Insights: Publications

5 Key Takeaways | Plan Investments and Fiduciary Risk Mitigation in the Trump Era

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The landscape for retirement plan investments and fiduciary risks is shifting in the early part of the second Trump Administration, both due to changes in the administration's policies and developments in the courts.

The Kilpatrick Employee Benefits team recently conducted an in-depth webinar that explored these changes and their impact on 401(k) and other retirement plans. The webinar provided actionable guidance for retirement plan fiduciaries to navigate the new retirement plan environment and reduce fiduciary risks.

Key takeaways from the team's presentation and discussion include:

1. Recent Shifts in the Role of the Regulator: The Supreme Court's decision in *Loper Bright Enterprises vs. Raimondo* limits the extent to which courts must defer to a regulatory agency's interpretation of an ambiguous statute (known as *Chevron* deference). In addition, the Trump administration's "deregulation" policies are intended to reduce the number of federal regulations. These developments raise questions about the extent to which the Department of Labor ("DOL") can provide useful guidance to fiduciaries through the rulemaking process. While the DOL may take a less active role in issuing regulations, its authority is not limited to rulemaking. As a result, we may still see the DOL exercise its enforcement authority in ways that advance the administration's policy positions.

2. Trends in 401(k) Litigation: Recent court decisions have not stemmed the flow of litigation over 401(k) plan expense and investment performance. The Supreme Court's recent decision in *Cunningham v. Cornell* is troubling in that it potentially allows plaintiffs to survive a motion to dismiss claims regarding plan expenses without showing that recordkeeping expenses were excessive, although it offered some suggestions to lower courts on procedures that may apply to weed out "meritless" litigation. The Sixth Circuit's decision in *Parker v. Hannifin* declining to require plaintiffs to point to meaningful benchmarks offers the Supreme Court an opportunity to impose a standard for these types of investment performance claims.

3. ESG Investing: The Trump administration is expected to continue scrutiny of investing based on economic, social and governance (ESG) factors in employer retirement plans. Also, proxy-voting policies that employ ESG factors for plan investments have recently been found to result in a breach of fiduciary duty in *American Airlines v. Spence*. It is important for retirement plan fiduciaries, with the assistance of their investment advisers, to take steps to monitor proxy voting policies of fund managers and to assess whether their proxy voting policies have been followed.

4. Crypto and Private Equity Investing: The Trump administration's policies may facilitate making more alternative asset classes (such as cryptocurrencies and private equity) available as part of investment options within 401(k) plans. However, retirement plan fiduciaries will still need to understand and be mindful of the issues related to these investments (such as volatility, valuation, liquidity and fee structures). Even if they are embraced by the DOL as permissible retirement plan investment options, retirement plan fiduciaries should note that the courts will ultimately decide whether an investment is prudent and may not defer to the DOL's position following the Supreme Court's overturning of *Chevron* deference.

5. Fiduciary Rule: Until there is further guidance from Congress or the DOL, the determination of when an individual is providing fiduciary investment advice to a retirement plan or participant is determined based on the five-part test articulated in 1975, as modified in part by the Deseret Letter and in part by Prohibited Transaction Exemption 2020-02.

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