HORAN WEALTH

DOL Proposes Principles-Based Rule for Selecting Investments with Private Market Exposure

On March 30, 2026, the U.S. Department of Labor (DOL) proposed a long-awaited proposed rule on Fiduciary Duties in Selecting Designated Investment Alternatives (Proposed Rule) to address a fiduciary's duty of prudence under Employee Retirement Income Security Act of 1974 (ERISA). The Proposed Rule clarifies fiduciary obligations when selecting investment options in defined contribution plans, including funds that contain private market investments, and provides a safe harbor designed to avoid second-guessing fiduciary decisions in court.

The Proposed Rule is asset-neutral and principles-based. It implements President Trump's Executive Order 14330, Democratizing Access to Alternative Assets for 401(k) Investors, by providing specific guidance on what may be a prudent fiduciary process for considering and selecting investments with private market exposure and other alternative investments. Overall, the DOL's goal for the Proposed Rule is to reduce litigation risk that the DOL perceives as constraining fiduciaries from offering investment opportunities that could improve participant outcomes.

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Proposed Rule Does Not and Cannot Change the ERISA Fiduciary Standard

At a time when private market exposure in defined contribution plan investments has become a hot topic, one thing hasn't changed: the fiduciary standard under ERISA remains the anchor for fiduciary investment decisions.

ERISA requires fiduciaries to act:

- Solely in the interest of participants and beneficiaries
- For the exclusive purpose of providing benefits and paying reasonable plan expenses

This is not a preference. It is the standard.

It means investment decisions cannot be driven by trends, external pressure, or non-financial objectives. Every decision must tie back to risk-adjusted financial outcomes for participants.

https://www.federalregister.gov/documents/2026/03/31/2026-06178/fiduciary-duties-in-selecting-designated-investment-alternatives
https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/

DOL Proposes Principles-Based Rule for Selecting Investments with Private Market Exposure (Cont.)

Prudence Is About Process, Not Perfection

The DOL guidance reinforces a critical point that is often misunderstood:

Fiduciary Success Is Measured By Process, Not Outcomes.

A prudent fiduciary (that is, one who fulfills the duty of prudence):

- Conducts a thorough, objective, and analytical review
- Evaluates reasonably available alternatives
- Considers unique facts and circumstances relevant to the specific investment
- Evaluates all investments, regardless of asset class or whether the investment contains public or private exposure, against the ERISA standard: is the investment reasonably determined to increase risk adjusted financial returns, net of fees?

Markets move. Performance changes. That is expected.

What matters is whether the decision-making process reflects the care, skill, and diligence of an ERISA fiduciary obligated to satisfy fiduciary standards described by courts as the "highest known to the law."

Fiduciary prudence is assessed on the fiduciary's investigation at the time of the investment decision – not on hindsight based on the investment results. Consistent with long-standing Court opinions and DOL guidance, the fiduciary duty of prudence is evaluated based on the process used to reach a determination consistent with the fiduciary investment standard.

DOL Proposes Principles-Based Rule for Selecting Investments with Private Market Exposure (Cont.)

Safe Harbor Designed To Provide Legal Protections

The key feature of the Proposed Rule is a safe harbor for responsible plan fiduciaries when they select investment options for a plan lineup. 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 investment options.

When a plan fiduciary does so following the process described in the Proposed Rule with respect to any of the six factors, the DOL intends that the fiduciary's judgment regarding the factor or factors be presumed, if challenged in court, to have met the fiduciary's duty of prudence under ERISA.

Whether DOL achieves its stated goal of ensuring that courts defer to fiduciaries under the safe harbor's presumptions of prudence remains to be seen (and very well could be subject to litigation).

Safe Habor Provides Asset-Neutral, Principles-Based Guidance

Regardless of whether the DOL achieves its litigation goal, the Proposed Rule provides important insights to responsible plan fiduciaries regarding how the DOL views key considerations in the fiduciary process. The Proposed Rule identifies six factors fiduciaries should consider when selecting plan investments:

- Performance. The obligation to select investments reasonably determined to increase risk-adjusted financial returns, net of fees, should be considered in the context of investment time horizons. For example, given the long-term nature of retirement savings, it can be prudent to give greater weight to the long-term historical performance of possible investments over short-term performance.

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- Fees. A fiduciary must consider fees and expenses in the selection of an investment option in the plan lineup, and, consistent with long-standing precedent, is not required to select the lowest cost investment in a non-apples-to-apples investment scenario. For example, diversification and the potential to increase risk adjusted returns may support inclusion of both a passive and a higher-cost-actively managed fund for asset classes in a plan's investment lineup. By contrast, when comparing apples to apples – like two investments with different fee classes that are "identical in all respects except cost" – it is a breach of the fiduciary duty of prudence to select the higher cost investment.
- Liquidity. A fiduciary must appropriately consider and determine that the investment option will have sufficient liquidity to meet the plan's anticipated needs at both the plan and individual levels. For example, immediate liquidity is a necessity when participant withdraws funds from the plan. By contrast, the DOL is clear that investments that have illiquid components are permissible under ERISA and, through an illiquidity premium, can reasonably be determined to satisfy the ERISA investment standard.
- Valuation. A fiduciary must appropriately consider and determine that the investment has adequate measures to ensure timely and accurate value determined through a conflict-free process.
- Performance Benchmarks. Each investment must have a meaningful benchmark with similar mandates, strategies, objectives, and risks. The Proposed Rule provides an example of how fiduciaries can construct composite benchmarks when an investment combines multiple asset classes.
- Complexity. Fiduciaries must have the skills and knowledge to understand an investment or must seek assistance from qualified professionals. The Proposed Rule makes clear that complexity alone does not disqualify an investment.

It may be expected that the DOL will revise some of these factors and related examples based on public comments on the Proposed Rule before adopting a final version.

DOL Proposes Principles-Based Rule for Selecting Investments with Private Market Exposure (Cont.)

Where This Matters Most Right Now

Consistent with the ERISA statute, as interpreted by the Supreme Court, the Proposed Rule is clear that the same ERISA fiduciary investment standard applies to all investment options, regardless of asset class or whether they provide private or public market exposure. The law also is clear that any ERISA investment decision must be supported by a prudent process that considers all relevant facts and circumstances.

Some responsible plan fiduciaries have raised questions as to the process to be used in evaluating the unique aspects of investments with private market exposure, and the Proposed Rule is geared to providing this guidance. Examples throughout the proposal illustrate how fiduciaries can assess liquidity restrictions, complex fee structures, valuation methodologies, and performance benchmarks for investments that include private market exposure. The guidance emphasizes that proper due diligence and, where appropriate, engagement of qualified investment professionals, are key to a prudent process.

What Happens Next

The Proposed Rule is open for public comment through June 1, 2026, and it can be expected that the final rule will contain differences with the proposal—in particular, around details and examples used in the proposal's safe harbors.

Stakeholders should engage constructively with this rulemaking recognizing what the Proposed Rule can't and can do. DOL rulemaking cannot – and will not – alter the standard for selecting and monitoring investment options within a plan lineup, mandate inclusion of investments with private market exposure in plan lineups, or newly "allow" such investments. But where the DOL rule can move the needle most is by providing clear guidance on how to evaluate different types of investments, including ones with private market exposure.

A Speech in France Shines a Light on U.S. Retirement Policy

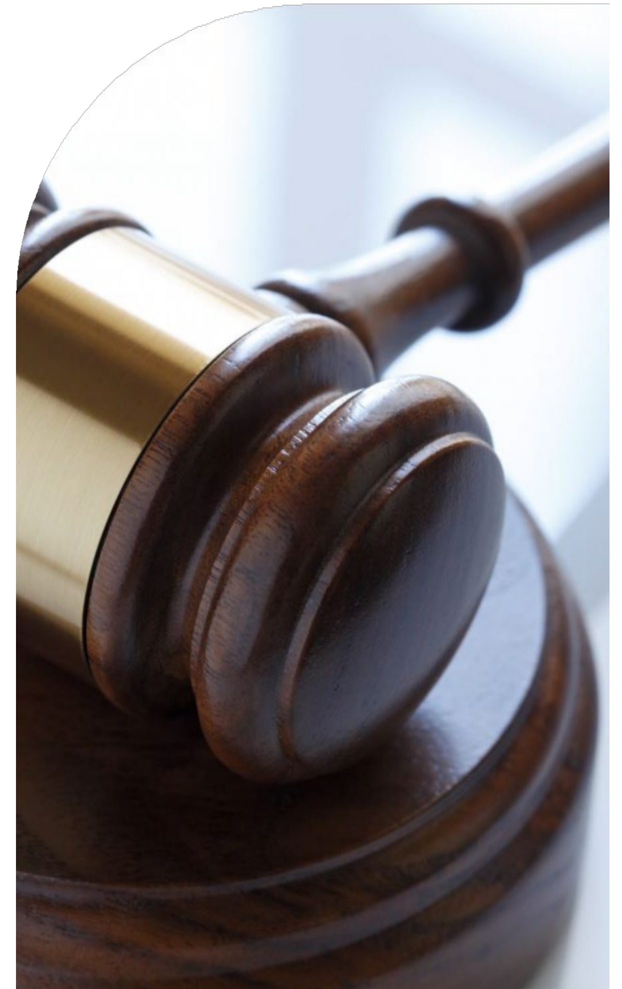
It's not every day that a speech in another country provides actionable insight into an administration's retirement policy views. But a recent speech in Paris by a senior official at the U.S. Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) does just that.

Exclusive Purpose vs. Social Investing

The speech compares U.S. retirement laws with international pension standards.

- Under U.S. law governing private sector retirement plans, investment decisions must be made for the exclusive purpose of maximizing risk-adjusted financial returns.
- By contrast, the speech highlights how international standards can permit non-financial, collateral purposes to be considered in what the speech calls "social investing."

It should come as no surprise that the speech offers a full-throated endorsement of the U.S. "exclusive purpose" rule over standards that permit social investing.



Implications for Forthcoming DOL ESG Investment Regulation

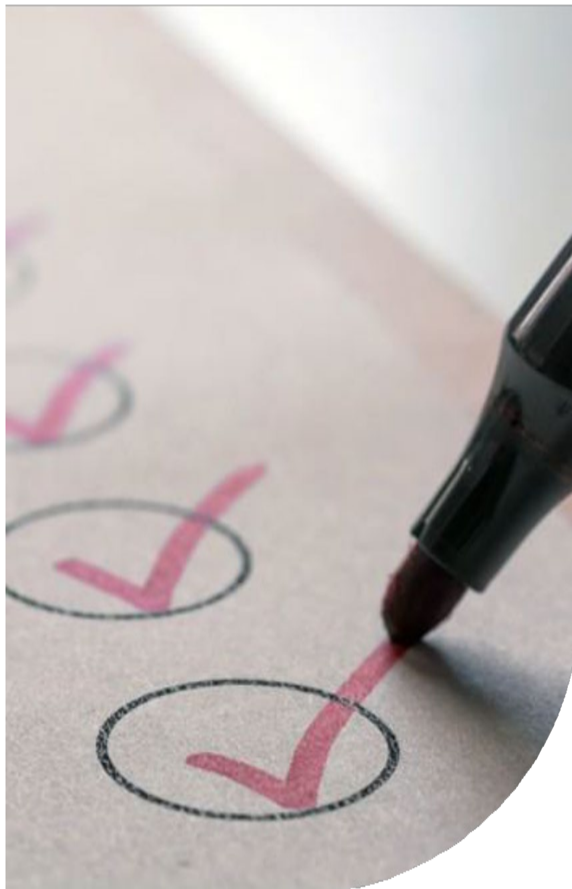
Many retirement plan advisors and their clients are closely monitoring when the current administration's DOL will release a new regulation addressing environmental, social, and governance (ESG) investing in retirement plans. This speech provides tea leaves to read for where the administration may be headed:

Consistent with the speech, it may be reasonable to expect DOL commentary to new regulation to strongly warn investment fiduciaries from straying from the exclusive purpose rule to consider non-financial ESG factors to further social investing goals.

While this emphasis may also be reflected in DOL enforcement priorities, actual changes in regulation are likely to be constrained. Fundamentally, any new DOL regulation will not, and cannot, alter the exclusive purpose rule – and, as this speech makes abundantly clear, nor would DOL want to.

What Advisors and Their Clients Should Know About DOL's Retirement Plan Enforcement Principles Update

On April 14, 2026, the U.S. Department of Labor (DOL)'s Employee Benefits Security Administration (EBSA) released a field assistance bulletin laying out principles for its enforcement priorities. As the entity charged with ensuring the security of retirement plan benefits of American workers and their beneficiaries, EBSA enforcement priorities are closely watched by the regulated community. This release may be particularly instructive to illustrate this administration's EBSA's approach to its regulatory oversight of retirement plans.



It identifies four principles.

1. **Focusing enforcement on the most egregious conduct and significant harm;**

As its highest priority, EBSA will focus on cases involving criminal misconduct and breach of the fiduciary duty of loyalty. EBSA will target individuals and entities who, acting in bad faith, improperly administer plan benefits or misappropriate assets for their own benefit or for other purposes unrelated to maximizing risk adjusted financial returns for American workers and their beneficiaries.

2. **Promoting fairness, prior notice, and clarity to the regulated community;**

The release states EBSA's goal to provide clear and advance notice to the regulated public about its interpretation of ERISA and fiduciary responsibilities. It seeks to avoid regulating through enforcement activities or using enforcement to drive policy.

3. **Requiring review by senior agency officials of all critical enforcement initiatives;**

The release requires EBSA leadership to be notified when possible two weeks before any deadline or proposed action involving significant enforcement activity. This notice requirement is intended to help EBSA leadership ensure EBSA is meeting its enforcement priorities and guidelines, and to ensure consistency of enforcement across all regions.

4. **Committing to timely and responsive enforcement.**

The release states EBSA's commitment to addressing concerns that some past investigations were "open-ended." EBSA announced in its bulletin that it would endeavor to close routine investigations within 18 months and complex investigations within 30 months.

What Advisors and Their Clients Should Know About DOL's Retirement Plan Enforcement Principles Update (Cont.)

Takeaways for Advisors, Plan Sponsors, and Other Employer Plan Fiduciaries

The release evidences EBSA's intent to spend enforcement resources going after bad actors but not imposing undue burdens on retirement plans that seek to comply with ERISA.

While welcome news for the regulated community, it may have little practical impact on well-run retirement plans. EBSA enforcement priorities change from one administration to the next, but core legal and fiduciary obligations for overseeing retirement plans are constant. The best way for investment fiduciaries to address their legal and regulatory risks in any regulatory environment is to ensure that obligations to select investments for the sole purpose of maximizing risk adjusted financial returns and other fiduciary obligations are scrupulously met.

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