

New U.S. Department of Labor proposed regulations could pave way for more alternative 401(k) investments

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In August 2025, President Trump issued Executive Order 14330, “Democratizing Access to Alternative Assets for 401(k) Investors.” The order instructed the Department of Labor (DOL) to propose regulations to provide guidance under the Employee Retirement Income Security Act of 1974 (ERISA) for fiduciaries who choose to designate “alternative investments” as part of participant-directed 401(k) retirement plans.

While “traditional” investment options typically consist of publicly traded stocks, bonds, or cash, alternative investments can include options such as private equity, hedge funds, real estate, infrastructure, commodities, and cryptocurrency.

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Under current ERISA regulations, there are no explicit restrictions on the type of investment a fiduciary may designate for a plan. However, greater regulatory burdens and higher litigation risk factors have historically kept fiduciaries from exercising alternative investment options for 401(k) plans.

There are a few reasons for this. Alternative investments are by nature typically less liquid than more traditional investments. Converting an investment in real property or Bitcoin into cash, for example, would take longer and be more difficult than selling shares of a large, publicly traded company.

Alternative investments also typically require higher minimum investment thresholds and higher fees that could be burdensome to individual plan participants. But perhaps the greatest issue with these investments is their volatility — they are typically more complex and carry a greater degree of risk than other, more stable investment menu options.

That being said, proponents of creating new regulations (and indeed the Trump administration) have argued that paving the way for more alternative options for 401(k) plans will give investors greater flexibility and lead to greater asset diversification. Even if these investments carry a higher degree of risk, they can also offer the opportunity for more competitive returns and may be more resilient to inflation and market downturns.

On March 31, 2026, the DOL released Proposed Regulations, “Fiduciary Duties in Selecting Designated Investment Alternatives” (91 FR 16088-01) (U.S. Department of Labor Proposed Regulations Section 2550.404a-6). The Proposed Regulations seek to clarify the duties a fiduciary owes to ERISA-covered plan participants when considering alternative investment options. It also subsequently creates a safe harbor to protect fiduciaries who exercise these duties appropriately.

Section 404(a)(1)(B) of ERISA already delineates a “duty of prudence” for fiduciaries that mandates that they act “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.”

Essentially, this means that fiduciaries must exercise reasonable caution and due diligence regarding the relative risks and benefits of different investment options. The Proposed Regulations reinforce that fiduciaries overseeing participant-directed plans must also exercise this same prudence when considering alternative investment options and the trade-offs related to them.

The Proposed Regulations also seek to clarify that just because an investment option is riskier or costlier than other alternatives does not automatically make it an imprudent choice. A recent U.S. Circuit Court of Appeals decision reinforced this very point.

In *Anderson v. Intel Corp. Investment Policy Committee*, 137 F.4th 1015 (9th Cir. 2025), an employee alleged that the

fiduciaries of his retirement plan had neglected their duty of prudence by investing in private equity and hedge funds, which he claimed underperformed compared to their more traditional investment counterparts.

However, the 9th Circuit affirmed a lower court’s ruling that Anderson made “only general arguments about the riskiness and costliness of hedge funds and private equity funds without providing factual allegations sufficient to support the claim that the investments that were actually made were ill-suited to the Intel funds.” (This decision is currently in the process of being appealed in the U.S. Supreme Court.)

The Proposed Regulations stipulate that “when ERISA fiduciary decision-making follows a prudent process — such as the process reflected in the Proposed Regulations — arbiters of disputes should defer to fiduciaries under a presumption of prudence.”

Moreover, the determination of a duty of prudence is largely a process-based determination, not an outcome-based one. Simply because a particular investment option performs poorly or has higher fees does not automatically imply that the fiduciary shunned their duties. In other words, prudence is assessed based on the fiduciary’s investigation *at the time of the investment decision*, not in hindsight based on the investment results.

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The “prudent process” being referred to here is a set of six proposed non-exclusive factors that, if adopted, would constitute a safe harbor guideline for fiduciaries when selecting alternative investment options.

- (1) **Performance:** The fiduciary should weigh the benefit of the investment’s expected returns against the risk of the investment over a span of time that makes sense for the plan and its participants. This span of time could be affected by the average age of the workforce and the expected retirement age.
- (2) **Fees:** A fiduciary need not always select the investments with the lowest fees. The fiduciary must determine that a given investment option’s fees make sense when

compared to the expected rate of return and/or other benefits the investment provides.

- (3) **Liquidity:** Although alternative investments are often less liquid than traditional investments, this is permissible if the level of liquidity makes sense at both the plan and participant levels. For example, some participants may not need easily liquidated assets if their retirement plans span a long time horizon and the fund offers a liquidity premium as a benefit.
- (4) **Valuation:** An alternative investment must be capable of being timely and accurately valued in accordance with the needs of a given plan. Additionally, this valuation must be obtained through an independent and conflict-free process in order to be considered accurate. Typically, 401(k) plan accounts are valued daily, and this may present challenges for plan operations and participant expectations if non-public assets are valued quarterly.
- (5) **Benchmark:** Fiduciaries must have a meaningful benchmark with which to evaluate the performance and success of alternative investments, i.e., “an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative.”
- (6) **Complexity:** When designating a complex investment, the fiduciary has a responsibility to ensure that they themselves have the knowledge, skill, and experience to understand the intricacies of the investment, or they must seek out this information from a qualified source, such as an investment professional.

Significant deference will apply to fiduciary decisions if the above six steps are followed per the Proposed Regulations. This new path for investment options under a 401(k) plan underscores the need for plan fiduciaries to carefully and periodically review their procedures and investment policy statements to enhance their decision-making processes.

Besides what the final regulations will be, there are some other uncertainties facing plan fiduciaries. State and federal securities laws restrict access to certain private funds to accredited investors and qualified purchasers only. In some cases, the 401(k) plan itself may qualify as such.

The Executive Order also directed the Securities and Exchange Commission (SEC) to consider ways to broaden access to alternative assets in 401(k) plans which may involve “revisions to existing SEC regulations and guidance relating to accredited investor and qualified purchaser status.”

The Proposed Regulations are open to public comments until June 1, 2026.

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