits marketplace is not always perfect. There are products and services that have been wildly successful and there are others that have not worked as intended despite the best of intentions. So while I am not here on behalf of any particular product or service, I am here to advocate that nearly 50 years of well-developed ERISA jurisprudence supports innovation while also protecting plan participants and beneficiaries and plan fiduciaries alike.

- I believe that as we navigate the challenging issues identified by the Council regarding QDIAs, the employee benefits marketplace will ultimately lead us to prudent and appropriate products and services. It will weed out those products and services that are too risky or do not meet the needs of plan participants. I caution against any kind of knee jerk reaction of trying to predetermine the balls and strikes and to try and inadvertently insulate plan participants and plan fiduciaries from innovation that may ultimately benefit all.

- With that being said, let me address my research. I know that others before the Council will directly address the success of the Pension Protection Act ("PPA") and how the introduction of auto features and appropriately diversified default investments have helped millions and millions of plan participants. From a litigation standpoint, the QDIA Safe Harbor also appears to be a success. I was only able to identify three cases addressing the safe harbor since its passage. In all instances, the courts found that it was available to entirely insulate plan fiduciaries against claims that participants were harmed from a lack of choice over investment allocation (i.e. lack of selection would preclude application of ERISA § 404(c) and thus the plan fiduciaries would otherwise be liable for whether the investment decision is prudent for individual participants). In one instance, the court found that there were fact issues to be decided regarding the sufficiency of notices received by participants. The relative low number of lawsuits challenging the applicability of the QDIA Safe Harbor suggests that it has been successful in one of its core goals of protecting plan fiduciaries from liability while also protecting plan participants from overly conservative investments.

- There have been dozens and dozens of lawsuits involving the prudence of including both off the shelf and custom TDFs. There is a recent clear trend of decisions in favor of plan fiduciaries where, as the Supreme Court has noted,

the courts have been "divid[ing] the plausible sheep from the meritless goats"[1] before expensive discovery occurs. The courts have noted the following:

- stating a claim requires plausible allegations of an imprudent process and plausible allegations that a hypothetical prudent fiduciary would not have selected the investment
- a meaningful benchmark is required for plaintiffs to make performance and fees comparisons
- a meaningful benchmark must have a similar objective, strategy, and goal (i.e. it is improper to compare active versus passive or to versus through or a TDF with a more conservative risk strategy versus one that does not)
- ERISA does not require selection of the cheapest fund available
- ERISA does not require selection of the best performing fund available
- offering an untested, custom approach is not a per se breach, in fact courts have favorably cited the 2013 DOL guidance noting its discussion of custom TDFs and therefore by definition that there may not be performance history
- the following allegations, standing on their own, have also been found to not support a breach claim:
    - allocation to sleeves of assets that are meant to have either higher levels of risk or lower levels of risk
    - months or years of underperformance
    - deviation from a glide path
    - net outflows
    - critical commentary from analysts
    - cheaper share class or vehicle is available without clear evidence that the strategies are the same and that there was no other plausible explanation (such as using revenue sharing to pay plan expenses)
    - valuation, liquidity, and transparency may be difficult for certain sleeves of assets

- Within the last year, multiple matters have gone through full bench trials that included prudence claims related to offering TDFs (as well as multiple summary judgment decisions). In each trial, the plan fiduciaries ultimately prevailed. The common theme has been that plan fiduciaries engaged in a comprehensive and robust procedurally prudent process that resulted in the selection of a substantively prudent investment in the best interests of plan participants. These trial decisions, along with decisions from other courts, found the following steps as supportive of a procedurally prudent process:
    - fiduciaries meet regularly and, as appropriate, have special meetings
    - quarterly monitoring reports are received and reviewed examining

[1] *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014).

performance and fees
- outside experts such as advisors, investment managers, consultants, and attorneys are retained to support the fiduciaries
- outside experts were not blindly followed (i.e. plan fiduciaries performed their own independent investigations)
- use of an IPS and watch list
- alternative funds were considered including through RFPs
- participant data, demographics, and preferences were examined
- special software or tools were used to compare fund performance and fees

- Litigation involving managed accounts is less common than that involving TDFs but tends to focus mostly on allegedly high costs and use of proprietary funds. One matter that went to a full summary judgment decision found the plan's fiduciaries had not breached ERISA even though cheaper providers were available where the due diligence prior to selection showed the selected managed account provider charged a premium fee but could meet the unique needs of the plan's participants.
- No court has rejected the DOL's 2013 guidance regarding selection of TDFs. Instead, courts have found the guidance to be instructive and, in one matter, found specifically that developing a custom TDF that sought to address the unique demographics and needs of the plan's participants appeared to be a fiduciary directive of the DOL (and consistent with ERISA's fiduciary duties).
- I found no matters reported in either Westlaw or Lexis where the annuity safe harbors for defined contribution plans were at issue. This is less surprising regarding the recent statutory safe harbor from SECURE because it is a relatively recent change. However, the undersigned was surprised to not find any litigation involving the regulatory safe harbor that DOL published first in 2008. Unfortunately, an absence of litigation does not allow us to draw conclusive inferences, but reasons could include (1) the safe harbor was successful in keeping plaintiffs firms from bringing cases even when they wanted to second guess the fiduciary process of the plan fiduciaries (plaintiffs firms will focus on matters that are easier to win with less legal and factual problems), (2) there are other reasons such cases are not brought, for example, not enough damages could be generated from a smaller group of participants using such funds to justify the time and expense or there are commonality/individual inquiry issues under Rule 23 making such cases poor vehicles to seek plan wide relief,[2] (3) very few plan fiduciaries are including

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[2] ERISA fiduciary breach matters brought my plan participants, while possible in a direct action on behalf of a plan, are far and away more popularly brought as Rule 23 class actions which in part require that (1) there are questions of law or fact

annuities in their defined contribution plans, or (4) participants have not been harmed and as such, there are no breach cases to bring.

- As noted above, litigation over the costs, uniqueness, or complexity of offering anything but off the shelf QDIA vehicles has demonstrated a clear path to insulate plan fiduciaries if a comprehensive and robust prudent process is followed. But what about the worst case scenario where the annuity provider fails? Litigation from the failure of Executive Life in the early 1990s is illustrative. Courts were not keen to find that plan fiduciaries needed to be perfect or prescient. Instead, plan fiduciaries were insulated from the fallout where they:
    - had competent decisions makers
    - a competitive bidding process was used
    - an RFP was conducted with finalist meetings
    - an experienced consultant/advisor was retained
    - information from multiple ratings agencies was considered
    - the plan fiduciaries performed their own independent investigation, not blindly relying on hired consultants

My recommendations for the Council are set out in further detail below, but can be summarized as follows:

(1) The fear of the possibility of future litigation should not negatively affect future regulations or guidance. The employee benefits marketplace is robust and there will naturally be winners and losers as different solutions are developed and tested with plan fiduciaries and plan participants. The lessons from the litigation discussed in detail below demonstrate that a prudent plan fiduciary, acting in the best interests of the plan participants, will be the key driver of which products and solutions will prevail and which will not. The prudent process itself should ultimately reject any product or service that is too expensive, too vague, not transparent enough, or has too much or too little risk.

(2) Future regulations or guidance should emphasize robust disclosure to plan participants of the fiduciary process itself that plan fiduciaries engage in. This not only benefits plan participants by demonstrating to them that QDIA vehicles have been selected in a way that is consistent with ERISA's fiduciary duties, it also addresses a major problem present today in ERISA litigation where federal pleading standards under Fed R. Civ. P. 12(b)(6), which governs motions to dismiss, does not allow plan fiduciaries the opportunity to cite to the process they engaged in until

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common to the class and (2) the claims or defenses of the representative parties are typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a).

much later in the litigation at the summary judgment or trial phase, after expensive and disruptive litigation has occurred. If such disclosures outlining the process itself were available to plan participants, there are better arguments available to plan fiduciaries to have these documents considered at the motion to dismiss stage (and in fact may result in less litigation brought altogether).

(3) Future regulations or guidance should seek a disclosure regime that seeks to meet the suggestions from the Supreme Court around circumstantial evidence to prove actual knowledge as noted in *Intel Corp. Inv. Policy Comm. v. Sulyma*. Such efforts should increase actual consumption of disclosures by plan participants while also benefitting plan fiduciaries by making the three-year statute of limitations more available as an affirmative defense.

II. Relevant QDIA Litigation

A. Claims Involving the QDIA Safe Harbor as a Defense

The QDIA Regulation relieves fiduciaries of an individual account plan who comply with the QDIA Regulation of liability for any loss or by reason of any breach that is the direct and necessary result of investing the participant's account in any QDIA or investment decisions in connection with the management of a QDIA. *See* ERISA § 404(c)(5), 29 U.S.C. § 1104(c)(5); 29 C.F.R. § 2550.404c-5(a)(l) & (a)(2) & (b)(l). Under the QDIA Regulation, the fiduciary protection is a "safe harbor" in that the fiduciaries who meet the standards of the QDIA Regulation are relieved of fiduciary liability, but "[s]uch standards are not intended to be the exclusive means by which a fiduciary might satisfy his or her responsibilities under [ERISA] with respect to the investment of assets in the individual account of a participant or beneficiary." 29 C.F.R. § 2550.404c-5(a)(2).

From my research, there are only three cases reported in either the Westlaw or Lexis databases where application of the QDIA Safe Harbor was at issue. In all instances, the courts found that the Safe Harbor has broad application to insulate the fiduciaries from liability over the account performance of individual participants.

First, in *Larson v. Allina Health Sys.*, plaintiffs brought a breach of prudence claim alleging that (1) it was improper to automatically enroll participants in the plan's managed account and (2) the plan's managed account itself was an imprudent default option.[3] The district court granted the defendants' motion to dismiss finding that (1) QDIAs are a legal form of enrollment plan under ERISA citing the existence of the

[3] *Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 794–95 (D. Minn. 2018).

QDIA Safe Harbor and (2) the QDIA Safe Harbor does not require a plan fiduciary to undertake an evaluation as to which of the different forms of QDIA provided for in the regulation is the most prudent for a participant or the plan.[4]

Second, in *Bidwell v. Univ. Med. Ctr., Inc.*, the district court (later affirmed by the 6th Circuit) held that the QDIA Safe Harbor was available to insulate the fiduciaries from liability when (1) a participant fails to make a change from the default assigned when they are automatically enrolled, (2) a participant fails to provide investment direction following the elimination of an investment alternative or a change in service provider, (3) a participant fails to provide investment instruction following a rollover from another plan, and (4) a participant fails to provide investment instruction where a plan administrator requests participants who previously had elected a particular investment vehicle to confirm whether they wish for their funds to remain in that investment vehicle.[5]

Third, in *Falcone v. DLA Piper*, the district court found that the QDIA Safe Harbor would be available to entirely insulate the plan's fiduciaries against liability if all the conditions were met.[6] In response to a summary judgment filing by defendants, the court held that there was a factual dispute over whether two disclosures sent to participants were adequately clear such that they were written in a manner reasonably calculated to be understood by the average plan participant.[7] The matter was settled shortly after the decision by the court.

B. Claims Involving Target Date Funds in General

In *Meiners v. Wells Fargo & Co.*, the 8th Circuit affirmed the decision of the district court to dismiss claims by the plaintiffs that the plan's TDFs were imprudent because a different TDF series performed better and had cheaper fees.[8] The court rejected these bare allegations finding that (1) plaintiffs failed to compare the plan's TDFs to a meaningful benchmark that had a similar strategy, (2) ERISA does not require a fiduciary to select the best performing fund, and (3) ERISA does not require a fiduciary to select the cheapest fund available.[9]

In *Smith v. CommonSpirit Health*, the 6th Circuit held that plaintiffs failed to state a claim that the plan's TDFs were imprudent because (1) the TDF managers had the

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[4] *Id.*
[5] *Bidwell v. Univ. Med. Ctr., Inc.*, 685 F.3d 613, 618–20 (6th Cir. 2012).
[6] *Falcone v. DLA Piper US LLP Profit Sharing & 401(K) Sav. Plan Comm.*, No. 09-5555, 2011 WL 13277203, at *5–8 (N.D. Cal. May 27, 2011).
[7] *Id.*
[8] *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018).
[9] *Id.*

ability to deviate slightly from the glide path, (2) the funds had net outflows, (3) outside analysts had been critical of the funds, and (4) a passive version of the TDF suite was available.[10] The court further held that the plaintiffs failed to compare the TDFs to a meaningful benchmark (one of a similar strategy) and also failed to allege a failure in procedural prudence in selecting the TDFs.[11]

In *Cunningham v Cornell University*, plaintiffs alleged that the plan's fiduciaries had failed to utilize the lowest cost share class of the TDF suite offered to participants.[12] The district court allowed this claim to go to trial but the parties settled it in order to allow other issues to be heard on appeal to the Second Circuit.[13]

In *Pizarro v. Home Depot, Inc.*, plaintiffs challenged the plan's TDF suite as imprudent due to underperformance. In ruling on cross motions for summary judgment, the district court granted Home Depot's motion finding that (1) the fiduciaries met regularly and reviewed quarterly monitoring reports, (2) use of a custom benchmark (as opposed to a general benchmark such as the S&P 500) for analyzing performance of the suite was not a breach of ERISA, (3) multiple outside experts were engaged to assist the fiduciaries, (4) comparison to other TDF suites with "different strategic approaches (i.e. different glide paths)" is a disfavored apples to oranges approach, (5) retaining the TDF suite through a two year period of underperformance was not a per se breach,[14] (6) the TDF suite tracked the custom benchmark, (7) the fees charged were on the lower end, (8) the TDF suite at issue was used by many other plans, and (9) the advisory to the fiduciaries recommended the

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[10] *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1167–68 (6th Cir. 2022).

[11] *Id*; *see also Beldock v. Microsoft Corp.*, No. 22-1082, 2023 WL 1798171, at *7 (W.D. Wash. Feb. 7, 2023); *Bracalente v. Cisco Sys., Inc.*, No. 22-4417, 2023 WL 5184138, at *4 (N.D. Cal. Aug. 11, 2023) ("The Supreme Court has recognized that 'the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise.' *Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022). Plaintiffs' 'underperformance-only' theory, however, would flatten this nuanced prudence evaluation into a one-dimensional comparison that considers only the funds' three-and five-year performance data.").

[12] *Cunningham v. Cornell Univ.*, No. 16-6525, 2019 WL 4735876, at *17 (S.D.N.Y. Sept. 27, 2019), aff'd, 86 F.4th 961 (2d Cir. 2023).

[13] *Cunningham v. Cornell Univ.*, 86 F.4th 961, 972 (2d Cir. 2023).

[14] "The fact that some target-date funds might have posted higher returns on a short-term basis does not mean that they were necessarily superior, or even desirable, options for the Plan, or that they met the Plan's goals. For the reasons discussed above, Plaintiffs have not shown that the other broad-based indexes and TDFs they reference are apt comparators…" *Pizarro v. Home Depot, Inc.*, 634 F. Supp. 3d 1260, 1296 (N.D. Ga. 2022).

TDF suite for inclusion in the lineup.[15]

In *Davis v. Magna Int'l*, the district court denied summary judgment for the defendant fiduciaries finding that there was a genuine issue of material facts as to the procedural prudence demonstrated by the fiduciaries in monitoring the plan's TDFs and whether they adequately looked at alternative structures.[16] A similar denial of summary judgment occurred in *In re Omnicom Grp. Inc. Erisa Litig.*[17]

In *Johnson v. Parker-Hannifin*, the district court held that plaintiffs failed to allege a meaningful benchmark in challenging the plan's TDFs. Specifically, the court held that "[p]laintiffs were required to include allegations about the funds' distinct 'objectives,' 'strategies,' and 'goals'…[s]imply alleging that the funds were all passively managed and had 'through' glidepaths falls well short of the Sixth Circuit's pleading requirement."[18]

In *Nunez v. B. Braun Med.*, Inc, the district court, after a bench trial, concluded that the plan's fiduciaries had been both procedurally and substantively prudent in offering the plan's TDFs finding that (1) the fiduciary committee met regularly (annually from 2014 to 2019 and quarterly thereafter), (2) the committee relied upon two different consultants that provided quarterly and annual reports, (3) the committee conducted its own investigations, (4) a watch list was used for monitoring purposes, (5) the funds used proper benchmarks, (6) cheaper share classes were

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[15] *Pizarro v. Home Depot,* Inc., 634 F. Supp. 3d 1260, 1291–98 (N.D. Ga. 2022).

[16] *Davis v. Magna Int'l of Am., Inc.*, No. 20-11060, 2023 WL 3821807, at *7 (E.D. Mich. June 5, 2023). Other district courts have allowed claims to move forward when the complaints include adequate allegations of imprudent process and in some instances the courts were reluctant to decide whether a benchmark was a proper comparison. *See In re MedStar ERISA Litig.,* No. 20-1984, 2021 WL 391701, at *6 (D. Md. Feb. 4, 2021); *In re Quest Diagnostics Inc. ERISA Litig.*, No. 20-7936, 2021 WL 1783274, at *4 (D.N.J. May 4, 2021); *In re: Prime Healthcare ERISA Litig.*, No. 20-1529, 2021 WL 3076649, at *7 (C.D. Cal. July 16, 2021); *In re Sutter Health ERISA Litig.*, No. 20-1007, 2023 WL 1868865, at *10 (E.D. Cal. Feb. 9, 2023); *Trauernicht v. Genworth Fin. Inc.*, No. 22-532, 2023 WL 5961651, at *14 (E.D. Va. Sept. 13, 2023); *Jones v. DISH Network Corp.*, No. 22-167, 2023 WL 7458377, at *10 (D. Colo. Nov. 6, 2023), *report and recommendation adopted*, No. 22-167, 2023 WL 8170913 (D. Colo. Nov. 24, 2023); *Coppel v. Seaworld Parks & Entertainment, Inc.*, No. 21-1430, 2024 WL 3086702, at *13 (S.D. Cal. Jan. 31, 2024); *Kistler v. Stanley Black & Decker, Inc.*, No. 22-966, 2024 WL 3292543, at *16 (D. Conn. July 3, 2024).

[17] *In re Omnicom Grp. Inc. Erisa Litig.*, No. 120CV4141CMSLC, 2022 WL 18674830, at *16 (S.D.N.Y. Dec. 23, 2022).

[18] *Johnson v. Parker-Hannifin, Corp.*, No. 21-256, 2023 WL 8374525, at *7 (N.D. Ohio Dec. 4, 2023).

examined, (7) alternative structures such as collective investment trusts were also examined, and (8) the TDFs had strong performance compared to other available funds.[19]

In *Phillips v. Cobham Advanced Electronic Solutions, Inc.*, plaintiffs alleged that the plan's TDF suite underperformed comparable funds suites. In dismissing the second amended complaint, the district court held that (1) allegations solely based on underperformance, including a focus on beta, do not state a claim under ERISA without also including specific allegations of an imprudent process and (2) the amount of time of any alleged underperformance also does not state a claim without specific allegations of an imprudent process.[20]

C. Claims Involving Custom Target Date Funds

There is ample case law supporting the development of custom TDFs that are different than what may be typical or popular in the industry.[21] "[A]s a matter of law, incorporation of a new proprietary fund or strategy alone does rise to an inference of imprudence."[22]

In *Jacobs v. Verizon*, plaintiffs alleged that the custom TDFs included in the plan (1)

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[19] *Nunez v. B. Braun Med., Inc.*, No. 20-4195, 2023 WL 5339620, at *9 (E.D. Pa. Aug. 18, 2023).

[20] *Phillips v. Cobham Advanced Electronic Solutions, Inc.*, No. 23-3785, 2024 WL 3228097, at *8 (N.D. Cal. June 28, 2024).

[21] "To the extent that the strategies offered by other consulting firms, or the practices of other plans, differed from the approach proposed by Aon, that is not evidence of imprudence." *Reetz v. Lowe's Companies, Inc.*, No. 18-75, 2021 WL 4771535, at *50 (W.D.N.C. Oct. 12, 2021), *aff'd sub nom. Reetz v. Aon Hewitt Inv. Consulting, Inc.*, 74 F.4th 171 (4th Cir. 2023); *see also DeBruyne v. Equitable Life Assur. Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (assertions about what is "typical" said "little about the wisdom of [the defendant's] investments"); *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 2021 WL 229235, at *10 (N.D. Cal. Jan. 21, 2021) (allegations that allocation model deviated from industry standard did not state a claim for breach of fiduciary duty); *Barchock v. CVS Health Corp.*, 2017 WL 9324762, at *5 (D.R.I. Jan. 31, 2017) (fiduciaries are not "held to the standard of looking to the average and copying what they see"), *adopted*, 2017 WL 1382517 (D.R.I. Apr. 18, 2017), *aff'd*, 886 F.3d 43 (1st Cir. 2018).

[22] *Bloom v. AllianceBernstein L.P.*, No. 22-10576, 2024 WL 1255708, at *8 (S.D.N.Y. Mar. 25, 2024); *see also Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 706 (W.D. Mo. 2019); *Patterson v. Morgan Stanley*, No. 16-CV-6568 (RJS), 2019 WL 4934834, at *14 (S.D.N.Y. Oct. 7, 2019) ("That the 2025 Trust was untested is also insufficient to establish imprudence in the selection and retention of the fund.").

included allocation to overly risky and underperforming custom fund of funds that were DIAs in the plan's lineup and (2) underperformed when compared to popular low fee passively managed TDFs.[23] The district court dismissed these allegations finding that (1) the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole, (2) a plan is not per se imprudent merely because it incorporates risky investments, (3) nothing in ERISA requires plan fiduciaries to include any particular mix of investment vehicles in their plan, (4) the investment strategy of each TDF fund is based on a level of risk generally deemed appropriate for someone who expects to retire in the year of the fund's target date, and (5) while offering plan participants a broad array of investment options brings more complexity to the exercise of choosing appropriate investments, courts have bristled at paternalistic theories that suggest ERISA forbids plan fiduciaries to allow participants to make their own choices.[24]

In *Wehner v. Genentech, Inc.*, the district dismissed claims that the plan's custom TDFs were expensive and underperformed, finding instead that comparison to retail TDFs were not a meaningful benchmark when custom TDFs "can be designed to the specific needs of a specific plan's demographics based on factors such as pay levels, expected retirement ages, contribution levels, or other sources of retirement income…[a] custom TDF strategy affords greater flexibility to fiduciaries when choosing the underlying investments, whereas a retail TDF is typically managed by only one investment manager, and plan fiduciaries will have no control over the investment lineup or asset classes comprising the fund…[and] [c]ustom TDFs may also have added expenses due to the design and need to occasionally rebalance the offerings and strategy to fit specific participants' needs."[25]

In *Anderson v. Intel Corp.*, plaintiffs alleged that the plan fiduciaries had breached ERISA by offering a custom TDF series that included the "non-traditional investments" of hedge funds, private equity, and commodities. In support, the plaintiffs, at various stages of the case, claimed that a prudent fiduciary would have been aware that these non-traditional assets (1) are difficult to value; (2) have higher than normal risk; (3) have a lack of liquidity; (4) charge high fees; (5) have a lack of transparency compared with other assets, (6) exhibit high operational risks, and (7) caused a drag on performance as compared to traditional equities.[26] In addition to arguing that these non-traditional assets were per se imprudent, plaintiffs argued

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[23] *Jacobs v. Verizon Commc'ns, Inc.*, No. 16-1082, 2017 WL 8809714, at *2 (S.D.N.Y. Sept. 28, 2017).
[24] *Id.* at *5–7 (citations and quotations omitted).
[25] *Wehner v. Genentech, Inc.*, No. 20-6894, 2021 WL 507599, at *8 (N.D. Cal. Feb. 9, 2021).
[26] *Anderson v. Intel Corp.*, No. 19-4618, 2021 WL 229235, at *10–11 (N.D. Cal. Jan. 21, 2021).

that the allocation to these non-traditional assets was too high.[27] The district court dismissed the plaintiffs' claims twice, finding that (1) they had failed to offer a meaningful benchmark to which to compare the custom TDF series (rejecting comparisons to the S&P 500 index, Morningstar's TDF benchmark, and four TDF series available in 40 Act funds) and (2) that the risk mitigation strategy of using non-traditional asset was not a breach as fiduciaries are not required to pursue a riskier strategy in the hope of maximizing returns.[28]

In *Lauderdale v. NFP Retirements, Inc.*, at issue were a series of custom TDFs held in collective investment trusts that offered three different risk-based glide paths for each vintage of TDF (i.e. aggressive, moderate, and conservative).[29] The custom TDFs used seven different asset classes, including those intended to provide protection against inflation, such as real estate, commodities, and Treasury Inflation Protected Securities, providing for a larger allocation than other TDF providers including some who made no allocation at all.[30] After a bench trial, the district court concluded that the plan fiduciaries had met their ERISA fiduciary duties in offering the custom TDFs in part given that (1) participant data was analyzed, (2) participant demographics and preferences were considered, (3) a proprietary tool of the investment manager was used to examine the unique needs of the plan, (4) other TDF products were considered as to whether they could meet the needs of the plan, (5) performance and fees were evaluated, (6) the investment manager had years of experience analyzing TDFs and kept a comprehensive database of available products and their unique characteristics, (7) the custom TDFs benefitted from the ability to swap individual funds being allocated to, the selection process took nine-months, and (9) the investment manager demonstrated continuous monitoring of the structure, design, and performance of the custom TDFs.[31] The district court further found that while there may have been other TDFs that could have expected higher returns, "doing so would have resulted in taking on more risk, subjecting participants to higher volatility and a higher likelihood of losses as their retirement dates approached. In selecting funds for a retirement plan, it is objectively reasonable for fiduciaries to select a fund that, among its other attributes, is expected to reduce the risk of severe loss in down markets."[32] Additionally, the district court favorably cited the 2013 DOL tips that custom TDFs can be appropriate, in rejecting allegations that the custom

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[27] *Id.*
[28] *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 579 F. Supp. 3d 1133, 1151–55 (N.D. Cal. 2022).
[29] *Lauderdale v. NFP Ret., Inc.*, No. 21-301, 2024 WL 751005, at *5 (C.D. Cal. Feb. 23, 2024).
[30] *Id.* at *6.
[31] *Id.* at *23–27.
[32] *Id.* at *28.

TDFs lacked performance history was a breach.[33]

D. Claims Involving Managed Accounts Generally

In *Larson v. Allina Health Sys.*, plaintiffs alleged a breach of prudence over use of a managed account option as the plan's QDIA alleging the fees charged were excessive and thus provided no benefit to the plan's participants.[34] The district court granted defendants' motion to dismiss finding that the plaintiffs failed to plead a meaningful benchmark that a prudent fiduciary would have selected that would show the plan's managed account was inferior and overly expensive.[35]

In *Disselkamp v. Norton Healthcare*, the district court allowed a claim to move forward alleging that the plan's managed account violated the duty of diversification by allocating too much exposure to the recordkeeper's proprietary stable value fund.[36] The matter later settled after the court denied class certification.

In *Miller v. AutoZone, Inc.*, the district court allowed claims alleging the plan's managed account steered allocation to proprietary funds that underperformed and had high fees to survive the motion to dismiss.[37]

In *Pizarro v. Home Depot, Inc.*, plaintiffs challenged as excessive, the fees paid for the plan's managed account provider, which included the payment of a data connectivity fee to the plan's recordkeeper.[38] The district granted summary judgment in favor of the plan fiduciaries by finding that plaintiffs failed to demonstrate losses to the plan because (1) fees charged to the plan were competitive based on those paid by other plans, (2) it was not imprudent to have fees based on the high number of participants that would need to be serviced, and (3) there was no evidence produced that would demonstrate that no prudent fiduciary would have selected the managed account provider at issue.[39] The district court also rejected a bald comparison to other managed account providers which allegedly could provide services at a lower cost because plaintiffs failed to demonstrate that the other managed account providers

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[33] *Id.*; *see also Mills v. Molina Healthcare, Inc.*, No. 22-1813, 2024 WL 1216711, at *16 (C.D. Cal. Mar. 20, 2024) (finding after a bench trial that the fiduciaries had not breached ERISA in offering the same custom TDFs as in *Lauderdale*).
[34] *Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 794–95 (D. Minn. 2018).
[35] *Id.*
[36] *Disselkamp v. Norton Healthcare, Inc.*, No. 18-48, 2019 WL 3536038, at *11 (W.D. Ky. Aug. 2, 2019).
[37] *Miller v. AutoZone, Inc.*, No. 19-2779, 2020 WL 6479564, at *4 (W.D. Tenn. Sept. 18, 2020).
[38] *Pizarro v. Home Depot, Inc.*, 634 F. Supp. 3d 1260, 1286 (N.D. Ga. 2022).
[39] *Id.* at 1289–90.

could meet the specific needs of the participant community of the Home Depot plan.[40] Said another way, the court refused to second guess a finding by the plan's fiduciaries that the chosen managed account provider was appropriate despite the fact that the managed account provider allegedly charged a premium fee.

E. Claims Involving Use of a QDIA and its Effect on Recordkeeping Fees

In *Silva v. Evonik Corp.*, plaintiffs alleged that the plan could have paid lower recordkeeping fees by switching to a different recordkeeper along with a change to the plan's QDIA. The district court, in granting summary judgment in favor of the defendants, found that the plan's fiduciaries (1) were not required to terminate and remove the plan's QDIA option (an allocation tool) in order to secure what plaintiffs alleged would be lower administrative fees from a different recordkeeper and (2) did not breach ERISA by offering actively managed funds even if it resulted in higher fees.[41] The court further found that the plan's fiduciaries engaged in a prudent process by (1) having the plan's advisor prepare a comprehensive quarterly report, (2) having regular committee meetings, and (3) having an off cycle meeting as circumstances required.[42]

F. Claims Mentioning the DOL's TDF Guidance

A handful of courts have directly addressed the DOL's "Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries."[43] In no instance has a court held a negative opinion or disagreed with the DOL's guidance.[44]

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[40] *Id.* at 1290.
[41] *Silva v. Evonik Corp.*, No. 20-2022, Dkt. 101 at p. 7–10 (D. N.J. June 28, 2024).
[42] *Id.* at pp. 6–7.
[43] *Available at* https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/target-date-retirement-funds.pdf.
[44] *See Pledger v. Reliance Tr. Co.*, No. 15-4444, 2019 WL 10886802, at *26 (N.D. Ga. Mar. 28, 2019); *Wehner v. Genentech, Inc.*, No. 20-6894, 2021 WL 507599, at *8 (N.D. Cal. Feb. 9, 2021); *Anderson v. Intel Corp. Inv. Pol. Comm.*, 579 F. Supp. 3d 1133, 1145 (N.D. Cal. 2022); *Lauderdale v. NFP Ret., Inc.*, No. 21-301, 2022 WL 422831, at *4 (C.D. Cal. Feb. 8, 2022); *Davis v. Magna Int'l of Am., Inc.*, No. 20-11060, 2023 WL 3821807, at *6 (E.D. Mich. June 5, 2023); *Johnson v. Parker-Hannifin, Corp.*, No. 21-256, 2023 WL 8374525, at *1 (N.D. Ohio Dec. 4, 2023); *Lauderdale v. NFP Ret., Inc.*, No. 21-301, 2024 WL 751005, at *9 (C.D. Cal. Feb. 23, 2024); *Phillips v. Cobham Advanced Electronic Solutions, Inc.*, No. 23-3785, 2024 WL 3228097, at *5 (N.D. Cal. June 28, 2024).

G. Use of Specialized Benchmarking or Procedural Process Tools

Multiple tools and services have been developed by service providers to assist fiduciaries in the selection of TDFs generally.[45] Such tools have been favorably cited by courts at supporting a prudent fiduciary process.[46] It is expected that tools and services will continue to become available for plan fiduciaries to utilize in the selection of QDIAs including those that focus on benchmarking managed accounts. Those focusing on retirement income as part of QDIAs are addressed in Ms. Treichel's testimony.

III. Relevant Litigation Involving Annuities or Retirement Income Products

A. Claims Involving the 29 C.F.R. § 2550.404a-4 Safe Harbor

A review of both Westlaw and Lexis resulted in no case citations to the regulatory safe harbor regarding annuity selection found at 29 C.F.R. § 2550.404a-4.

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[45] *See, e.g.*, (1) the Target Date ProView fund analyzer, available at https://www.capitalgroup.com/advisor/tools/target-date-proview.html; (2) the TargetDate Visualizer, available at https://www.putnam.com/dcio/tools/targetdatevisualizer/; (3) Target Date Compass®, available at https://am.jpmorgan.com/us/en/asset-management/adv/tools/retirement-tools/target-date-compass/; (4) TDF Analyzer, available at https://www.rpag.com/premier-technology/target-date-analysis; (5) Target Data Radar, available at https://www.markovprocesses.com/product/target-date-radar/ ; (6) Target Date Analyzer, available at https://advisors.principal.com/wps/portal/advisor/existing-business/retirement-investment-info/investment-tools-resources; and (7) Target Date Blueprint, available at https://www.americancentury.com/advisors/defined-contributions/capabilities/target-date-blueprint/. The order of these tools was dictated by the order performed by a google search for "target date fund analyzer tools." For purposes of full disclosure, the undersigned played a role in the development of the first iteration of the Target Date Analyzer.

[46] *See, e.g.*, *Lauderdale v. NFP Ret., Inc.*, No. 21-301, 2024 WL 751005, at *27 (C.D. Cal. Feb. 23, 2024) (the investment managers proprietary tool "indicated that Plan participants were heterogenous and would benefit from a moderate glidepath for the QDIA and a multi-glidepath solution for the Plan as a whole"); *see also Nunez v. B. Braun Med., Inc.*, No. 20-4195, 2023 WL 5339620, at *9 (E.D. Pa. Aug. 18, 2023) (favorably citing the fiduciaries use of a service offered by the retirement industry to benchmark fees).

B. Claims Involving the 29 U.S.C. § 1104(e) Safe Harbor

A review of both Westlaw and Lexis resulted in no case citations to the statutory safe harbor regarding annuity selection found at 29 U.S.C. § 1104(e).

C. Claims Involving the Failure of Executive Life (and Interpretive Bulletin 95-1)

By way of background, Executive Life, once a prominent insurance company, faced significant challenges due to its investment strategies. The company heavily invested in high-yield, high-risk "junk" bonds. Despite initially receiving high ratings from major rating agencies like Standard & Poor's and A.M. Best, which indicated financial stability and profitability, Executive Life's reliance on these junk bonds ultimately led to its downfall.

In the early 1990s, the junk bond market collapsed, significantly impacting Executive Life's financial health. The company's investments lost substantial value, and it could no longer meet its obligations. This financial distress led to regulatory intervention, and in 1991, the California Insurance Commissioner seized control of Executive Life. The company was declared insolvent, and its assets were eventually sold off to pay policyholders and creditors.

Unsurprisingly, there were ERISA breach cases brought against plan fiduciaries that had purchased annuities from Executive Life. DOL issued Interpretive Bulletin 95-1 in response. Although it is only applicable to defined benefit plans, how the courts interpreted Interpretive Bulletin 95-1[47] is illustrative as is the summaries below of important case holdings.

In *In re Unisys Sav. Plan Litig.*, the 3rd Circuit affirmed the decision of the district court after a ten-day bench trial that the plan's fiduciaries had acted both procedurally and substantively prudent.[48] In support, both courts favorably cited the following (1) the plan sponsor delegated decision making to individuals with financial background, (2) there was a competitive bidding process, (3) interviews were held with the finalists, (4) an experienced investment consultant was hired as an advisor, (5) information was obtained from multiple ratings agencies and evaluated, (6) the annuity industry was monitored generally for important development, and (7) the plan fiduciaries engaged in their own independent analysis and did not blindly rely on the advisor.[49] The courts found specifically that reliance on the ratings agencies

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[47] 29 C.F.R. § 2509.95–1.
[48] *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 150–54 (3d Cir. 1999).
[49] *Id.*

was reasonable.[50] Substantively, the courts also held that a "hypothetical prudent fiduciary" would have made purchases from Executive Life because (1) Executive Life was qualified under federal regulations as well as state licensed, (2) other judicial decisions endorsed Exective Life, (3) the advisor kept Executive Life on its list of approved vendors until six months after the transaction at issue, and (4) other well known pension plans had also purchased from Executive Life.[51]

In *Bussian v. RJR Nabisco, Inc.*, the 5th Circuit held that the district court improperly granted summary judgment to the plan's fiduciaries because there were disputed issues of fact wherein a reasonable fact finder could conclude that the plan's fiduciaries failed to engage in a procedurally prudent process and that a hypothetical prudent fiduciary may not have selected Executive Life.[52] The 5th Circuit endorsed a process that would be procedurally prudent similar to that of the 3rd Circuit in *In re Unisys*, finding that: (1) reliance on an expert advisor is justified on many factors including "the expert's reputation and experience, the extensiveness and thoroughness of the expert's investigation, whether the expert's opinion is supported by relevant material, and whether the expert's methods and assumptions are appropriate to the decision at hand,"[53] (2) ratings agencies cannot be blindly relied upon, (3) some ratings agencies are more highly regarded than others, and (3) the methodologies used must be understood.[54] Importantly, the court also recognized that no provider is perfect and that each has its own warts, finding that such warts is not a categorical bar, but must be studied qualitatively and quantitatively by the decision makers.[55]

In *Riley v. Murdock*, the district court (later affirmed by the 4th Circuit) found that the fiduciaries had engaged in a procedurally prudent process when they (1) formed a committee of experienced financial managers, (2) an experienced and leading consultant was hired, (3) top providers were examined, (4) a law firm was engaged to conduct its own investigation of each provider, (5) a consultant specializing in insurance was also hired, (6) independent information about Executive Life was sought, (7) other pension plans that had purchased from Executive Life were

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[50] *Id.* at 151–52.
[51] *Id.* at 153–54.
[52] *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 303–08 (5th Cir. 2000). Where there lacked evidence of prudent investigations focused solely on the best interests of the plan participants, the 9th Circuit also found potential liability. *See Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401 (9th Cir. 1995) ("The district court was presented with strong evidence that reversion maximization figured prominently in Revlon's spin-off/plan termination decision.").
[53] *Bussian*, 223 F.3d at 301.
[54] *Id.* at 301–02.
[55] *Id.* at 302.

contacted, and (8) the committee relied upon a high rating from one of the ratings agencies.[56]

A diligent search of Westlaw and Lexis found that no court has ever adopted the DOL's position in Interpretive Bulletin 95-1 that ERISA requires the selection of the "safest annuity available." Instead, courts have found that ERISA requires only that fiduciaries act in the best interest of plan participants in choosing an annuity provider.

> We agree with the Bulletin and the Secretary that once the decision to terminate a plan has been made, the primary interest of plan beneficiaries and participants is in the full and timely payment of their promised benefits. We agree that beneficiaries and participants whose plan is being terminated gain nothing from an annuity offered at a comparative discount by a provider that brings to the table a heightened risk of default. We would even add that the purchase of such an annuity can be considered an example of the imposition on annuitants of uncompensated risk—the risk of default is borne by the annuitants and, in those states that have guaranty associations, by those associations, while the benefit is granted to the sponsor in the form of a lower price and larger reversion.
>
> However, we are not persuaded that § 1104(a) imposes on fiduciaries the obligation to purchase the "safest available annuity" in order to fulfill their fiduciary duties. We hold that the proper standard to be applied to this case is the standard applicable in other situations that involve the potential for conflicting interests: fiduciaries act consistently with ERISA's obligations if "their decisions [are] made with an eye single to the interests of the participants and beneficiaries." [*Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir. 1982)]; *see, e.g.,* [*Metzler v. Graham*, 112 F.3d 207, 213 (5th Cir.1997)]; *Pilkington PLC v. Perelman,* 72 F.3d 1396 (9th Cir.1995); [Reich v. Compton, 57 F.3d 270, 291 (3d Cir.1995)]; *Deak v. Masters, Mates & Pilots Pension Plan,* 821 F.2d 572, 580 (11th Cir.1987) []; *Leigh v. Engle,* 727 F.2d 113, 125 (7th Cir.1984) ("*Leigh I* "). That standard does not require that a fiduciary under the circumstances of this case purchase the "safest available annuity." *Cf. Riley v. Murdock,* No. 95–2414, 1996 WL 209613, at *1 (4th Cir. Apr.30, 1996) (unpublished) (rejecting the standard advocated by the Department of Labor).[57]

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[56] *Riley v. Murdock*, 890 F. Supp. 444, 458 (E.D.N.C. 1995), *aff'd,* 83 F.3d 415 (4th Cir. 1996).

[57] *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 298 (5th Cir. 2000).

IV. Recommendations

A. Future Regulations or Guidance Should Not Be Overly Fearful of the Possibility of Litigation

While there has been extensive litigation involving TDFs and managed accounts, the developing case law demonstrates that fiduciaries that engage in robust procedural prudence are ultimately insulated when offering investments that are custom or unique. As outlined above in the Executive Summary, courts have repeatedly outlined the steps they perceive as meeting the procedural prudence standard, providing increasingly clear guidance to plan fiduciaries. As outlined in Mr. Treichel's testimony, while the industry is going through a rapid expansion of product and terminology with an array of fee structures, this, in my opinion, is no different from a litigation perspective from other difficult decisions that must be made by plan fiduciaries each and every day (e.g. hiring experienced advisors and recordkeepers each of which has its own unique offerings and potential "warts" as one court pointed out that all annuity providers also have). The employee benefits marketplace will therefore have winners and losers and that should ultimately be dictated from the robust procedural prudence of plan fiduciaries examining new or different products and services.

In light of the increased case activity since the DOL issued its 2013 tips, as well as the favorable citation of the same by multiple courts, the DOL should consider issuing updated tips that explicitly includes additional steps that the courts have found procedurally prudent. The updated tips may also want to be expanded to include guidance on managed accounts as well as retirement income solutions.

B. Future Regulations or Guidance Should Emphasize Robust Disclosure of the Fiduciary Process Itself

Most, if not all, disclosures to plan participants under ERISA seek to provide them information about features or benefits of plans. A statement to inform of account balance. A 404a-5 disclosure to inform of fees being paid from their account. A summary plan description to inform of benefits, rights, and features. But no disclosure currently seeks to inform plan participants of the fiduciary process itself that is engaged in by the prudent plan fiduciaries. If future regulations or guidance required such disclosures, this would benefit plan participants by demonstrating to them that QDIA vehicles have been selected in a way that is consistent with ERISA's fiduciary duties. However, it would also address a major problem present today in ERISA litigation where federal pleading standards under Fed R. Civ. P. 12(b)(6), which governs motions to dismiss, does not allow plan fiduciaries the opportunity to cite to the process they engaged in until much later in the litigation at the summary

judgment or trial phase, after expensive and disruptive litigation has occurred. If such disclosures outlining the process itself were available to plan participants, there are better arguments available to plan fiduciaries to have these documents considered at the motion to dismiss stage (and in fact may result in less litigation brought altogether). The record is replete with matters where the allegations are wholly inconsistent with the actual factual record, but courts are hamstrung and cannot consider this evidence until much later in the process.

C. Increase Availability of the Three-Year Statute of Limitation

The three-year actual knowledge statute of limitation found in ERISA,[58] by definition, decreases exposure for plan fiduciaries by more than 50% versus the six-year statue of repose, given that damages from years four to six compound on earlier damages for years three and prior. The Supreme Court, in *Intel Corp. Inv. Policy Comm. v. Sulyma*, found that this actual knowledge standard does not include constructive knowledge, recognizing that this holding may "substantially diminish[] the protection that it provides for ERISA fiduciaries."[59] However, the opinion went on to recognize that:

> actual knowledge can be proved through inference from circumstantial evidence…Evidence of disclosure would no doubt be relevant, as would electronic records showing that a plaintiff viewed the relevant disclosures and evidence suggesting that the plaintiff took action in response to the information contained in them. And though, [a]t the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party, that is true only if there is a genuine dispute as to those facts…If a plaintiff 's denial of knowledge is blatantly contradicted by the record, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.[60]

It is my recommendation that the DOL, in any future regulatory or guidance efforts, should seek to incorporate requirements that would provide plan fiduciaries with the circumstantial evidence they need to show that plan participants had actual knowledge of information about QDIAs or annuities. This would also benefit plan participants by working to increase actual consumption of disclosures. This is easiest done in the context of electronic disclosure where an evidence trail could be captured to demonstrate a participant reviewed the information. Increased availability of the three-year statute of limitation would still benefit those plan participants who may

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[58] 29 U.S.C. § 1113(2).
[59] *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 778–79 (2020).
[60] *Id.* at 779 (quotations and citations omitted).

be harmed by giving them access to the courts, but would also benefit plan fiduciaries by decreasing their potential exposure. The holding of potential claims until just before the six-year statute of repose in order to maximize potential damages (as opposed to moving immediately seeking to protect plan participants) would be severely curtailed, a practice that absolutely happens today.

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Thank you for the opportunity to present this testimony.