

DOL's Proposed Safe Harbor for Retirement Plan Fiduciaries Selecting Designated Investment Alternatives

On March 31, 2026, the U.S. Department of Labor's (DOL) Employee Benefits Security Administration issued a proposed regulation titled [Fiduciary Duties in Selecting Designated Investment Alternatives](#) (the Proposed Rule). The Proposed Rule clarifies and provides a safe harbor for how the duty of prudence under the Employee Retirement Income Security Act of 1974 (ERISA) applies when fiduciaries of participant directed defined contribution retirement plans select designated investment alternatives. "Designated investment alternatives" include any investment alternative designated by the plan into which participants and beneficiaries may direct their account assets.

The Proposed Rule implements Section 3(c) of President Trump's August 2025 Executive Order 14330, *Democratizing Access to Alternative Assets for 401(k) Investors*. The Executive Order directed the DOL to propose guidance clarifying the ERISA fiduciary duties owed to plan participants when asset allocation funds with investments in alternative assets are made available as investment options. According to the DOL, the overarching goal is to alleviate regulatory burdens and litigation risk that that may deter fiduciaries from offering investment options they otherwise believe to be appropriate for plan participants.

More broadly, the Proposed Rule articulates the general standard imposed by ERISA's duty of prudence on retirement plan fiduciaries when selecting designated investment alternatives. It also establishes a process based safe harbor that plan fiduciaries may rely on when determining which designated investment alternatives to include in a plan's investment menu.

Proposed Safe Harbor Regulation

The Proposed Rule would add a new regulation at 29 C.F.R. § 2550.404a-6 establishing a process based safe harbor for investment selection. Under this framework, a fiduciary that objectively, thoroughly and analytically evaluates relevant factors when selecting a designated investment alternative is entitled to a presumption that it satisfied ERISA's duty of prudence with respect to that selection.

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The regulation identifies a non-exclusive set of six factors that the DOL believes will be relevant in most cases. The weight and applicability of each of the factors varies based on the particular facts and circumstances involved.

- *Performance*: Consideration of a “reasonable number” of comparable alternative investments and whether the investment’s expected risk-adjusted returns over an appropriate time-horizon further the purposes of the plan. Fiduciaries should not focus solely on expected returns. Rather, fiduciaries must consider investment risk, participant characteristics and anticipated needs, and must evaluate expected returns net of fees and expenses.
- *Fees*: Assessment of a “reasonable number” of comparable alternative and whether the investment’s fees are reasonable in relation to expected risk adjusted returns and other benefits, features, or services (*i.e.*, “other value”). The fiduciary is not required to select the lowest cost alternative or to compare an investment with every similar option available in the marketplace.
- *Liquidity*: Evaluation of whether the investment provides sufficient liquidity to meet the anticipated needs of the plan and its participants, including consideration of redemption terms, participant level liquidity expectations and the potential impact of other investors’ withdrawals. Because participant-directed individual account plans mostly involve long investment time horizons, the fiduciary does not need to select only fully liquid investments. Nonetheless, fiduciaries must ensure that investments can deliver on any promises of liquidity that are made to participants and beneficiaries.
- *Valuation*: Determination that the investment can be timely and accurately valued for plan purposes. Investments need not be limited to publicly traded securities, but assets without a generally recognized market must be valued through an independent, conflict-free process that satisfies generally recognized accounting standards.
- *Benchmarking*: Comparison of the investment’s expected risk adjusted returns against a meaningful benchmark with similar mandates, strategies, objectives and risk characteristics. The Proposed Rule does not disadvantage new or innovative investment designs. Instead, when considering such an investment, a fiduciary should seek to identify the best possible comparator investments while assessing the potential value position presented by that investment design.
- *Complexity*: Consideration of whether the fiduciary possesses the skill,



knowledge, experience and capacity necessary to understand the investment and its risks, or whether assistance from a qualified investment professional is required. The Proposed Rule confirms that complex or sophisticated strategies are not precluded if they are prudently selected and adequately understood.

Practical Considerations

Under the Proposed Rule, a fiduciary that satisfies the Proposed Rule's process requirements would receive "significant deference" with respect to the prudence of its investment selection decision. Importantly, however, the Proposed Rule addresses only the duty of prudence as it relates to the *selection* of investments. It does not address the ongoing duty to monitor investments under *Tibble v. Edison International*, 575 U.S. 523 (2015). The DOL has indicated that it expects to issue additional guidance addressing monitoring obligations in the future.

The Proposed Rule also does not alter ERISA's duty of loyalty or the prohibited transaction rules, which continue to apply independently to all fiduciary investment decisions.

Takeaways for Plan Sponsors

The Proposed Rule reinforces ERISA's longstanding emphasis on maintaining a prudent, well documented investment selection process. While the proposed safe harbor may provide plan fiduciaries with greater comfort when evaluating a broader range of investment alternatives, including those with exposure to alternative assets, it does not eliminate the need for careful analysis or ongoing oversight. Plan sponsors and fiduciaries should assess whether they, and their investment advisers or consultants, have the expertise necessary to evaluate and monitor all plan investments and should ensure that both initial selection decisions and ongoing monitoring activities are appropriately documented.

The DOL has provided a 60 day public comment period for the Proposed Rule. Reinhart's Employee Benefits Team will continue to monitor developments and provide updates as the rulemaking process proceeds. For more information or questions, do not hesitate to contact your Reinhart attorney.

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