



May 15, 2026

Department of Labor’s Proposed Regulation on Fiduciary Duties in Selecting Designated Investment Alternatives

Introduction

The fiduciary standards in the Employee Retirement Income Security Act of 1974 (ERISA; P.L. 93-406) require that individuals (referred to as *fiduciaries*) who make decisions in private-sector pension plans adhere to specified standards of conduct. The standards include an obligation to act prudently and for the exclusive purpose of providing benefits to participants and beneficiaries. Among the individuals who are fiduciaries are those who choose plan investments in *defined contribution* (DC) plans (such as 401(k) plans).

In DC plans, participants have individual retirement savings accounts in which contributions by employees, employers, or both are invested. DC plans typically offer their participants a variety of investments, such as mutual funds, collective investment trusts (CITs), target date funds, employer stock, and annuities or other lifetime income products. The investment options that DC plan sponsors provide to their participants are called *designated investment alternatives* (DIAs).

In recent years, various stakeholders have expressed interest in expanding investment options in 401(k) plans to include alternative assets, such as private investments (e.g., private equity) and digital assets (e.g., cryptocurrencies). Proponents say that the benefits of incorporating these investments include the potential for higher investment returns and increased portfolio diversification. Opponents note the risky and speculative nature of these investments, the high and sometimes opaque nature of private equity fees, and concerns about the liquidity of these investments.

ERISA does not restrict the investments a 401(k) plan sponsor can offer; however, plan sponsors generally act cautiously for a number of reasons, such as the obligation to act prudently and the possibility of lawsuits by plan participants for perceived violations of fiduciary duty.

Regulatory History

In 1979, DOL issued a regulation titled “Investment Duties,” which said that a fiduciary has satisfied their duties if they have given “appropriate consideration to those facts and circumstances” relevant to the particular investment and has “acted accordingly.”

In recent years, DOL has addressed the use of alternative assets in DC plans. In response to efforts to include cryptocurrency in DC plans, on March 10, 2022, the Department of Labor (DOL) issued a Compliance Assistance Release, “401(k) Plan Investments in ‘Cryptocurrencies,’” in which the department expressed “serious concerns” about plan fiduciaries’ decisions to

allow DC plan participants to invest in cryptocurrencies. On May 28, 2025, DOL rescinded the March 2022 compliance release.

Regarding private equity, in a June 3, 2020, Information Letter, DOL indicated that offering “a professionally managed asset allocation fund with a private equity component,” as described in the letter, would not violate the fiduciary’s duties. On December 21, 2021, DOL issued a supplemental statement cautioning its applicability outside of the context of the 2020 Information Letter. On August 12, 2025, DOL rescinded the supplemental statement.

On August 7, 2025, President Trump issued Executive Order 14330 directing DOL to clarify its “position on alternative assets and the appropriate fiduciary process associated with offering asset allocation funds containing investments in alternative assets under ERISA.” The executive order defined “alternative assets” as private market instruments (such as private equity and private credit that are not traded on public exchanges), real estate, digital assets, commodities, infrastructure projects, and lifetime income investment strategies.

DOL’s 2026 Proposed Regulation

On March 31, 2026, DOL issued a proposed regulation titled “Fiduciary Duties in Selecting Designated Investment Alternatives,” indicating that it “supplements and expands on the 1979 Investment Duties Regulation.” The proposed regulation “clarifies, and provides a safe harbor for, a fiduciary’s duty of prudence” under ERISA “in connection with selecting designated investment alternatives for a participant-directed individual account plan, including asset allocation funds that include alternative assets.” DOL is accepting comments on the proposed regulation through June 1, 2026.

While E.O. 14330 specifically addressed alternative assets, DOL describes the proposed regulation as “asset neutral” and therefore applicable to any potential DIA. The proposed regulation defines a DIA as an investment alternative “designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, including a qualified default investment alternative.” The proposal specifically excludes *brokerage windows* from the definition of DIAs. A brokerage window is an arrangement within a DC plan through which participants may purchase a wide range of investments beyond those selected by the plan. About 25% of plans offer brokerage windows.

DOL indicated that the goal of the proposed regulation is “to alleviate certain regulatory burdens and litigation risk

that interfere with the ability of American workers to achieve, through their retirement accounts, the competitive returns and asset diversification necessary to secure a dignified and comfortable retirement.” To support this goal, DOL identifies three key principles of the proposal: (1) it affirms ERISA as a law grounded in process, (2) ERISA gives maximum discretion and flexibility to plan fiduciaries in selecting DIAs, and (3) when fiduciaries follow a prudent process, arbiters of disputes should defer to fiduciaries under a presumption of prudence.

The proposal begins with a discussion of the general duties of prudence by plan fiduciaries and statements that selecting DIAs is a fiduciary act and that prudent fiduciaries have maximum discretion to select investments to further the purposes of the plan. DOL notes that there is no requirement or restriction on DIAs that are otherwise legal. For example, a plan could not include an investment in a sanctioned program or country.

The proposal notes that fiduciaries have the “duty to act prudently when establishing a plan investment menu to maximize risk-adjusted returns” and that prudence “requires appropriate consideration of all relevant factors.”

Safe Harbor Factors in the Proposed Regulation

The proposal provides a process-based *safe harbor* for fiduciaries to use when selecting DIAs. DOL identifies six (non-exhaustive) factors for a fiduciary to “objectively, thoroughly, and analytically” consider when selecting DIAs. If fiduciaries follow the process with respect to the factors (which may include relying on recommendations from outside fiduciaries), then “the plan fiduciary’s judgment with respect to the particular factor or factors, including the relationship between the factors, is presumed to have met the duties” in ERISA.

The six factors in the proposed regulation include performance, fees, liquidity, complexity, performance benchmarks, and valuation. Within the six factors, the proposal provides 20 examples in total as illustrations of what DOL believes would (and would not) be considered prudent processes. The factors are summarized as follows:

- **Performance.** DOL indicates that fiduciaries do not have to try to achieve the highest absolute returns. Rather, this factor says to consider the “risk-adjusted expected returns, over an appropriate time-horizon, of the designated investment alternative, net of anticipated fees and expenses.”
- **Fees.** DOL notes that fiduciaries are not required to choose DIAs with the lowest fees. Rather they must determine that the fees are “appropriate, taking into account its risk-adjusted expected returns and any other value” that the DIA brings to the plan. DOL says that “a prudent plan fiduciary could choose to pay more in exchange for greater services.”
- **Liquidity.** Liquidity refers to how easily an investment can be bought or sold. Some investments, such as mutual funds, are considered liquid because they can be redeemed for cash quickly, while others, such as annuities, may restrict or impose fees when cashing out.

The proposal says that fiduciaries must consider whether the DIA has sufficient liquidity to be able to meet both the plan’s liquidity needs (such as a change in the plan’s investment menu) and participants’ liquidity needs (such as withdrawals). The proposal notes that “because participant-directed individual account plans are long-term retirement savings vehicles, particularly for participants early in their careers, there is no requirement that a fiduciary select only fully liquid products.”

- **Valuation.** The DIA must be “capable of being timely and accurately valued in accordance with the needs of the plan.” Securities that are not publicly traded must be “valued through a conflict-free, independent process no less frequently than quarterly, according to procedures that satisfy” Financial Accounting Standards Board Topic 820.
- **Performance Benchmarks.** Each DIA must have a *meaningful benchmark* in order to evaluate the performance of the DIA. The proposed regulation defines a meaningful benchmark as “an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative.”
- **Complexity.** The fiduciary must determine that it has the skill to evaluate the complexity of DIAs and, if not, then it “must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual.” The proposal provides examples of complexity as fees in private assets and participant needs (such as choosing appropriate investments based on participants’ characteristics such as ages and risk tolerances).

Skidmore Deference

The proposal suggests that the “regulation should carry persuasive weight to courts under *Skidmore* [*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)].” Following the Supreme Court’s decision in *Loper Bright v. Raimondo* [603 U.S. 369 (2024)], courts no longer defer to an agency’s reasonable interpretation of an ambiguous statute, but courts may give such interpretations “due respect,” under *Skidmore*, based on the thoroughness of the agency’s reasoning and the agency’s expertise. In its proposal, DOL suggests that courts should find the agency’s reasoning persuasive such “that fiduciaries that comply with the regulation should be found to have followed a prudent process.”

Duty to Monitor DIAs

The proposed regulation does not address the duty to monitor DIAs at regular intervals after their selection, and DOL notes that it anticipates issuing interpretive guidance on this in the near term. It says that DOL “generally is of the view that the factors and processes (or substantially similar factors and processes) outlined in the proposed regulation—including the illustrative safe harbor examples—apply to this ongoing duty.”

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