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Digest

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DOL releases proposed regulations on alternative investments

Choosing a suitable investment menu for participants is one of the most important fiduciary duties that plan sponsors undertake. When making these decisions, plan sponsors must consider numerous factors, including the makeup of their workforce, investment diversification requirements and the expenses associated with each investment. Despite their best efforts, these fiduciaries may face legal actions alleging poor fund performance, excessive fees or improper use of forfeitures. In the last few years, these types of lawsuits have become commonplace and while many of them have been dismissed or settled, some cases have survived—and continue to cause employers' concern. Recently proposed regulations may give plan sponsors more protection from liability if they follow the processes outlined in the new rules.

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Background

During the previous U.S. administration, the Department of Labor (DOL) had issued a statement that cautioned fiduciaries about selecting investments with a "private equity component." The current administration withdrew this statement last fall because it deviated from the DOL's historically neutral approach to investment decisions.

Last August, the president issued Executive Order 14330, Democratizing Access to Alternative Assets for 401(k) Investors. This order directed the DOL to reexamine existing guidance on private market investments within participant-directed defined contribution retirement plans. Although this order may have reflected the president's belief that alternative assets should be made more readily available to investors, some were concerned that promoting such assets would once again depart from the DOL's neutral stance.

On March 30, 2026, the DOL released proposed regulations, which seem to take a neutral position on alternative investments. Rather than creating a rule that applies to a specific class of assets, the DOL addresses a plan fiduciary's duty of prudence when selecting all investment options for a participant-directed plan—not just when choosing "alternative investments."

A process-based approach

In the proposed regulations, the DOL now takes a broader stance in defining the investment-selection process that plan fiduciaries must follow to ensure compliance with their duties under the Employee Retirement Income Security Act of 1974 (ERISA). While fulfilling the executive order's directive to "reexamine existing guidance," the DOL seems to carefully couch its language to avoid a perception of bias toward less traditional investments.

The DOL states that the proposed regulations seek to "alleviate certain regulatory burdens and litigation risk that interfere with the ability of American workers to achieve ... the competitive returns and asset diversification necessary to secure a dignified and comfortable retirement." To support this goal, the DOL emphasizes three key principles that apply when enforcing certain provisions of ERISA.

- The process of selecting prudent investments is more important than the results; whether selections were prudent should not rely on hindsight determinations
- Plan fiduciaries (e.g., plan sponsors) should retain maximum discretion and flexibility when selecting investment options, including alternative investments
- When plan fiduciaries follow a prudent decision-making process, they will benefit from a safe harbor "presumption of prudence" to insulate them from burdensome litigation

The DOL is proposing a process-based "safe harbor" for plan fiduciaries to use when selecting investment options. Those who "objectively, thoroughly and analytically consider and make a determination" with respect to the following six factors will be presumed to be using reasonable judgment, which should be entitled to significant deference.

- Performance
- Fees
- Liquidity
- Valuation
- Benchmarking
- Complexity

Although this list of factors is not exhaustive, the DOL believes that they are "integral to the vast majority of designated investment alternatives provided within participant-directed individual account plans." The proposed regulations also contain examples that illustrate how each of these six factors could be evaluated to demonstrate that a fiduciary has exercised reasonable judgment. These examples—20 in all—provide

practical, real-world suggestions that may prove useful as plan sponsors select any plan investment.

Some practical considerations

Much can be said about how the new proposed regulations may change the way plan sponsors select investment options—and about how much different the final regulations might be. With all the interest that this release has generated, there is surely much more to come. Meanwhile, three observations seem apt. First, in some ways, not much has changed. ERISA—the statute that dictates the scope of any related regulation—requires the utmost diligence by plan fiduciaries. In creating an investment menu for participants, plan sponsors should still engage qualified investment advisors to analyze possible investments using (at least) the six factors listed above. Perhaps as important, this process must be carefully documented as it is being conducted to demonstrate safe harbor compliance under the new rule.

Second, alternative investments have long been a part of defined benefit (DB) plan assets, but sponsors of DB plans are responsible for promised benefits. If alternatives lose value in a DB plan, the plan sponsor will have to make additional contributions to make up the difference. In most defined contribution (DC) plans, there is no such backstop so if the investment loses value, the participant simply bears the loss. Consequently, any alternative assets that are made available in a participant-directed DC plan are likely to constitute a very small portion of, for example, a target-date fund (TDF). These "sleeves" of alternatives within an investment may provide some exposure that participants cannot buy directly, while the rest of the fund (e.g., stocks, bonds, cash) provides the required daily liquidity to meet distribution and trading demands.

Third, many in the retirement plan industry are interested in the comment and revision period that will result in a final rule. Considering the executive order and the push for greater access to private assets in plans, some circles will welcome the DOL's safe harbor in the proposed regulations. Others, however, caution that true fiduciary prudence extends beyond a proper process and involves achieving substantively reasonable results. The deadline to submit comments on the proposed rule closed in June with the Federal Register's website logging nearly 40,000 comments. It appears that there may be quite a vigorous debate about procedural prudence versus substantive prudence. The final regulations will surely have to address this tension.

Independent contractor rule change proposed

Another Biden-era rule is being revised by the DOL: the independent contractor rule. While this change may not affect all employers, many plan sponsors have workers that are classified as contractors versus employees. A correct classification is essential to plan compliance. Treating common law employees as if they are independent contractors—or vice versa—could lead to complicated and expensive remedies so getting it right is critically important.

On February 26, 2026, the DOL issued a proposed regulation that replaces the 2024 final rule and restores an analysis that was established during the first Trump administration. The previous 2024 rule used a "totality of the circumstances" test, with six factors used to determine a worker's status.

1. Opportunity for profit/loss based on worker's initiative and investment
2. Investments by worker and employer
3. Degree of permanence of the relationship
4. Nature/degree of control over the work
5. Work's integration into the employer's business
6. Worker's skill and initiative

The new proposed rule gives two of these six factors greater weight: 1) the nature and degree of control that the employer exercises over the work and 2) the opportunity for profit or loss based on the worker's initiative and investment. The DOL believes that these core factors will provide enough guidance in most cases. Other secondary factors, such as the skill required and the permanence of the relationship, could be considered, if needed.

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Critics of the previous rule argue that the multiple factors—with no clear guidance on weighing them—could lead to inconsistent outcomes and increased litigation. The new rule gives multiple fact-specific examples, which provide additional clarity and may reduce the uncertainty about applying the factors. The old rule tended to favor a finding that workers were employees (and potentially eligible for retirement benefits, for example); the new rule leans toward allowing more workers to be classified as independent contractors, which employers tend to favor.

The comment period for this proposed rule has recently ended (with 27 comments received). After reviewing the comments, the DOL hopes to issue a final classification rule by the end of the year. Despite any federal rule becoming "final" through the administrative rulemaking process, the party in the executive branch will likely revise the rules to reflect its preferences.

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