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BLOG

DOL Proposes Safe Harbor for Alternative Investments in 401(k) Plans

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> *The proposed rule establishes a non-exhaustive six-factor framework for fiduciaries selecting designated investment alternatives, including private equity, cryptocurrency, and other nontraditional assets.*

The U.S. Department of Labor (the DOL) has published its long-awaited proposed rule on selecting alternative investments in participant-directed 401(k) defined contribution (DC) retirement plans (the Proposed Rule). However, the Proposed Rule is not limited to alternative assets, and if finalized, would establish a safe harbor process for the selection of *any* designated investment alternative. This process is asset-neutral and does not require, prefer, or restrict any asset class. The Proposed Rule is subject to a 60-day public comment period (ending June 1, 2026) and is not yet final; committees should treat the safe harbor as directional guidance for enhancing selection processes while monitoring the progress of the final rule.

In practical terms, the safe harbor is a roadmap that, if followed and documented, creates a rebuttable presumption that the applicable fiduciary (i.e., investment committee) satisfied the duty of prudence under Section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA) when choosing investment options.

BACKGROUND: THE EXECUTIVE ORDER

As discussed in our prior blog post, President Trump signed an executive order in August 2025, directing the DOL, the Securities and Exchange Commission, and the Department of the Treasury (including the Internal Revenue Service) to review and revise guidance and regulations to facilitate the inclusion of alternative investments—such as private equity, cryptocurrency, and other nontraditional assets—in participant-directed DC plans.

THE PROPOSED RULE: THE SAFE HARBOR PROCESS

Under the safe harbor process, when a DC plan fiduciary objectively, thoroughly, and analytically considers any of the six factors (see below) and makes a determination following the described process, the Proposed Rule provides the plan fiduciary with a rebuttable presumption that the fiduciary satisfied their ERISA duty of prudence. The list of six factors is non-exhaustive, and applicability varies with facts and circumstances. The safe harbor presently covers selection only; the DOL anticipates issuing separate interpretive guidance on monitoring. The six factors are as follows:

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1. **PERFORMANCE:** A fiduciary must consider the performance of a reasonable number of similar investment alternatives over an appropriate time horizon and conclude that the designated investment alternative will maximize risk-adjusted returns, net of fees and expenses. Fiduciaries need not select the option with the highest recent returns if a lower-volatility strategy better maximizes risk-adjusted outcomes over the plan-appropriate horizon.
2. **FEES:** A fiduciary must consider the fees and expenses of a reasonable number of similar alternatives and conclude that the fees of the designated investment alternative are appropriate considering the risk-adjusted return plus any other "*value*" of the designated investment alternative. A process is not imprudent solely because the fiduciary selected an alternative with higher fees, provided the fiduciary relies on a documented value proposition—such as diversification, downside protection, or lifetime income features—showing how it supports expected risk-adjusted returns over an appropriate horizon.
3. **LIQUIDITY:** A fiduciary must determine that the designated investment alternative will have sufficient liquidity to meet the plan's anticipated needs at both the plan level and participant level. ERISA does not require only fully liquid products in participant-directed DC plans; some sacrifice of liquidity may be prudent in pursuit of better risk-adjusted returns, consistent with participant needs.
4. **VALUATION:** A fiduciary must appropriately consider and determine that the designated investment alternative has adopted adequate measures to ensure that it is being timely and accurately valued through an independent and conflict-free process in accordance with the needs of the plan.
5. **PERFORMANCE BENCHMARKS:** A fiduciary must determine what each designated investment alternative's meaningful benchmark is—defined as an investment, strategy, index, or other comparator with similar mandates, strategies, objectives, and risks—and compare the designated investment alternative to the meaningful benchmark as a means of evaluating the risk-adjusted expected returns, net of fees.
6. **COMPLEXITY:** A fiduciary must appropriately consider the designated investment alternative's complexity and determine whether they have the skills, knowledge, experience, and capacity to comprehend, evaluate, and operationalize the designated investment alternative. To the extent a fiduciary is unable to meet that standard with respect to a designated investment alternative, the fiduciary must seek assistance from a qualified investment advice fiduciary as defined in section 3(21)(A)(ii) of ERISA, an investment manager as defined in section 3(38) of ERISA, or another individual.

WHAT PLAN FIDUCIARIES SHOULD DO NOW

As the Proposed Rule moves toward finalization, plan sponsors and fiduciaries should:

1. **Review Your Plan's Investment Selection Criteria.** Consider incorporating the six factors identified by the Proposed Rule, as applicable. While the safe harbor process is not mandatory, deviation from the process may expose the plan to heightened litigation risks.
2. **Update Your Plan's Investment Policy Statement.** Review your IPS and consider changes to reflect the updated selection criteria as well as any contemplated changes related to alternative assets, including criteria for manager selection, valuation procedures, liquidity requirements, and benchmarking.
3. **Assess Your Plan's Governance and Expertise.** Determine whether your investment committee has the background and resources to evaluate each designated investment alternative, including any alternative assets, or whether delegation to an investment advice fiduciary or investment manager, commonly referred to as an Outsourced Chief Investment Officer, is necessary or desirable. If you are considering alternative assets, confer with your recordkeeper regarding their operational readiness and prepare participant-facing explanations and communications.
4. **Consult Investment Managers.** Consult professionals with expertise in alternative assets to determine whether, and in what form, alternative investments may be appropriate for your DC plan participant population.
5. **Monitor ERISA Litigation Developments.** Monitor how courts respond to including the Supreme Court of the United States' pending decision in *Anderson v. Intel Corp. Investment Policy Committee*, which will shape how courts assess fiduciary decisions in this space.

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6. **Consider Other Suggestions.** Consider submitting comments within the 60-day window, including whether participant characteristics should be an explicit factor for target-date funds and managed accounts.

WINSTON TAKEAWAY

The Department of Labor proposes safe harbor framework for fiduciaries selecting designated investment alternatives, including private equity, cryptocurrency, and other nontraditional assets. In practical terms, the proposed guidance is a roadmap that, if followed and documented, creates a rebuttable presumption that the applicable fiduciary (i.e., investment committee) satisfied the duty of prudence.

Please contact a member of the Winston & Strawn Employee Benefits & Executive Compensation Practice or your Winston relationship attorney for further information.

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Authors

Joseph S. Adams

David Rogers

Amy Gordon

Anne Becker

Regan S. Rusher

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Joseph S. Adams

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