

Trump Accounts

Buried Treasure or Fool's Gold?

What to Consider Before Setting Sail

Presented by Allison Martinez





Today's Presenter



Allison Martinez

Allison Martinez is an employee benefits and tax attorney with more than a decade of experience helping employers navigate complex tax and benefits laws. Her practice covers a broad range of retirement and health and welfare plan matters, including plan design, operational compliance, HIPAA, COBRA, ACA implementation, nonqualified deferred compensation plans, and plan corrections through IRS and DOL programs. She advises private employers, governmental entities, nonprofit organizations, and religious organizations.

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Disclaimer



The information provided during this program does not constitute legal advice. In addition, this program only provides a summary of certain complex and always evolving laws and regulations. Attendees should consult their legal counsel for guidance on the application and implementation of the many federal and state laws that impact employee benefit plans and the workplace, including the topics discussed during this program.

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PART I

The Voyage Begins

Charting the Course



Background



- Trump Accounts ("Accounts") officially launched on July 4, 2026.
- Section 70204 of the One, Big, Beautiful Bill Act added new Sections to the Internal Revenue Code:

530A

Trump Accounts

128

Employer Contributions to Trump Accounts

6434

Trump Accounts Contribution Pilot Program

139J

Certain Contributions to Trump Accounts

6659

Improper Claim for Trump Account Contribution Pilot Program Credit



Overview



- **What is an Account?** An IRA established for minors that is only invested in "eligible investments" during the growth period and satisfies contribution limits.
- **Why?** Intended to promote long-term investing for the benefit of children.
- **How?** Government estimates with the \$1,000 pilot program contribution alone it will grow to:

Age	Estimate
18	\$6,000
27	\$15,000
55	\$243,000

Source: <https://trumpaccounts.gov/>

These estimates increase dramatically depending on the contributions made to the Accounts:

Age	Estimate based on annual \$250 contribution	Estimate based on annual \$5,000 contribution
18	\$19,000	\$271,000
27	\$51,000	\$742,000
55	\$878,000	\$13M

Source: <https://trumpaccounts.gov/>

More than 6 Million Accounts have been opened.



Guidance



Code Sections 530A, 128,
and 6434

Notice 2025-68

Technical Release 2026-02

Proposed Regulations

Proposed Regulations —

Set 1

- 1.530A-1 – General requirements and election to open an Account
- (1.530A-2 through 1.530A-6 reserved.)
- Comments were due May 8, 2026
- Public hearing was held on July 16, 2026

Set 2

- 301.6434-1 – Election for Trump accounts contribution pilot program
- Comments were due April 8, 2026
- Public hearing was held on July 16, 2026



Guidance (Continued)



Set 3

- 1.128-1 – Trump account contribution program; definitions
- 1.128-2 – Trump account contribution program; in general
- 1.128-3 – Nondiscrimination requirements
- 1.129-1 – Dependent care assistance programs
- 1.129-2 – Nondiscrimination requirements
- Comments must be received by September 25, 2026
- Public hearing is scheduled to be held on October 15, 2026, at 10 a.m. (Eastern)

Set 4

- 1.530A-3 – Trump accounts—Eligible investments
- Comments and requests for a public hearing due October 20, 2026



More proposed regulations to come!



Life Cycle of an Account



Establishment



Growth Period



Post-Growth Period

Growth Period

Establishment of account until last day of calendar year when eligible individual turns 17.

Post-Growth Period

Begins on first day of calendar year when Account holder turns 18.



Example: Born 10/1/2025, reaches 17 on 10/1/2042. Last day of growth period will be 12/31/2042.



PART II

What is an Account?

Inside the Treasure Chest



General Requirements



- Generally, meets the requirements of an individual IRA that's not a Roth IRA.
- **Written governing instrument** which meets certain requirements.
- The Account is either:
 - Initial Account; or
 - Rollover Account

Initial Account

Created or organized by the Secretary of the exclusive benefit of an **eligible individual** (or their beneficiaries).

Rollover Account

Created or organized in the U.S. for the **exclusive benefit** of an individual during their **growth period** *and* funded by a rollover contribution from an existing Account.



Can only have one Account at time!



Written Governing Instrument Requirements



- Must satisfy the requirements of Code Section 408(a)(1) – (6) and Section 530A.
- Must clearly designate as an Account at the time of establishment.
- State the rules applicable during and after the "growth period."

During the Growth Period

- No contributions in excess of the limit.
- No distributions allowed before 1st day of the calendar year when the account beneficiary turns 18 unless permitted by statute.
 - Limited exceptions – e.g., qualified rollover.
- Only "**eligible investments**" during the period before the first day of the calendar year when the account beneficiary turns 18.

After the Growth Period

- 408(a)(1) – (6) will apply, unless prohibited by Code Section 530A.
- For example:
 - The proposed regulations provide Code Section 401(a)(1)'s contribution limits will apply, except the Account cannot receive contributions under a SEP arrangement or SIMPLE IRA.
 - Typical IRA distribution rules apply.



Who Are the Accounts For?



An "eligible individual"

- Any individual
 - Who will not turn 18 before the end of the calendar year when the election to open the Account is made.
 - Who has been issued a Social Security Number when the election to open the Account is made.
 - For whom no prior election has been made.



Distributions



In general - When: No distributions are allowed before the 1st day of the calendar year when the Account beneficiary turns 18.

After that, traditional IRA rules generally apply.

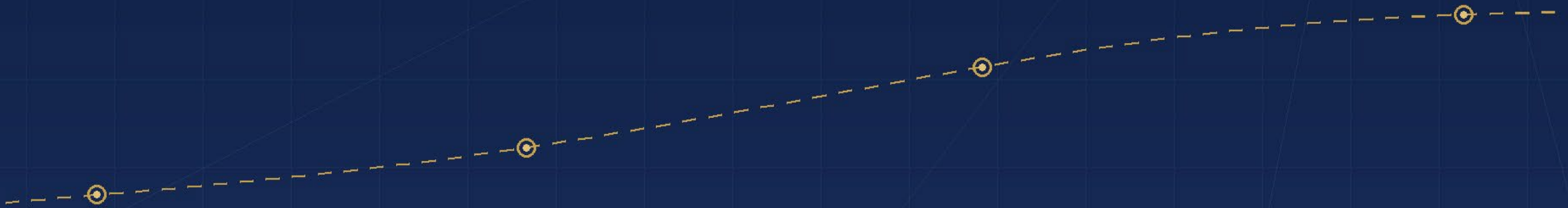
Restrictions on use of distributions? No.



PART III

How to Open An Account

Claiming the Treasure





Election Made by an Authorized Individual

Who is an **authorized individual**? If no prior election has been made to open an initial Account, the **authorized individual** is:

- If making an election to receive a Code Section 6434 pilot program contribution at the same time, the authorized individual is the person authorized to make the election for the pilot program contribution.
- If a pilot program contribution election under §6434 isn't made at the same time as the election to open the initial Trump account, then the authorized individual is, in order of priority:

A legal guardian



Parent



Adult sibling



Grandparent

*If there are multiple people in the same highest level of priority and no prior election has been made, then any individual in that level may make the election.

*By making the election, the authorized individual is representing, under the penalty of perjury, he or she is authorized to open the initial Account.





Election Deemed Made by the Secretary

- If, based on information available from tax returns, the Secretary determines that the individual has met the requirements to be an eligible individual, no prior election has been made by an authorized individual, and an election was made by an individual who was not an authorized individual at the time the election was made.



In these circumstances, the Secretary is deemed to have made the election, and the Account won't stop being an Account.



When to Elect



During the Growth Period!

If an initial election is made, it must be made on or before December 31 of the calendar year when the eligible individual will turn 17.



How to Elect



How to elect

- On the Form 4547
- Through a website made available by the Secretary – <https://www.irs.gov/trumpaccounts>



Resolving Multiple Elections for an Eligible Individual



First processed wins

Only the first election to open an initial Trump account that is processed will result in opening of an initial Trump account.

No further processing

Once the Secretary processes the 1st election to open an initial Account, no other elections for that eligible individual will be processed.





Who Is Responsible for the Initial Account?

- The individual who makes the election to open the initial Account is responsible for the initial Account when it's established.
- Unless otherwise provided under the Account agreement or applicable law, the responsible party has authority while the Account beneficiary lacks legal capacity (i.e., is a minor) to:
 - Select eligible investments (if more than one is offered);
 - Direct a transfer for a qualified rollover contribution;
 - Direct a transfer for a qualified ABLE rollover contribution; or
 - Select a successor responsible party.



Trustee



Who can be a trustee?

- **Bank or Approved Nonbank**
- **Nonbank trustees:** Any person approved by the IRS as of 12/31/2025 to be a nonbank trustee of an IRA is automatically approved.
- When selected by the **Secretary** – The following must be considered:
 - Trustee's history or reliability and regulatory compliance;
 - Customers' service experience with the trustee; and
 - Costs imposed on the Account or Account's beneficiary by the trustee

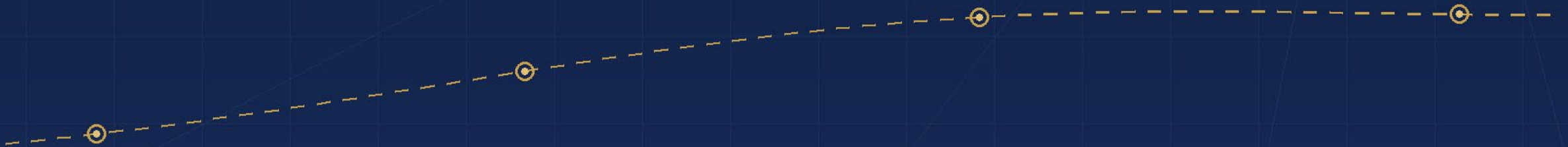
Anyone automatically approved to be a trustee who becomes an Account trustee **must** notify the IRS in writing.



PART IV

Contributions

Filling the Treasure Chest





Annual Aggregate Limit

- **Annual Aggregate Limit:** \$5,000 per year (other than **exempt contributions**) (can be adjusted for inflation beginning in 2028)

Exempt Contributions

- Qualified rollover contributions
 - Qualified general contributions
 - Pilot program contributions pursuant to Code Section 6434
- **Excess Contributions - What happens if too much is contributed?** If contributions are made during the growth period that exceed the annual limit:
 - Excess must be distributed;
 - The distribution is not included in the Account holder's income; and
 - Tax on the distributee is increased by 100% of the amount of the net income attributable to the distributed excess.



Open Question – Determination of source of excess contributions.



Pilot Program Contributions



Where's the FREE money?

- An **election** can be made for an **eligible child** to receive a \$1,000 seed contribution from the federal government.
 - **Pending legislation to watch HR 8313**
 - \$1,000 contribution permanent.
 - Indexed for inflation
 - Introduced on April 15, 2026, and was referred to the House Committee on Ways and Means

\$1,000

Pilot program seed contribution from the federal government



Pilot Program Contributions



Eligible child:

- U.S. citizen born in 2025, 2026, 2027, or 2028;
- Who has been issued a social security number before the date the §6343 election is made and the election application must include the social security number;
- For whom no other election has previously been made; and
- Who is anticipated by the pilot program electing individual to be that individual's qualifying child under Code §152(c).



All gold is a treasure, but not all treasures will be gold.

All eligible children will be eligible individuals, but not all eligible individuals will be eligible children.

The Election:

- The **pilot program election** is made by the **pilot-program electing individual**.
- A **pilot program electing individual** is a person who anticipates being able to claim the qualifying child will be their qualifying child under §152(c).
- **How to make the election** –
 - On the form prescribed by the Secretary (i.e., Form 4547 where there's a box to check)
 - Electronic application or website prescribed by the Secretary:
 - <https://trumpaccounts.gov/>
 - <https://www.irs.gov/trumpaccounts>



Not Automatic – In July 2026, the Social Security Administration announced it would update guidance for hospitals to include Account enrollment information, but there's no *automatic* creation of an Account.





Pilot Program Contributions

When to make the election

Available methods allow elections to be made at any time during the year.

Last day to elect

No later than December 31 of the year the child turns 17.

Mechanics of the Pilot Program Contribution Election

- The Secretary will treat the eligible child as if the eligible child had made a \$1,000 payment for the special taxable year.
- Because a special taxable year has zero tax liability, treating the child as if they had made a \$1,000 payment against Federal income tax would result in an overpayment for the special taxable year.
- The IRS would not offset that overpayment by any other debts owed by the eligible child or the pilot program-electing individual.
- The Secretary would remit the full \$1,000 overpayment for the special taxable year as a \$1,000 pilot program contribution to the Trump account of the eligible child.



*Generally, the \$1,000 overpayment associated with the pilot program contribution can't be applied towards other tax liabilities as an offset or credit.



Pilot Program Contributions



What happens if there are multiple elections to open an Account for the same child?

- Only the first pilot program election will result in the \$1,000 refund as a pilot program contribution.
- Once the first pilot program election form is processed, no more pilot program elections will be processed.



What if you fail to make a timely pilot program election? You're out of luck, 26 CFR §§301.9100-1 – 301.9100-3 don't apply.



Who Can Contribute to an Account?



- Basically anyone, but different rules apply to each type of contribution.

Parents

Account holders

Government

Employers

Nonprofits

Donors

and more



PART V

How do Employer Contributions Work?

When Employers Join the Crew



The Exclusion and the Maximum



- Employer's contributions (including salary reduction contributions) to employee's or employee's dependent's(s') Accounts are excluded from employee's gross income, if made pursuant to a Trump Account Contribution Program ("TACP")
- **Maximum Exclusion:** Up to \$2,500 *per year, per employee* (indexed for inflation beginning after 2027)
 - A lower dollar amount can be specified by the TACP.

\$2,500

Maximum exclusion per year, per employee —
indexed for inflation beginning after 2027





Is a TACP Subject to ERISA?

- **Subject to ERISA?** No, probably not. (Technical Release 2026-02).
 - ERISA applies to plans established by employers to provide retirement benefits to *employees*.
 - If benefitting employees, ERISA will **not** apply if –
 - **Made pursuant to a §128 TACP based on the IRA safe harbor regulation:**
 - Employee participation is completely voluntary.
 - There are no conditions on the use of Account funds other than those permitted by the Code.
 - The employer does not make or influence the investment decisions with respect to funds contributed to the Account.
 - There are no representations that the Accounts or contributions to the Accounts are an employee pension benefit plan or an employee welfare benefit plan established or maintained by the employer.
 - The employer does not receive any payment or compensation in connection with an Account.
- **Made outside of a §128 arrangement** – Post-tax payroll deductions to an employee's own Account, like the payroll deduction programs that are available to employees' IRAs. Allowing employees to utilize these programs to make contributions to their own Accounts during the growth period will not result in an ERISA-covered plan if all the following requirements are met:
 - The employer does not contribute to the Employee's Account.
 - The employee's participation in the program is voluntary.
 - The employer receives no consideration in connection with the program, other than reasonable compensation for administrative services actually provided in connection with payroll deductions.
 - The employer does not endorse the program.



TACP – General Rules



Separate written plan

For the exclusive benefit of providing contributions to Accounts of employees or their dependents;
and

Operational compliance

(i.e., follow the terms of the written plan).

TACP Separate Written Plan – §128 requires that the separate written plan for a TACP must meet requirements similar to §129 (d)(2), (3), (6), (7), and (8) (i.e., Dependent Care Assistance Program ("DCAP") rules).



TACP - Separate Written Plan



- Requirements of a **separate written plan**:
 - The classes of employees eligible to participate;
 - The rules governing employer contributions (e.g., amount and whether contributions may be made via a §125 cafeteria plan salary reduction arrangement);
 - The procedures to designate the Account of the employee or of a dependent of the employee to receive contributions;
 - **Certification, notice, and reporting procedures** required by the regulations;
 - The plan year; **and**
 - Procedures for correcting administrative failures and for furnishing notices to employees and trustees when amounts previously designated as §128 contributions are subsequently determined not to be excludable from an employee's gross income under §128(a).



NOTE: TACP cannot limit contributions to Accounts held by a particular trustee/trustees. An arrangement will fail to be a TACP if an employee limits the contributions to Accounts held by a particular trustee (or trustees).



Permissible TACP Contributions



- Only to an employee or employee's dependent who is in their growth period.
- Can't exceed the annual limit which is capped at the lesser of:
 - \$2,500 per employee per year (as adjusted for inflation); or
 - The amount set forth in the TACP's written plan document.
- The \$2,500 limit applies based on the employee as an individual
 - All of an employee's employers' contributions must be taken into account.
 - Employee may allocate the contribution among multiple Accounts (e.g., the Account of multiple dependents)



Permissible TACP Contributions (Continued)



- Excess §128 contributions may not be excluded from the employee's gross income.
- Plan won't fail to be a TACP if an individual received excess contributions, if the TACP prohibits contributions in excess of the TACP limit.



The employer has no obligation with respect to the overall annual Account contribution limit set by Code §530A(c)(2) (i.e., \$5,000 (indexed after 2027))



TACPs and Cafeteria Plans



TACP can be offered via salary reduction under a §125 plan **only** if the contribution is made to the Account of an employee's dependent.



TACP contribution to an employee's Account **cannot** be offered via salary reduction under a §125 plan.

- Elections:
 - §125 plan that offers a §128 contribution via salary reduction **may allow** employees to make, change, or revoke prospective elections at **any time** during the plan year—as long as the election is for salary that's not yet currently available.
 - The §125 plan **must** specifically provide the Account contribution benefit and allow participants to prospectively change or revoke elections at least once a month before salary becomes currently available.



Implementation Tip – Don't forget to review and to amend §125 plans.



Account Certification



- **Certification** Generally, employer can rely on an employee's certification that meets the following requirements—unless the employer has *actual knowledge* the certification is incorrect.
 - **Requirements of employee certification** –
 - Employee certification **must be in writing** (paper or electronic) and include the following representations:
 - Beneficiary of Account that will receive the employer contribution is the **employee** or anticipated to be the **employee's dependent** for the employees' taxable year in which the contribution is made;
 - The Account beneficiary's **date of birth**; and
 - The employee knows no facts that would make the Account beneficiary ineligible to receive a contribution to his or her Account for that calendar year.



Employer Verification of Account Validity



Employer verification of validity of Account is required.

- Can't rely solely on the employee's certification to establish that the recipient account is a valid Account.
- A method must be used that is reasonably designed to verify, through information provided by the trustee, payroll processor, or other service provider, that the contribution is made to a valid Account.



Open Question – What does that look like in practice?



Notice and Reporting Requirements



- **Notice** – Reasonable notification of the availability and terms of the TACP must be provided to all eligible employees.
- **Reporting Requirements** – A written statement showing the amount of §128 contributions that were made for an employee during the previous calendar year under the employer's TACP must be furnished to that employee.
 - This requirement is satisfied by including the amount of Account contributions on the employee's Form W-2, Wage and Tax Statement, in the manner specified in the form's instructions for reporting of §128 contributions.

Box 12, Code TA

Form W-2 reporting for § 128 contributions



Employer Communications Regarding TACP



- **Affirmative statement.** When the TACP contributions are transmitted to the trustee, the employer must affirmatively identify the contributions as §128 contribution in *writing*.
- **Procedures.** The employer must adopt procedures to:
 - Ensure that §128 contributions are properly identified;
 - Notify the trustee when a contribution is a §128 contribution; and
 - Notify a trustee when a contribution previously identified as a §128 contribution is not a §128 contribution.





Trustee's Reliance and Corrective Notice

- **Trustee's reliance.** The trustee of an Account receiving a contribution may rely on the identification of a contribution as a §128 contribution for purposes of §530A until the trustee receives a corrective notice or has contrary knowledge.
- **Corrective notice**
 - **Contents of notice.** If an amount previously identified as a §128 contribution is subsequently determined not to be a §128 contribution (all or partial), the employer must provide notice in **writing** to the trustee identifying:
 - the affected account;
 - the calendar year in which the contribution was made; and
 - the amount determined not to be a §128 contribution.

Timing of the Notice

- **Timing of the notice.** The notice must be furnished within a reasonable period of time following the date the employer determines that an amount is not a §128 contribution.

21 calendar days

"Reasonable" for purposes of furnishing the corrective notice



TACPs May Not Discriminate in Favor of Highly Compensated Employees ("HCEs")



Who is an HCE?

- For purposes of an Account, an HCE has the same definition as in §414(q).
- Any employee who:
 - Was a 5% owner at any time during the year or the preceding year; or
 - For the preceding year –
 - Had compensation in excess of \$160,000 (this amount is subject to adjustment), and
 - If the employee elects for the preceding year, was in the top-paid group of employees for the preceding year.
 - Top-paid group is the top 20% of the employees when ranked on the basis of compensation paid during such year.

Who is a non-HCE? Any employee who is **not** an HCE.

Disqualification of the TACP. A TACP that fails to satisfy the nondiscrimination requirements will **not** be considered a TACP program with respect to HCEs participating in the program, but will not affect the TACP's status for the NHCE participants



PART VI

How do you know if a TACP discriminates in favor of HCEs?

Fair Shares Across the Crew



Navigating the Tests



- (1) Contributions and benefits
- (2) Eligibility
 - Reasonable Classification
 - Nondiscriminatory Classification
 - Facts and circumstances
 - Safe Harbor
- (3) Average Benefits Test (“ABT”)



Contributions and Benefits Rule



Contributions and Benefits Rule.

- TACP must provide benefits on the same terms for all eligible employees.
- Can't discriminate as to contribution or benefits.



Eligibility



- TACP must benefit employees under an **eligibility classification** established by the employer that's based on objective business criteria, and is **nondiscriminatory**.
- Employee is only deemed "eligible" if they had meaningful opportunity to receive benefits—via salary reduction or otherwise—regardless as to whether those benefits were actually received.

Based on all facts and circumstances, the classification must be **reasonable** and established under objective business criteria that identify an eligible category (or categories) of employees.

Examples of what's "reasonable" —

- Specific job categories
- Nature of compensation (i.e., hourly vs. salaried)
- Geographic location)
- Similar bona fide business criteria

Examples of what's **not** reasonable—

- Listing employees by name
- Using another criteria that's the same as listing employees by name





Nondiscriminatory Classification

- Can't discriminate in favor of HCEs or their dependents.
- Classifications are nondiscriminatory if, and only if, the group of employees included in the classification eligible under the plan year meets either:

The facts and circumstances test

OR

The safe harbor

Facts and Circumstances

- Based on all relevant facts and circumstances, the Secretary determines the classification is nondiscriminatory.
- No single fact is determinative.
- Facts and circumstances considered include:
 - Underlying business reason for the classification. Greater the reason for the classification, the more likely it's nondiscriminatory.
 - Percentage of the employer's employees who are eligible under the TACP. The higher the percentage, more likely isn't nondiscriminatory.
 - Number of employees eligible in each salary range is representative of the employees in each salary range of the employer's workforce. The more representative the percentages of employees eligible under the plan in each salary range, the more likely the classification is to be nondiscriminatory.
 - The difference between the **ratio percentage** and the employer's **safe harbor percentage**. The smaller the difference, the more likely the classification is to be nondiscriminatory.





Safe Harbor Test and Ratio Percentage

A plan will meet the safe harbor test if its **ratio percentage** is greater than or equal to the employer's **safe harbor percentage**.

- **Ratio percentage:** For the plan year:

(eligibility percentage of NHCEs)

Divided by

(eligibility percentage of HCEs)

Rounded to the nearest hundredth of a percentage point.



Eligibility Percentage



- Eligibility percentage of NHCEs =

(number of NHCEs who are eligible under the plan) *divided by* (total number of NHCEs of the employer)

- The eligibility percentage of HCEs =

(the number of HCEs who are eligible under the plan) *divided by* (the total number of HCEs of the employer)



Excluded Employees and the Safe Harbor Percentage



- For purposes of these percentages, certain employees are **excluded**:
 - Employees who haven't reached 21 and completed one year of service
 - Employees who aren't included in a TACP who are included in a unit of employees covered collective bargaining agreement where the TACP was the subject of good faith bargaining between employee representatives and the employer(s).
- **Safe harbor percentage**: 90 percent, reduced by 3/4 of a percentage point for each whole percentage point by which the NHCE concentration percentage exceeds 60%.
 - NHCE concentration percentage is equal to the percentage of all of the employer's employees who are NHCEs.





Average Benefits Test

- TACP will meet this test if the average benefits provided to NHCEs under all of the employer's TACPs is at least 55% of the average benefits provided to HCEs under all of the employer's TACPs.
- **Average benefits provided**
 - In general: For HCEs or NHCEs the average benefits provided equals:

(the total dollar amount of contributions provided under all TACPs of the employer during the plan year to employees in that group)

Divided by

(number of employees in that group to whom any such contributions are provided during the plan year, via salary reduction or otherwise)



Employees Taken Into Account



- Any individual employed by the employer on **any day** of the year is considered in the denominator if:
 - The employer makes \$128 contribution to an Account of the employee or the employee's dependent during the plan year via salary reduction or otherwise; and
 - The employee isn't an excluded employee:
 - Excluded employees:
 - Employees who haven't reached 21 and completed one year of service
 - Employees who aren't included in a TACP who are included in a unit of employees covered collective bargaining agreement where the TACP was the subject of good faith bargaining.





Timing & Special Rule for Salary Reduction Agreements

- **When to perform the average benefits test?** The test must be satisfied on the last day of the plan year.
- **Special rule for salary reduction agreements.** In the case of any benefits provided through a salary reduction agreement, a plan may disregard any employee whose compensation is less than \$25,000.
 - **Compensation –**
 - **Defined with cross references:** §414(q)(4); §415(c)(3)
 - Generally, a participant's compensation from the employer for the year, including certain elective deferrals (§402(g)) and certain excluded amounts (e.g., §125 elections).



Correction of Nondiscrimination Failures



- **Correction of nondiscrimination failures** – If a plan fails the **average benefits test** as of the **last day of the plan year**, the plan may still be treated as satisfying the requirements with respect to HCEs and their dependents if the plan takes the **prescribed remedial actions**.

Remedial actions — Correction. If a TACP fails to meet the ABT on the last day of the plan year, the plan will be treated as meeting those requirements by including excess benefits amount received by HCEs in income.

Excess Benefit Amount "Included in Income"

- **Excess benefit amount** considered "included in income" if:
 - The employer treats the amount as:
 - Gross income;
 - Wages, if applicable, for purposes of Code §§3401, 3121, and 3306; and
 - Compensation for purposes of Code §3231; *and*
 - Reports the amount as such for the year being tested by the deadline for furnishing Forms W-2 for the year when the excess benefits were received (i.e., generally January 31 of the following year).



Compliance Tip: Because the excess benefit amounts are not provided under a TACP, the plan must provide a corrective notice discussed above.





How Are Excess Benefits Allocated to Correct the ABT?

Determine:

(average \$128 contribution for all NHCEs) *divided by* (0.55)

- **All HCEs have \$128 contributions that exceed the result:** Amount of excess benefits to be included in **each** HCE's income is the excess of the amount of that HCE's \$128 contribution over the above amount.
- **Not all HCEs have \$128 contributions that exceed the result:** The plan may allocate the reduction of \$128 contributions amount HCEs in any reasonable manner. Can use methods similar to those for apportioning excess amounts in §1.401(k)-2(b)(2)(iii).

Contributions to taken into account:



For purposes of the contributions and benefits rule, the eligibility tests, and the ABT, an **employer's contributions** to the Account of an employee or an employee's dependent outside of a TACP (e.g., taxable contributions in excess of the annual non-taxable TACP limit) are **not** taken into account.





Special Safe Harbor for Pilot Program Matching Contribution Arrangements

- Contributions made pursuant to a **pilot match contribution arrangement** are **disregarded** for purposes of the contributions and benefits rule and the ABT.
- **Pilot match contribution arrangement.** For an arrangement to qualify as a "pilot program contribution arrangement," it must:
 - Be designed to provide contributions to Accounts because the Account beneficiary is:
 - An employee's dependent; and
 - An **eligible child** as defined above; and
 - Make contributions under the arrangement available on the same terms and conditions to all employees who are not "excluded employees."
 - "Excluded employees" has the same meaning as above.
 - An arrangement can still qualify as a "pilot program contribution arrangement" if it relies on **reasonable measures** to establish an employee's dependent is an eligible child.
 - **Example:** The employee's certification of a dependent's date of birth is a reasonable measure to ensure eligibility.
- **Additional Section 128 Contributions.**
 - Any contributions **other than** "pilot program contribution arrangement" contributions—regardless as to whether made via salary reduction or otherwise—must separately satisfy the contributions and benefits rule and the ABT.
 - For purposes of the contributions and benefits rule and the ABT, pilot program match contributions **may** be disregarded.





What Happens if a TACP Fails to Satisfy the Nondiscrimination Rules?

If corrected

If the ABT failure is corrected as required above, the TACP will retain its status.

If not corrected

If an ABT failure is **not** corrected, or the TACP otherwise fails to meet the nondiscrimination rules, the plan is **not** a TACP for the HCEs; but it is treated as a TACP for NHCEs.



PART VII

Examples

Following the Captain's Log



Example 1



In 2026, Make \$olid Gold, Inc. ("M\$G") has 15 HCEs and 15 NHCEs. M\$G has a TACP funded exclusively with salary reduction elections made by employees under M\$G's §125 plan. All 30 employees are eligible to make the salary reduction elections to the plan on the same terms.

- 11 HCEs and 4 NHCEs elect to each contribute \$2,500 under the plan. The other employees elect no benefits under the plan.
- The average benefits provided to the HCEs is \$2,500 ($\$27,500/11$) and the average benefits provided to the NHCEs is also \$2,500 ($\$10,000/4$).



The average benefits provided to the NHCEs is 100 percent of the average benefits provided to the HCEs, and the required threshold of 55% percent is met.



Example 2



In 2026, M\$G has 15 HCEs and 15 NHCEs. M\$G has a TACP funded exclusively with salary reduction elections made by employees under M\$G's §125 plan. All 30 employees are eligible to make the salary reduction elections on the plan on the same terms.

- Employees elect to contribute as follows:

	HCE	NHCE
\$2,500	11	1
\$1,500	0	3
\$1,000	0	1
\$500	0	2

- The average benefits provided to NHCEs of \$1,285.71 (\$9,000/7). The average benefits provided to the HCEs is \$2,500 (\$27,500/11).
- The average benefits provided to the NHCEs is 51.4 percent of the average benefits provided to the HCEs (\$1,285.71/\$2,500), and the required threshold of 55 percent is not satisfied.



Example 3



In 2026, M\$G has 15 HCEs and 15 NHCEs. M\$G has a TACP funded exclusively with salary reduction elections made by employees under M\$G's §125 plan, but not all NHCEs were eligible to make salary reduction elections.

- Employees elect to contribute as follows:

	HCE	NHCE
\$2,500	11	1
\$1,500	0	1 (because 2 were excluded)
\$1,000	0	1
\$500	0	0 (because 2 were excluded)

- Because some NHCEs were excluded, \$5,000 in benefits are provided to three NHCEs, and the average benefits provided to NHCEs is \$1,666.67 (\$5,000/3).
- The average benefits provided to the NHCEs is 66.7 percent of the average benefits provided to the HCEs (\$1,666.67/\$2,500), and the required threshold of 55 percent is met.



Example 4



In 2026, M\$G has 15 HCEs and 15 NHCEs. M\$G has a TACP funded exclusively with salary reduction elections made by employees under M\$G's §125 plan. All 30 employees are eligible to make the salary reduction elections on the plan on the same terms.

- Employees elect to contribute as follows:

	HCE	NHCE
\$2,500	11	1
\$1,500	0	3
\$1,000	0	1
\$500	0	2

- On or before Monday, February 1, 2027, the furnishing deadline for the Form W-2 for 2026, M\$G treats \$500 of the benefits elected by each of the HCEs as gross income and wages for the 2026, reducing the benefits provided to the HCEs to a collective \$22,000 in benefits provided to 11 HCEs, reducing the average benefit to HCEs to \$2,000 (\$22,000/11).
- The average benefits provided to the NHCEs is 64.29% of the average benefits provided to the HCEs (\$1,285.71/\$2,000), and the required threshold of 55% is satisfied.



What if M\$G also makes a \$1,000 contribution that's not excludable from income under §128 to each of the employees who elected benefits under the plan? Because taxable employer contributions are not considered when calculating the average benefits, the conclusion would not change.



Example 5



In 2026, M\$G has 15 HCEs and 15 NHCEs. M\$G has a TACP funded exclusively with salary reduction elections made by employees under M\$G's §125 plan.

- 11 HCEs and 4 NHCEs elect to each contribute \$2,500 under the plan. The other employees elect no benefits under the plan, and the 14 NHCEs that didn't elect to contribute were not eligible to contribute.
- The 11 NHCEs who were not eligible to contribute weren't considered "excluded employees" (e.g., not 21 with 1 year of service).



Here, M\$G's plan discriminates in favor of HCEs as to eligibility and does not satisfy the eligibility nondiscrimination requirements. The plan is not a TACP with respect to HCEs and the benefits provided to HCEs are included in their income and wages within the meaning of sections 3401, 3121 (or compensation within the meaning of section 3231), and 3306. Because the benefits are not provided under a TACP, the plan must provide a **corrective notice**.



PART VIII

The Money is Safely Inside the Account, Now What?

Protecting the Treasure & Digging For More.





Key Terms

- Only **eligible investments** are allowed during an Account's **growth period**.
- **What is an eligible investment?** An **eligible investment** is a **mutual fund** or **exchange traded fund (ETF)** that:
 - Tracks returns of a qualified index;
 - Does not use leverage;
 - Does not have account fees or expenses that exceed 0.1% of the balance of the investment in the fund; **and**
 - Meets the other criteria the Secretary determines is appropriate.

What is an ETF? A domestic corporation (including a regulated investment company (RIC) (as defined in Code §8851(a)) that is registered under the 1940 Act that is:

- An "exchange-traded fund" as defined for purposes of the 1940 Act (17 CFR §270.6c-11(a)(1)); or
- An entity that operates in substantially the same manner as an exchange-traded fund but isn't described in 1940 Act (17 CFR §270.6c-11(a)(1) (e.g., unit investment trust or ETF share class of a mutual fund operating as an ETF under exemptive relief granted by the SEC).

What is a mutual fund? A domestic corporation (including a RIC) that's registered under the 1940 Act as an open-end company (15 U.S.C. §80a-5(a)(1)) that is not an ETF.



Qualified Index



- A **qualified index** is:
 - The S&P 500 stock market; **or**
 - Any other index that is
 - Comprised of **equity investments** in **primarily** U.S. companies; **and**
 - For which regulated futures contracts are traded on a qualified board or exchange.
 - Does not include any industry or sector-specific index, but may include an index based on market capitalization.
 - No environmental, social, and governance indices!
 - "**Primarily U.S. companies**" means U.S. companies represent at least 90% of the index based on their weightings in the index.



We'll dig into this further in a few slides!





How to Determine if an Eligible Investment Tracks an Index

- The fund's objective is to provide investment results that, *before* fees and expenses, replicate the performance of the index, and the fund holds investments that are *reasonably* expected to accomplish that objective.
 - Example: Hold shares of most or all of the stocks that are constituents of the index in proportion to the stocks' weighting in the index.
- An investment fund **won't** fail to track the returns of an index just because the fund's returns are affected by fees, expenses, trading costs, variations from buying and selling securities when the index changes, and similar variations incidental to operating a fund that seeks to replicate the performance of an index.





When Investment Funds Do Not Track Returns of an Index

- **Generally**, an investment fund does not track returns of an index if the fund uses 1 or more strategies to outperform, or otherwise perform differently from, the index.
- An investment fund that, in some or all market conditions, uses any strategy to decrease or increase the volatility, risk, or current income associated with the index does not track the returns of the index.
 - **Example:** An investment fund that owns shares of each stock that is a component of an index and sells covered calls on some or all of those shares does not track the returns of the index, because the fund's strategy reduces the fund's participation in the potential appreciation in the shares and increases the fund's current income.
 - **Example:** An investment fund that seeks to provide investment results consistent with the return on *several different indices* does not track the returns of *an index*.

What about securities lending?

Engaging in securities lending transactions will not cause an investment fund to fail to track the returns of an index as long as the investment fund retains full economic exposure to the securities.





What Does It Mean for an Eligible Investment "not to use leverage"?

- **Generally**, an investment fund that references an index uses leverage if the fund uses borrowings, derivatives, or other strategies that are economically equivalent to borrowings in a way that materially increases the risk of loss associated with an investment in the investment fund (when compared to an investment in a fund that holds the index components physically and doesn't borrow or use derivatives).
- **Leverage is used where**, if due to borrowings or derivatives or other economic equivalent, a change in the level of the index returns or which the fund seeks to replicate tends to result in a materially greater proportional change in the net value of the fund's portfolio.
 - **Example:** Leverage is used where the fund provides investment results that correspond to the performance of an index multiplied by a number greater than one (regardless of whether the fund uses borrowings, derivatives, or another economic equivalent to provide such results).





Are Any Borrowings or Derivatives Permitted?

- An investment fund can borrow or use derivatives as part of its strategy to **replicate the performance of an index**, as long as the borrowings or derivatives **do not materially increase the risk of loss** associated with the investment fund.
- No prohibited use of leverage where an investment fund incurs short-term borrowings to provide liquidity for redemptions or to purchase portfolio securities in connection with investment flows into the fund or because the fund uses derivatives to gain synthetic exposure to certain index components.
- An investment fund's obligation to return collateral received for permissible securities lending transactions is not treated as leverage if the investment fund takes appropriate steps to limit the risk of loss with respect to the collateral.

To limit the risk of loss with respect to cash collateral, the investment fund must hold the collateral in cash or in highly liquid, conservative positions (like money market funds).

To limit the risk of loss with respect to non-cash collateral, the investment fund must not sell the collateral or otherwise use the collateral (for example, by pledging it as collateral in another transaction) to increase the fund's exposure to the index or other assets.





Tracking “an” Index

- An index must have a publicly available index methodology that describes the criteria for inclusion in the index and the construction of the index.
- Whether an index is considered a "qualified index" is generally determined by reference to the index methodology for the index.
- Industry-specific and sector-specific indices. Indexes are considered "industry-specific" or "sector-specific" if the inclusion of stock or interest in the index depends on the business or industry in which the issuing company is engaged.
 - Any index that depends on industry classification codes for a company's inclusion in the index is an industry-specific or sector-specific index.
 - An index that includes stocks of companies operating in several related industries or sectors (e.g., hotels, air travel, and outdoor recreation) is an industry-specific or sector-specific index.



An Environmental, Social, and Governance ("ESG") Index is Prohibited



Any investment fund that corresponds to the returns of an ESG index is **NOT** an eligible investment.

Any investment fund that is marketed or sold as having an investment objective to track an ESG index is **NOT** an eligible investment.

An ESG index includes any index that has, or is marketed as having, a focus on environmental, social, or governance factors.





When is an Index Based on Market Capitalization?

An index is based on market capitalization if a condition for the inclusion of a company's stock (or other ownership interests) in the index is that the company has a market capitalization that is:

- within a specified range;
- over or under a specified threshold; or
- that meets specified ranking criteria.



An index that otherwise meets the requirements to be a qualified index won't be disqualified as a qualified index due to such a condition for inclusion.





What Does It Mean to Be Comprised of Equity Investments?

- An index is considered to be comprised of equity investments if the index is comprised entirely of stocks and similar ownership interests in the form of partnership or membership interests.
- An index is **NOT** comprised of equity investments if it includes debt instruments, derivatives, or any other asset that is not an ownership interest in a company.



What are United States companies? Domestic companies under Code §7701(a)(4).



Limit on Fees and Expenses



- An investment fund is not an eligible investment if the sum of its **annual fees** and **annual expenses** is more than 0.1 percent of the net value of its assets.

0.1%

Maximum combined annual fees and annual expenses, as a percentage of the net value of the fund's assets





Fees



- Generally, an investment fund's annual fee amount is the aggregate amount of fees from the investment fund imposed during the most recent fiscal year of the investment fund the financial data from which has appeared in the investment fund's prospectus, expressed as a percentage of the investment fund's average net asset value during that fiscal year (or a reasonable estimate).
- If the most recent prospectus discloses a change in the investment fund's fee structure that increases the investment fund's aggregate annual fees, the computation described in the preceding sentence must take into account the effect of such increase (or a reasonable estimate).
- If an investment fund has multiple share classes, annual fees are computed separately for each class, based on the fees that apply to that class and the assets allocable to that class.

What are an investment fund's fees?

- All of the amounts that the fund charges its investment fund holders directly, without regard to how such amounts are computed, when they are imposed, or how such amounts are referred to in securities filings or marketing materials.
 - This includes
 - annual, periodic, transactional, and other recurring amounts.
 - amounts a single time, such as upon a purchase or redemption of interests in the investment fund.
 - amounts expressed as a fixed dollar amount, as a percentage of the amount invested, or on another basis.



Helpful Tip: An investment fund's fees are disclosed in the fund's prospectus, often under the heading "Shareholder Fees" or "Unitholder Fees" in a fee table.





Trustee's fees aren't included



- Fees charged by a trustee for providing an account are not treated as part of any investment fund's annual fees, they're considered trustee fees.
- A fee charged by a financial intermediary for a service, such as carrying out a purchase or sale of an investment fund is not considered a part of the investment fund's fees if the fee is not charged on behalf of or at the direction of the investment fund, is not paid (directly or indirectly) to the investment fund, and is not attributable to any cost of offering the investment fund. A fee charged by a trustee for such a service is be considered a part of the investment fund's fees.





Expenses



Annual Expenses

- Annual expenses are the amount set forth as the investment fund's total annual operating expenses in its prospectus.
 - The amount may be stated as a percentage of the value of the investment fund holder's investment, or as a percentage of the net value of the fund's net assets.
 - If an investment fund's prospectus lists total operating expenses reduced by fee waivers or expense reimbursements, the reduced amount applies for purposes of section 530A.
 - If an investment fund has multiple share classes, annual expenses are computed separately for each class, based on the expenses and assets allocable to each class.





Trustee Investment Duties

Trustees must ensure Account funds are **ONLY** invested in one or more eligible investments during the growth period. How is this requirement met?

- **Written governing instrument requirements.** The written governing instrument creating the Account must include procedures for:

Selecting eligible investments and default eligible investments.

Situations where funds don't need to be invested in an eligible investment.

How to correct administrative errors.



Trustee's Monitoring Requirements



- During the growth period, the trustee must monitor each investment fund that the trustee makes available to Account beneficiaries.
- After making an initial determination that an investment fund is an eligible investment at the time the trustee first offers the investment fund to any Account for which it is the trustee, the trustee must then make **subsequent periodic determinations at least once every 12 months whether the investment fund continues to be an eligible investment.**
- These determinations must include verifying that the annual fees and expenses of the investment fund continue to meet the requirements of section §530A(b)(3)(A) and the regulations.
- **The trustee may rely on an investment fund's prospectus and other public documents required by Federal securities laws** in making its determinations.



Default Eligible Investments



General Rule

- The trustee **must establish** for each Account under the trustee's administration a **default eligible investment** in which, during the growth period, all contributions, proceeds from sales or other dispositions, and any other amounts for investment will be invested unless the account beneficiary (or any person authorized to act on behalf of the account beneficiary under the Account's written governing instrument (the responsible party)) specifies a different eligible investment for the contribution or other amount.

Related Requirements

- The default eligible investment for an Account can be a **single eligible investment** or a **combination of eligible investments** in specified proportions and may be changed by the trustee from time to time.
- The trustee must **clearly disclose** to each account beneficiary the default eligible investment in effect upon the establishment of the account and upon any subsequent change to the default eligible investment.
- The requirement to establish a default eligible investment **does not preclude arrangements** between the trustee and the account **beneficiary that give effect to different instructions** on an ongoing basis.

Example: The trustee may follow instructions of an account beneficiary (or responsible party) to invest all contributions or other amounts for investment in that account beneficiary's account (or all such amounts for which another instruction is not provided) in a specified eligible investment other than the trustee's default eligible investment.





Dividends and Other Investment Fund Distributions

- The trustee of an Account must disclose to the account beneficiary how amounts received as dividends or other distributions from eligible investments will be invested unless the account beneficiary (or responsible party) gives different instructions regarding the dividends and distributions.



Example: Amounts received as dividends and distributions might be reinvested in the same eligible investments that paid the dividends or other distributions or invested in the Account's default eligible investment. The trustee may give effect to directions from the account beneficiary (or responsible party) that a specific distribution, or distributions generally, be invested in a different way that complies with Code §530A.

Situations where funds don't need to be invested in an eligible investment

- **Certain cash holdings.** During the growth period, the trustee may permit an amount received in an Account as cash.
 - This includes an amount received as a contribution, proceeds of a sale or other disposition, or a distribution, to be held in cash for the time reasonably necessary to complete a transaction permitted under Code §530A, including an investment, reinvestment, distribution of excess contribution, qualified rollover contribution, or qualified ABLE rollover contribution.





Ceasing to be an Eligible Investment

- If an investment fund that was an eligible investment (as determined by the trustee as of the trustee's last determination date) **ceases to be an eligible investment during the growth period**, for the account to remain an Account, the **trustee must ensure the prompt sale or disposition of shares in the investment fund and the reinvestment of the proceeds** consistent with the selected designated eligible investment above) and **disclose how the proceeds were reinvested to the account beneficiary**.

What is considered "prompt"? A sale or disposition of shares in the investment fund and the reinvestment of the proceeds will be considered prompt if the sale or disposition and reinvestment of the proceeds occur within **30 calendar days** of the investment fund ceasing to be an eligible investment.

Time a fund is treated as ceasing to be an eligible investment

- This is determined based on whether the trustee is in compliance with the monitoring and periodic determination requirements.

NOT in compliance.

The investment fund ceases to be an eligible investment on the **1st day that the investment fund does not meet the requirements** to be an eligible investment.

In compliance.

The investment fund is treated as ceasing to be an eligible investment on the **earlier of the date of the next periodic determination conducted by the trustee or** the date on which the trustee acquires **actual knowledge** that the investment is no longer an eligible investment.



What Happens if Account Funds Are Invested in Ineligible Investments During the Growth Period?



- Generally, if any funds in an Account are invested in an asset other than an **eligible investment during the growth period**, **an account will cease to be an Account** (and thus will also cease to be an individual retirement account (IRA) under section 408(a)) as of the first day the account holds the ineligible investment.
 - **Exception:** If any funds of an account are invested in an asset that is an eligible investment at the time the asset is acquired but that becomes an ineligible asset during the growth period, then the account will cease to be an Account (and an IRA) as of the 30th day after the day that the asset ceased to be an eligible investment.
 - If this provision applies to cause an account to cease to be an Account (and an IRA), then the account will be treated as if there were a distribution on that day of an amount equal to the fair market value of all of the assets in the account on that day.
 - This is the case even if part of the fair market value of the account as of that day is attributable to excess contributions that may otherwise be returned tax-free under Code §530A(d)(5).



How to correct administrative errors

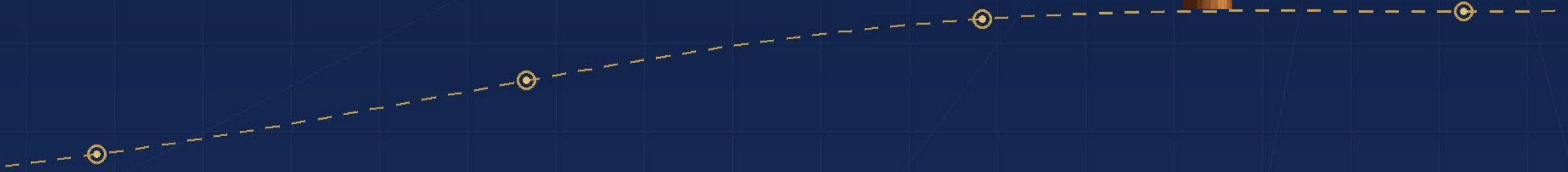
- If a trustee has the required procedures in place, but a portion of the assets of an Account are not invested in an eligible investment during the growth period due to an administrative error by the trustee (e.g., due to an oversight or mistake in applying the procedures), the account will not cease to be an Account if the trustee sells or disposes of the assets that are not invested in an eligible investment and reinvests the proceeds in an eligible investment within 30 calendar days from the first day that the portion was not invested in an eligible investment.
- The trustee must disclose to the account beneficiary:
 - the duration of the error;
 - the assets that were held during the error period; and
 - the amount reinvested in an eligible investment at the end of the error period.



PART IX

What's on the Horizon

Keep a Weather Eye on the Horizon



What's on the Horizon



01

Finalized regulations

02

More proposed regulations!

03

Lessons from experience



Additional Considerations for Employers

Is a TACP a good fit for your organization's goals and your employees' needs?

Are you internally prepared for additional compliance burdens?

Are your service providers prepared?



Boutwell Fay LLP

ATTORNEYS AT LAW

Employee Benefits & ERISA



Thank You

Have additional questions?

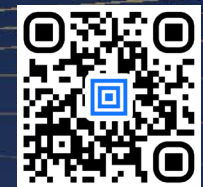
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