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Why Complying with ERISA Section 404(c)'s Safe Harbor for Participant-Directed Plans Is Worth the Effort for Plan Sponsors and Fiduciaries

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This article addresses the role that ERISA Section 404(c) plays in today's defined-contribution plan design and litigation landscape. The article first discusses basic features of participant-directed 401(k) plans. Next, we set forth a general overview of ERISA's fiduciary provisions and discuss Section 404(c)'s statutory and regulatory framework, the litigation landscape, and key decisions involving Section 404(c)—including the DOL's position that 404(c) does not apply to fiduciary breaches in the selection and retention of plan investment options. Finally, we address why plan sponsors and fiduciaries should consider Section 404(c) as an important part of their plan design and administration.

Lawsuits challenging ERISA plan investments have skyrocketed over the last decade. The two areas of greatest challenge have involved employer stock investments and plan-related fees, though the litigation frontier is broader. Fiduciaries are not guarantors of investment performance,[1] yet their decisions with respect to plan investments face more scrutiny than ever with an active plaintiffs' bar and a volatile market. However, the ERISA statute is full of compromises,[2]

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and ERISA Section 404(c) is one example.[3] While ERISA gives plan participants the protection of fiduciary standards governing the general operation of benefit plans, Section 404(c) provides plan fiduciaries with a safe harbor from liability for fiduciary breaches in individual account plans that permit a participant to "exercise control over the assets in his account."[4]

To obtain ERISA Section 404(c) protection, a plan must comply with the Department of Labor's (DOL's) implementing regulations, which set forth detailed requirements concerning disclosures to plan participants and the breadth and nature of investment alternatives offered under the plan.[5] If a plan satisfies these regulatory requirements, participants are deemed to "exercise[ ] control over the assets in [their] account[s]."[6] In exchange for the freedom to direct their own investments, ERISA Section 404(c) shifts to participants the risk that their investment decisions will result in losses to their accounts. In short, the ERISA Section 404(c) safe harbor is predicated upon informed choice.

The plaintiffs' bar has criticized ERISA Section 404(c) as letting fiduciaries off the hook too easily for bad decision-making, and the DOL maintains that ERISA Section 404(c) does not excuse imprudence in the selection and retention of plan investments. Plan sponsors and fiduciaries may be asking: Is Section 404(c) compliance really worth the effort?

The answer is yes. The DOL's attempt to carve out an exclusion to ERISA Section 404(c)'s application appears nowhere in the statute or Section 404(c)'s regulations.[7] Every appellate court to address the issue on the merits has ruled that ERISA Section 404(c) can apply to investment selection decisions.[8] This is the right result. What is the point of a safe harbor that provides no real safe harbor? ERISA Section 404(c) presupposes the occurrence of a breach, but operates to provide fiduciaries with a defense to "any breach."[9]

ERISA Section 404(c) preserves the essential purpose of defined contribution plans by balancing fiduciary and participant responsibilities for retirement plan investing. The viability of an ERISA Section 404(c) defense is an essential plan design tool, especially at a time when many employers are scaling back benefits programs in an effort to contain costs. Imposing impossible-to-meet burdens on fiduciaries with respect to plan investments may cause plan sponsors to phase out 401(k) plans as they have defined benefit plans. ERISA was enacted to protect plan participants,[10] but Congress was also concerned about "not creat[ing] a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering . . . benefit plans in the first place."[11] ERISA Section 404(c) achieves this balance.

401(K) PLANS IN A NUTSHELL

A 401(k) plan is a "defined contribution plan" within the meaning of ERISA[12] and qualified under Sections 401(a) and 401(k) of the Internal

Revenue Code.[13] As the marketplace has shifted from defined benefit to defined contribution plans, 401(k) plans have become a common retirement planning tool.[14] While defined benefit plans "promise[] a specific defined benefit[,] the calculation of which is not dependent upon investment gains or losses,"[15] defined contribution individual account plans shift the risk of investment loss to plan participants. Now 401(k) plans are the most common employer-sponsored retirement plan in the country.[16] As of year-end 2008, 401(k) plans held approximately $2.4 trillion in assets, compared to $385 billion in 1990.[17]

Typically, eligible employees voluntarily participate in their employer's 401(k) plan by making pre- or post-tax contributions to one or more different investment options offered under the plan; those contributions may be matched by the employer. Plan participants choose their own investments from a menu of options and are entitled to a benefit that varies according to the amount contributed and the investment gains and losses on those amounts.[18]

Common 401(k) plan investment offerings include mutual funds, privately managed separate accounts, collective trust funds, and employer stock funds.[19] A mutual fund is "a pool of assets, consisting primarily of portfolio securities, and belonging to the individual investors holding shares in the fund."[20] A separate account is a segregated portfolio of securities, held directly by a private investor, which is designed to meet the investor's investment objectives.[21] A collective trust is an investment fund formed from the pooling of investments by institutional investors.[22] As the name implies, an employer stock fund is a single-stock fund that invests in employer securities.[23]

OVERVIEW OF ERISA'S FIDUCIARY PROVISIONS

ERISA defines a fiduciary as a person who (i) "exercises any discretionary authority or control respecting management of [a] plan or [who] exercises any authority of control respecting management or disposition of [plan] assets; (ii) "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of [a] plan, or has any authority to responsibility to do so;" or (iii) has "any discretionary authority or discretionary responsibility in the administration of [a] plan."[24] This definition is functional in nature, and courts have recognized that fiduciaries may wear more than one "hat."[25] Thus, ERISA's fiduciary provisions do not extend to plan design/"settlor" activities such as establishing, designing, amending, or terminating an ERISA plan.[26]

ERISA Section 404(a) requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[27] Specifically, an ERISA fiduciary has:

1. A duty to act for the exclusive purpose of providing benefits to plan participants and beneficiaries;
2. A duty to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims";
3. A duty to diversify the plan's investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so"; and
4. "[A] duty to administer the plan in accordance with . . . [the governing] documents and instruments . . . insofar as such documents and instruments are consistent with the provisions of [ERISA]."[28]

ERISA also sets forth a variety of "prohibited transactions" to ensure arm's-length transactions and avoid fiduciary self-dealing.[29]

ERISA's civil enforcement scheme establishes specific causes of action that plan participants may bring against plan fiduciaries for alleged breach of their ERISA duties. ERISA Section 502(a)(2), which is invoked most often in the plan investment context, authorizes plan participants to seek relief on behalf of the plan for damages allegedly "resulting from" a fiduciary's breach of duty.[30]

ERISA SECTION 404(C): THE STATUTE AND THE REGULATIONS

Statutory Overview and Policy

ERISA Section 404(c)'s safe harbor "recognizes an exception to [fiduciary] dut[ies] . . . for plans that delegate control over assets directly to the participant or beneficiary."[31] In pertinent part, ERISA Section 404(c) provides:

> In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary [of Labor])—
>
> (ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.[32]

The underlying policy decision behind ERISA Section 404(c) is that plan participants should not be allowed to recover for those losses that are directly attributable to their own investment decisions.[33] At the same time, the DOL's regulations concerning when a participant exercises "control over the assets in his account" require plans to provide participants with a range of investment options and adhere to a specific disclosure scheme.[34] When a plan complies with the regulations, ERISA Section 404(c) provides benefits both to participants and fiduciaries. Participants are allowed the freedom to direct their own investments with access to detailed disclosures to inform their choices. Fiduciaries, on the other hand, are absolved of liability for breaches caused by the participant's direction of his or her own account. If fiduciaries could not obtain relief from participant-directed losses, there would be little incentive for employers to implement a plan that complies with ERISA Section 404(c).[35]

The DOL's Section 404(c) Regulations

As referenced above, in ERISA Section 404(c), Congress authorized the DOL to implement regulations defining the circumstances under which a plan participant would be deemed to "exercise[ ] control over the assets in his account."[36] The DOL implemented its ERISA Section 404(c) regulations effective October 13, 1992.[37]

The DOL's regulations provide that fiduciaries will not be liable "for any loss, or with respect to any breach . . . that is the direct and necessary result" of a participant's "exercise of control."[38] For participants to exercise the requisite "control" under ERISA Section 404(c), the DOL's regulations require individual account plans[39] to satisfy three principal criteria:

1. The plan must offer "a broad range of investment alternatives";[40]

2. The plan must provide participants "an opportunity to exercise control over [the] assets in [their] account";[41] and

3. For plans that offer employer stock as an investment option, the plan must provide additional disclosures and confidentiality safeguards for shareholder voting rights.[42]

The regulations also carve out specific circumstances where a participant is deemed *not* to exercise independent control over the assets in his or her account.[43]

Broad Range of Investment Alternatives

To qualify for ERISA Section 404(c) protection, a plan must offer participants "a broad range of investment alternatives."[44] Under the regulations, the plan's investment alternatives must provide participants with a reasonable opportunity to:

- **Materially affect return:** The investment alternatives under the plan must allow a participant to materially affect the potential return on amounts in his or her account with respect to which he or she can exercise control and the degree of risk to which such accounts are subject.[45]

- **Choose from three or more alternatives:** There must be at least three investment alternatives under the plan. Each investment offering must be diversified and have materially different risk and return characteristics, which in the aggregate enable the participant to achieve a portfolio with aggregate risk and return characteristics within an appropriate range for the individual participant.[46]

- **Diversify to minimize risk of large losses:** The investment options must allow the participant to diversify his or her account so as to minimize the risk of large losses, taking into account the nature of the plan and the size of the participant's account.[47]

Opportunity to Exercise Control

Under the DOL's regulations, a plan is deemed to provide a participant with an "opportunity to exercise control" if the participant (1) "has a reasonable opportunity to give investment instructions;"[48] and (2) "is provided or has the opportunity to obtain sufficient information to make informed decisions."[49] A plan satisfies the first requirement where the participant can give investment instructions to a fiduciary who is obligated to comply with the instructions and the participant can receive written confirmation of the instructions.[50]

With respect to "the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives under the plan,"[51] the regulations set forth a variety of disclosures that must be made to participants, some of which are mandatory and some of which must be provided upon request:

Mandatory Disclosures

- **Section 404(c) explanation:** The plan must inform participants that it is intended to constitute a plan under ERISA Section 404(c) and that plan fiduciaries may be relieved of liability for losses that are the direct and necessary result of investment instructions given by participants.[52]

- **Description of investment alternatives:** The plan must describe the investment alternatives available under the plan and must provide a general description of the investment objectives and risk and return characteristics of each alternative, including information relating to the type and diversification of assets comprising the investment portfolio.[53]

- **Investment managers:** The plan must identify any investment managers.[54]

- **Investment instruction explanation:** The plan must explain the circumstances under which participants may give investment instructions and explain any limitations on such instructions, including any restrictions on transfer to or from a designated investment alternative, and any restrictions on the exercise of voting, tender, and similar rights.[55]

- **Fees and expenses:** The plan must describe any transaction fees and expenses that affect the participant's account balance in connection with purchases or sales of interest in investment alternatives.[56]

- **Voting, tender, and similar rights:** If voting, tender, or similar rights are passed through to participants, participants must receive any materials provided to the plan relating to the exercise of those rights as well as a description of the plan provisions relating to the exercise of those rights.[57]

- **Prospectuses:** Participants must be given a copy of all prospectuses provided to the plan.[58]

- **Confidentiality procedures for employer stock:** If the plan offers employer stock, the plan must describe the procedures established to provide for the confidentiality of information relating to the purchase, holding, and sale of employer securities, and the exercise of voting, tender, and similar rights by participants, as well as the contact information for the plan fiduciary responsible for monitoring compliance with the confidentiality procedures.[59]

- **How to obtain "upon request" information:** The plan must describe all additional information that may be obtained upon request and the contact information for the plan fiduciary.[60]

"Upon Request" Information

— **Operating expenses:** Upon request, participants must be given a description of the annual operating expenses of each investment alternative under the plan that reduce the rate of return to participants and the aggregate amount of such expenses expressed as a percentage of average net assets of the investment alternative.[61]

— **Investment materials:** Upon request, participants must be given copies of any prospectuses, financial statements, and reports and any other materials relating to the investment alternatives under the plan.[62]

— **Asset information:** Upon request, participants must be given a list of assets comprising the portfolio of an investment alternative under the plan and the value of such assets.[63]

— **Performance information:** Upon request, participants must be given information concerning the value of shares or units of plan investment alternatives, as well as information concerning the past and current investment performance of the investment options.[64]

— **Account information:** Upon request, participants must be given information concerning the value of their own accounts.[65]

Special Rules Where Employer Stock Is Offered

The DOL's regulations also set forth special rules for plans offering employer stock as an investment:

- **National exchange:** The employer stock must be traded on a publicly traded national exchange.[66]

- **Sufficient frequency/volume:** The employer stock must be traded with sufficient frequency and in sufficient volume to ensure that participant directions to buy or sell will be acted upon promptly and efficiently.[67]

- **Shareholder information:** Participants must be given the same information that is provided to shareholders of the employer stock.[68]

- **Voting, tender, and similar rights:** Voting, tender, and similar rights with respect to the employer's stock must be passed through to participants with accounts holding the employer's stock.[69]

- **Confidentiality procedures:** Written confidentiality procedures must be in place to safeguard the confidentiality of participant decisions with respect to their holdings in employer stock, and the plan should appoint a fiduciary with the responsibility for ensuring these confidentiality procedures are followed and determining whether an independent fiduciary is necessary.[70]
- **Independent fiduciary:** An independent fiduciary must be appointed where the fiduciary responsible for maintaining confidentiality determines there is the potential for undue employer influence upon participants with regard to the direct or indirect exercise of shareholder rights.[71]

Exceptions Where Participants Are Deemed Not to Have Exercised Independent Control

Under the DOL's regulations, participants are deemed not to have exercised independent control over their individual accounts where:

1. A fiduciary exerts improper influence over a participant;
2. A participant is legally incompetent; or
3. A fiduciary conceals material non-public facts regarding a plan investment option from a participant.[72]

However, the "concealment" exception does not apply where "the disclosure of such information by the plan fiduciary to the participant or beneficiary would violate any provision of federal law or any provision of state law which is not preempted. . . ."[73]

SECTION 404(C) IN ACTION: KEY ISSUES IN LITIGATION

The Litigation Landscape and Key Appellate Court Decisions

In the past decade there has been a significant uptick in purported class action lawsuits against 401(k) plan fiduciaries alleging breach of fiduciary duties in connection with plan investments—especially with respect to employer stock funds and allegedly excessive fees. In employer "stock-drop" lawsuits, plaintiffs typically allege that plan fiduciaries:

1. Imprudently permitted the plan to offer company stock as an investment when the stock price declined in value; and
2. Affirmatively misled or failed to warn participants of the circumstances adversely affecting the company which created a heightened risk of loss in the stock fund.[74]

In excessive fee cases, plaintiffs typically allege that the plan's investment funds had unreasonably high fees, thus rendering the funds imprudent investments, and that plan fiduciaries failed to provide participants with sufficient information regarding the impact of fees on participants' account balances.[75]

Fiduciaries in some of these cases have asserted ERISA Section 404(c) as an affirmative defense.[76] Three courts of appeal (the Third, Fifth, and Seventh Circuits) have addressed the ERISA Section 404(c) defense.

In re Unisys Savings Plan Litigation

The *Unisys*[77] case pre-dates the recent wave of stock-drop and excessive fee cases. The plaintiffs in *Unisys* claimed that the fiduciaries had breached their duties of prudence and diversification by investing 401(k) assets in "guaranteed investment" contracts issued by an insurance company that ultimately went into receivership. The plaintiffs also asserted fiduciary misrepresentation claims regarding communications to plan participants as to the risk of such investments. In vacating the district court's grant of summary judgment to the defendants, the Third Circuit addressed the applicability of ERISA Section 404(c).[78] Relying heavily on ERISA Section 404(c)'s legislative history,[79] the court held that ERISA Section 404(c) would excuse a defendant's "breach of duty in making an investment decision" because "the statute's unqualified instruction that a fiduciary is excused from liability for 'any loss' which 'results from [a] participant's or [a] beneficiary's exercise of control' clearly indicates that a fiduciary may call upon [Section 404(c)'s] protection where a causal nexus between a participant's or a beneficiary's exercise of control and the claimed loss is demonstrated."[80]

In remanding the claims for trial, the court found questions of fact as to the scope and content of investment-related information "made available to participants as a matter of course."[81] The court also observed that a fact-finder could find the plan's multiple restrictions on participants' ability to transfer investments from one investment fund to another "so significantly limited their ability to decide in which Funds their respective assets were allocated, that the restrictions [were] antithetical to the concept of 'independent control' that Congress enacted in section [404(c)]."[82] On remand, the district court entered judgment in the defendants' favor after a bench trial.[83] In addition to finding that the defendants had not breached their fiduciary duties under ERISA, the court held that ERISA Section 404(c) precluded a finding of liability. The court stated: "[T]he participants admit that they, alone, were responsible for their investment choices and affirmatively elected to stay with [the fund at issue,] in the face of abundant ongoing public information regarding the problems at the insurer."[84]

Langbecker v. Electronic Data Systems

In *Langbecker*,[85] an employer stock-drop case, the Fifth Circuit considered ERISA Section 404(c) in the context of class certification. The Fifth Circuit vacated the district court's order certifying a class under Federal Rule of Civil Procedure 23[86] and remanded the case for further proceedings where the district court "incorrectly eliminated the [Section 404(c)] defense from its evaluation of the suitability [of the case] for class treatment."[87] According to the *Langbecker* court, the transactional nature of ERISA Section 404(c) implicates the "typicality" requirement of Rule 23.[88] The court found that, "because [Section 404(c)] individualizes the consequences of fiduciary duty violations," any determination of class treatment must first take into account "the extent to which [Section 404(c)] decisions by participants undermine the feasibility of class action treatment."[89] Indeed, many of the participants continued to invest in the purportedly "imprudent" stock at issue even after knowing those facts which the plaintiffs claimed made the stock a bad investment.[90]

Hecker v. Deere & Co.

In *Hecker,*[91] an excessive fees case, the Seventh Circuit affirmed the dismissal of a purported class action complaint under Rule 12(b)(6). The *Hecker* plaintiffs alleged that Deere & Co.'s (Deere) 401(k) plans' investment offerings charged excessive asset fees because investment advisor, Fidelity Management and Research Company, engaged in undisclosed revenue-sharing with plan trustee Fidelity Management Trust Company.[92]

In affirming dismissal of the complaint, the Seventh Circuit ruled that 401(k) fiduciaries do not have a duty to "scour the market to find and offer the cheapest possible fund," and the Deere fiduciaries had discharged their duties by offering a wide range of funds as investment options with a wide range of expenses; in addition to 26 specified investment options, the plans offered a brokerage window through which participants could invest in more than 2,500 additional (non-Fidelity) mutual funds.[93] The court also rejected the plaintiffs' disclosure claim, holding that there is no ERISA duty to affirmatively disclose revenue sharing in mutual fund investment options in a 401(k) plan as long as total "expense ratios" are disclosed.[94]

The court alternatively affirmed dismissal of the complaint based on ERISA Section 404(c), as the plaintiffs "cho[se] to anticipate the [Section 404(c)] defense in their Complaint explicitly" and therefore "put it in play" by alleging that the Section 404(c) was unavailable based on the alleged failure to disclose the details of revenue-sharing between the Fidelity entities.[95] With ERISA Section 404(c)'s actual requirements established by the complaint and through documents referenced in the complaint (and therefore subject to consideration on a motion to dismiss), the Seventh Circuit held that dismissal on the basis of ERISA Section 404(c) was appropriate.[96]

With respect to the ERISA Section 404(c) requirements, the *Hecker* court emphasized that the 404(c) regulations provide that the safe harbor defense is available if a plan offers "'a broad range of investment alternatives.'"[97] Under those regulations, a plan must provide participants with sufficient investment alternatives to accomplish three goals: (1) "the ability materially to affect potential return and degree of risk in the investor's portfolio"; (2) "a choice from at least three investment alternatives each of which is diversified and has materially different risk and return characteristics"; and (3) "the ability to diversify sufficiently so as to minimize the risk of large losses."[98]

Pointing to the 2,500 mutual funds available to participants through the Deere plan's brokerage option, the court found implausible "[a]ny allegation that these options did not provide the participants with a reasonable opportunity to accomplish the three goals outlined in the regulation, or control the risk of loss from fees."[99] The court concluded: "Given the numerous investment options, varied in type and fee, neither Deere nor Fidelity (assuming for the sake of argument that it somehow had fiduciary duties in this respect) can be held responsible for those choices."[100] The court reaffirmed its decision in denying the plaintiffs' petition for rehearing and rehearing *en banc*.[101]

Courts Are Refusing to Use 404(c) as a Mechanism for Expanding ERISA's General Disclosure Rules

Courts applying the ERISA 404(c) safe harbor have rejected the notion that fiduciaries are obligated to provide disclosures beyond those required by the ERISA Section 404(c) regulations and ERISA's basic disclosure scheme.[102] For example, in *Hecker*, the Seventh Circuit rejected the plaintiffs' argument that the "concealment" exception set forth in the DOL's 404(c) regulations[103] rendered ERISA Section 404(c) unavailable because participants were not given information about revenue-sharing and other information not subject to disclosure under ERISA or the regulations.[104] The court confirmed that there is no special requirement that participants receive additional information relating to a plan's fees and expenses beyond ERISA Section 404(c)'s express fee disclosure requirements before the safe harbor will apply.[105]

District courts have reached similar results. In *Lingis v. Motorola, Inc.*,[106] a stock-drop case, the court addressed the reach of the concealment exception in ERISA Section 404(c)'s regulations.[107] The *Lingis* plaintiffs asserted that defendants could not rely on ERISA Section 404(c) unless they "show[ed] that all material information necessary to make informed investment judgments was disclosed to the participants."[108] The court rejected the plaintiffs' argument, reasoning that neither ERISA Section 404(c) nor the DOL's regulations "require[] a fiduciary to guarantee that all material facts are conveyed to participants. Rather, the regulation prohibits fiduciaries from concealing such facts."[109] The court found that, under ERISA Section 404(c), "concealment" required "a party to take some affirmative steps to 'hide, secrete or withhold information from the knowledge of others.'"[110] Allegations that fiduciaries merely did not inform participants about certain facts were not enough to defeat application of ERISA Section 404(c) under the concealment exception.[111]

In reaching this decision, the *Lingis* court also considered the type of information that would fall into the category of "material non-public facts" under ERISA Section 404(c)'s concealment exception.[112] In the absence of any specific guidance from the regulations, the court ruled, "consistent with the *in pari materia* canon of interpretation that two statutes with the same purpose should be construed as consistent with one another," that "the disclosure duty contemplated by the [DOL] regulation is equivalent to the disclosure duty imposed by ERISA more generally."[113] Thus, the question of whether plan fiduciaries concealed information for ERISA Section 404(c) purposes "merge[d]" with the question of whether the fiduciaries failed to disclose material information under ERISA's duty of loyalty, and the court did not interpret ERISA to require disclosure of non-public information about an investment option to plan participants if fiduciaries had made no false or misleading statements.[114] The court explained: "while Defendants may have had some obligation to disclose Plan-specific information to beneficiaries, they were under no duty to generally share additional information about any of the various investments—including the Motorola Stock Fund—offered by the Plan. Creating a standard that requires Plan fiduciaries 'to continuously gather and disclose nonpublic information bearing some relation to the plan sponsor's financial condition' would 'extend[ ] the statutory language [of ERISA] beyond [its] plain meaning.'"[115] The *Lingis* court ultimately ruled that the Motorola fiduciaries fully satisfied their ERISA disclosure obligations because "the documents [they] . . . provide[d] to Plan participants mentioned that the Motorola Stock Fund was the riskiest investment option . . . because it was undiversified."[116]

The court in *Tullis v. UMB Bank*[117] likewise declined to apply the concealment exception to Section 404(c). In *Tullis*, two plan participants brought suit against the plan's trustee, UMB Bank, alleging that UMB breached its fiduciary duties by failing to disclose to plan participants that the plan's investment advisor, Continental Capital, had engaged in fraudulent activities that resulted in the depletion of the plaintiffs' accounts.[118] According to the plaintiffs, at least four years before they learned of the losses to their accounts, UMB knew that the SEC had entered a temporary restraining order against Continental Capital due to the misconduct of its brokers.[119] The plaintiffs also alleged that two years before they learned of the losses to their accounts, UMB filed a lawsuit against Continental Capital and its individual brokers on behalf of the plan alleging that several investments made by Continental Capital were improper or simply never took place.[120] UMB allegedly did not, however, inform participants of the fraudulent activities of Continental Capital.[121] After the plaintiffs learned of Continental Capital's bankruptcy two years later, they also discovered that, due to its brokers' misconduct, the actual value of their accounts was significantly less than the value represented by UMB.[122]

In opposing UMB's motion for summary judgment, the plaintiffs argued that ERISA Section 404(c) was not available to UMB due to the regulations' concealment exception, which the plaintiffs construed as imposing on UMB "an affirmative duty to inquire into the plaintiffs' knowledge" of the fraudulent activities surrounding plan investments by Continental Capital.[123] The court rejected the plaintiffs' argument, ruling that the "general duties of disclosure imposed by ERISA are equivalent to the duties not to conceal involved in qualifying for section 404(c) protection."[124] Thus, the court held that "the 'safe harbor' defense becomes unavailable when defendant has concealed material non-public information" and not merely where the plaintiffs allege "that defendant had actual knowledge of the information" but no inquiry concerning the information was made by the plaintiffs.[125] Because the plaintiffs exercised independent control over their accounts,[126] yet made no inquiries to plan fiduciaries, UMB "was under no affirmative duty" to disclose information concerning Continental Capital's misconduct under ERISA Section 404(c)'s concealment exception.[127]

The DOL's Position: Section 404(c) Does Not Apply to Fiduciary Breaches in Investment Selection and Retention

The DOL takes the position that fiduciary breaches in the selection and retention of plan investment options are not afforded protection under ERISA Section 404(c). The DOL's position is based on a footnote to the preamble of its ERISA Section 404(c) regulations.[128] That preamble footnote states that the selection and/or retention of investment options does not fall under the purview of Section 404(c) because "the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) Plan is a fiduciary function [and] . . . is not a direct and necessary result of any participant direction of such plan."[129]

This limitation appears nowhere in the regulations themselves or, for that matter, in the statute, but the DOL asserts that its footnote commentary is entitled to deference under *Chevron USA v. Natural Resources Defense Council*.[130] Under *Chevron*, an agency's regulations are entitled to judicial deference if the court concludes that the plain meaning of the statute in which Congress delegated authority to the agency supports the regulation at issue or, if the statute is silent or unclear on the point at issue, where the agency's regulation is a "reasonable" reading of the statute.[131] According to the DOL, because Congress empowered the DOL through its Section 404(c) regulations to determine under what circumstances a plan participant "exercises control over the assets in his account," courts must defer to its footnote statement purporting to limit the reach of ERISA Section 404(c).[132]

The DOL has advocated its position in several *amicus curiae* briefs.[133] According to the DOL, under the ERISA Section 404(c) regulations, "plan fiduciaries are shielded only for losses 'which result[] from' the participant's exercise of control, and not from losses attributable to their own fiduciary misconduct."[134] The DOL also asserts that "[t]he selection of particular funds to include as investment options in a retirement plan is the responsibility of the plan's fiduciaries, and logically precedes (and thus cannot 'result[] from') a participant's decision to invest in any particular option."[135] Thus, the DOL maintains that fiduciaries retain liability for losses resulting from the imprudent selection or monitoring of plan investment options, even where a plan otherwise complies with ERISA Section 404(c) and participants choose to invest in the allegedly imprudent investment offerings.[136]

Every Appellate Court to Address the Issue on the Merits Has Concluded That Section 404(c), by Its Terms, Applies to Investment Selection and Retention Breaches

The three appellate courts to address ERISA Section 404(c) on the merits—the Third Circuit in *Unisys*, the Fifth Circuit in *Langbecker,* and the Seventh Circuit in *Hecker*—each considered the applicability of ERISA Section 404(c) to investment selection breaches. The *Unisys* court considered the question before the DOL's regulations were adopted and held that the text of ERISA Section 404(c) applied to all breaches.[137] The *Langbecker* and *Hecker* courts addressed the DOL's preamble footnote and chose to reject it based on the circumstances at issue in those cases.[138]

In *Unisys,* the Third Circuit framed the question as whether ERISA Section 404(c) "allows a fiduciary, who is shown to have committed a breach of duty in making an investment decision, to argue that despite the breach, it may not be held liable because the alleged loss resulted from a participant's exercise of control."[139] The *Unisys* court answered that "[i]n light of [section 404(c)'s] plain language, we believe that it does."[140] As the Third Circuit explained:

> There is nothing in [section 404(c)] which suggests that a breach on the part of a fiduciary bars it from asserting [section 404(c)'s] application. On the contrary, the statute's unqualified instruction that a fiduciary is excused from liability for "any loss" which "results from [a] participant's] or a beneficiary's exercise of control" clearly indicates that a fiduciary may call upon [section 404(c)'s] protection where a causal nexus between a participant's or a beneficiary's exercise of control and the claimed loss is demonstrated.[141]

In *Langbecker*, the Fifth Circuit addressed the DOL's footnote commentary head-on, framing the issue as a "complex interpretive question [of] whether the losses [from the imprudent selection of an investment] 'result from' the participants' exercise of control pursuant to § 404(c)."[142] According to the court, the losses "could not have occurred but for two separate acts: the fiduciary's inclusion of 'bad' stocks into the pot, and the participants' choices to invest in those 'bad' stocks with full § 404(c) disclosure."[143] The court then examined the DOL's footnote and whether it was entitled to deference. Because the DOL's footnote commentary never made it into the Code of Federal Regulations, the Fifth Circuit ruled it was "at best a comment on the regulations and is not itself a regulation" to which *Chevron* deference was owed.[144] The court also rejected the argument that the DOL's footnote qualified as an "interpretation" to which the court was required to give deference, pointing out that agency commentary qualifies as binding "interpretation" only when it construes an ambiguous regulation.[145] However, no party, including the DOL, asserted that the 404(c) regulations were ambiguous. Therefore, the rule requiring deference to agency interpretation did not apply.[146]

The court also concluded that regardless of whether any deference applied, the DOL's footnote was "not reasonable" because it contradicted the terms of ERISA Section 404(c).[147] The Fifth Circuit agreed with *Unisys*'s interpretation of ERISA Section 404(c), which it found to "embod[y] a common sense interpretation of the statute."[148] As the *Langbecker* court recognized, the "DOL footnote would render the § 404(c) defense applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary."[149] Indeed, the DOL's position would effectively "eliminate a § 404(c) defense altogether."[150]

The *Langbecker* court also discussed the policy judgment behind ERISA Section 404(c). As the court explained, "[a] plan fiduciary may have violated the duties of selection and monitoring of a plan investment, but § 404(c) recognizes that participants are not helpless victims of every error."[151] Rather, where Section 404(c)'s requirements have been met, participants "have access to information about the Plan's investments . . . and they are furnished with risk-diversified investment options."[152] The court concluded that "the plan sponsor cannot be a guarantor of outcomes for participants."[153]

In *Hecker*,[154] the Seventh Circuit likewise rejected the plaintiffs' argument that ERISA Section 404(c) "has no application to a fiduciary's assembling an imprudent menu of investment options in the first instance."[155] The court agreed with the defendants' characterization of the DOL's footnote as "informal commentary, which was never embodied in the final regulations, [and which therefore] cannot override the language of the statute and regulations."[156] Thus, the court declined to apply Chevron deference to the DOL's footnote.[157]

The court declined to decide the "abstract question" of whether ERISA Section 404(c) always applied to the selection of investment options for a plan, but stated:

> Even if [section 404(c)] does not always shield a fiduciary from an imprudent selection of funds under every circumstances that can be imagined, it does protect a fiduciary that satisfies the criteria of [section 404(c)] and includes a sufficient range of options so that the participants have control over the risk of loss.[158]

The court concluded by touching on the underlying policy of ERISA Section 404(c). Given the breadth of investment options, the court found that "[i]f particular participants lost money or did not earn as much as they would have liked, that disappointing outcome was attributable to their individual choices."[159] Because the plans satisfied the criteria of Section 404(c), the defendants could not be held responsible for the independent decisions of participants to invest in the plans and in particular funds.[160] According to the court, "the risk of loss" had shifted to the plaintiffs.[161]

The Seventh Circuit revisited the issue in its subsequent opinion denying the plaintiffs' petition for rehearing and rehearing *en banc*.[162] In "*Hecker II*," the court addressed more directly the DOL's contention that its footnote commentary was entitled to *Chevron* deference.[163] In her *amicus curiae* brief submitted in support of the plaintiffs' petition, the Secretary of Labor argued that the footnote commentary was entitled to deference because it was a reasonable interpretation of ERISA Section 404(c) and because the Secretary had consistently interpreted ERISA Section 404(c) and the DOL regulations to preclude ERISA Section 404(c) protection to investment selection breaches.[164] The court rejected those arguments, stating that "we cannot agree with the Secretary that the footnote in the preamble is entitled to full *Chevron* deference," and emphasizing that "the panel did not ignore any language in the regulation proper."[165]

The *Hecker II* court next addressed the Secretary of Labor's arguments that *Hecker I* would allow plan fiduciaries to escape liability "by the simple expedient of including a very large number of investment alternatives" in a plan portfolio[166] and that this would result in "obvious, even reckless, imprudence in the selection of investments."[167] The *Hecker II* court found that the Secretary's concerns were "more hypothetical than real."[168] According to the court, *Hecker I* did not stand for the "broad proposition" that a fiduciary could immunize itself from liability in all instances by imprudently selecting an overpriced portfolio so long as the portfolio contained "a very large number of investment alternatives."[169] The court emphasized that its earlier opinion "was not intended to give a green light" to such conduct, but rather was "tethered closely to the facts before the court," which included no allegations that the investment alternatives were unsound or reckless as opposed to simply containing excessive fees.[170]*Hecker II* did nothing, however, to alter the basic proposition from *Hecker I* that ERISA Section 404(c) may "protect a fiduciary that satisfies the criteria of [Section 404(c)] and includes a sufficient range of options so that the participants have control over the risk of loss."[171] This is consistent with the statute.

To date, no appellate court has expressly adopted the DOL's position.[172] While ERISA plaintiffs point to the Fourth Circuit's decision in *DiFelice v. US Airways*[173] as supporting the DOL's view, the Fourth Circuit's reference to Section 404(c) was *dicta*. In *DiFelice*, a stock-drop case, the plaintiffs alleged that US Airways' decision to continue to offer company stock as a plan investment option despite its eventual bankruptcy was a breach of the fiduciaries' duty of prudence.[174] After a bench trial, the district court entered judgment in US Airways' favor on the merits, concluding that US Airways' offering of its stock was prudent under the circumstances.[175] The Fourth Circuit affirmed, and ERISA Section 404(c) was not raised by the parties on appeal.[176] Because the court found there had been no fiduciary breach, its footnote observation that ERISA Section 404(c) "does not apply to a fiduciary's decisions to select and maintain certain investment options within a participant-driven 401(k) plan" was *dicta*.[177]

The DOL's Proposed Fix: Amend the Regulations to "Reiterate" That Section 404(c) Does Not Apply to Investment Selection

On July 23, 2008, the DOL released proposed changes to its regulations to add new plan disclosure requirements and to restate the DOL's position with respect to the scope of ERISA Section 404(c)'s protection.[178] This would include a new regulation applicable to ERISA's prudence provision to "make[] clear that nothing in the regulation would relieve a fiduciary of its responsibilities to prudently select and monitor service providers to the plan and the investments made available under the plan (i.e., designated investment alternatives)."[179] The DOL also proposed to amend Paragraph (d)(2)(i) of the ERISA Section 404(c) regulations to provide that the regulations "do[] not relieve a fiduciary from the duty to prudently select and monitor any designated investment manager or designated investment alternative offered under the plan."[180] According to the DOL, this proposed regulation would "reiterate [the DOL's] long held position that the relief afforded by Section 404(c) . . . does not extend to a fiduciary's duty to prudently select and monitor designated investment managers and investment alternatives."[181] In other words, if the fiduciary or plan sponsor picks the investment to be offered to plan participants, ERISA Section 404(c) is superfluous.

Though the proposed regulations have been tabled for the time being,[182] the DOL has announced its intent to reintroduce them in the future.[183]

WHY COMPLYING WITH SECTION 404(C) IS WORTH THE EFFORT FOR PLAN SPONSORS AND FIDUCIARIES

ERISA Section 404(c) has its critics, but the recent challenges to 404(c)'s scope of protection should not dissuade plan sponsors and fiduciaries from offering 404(c) plans. To the contrary (and as appellate courts have recognized), ERISA Section 404(c) achieves the appropriate balance between fiduciary standards and informed participant decision-making.

Appellate Courts Are Doing the Right Thing: Respecting the Terms of the Statute in Refusing to Carve Out an Exception for Investment Selection Breaches

As discussed above, every appellate court to consider the issue on the merits has ruled that ERISA Section 404(c) may apply to fiduciary breaches stemming from investment selection. This is consistent with the statute. ERISA Section 404(c) applies to "any loss" and "any breach" resulting from a participant's "exercise of control" over the assets in his or her account.[184]

With due respect to the Secretary, the DOL's position that ERISA Section 404(c) does not apply to investment selection and retention decisions would read the "any loss" and "any breach" language right out of the statute. By its terms, ERISA Section 404(c) does not differentiate one form of fiduciary breach from another.[185] The *Langbecker* court correctly found that, by seeking to effectively write the word "any" out of ERISA Section 404(c), the DOL's footnote commentary would render ERISA Section 404(c)'s safe harbor illusory by making the defense "applicable only where plan managers breached no fiduciary duty, and thus only where it is unnecessary."[186]

ERISA Section 404(c), however, presupposes the occurrence of a breach. As *Langbecker* recognized, investment losses in participant-directed accounts can occur only as the product of two separate acts: (1) "the fiduciary's inclusion of 'bad' stocks into the pot;" and (2) "the participants' choices to invest in those 'bad' stocks . . . ."[187] Because a loss from a "bad" investment option could not occur without a corresponding participant decision to invest, ERISA Section 404(c) relieves fiduciaries of liability for such losses and places the "risk of loss" firmly with the participant—who independently directed the investment against the backdrop of extensive disclosures specific to the investment.[188]

The DOL's position is also premised on the notion that a participant must have the ability to control the initial breach itself for ERISA Section 404(c) to apply at all. However, 401(k) plans don't operate that way. Plan sponsors and fiduciaries are always responsible for selecting investment options to place on the menu of investment options, while participants never are. ERISA Section 404(c) expressly recognizes that plans originate only when the plan sponsor designs them or fiduciaries select investments.[189] ERISA Section 404(c) assumes that fiduciaries will control the initial investment selection but nonetheless provides a safe harbor when the participant has "control over the assets in his account."[190] The DOL's position may also impermissibly reach to settlor conduct, which is not covered by ERISA's fiduciary provisions, as many plan sponsors select investment alternatives as a matter of plan design, not fiduciary discretion.[191]

The *Langbecker* and *Hecker* courts correctly declined to accord deference to the DOL's position. For agency deference to apply, there must first be an ambiguity, either in the text of the statute the agency has authority to regulate, or in a regulation the agency is authorized to issue.[192] On this point there is neither. ERISA Section 404(c) limits the DOL's authority to promulgating regulations that define what it means for a participant to "exercise control over the assets in his account," but the statute does not authorize the DOL to exclude alleged plan-level fiduciary duty breaches or otherwise make regulatory determinations as to which breaches qualify for Section 404(c) protection. Thus, even the DOL's proposed amendments to the ERISA Section 404(c) regulations[193] are beyond the scope of the Secretary's authority under the statute.

From a Policy Perspective, Section 404(c) Strikes the Appropriate Balance Between Fiduciary Standards and Participant Decision-Making

ERISA Section 404(c) is predicated on informed choice. To qualify for the safe harbor, fiduciaries must first satisfy the exacting regulatory requirements. This is no easy task, and the reality is that fiduciaries must be diligent even to qualify for 404(c) protection—but it is worth the effort. Where ERISA Section 404(c)'s requirements are met, participants necessarily have access to a diversified menu of investment options (which is also consistent with ERISA's general prudence regulations)[194] and a plethora of information. In short, they have the freedom to invest in, or avoid, any funds that do not suit their individual needs, which strikes an appropriate balance to ERISA's fiduciary standards.

Plan sponsors should consider ERISA Section 404(c) plans as one of several tools they may use in tailoring benefit plans to their particular participant populations. The *Unisys* court pointed out that, "while all plans which qualify under section [404(c)] have certain elements in common, each section [404(c)] plan is unique . . ."[195] Indeed, ERISA Section 404(c) acknowledges that in a participant-directed plan, there is no one-size-fits-all approach to retirement planning. An investment strategy that works for one participant may not be appropriate for another depending on differences in risk tolerance, total financial portfolio, time remaining until retirement, and a host of other variables. If a participant chooses in the face of extensive disclosures to invest in a fund that does not yield the results he or she had hoped, any resulting losses cannot be the responsibility of the fiduciaries. *Langbecker* was correct: plan fiduciaries "cannot be a guarantor of outcomes for participants,"[196] and in a landscape where no investment seems to be immune from potential litigation, 404(c) is consistent with Congress's goal of encouraging employers to continue sponsoring benefit plans.[197]

NOTES

1. *See* Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 312 (5th Cir. 2007) (noting same).

2. *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) ("ERISA [is] an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs.").

3. *See* 29 U.S.C. § 1104(c) ("ERISA Section 404(c)").

4. *Id.*

5. *See infra* Part III.B. Even if a plan does not technically comply with Section 404(c)'s requirements, it is permissible for fiduciaries to delegate investment choices to plan participants. *See* Jenkins v. Yager, 444 F.3d 916, 925–926 (7th Cir. 2006) (finding no fiduciary breach where fiduciary provided information about the performance of each investment alternative to participants and provided investor education meetings and materials regarding same).

6. *See* 29 C.F.R. § 2550.404c-1(a)(1-2).

7. The DOL's position is grounded in a footnote to the preamble of Section 404(c)'s regulations—not the regulations themselves. *See* Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 *Fed. Reg.* 46,906, 46,924 n.27 (Oct. 13, 1992). *See infra* Part IV for additional discussion.

8. *See Langbecker*, 476 F.3d at 310–312; *Hecker v. Deere & Co.*, 556 F.3d 575, 589 (7th Cir.), *pet. for reh'g and pet. for reh'g en banc denied*, 569 F.3d 708 (7th Cir. 2009), *pet. for cert. denied,* 78 USLW 3239 (U.S. Jan. 19, 2010); *see also In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 445 (3d Cir. 1996). *See infra* Part IV for additional discussion.

9. 29 U.S.C. § 1104(c); *see also Langbecker*, 476 F.3d at 309 ("Section 404(c) relieves a fiduciary from liability 'for any loss' or 'by reason of any breach'" where a plan complies with Section 404(c)'s requirements).

10. *See* 29 U.S.C. § 1001(b).

11. Varity Corp. v. Howe, 516 U.S. 489, 497 (1996). *See also* Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan."); Moore v. Reynolds Metals Co. Retirement Program, 740 F.2d 454, 456 (6th Cir. 1984) ("[A]n employer has no affirmative duty to provide employees with a pension plan. . . . In enacting ERISA, Congress continued its reliance on *voluntary* action by employers . . . .") (emphasis in original); Standard Oil Co. of California v. Agsalud, 633 F.2d 760, 764 (9th Cir. 1980) ("ERISA itself does not require employers to provide plans.").

12. 29 U.S.C. § 1002(34).

13. 26 U.S.C. §§ 401(a), (k). Amendments enacted to the Internal Revenue Code (IRC) in 1978 allowed for the creation of 401(k) plans. *See* Revenue Act of 1978, Pub. L. No. 95-600, § 135, 92 Stat. 2763 (1978) (codified at 26 U.S.C. § 401(k)). The IRS proposed regulations for IRC § 401(k) on November 10, 1981. *See* 46 *Fed. Reg*. 55544 (Nov. 10, 1981).

14. *See* LaRue v. DeWolff, Boberg & Assocs., Inc., 128 S. Ct. 1020, 1025 (2008) (characterizing defined benefit plans as the "former landscape of employee benefit plans"; "That landscape has changed. Defined contribution plans dominate the retirement plan today").

15. Lyons v. Georgia-Pacific Corp. Salaried Employees' Retirement Plan, 221 F.3d 1235, 1237 (11th Cir. 2000) (citation omitted); *see also* 29 U.S.C. § 1002(35).

16. *See* Investment Company Institute, "Research Perspective, 401(k) Pans: A 25-Year Retrospective," Vol. 12, No. 2, at p. 2 (Nov. 2006) ("25-year Retrospective"), available at *http://ici.org*.

17. *See* Investment Company Institute, "Research Fundamentals: The U.S. Retirement Market, 2008," Vol. 18, No. 5, at p. 9 (June 2009) ("U.S. Retirement Market"), available at *http://ici.org*.

18. *See* Eaton v. Onan Corp., 117 F. Supp. 2d 812, 817 (S.D. Ind. 2000) ("Because a participant's retirement benefit is not a fixed amount, the participant bears the investment risk."); *In re Unisys Sav. Plan Litig.*, No. 91-3067, 1997 WL 732473, at *25 n.30 (E.D. Pa. Nov. 24, 1997) (noting that participants in a defined contribution plan, not the employer, assume the risk of loss for their investments), *aff'd*, 173 F.3d 145 (3d Cir. 1999).

19. *See* Deloitte Consulting, Annual 401(k) Benchmarking Survey, 2005/2006 Edition.

20. Boeckman v. A.G. Edwards, 461 F. Supp. 2d 801, 803 (S.D. Ill. 2006) (citing Burks v. Lasker, 441 U.S. 471, 480 (1979)). The *Boeckman* court explained that the appeal of a mutual fund as an investment option includes "the diversification of risks, professional management, and the opportunity it affords small investors to invest their

savings in a professionally managed portfolio of equity securities." *Id.* (citing Noboru Tanabe, "Japan's Investment Trust: A Vehicle of Savings for Tomorrow," 2 *Ind. Int'l & Comp. L. Rev.*, 385, 387 (1992)).

Mutual funds fall into two categories of management: passively managed funds, also known as index funds, and actively managed funds. "An index fund will attempt to achieve its investment objective primarily by investing in the securities . . . of companies that are included in a selected index"—*e.g.*, the S&P 500. *See* "Index Funds," available at *http://www.sec.gov/answers/indexf.htm*. In contrast, actively managed funds have managers who actively research, monitor, and trade the holdings of the fund to seek a higher return than the market as a whole. *See Department of Labor, A Look at 401(k) Plan Fees for Employees,* available at *http://www.dol.gov./ebsa/publications/401(k)_employee.html.*

Some mutual funds offer more than one class of shares. *See* "Invest Wisely: An Introduction to Mutual Funds," available at *http://www.sec.gov/investor/pubs/inwsmf.htm*. Each class invests in the same portfolio and has the same investment objectives, but different classes will have different shareholder services and/or distribution arrangements with different fees and expenses. *Id.* Two such share classes are retail shares and institutional shares. Retail mutual funds are funds marketed and made available to the general public. Institutional mutual funds are similar to retail mutual funds in that they typically reflect a range of broad asset allocation objectives, and many institutional funds are provided by the major retail mutual fund providers (though not all retail funds have corresponding institutional funds). However, institutional mutual funds are available to a more limited set of investors. These investors include large financial service providers like banks, mutual fund families, stockbrokers, or insurance companies. Institutional funds are not generally available to the public; however, they are available to large 401(k) plans and other defined contribution plans with substantial assets, provided they can meet and maintain the investment minimums. Generally, institutional funds are not sold through broker/dealers, nor is their performance displayed in the press. *See generally* Pension and Welfare Benefits Administration, Study of 401(k) Plan Fees and Expenses, April 13, 1998 at Sections 2.4., 2.4.1.

[21] *See http://www.investopedia.com/terms/s/separateaccounts.asp.*

[22] *See http://www.investorwords.com/5462/collective_trust.html*; *see also* Jeffrey S. Torf, "Basic ERISA Reporting and Disclosure Requirements," *Practicing Law Institute*, 370 *PLI/Tax* 481, 520 (July 20–21, 1995) (defining a collective trust as a "trust maintained by a bank, trust company, or similar institution which is regulated, supervised, and subject to periodic examination by a state or Federal agency for the collective investment and reinvestment of assets contributed thereto from employee benefit plans maintained by more than one employer or a controlled group of corporations").

[23] *See, e.g.,* Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008).

[24] 29 U.S.C. § 1002(21)(A).

[25] *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) (recognizing functional nature of ERISA fiduciary status); Holdeman v. Devine, 474 F.3d 770, 778 (10th Cir. 2007) (ERISA fiduciary can wear two hats, as an employer and a fiduciary); Ames v. Am. Nat'l Can Co., 170 F.3d 751, 757 (7th Cir. 1999) ("ERISA fiduciaries are allowed to wear more than one hat.").

[26] *See, e.g.,* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444–445 (1999) (activities related to the formation and design rather than management of the plans are settlor functions); Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) (same); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) (same).

27. 29 U.S.C. § 1104(a)(1).

28. 29 U.S.C. § 1104(a)(1)(A)-(D). *See also* 29 U.S.C. § 1103(c)(1) (plan assets may never inure to the benefit of the employer; fiduciary must discharge its duties with an eye towards defraying expenses of administering the plan). With respect to the acquisition and holding of employer securities, ERISA Section 404(a)(2) expressly exempts "eligible individual account plans" (EIAPs) from the "the diversification requirement of [Section 404(a)(1)(C)] and the prudence requirement (only to the extent that it requires diversification) of [Section 404(a)(1)(B)]." 29 U.S.C. §§ 1104(a)(2), 1107(d)(2). EIAPs are also permitted to hold more than 10 percent of plan assets in employer securities. 29 U.S.C. § 1107(b)(1).

29. ERISA Section 406(a), 29 U.S.C.§ 1106(a), prohibits a fiduciary from causing a plan to enter into certain transactions with a "party in interest," which may include plan sponsors, participants, beneficiaries, fiduciaries, related corporations and officers or directors of the plan sponsor. *See* 29 U.S.C. §§ 1002(14), 1106(a). ERISA Section 406(b) prohibits any transaction that could be construed as "self-dealing" by the fiduciary. *See* 29 U.S.C. § 1106(b). ERISA Section 408 sets forth a number of specific exemptions from the prohibited transaction rules. *See* 29 U.S.C. § 1108. In addition, ERISA Section 408(a) provides that the Secretary of Labor may grant individual administrative exemptions from ERISA's prohibited transaction rules if the Secretary finds that such exemption is (a) administratively feasible; (b) in the interest of the plan and its participants and beneficiaries; and (c) protective of the rights of participants and beneficiaries of such plan. *See* 29 U.S.C. § 1108(a). Section 408(a) also gives the Secretary of Labor the authority to grant prohibited transaction class exemptions (PTCE) that covers classes of both fiduciaries and transactions. These class exemptions generally focus on an industry practice which affects employee benefit plans and could result in prohibited transactions under ERISA without an exemption. *See, e.g.,* PTCE 84-14 (exemption for qualified professional asset managers); PTCE 75-1, 86-128, *amended by* 71 *Fed. Reg*. 5885, 5887 (Feb. 3, 2006) (exemption permitting broker-dealers who are fiduciaries with respect to a plan to execute securities brokerage transactions on behalf of their plan clients); PTCE 77-3 and 77-4 (exemptions for mutual fund advisors).

30. ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), permits plan participants to seek "appropriate relief" under ERISA Section 409(a), which in turn provides in part that plan fiduciaries who breach their fiduciary duties under ERISA "shall be personally liable to make good to [the] plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate. . . ." 29 U.S.C. § 1109(a).

In LaRue v. DeWolff, Boberg & Associates, Inc., 128 S. Ct. 1020 (2008), the Supreme Court held that individual participants in defined contribution plans can sue to recover losses incurred by their individual plan accounts. LaRue was a 401(k) plan participant who sought money damages equal to the amount by which his account had been diminished when the plan fiduciaries failed to follow his investment directions (approximately $150,000). The Supreme Court considered whether LaRue was seeking relief for losses to the plan as permitted under Sections 502(a)(2) and 409(a), or whether he was seeking individual relief that would only be available under Section 502(a)(3). The Court concluded that fiduciary misconduct "need not threaten the solvency of the entire plan" and held that Sections 502(a)(2) and 409(a) protect the financial integrity of the plan, regardless of whether a fiduciary breach harms all participants or individual accounts. The Court also explained that its prior statement in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985), that ERISA only allowed recovery for losses to the plan "as a whole," was made in the context of a defined benefit plan in which plan assets were not allocated to any particular participants, but rather belonged to the plan as a whole. In the defined contribution context, however, assets are allocated to specific accounts. Accordingly, the Court explained, any loss to any account was a loss "to the plan." The Court found additional support for its reading of Section 502(a)(2) in Section 404(c), whose exemption of fiduciaries from losses caused by participant direction of their individual accounts would be superfluous if a fiduciary could never be liable for losses to an individual account. *LaRue*, 128 S. Ct. at 1025–1026.

ERISA Section 502(a)(3) permits plan participants to seek "other appropriate equitable relief" on their own behalf for alleged breaches of fiduciary duties. *See* 29 U.S.C. § 1132(a)(3). Such relief is limited, however, to "those categories of relief that were typically available in equity." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002) (citation omitted); *accord* Sereboff v. Mid Atlantic Med. Servs., 126 1869, 1874–1875 (2006) (same).

[31] Hecker v. Deere & Co., 556 F.3d 575, 580 (7th Cir.), *pet for reh'g and reh'g en banc denied*, 569 F.3d 708 (7th Cir. 2009), *cert. denied,* 78 USLW 3239 (U.S. Jan. 19, 2010); *see also* Jenkins v. Yager, 444 F.3d 916, 923 (7th Cir. 2006) (recognizing Section 404(c) as fiduciary "safe harbor"); Langbecker v. Electronic Data Sys., 476 F.3d 299, 309 (5th Cir. 2007) ("Section 404(c) relieves a fiduciary from liability 'for any loss' or 'by reason of any breach' if the plan is an individual account plan and the loss 'results from' a participant's exercise of control over assets in his account."); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 445 (3d Cir. 1996) (recognizing that Section 404(c) safe harbor applies to those fiduciaries who are "shown to have committed a breach of duty"); Tullis v. UMB Bank, N.A., No. 3:06-CV-7029, 2009 WL 2435084, at *4 (N.D. Ohio Aug. 11, 2009) ("Section 404(c) of ERISA relieves fiduciaries from liability for losses caused by a participant's individual exercise of control over assets.").

[32] 29 U.S.C. § 1104(c).

[33] *See Langbecker*, 476 F.3d at 312 ("Section 404(c) contemplates an individual, transactional defense [in situations where participants direct their own accounts], which is another way of saying that in participant-directed plans, the plan sponsor cannot be a guarantor of outcomes for participants."); *Hecker*, 556 F.3d at 590 (In a Section 404(c) plan, "[i]f particular participants lost money or did not earn as much as they would have liked, that disappointing outcome was attributable to their individual choices.").

[34] *See infra* Part III.B.

[35] Keith R. Pyle, "Compliance Under ERISA Section 404(c) With Increasing Investment Alternatives And Account Accessibility," 32 *Ind. L. Rev.*, 1467, 1469 (1999).

[36] 29 U.S.C. § 1104(c).

[37] *See* 29 C.F.R. § 2550.404c-1.

[38] 29 C.F.R. § 2550.404c-1(d)(2)(i).

[39] ERISA Section 3(34) defines an "individual account plan" and the synonymous "defined contribution plan" as "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34).

[40] 29 C.F.R. § 2550.404c-1(b)(3).

[41] 29 C.F.R. § 2550.404c-1(b)(2).

[42] 29 C.F.R. § 2550.404c-1(d)(2)(ii)(E)(4).

[43] 29 C.F.R. § 2550.404c-1(c).

[44] 29 C.F.R. § 2550.404c-1(b)(3)(i).

[45] 29 C.F.R. § 2550.404c-1(b)(3)(i)(A).

[46] 29 C.F.R. § 2550.404c-1(b)(3)(i)(B).

[47] 29 C.F.R. § 2550.404c-1(b)(3)(i)(C).

[48] 29 C.F.R. § 2550.404c-1(b)(2)(i)(A).

[49] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B).

[50] 29 C.F.R. § 2550.404c-1(b)(2)(i)(A).

[51] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B).

[52] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(i).

[53] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ii).

[54] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(iii).

[55] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(iv).

[56] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(v).

[57] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ix).

[58] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(viii). The "prospectus" requirement can be satisfied by providing participants with a mutual fund's summary prospectus. *See* U.S. Department of Labor, Field Assistance Bulletin 2009-03 (Sept. 8, 2009).

[59] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(vii).

[60] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(vi).

[61] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2)(i).

[62] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2)(ii).

[63] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2)(iii).

[64] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2)(iv).

[65] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2)(v).

[66] 29 C.F.R. § 2550.404c-1(d)(2)(ii)(E)(4)(iii).

[67] 29 C.F.R. § 2550.404c-1(d)(2)(ii)(E)(4)(iv).

[68] 29 C.F.R. § 2550.404c-1(d)(2)(ii)(E)(4)(v).

[69] 29 C.F.R. § 2550.404c-1(d)(2)(ii)(E)(4)(vi).

[70] 29 C.F.R. § 2550.404c-1(d)(2)(ii)(E)(4)(viii).

[71] 29 C.F.R. § 2550.404c-1(d)(2)(ii)(E)(4)(ix).

[72] 29 C.F.R. § 2550.404c-1(c)(2).

73. 29 C.F.R. § 2550.404c-1(c)(2)(ii).

74. *See generally e.g., Kirschbaum,* 526 F.3d 243; Pugh v. Tribune Co., 521 F.3d 686, 700 (7th Cir. 2008); Rogers v. Baxter Int'l, Inc., 521 F.3d 702, 705 (7th Cir. 2008); Edgar v. Avaya, Inc., 503 F.3d 340 (3d Cir. 2007); Harzewski v. Guidant Corp., 489 F.3d 799 (7th Cir. 2007); DiFelice v. U.S. Airways, Inc., 497 F.3d 410 (4th Cir. 2007); Summers v. State Street Bank & Trust Co., 453 F.3d 404 (7th Cir. 2006), *cert. denied*, 75 USLW 3196, 3266 (2007); Benitez v. Humana, Inc., No. 3:08cv-211-H, 2009 WL 3166651 (W.D. Ky. Sept. 30, 2009); *In re Computer Sciences Corp. ERISA Litig.*, 635 F. Supp. 2d 1128 (C.D. Cal. 2009), *appeal pending*, No. 09-56248 (9th Cir.); *In re Huntington Bancshares Inc. ERISA Litig.*, 620 F. Supp. 2d 842 (S.D. Ohio 2009); Lingis v. Motorola, Inc., No. 03 C 5044, 2009 WL 1708097 (N.D. Ill. June 17, 2009), appeal docketed, No. 09-2796 (7th Cir. July 14, 2009); Brieger v. Tellabs, Inc., 629 F. Supp. 2d 848 (N.D. Ill. 2009); *In re RadioShack Corp. ERISA Litig.*, 547 F. Supp. 2d 606 (N.D. Tex. 2008).

75. *See generally e.g.,* Hecker v. Deere & Co., 556 F.3d 575 (7th Cir.), *pet. for reh'g and reh'g en banc denied,* 569 F.3d 708 (7th Cir. 2009), *cert. denied,* 78 USLW 3239 (U.S. Jan. 19, 2010); Kanawi v. Bechtel Corp., 590 F. Supp. 2d 1213 (N.D. Cal. 2008), *appeal docketed*, No. 09-16253 (9th Cir. June 17, 2009); *In re Honda of Am., Inc. ERISA Fees Litig.*, Case No. 2:08-cv-01059, 2009 WL 3270490 (S.D. Ohio Oct. 9, 2009).

76. *See, e.g.*, *Hecker*, 556 F.3d at 588; *Langbecker,* 476 F.3d at 312; *Lingis*, 2009 WL 1708097 at **8–12; *Kanawi,* 590 F. Supp. 2d at 1232; *In re Washington Mutual, Inc. Sec. Deriv.and ERISA Litig.*, No. C07-1874, 2009 WL 3246994, at *7 (W.D. Wash. Oct. 5, 2009); Tussey v. ABB, Inc., No. 06-04305, 2008 WL 379666, at *3 (W.D. Mo. Feb. 11, 2008); George v. Kraft Foods Global, Inc., No. 06-cv-798, 2007 WL 853998, at *4 (S.D. Ill. Mar. 16, 2007); *In re Sprint Corp. ERISA Litig.*, 388 F. Supp. 2d 1207, 1234 (D. Kan. 2004); *In re Reliant Energy ERISALitig.*, 336 F. Supp. 2d 646, 669 (S.D. Tex. 2004).

77. *In re Unisys Sav. Plan Litig.*, 74 F.3d 420 (3d Cir. 1996), *on remand*, 1997 WL 732473 (E.D. Pa. Nov. 24, 1997), *aff'd*, 173 F.3d 145 (3d Cir. 1999).

78. *Unisys,* 74 F.3d at 442–448. The transactions at issue in *Unisys* predated the DOL's Section 404(c) regulations. *Id.*

79. *Id.* at 445–446 (citing H.R. Conf. Rep. No. 1280, *reprinted in* 1974 U.S.C.C.A.N. at 5085–5086).

80. *Id.* at 445.

81. *Id.* at 447.

82. *Id.* at 448.

83. 1997 WL 732473, at *32.

84. *Id.* at *31. The Third Circuit affirmed, but did not address Section 404(c). 173 F.3d at 160–161.

85. 476 F.3d 299 (5th Cir. 2007).

86. To certify a class under Federal Rule of Civil Procedure 23, a plaintiff must demonstrate that (1) the class is so numerous that "joinder of all members is impracticable;" (2) there are "questions of law or fact common to the class;" (3) the claims of the representative party are "typical" of the class; and (4) the representative party is able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

87. 476 F.3d at 313.

88. This is consistent with the Section 404(c) regulations. For example, the DOL's regulations expressly state that the regulations "are applicable solely for the purpose of determining whether a plan is an ERISA Section 404(c) plan and *whether a particular transaction* engaged in by a participant or beneficiary of such plan is afforded relief by section 404(c)." 29 C.F.R. § 2550.404c-1(a)(2) (emphasis added). The DOL's regulations also provide that "[w]hether a participant or beneficiary has exercised independent control in fact *with respect to a transaction* depends on the facts and circumstances of the particular case." 29 C.F.R. § 2550.404c-1(c)(2) (emphasis added).

89. *Id.* at 312.

90. *Id. See also* Wiseman v. First Citizens Bank & Trust Co., 212 F.R.D. 482, 487 (W.D.N.C. 2003) (denying plaintiffs' motion for class certification after finding that "the issue of independent control [for Section 404(c) purposes] will require an individual analysis for each class member" and that "[e]xamining the issue of independent control for each of hundreds of thousands of plaintiffs will make a class action unwieldy and impracticable"); Thomas v. Aris Corp. of America, 219 F.R.D. 338, 342 (M.D. Pa. 2003) (denying plaintiffs' motion for class certification after concluding that defendants' invocation of the Section 404(c) defense "renders the potential class members' claims significantly different from and atypical of [the representative plaintiff's] claim"). On the other hand, some district courts have ruled that Section 404(c) "is not an appropriate basis to deny class certification." Kanawi v. Bechtel Corp., 254 F.R.D. 102, 109–110 (N.D. Cal. 2008); *see also In re Schering-Plough Corp. ERISA Litig.*, No. 03-1204, 2008 WL 4510255, at *10 n.6 (D. N.J. Jan. 31, 2008) ("ERISA classes can be, and often are, certified despite the potential applicability of a section 404(c) defense."); George v. Kraft Foods Global, Inc., 251 F.R.D. 338, 349–350 (N.D. Ill. 2008) (certifying class and holding that the adjudication of Section 404(c) defense did not require individualized determinations to decide whether the defense actually had merit and, thus, did not defeat typicality); Lively v. Dynegy, Inc., No. 05-CV-00063, 2007 WL 685861, at *10 (S.D. Ill. Mar. 2, 2007) (same); Brieger v. Tellabs, Inc., 245 F.R.D. 345, 353 (N.D. Ill. 2007) (rejecting Section 404(c) as a bar to a finding of typicality: "[P]laintiffs' claims focus on defendants' actions toward the plan, and whether those actions were prudent. . . . [T]he court does not understand plaintiffs' claims on behalf of the Plan to be affected by individual investment patterns.").

91. 556 F.3d 575, *pet. for reh'g and reh'g en banc denied,* 569 F.3d 708 (7th Cir. 2009), *cert. denied,* 78 USLW 3239 (U.S. Jan. 19, 2010).

92. 556 F.3d at 578–579.

93. *Id.* at 586. The court also affirmed the dismissal of claims against the Fidelity entities on grounds that they were not plan fiduciaries. *Id.* at 584.

94. *Id.* at 585–586. The court also rejected plaintiffs' claims that plan participants had been misled through SPD supplement statements which allegedly gave "the impression that Deere was paying the administrative costs of the Plans, even though in reality the participants were paying through the revenue sharing system we have described." *Id.* at 585. The court emphasized that, in fact, "the participants were told about the total fees imposed by the various funds, and the participants were free to direct their dollars to lower-cost funds if that was what they wished to do. The SPD supplements told participants to look to the fund prospectuses for detailed information on fund-level expenses, and the prospectuses in fact furnished that information." *Id.* While noting that Deere "may not have been behaving admirably by creating the impression that it was generously subsidizing its employees' investments by paying something to Fidelity Trust when it was doing

no such thing," the court found that "the Complaint does not allege any particular dollar amount that was fraudulently stated." *Id.* Further, "[h]ow Fidelity Research decided to allocate the monies it collected (and about which the participants were fully informed) was not, at the time of the events here, something that had to be disclosed." *Id.*

The court also found that Deere had not omitted any material information in its disclosures to participants, because Deere disclosed the total fees for the funds and directed participants to the fund prospectuses for fund-level expense information. In the eyes of the Seventh Circuit, "[t]he total fee, not the internal, post-collection distribution of the fee, is the critical figure for someone interested in the cost of including a certain investment in her portfolio and the net value of that investment. . . . The later distribution of the fees by Fidelity [Management] is not information the participants needed to know to keep from acting to their detriment. . . . The information is thus not material, and its omission is not a breach of Deere's fiduciary duty." *Id.* at 586.

[95] 556 F.3d at 588. The court noted that, while Rule 12(b)(6) dismissals typically are not based on the assessment of an affirmative defense, "that rule does not apply when a party has included in its complaint 'facts that establish an impenetrable defense to its claims.'" *Id.* (quoting Tamayo v. Blagojevich, 526 F.3d 1074, 1086 (7th Cir. 2008)). "A plaintiff pleads himself out of the court when it would be necessary to contradict the complaint in order to prevail on the merits. . . . If the plaintiff voluntarily provides unnecessary facts in her complaint, the defendant may use those facts to demonstrate that she is not entitled to relief." *Id.*

The *Hecker* court also noted that, by so "extensively" discussing in the complaint the ways the plans allegedly fell short of Section 404(c) compliance, plaintiffs also had *waived* arguments against defendants' alleged failure to comply with those Section 404(c) requirements that plaintiffs had *not* addressed in their complaint *Id.* at 588–589. Thus, plaintiffs were left to argue against defendants' compliance with only those aspects of Section 404(c) that were preemptively challenged in the complaint. *Id.* at 589. *See also* Abbott v. Lockheed Martin Corp., No. 06-cv-0701, 2009 WL 839099, at *13 (S.D. Ill. Mar. 31, 2009) (following *Hecker* and holding that plaintiffs' decision to anticipate Section 404(c) in their complaint "waived the right to complain about [defendants'] compliance with all but" those Section 404(c) regulations which plaintiffs addressed in their complaint).

On the other hand, some courts have declined to apply Section 404(c) at the pleadings stage. *See, e.g.*, *Tussey*, 2008 WL 379666, at *3 (collecting cases and finding that "Section 404(c) is an affirmative defense that must be pleaded and proved at trial and is not appropriately resolved in a motion to dismiss"); *RadioShack*, 547 F. Supp. 2d at 617 (fact questions precluded consideration of Section 404(c) defense on motion to dismiss); *Sprint*, 388 F. Supp. 2d at 1234–1235 (collecting cases and holding that "[r]esolution of [section 404(c)] on a motion to dismiss is premature"); Rankin v. Rots, 278 F. Supp. 2d 853, 873 (E.D. Mich. 2003) ("Whether or not section 404(c) applies is not a question on a motion to dismiss.").

[96] 556 F.3d at 589–590.

[97] *Id.* at 589 (quoting 29 C.F.R. § 2550.404c-1(b)(3)).

[98] *Id.* (citing 29 C.F.R. §§ 2550.404c1(b)(3)(i)(A)-(C)).

[99] *Id.* at 590.

[100] *Id.*

[101] 569 F.3d 708. *See infra* Part IV.D for additional discussion.

102. ERISA includes a comprehensive disclosure scheme, which is set forth at 29 U.S.C. § 1021, *et seq.*, and the DOL's implementing regulations at 29 C.F.R. § 2520, *et seq.* The regulations cover three main areas of disclosure: (1) materials that must be provided to plan participants; (2) materials that must be made available to participants upon request; and (3) materials that must be made available to participants for inspection at reasonable times and in a reasonable place. *See* 29 C.F.R. § 2520.104b-1(a). Within the first category, the principal material that must be provided plan participants is a summary plan description (SPD). *See* 29 C.F.R. §§ 2520.102-2, 2520.104b-3.

103. 29 C.F.R. § 2550.404c-1(c)(2)(ii).

104. *See Hecker*, 556 F.3d at 589 ("[T]he regulations implementing the safe-harbor defense describe in detail the expenses and fees that must be disclosed."), *affirming* Hecker v. Deere & Co., 496 F. Supp. 2d 967, 975 (W.D. Wis. 2007) ("The allegedly omitted disclosures are not required by the language of the regulations and would instead require judicial expansion of the detailed disclosure regime crafted by Congress and the Department of Labor pursuant to its statutory authority.").

105. 556 F.3d at 589; *see also* 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(v) (regulation addressing fee disclosures pursuant to Section 404(c)).

106. No. 03 C 5044, 2009 WL 1708097 (N.D. Ill. June 17, 2009), *appeal docketed*, No. 09-2796 (July 14, 2009).

107. *Id.* at *8.

108. *Id.*

109. *Id.* (emphasis in original).

110. *Id.* (quoting *Black's Law Dictionary* 288 (6th ed. 1990)).

111. *Id.*

112. 2009 WL 1708097, at **9–10.

113. *Id.* at *9.

114. *Id.* at *10 (noting that "courts have suggested that requiring disclosure of non-public information to plan beneficiaries when the information has not been provided to the market generally may run afoul of the insider trading laws"). This is consistent with Section 514(d) of ERISA, which provides that "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d).

Several other courts have held in the stock-drop context, regardless of Section 404(c), that ERISA fiduciaries are not obligated to violate insider trading laws by (1) making selective disclosures of materially adverse information to plan participants ahead of the market, or (2) liquidating or closing the employer stock fund based on material inside information not yet disclosed to the market. *See, e.g.,* Edgar v. Avaya, Inc., 503 F.3d 340 (3d Cir. 2007) (rejecting argument that inside information must be disclosed in violation of securities law); Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 256 (5th Cir. 2008) ("from a practical standpoint, compelling fiduciaries to sell off a plan's holdings of company stock may bring about precisely the result plaintiffs seek to avoid: a drop in the stock price."); *In re Computer Sciences Corp. ERISA Litig.*, 635 F. Supp. 2d 1128 (C.D. Cal. 2009) ("Eliminating CSC stock as an investment option for its employees is a clarion call to the investment world that the [fiduciaries] lacked confidence in the value of [the company's] stock, and could have a catastrophic effect on CSC stock price, severely harming all CSC stock holders, including Plan members"), *appeal pending,* No. 09-56248 (9th Cir.). *But see* Brieger v. Tellabs, Inc., 629 F. Supp. 2d 848, 865 (N.D. Ill. 2009) ("reject[ing] defendants' argument that they could not disclose certain information out of fear of violating securities laws," as "that reasoning would essentially permit a fiduciary to violate his or her ERISA duties under the guise of complying with another statute when other options exist," including disclosure to the general public or retention of an independent fiduciary); Shanehchian v. Macy's, Inc., No. 1:07-CV-00828, 2009 WL 2524562, at *9 (S.D. Ohio Aug. 14, 2009) (finding "not . . . well-taken" defendants' argument that stock-drop claims should be dismissed because they attempt to circumvent insider trading laws).

115. 2009 WL 1708097, at *11 (citation omitted).

116. *Id.* at *12.

117. No. 3:06-CV-7029, 2009 WL 2435084 (N.D. Ohio Aug. 11, 2009).

118. *Id.* at **1–2.

119. *Id.* at *1.

120. *Id.*

121. *Id.* at **1–2.

122. *Id.* at *2.

123. *Id.* at *7 (internal quotations omitted).

124. *Id.* at *8.

125. *Id.*

126. The court made separate findings that the plan complied with each of Section 404(c)'s regulatory requirements. *Id.* at **4–5.

127. *Id.*

128. Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 *Fed. Reg.* 46, 906, 46,924 n.27 (Oct. 13, 1992).

129. *Id.*

130. 467 U.S. 837, 842–845 (1984).

131. *Id.* Courts also defer to an agency's reasonable interpretation of its own regulation where the regulation is ambiguous. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997). The key to triggering agency deference under *Chevron* and *Auer* is the resolution of ambiguity in a statutory or regulatory scheme. In the absence of such ambiguity, no deference is required. Rather, the agency's position is entitled only to "respect," and "only to the extent that those interpretations have the power to persuade." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also* U.S. v. Mead Corp., 533 U.S. 218, 234 (2001). Thus, deference does not apply to "more informal statement[s] of administrative practice . . . ." *Hecker*, 569 F.3d at 710 (citing *Mead*, 533 U.S. 218 and *Skidmore*, 323 U.S. 134).

132. Brief of the Secretary of Labor, Hilda L. Solis, As Amicus Curiae in Support of Panel Rehearing at 4–8, Hecker v. Deere & Co., 569 F.3d 708 (7th Cir. 2009) (No. 07-3605).

133. *See, e.g.*, Brief of the Secretary of Labor, Hilda L. Solis, As Amicus Curiae in Support of Panel Rehearing, Hecker v. Deere & Co., 569 F.3d 708 (7th Cir. 2009) (No. 07-3605); Brief of the Secretary of Labor, Hilda L. Solis, As Amicus Curiae in Support of Plaintiff-Appellee And Requesting Affirmance, Wendel v. Herzlinger,

(3d Cir. May 26, 2009) (No. 08-4814); Brief of the Secretary of Labor, Elaine L. Chao, As Amicus Curiae in Support of Plaintiff-Appellants, Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009) (No. 07-3605); Brief of the Secretary of Labor, Elaine L. Chao, As Amicus Curiae in Support of Plaintiffs-Appellees, Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299 (5th Cir. 2007) (No. 04-41760); Amended Brief of the Secretary of Labor As Amicus Curiae Opposing the Motion to Dismiss, Tittle v. Enron Corp., 284 F. Supp. 2d 511 (S.D. Tex. 2003) (No. 01-3913).

134. Brief of Secretary of Labor, Elaine L. Chao, As Amicus Curiae in Support of Plaintiff-Appellants, Hecker v. Deere & Co., 556 F.3d 575 (7th Cir. 2009) (No. 07-3605).

135. *Id.* According to the Secretary, "[i]t is the fiduciary's responsibility to choose investment options in a manner consistent with the core fiduciary duties of prudence and loyalty. If it has done so, section 404(c) relieves the fiduciary from responsibility for the participants' exercise of authority over their own accounts. If, however, the funds offered to the participants were imprudently selected or maintained, the fiduciary retains liability for the losses attributable to the fiduciary's own imprudence." *Id.*

136. *Id.*

137. 74 F.3d 420 (3d Cir. 1996).

138. *See Langbecker*, 476 F.3d at 310–312; *Hecker*, 556 F.3d at 589–590 and 569 F.3d at 709–711.

139. 74 F.3d at 445.

140. *Id.*

141. *Id.*

142. 476 F.3d at 310.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 310–311.

148. *Id.* at 311.

149. *Id.*

150. *Id.*

151. *Id.* at 312.

152. *Id.*

153. *Id.*

154. 556 F.3d 575 (7th Cir.), *pet. for reh'g and pet. for reh'g en banc denied*, 569 F.3d 708 (7th Cir. 2009), *cert. denied,* 78 USLW 3239 (U.S. Jan. 19, 2010).

155. 556 F.3d at 589 (internal quotations and alterations omitted). The court characterized plaintiffs' argument as having "[p]inned their hopes on a footnote to the preamble to the [DOL] implementing regulations." *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 589.

159. *Id.* at 590.

160. *Id.*

161. *Id.*

162. 569 F.3d 708.

163. *Id.* at 709–711.

164. Brief of the Secretary of Labor, Hilda L. Solis, As Amicus Curiae in Support of Panel Rehearing at 4–8, Hecker v. Deere & Co., 569 F.3d 708 (7th Cir. 2009) (No. 07-3605).

165. 569 F.3d at 709–710.

166. *Id.* at 711; *see* Brief of the Secretary of Labor, Hilda L. Solis, As Amicus Curiae in Support of Panel Rehearing at 13, Hecker v. Deere & Co., 569 F.3d 708 (7th Cir. 2009) (No. 07-3605).

167. Brief of the Secretary of Labor, Hilda L. Solis, As Amicus Curiae in Support of Panel Rehearing at 14, Hecker v. Deere & Co., 569 F.3d 708 (7th Cir. 2009) (No. 07-3605).

168. 569 F.3d at 710.

169. *Id.* at 710–711.

170. *Id.* at 711.

171. 556 F.3d at 589. *See also* Lingis v. Motorola, Inc., No. 03-C-5044, 2009 WL 1708097, at *13 (applying *Hecker* in stock-drop case), *appeal docketed*, No. 09-2796 (July 14, 2009); Tullis v. UMB Bank*, N.A.*, No. 3:06 CV 7029, 2009 WL 2435084, at **4–5, 7–8 (N.D. Ohio Aug. 11, 2009) (applying *Hecker* to plaintiffs' claims of breach of fiduciary duty of loyalty).

172. A handful of district courts have followed the DOL's position. *See* Page v. Impac Mortgage Holdings, No. 07-1447, 2009 WL 890722, at *4 (C.D. Cal. Mar. 31, 2009) (following DOL position); Tatum v. R.J. Reynolds Tobacco Co., 254 F.R.D. 59, 66 (M.D.N.C. 2008) (same); *In re Dynegy, Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 894 n.57 (S.D. Tex. 2004) (same); *In re Tyco*, 606 F. Supp. 2d 166, 169 (D.N.H. 2009) (same); *In re Enron Corp. Securities, Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 578–579 (S.D. Tex. 2003) (recognizing the DOL's position that plan fiduciaries "retain[] the duty to prudently select investment options under the plan and to oversee their performance on a continuing basis" and that breaches of such duties cannot be absolved by Section 404(c)). *See also* Kanawi v. Bechtel Corp., 590 F. Supp. 2d 1213, 1232 (N.D. Cal. 2008) (adopting DOL's position; "[w]here the options available to participants are tainted by conflicts of interest or imprudent management, a party should not be able to avoid liability simply by providing participants the opportunity to exercise control over their accounts."), *appeal docketed*, No. 09-16253 (9th Cir. June 17, 2009); Tibble v. Edison Int'l, No. 07-5359, 2009 WL 2382340, at **41–42 (C.D. Cal. July 16, 2009) (distinguishing *Hecker*; because plaintiffs alleged more egregious breaches of the duty of loyalty as the result of fiduciary conflicts of interest, "this case does not justify the same broad application of the safe harbor as . . . used in *Hecker*" and "the better view is that . . . supported by the DOL, that the fiduciaries should not be shielded from liability for offering the participants investment options that are the result of a conflict of interest").

[173] 497 F.3d 410, 418 n.3 (4th Cir. 2007).

[174] *Id.* at 414–417.

[175] 436 F. Supp. 2d 756 (E.D. Va. 2006).

[176] 497 F.3d at 421.

[177] *Id.*

[178] 73 *Fed. Reg.* 43,014 (July 23, 2008). Among other things, the proposed new regulations would require providing the following information to each participant in a participant-directed plan with respect to each investment option in the plan (other than a brokerage window, self-directed brokerage account, or similar plan arrangement that enables a participant to select investments beyond those designated by the plan): (1) the name and category of the investment alternative (*e.g.*, money market mutual fund, balanced fund, index fund, and whether the investment is actively or passively managed) and an Internet address that will lead participants to supplemental information about the investment option; (2) average annual total return on the investment for one-year, five-year, and 10-year periods, if available; (3) performance date for "an appropriate broad-based benchmark" over time periods comparable to the performance data periods; and (4) fees and expenses related to the purchase, holding, and sale of the investment alternative, including (a) shareholder-type fees charged directly against the investment, such as sales loads, sales charges, and redemption fees; and (b) total annual operating expenses expressed as a percentage (*i.e.*, expense ratio).

[179] *Id.*

[180] *Id.* at 43,018.

[181] *Id.*

[182] On January 20, 2009, White House Chief of Staff Rahm Emanuel sent a memo to the heads of Executive Departments and Agencies directing that they reconsider all pending proposed regulations from the prior administration. This temporary moratorium on new rules and regulations put the DOL's Section 404(c) regulations on hold.

[183] *See* BNA Pension & Benefits Daily, *Plan Disclosure Among Rules Still in Works, Future Focus on Distributions, Official Says* (Nov. 25, 2009) (reporting on comments by Robert Doyle, director, Office of Regulations and Interpretations in the DOL's Employee Benefits Security Administration, at ABA Business Law Section meeting held November 20, 2009).

[184] 29 U.S.C. § 1104(c). Courts have also properly declined to use 404(c) as a means to expand ERISA's general disclosure requirements. *See supra* Part IV.B.

[185] *See also* LaRue v. DeWolff, Boberg & Assoc, Inc., 128 S. Ct. 1020 (2008). The concurrences of Justices Scalia and Thomas construed Section 404(c)'s counterpart on the liability side—ERISA Section 409(a), which imposes liability on breaching fiduciaries for "*any* loss to the plan . . . ." The concurrence observed that "Congress' repeated use of the word 'any' in § 409(a) clarifies that the key factor is whether the alleged losses can be said to be losses 'to the plan,' not whether they are otherwise of a particular nature or kind." *Id.* at 1028. Because Congress used the same unqualified "any" language in Section 404(c) as it does in Section 409(a), it seems apparent that Congress intended Section 404(c) and Section 409(a) to be symmetrical, and that a fiduciary responsible for "any loss" under Section 409(a) can also be shielded from "any breach" under Section 404(c), regardless of whether the breach, or the loss, is "of a particular nature or kind."

186. *Langbecker*, 476 F.3d at 311. *See also Unisys,* 74 F.3d at 445 ("There is nothing in [section 404(c)] which suggests that a breach on the part of a fiduciary bars it from asserting [section 404(c)'s] application. On the contrary, the statute's unqualified instruction that a fiduciary is excused from liability for 'any loss' which 'results from [a] participant's] or [a] beneficiary's exercise of control' clearly indicates that a fiduciary may all upon [section 404(c)'s] protection where a causal nexus between a participant's] or a beneficiary's exercise of control and the claimed loss is demonstrated.").

187. 476 F.3d at 310.

188. *See supra* Part III.B.

189. *See* 29 U.S.C. § 1104(c)(1)(A) ("In the case of a pension plan which provides for . . . .").

190. 29 U.S.C. § 1104(c).

191. *See* Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444–445 (1999); Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). *Hecker* also recognized that the DOL's position is overbroad to the extent it can be construed to mean that the selection of plan investments is always a fiduciary function. 556 F.3d at 586.

192. *See Chevron*, 467 U.S. at 842–845; *Auer,* 519 U.S. at 461; *Skidmore*, 323 U.S. at 140; *Mead Corp.*, 533 U.S. at 234.

193. *See supra* Part IV.E.

194. ERISA's prudence regulations are consistent with "modern portfolio theory," which focuses on the total mix of available investment options—including a range of risk and return characteristics—rather than on a single specific option. *See* 29 C.F.R. § 2550.404a-1(b). *See also* Summers v. State St. Bank & Trust Co.,453 F.3d 404, 411 (7th Cir. 2006) ("it is the riskiness of one's portfolio, not of a particular asset in the portfolio, that is important to the risk-averse investor"), *cert. denied,* 549 U.S. 1245 (2007); Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc., 173 F.3d 313, 322 (5th Cir. 1999) (finding that the district court erroneously evaluated the prudence of the investment in isolation rather than by using the modern portfolio theory required by ERISA and as expressed by the Secretary's regulations). *But see DiFelice*, 497 F.3d at 423 ("the 'relevant portfolio' that must be prudent is each available Fund considered on its own").

195. 74 F.3d at 446.

196. 476 F.3d at 310.

197. *See supra* n.11 and accompanying text.

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