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DOL proposes broad safe harbor for selecting DC plan investments

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In this article

The Department of Labor (DOL) is proposing a new regulation that would address how defined contribution (DC) plan fiduciaries could demonstrate prudent selection of investment options. The proposal responds to an August 7, 2025, executive order (EO) directing DOL to take action aimed at encouraging DC plans to offer participants greater exposure to private equity, digital currencies, and other "alternative assets." However, the proposal would be significantly broader in scope, establishing a process-based framework that includes six safe-harbor factors for fiduciaries to consider when selecting all types of DC plan investment options. (The proposal wouldn't apply to the selection of investments for defined benefit plans or DC plans that don't allow participants to direct their investments.) Comments are due by June 1.

Key takeaways for DC plan fiduciaries

Implications for DC plan fiduciaries include the following:

- **Not limited to alternative assets.** The proposal would apply to all types of DC plan investment options, including those that only invest in publicly traded securities. However, the proposal wouldn't apply to brokerage windows or self-directed brokerage accounts.

- **Prudent process safe harbor.** The proposal would establish a framework for DC plan fiduciaries to demonstrate they followed a prudent process when selecting an investment option. The process would involve giving appropriate consideration to the facts and circumstances a fiduciary knows (or should know) are relevant to a particular investment option.
- **Safe-harbor factors.** The proposal would establish the following six safe-harbor factors for fiduciaries to consider when selecting DC plan investments: performance, fees, liquidity, valuation, performance benchmarking, and complexity. Fiduciaries who appropriately consider these factors would be presumed to fulfill their ERISA duty of prudence.
- **Limited to initial investment selection of individual options.** The safe harbor factors would apply to the initial decision to select an investment option but not ongoing monitoring of the investment. DOL intends to issue other guidance to address the duty to monitor DC plan investments.
- **Reliance on professional experts.** Fiduciaries could demonstrate compliance with any safe harbor factor by relying on recommendations from an investment advice fiduciary or delegating investment selection responsibility to a professional investment manager.
- **Prudent menu construction.** Fiduciaries would also need to act prudently when establishing a diversified menu of investment options that enables participants to maximize risk-adjusted returns, net of fees, across their entire plan investment portfolios. However, the proposal doesn't explain how fiduciaries would satisfy this duty.
- **Supplements existing fiduciary guidance.** The proposal would supplement — but not replace — existing fiduciary guidance, such as DOL's investment duties regulation, DC plan annuity selection safe-harbor regulation, 2025 advisory opinion on lifetime income solutions in qualified default investment alternatives (QDIAs), 2020 information letter on private equity investments in asset-allocation funds, and 2013 target date fund tip sheet. This existing guidance may include other considerations for fiduciaries to factor into their investment decisions.
- **No effective date specified.** The proposal doesn't specify when the safe harbor would take effect. Nor does DOL explain the proposal's implications for investment selection decisions made before issuance of a final regulation.

This article provides background on the EO, summarizes the proposal's key components, and highlights areas where DOL has requested public comments.

Background on alternative assets

The proposal responds to an EO signed last August. That order directed DOL to take certain actions by February 3, 2026, to encourage DC plan fiduciaries to offer participants greater exposure to six categories of alternative assets (see DC plans await DOL's Trump-ordered

alternative asset guidance (August 25, 2025)). According to the order, participants should have access to funds that invest in alternative assets when the plan fiduciary determines they provide an appropriate opportunity for participants "to enhance the net risk-adjusted returns on their retirement assets."

The order instructed DOL to take the following actions:

- Reexamine existing DOL guidance on asset allocation funds that include investments in alternative assets
- Consider rescinding the agency's previous statement — issued during the Biden administration — cautioning fiduciaries of "typical" DC plans about including private equity investments as components of target-date or balanced funds (DOL rescinded this statement less than a week after the order was signed)
- Clarify the agency's position on alternative assets and the appropriate process for ERISA fiduciaries when deciding to offer asset allocation funds with exposure to these investments
- Propose regulations or guidance — which may include "appropriately calibrated" safe harbors — that describe the duties fiduciaries owe to participants when deciding whether to offer alternative investments
- Consult with the Department of the Treasury, the Securities and Exchange Commission, and other federal regulators as necessary

The order also instructed DOL to prioritize actions that may "curb" ERISA lawsuits when implementing these directives.

Scope and structure of the proposal

DOL's longstanding view is that the selection of an investment option for a DC plan is a fiduciary act that is subject to ERISA's duty of prudence. The agency's investment duties regulation — originally adopted in 1979 and updated during the Biden administration — includes a safe harbor providing that fiduciaries will satisfy their obligation to act prudently by giving appropriate consideration to the facts and circumstances they know (or should know) are relevant to an investment, including the role the investment plays in the plan's investment menu. A fiduciary's decision must be based on factors they reasonably determine are relevant to the risk or return of the investment.

Prudent process standard. The proposal would mirror the investment duties regulation by providing that DC plan fiduciaries must follow a prudent process that gives appropriate consideration to the facts and circumstances they know (or should know) are relevant to the particular investment option. This provision of the proposal would be limited to the duty of prudence and have no bearing on a fiduciary's obligations to comply with their separate duty of loyalty or ERISA's prohibited transaction rules.

Process-based safe harbor. The proposal would also provide a process-based safe harbor with a "non-exhaustive" list of six factors for evaluating DC plan investment options, along with examples demonstrating the application of each factor to hypothetical scenarios (see below for a more detailed overview). If a fiduciary "objectively, thoroughly, and analytically" considers these factors when selecting an investment option, the fiduciary's selection decision would be "presumed" to be prudent and entitled to "significant deference." While this provision of the proposal is described as a safe harbor, the proposal's framing differs from other existing fiduciary safe harbors. For example, the DC annuity selection safe-harbor regulation specifically states that compliance is optional and that the safe harbor "does not establish minimum requirements or the exclusive means for satisfying" ERISA's duty of prudence. The proposal doesn't contain similar language.

Not limited to alternative investments. While the EO's directives focused on asset allocation funds with exposure to alternative assets, the proposal would apply to all types of DC plan investment options even if they only invest in publicly traded securities like stocks and bonds. The proposal specifically notes that managed account services that are QDIAs would be covered, even though these services aren't considered an investment option under DOL's participant disclosure regulations. However, the proposal wouldn't apply to brokerage windows, self-directed brokerage accounts, and similar arrangements that allow participants to select investments beyond those specified by the plan, or the investments available through those features.

Asset neutrality. The proposal would clarify that ERISA's duty of prudence doesn't restrict any specific type of investment — including investments in the categories of alternative assets listed in the EO — and gives fiduciaries "maximum discretion" to select investments that further the purposes of the plan. However, other federal laws may prohibit plans from offering certain types of investments, such as investments in foreign adversaries.

Reliance on investment professionals. A fiduciary could demonstrate compliance by relying on recommendations of a prudently selected ERISA Section 3(21) investment advice fiduciary or prudently delegating investment selection responsibility to an investment manager under ERISA Section 3(38). While DOL indicates in the preamble that fiduciaries generally wouldn't be required to rely on an investment professional, many of the examples illustrating the proper application of the proposal's safe-harbor factors involve a fiduciary's reliance on an investment advice fiduciary's recommendations — and a fiduciary might be required to seek assistance if it cannot understand an investment sufficiently to make a prudent decision.

Overview of proposed safe-harbor factors

The proposal's six safe-harbor factors are performance, fees, liquidity, valuation, performance benchmarking, and complexity. The proposal includes examples demonstrating the application of each factor to hypothetical scenarios. In the proposal's preamble, DOL indicates that it believes these factors are "integral to the vast majority" of DC plan investment options, though each factor's applicability to a particular investment option would vary based on the facts and circumstances.

Performance. Fiduciaries would need to consider a reasonable number of similar investment options and determine that the selected investment's risk-adjusted expected returns over an appropriate time horizon — net of anticipated fees and expenses — will enable participants to maximize risk-adjusted returns. In the proposal's preamble, DOL explains that fiduciaries shouldn't focus solely on expected returns but must take into account risks the investors are exposed to (such as economic and market risks) and participants' risk capacity (including their investment time horizon) when making this determination. Two hypothetical examples involving target date fund selection illustrate the following principles:

- Fiduciaries wouldn't have to select the investment option with the highest expected returns but could prudently select a lower-risk option with lower expected returns.
- To improve risk-adjusted returns, fiduciaries could consider investment options that hold alternative assets with low correlations to stocks and bonds, thereby lowering volatility of returns.
- Because of the long-term nature of retirement savings, fiduciaries could give greater weight to an investment's long-term historical performance than returns during a shorter — or the most recent — time period.

Fees. Fiduciaries would need to consider a reasonable number of similar investment options and determine that the selected investment's fees and expenses are appropriate, taking into account the investment's risk-adjusted expected returns and any other value the investment provides, such as benefits, features, or services. Fiduciaries wouldn't have to select the investment with the lowest fees but could prudently select a higher-fee investment that provides greater services. Five hypothetical scenarios illustrate the following principles:

- Determining a reasonable number of investment options to consider, and whether those options are sufficiently similar, depends on the facts and circumstances, but fiduciaries wouldn't have to consider every similar investment option available in the market.
- A fiduciary generally would need to consider differences in fee structures of an investment option's share classes and select the most economical share class available to the plan.
- A fiduciary could prudently decide to add a new investment option similar to an existing option but with higher fees if the new option has a feature whose value justifies the additional fees.
- Considering an investment manager's proposed change in strategy would be tantamount to selecting a new investment and would require the same level of analysis.
- Fiduciaries could prudently decide to offer both actively managed and passive investment options within the same strategy to provide greater diversification, even though the actively managed investment charges higher fees than the passive one.

Liquidity. This factor would require fiduciaries to determine that the investment option will have sufficient liquidity to meet the anticipated needs of both participants and the plan. Fiduciaries would be deemed to meet this requirement when selecting a registered mutual fund as an

investment option. Because of the long-term nature of retirement savings, fiduciaries wouldn't always have to select fully liquid investments but could prudently sacrifice some liquidity to seek higher risk-adjusted returns. The preamble explains that this includes selecting investments that hold illiquid alternative assets. Four examples illustrate how fiduciaries could apply this factor:

- **Participant-level liquidity.** When selecting investment options — especially QDIAs — fiduciaries would need to conclude that the investment will have sufficient liquidity at the time of its selection to meet the plan's need for immediate liquidity due to participant-level events, such as participant withdrawals, loans, or asset reallocations and reinvestments. For investment options that aren't registered mutual funds, such as collective investment trusts (CITs), fiduciaries would need to:

  — Obtain the fund manager's written representation (or perform appropriate due diligence to substantiate) that the investment has a liquidity risk management program substantially similar to a mutual fund

  — Read, critically review, and understand the written representation and consult with a qualified professional where appropriate

  — Neither know, nor have reason to know, other information that would cause the fiduciary to question the written representation

  The proposal also notes that when assessing lifetime income products, such as deferred annuities, fiduciaries would need to balance any restrictions on liquidity with the value of future guaranteed benefit payments to participants.

- **Plan-level liquidity.** Some investment options apply restrictions on redemptions due to plan-level activities, such as recordkeeper changes or plan mergers. These restrictions help the investment option maintain consistent target positions following significant withdrawals by investors. Fiduciaries would need to determine that such restrictions don't conflict with the plan's anticipated liquidity needs. Fiduciaries could follow the same process for obtaining and reviewing a written representation from the manager that applies when evaluating participant-level liquidity. Alternatively, a fiduciary could evaluate the investment's:

  — Maximum allocation to illiquid investments

  — Time likely needed to sell these investments without reducing their value

  — Time until these investments will return capital to investors

  — Advanced notice required for the plan to exit the investment option

  Based on this evaluation, the fiduciary would need to conclude that the investment will appropriately balance the plan's future liquidity needs, the investment's ability to achieve increased risk-adjusted returns, and the investment's ability to maintain its asset allocation targets even if multiple investors redeem their investments.

Valuation. Fiduciaries would need to determine that the investment option has adopted adequate measures to ensure timely and accurate valuation in accordance with the plan's needs. Four examples explain the following principles:

- **Publicly traded securities.** Fiduciaries generally would be able to rely on asset valuations derived from a national securities exchange or similar public exchange.
- **Non-publicly traded assets.** For investment options that include assets with no generally recognized market, fiduciaries would be able to rely on the manager's written representation (or the fiduciary's appropriate due diligence) that these assets are valued through a conflict-free, independent process in accordance with US generally accepted accounting principles. Similar to the written representations for evaluating liquidity, fiduciaries would need to read, critically review, and understand this representation (including consultation with a qualified professional where appropriate) and neither know, nor have reason to know, other information that would cause the fiduciary to question the representation.
    - **Mutual funds.** For mutual funds that hold securities with no generally recognized market, fiduciaries could also prudently assess valuation by reading the fund's publicly available audited financial statements and valuation-related disclosures (or performing other appropriate due diligence) and consulting a qualified professional as appropriate.
    - **Continuation funds.** When investing in a type of private-asset vehicle called a continuation fund that has acquired (or expects to acquire) assets with no generally recognized market from another investment vehicle managed or controlled by the same manager or its affiliate, the fiduciary would have to assess whether the assets are valued through a conflict-free, independent process and determine that the manager's conflict of interest hasn't resulted in an inaccurate valuation. A valuation method that relies on the manager's proprietary valuation methodology wouldn't satisfy this standard.

Performance benchmark. Fiduciaries would need to compare the investment option's risk-adjusted expected returns, net of fees, to a "meaningful benchmark" — an investment strategy, index, or other comparator with similar mandates, strategies, objectives, and risks. The proposal indicates that there may be more than one meaningful benchmark for a particular investment option, but no single benchmark would be meaningful for all plan investments. Fiduciaries would be able to determine the investment option's expected returns based on historical performance. For investments without historical performance, fiduciaries could use the historical performance of a different investment (other than the meaningful benchmark) with similar mandates, strategies, objectives, and risks. This factor wouldn't establish a presumption or preference against "new or innovative" investment products. Three examples illustrate the following principles:

- For investments like target date funds that invest in different asset classes, fiduciaries wouldn't satisfy the safe harbor by using a dissimilar index (e.g., a single-equity index) when other benchmarks with more similarities to the investment are readily available. However, if the fund only invests in publicly traded securities, fiduciaries would be able to rely on a composite benchmark that blends multiple broad-based securities market indices to represent the fund's

asset allocation. Plan fiduciaries would have to review and understand the benchmark's description and consult with an investment professional, as appropriate.

- If an investment is an asset allocation fund with investments in both alternative assets and publicly traded securities, fiduciaries would be able to rely on a composite benchmark created by a prudently selected investment advice fiduciary that is independent of the fund manager. In the example, the investment advice fiduciary provides a written explanation of the composite benchmark to the plan fiduciary, who reads, critically reviews, and understands the explanation and neither knows, or has reason to know, other information that would cause the fiduciary to question the explanation.

In a footnote in the preamble, DOL explains that the meaningful benchmark plan fiduciaries use to satisfy this factor may be different than the benchmark required under the agency's participant disclosure regulation. DOL hasn't yet implemented the SECURE 2.0 Act's direction to update that regulation to allow plan administrators to use blended benchmarks in participant disclosures for investment options that hold a mix of asset classes, such as target-date and balanced funds.

Complexity. Fiduciaries would have to determine whether they have the skills, knowledge, experience, and capacity to sufficiently comprehend an investment option's complexity or would need to seek assistance from a qualified investment advice fiduciary, investment manager, or other individual. Two examples illustrate this factor's application:

- **Complex fee structures.** One example addresses fiduciaries' consideration of complex fee structures associated with an investment option that includes holdings of alternative assets with variable fee-based incentive structures that include both management fees and performance fees, such as carried interest rights. The example provides that fiduciaries would satisfy this factor by taking one of the following approaches:
  - **Due diligence approach.** The fiduciary conducts relevant due diligence — which may involve consulting an investment advice fiduciary — to understand each fee the plan may pay and determine the average total expected rate of the investment option's fees, including when they will be paid and how they will be determined. Based on this assessment, the fiduciary concludes that the fee structure will deliver increased value by incentivizing performance and that the associated increase in expected risk-adjusted returns outweighs the variability or potential unpredictability of the amount and timing of fees.
  - **Flat fee approach.** Under this approach, the fiduciary would obtain a written representation from the manager (or perform due diligence to confirm) that underlying variable fees won't be passed through the plan (i.e., the plan will only pay a flat management fee based on assets under management). The fiduciary would have to read, critically review, and understand the written representation — which may include consulting with a qualified professional expert, where appropriate — and neither know, nor have reason to know, other information that would cause the fiduciary to question the manager's representation.

Other aspects of the proposal

In addition to the process-based framework and related safe harbor factors, DC plan fiduciaries should be aware of several other elements of the proposal.

Duty to monitor not covered. Fiduciaries have an ongoing obligation to monitor plan investments at regular intervals and remove those the fiduciary determines are no longer prudent. In the preamble, DOL explains that the proposal wouldn't address this duty to monitor, but the agency anticipates issuing other interpretive guidance in the near future. However, DOL generally believes the proposal's factors and examples would apply to fiduciaries' ongoing monitoring of investments. Accordingly, DOL indicates that fiduciaries who follow the process outlined in the proposal during "appropriately established monitoring cycles" would satisfy their monitoring requirements.

Duty to construct prudent investment menu. The proposal would provide that DC plan fiduciaries have a duty to act prudently when establishing a diversified menu of investment options that enable participants to maximize risk-adjusted returns, net of fees, across their entire portfolio of plan investments. However, DOL says guidance on how to satisfy this duty is beyond the scope of the proposal. In the proposal's preamble, DOL acknowledges that many DC plans already offer investment menus that comply with the safe harbor in ERISA Section 404(c), which relieves fiduciaries of liability for investment losses when participants decide how to invest their accounts. Under DOL's 404(c) regulation, fiduciaries must offer a "broad range" of investment options to qualify for this relief, though the agency doesn't explain whether doing so would satisfy this element of the proposal.

Longevity risk-sharing pools. The proposal wouldn't apply to plan design features selected by sponsors in a non-fiduciary settlor capacity, including features that establish benefit payment methods under the plan. The preamble and the proposal itself specifically address longevity risk-sharing pools, in which participants' benefits are adjusted for the mortality experience of other participants in the pool. The EO identified such pools as a type of alternative asset, but DOL describes them as "a risk-sharing mechanism that can incorporate many investment strategies, rather than itself constituting an alternative asset." DOL acknowledges that these products might be offered through a designated investment alternative, but the proposal explains that to the extent these products are simply plan design features that establish a payout method for a participant's account, they wouldn't be covered under the rule.

Attempt to curb ERISA lawsuits

In the preamble, DOL indicates that alleviating litigation risk is an overarching goal of the proposal. Toward that end, the proposal incorporates the following principles:

- Affirming that ERISA's duty of prudence is a "process-based inquiry" focused on the fiduciary's investigation at the time of the investment decision without the application of hindsight

- Confirming that ERISA gives fiduciaries "maximum discretion and flexibility" when selecting investment options
- Advocating that courts should defer to fiduciaries' investment decisions by applying a presumption of prudence where fiduciaries have followed a prudent process like the one reflected in the proposal

The preamble includes a lengthy discussion of recent court rulings as support for these principles, as well as DOL's legal authority to issue a safe harbor on the application of ERISA's duty of prudence. DOL believes that fiduciaries who can "actively demonstrate" compliance with the proposal's safe-harbor factors "should be able to confidently rely" on those factors to defend their decisions. However, because meeting the safe harbor factors would be highly fact-dependent, whether courts would consider compliance with the proposal at the motion-to-dismiss stage remains unclear. Whether courts would agree with DOL's views on applying a more deferential standard of review to fiduciaries' investment decisions is also uncertain.

The Supreme Court of the United States (SCOTUS) is also poised to hear a case during its next term that could affect portions of DOL's legal analysis. That case involves allegations that DC plan fiduciaries breached their duty of prudence by offering investment options with allocations to alternative assets. SCOTUS will consider whether plaintiffs must allege a "meaningful benchmark" to satisfy the pleading standard for fiduciary breach claims premised on underperformance.

Request for comment

DOL requests comments on all aspects of the proposal by June 1, including the following items:

- The comprehensiveness and applicability of the six safe-harbor factors in light of best practices in the DC plan marketplace and established investment principles
- Any additional factors that could enhance the proposal, including whether participant profiles or characteristics should be included as a stand-alone factor (either for all investment options or only target date funds and managed accounts)
- Additional safeguards to address valuation risks for private asset vehicles like continuation funds
- Best practices for monitoring investment options and constructing DC plan investment menus, including whether future guidance should address whether the 404(c) regulation's requirements remain a best practice
- Whether more plans would use an ERISA Section 3(21) investment advice fiduciary or Section 3(38) investment manager as a result of the proposal and how plan costs will be affected
- What portion of DC plans use off-the-shelf plan designs with set investment lineups, and whether usage varies by plan size

- How the proposal would change fiduciary litigation, including affecting the cost of fiduciary insurance and scope of coverage
- Whether fiduciaries would be more likely to include alternative assets and, if so, in what form
- Magnitude of financial benefits associated with increased use of alternative assets in DC plans

Related resources

Non-Mercer resources

- Proposed rule (Federal Register, March 31, 2026)
- News release (DOL, March 30, 2026)
- Fact sheet (DOL, March 30, 2026)

Mercer Law & Policy resources

- DOL clarifies scope of QDIA relief for lifetime income products (December 2, 2025)
- DC plans await DOL's Trump-ordered alternative asset guidance (August 25, 2025)
- DOL reverses course on repeal of DC annuity safe harbor (August 14, 2025)
- DOL axes earlier warning about cryptocurrency in 401(k) plans (May 30, 2025)
- On second thought, DOL has softer touch with ESG investing rule (December 13, 2022)
- High court declines to raise the bar on excessive fee cases (February 8, 2022)
- DOL cautions DC plan fiduciaries about private equity offerings (January 28, 2022)
- DC plans can offer investment funds with private equity, DOL says (June 17, 2020)

Other Mercer resources

- A glimpse into the future for DC plan fiduciaries (April 3, 2026)
- Top considerations for DC plan sponsors in 2026

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