Alternative Investments in Retirement Plans

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Action: The Department of Labor (DOL) released a proposed rule intended to increase access to alternative investments (*e.g.*, private market investments, commodities, and digital assets) in employer-sponsored retirement plans.[1] Under the proposal, fiduciaries – including both employers offering access to retirement plans and fund managers – would have a process-based safe harbor to include access to alternative investments while also complying with their duties under the Employee Retirement Income Security Act (ERISA), which proponents believe may expand access to alternative investments. Comments are due by June 1, 2026.

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- Since an August 2025 Executive Order, the Administration has made expanding access to alternative investments – particularly crypto assets and private equity – a priority as a decline in IPOs has raised concerns that retail investors may be deprived of access to investments with high growth potential. The SEC has made both reducing regulation to encourage more IPOs and expanding the crypto industry priorities.

- The proposal does not require that fiduciaries provide access to any particular investment, but it could reduce litigation risk for those that do and, as a result, increase alternative offerings.

- Under ERISA, fiduciaries have a duty to "prudently select and monitor any service provider or designated investment alternative offered under the plan." Fiduciaries have generally interpreted this requirement conservatively, favoring common investment vehicles (e.g., mutual funds, index funds, and target-date funds) rather than assets that may appear novel, volatile, or are lightly regulated.

- The proposed rule, if adopted, could provide the regulatory certainty needed to offer so-called "alternative investments." At the same time, some experts have expressed concerns that the high fees and volatility associated with many alternative assets make them inappropriate for the typical 401(k) investor. In addition, the proposal's broad safe harbor may reduce legal remedies for investors who believe plan sponsors or fund managers violated their fiduciary duties.

- Given the volatility and complexity of many alternative investments, investors may see increased risk even when fiduciaries follow a clearly documented and prudent investment selection process.

- **What this means for business**: Fiduciaries – including both employers and fund managers – should examine the appropriateness of offering alternative investments, weighing the factors outlined in the DOL proposal and other statutory and regulatory obligations but are under no obligation to offer them.

- Fiduciaries should also review policy statements and due-diligence procedures to comply with the DOL's proposed safe harbor regardless of their decisions regarding alternative investments.
- Employers and fund managers may also consider submitting comments on the proposal.
- Employers who choose to offer these investments may also consider providing education and training opportunities for employees to learn about new retirement plan options and understand potential risks of new asset categories.

1. [1] https://www.federalregister.gov/documents/2026/03/31/2026-06178/fiduciary-duties-in-selecting-designated-investment-alternatives