

Department of Labor Proposes New Safe Harbor for Fiduciary Investment Selection in Participant-Directed Retirement Plans

Introduction

On March 24, 2026, the Department of Labor (the “Department”) published proposed regulations (the “Proposed Regulations”) implementing Section 3(c) of President Trump’s Executive Order 14330, titled “Democratizing Access to Alternative Assets for 401(k) Investors” (the “Order”). The Proposed Regulations address the fiduciary duty of prudence under the Employee Retirement Income Security Act of 1974 (“ERISA”) related to the selection of investment options for participant-directed individual account plans, including alternative investments as defined under the Order (“Alternative Investments”)¹.

The stated goal of the Proposed Regulations is to alleviate regulatory burdens and litigation risks that, in the Department’s view, have interfered with the ability of American workers to achieve sufficiently competitive returns and meaningful asset diversification through their retirement accounts. The Department frames the proposal as an effort to ensure that ERISA gives fiduciaries—rather than, in the Department’s words, “opportunistic trial lawyers”—the discretion and flexibility to determine when designated investment alternatives, including those containing Alternative Investments, offer participants the opportunity to maximize risk-adjusted returns net of fees.

The Proposed Regulations are based around three key principles. First, they affirm that ERISA is a law grounded in process—meaning that a fiduciary’s conduct is judged by its decision-making procedure, not by hindsight evaluation of investment results. Second, the Proposed Regulations emphasize that ERISA gives plan fiduciaries maximum discretion and flexibility in selecting designated investment alternatives, and that no type or class of investment is per se prudent or imprudent under ERISA. Third, they establish that when fiduciary decision-making follows a prudent process—such as the process reflected in the proposed regulation’s safe harbor—courts and other adjudicators should give deference to such fiduciaries under a presumption of prudence.

¹ The Order defines alternative investments to include (i) private market investments, including direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the managers of such investments, if applicable, seek to take an active role in the management of such companies; (ii) direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate; (iii) holdings in actively managed investment vehicles that are investing in digital assets; (iv) direct and indirect investments in commodities; (v) direct and indirect interests in projects financing infrastructure development; and (vi) lifetime income investment strategies including longevity risk-sharing pools.

Background

ERISA's duty of prudence, found in Section 404(a)(1)(B) of the statute, requires that a plan fiduciary discharge its duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Critically, the standard is process-oriented: courts evaluate whether the fiduciary used appropriate methods to investigate and evaluate an investment at the time of the decision, not whether the investment ultimately performed well or poorly. As multiple federal appellate courts have put it, the duty of prudence "requires prudence, not prescience."

Scope of the Proposed Regulation

The Proposed Regulations apply specifically to a plan fiduciary's selection of designated investment alternatives for a participant-directed individual account plan. Note that the Proposed Regulations do not apply to investment options that are brokerage windows, self-directed brokerage accounts, or similar arrangements that enable participants to select investments beyond those designated by the plan. The Proposed Regulations also do not address the choice of plan design features in a nonfiduciary capacity. Importantly, the Proposed Regulations do not directly address the separate but related fiduciary duty to monitor designated investment alternatives after their initial selection, though the Department has indicated that it anticipates issuing interpretive guidance on monitoring obligations in the near term and generally expects that the same (or similar) factors and processes described in this safe harbor would apply to ongoing monitoring as well.

The Proposed Safe Harbor

The heart of the Proposed Regulations is a process-based safe harbor designed to give plan fiduciaries greater clarity and confidence when selecting designated investment alternatives. The safe harbor identifies six (non-exhaustive) factors that a fiduciary must objectively, thoroughly, and analytically consider—and make affirmative determinations about—when selecting the plan's investment options. (Note that reliance on an outside expert may be part of the safe harbor practice.) Following the safe harbor provides a presumption of reasonableness, and resulting investment option choices are entitled to significant deference. In other words, a fiduciary that complies with the safe harbor should be able to rely on that compliance to defend its actions against claims of imprudence. The Department likens this to the manner in which fiduciaries can rely on judicial deference in the benefit-claims context under the Supreme Court's Firestone framework.

The six safe harbor factors are as follows:

- 1. Performance.** The fiduciary must consider a reasonable number of similar investment alternatives and determine that the risk-adjusted expected returns of the selected investment alternative, over an appropriate time horizon and net of anticipated fees and expenses, furthers the purposes of the plan by

enabling participants to maximize risk-adjusted returns. This factor emphasizes that fiduciaries need not choose the highest absolute returns. It may in certain situations be prudent to select a lower-return, lower-risk investment strategy. The regulation also stresses that it may be prudent to consider long-term performance data, consistent with the long-term nature of retirement savings, rather than focusing on short-term or recent results (dependent on individual circumstances).

2. **Fees.** The fiduciary must also review a reasonable number of similar investment alternatives and determine that the fees and expenses of the selected investment are appropriate, considering the investment's risk-adjusted expected returns and any features specific to the investment. Notably, the regulation makes explicit that a fiduciary does not violate the duty of prudence solely by failing to select the lowest-cost option. A fiduciary may prudently pay higher fees in exchange for greater value, which, depending on the circumstances, could include superior customer service, lifetime income features, active management, or risk-mitigation strategies that reduce portfolio volatility and protect against large losses during market downturns.
3. **Liquidity.** The fiduciary must consider and determine that the investment option will have sufficient liquidity to meet the plan's anticipated needs at both the individual participant level (covering events such as hardship withdrawals, loans, and distributions upon separation from service) and the plan level (covering events such as plan terminations, recordkeeper changes, or corporate mergers). The Proposed Regulations make clear that there is no requirement to select only fully liquid products—fiduciaries may prudently sacrifice some liquidity in pursuit of higher risk-adjusted returns, as long as the plan's liquidity needs are met. The safe harbor provides specific guidance on how fiduciaries can satisfy the liquidity factor, including by relying on liquidity risk management programs that mutual funds are required to maintain under the Investment Company Act (the "Act").

For investments that include non-publicly traded securities, the fiduciary will be deemed to have met the applicable consideration and determination requirements if the following three conditions are met. First, the fiduciary must receive a written representation from the individual who manages the investment (or otherwise perform appropriate due diligence) that the investment has adopted and implemented a liquidity risk management program that is similar to a program that meets the requirements of the Act. Second, the fiduciary must read, critically review, and understand the representation (with the assistance of a qualified professional, as appropriate). Third, the fiduciary must not know, or have reason to know, anything that would bring the representation into question.

4. **Valuation.** The fiduciary must consider and determine that the investment has adopted adequate measures to ensure it can be timely and accurately valued. (Note that these measures may vary depending on specific facts and

circumstances.) Fiduciaries may rely on valuations derived from public exchanges for publicly traded securities. For investments that include non-publicly traded securities, the fiduciary may rely on valuations produced using recognized procedures for measuring the fair value of assets for disclosure in financial statements prepared in accordance with generally accepted accounting principles through a conflict-free, independent process; provided that the fiduciary reads, critically reviews and understands the written valuation, consulting a professional where appropriate, and does not know, or have reason to know, anything that would bring the representation into question. The regulation specifically warns against reliance on conflicted or self-serving valuations.

- 5. Performance Benchmark.** The fiduciary must consider and determine that each investment has a meaningful benchmark—defined as an investment, strategy, index, or other comparator with similar mandates, strategies, objectives, and risks—and compare the investment's risk-adjusted expected returns to that benchmark. The regulation makes clear that no single benchmark is appropriate for all investment options and that comparisons must be suitable. For investments with private asset components, a fiduciary may rely on composite benchmarks using methodologies commonly employed by investment professionals.
- 6. Complexity.** The fiduciary must consider the complexity of the investment and assess whether the fiduciary has the skills, knowledge, experience, and capacity to understand it sufficiently to discharge its fiduciary obligations. If the fiduciary lacks the necessary expertise, it must seek assistance from a qualified investment advice fiduciary, investment manager, or other professional.

Summary

The Proposed Regulations represent a potentially significant shift in the regulatory landscape for participant-directed retirement plans. They remain subject to a 60-day public comment period prior to possible revision and finalization.

Several cross-cutting themes emerge from the safe harbor's detailed examples. First, fiduciaries may—and in many cases should—enlist the services of professional advisors, including ERISA Section 3(21) investment advice fiduciaries and Section 3(38) investment managers, and may rely on their analysis and recommendations as part of a prudent process. Second, where a fiduciary obtains written representations (for example, regarding a fund's liquidity risk management program or valuation methodology), the fiduciary must read, critically review, and understand those representations, and must not have reason to know information that would call them into question. Third, the safe harbor is asset-neutral: it does not favor or disfavor any particular type of investment.

Employer Take Aways

It is important to remember that the proposed safe harbor is optional. Although we expect that it will quickly become a best practice to follow the outlined steps, those steps are not required. That said, plan fiduciaries should likely consider the Proposed Regulations' safe harbor requirements when reviewing any potential new investment options and thoroughly document the research, review and decision-making process in which they engage. Furthermore, plan fiduciaries should carefully consider whether they possess the capacity and understanding required to adequately review any investment options or comparators, and engage professional advisors whenever required (remembering that the selection of such advisors is, itself, a fiduciary act).

Whether or not a plan intends to follow the procedure outlined in the safe harbor, plan fiduciaries responsible for investments should review their internal policies and procedures (including any investment policy statements) to ensure they are not inconsistent with the guidance in the Proposed Regulations (and eventually the related final regulations).

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

[Douglas L. Tang](#)

212.336.2844

dtang@pbwt.com

[Jessica S. Carter](#)

212.336.2885

jcarter@pbwt.com

[JoAnn Kim](#)

212.336.2221

jokim@pbwt.com

To subscribe to any of our publications, call us at 212.336.2000, email mktg@pbwt.com or sign up on our website, <https://www.pbwt.com/subscribe/>.

This publication may constitute attorney advertising in some jurisdictions.

© 2026 Patterson Belknap Webb & Tyler LLP

Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas

New York, NY 10036-6710

212.336.2000

www.pbwt.com