

FACT SHEET



Fiduciary Duties In Selecting Designated Investment Alternatives Proposed Rule

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The U.S. Department of Labor released a proposal that clarifies, and provides a safe harbor for, a fiduciary's duty of prudence under the Employee Retirement Income Security Act of 1974 (ERISA) in connection with selecting designated investment alternatives for a participant-directed individual account plan, including asset allocation funds that include alternative assets. The proposal carries out President Trump's Executive Order 14330 (EO 14330), Democratizing Access to Alternative Assets for 401(k) Investors.

Background

On August 7, 2025, President Trump issued EO 14330 to broaden 401(k) investment options. EO 14330 noted that many Americans in employer-sponsored defined contribution plans lack access to the potential growth and diversification that alternative assets may offer. It cited regulatory burdens and litigation risk as factors that may impede access to these investments.

EO 14330 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.”

EO 14330 defines “alternative assets” to include:

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

EO 14330 directed the Department of Labor (Department) to propose regulations or other guidance, including appropriately calibrated safe harbors, that clarify the ERISA fiduciary duties owed to plan participants when plans offer asset allocation funds with investments in alternative

assets. It also instructed the Department to prioritize approaches designed to curb litigation risk that may constrain fiduciaries from applying their best judgment in offering investment opportunities to plan participants.

In implementing EO 14330, the Department proposes a regulation that provides guidance to fiduciaries on their responsibilities under ERISA section 404(a) when prudently selecting designated investment alternatives for participant-directed individual account plans.

Although EO 14330 focused on fiduciary responsibilities for offering an asset allocation fund that includes investments in alternative assets, the proposed regulation would apply to the selection of any type of investment as a designated investment alternative, including investments in the alternative assets (as defined in EO 14330). This approach recognizes that a fiduciary's responsibilities when selecting asset allocation funds are the same as those that apply when selecting any other type of investment. It also reflects key principles behind this proposal: prudence under ERISA is based on process and gives maximum discretion and flexibility to plan fiduciaries in selecting any type of investment as a designated investment alternative. The proposal affirms this flexibility by establishing safe harbors, a process that fiduciaries may use to meet their prudence obligations under ERISA.

ERISA Section 404(a) Duty of Prudence

ERISA imposes a duty of prudence on fiduciaries of ERISA-covered employee benefit plans. Under section 404(a)(1)(B) of ERISA, plan fiduciaries must discharge their 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." Selecting a designated investment alternative for a participant-directed individual account plan is a fiduciary act governed by ERISA's duty of prudence.

In 1979, the Department published a regulation titled Investment Duties (hereinafter 1979 Investment Duties Regulation) providing general guidance with respect to prudently selecting investments.¹ Today's proposed regulation supplements and expands on the 1979 Investment Duties Regulation in the context of selecting designated investment alternatives for participant-directed individual account plans. Nothing in today's proposed regulation disturbs the 1979 Investment Duties Regulation.

Overview of the Proposed Regulation

In general, to satisfy the duty of prudence under ERISA section 404(a) when selecting a designated investment alternative, a plan fiduciary must use a prudent process. This process must consider the relevant facts and circumstances that, given the scope of such fiduciary's investment responsibility or authority, the fiduciary knows or should know are relevant to the particular designated investment alternative.

¹ 29 CFR 2550.404a-1; 44 FR 37225 (June 26, 1979).

Safe harbor

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.

Six Factors and Examples

The Department identified the six factors through thorough consideration of its experience, a comprehensive review of pertinent case law, existing regulations, previous sub-regulatory guidance, EO 14330, and valuable stakeholder input. Each 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. Examples apply each factor to different fact patterns involving different types of investments.

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.

Examples focus on maximizing risk-adjusted returns and investment time horizons.

One example demonstrates that it may be prudent to select a lower-risk strategy with a lower expected return—a strategy that may be accomplished with investments that hold alternative assets with low correlations to stock and bonds in their portfolios for the purpose of improving risk-adjusted returns.

One example demonstrates that, given the long-term nature of retirement savings, it is often prudent to give greater weight to the long-term historical performance of possible designated investment alternatives over short-term performance.

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.

One example illustrates that a fiduciary is not imprudent solely because it did not select an investment with the lowest fees and expenses. But this example emphasizes that all

else being equal, a plan fiduciary must rely on the value proposition of a designated investment alternative with higher fees and expenses than similar alternatives with lower fees and expenses when choosing that designated investment alternative.

One example demonstrates that a lifetime income feature's value may justify higher total fees than a designated investment alternative without this feature.

One example demonstrates that a strategy incorporating alternative assets, designed to further the purposes of the plan by decreasing volatility, and reducing the risk of large losses during a market downturn may justify a higher expense ratio.

One example demonstrates imprudence when the fiduciary failed to consider the different value proposition between two available share classes and selected the more expensive share class even though both share classes are identical in all respects except cost.

One example illustrates that a plan fiduciary may offer both actively and passively managed funds within a plan menu to secure diversification benefits if the fiduciary concludes that the diversification benefits' value justifies selecting an actively managed fund that charges higher fees than a passive counterpart.

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.

One example, focusing on participant-level events that may trigger a need for immediate liquidity (such as participant benefit withdrawals due to retirement, separation from service, or financial hardship, asset reallocations or reinvestments to other designated investment alternatives, and plan loans), illustrates a prudent process that relies on the designated investment alternative's (including one that holds a percentage of assets that are not securities, non-publicly traded securities, or securities acquired in exempt offerings) registration under and compliance with rules under the Investment Company Act of 1940, including the requirement to adopt and implement a compliant written liquidity and risk management program.

One example, focusing on participant-level events that may trigger a need for immediate liquidity but does not involve a registered mutual fund as the selected designated investment alternative, illustrates a prudent process. That process relies on the named fiduciary receiving a written representation from the designated investment alternative's manager that it has adopted and implemented a liquidity risk management program substantially similar to a program that meets the Investment Company Act of 1940's requirements. In such a case, the process is prudent if the named fiduciary reads, critically reviews and understands the written representation, consults with a qualified professional where appropriate, and does not know or have reason to know other information that would cause the fiduciary to question the written representation.

One example, involving a deferred annuity contract under which allocations become fully committed after 90 days and any immediate withdrawals by a participant before age 65 result in a penalty and a market value adjustment, illustrates a prudent process when the

named fiduciary balances the restrictions on liquidity with the value of the guaranteed monthly payments under the annuity contract (recognizing that such guarantees help participants manage investment and longevity risk) and concludes that the increase in the value of the monthly payments and the certainty of the insurer's guarantee justify the restrictions on liquidity.

One example, focusing on pooled investment vehicles and temporal restrictions on redemptions (e.g., advance notice and incremental redemptions over a period of time) necessary to maintain asset allocation targets (with strategies involving positions in certain private assets along with public assets), illustrates a prudent process. That process relies on the named fiduciary's evaluation, in concert with an investment advice fiduciary, of the maximum that the designated investment alternative will allocate to illiquid assets, the time until such investments could likely be sold without reducing their value, the time until such investments will return capital, the scope and duration of the temporal restrictions on the plan, and the plan's potential need for withdrawal.

One example, focusing on pooled investment vehicles and temporal restrictions on redemptions (e.g., advance notice and incremental redemptions over a period of time) necessary to maintain asset allocation targets (with strategies involving positions in certain private assets along with public assets), illustrates a prudent process that relies on the designated investment alternative's registration under and compliance with rules under the Investment Company Act of 1940 (including the requirement to adopt and implement a compliant written liquidity and risk management program).

One example, focusing on pooled investment vehicles and temporal restrictions on redemptions (e.g., advance notice and incremental redemptions over a period of time) necessary to maintain asset allocation targets (with strategies involving positions in certain private assets along with public assets), illustrates a prudent process. That process relies on the manager of the designated investment alternative that is not registered under the Investment Company Act of 1940 providing to the named fiduciary a written representation that the designated investment alternative has adopted and implemented a liquidity risk management program that is substantially similar to a program that meets the Investment Company Act of 1940's liquidity risk management requirements. In such a case, the process is prudent if the named fiduciary reads, critically reviews and understands the written representation, consults with a qualified professional where appropriate, and does not know or have reason to know, other information which causes the fiduciary to question the written representation.

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.

Examples apply this standard to different types of investment funds, including mutual funds registered under the Investment Company Act of 1940, with a range of investments, including publicly traded securities and alternative asset investments, and to

investments where conflicts of interest could exist and could impact risk-adjusted return on investment.

One example illustrates a prudent selection process that relies on asset valuations derived from a national securities exchange when all the underlying investments of the selected designated investment alternative (an open-end mutual fund) trade daily on a public exchange (except for necessary cash reserves for operating expenses).

One example illustrates a prudent selection process that relies on a written representation that the securities for which there is not a generally recognized market are valued through a conflict-free, independent process no less frequently than quarterly, according to procedures that satisfy the Financial Accounting Standards Board Accounting Standards Codification 820, titled Fair Value Measurement (or any successor standard).

One example, involving an open-end mutual fund registered under the Investment Company Act of 1940 that contains some securities for which there is not a generally recognized market, demonstrates a prudent selection process that relies on the fund's publicly available financial statements and valuation-related disclosures, as well as the fund's Form N-1A prospectus disclosures (to confirm that a majority of the fund's board is independent).

One example, in which the named fiduciary selects as a designated investment alternative a continuation fund managed by an entity that is permitted to purchase assets (assets that do not trade on a public exchange and lack readily observable market prices) from an investment vehicle that is managed by an affiliate of the entity (based on the application of the entity's proprietary valuation methods that rely on inputs provided by the entity or its affiliates), illustrates a selection that does not meet the safe harbor in the proposed regulation or ERISA's prudence standard in section 404 because the assets will not be valued through a conflict-free and independent process.

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.

One example involving a target date fund illustrates that a "meaningful benchmark" does not include an index that only tracks the returns of large capitalization U.S. equities when other benchmarks with more similarities to the target date fund were readily available.

One example, involving an asset allocation fund registered under the Investment Company Act of 1940 containing publicly traded stocks and bonds and a private equity sleeve, illustrates that a “meaningful benchmark” may include a composite benchmark that blends the performance of broad-based securities market indices reflective of and in proportion to the stock and bond holdings of the fund, along with a combination of methodologies commonly used by investment professionals for the private equity sleeve, including the internal rate of return method and a public market equivalent method.

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.

One example, involving a designated investment alternative with varied private assets that use sophisticated and variable fee-based incentive structures to drive performance (including management fees and performance fees which include carried interest rights), illustrates alternative scenarios in which a named fiduciary would be considered to have prudently considered the complexity of the designated investment alternative and determined that she has the skills, knowledge, experience, and capacity to comprehend it sufficiently to discharge its obligations under ERISA and the plan documents or whether it must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual.

One example, involving a managed account service that creates a customized portfolio tailored to each participant’s unique financial circumstances for a higher fee compared to a target date fund that is also available under the plan, illustrates a fiduciary that would fail to satisfy the safe harbor and ERISA’s prudence standard in section 404 because he does not understand the design of the service and as a result does not provide sufficient participant information to the service to allow participants to obtain the benefit of the customized program, justifying the higher fee.

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. 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.

Contact Information

For questions about the proposed rulemaking, contact EBSA’s Office of Regulations and Interpretations at (202) 693-8500.