

# Actively Managed Funds Remain Appropriate Investment Options for 401(k) Plans

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When the Employee Retirement Income Security Act (ERISA) was enacted in 1974, defined benefit plans dominated the retirement landscape and passively managed funds were generally nonexistent. Yet by 1992, when the Department of Labor (DOL) issued its regulation on when plan fiduciaries could avoid liability for participant investment decisions, defined contribution 401(k) plans were common and passively managed funds were widely available. Against this backdrop, DOL explained that plan fiduciaries wishing to avoid liability for participant investment decisions should offer to participants a set of investment alternatives that, in the aggregate, enable participants to “construct a portfolio with risk and return characteristics appropriate to their circumstances.”<sup>1</sup> Plan fiduciaries thus viewed it as their obligation to provide a broad range of investment alternatives to plan participants.<sup>2</sup>

A number of lawsuits have confirmed that plan fiduciaries were wise to offer a varied selection of investment alternatives to plan participants. For example, in a lawsuit brought against Exelon Corporation, plaintiffs had alleged that plan fiduciaries acted imprudently in selecting certain investment funds with allegedly high fees.<sup>3</sup> The court ruled in favor of the plan fiduciaries, however, because the plan offered 32 investment options consisting of both actively managed and passively managed funds—certainly, a “wide range of [investment] options.”<sup>4</sup>

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The emergence of target-date funds that could be used as the participants’ entire investment portfolio did not affect the need to provide participants with a broad range of investment alternatives. This is because some plan participants may choose not to invest in a target-date offering or may invest in a target-date fund in addition to other investment alternatives. (Also, because target-date funds could use either actively managed or passively managed investments, or both, a decision to offer target-date funds always involves a determination of whether to use active management. All target-date funds, of course, have actively managed glide paths.)

Thus, regardless of the availability of target-date funds, which could serve as a participant’s entire investment portfolio, many plan fiduciaries continue to assess how best to offer plan participants a fulsome range of investment alternatives. Many plan fiduciaries view actively managed funds—with return-risk characteristics that differ from

market indexes—as providing plan participants with the ability to more easily vary the return-risk characteristics of their individual investment portfolios than they could with passively managed funds alone. For example, a plan participant interested in building a portfolio with exposure to small-cap stocks (but concerned about volatility) may appreciate an actively managed small-cap fund that is managed to have a lower volatility than the Russell 2000 Index.

Some commentators have suggested that index funds are easier to monitor for plan fiduciaries in that they mostly remove the need to monitor performance. ERISA, however, requires plan fiduciaries to act solely in the interest of the plan’s participants and beneficiaries and not with the goal of making the fiduciaries’ job easier. Indeed, ERISA explicitly prohibits plan fiduciaries from using plan assets in their own self-interest,<sup>5</sup> and the plan’s right to select investment funds is an “asset” that belongs to the plan.<sup>6</sup> Thus, while plan fiduciaries are allowed to receive an

“incidental benefit” if they do in fact act in the best interest of the plan’s participants and beneficiaries,<sup>7</sup> the plan fiduciaries would be exposed to the potential allegation that they offered only passively managed funds in the plan to eliminate the need to closely monitor fund performance.

Although it is not the purpose of this article to assess the strength of the argument that limiting available investment alternatives to passively managed funds—and thereby precluding all plan participants from achieving above-market returns at all times—is in the best interest of the plan’s participants and beneficiaries, we note that a potential claim that could be asserted against plan fiduciaries for not making actively managed funds available is: That the plan fiduciaries breached their duty of prudence by precluding plan participants from realizing higher returns than the market returns available through passively managed funds.

We do not believe that there is a need for plan fiduciaries to even consider offering only passively managed funds to plan participants because, as we explain below, there is no legal basis for concluding that ERISA or DOL prefers passive management over active management, or vice versa.

ERISA requires plan fiduciaries to act in the sole interest of the plan’s participants and to act as a prudent person would act under the same circumstances.<sup>8</sup> The legislative history indicates that Congress intended to apply “traditional trust law” principles to the conduct of fiduciaries,<sup>9</sup> and courts have looked to the common law of trust in determining how a prudent fiduciary would have acted where ERISA does not provide an explicit permission or prohibition.<sup>10</sup>

Although ERISA is a “comprehensive and reticulated statute,”<sup>11</sup> it does not mandate specific investments or investment types as necessarily prudent or

imprudent. DOL “has not specified that any particular investment product or category is illegal or per se imprudent” either.<sup>12</sup> There are certain specific rules, such as the prohibition on the extent to which a defined benefit plan can invest in employer securities,<sup>13</sup> but none that goes to the active vs. passive management issue. (Even if Congress had wanted to limit plan fiduciaries’ ability to use certain investment types or vehicles—which it did not—Congress could not have done so with respect to actively managed funds because passively managed funds were not yet in existence.)

The common law of trust, on which ERISA’s prudent-person rule is based, does not classify “specific investments or courses of action [as] prudent or imprudent in the abstract.”<sup>14</sup> And consistent with this principle, DOL has opined that, “[w]hether a particular fund or investment alternative satisfies [ERISA’s prudence] requirement[ ] ... is an inherently factual question, and ... [t]he appropriate plan fiduciaries must make this determination, based on all the facts and circumstances of the individual situation.”<sup>15</sup> In short, ERISA does not limit the type of investment strategy that can be used for plan investments.

What ERISA requires is for plan fiduciaries to “engage[ ] in a reasoned decision-making process, consistent with that of a prudent man acting in a like capacity.”<sup>16</sup> Under DOL regulations interpreting the prudent-person standard, plan fiduciaries, in making investment decisions, should give appropriate consideration to the relevant facts and circumstances in light of the role a “particular investment or investment course of action” plays in the “plan’s investment portfolio.”<sup>17</sup> Plan fiduciaries must act prudently in both selecting an investment fund and in monitoring the investment fund after selection.<sup>18</sup> These rules apply regardless of the investment strategy used by an investment fund.

DOL confirmed this when it issued new guidance in 2015 on “investments that

are selected for the economic benefits they create in addition to the investment return.”<sup>19</sup> In that guidance, DOL yet again confirmed that whether the selection of “a particular fund or investment alternative satisfies the [prudent-person] requirement[ ] ... is an inherently factual question that the appropriate plan fiduciaries must decide based on all the facts and circumstances of the individual situation.”<sup>20</sup>

DOL has never opined formally that actively managed funds are less appropriate for a 401(k) plan than passively managed funds. In fact, when the 401(k) fee cases started to gain traction about 10 years ago, DOL opposed proposed legislation by Rep. George Miller (D-CA)—the 401(K) Fair Disclosure for Retirement Security Act of 2007—that would have required 401(k) plans to offer at least one index fund as an investment option. At that time, DOL expressed concern with legislative proposals “that would mandate specific investment options—limiting the ability of employers and workers together to design plans that best serve their mutual needs.”<sup>21</sup>

More recently, in adopting the participant disclosure regulation under section 404(a) of ERISA in 2010, DOL included a model disclosure chart that included both index and actively managed funds.<sup>22</sup> This is not surprising in that the vast majority of 401(k) plans included—and still includes—actively managed funds as investment options. Importantly, nothing in the participant disclosure regulation or the Federal Register notice containing DOL’s commentary suggests that DOL viewed passively managed funds as more appropriate for a 401(k) plan than actively managed funds, or vice versa.<sup>23</sup>

As noted above, DOL issued new guidance in 2015 on “economically targeted” investments that are “selected for the economic benefits they create in addition to the investment return.”<sup>24</sup> In that guidance, DOL noted that plan fiduciaries

“need not treat commercially reasonable [economically targeted] investments as inherently suspect or in need of special scrutiny” and that “socially-responsible mutual funds,” for example, may be used as investment alternatives in 401(k) plans if they are prudently selected.<sup>25</sup> Although some indexes are made up of socially responsible companies, these indexes are not the type of broad securities market indexes commonly associated with passively managed index funds. Thus, DOL’s new guidance implicitly confirms that investment strategies (such as active management) that are different from tracking a broad securities market index are not inherently suspect or in need of special scrutiny.

Additional evidence of DOL’s neutrality on active vs. passive management can be found in the DOL’s regulation on “qualified default investment alternatives” (“QDIAs”). Plan fiduciaries may, in the absence of investment directions from plan participants, invest plan participant account balances in a QDIA and avoid potential liability for investment losses.<sup>26</sup> One of the permitted forms of a QDIA is a managed account option,<sup>27</sup> which could involve an investment manager allocating participant account balances to the available investment alternatives under the plan for a management fee. This is a form of active management.

In a lawsuit brought against United Technologies, the court rejected plaintiffs’ argument that higher fees of actively managed mutual funds necessarily made the funds inappropriate for use in 401(k) plans.<sup>28</sup> The court held that the plan fiduciaries’ process for selecting actively managed funds, which included consideration of potential investment performance, fees, and fund managers’ experience, was a prudent process.<sup>29</sup> The court also held that it was not enough for the plaintiffs to allege that the selection of actively managed funds was imprudent without showing which particular investment decisions were imprudent.<sup>30</sup>

Similarly, in a case brought against Boeing, plaintiffs challenged “the [plan fiduciaries’] decision to select actively managed [mutual funds,] which [the plaintiffs alleged] were not reasonably expected to outperform low cost passive index funds.”<sup>31</sup> The plaintiffs, however, did not succeed on this general attack on the value of active management, and the settlement agreement reached in the case does not include Boeing agreeing to stop using actively managed funds.<sup>32</sup>

The Boeing settlement agreement does include Boeing’s agreement to retain an independent investment consultant to review whether a technology sector fund is an appropriate investment option for the plan.<sup>33</sup> But the basis for the plaintiffs’ challenge was that the plan’s technology sector fund was excessively high-risk in that it was concentrated in a single sector.<sup>34</sup> The plaintiffs could have made the same high-risk argument if a passively managed technology fund was used instead of an actively managed fund.

A lawsuit that was brought against Kraft is no exception. In that case, the court ruled that there was a triable issue as to whether the use of actively managed U.S. stock investments was prudent in the company’s 401(k) plan.<sup>35</sup> However, this ruling was based on the plaintiffs’ allegation that the plan fiduciaries—when acting with respect to the company’s defined benefit plan—had concluded that they could not find a U.S. stock investment manager who could reliably outperform the market and therefore removed all actively managed U.S. stock investments from the defined benefit plan. This was an unusual fact specific to the Kraft plan fiduciaries.<sup>36</sup> The case was settled before trial, so it is not clear whether the plan fiduciaries would have been successful in arguing that, despite their subjective beliefs, the selection of actively managed U.S. stock funds was objectively prudent. Indeed, there is case-law support for the position that plan fiduciaries cannot be held liable for “objectively prudent investments”

regardless of whether the plan fiduciaries made the investments “through prayer, astrology or just blind luck.”<sup>37</sup>

In a lawsuit brought against Wal-Mart, plaintiffs alleged that the plan fiduciaries imprudently selected retail class shares of mostly actively managed mutual funds as investment options in the plan.<sup>38</sup> The plaintiffs argued that due to the size of the Wal-Mart plan and its bargaining power, equivalent institutional class shares with lower expenses could have been offered.<sup>39</sup> Thus, the claims in the Wal-Mart case centered around the payment of higher fees for the same investment strategy and not whether the investment strategy was active or passive. (Both actively managed and passively managed mutual funds have multiple share classes.) The settlement agreement reached in the case does not restrict Wal-Mart’s ability to continue to use actively managed funds.<sup>40</sup>

Although the use of retail class shares of mutual funds is a different issue from the active vs. passive management issue, we note that there have been several court decisions concluding that plan fiduciaries did not breach their fiduciary duty in offering retail class shares of mutual funds in their 401(k) plans. One rationale in these decisions is participant choice: that the participants could have chosen to invest in less expensive investment alternatives that were also available in the plan.<sup>41</sup> This rationale also would apply to the plan participant’s decision to invest in actively managed funds when passively managed funds are also available in the plan.

DOL is correct to point out that actively managed funds in general have higher fees than passively managed funds, but plan fiduciaries should not make investment decisions based solely on fees. “[N]othing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems).”<sup>42</sup>

DOL's own regulation provides that fees have to be considered in light of the "particular facts and circumstances of each case."<sup>43</sup> One of the facts and circumstances, when evaluating investment funds, is the expected investment results that the fund managers could produce through their investment management activities (which generally are more involved for actively managed funds than passively managed funds). Indeed, before DOL increased its focus on fees—perhaps as a reaction to the 401(k) fee cases—DOL was emphasizing the risk and return characteristics of a fund: "to act prudently, a plan fiduciary must consider, among other factors, the availability, riskiness, and potential return of alternative investments for his plan."<sup>44</sup>

Plan fiduciaries should, of course, consider fees, but they should know that "it is performance net of fees rather than mere fees that courts have used to ... [consider whether] a claim for breach of fiduciary duty had been stated" against plan fiduciaries for imprudent selection of investment alternatives.<sup>45</sup>

Some active managers have long track records of beating the index after fees. For example, one study found that, "... until the end of 2009, the most active stock pickers have outperformed their benchmark indices even after fees and transaction costs."<sup>46</sup> Another study found that "truly active funds are able to outperform their benchmarks on average by 1.04% per year."<sup>47</sup>

So there is the real prospect that plan participants could achieve better retirement savings with actively managed funds than with passively managed funds. To illustrate, one study found that a hypothetical per-month investment of \$500 from December 1994 for the next 20 years in equity-focused actively managed mutual funds from an active manager would have resulted in a 19 percent (or approximately \$50,000) greater ending balance (after fees) compared to what the plan participant

would have achieved by earning relevant market index returns.<sup>48</sup> Similar studies have been done with funds from other active managers.

In addition, many "[a]ctive managers tend to do better [than passive managers] in moderately up markets or down markets."<sup>49</sup> This potential downside protection could play an important role in retirement plan investment portfolios, and some actively managed funds are intentionally designed as a lower-risk alternative to the relevant benchmark index. It would be unfair to criticize these funds for underperforming the index after fees when the fund investor is exposed to lower risk than the risk associated with investing in the index.

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Some commentators suggest that it is unlikely that plan fiduciaries could be expected to pick one of the better actively managed funds. Many investment consultants, however, believe that it is possible to select—through a rigorous process—actively managed funds that are expected to outperform (on a net of fees basis) comparable passively managed funds over a long term. For ERISA purposes, plan fiduciaries' reliance on such investment consultants will support a finding that the fiduciaries acted prudently in selecting an actively managed fund.<sup>50</sup>

Also, as noted above, ERISA requires plan fiduciaries to act as how a prudent person acting in a like capacity would have acted.<sup>51</sup> In this regard, the fact that actively managed funds are included in most 401(k) plans would support plan fiduciaries' decision to select actively managed funds.<sup>52</sup>

The prudence test under ERISA is whether plan fiduciaries used a prudent process in reaching an investment decision and not how the investment subsequently performed.<sup>53</sup> Thus, plan fiduciaries should not be held liable if a prudently selected actively managed fund fails to beat (on a net of fees basis) a comparable passively managed fund managed to the same benchmark. "The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investment succeeded or failed."<sup>54</sup>

Even if a fund were to lose money (rather than merely underperform its benchmark index) over multiple years, the plan fiduciaries should not be held liable for participant losses resulting from investing in that fund as long as the plan fiduciaries acted prudently in staying with the fund. This was confirmed in a court decision involving mutual fund investment options in a 401(k) plan that sustained losses over a three-year period.<sup>55</sup> The court noted that, when selecting the mutual funds, the fiduciary had considered their long-term prospects and regularly monitored their performance.<sup>56</sup> The court thus confirmed that the funds' investment losses alone did not establish a breach of fiduciary duty.<sup>57</sup>

Even if an investment in a fund were to become worthless, the plan fiduciaries are not necessarily imprudent in having allowed plan participants to invest in the fund. For example, plaintiffs in a lawsuit that involved US Airways' 401(k) plan challenged the decision of plan fiduciaries to retain an employer stock fund as an investment option until US Airways filed for bankruptcy.<sup>58</sup> Although the

court noted that the employer stock fund was exempt from the diversification requirements of ERISA, it analyzed the prudence of the decision to retain the fund as it would any investment, including whether fiduciaries “employed the appropriate methods to investigate the merits of the investment.”<sup>59</sup> The court then held that the plan fiduciaries acted prudently by regularly meeting to discuss the status of the stock fund and by seeking independent advice.<sup>60</sup> The court explained that, although the stock fund ultimately lost its value through the bankruptcy, the decision of an ERISA fiduciary “cannot be measured in hindsight” and an investment’s diminution in value does not alone establish a breach of fiduciary duty.<sup>61</sup>

## CONCLUSION

Recent DOL emphasis on the impact of fees on retirement income, combined with numerous 401(k) plan fee lawsuits, has led some plan fiduciaries to believe that offering actively managed funds to plan participants would involve more risk to the plan fiduciaries than offering only passively managed funds. As we explained in this article, ERISA does not favor one type of investment strategy over another and, provided that the fiduciaries act prudently in selecting and monitoring investment funds, including actively managed funds in a plan’s investment line-up could be an effective approach to reducing the fiduciaries’ potential liability. ●

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## ENDNOTES

- Final Regulation Regarding Participant Directed Individual Account Plans [ERISA Section 404(c) Plans], 57 Fed. Reg. 46906, 46919 [Oct. 13, 1992] (emphasis added).
- Separate from the fiduciary responsibility issue under ERISA, employers have a legitimate interest in offering to their employees a 401(k) plan that is competitive with those offered by their competitors. In this regard, offering a plan investment line-up that is consistent with employee expectations is an important consideration for employers. Many employees expect the ability to invest in actively managed funds through their 401(k) plans.
- Loomis v. Exelon*, 658 F.3d 667 (7th Cir. 2011).
- Id.* at 670.
- ERISA §§ 406(a)(1)(D) and 406(b)(1).
- See, e.g., Internal Revenue Service General Counsel Memorandum, GCM 38020 (July 19, 1979).
- See *Brock v. Citizens Bank of Clovis*, 841 F.2d 344, 347 (10th Cir. 1988); DOL Advisory Opinion 85-33A [Apr. 4, 1985].
- ERISA § 404(a)(1)(B).
- H.R. Conf. Rep. 93-1280, 1974 U.S.C.C.A.N. 5038, 5076 [Aug. 12, 1974] (“ERISA Conference Report”).
- See, e.g., *Tibble v. Edison Int’l*, 135 S. Ct. 1823, 1828 (2015).
- Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).
- Best Interest Contract Exemption, 81 Fed. Reg. 21002, 21032 [Apr. 8, 2016].
- ERISA § 407(a)(2).
- Restatement (Third) of Trusts, § 90 cmt. e(1).
- DOL Advisory Opinion 98-04A (May 28, 1998).
- DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007).
- 29 C.F.R. § 2550.404a-1(b).
- Tibble*, 135 S. Ct. at 1828.
- Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65135 (Oct. 26, 2015).
- Id.*, 80 Fed. Reg. at 65137.
- DOL Testimony to the Committee on Ways and Means, U.S. House of Representatives (Oct. 30, 2007).
- 29 C.F.R. § 2550.404a-5.
- In connection with DOL’s regulatory efforts to re-define the definition of an advice fiduciary, DOL noted that “the prevailing (though by no means universal) view in the academic literature ... [is] that the optimal investment strategy is often to buy and hold a diversified portfolio of assets calibrated to track the overall performance of financial markets.” Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960, 21978 [Apr. 20, 2015]. But this statement falls short of DOL taking a formal position on the active vs. passive management debate and was made in seeking comments on a potential

- prohibited transaction exemption for low-cost investment options. Importantly, DOL subsequently declined to pursue such exemption. Best Interest Contract Exemption, 81 Fed. Reg. 21002, 21063 [Apr. 8, 2016].
- Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65135 (Oct. 26, 2015).
  - Id.*, 80 Fed. Reg. 65136-37.
  - 29 C.F.R. § 2550.404c-5.
  - 29 C.F.R. § 2550.404c-5(e)(4)(iii).
  - Taylor v. United Techs. Corp.*, 2009 WL 535779, at \*10 [D. Conn. Mar. 3, 2009].
  - Id.* at \*5 and \*10.
  - Id.* at \*10.
  - Spano v. Boeing Co.*, 294 F.R.D. 114, 118 [S.D. Ill. 2013].
  - Spano v. Boeing Co.*, No. 3:06-cv-743 [S.D. Ill.], document number 554.
  - Id.*
  - See *id.*
  - George v. Kraft Foods Global, Inc.*, 800 F.Supp.2d 911 [N.D. Ill. July 19, 2011].
  - This type of argument made in Kraft could be made against plan fiduciaries that decide not to offer actively managed investment alternatives in a company’s 401(k) plan while investing the company’s defined benefit plan assets in actively managed funds. So there will always be some risk to plan fiduciaries in taking inconsistent approaches to 401(k) plan and defined benefit plan investments.
  - Fink v. Nat’l Sav. & Trust Co.*, 772 F.2d 951, 962 [D.C. Cir. 1985].
  - Braden v. Wal-Mart Stores Inc.*, 590 F. Supp. 2d 1159, 1164 [W.D. Mo. 2008] *vacated and remanded*, 588 F.3d 585 (8th Cir. 2009).
  - Braden v. Wal-Mart Stores Inc.*, 588 F.3d at 590.
  - Braden v. Wal-Mart Stores, Inc.*, No. 6:08-cv-3109 [W.D. Mo. filed Mar. 27, 2008], document number 229.
  - See, e.g., *Hecker v. Deere & Co.*, 556 F.3d 575, 590 (7th Cir. 2009) (“If particular participants lost money or did not earn as much as they would have liked, that disappointing outcome was attributable to their individual choices. 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.”).
  - Id.* at 586.
  - 29 C.F.R. § 408c-2(b)(1).
  - See, e.g., DOL Advisory Opinion 85-36A.
  - Laboy v. Bd. of Trustees of Bldg. Serv.*, 2012 WL 3191961, at \*2 [S.D.N.Y. Aug. 7, 2012]. See also *Taylor v. United Techs. Corp.*, 2009 WL 535779, at \*10 [noting that the “selection process [for actively managed mutual funds] included appropriate consideration of the fees charged on the mutual fund options, and of the returns of each mutual fund net of its management expenses”].
  - Antti Petajisto, “Active Share and Mutual Fund Performance,” *Financial Analysts Journal* 69, no. 4, July/August 2013: 73-93.

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47. Martijn Cremers, Miguel A. Ferreira, Pedro Matos, and Laura Starks, "Indexing and Active Fund Management: International Evidence," *Journal of Financial Economics* 120, no. 3 (June): 539-560,
48. "Capital Idea: The Active Advantage Can Help Investors Pursue Better Outcomes," American Funds, 2015, p. 7.
49. Richard Yasenchak and Valerie Azuelos, "Active vs. Passive: The Age-Old Debate," March 2015, [https://cdn2.hubspot.net/hubfs/2361381/Resources/Active%20vs.%20Passive\\_FINAL.pdf?t=1507072500539](https://cdn2.hubspot.net/hubfs/2361381/Resources/Active%20vs.%20Passive_FINAL.pdf?t=1507072500539).
50. Plan fiduciaries' use of an expert supports a finding that the fiduciaries employed a prudent decision-making process. See *Gregg v. Transp. Workers of Am. Int'l*, 343 F.3d 833, 841 (6th Cir. 2003) ["A fiduciary's effort to obtain an independent assessment serves as evidence that the fiduciary undertook a thorough investigation."]; *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 300 (5th Cir. 2000) ["Engaging the services of an independent, outside advisor may serve the ... purposes of increasing the thoroughness and impartiality of the relevant investigation ..."]; DOL, Meeting Your Fiduciary Responsibilities ["[ERISA's duty of prudence] requires expertise in a variety of areas, such as investments. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions."].
51. ERISA § 404(a)(1)(B).

52. As a general matter not limited to ERISA, prevailing industry practice should inform how a prudent person would have acted under like circumstances. *Cf. Kuberski v. New York Cent. R.R. Co.*, 359 F.2d 90, 93 (2d Cir. 1996) [holding that a plaintiff seeking to subject a defendant to a higher standard of conduct than the prevailing industry practice must first "introduce[] some evidence that the general practice of the industry is not a reasonably prudent practice."]; *Jones v. Miles Laboratories, Inc.*, 887 F.2d 1576, 1578 (11th Cir. 1989) ["Evidence of standard industry practice is often useful in determining the appropriate degree of care in an industry's operations."].
53. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007) ["First and foremost, whether a fiduciary's actions are prudent cannot be measured in hindsight ..."]; *Chao v. Merino*, 425 F.3d 174, 182 (2d Cir. 2006) [plan fiduciary's "actions are not to be judged from the vantage point of hindsight"]; *DeBruyne v. Equitable Life Assur. Soc. of the U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) ["The ultimate outcome of an investment is not proof of imprudence."]; *Jenkins v. Yager*, 444 F.3d 916, 926 (7th Cir. 2006) ["We have stated that investment losses are not proof that [a fiduciary] violated his duty of care."]; *Bussian v. RJR Nabisco Inc.*, 223 F.3d 286, 299 (5th Cir. 2000) ["ERISA's test of prudence is one of conduct, and not a test of performance of the investment."].
54. *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983).
55. *Jenkins v. Yager*, 444 F.3d at 926.

56. *Id.*
57. *Id.*
58. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d at 413.
59. *Id.* at 420.
60. *Id.* at 421.
61. *Id.* at 424.

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