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Stable Value Funds: The Latest Wave of Class Action ERISA Litigation

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Since the beginning of 2025, over two dozen putative class action lawsuits have been filed against retirement plan sponsors and their fiduciaries challenging the stable value funds offered in their plans. The complaints follow a common template. A participant alleges that the plan's stable value fund credited a lower rate of return than other products the fiduciaries could have selected, and asks the court to infer from that comparison that the fiduciary process in selecting and monitoring the fund was flawed.

In this article, we begin with an overview of stable value funds. We then assess the claims in the current wave of litigation, the arguments defendants have made in seeking dismissal, and the division among the circuit courts over the pleading standard applicable to these claims. We conclude with action items that plan fiduciaries should consider in order to mitigate the risk of being sued.

Background

A stable value fund is a capital preservation vehicle rather than a growth vehicle. Participants transact at book value—contributions plus accrued interest—and not at the market value of the underlying assets, so that day-to-day movement in bond prices does not reach a participant's account balance. That insulation is typically provided by a contract with an insurer, bank, or other financial institution, commonly called a "wrap," which guarantees redemption at book value. As the Eleventh Circuit observed in *Pizarro v. Home Depot (https://www.truckerhuss.com/wp-content/uploads/2026/08/Pizarro-v.-Home-Depot-Inc.-22-13643-2024-08-02.pdf)* the principal objective of a stable value contract is "capital preservation," meaning "delivering positive returns in every year" regardless of market conditions.

Participants receive a crediting rate, which the issuer declares in advance for a specified period—typically quarterly or semiannually—and which is generally subject to a contractual floor of zero. Behind that rate is an underlying portfolio consisting primarily of high-quality fixed income securities and other conservative investments. The issuer's income is the "spread," the difference between what the portfolio earns and the sum of the crediting rate and the issuer's expenses. If the portfolio yields 4.50 percent, the declared rate is 3.25 percent, and expenses are 0.40 percent, the issuer retains 0.85 percent. In exchange, it bears the risk that the portfolio underperforms the guarantee it has already made.

Additionally, the crediting rate is *smoothed*, meaning that gains and losses in the underlying portfolio are amortized over its duration instead of being passed through immediately, and the rate therefore lags market interest rates in both directions. When the Federal Reserve raised rates in 2022 and 2023, Treasury bills and money market funds repriced almost immediately, while stable value crediting rates rose slowly from portfolios holding older, lower-yielding bonds. The same lag protected participants when rates declined. Plaintiffs, however, focus on measuring the period during which they allege it ran against them.

Types of Stable Value Funds

The term "stable value fund" describes a category rather than a single product, and the structures within it differ materially. These funds generally take one of four forms:

1. a traditional or general account guaranteed investment contract (a "GIC"), in which the plan invests in the issuer's general account, the issuer declares the crediting rate, and the plan takes credit exposure to the issuer;
2. a separate account GIC, in which assets are segregated from the issuer's general creditors while still utilizing a single wrap provider;
3. a synthetic GIC, in which the plan or fund owns the bond portfolio and purchases wrap contracts from banks or insurers, with the crediting rate set by formula; and
4. a pooled collective investment trust, diversified across many contracts and wrap issuers, with an additional layer of fees.

Two products bearing the same label of "stable value fund" may therefore be materially different investments. The complaints rarely identify which of these structures the challenged fund actually uses—an omission that matters, because the comparators they offer are frequently drawn from different types of funds.

Plaintiffs' Claims

The typical complaint charts the challenged fund's annual crediting rates against a small group of purported comparator products over a putative class period beginning in early 2020. Plaintiffs allege that the fiduciaries should have anticipated the Federal Reserve's tightening cycle and moved the plan's assets. The complaints often plead breach of the duty of prudence against the investment committee, and a derivative claim for breach of the duty to monitor against the plan sponsor and its board. Plaintiffs usually concede that they have no actual knowledge of the committee's decision-making process, and ask the court to infer a flawed process from performance data alone. Some of these cases also assert prohibited transaction claims under ERISA §406(a), based on the issuer's retention of spread income and, where the issuer also serves as recordkeeper, its fees.

Notably, plaintiffs' theories cut both ways: in the past, fiduciaries have been sued for managing stable value funds too conservatively, as in *Ellis v. Fidelity Management Trust Co. (https://www.truckerhuss.com/wp-content/uploads/2026/08/Ellis-v.-Fidelity-Mgmt.-Tr.-Co.17-1693-2018-02-21.pdf)* and elsewhere for offering stable value products alleged to be too risky.

Defendants' Arguments

In moving to dismiss these complaints, defendants have made several arguments. First, ERISA's test of prudence is one of process, not results, and a fiduciary's decisions are judged on the information available at the time, without the benefit of hindsight. As the Ninth Circuit put it in *Anderson v. Intel Corp. Inv. Pol'y Comm. (https://www.truckerhuss.com/wp-content/uploads/2026/08/Anderson-v.-Intel-22-16268-2025-05-22.pdf)*, "ERISA requires prudence, not prescience." Second, the complaints generally plead no facts regarding the fiduciary process, and underperformance alone cannot substitute for those allegations. Third, the challenged funds did what they were designed to do: preserve principal and credit a positive return in every year of the class period. Fourth, defendants point to cases where courts have held that performance differences of one to three percent, measured over a short period of time, are insufficient to support an inference of imprudence in a plan intended to last for decades. Fifth, claims challenging the fund's initial selection are often barred by ERISA's six-year statute of repose. And, perhaps most significantly, defendants argue that plaintiffs' alleged comparators are not meaningful benchmarks and therefore cannot support a claim.

The prohibited transaction claims face independent obstacles. Defendants argue, among other things, that the collection of a contractually determined recordkeeping fee is not a "transaction" within the meaning of ERISA §406(a), and that assets underlying many stable value funds are not "plan assets" for purposes of the statute.

The "Meaningful Benchmark" Pleading Standard

Whether plaintiffs' fiduciary breach claims survive dismissal may turn largely on the "meaningful benchmark" pleading standard, an issue now pending before the United States Supreme Court in *Anderson*, set for oral argument on October 6, 2026.

Where a plaintiff asks a court to infer a flawed fiduciary process from relative performance, most courts require the plaintiff to plead that the comparator funds are meaningfully similar to the challenged investment, sharing the same aims, risks, and potential rewards. Absent such similarity, as the Eighth Circuit stated in *Davis v. Washington Univ. in St. Louis (https://www.truckerhuss.com/wp-content/uploads/2026/08/Davis-v.-Washington-Univ-18-3345-2020-05-22.pdf)*, the court is being asked to compare "apples and oranges."

The weight of appellate authority supports this requirement in some form. The Eighth Circuit has applied it in *Meiners v. Wells Fargo & Co. (https://www.truckerhuss.com/wp-content/uploads/2026/08/Meiners-v.-Wells-Fargo-17-2397-2018-08-03.pdf), Davis* and *Matousek v. MidAmerican Energy Co. (https://www.truckerhuss.com/wp-content/uploads/2026/08/Matousek-v.-Mid-America-21-2749-2022-10-12.pdf);* the Seventh Circuit in *Albert v. Oshkosh Corp. (https://www.truckerhuss.com/wp-content/uploads/2026/08/Albert-v.-Oshkosh.pdf)*; the Tenth Circuit in *Matney v. Barrick Gold of North America (https://www.truckerhuss.com/wp-content/uploads/2026/08/Matney-v.-Barrick-22-4045-2023-09-06.pdf)*; the Second Circuit in *Singh v. Deloitte LLP (https://www.truckerhuss.com/wp-content/uploads/2026/08/Singh-v.-Deloitte-23-1108-2024-12-10.pdf)*; and the Ninth Circuit in *Anderson*, which grounded the requirement in ERISA's text, reasoning that a standard of care measured by a prudent person "acting in a like capacity" in "an enterprise of a like character and with like aims" is inherently comparative. The Third Circuit, in *Sweda v. Univ.*

of Pennsylvania (https://www.truckerhuss.com/wp-content/uploads/2026/08/Sweda-v.-University-of-Pennsylvania-17-3244-2019-05-02.pdf) and *Mator v. Wesco Distribution, Inc. (https://www.truckerhuss.com/wp-content/uploads/2026/08/Mator-v.-Wesco-22-2552-2024-05-16.pdf)*, applies a more holistic version, asking whether the complaint as a whole supplies a sound basis for comparison rather than requiring a precise match. Several circuits have not squarely addressed the issue, although district courts within them have largely adopted the standard.

By contrast, in a divided panel decision in *Johnson v. Parker-Hannifin Corp. (https://www.truckerhuss.com/wp-content/uploads/2026/08/Johnson-v.-Parker-Hannifan-24-3014-2024-11-20.pdf)*, the Sixth Circuit held that a plaintiff need not necessarily identify a meaningful benchmark, and instead may rely on a comparison to a better-performing fund supported by context-specific allegations about the fiduciaries' conduct. That holding may be difficult to reconcile with the same circuit's earlier decision in *Smith v. CommonSpirit Health (https://www.truckerhuss.com/wp-content/uploads/2026/08/Smith-v.-CommonSpirit-Health-21-5964-2022-06-21.pdf)*, which required that comparator funds share the challenged fund's strategies, risk profiles, and objectives. Rehearing en banc in *Johnson* was denied, and a certiorari petition remains pending.

Supreme Court Review

Anderson arises from the dismissal of claims that Intel's fiduciaries imprudently retained custom target date funds with significant hedge fund and private equity exposure. The Ninth Circuit affirmed, holding that the plaintiffs' comparators, equity-heavy retail funds and published target date indices, were not meaningfully comparable to investments designed to reduce correlation with the equity markets. The Supreme Court granted certiorari on January 16, 2026, and argument is set for October 6, 2026, with a decision expected by the end of June 2027. The United States Department of Labor filed an amicus brief in July 2026 supporting Intel and urging the Court to sustain the requirement, as have employer and plan sponsor trade groups.

The implications of *Anderson* for stable value litigation are potentially significant. The current complaints allege almost nothing about the structure of the comparator products, including who bears the credit risk, what the wrap contract covers, or what liquidity restrictions and fees apply. Should the Court affirm, many of these complaints would likely not survive dismissal in their present form.

Practical Considerations

While we wait for the Supreme Court's decision in *Anderson*, proactive plan fiduciaries may consider taking steps to reduce potential fiduciary risk, including:

- Identifying the type of stable value product the plan holds, and confirming that the committee understands who bears the credit risk, who sets the crediting rate, and what the wrap contract guarantees;
- Benchmarking the fund against structurally comparable products, and reviewing any benchmark specified in the investment policy statement and the fund's fact sheet, which plaintiffs may attempt to use to support their claims;
- Documenting the decision to retain the fund and the reasons for it, including the deliberate tradeoff of yield for principal protection and liquidity;
- Testing the market periodically, through a request for proposals or an advisor-led review, and documenting the analysis even where no change is made; and

- Reviewing the total cost of the arrangement, including the spread, and any affiliation between the issuer and the plan's recordkeeper.

If you would like further information regarding the status of stable value fund litigation and/or how to reduce the related fiduciary risk, please contact us.

The IRS Issues Proposed Regulations on Trump Accounts and Dependent Care Assistance Programs

 Elizabeth Loh |  Alaina Harwood

Introduction

On August 11, 2026, the Internal Revenue Service ("IRS") and Department of Treasury (the "Department") released proposed regulations (https://www.govinfo.gov/content/pkg/FR-2026-08-11/pdf/2026-16314.pdf) governing employer contributions to Trump Accounts ("TAs") and long-awaited nondiscrimination guidance regarding Dependent Care Assistance Programs ("DCAPs"). The rules establish the operational framework for Trump Account employer contribution programs ("TACPs") while also clarifying DCAP and TACP nondiscrimination testing requirements. Although the rules are in proposed form, plan sponsors may rely on the guidance when implementing TACPs and performing nondiscrimination testing until the regulations are finalized.

Regulatory Background

TAs are tax-advantaged investment accounts for minor children that convert to traditional individual retirement accounts ("IRAs") once the child turns 18. During the "growth period" (the period from the child's birth through December 31 of the year in which the child attains age 17), eligible contributions may be made to the child's TA, earnings accumulate on a tax-deferred basis, and distributions from the account are prohibited.

TAs were established under the One Big Beautiful Bill Act ("OBBBA"), enacted on July 4, 2025, through the addition of Sections 530A (establishing TAs), 128 (an income exclusion for employer contributions to TAs), and 6434 (the $1,000 pilot program contribution for U.S. citizens born between 2025 and 2028) (the "Pilot Program") to the Internal Revenue Code ("Code"). The IRS subsequently issued Notice 2025-68, providing initial guidance on TAs and reserving Section 128 TACP guidance for future rulemaking. The Department of Labor later issued a Technical Release (https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/technical-releases/26-02) confirming that Section 128 TACPs generally will not be subject to ERISA.

For DCAPs, Code Section 129 establishes the statutory requirements for excluding employer-provided dependent care assistance from employees' gross income, which includes the following:

- DCAPs must be administered pursuant to a written plan for the exclusive benefit of employees;

- the amount of any contribution or assistance is subject to an annual cap ($7,500, or $3,750 for married individuals filing separately); and
- contributions and benefits may not discriminate in favor of highly compensated employees (HCEs), as that term is defined in Code Section 414(q).

The statutory nondiscrimination testing provisions leave much to be desired by plan sponsors because they do not provide express guidance on how to conduct testing. However, mark the first regulatory guidance regarding DCAPs and provide much-needed clarity on these requirements.

Trump Accounts

The proposed regulations establish the framework for making contributions through a TACP. The components of that framework are described in detail below.

Definitions. The proposed rules establish several definitions for TACPs. The rules define "employee" as a common-law employee and explicitly exclude self-employed individuals. (This is a departure from the statutory DCAP framework under Code Section 129(e)(3), which includes self-employed individuals as being eligible to receive employer-sponsored dependent care assistance.) All members of an employer's controlled group are aggregated and treated as a single "employer," similar to how employers are aggregated for purposes of the DCAP rules. This means that all entities within a controlled group are considered one employer for purposes of performing nondiscrimination testing and administering annual contribution limits, as explained below. Furthermore, a "dependent" is defined by cross-reference to Section 152. This means that employers may contribute, for example, to the TAs of an employee's biological child, stepchild, adopted child, foster child, *etc*.

Requirements for Programs Allowing Employer Contributions to Trump Accounts. Amounts an employer contributes to a TA of an employee or any dependent of the employee (including by salary reduction under a Section 125 cafeteria plan) are excluded from the employee's income if the following TACP requirements are met:

- <u>Separate Written Plan</u>. An employer sponsoring a TACP must maintain a written plan document that includes the following information:

  - the classes of employees eligible to participate;
  - the rules governing employer contributions and the amounts of such contributions (including whether contributions may be made under a Section 125 cafeteria plan);
  - the procedures under which an employee must designate the TA to receive contributions;
  - the procedures for employee certification, notifying eligible employees of the availability of the program, and annual reporting that indicates the amount of Section 128 contributions made for the employee, as described below;
  - the TACP's plan year; and
  - the procedures for correcting administrative failures and for furnishing notices to employees when contributions are determined to be included in the employee's gross income.

  Note: The proposed rules clarify that an arrangement will fail to be a TACP if the employer does not follow the terms of its written plan document when administering the program.

- <u>Permissible Contributions</u>. The TACP must limit contributions to a TA whose beneficiary is in their growth period and is either the employee or the employee's dependent. However, if amounts are contributed through a Section 125 cafeteria plan, then such contributions may be made only to the TA of the employee's dependent.

- Annual Contribution Limits. The aggregate amount contributed to a TA with respect to an employee in a calendar year cannot exceed the annual limit of $2,500 for 2026 and 2027 (the annual limit for future tax years will be adjusted for inflation).

  Note: The proposed rules clarify that the annual limit applies with respect to each employee and provide several examples. For example, if an employee has multiple employers during the year, the maximum the employee may exclude from income is the annual limit (*i.e.*, $2,500), regardless of whether the aggregate contributions from all employers exceed the limit for the year. Importantly, employers are not required to coordinate with unrelated employers or monitor compliance with the overall annual contribution account limit for TAs (which is $5,000); therefore, a program does not fail to be a TACP if an employee ultimately has excess contributions for the year, as long as the employer's TACP prohibits contributions under the program that exceed the applicable TACP IRS limit. Furthermore, if an employee has multiple dependents, each with their own TA, then the employee is allowed to allocate their TACP contribution, up to the aggregated maximum statutory limit, across the various accounts. Additionally, if an employer makes a matching contribution to an employee's TA pursuant to the Pilot Program for eligible children born between 2025 and 2028, the matching contribution counts toward the TACP's annual limit.

- Employee Certification of Valid Trump Account. Before a TACP may make contributions to a TA, it must be certain that the account beneficiary is in their growth period, and is the employee or the employee's dependent. To obtain this information, an employer may rely on an employee's written certification. The employee's certification must be in writing and include the following representations:

  - that the account beneficiary is the employee or the employee's dependent;
  - the beneficiary's date of birth (to allow the employer to determine if the beneficiary is in their growth period); and
  - that no facts are known to the employee that would make the account beneficiary ineligible to receive a contribution to their TA for the calendar year.

  Note: In addition to the employee's certification, an employer must take the additional step of verifying that contributions are being made to a valid TA. For example, one method of validation might be to have the employee provide the employer with a unique identifying number that corresponds to a particular TA, which the employer could then use to verify that the account is a valid TA. The Department and IRS state in the guidance that they are "exploring ways in which this information can be validated in a secure, electronic way."

- No Discrimination in Favor of HCEs. An employer contribution program for TAs cannot discriminate in favor of HCEs. (Similar to DCAPs, the proposed rules for employer contributions to Trump Accounts use Code Section 414(q) for defining HCEs.) To comply with this requirement, the program must pass several nondiscrimination tests, as described later in this article.

- Employee Notification of Program. The rules require reasonable notification of the availability and terms of the program to eligible employees. The guidance does not mandate specific content requirements for this notice or address the method for furnishing such notice to employees. Accordingly, employers will have flexibility in how to draft and distribute these notices.

- Selection of Trump Account Trustee. Employers had questioned whether they would have the ability to limit the number of trustees to which they send TA contributions, hoping to minimize the administrative burden associated with sending contributions to multiple trustees. In response, the proposed rules clarify that a TACP may **not** restrict contributions to a particular trustee or trustees. The guidance states that limiting contributions to a particular trustee would "frustrate the purposes of section 128," because (for example) an employee whose dependent has a TA with a different trustee (other than the one selected by the employer) would be precluded from receiving contributions to the dependent's TA.

- Statement of Trump Account Contributions. Employers will need to include the amount of TA contributions on employees' Forms W-2 (using the Form W-2 instructions).

  Note: The 2026 General Instructions for Form W-2 provide that the employer must report on the form the amount of Section 128 contributions made to the TA of an employee or dependent of an employee in box 12 with Code TA.

- Employer Communications to Trustee Regarding Contributions. Whenever an employer transmits a Section 128 contribution to an employee's TA trustee, the employer must provide a written statement to the trustee affirmatively identifying the amount as a Section 128 contribution. The employer must adopt procedures to: (i) ensure that Section 128 contributions are properly identified to the trustee; (ii) notify the trustee whenever a contribution is a Section 128 contribution; and (iii) notify the trustee whenever a contribution that was previously identified as a Section 128 contribution is not such a contribution. If an employer subsequently discovers that a Section 128 contribution remitted to a trustee did not meet the requirements of Section 128, the employer must provide a corrective notice to the trustee with information about the affected TA, the calendar year in which the contribution was made, and the amount determined not to be a Section 128 contribution. The employer must provide the notice within a reasonable period of time following the date the employer determines that an amount is not a Section 128 contribution—the rules provide for a 21-day safe harbor for this purpose. However, the rules are silent regarding how the employer must provide the corrective notice and whether the employer must notify the affected employee. Given that the Department and IRS are requesting comments on these issues, we expect further guidance on issuing corrective notices.

Contributions Under Section 125 Plan. The proposed regulations allow employees to make pre-tax contributions to their dependents' TAs when made through the employer's Section 125 cafeteria plan. The rules confirm that employees must be given the ability to make changes to their elections or revoke their elections on at least a monthly basis, similar to the rules governing election changes for health savings accounts. These elections must be effective on a prospective basis.

Employers that want to give employees the option to make Section 128 contributions via pre-tax salary reductions will need to amend their cafeteria plan documents to include TACP contributions as a qualified benefit under the employer's Section 125 cafeteria plan.

Taxation of Trump Account Contributions. Employer contributions to TAs are excludable from gross income. However, these contributions are considered wages for FICA and FUTA purposes.

> **Note**: The tax treatment of employer contributions to TAs is less favorable than contributions to flexible spending accounts and health savings accounts. Those contributions are generally excluded from income, FICA, and FUTA taxation.

Dependent Care Assistance Program and Trump Account Contribution Program Nondiscrimination Testing

The DCAP nondiscrimination rules in their current form are fairly high-level, and the IRS has not previously issued guidance on the mechanics of this testing. Because the TACP nondiscrimination testing rules borrow from the DCAP nondiscrimination rules, the IRS has used this opportunity to issue guidance for both programs.

DCAP Nondiscrimination Testing Clarified. The DCAP nondiscrimination testing rules are designed to prevent DCAPs from favoring HCEs with respect to eligibility or benefits. The DCAP nondiscrimination requirements consist of four tests: (i) the eligibility test; (ii) the contribution and benefits test; (iii) the ownership concentration test; and (iv) the average benefits test.

- Eligibility Testing. The current rules provide that a DCAP must benefit employees who "qualify under a classification set up by the employer and found by the Secretary not to be discriminatory in favor of [highly compensated employees or their dependents]." However, Code Section 129 does not provide guidance on how to conduct this testing. The proposed rules provide a framework for eligibility testing.

  An employer must pass either (i) a numerical safe harbor ratio percentage test, or (ii) a facts and circumstances test (*g.*, taking into account factors such as reasonable business classifications and whether the number of employees eligible under the DCAP in each salary range is representative of the number of employees in each salary range of the employer's workforce).

- Contribution and Benefits Testing. The current Section 129 nondiscrimination rules provide that contributions or benefits provided under an employer DCAP may not discriminate in favor of HCEs or their dependents. The proposed regulations clarify that a DCAP that provides benefits on the "same terms" for all eligible employees will satisfy the contribution and benefits testing requirements. For example, a DCAP that allows all non-HCEs to contribute the same amount as HCEs will pass contribution and benefits testing, even if HCEs and non-HCEs receive different amounts through the DCAP due to different election amounts or utilization rates.

- Ownership Concentration Test. The rules state that not more than 25 percent of the amounts paid or incurred by the employer for dependent care assistance during the year can be provided to shareholders or owners (including their spouses or dependents) who individually own more than five percent of the employer's stock.

- Average Benefits Test. Historically, the average benefits test has been challenging for DCAPs to pass. The newly issued guidance provides greater clarity on how to run this test and will likely allow more DCAPs to pass testing. A DCAP will satisfy the average benefits test if the average benefits provided to non-HCEs is at least 55% of the average benefits provided to HCEs under the employer DCAP. This test is meant to ensure that HCEs are not participating in the employer DCAP disproportionately. Previously, there was considerable confusion regarding who to include in the average benefits testing (*g.*, all employees, all eligible employees, or only participating employees). The proposed rules clarify that when calculating average benefits provided to employees, the employer would take the total dollar amount of dependent care assistance provided and divide that by the number of employees actually participating in the employer DCAP during the plan year.

> **Note**: This clarification will be helpful to employers seeking to pass 55% average benefits testing. Previously, many employers included all eligible employees in the testing denominator, which drove down the non-HCE average—making testing harder to pass.

How Do These Tests Apply to TACPs? The TACP nondiscrimination rules generally mirror the Section 129 DCAP nondiscrimination rules and proposed guidance. For example, TACPs are subject to the eligibility, contribution and benefits, and average benefits tests (as described above). However, unlike DCAPs, TACPs are not subject to the ownership concentration test.

Additionally, the TACP rules provide a nondiscrimination testing safe harbor for employers making matching contributions to the TAs of dependents of employees receiving pilot program contributions. Under this safe harbor, these matching contributions would be disregarded for purposes of the TACP average benefits testing and contributions and benefits testing. To be eligible for this safe harbor, the employer's matching contributions must be made available on the same terms and conditions to all employees who are not excluded employees.

Corrections For Testing Failures. Previously, it was unclear whether an employer could correct for average benefits testing or ownership testing failures. If a DCAP failed these tests, the risk was that participating HCEs would have to include their total DCAP amounts into taxable income. The proposed rules provide that average benefits testing and ownership testing failures may be corrected by including "excess benefits" (and not total benefits) in HCEs' income by the Form W-2 furnishing deadline. For example, a 2026 testing failure may be corrected by the January 31, 2027, Form W-2 filing deadline. However, if such amounts are unable to be remediated by the applicable deadline, the DCAP fails to be a DCAP only with respect to HCEs (*i.e.*, HCEs will need to include employer-provided dependent care assistance in their taxable income); non-HCEs, however, may still receive favorable tax treatment. The proposed rules explain how to determine the amount of "excess benefits" for HCEs and reasonable methods for allocating these "excess benefits" among them.

> **Note:** TACPs follow the same rules for remediating average benefits testing failures but also require notice to the TA trustee that the contribution has been recharacterized as a non-Section 128 contribution.

What is Next?

The proposed regulations provide employers with a workable framework for establishing TACPs and much needed clarity on DCAP nondiscrimination testing. Importantly, employers may rely on the proposed guidance now—they do not need to wait for final regulations to implement TACPs or perform required nondiscrimination testing. At the same time, employers need to keep in mind that the final regulations may incorporate changes based on public comments, and be prepared to adjust their programs accordingly.

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