REGULATORY GUIDANCE

# What’s at the Top of Tom Clark's Regulatory Watchlist? PSCA National

"EBSA is just getting started," he said, "and we’re only seeing a few prongs of a multi-prong approach to addressing what they perceive as excesses that have developed in favor of the anti-plan sponsor plaintiffs’ bar.”


"I think the most interesting things coming down the pike for me are actually two things," Tom Clark said during a conversation at the PSCA National Conference in St. Louis, Mo. "First, I want to see what the Department of Labor is going to say in the *Intel* case when they submit their amicus brief. It's not going to look like it did last time, right? Or like any of these other DOLs on the other side."

The outspoken Clark, The Wagner Law Group's Deputy Managing Partner, was, of course, referring to *Anderson v. Intel Corporation Investment Policy Committee et al*. In January, the Supreme Court agreed to hear arguments in the 401(k) case involving alternative investments and the need for a "meaningful benchmark."

"The DOL is going to come out sometime in the next few weeks or months in favor of the meaningful benchmark, right?" he (rhetorically) asked. "They built it into their proposed reg, right? So, it'll be interesting to see how they approach this from the plan sponsor's perspective."

The proposed regulation is the *Fiduciary Duties in Selecting Designated Investment Alternatives* (better known as the "Investment Selection Rule"), which the DOL released in late March at the direction of last August's executive order issued by President Trump to make it easier to include private market investments – including debt, equity, credit, and infrastructure – and cryptocurrencies in 401(k) plans.

Got all that?

The ‘meaningful benchmark doctrine’ is a good thing,” Clark argued. “People have come out against it, people that I respect and care about, but with whom I disagree.”

He hesitated when asked why some are against it, claiming he didn’t want to "speak for their beliefs.” Yet, he said, generally, the argument is that “it might have the perverse effect of adding an investment that doesn’t have a comparator. If you don’t have a meaningful benchmark, no one could ever criticize you. But that’s inconsistent with ERISA.”

Using Beanie Babies (of all things) as an example, he argued that “if someone decides to put a Beanie Baby fund into a 401(k), it won’t really matter what their process is, they’re just going to have substantively messed up. Procedural prudence, substantive prudence – it’s just a bad choice. At some point, you still have to, at least, make good choices. But I don’t know if I buy into it.”

There’s always going to be a better lineup one could choose, “and you need to have some sort of governor or guardrails. So, this ‘meaningful benchmark’ doctrine that’s developed from the case law makes a lot of sense. It says if you’re going to criticize a fiduciary’s decision, you have to have it comparable to something that makes sense and you’re comfortable with.”

Secondly, he’s interested in the “huge increase” in DOL guidance and regulations juxtaposed with the *Loper Bright/Chevron* deference decision, “that basically kicked the legs out of blindly following regulatory guidance.”

“EBSA acknowledges that its whole proposed rule will now only receive Skidmore deference, so it will be fascinating,” Clark concluded. “It basically means if a judge likes it, they’ll cite it. If a judge doesn’t like it, they won’t cite it. Well, we were kind of in that position already. There’s nothing wrong with providing guidance and cover, so it’ll be interesting to see how that plays out. But I think EBSA is just getting started, and we’re only seeing a few prongs of a multi-prong approach to addressing what they perceive as excesses that have developed in favor of the anti-plan sponsor plaintiffs’ bar.”

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