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ERISA Update

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DOL Proposes Safe Harbor for Selection of Designated Investment Alternatives in 401(k) Plans

In this update, we summarize the proposed rule and the litigation context in which it arose and practical considerations for employers, plan fiduciaries, and alternative asset managers.

On March 30, 2026, the U.S. Department of Labor (DOL) [proposed a new rule](#) that would give 401(k) plan fiduciaries a clearer path to offering alternative investments—like private equity, real estate, and infrastructure—alongside traditional mutual funds and index funds.^[1]

Under the Employee Retirement Income Security Act (ERISA), fiduciaries who select investment options for a retirement plan must satisfy a duty of prudence. The proposed rule would create a process-based safe harbor under ERISA that sets forth steps for plan fiduciaries to follow when selecting investment options for participant-directed defined contribution retirement plans, which under the rule, would give rise to a legal presumption that the fiduciaries satisfied this duty of prudence.

The safe harbor applies to all investment selections—not just alternative investments—but it was prompted by Executive Order 14330, which President Trump signed in August 2025 to expand retirement savers' access to alternative assets. If finalized, the rule could make fiduciaries more

comfortable offering investment options that include exposure to alternative assets offered by private equity firms, real estate fund managers, and other fund managers.

In this update, we summarize the proposed rule and the litigation context in which it arose and practical considerations for employers, plan fiduciaries, and alternative asset managers.

Although the proposed rule is not yet final, there are a few key takeaways at this stage:

- **For employers and plan fiduciaries:** The proposal provides guidance on how to evaluate nontraditional investments, which could reduce the legal risk of considering these alternatives for ERISA-governed plans. Thoughtful fiduciary committee process, monitoring, and documentation remain essential.
- **For alternative asset managers:** The proposal could significantly expand the market and capital raising opportunities for products designed for defined contribution plans. Managers who want to be positioned when a final rule takes effect should be thinking now about product structure, fee transparency, liquidity management, and valuation processes.
- **Comments are due by June 1.** Employers, plan fiduciaries, fund managers, and others who would be affected should consider submitting comments to DOL during the 60-day comment period.
- **The final rule could change.** DOL could revise the rule in response to comments. Plan sponsors and fund managers should review the final rule when it is released, which could be by the end of 2026.

Background

Why Alternatives Have Been Rare In 401(k) Plans

Alternative investments—such as private equity, private credit, real estate, infrastructure, digital assets, and commodities—are often cited as offering diversification benefits and the potential for higher risk-adjusted returns, and they are already common in traditional pension plans. Yet they remain rare in participant-directed defined contribution plans, such as 401(k) and 403(b) retirement plans.

The reluctance to include them in such plans has come from both plan sponsors and the managers of alternative investment funds.

On the plan sponsor side, alternative investments present some features that have attracted ERISA class action lawsuits, which in turn has discouraged plan sponsors from including such products in their lineups. Compared with traditional mutual funds and the low-cost index funds now common in 401(k) plans, alternatives can involve higher fees, more complex structures, more difficult valuation issues, and reduced liquidity. Plaintiffs regularly point to these features when alleging that fiduciaries acted imprudently in including alternatives among plan investment lineups. In the proposal's preamble, DOL identified litigation risk as a central reason for the relative absence of alternative investments in 401(k) plans, citing more than 500 suits since 2016 alleging violations of ERISA and more than \$1 billion in ERISA settlements since 2020. Against that backdrop, DOL concluded that the threat of litigation has discouraged fiduciaries from

offering investment options beyond the familiar mix of mutual funds, index funds, and target date funds, even where other options could improve participant outcomes.

On the alternative investment manager side, practical obstacles have limited access to 401(k) capital. Most alternative investment managers have primarily sponsored private funds that restrict investments by benefit plan investors to less than 25% of any class of equity interests (the so-called “25% Test”), which leads them to prefer large institutional pension plans over smaller accounts. Typical private equity fund structures also call capital and make distributions irregularly based on deal flow, and have limited or irregular liquidity mechanisms, creating complications for inclusion in 401(k) plans with participants that might change jobs, take a hardship withdrawal, take a plan loan, or retire at any time. And while most private funds value their portfolios quarterly using internal processes, most 401(k) plans operate on a daily valuation cycle. For these reasons, many alternative investment managers have historically viewed the back-office infrastructure required to administer many small accounts as not worth the effort.

That dynamic is already changing. In recent years, alternative investment managers have embraced the “retailization” of the industry, investing significant capital in private wealth distribution channels, and entirely new product designs, including semi-liquid fund structures that are regulated under the Investment Company Act. This broader trend of increased retail access to private market investment opportunities has led these historically institutional-focused alternative investment managers to invest in retail distribution relationships and operational and compliance infrastructure that may better position them to also access 401(k) capital. And although DOL’s prior guidance sent mixed signals—at times acknowledging that alternatives could be included in 401(k) plans, and at times warning fiduciaries against doing so—the agency has recently made it clear that defined contribution plan participants should have access to alternatives. Following Executive Order 14330, DOL rescinded its restrictive guidance on private equity in 401(k) plans. The new proposed rule is the most significant action to follow the Executive Order.

These market and regulatory dynamics have led to increased interest among alternative investment managers in developing purpose-built products specifically designed for inclusion in 401(k) plan investment line-ups, most notably, Investment Company Act-registered funds that fit within target date funds structured as collective investment trusts. Target date funds are diversified asset allocation funds that use an investor’s target retirement date to adjust asset allocation over time, becoming more conservative as retirement approaches. Sponsors of target date funds may include an alternatives sleeve in a registered fund wrapper within a predominantly liquid portfolio to provide 401(k) plan participants the benefits of exposure to alternative investments within a balanced portfolio that meets the operational needs of 401(k) plan participants and fiduciaries.

What The Proposal Would Do

The proposal would add a new regulation at 29 C.F.R. § 2550.404a-6. Its most important provisions establish a process-based safe harbor for fiduciaries selecting investment options for a retirement plan menu—including, but not limited to, options containing alternative investments. In that respect, the proposed rule is broader than Executive Order 14330. The proposal states that ERISA “does not require or restrict any specific type” of investment, so long as it is legal.^[2] It

does, however, exclude brokerage windows from the definition of designated investment alternative, leaving those arrangements outside the scope of the rule.^[3]

Under the proposal, a fiduciary that objectively, thoroughly, and analytically evaluates the factors listed in the rule when selecting a designated investment alternative would be entitled to a legal presumption that it satisfied ERISA's prudence requirement as to those factors.^[4] The proposal states that such a determination would be entitled to "significant deference."^[5]

The **six factors** listed in the rule are:

1. Expected performance;
2. Fees and expenses;
3. Liquidity;
4. Valuation;
5. Benchmarking; and
6. Complexity.^[6]

The factors are "non-exhaustive," meaning a fiduciary should still consider other factors that "the fiduciary knows or should know are relevant to the particular designated investment alternative."^[7]

The proposal also includes illustrative examples, several of which address features commonly associated with private-market or other nontraditional investments—including limited liquidity, fair-value pricing procedures, and the use of alternative assets within diversified asset allocation strategies.^[8]

Practical Considerations

Even at the proposal stage, the proposal carries practical implications. It may encourage plan fiduciaries to revisit their prior assumptions that certain structures are effectively off-limits, or present too great a risk of attracting an unmeritorious lawsuit, solely because they involve alternative assets—and it may encourage alternative investment sponsors to begin building the infrastructure required to access defined contribution plan capital.

For Employers And Plan Fiduciaries

The proposal reinforces the importance of careful committee process, reasoned analysis, and ongoing monitoring. It confirms that the key fiduciary question is not whether an investment falls within a handful of "favored" categories, but whether the fiduciary engaged in a prudent and well-documented decisionmaking process tailored to the investment and the plan. That focus is intended to reduce the litigation risk posed by including on plan menus funds that include exposure to alternative investments.

For Alternative Investment Fund Managers

The proposal presents alternative investment fund managers an opportunity to expand their platforms by creating products designed for participant-directed defined contribution plans. Fund managers that have historically sponsored private funds will need to consider multiple issues, including:

- **Valuation requirements.** Many 401(k) plans price investments daily, which can be difficult for funds that hold assets without readily available market prices.
- **Participant liquidity events.** Fund managers will need to plan for outflows, because 401(k) participants can change jobs, retire, take hardship withdrawals, take plan loans, or in most cases move money between investments at any time.
- **Fee transparency and reasonableness.** 401(k) plans are required to disclose investment fees to participants, which means fund managers will need to provide robust fee disclosure, and plan fiduciaries closely monitor fee structures and overall fee/expense levels to ensure reasonableness.
- **Securities law exemptions.** Many private funds rely on exemptions under the Investment Company Act—such as Sections 3(c)(1) and 3(c)(7)—that restrict how they can be marketed, including limits on general solicitation. Private fund managers will need to consider whether those restrictions are compatible with a participant-directed defined contribution plan that makes the investment available to all participants.
- **The 25% Test.** Fund managers will need to continue tracking benefit plan commitments carefully to meet the 25% Test, or consider whether to instead rely on the venture capital operating company or real estate operating company safe harbors.
- **Investment Company Act considerations.** The operational and compliance incompatibility of traditional private fund structures with 401(k) plans will likely lead alternative investment fund managers to consider Investment Company Act-regulated structures, such as interval funds, tender offer funds, and non-traded BDCs. These structures avoid the limitations of the 25% Test and the need for reliance on certain securities law exemptions. Investment Company Act-registered funds also provide the robust disclosure and valuation frequency that is needed for participant-directed 401(k) plans that provide for daily transactions by participants.
- **Investment Advisers Act considerations.** Fund managers building products for 401(k) plans will also need to consider their obligations under the Investment Advisers Act. From an Advisers Act perspective, the manager's contractual client is typically the private fund, the target date fund manager, or other fiduciary decision-maker, rather than individual participants. This creates a dual compliance lens: managers will be diligenced against both SEC/Advisers Act requirements applicable to an adviser managing a pooled investment vehicle and ERISA/DOL requirements for products used in a 401(k) context.
- **Fund documentation and conflicts management.** Fund documentation may need to be adjusted so it is operationally compatible with the platform and readable for ERISA-oriented gatekeepers. Liquidity provisions should clearly define redemption windows, notice requirements, gates, suspension rights, and any in-kind mechanics. Managers should provide a clear expense allocation policy, identify any caps or waivers, and disclose any platform or data-related fees.

Looking Ahead

Submit comments by June 1. The proposed rule is open for public comment for 60 days. Rulemaking comments matter—this is a proposal, not a final rule, and the final version will reflect the input DOL receives. Plan sponsors, fiduciaries, asset managers, and service providers that want to shape the final product should consider engaging in the comment process.

Watch Congress and the courts. Interested parties should also monitor potential developments in the legislative and judicial branches. Members of Congress have continued to show interest in the policy goals of Executive Order 14330. One bill in early stages—the *Retirement Investment Choice Act*—would provide that Executive Order 14330 “shall have the force and effect of law.”^[9] And the Senate HELP Committee addressed alternative investments in a December 2025 hearing on retirement policy.^[10] In the courts, the Supreme Court granted certiorari in *Anderson v. Intel Corporation Investment Policy Committee*, No. 25-498, which will address whether pleading an ERISA fiduciary breach claim predicated on fund underperformance requires alleging a “meaningful benchmark.” The Proposed Rule may affect the Supreme Court’s decision in *Intel*, which will not be argued before Fall 2026 and is unlikely to be decided until after the proposed rule is finalized.

Monitor SEC examination priorities. Alternative investment managers entering the 401(k) space should also monitor SEC examination priorities, which in 2026 have emphasized adherence to duty of care and duty of loyalty obligations, particularly with regard to aspects of their business that serve retail investors. Given the retail-adjacent nature of 401(k) participants, managers should expect heightened scrutiny of their compliance programs, Marketing Rule adherence, and conflicts management practices. Recent enforcement cases involving the Marketing Rule have focused on retail-facing communications, signaling the SEC’s focus on investor protection in contexts where retail participants may be affected.

Consider impact on existing fund operations. Managers should consider the potential impact of entering the 401(k) space on their existing fund operations. Expanding into retail-adjacent channels can create headline risk, examination risk, and litigation risk that may draw attention away from managing existing private funds. Managers should also carefully consider conflicts that may arise, including allocation of constrained capacity across accounts, co-investment allocation obligations under existing side letters, and whether fee streams used to seed assets for defined contribution products could affect GP economics or existing LP relationships.

Maintain fiduciary discipline. The proposed rule is fundamentally focused on process, and a disciplined fiduciary process remains the most effective defense against litigation even in the absence of the proposed rule. Although the proposed rule, if finalized in its current form, would create a safe harbor where that process standard has been met, it will also remain to be seen how courts will apply any final rule in private litigation.

Gibson Dunn will continue to monitor these developments, and is available to assist plan sponsors, fiduciaries, fund managers, and others in navigating these developments.

^[1] *Fiduciary Duties in Selecting Designated Investment Alternatives*, 91 Fed. Reg. 16,088 (Mar. 31, 2026).

- [2] Proposed Section 2550.404a-6(c), 91 Fed. Reg. at 16,136.
- [3] Proposed Section 2550.404a-6(m)(2), 91 Fed. Reg. at 16,144.
- [4] Proposed Section 2550.404a-6(f), 91 Fed. Reg. at 16,136.
- [5] *Id.*
- [6] Proposed Section 2550.404a-6(g)-(l), 91 Fed. Reg. at 16,136-44.
- [7] Proposed Section 2550.404a-6(f), (e), 91 Fed. Reg. at 16,136.
- [8] Proposed Section 2550.404a-6(g)-(l), 91 Fed. Reg. at 16,136-44 (examples).
- [9] H.R. 5748, 119th Cong. (2025).
- [10] Senate HELP Comm., *The Future of Retirement* (Hearing, Dec. 2025).

The following Gibson Dunn lawyers prepared this update: Andrew G.I. Kilberg, Kevin Bettsteller, Michael Collins, Blake Estes, Marian Fowler, David Perechocky, Brian Richman, Jennafer Tryck, Shannon Errico, and Aaron Hauptman.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding the issues discussed above. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's Administrative Law & Regulatory, ERISA Litigation, Executive Compensation & Employee Benefits, Investment Funds, or Real Estate / REITS practice groups:

Administrative Law & Regulatory:

Eugene Scalia – Washington, D.C. (+1 202.955.8543, esmith@gibsondunn.com)

Andrew G.I. Kilberg – Washington, D.C. (+1 202.887.3759, akilberg@gibsondunn.com)

Brian Richman – Dallas (+1 214.698.3466, brichman@gibsondunn.com)

ERISA Litigation:

Karl G. Nelson – Dallas (+1 214.698.3203, knelson@gibsondunn.com)

Ashley E. Johnson – Dallas (+1 214.698.3111, ajohnson@gibsondunn.com)

Jennafer M. Tryck – Orange County (+1 949.451.4089, jtryck@gibsondunn.com)

Executive Compensation & Employee Benefits:

Michael J. Collins – Washington, D.C. (+1 202-887-3551, mcollins@gibsondunn.com)

Sean C. Feller – Los Angeles (+1 310.551.8746, sfeller@gibsondunn.com)

Krista Hanvey – Dallas (+1 214.698.3425, khanvey@gibsondunn.com)

Investment Funds:

Kevin Bettsteller – Los Angeles (+1 310.552.8566, kbettsteller@gibsondunn.com)

Shannon Errico – New York (+1 212.351.2448, serrico@gibsondunn.com)

Blake E. Estes – New York (+1 332.253.7778, bestes@gibsondunn.com)

Marian Fowler – Washington, D.C. (+1 202.955.8525, mfowler@gibsondunn.com)

MacRae Robinson – New York (mmrobinson@gibsondunn.com)

Real Estate / REITS:

David Perechocky – New York (+1 212.351.6266, dperechocky@gibsondunn.com)

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