



## The DOL Proposed Rule<sup>1</sup>: Fiduciary Duties In Selecting Designated Investment Alternatives

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*This summary is informational and educational. It does not intend to be offering legal or regulatory advice by this Firm or the author, Philip Chao. Links to the regulation is provided. Please review the proposed regulation in its entirety with in-depth discussion and examples for a more complete understanding.*

### Objective

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.

### Three key principles form the bedrock of the proposed regulation:

1. Affirms ERISA as a law grounded in process<sup>2</sup>.
2. ERISA gives maximum discretion and flexibility to plan fiduciaries in selecting designated investment alternatives<sup>3</sup>, including the alternative investments described in Executive Order 14330, titled Democratizing Access to Alternative Assets for 401(k) Investors.
3. When an ERISA fiduciary decision-making follows a prudent process - such as the process reflected in the proposed regulation - arbiters of disputes should defer to fiduciaries under a presumption of prudence.

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<sup>1</sup> <https://public-inspection.federalregister.gov/2026-06178.pdf>

<sup>2</sup> A PRUDENT PROCESS Prudent man standard of care states that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A)for the exclusive purpose of:

(i)providing benefits to participants and their beneficiaries; and

(ii)defraying reasonable expenses of administering the plan;

(B)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;

(C)by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D)in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with ERISA 29 U.S. Code § 1104

<sup>3</sup> A Designated Investment Alternative means any 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. The term “designated investment alternative” shall not include “brokerage windows,” “self directed brokerage accounts,” or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. 29 CFR § 2550.404a-1

## The Duty of Prudence Under ERISA:

### Section 404(a)(1)(a)

This section states: “a fiduciary shall discharge that person's duties with respect to the plan... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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.”

### Section 404((a)(1)(b)(1)(i):

With regard to the consideration of an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to the fiduciary's investment duties, the fiduciary:

- (i) With regard to the consideration of an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to the fiduciary's investment duties, and
- (ii) The 1979 Investment Duties Regulation states under this section states: Has acted accordingly. (This shall include, “but is not necessarily limited to” certain factors depending on the type of plan. That regulation makes clear that the fiduciary of any plan must take “into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks. Further, that under certain circumstances the fiduciary also must specifically consider diversification, liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan, and projected return of the portfolio relative to the funding objectives of the plan. 29 CFR 2550.404a-1(b)(2)(ii)

### Executive Order 14330<sup>4</sup>

On August 7, 2025, President Trump issued Executive Order (EO 14330), Democratizing Access to Alternative Assets for 401(k) Investors. EO 14330 pointed out that, currently, many Americans in employer-sponsored defined contribution plans do not have the opportunity to participate in the potential growth and diversification opportunities offered by alternative asset investments. It cited regulatory burdens and litigation risk as factors that may impede access to these investments. It stated it is the policy of the United States that “every American preparing for retirement should have access to funds that include investments in alternative assets when the relevant plan fiduciary determines that such access provides an appropriate opportunity for plan participants and beneficiaries to enhance the net risk-adjusted returns on their retirement assets.”

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<sup>4</sup> <https://www.federalregister.gov/documents/2025/08/12/2025-15340/democratizing-access-to-alternative-assets-for-401k-investors>

EO 14330 contains a definition of alternative assets<sup>5</sup> which includes the following:

1. 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;
2. direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate;
3. holdings in actively managed investment vehicles that are investing in digital assets;
4. direct and indirect investments in commodities;
5. direct and indirect interests in projects financing infrastructure development; and
6. lifetime income investment strategies including longevity risk-sharing pools.

In carrying out EO 14330's directives, the Department is to prioritize approaches that are designed to curb litigation risk that may constrain fiduciaries from applying their best judgment in offering investment opportunities to plan participants.

EO 14330 directed the Department to focus guidance on fiduciary responsibilities in connection with offering an asset allocation fund that includes investments in alternative assets, the Department has decided not to limit the proposed rule to such funds.

The Department addresses in this proposal ERISA's fiduciary duty of prudence with respect to the selection of any designated investment alternative. The Department expects that by focusing on the factors and examples - often in the context of the selection of alternative assets, the Department has fully addressed EO 14330, showing how a good fiduciary process can justify and support the discretionary investment decisions of plan fiduciaries, including when they choose to select asset allocation funds that contain alternative assets.

### **Proposed Safe Harbor Regulation<sup>6</sup>**

The proposed regulation establishes a process-based safe harbor for plan fiduciaries when they select designated investment alternatives. It identifies a non-exhaustive list of six factors for a plan fiduciary to objectively, thoroughly, and analytically consider and make determinations about when selecting designated investment alternatives. When a plan fiduciary does so following the process described in the proposed regulation with respect to any of the six factors, its judgment regarding the factor or factors is presumed to have met the fiduciary's duties under section 404(a)(1)(B) of ERISA.

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<sup>5</sup> Alternative assets are highly varied, as the executive order demonstrates, and alternatives include nearly all investments other than those typically considered to be "traditional" asset classes—i.e., publicly-traded stocks, bonds and cash. Alternative assets sometimes are less liquid and harder to value than traditional asset classes, and the fee structures for alternative investments are often more sophisticated and performance-driven than for traditional investments.

<sup>6</sup> <https://beta.dol.gov/research-data/fact-sheet/fiduciary-duties-selecting-designated-investment-alternatives-proposed-rule>

## Six Factors

Each of the six factor's applicability to a specific designated investment alternative varies based on the particular facts and circumstances involved. However, the Department believes that each of the six factors are integral to the vast majority of designated investment alternatives participant-directed individual account plans provide.

### 1. Performance:

The fiduciary must appropriately consider a reasonable number of similar investment alternatives and determine that the risk-adjusted expected returns of the designated investment alternative, over an appropriate time horizon and net of anticipated fees and expenses, furthers the purposes of the plan by enabling participants and beneficiaries to maximize risk-adjusted return on investment, net of those fees and expenses.

### 2. Fees

The fiduciary must consider a reasonable number of similar alternatives and determine that the fees and expenses of the designated investment alternative are appropriate, taking into account its risk-adjusted expected returns, and any other value the alternative brings to furthering the purposes of the plan. For this purpose, “value” includes any benefits, features, or services other than risk-adjusted returns net of fees.

### 3. Liquidity

The fiduciary must appropriately consider and determine that the designated investment alternative will have sufficient liquidity to meet the plan's anticipated needs at both the plan and individual levels.

### 4. Valuation

The fiduciary must appropriately consider and determine that the designated investment alternative has adopted adequate measures to ensure that the designated investment alternative is capable of being timely and accurately valued in accordance with the needs of the plan.

### 5. Performance Benchmarks

The fiduciary must appropriately consider and determine that each designated investment alternative has a meaningful benchmark and compare the risk-adjusted expected returns, net of fees, of the designated investment alternative to the meaningful benchmark. The proposal defines “meaningful benchmark” for this purpose as “an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative.” The proposal clarifies that although there may be more than one meaningful benchmark for a designated investment alternative, no single benchmark is a meaningful benchmark for all designated investment alternatives. The proposal also accommodates innovation by making clear that there is no presumption or preference against new or innovative designated investment alternative designs, and that when considering a new or innovative product design, a fiduciary should identify the best possible comparators to it while also scrutinizing the potential value proposition presented by the new or innovative design.

## **6. Complexity**

The fiduciary must appropriately consider the designated investment alternative's complexity and determine that she has the skills, knowledge, experience, and capacity to comprehend the designated investment alternative sufficiently to discharge her obligations under ERISA and the governing plan documents or whether she must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual in evaluating the designated investment alternative.

### **Public Comment Period**

The comment period runs for 60 days after publication in the Federal Register. The proposal includes instructions on submitting comments through [www.regulations.gov](http://www.regulations.gov). Commenters are free to express views not only on the proposal's provisions, but also on any issues relevant to the proposal's subject matter. For questions about the proposed rulemaking, contact EBSA's Office of Regulations and Interpretations at (202) 693-8500.