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# DOL Proposes Safe Harbor for Alternative Investments in 401(k) Plans

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# Why Alternatives Have Been Rare in 401(k) Plans



## Plan Sponsor Concerns

Litigation risk posed by plaintiffs alleging alternatives are imprudent, largely due to higher fees compared to index funds

- **500+ ERISA lawsuits since 2016**
- **\$1B+ in settlements since 2020**



## Fund Manager Obstacles

- Need to smooth out operational frictions
- Irregular capital calls / distributions don't fit 401(k) liquidity needs
- Quarterly valuations vs. daily pricing needs

*Result: Litigation risk + operational barriers = alternatives largely absent from DC plans*

# What Changed: Regulatory & Market Shifts

## REGULATORY SHIFTS

Aug 2025

### Executive Order 14330

President Trump directs expansion of retirement savers' access to alternative assets

Aug 2025

### DOL Rescinds Restrictive Guidance

Prior restrictive guidance on private equity in 401(k) plans withdrawn

Mar 2026

### DOL Proposed Rule

New process-based safe harbor at 29 C.F.R. § 2550.404a-6 proposed

## MARKET SHIFTS



Alternative managers increasingly investing in "retailization" – semi-liquid structures, registered funds, and retail distribution infrastructure.



Pressure on plan sponsors to generate above-market returns and enhanced diversification through alternatives.

# The Proposed Rule: **Process-Based Safe Harbor**



New regulation at 29 C.F.R. § 2550.404a-6

## Scope

Applies to ALL investment selections, not just alternatives. Excludes brokerage windows.

## Mechanism

Fiduciaries who objectively, thoroughly, and analytically evaluate listed factors receive a legal presumption of prudence as to those factors.

## Deference

DOL states the rule would be entitled to *Skidmore* deference from courts.

# The Six Elevation Factors

The rule enumerates factors typically relevant to selecting designated investment alternatives:

1

## Expected Performance

Whether the investment maximizes projected risk-adjusted returns, net of fees

2

## Fees & Expenses

Whether fees are justified by returns and other value

3

## Liquidity

Can the investment meet liquidity needs at plan and individual levels

4

## Valuation

Can the investment alternative be timely and accurately valued

5

## Benchmarking

Whether the projected returns compare favorably to benchmarks

6

## Complexity

Whether the fiduciary understands the investment or needs professional advice

*These factors are non-exhaustive — fiduciaries should also consider other relevant factors specific to the investment.*

# Implications for Plan Fiduciaries



*The rule places the focus on how the investment decision was made.*

## → Revisit Prior Assumptions

If the rule is finalized, alternatives will no longer be viewed by many effectively “off-limits.” As litigation risk declines, determine whether and when to select new designated investment alternatives.

## → Process Is Paramount

The safe harbor rewards careful committee process, reasoned analysis, and documentation.

## → Ongoing Monitoring Required

Selection is not a one-time event. Fiduciaries must periodically monitor investments and document ongoing prudence.

## → Litigation Risk Reduced, Not Eliminated

The presumption of prudence is designed to deter unmeritorious lawsuits, but disciplined process remains the strongest defense.

# Implications for **Alternative Fund Managers**

Key considerations for managers building 401(k)-compatible products:

## **Valuation**

Daily pricing needs vs. illiquid asset valuations

## **Fee Transparency**

Robust disclosure required; fees must be reasonable

## **25% Test**

Track benefit plan commitments or use VCOC/REOC safe harbors

## **Fund Docs**

Ensure operational compatibility with 401(k) platforms

## **Liquidity**

Must accommodate job changes, retirements, hardship withdrawals, loans

## **Securities Law**

Review compatibility of 3(c)(1)/3(c)(7) exemptions with participant-directed plans

## **Product Structure**

Consider interval funds and/or collective investment trusts structured as target-date funds

## **Conflicts**

Manage allocation, co-investment, and fee conflicts across channels

**Opportunity:** This rule could significantly expand the market for DC-compatible alternative products.

# Looking Ahead: **Timeline & Action Items**



## **Comments Due June 1, 2026**

60-day public comment period. Plan sponsors, fiduciaries, asset managers, and service providers should consider engaging. Final rule could be released by end of 2026 — may differ from the proposal based on public comments.



## **Watch the Courts**

Supreme Court granted cert in Anderson v. Intel (No. 25-498) — will address whether ERISA breach claims require a "meaningful benchmark." Argument no earlier than Fall 2026.



## **SEC Examination Priorities**

2026 priorities emphasize duty of care/loyalty for retail-facing products. Marketing Rule enforcement focused on retail communications.

# Conclusion

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Thank you for joining today's webinar.

For further information or questions, please contact one of our Gibson Dunn presenters.

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