

Back to the Future: Recent DOL Guidance on Fiduciary Implications of Investment Selection and Advice

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In the last month, the U.S. Department of Labor (“DOL”) has released several pieces of guidance related to ERISA fiduciary status and standards of conduct relating to investment selection and related advice in retirement plans. In each case, the guidance harkens back to familiar historical principles.

Reinstatement of the 1975 Five-Part Fiduciary Test

Over the course of the last 15 years, the U.S. Department of Labor (“DOL”) has attempted—on multiple occasions—to redefine (and expand) who will be considered an ERISA fiduciary as a result of providing investment advice. The DOL has explained that the existing regulations were issued in 1975, and the world of investing has changed significantly since then. Nonetheless, each time, those efforts have been met with litigation ultimately resulting in the vacatur of the rule. Earlier this year, the Trump DOL decided (after lengthy consideration) not to continue defending the most recent, Biden-era fiduciary rule in court, and the Fifth Circuit overturned the rule shortly thereafter.

The DOL recently issued a press release confirming its view that, as a result of the Fifth Circuit decision, the 1975 five-part fiduciary test once again governs when a person or entity is treated as providing fiduciary investment advice under ERISA. Under the reinstated 1975 regulation, a person is deemed to provide fiduciary investment advice only if all five of the following elements are satisfied:

1. The person renders advice or makes recommendations as to the value of securities or other property or as to the advisability of investing in, purchasing, or selling securities or other property;
2. The advice is provided on a regular basis;
3. The advice is provided pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary;
4. The advice is intended to serve as a primary basis for investment decisions; and
5. The advice is individualized based on the particular needs of the plan.

Probably the most significant implication of the reinstatement of this test is that one-time advice to participants regarding whether to rollover their accounts, without more, will typically not result in fiduciary status—something the regulatory efforts in recent years were designed to address.

The Proposed Rule: Duty of Prudence Safe Harbor

Separately, the DOL has proposed a new rule (the “Proposed Rule”) which establishes a process-based safe harbor for satisfying ERISA’s duty of prudence in the selection and monitoring of designated investment alternatives (“DIAs”). While this rule was issued in response to a directive in the administration’s Executive Order regarding the inclusion of alternative assets (private equity, etc.) in retirement plan investment line-ups, it is critically important to note that its scope is not limited such assets, but rather applies more broadly to the selection of any DIA for a plan investment menu.

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If the Proposed Rule becomes final, then fiduciaries can establish a rebuttable presumption that their selection of a DIA was prudent if they can show that they used a well-reasoned and well-documented evaluation process that considered at least the following six elements:

1. Performance
2. Fees and expenses
3. Liquidity and redemption features
4. Valuation methodology
5. Benchmarking against comparable investments
6. Complexity and transparency

While this guidance naturally applies to DOL enforcement activity, the new safe harbor was also designed to provide plan fiduciaries additional comfort in the face of the exponential growth in ERISA litigation by plan participants challenging investment selection. However, critics of the proposed rule have pointed out that a rebuttable presumption is not the same thing as a true “safe harbor” and may do little to stem the tide of litigation.

Fiduciary Status of Proxy Advisory Services

The DOL has long held that voting rights associated with plan investments are themselves a plan asset. In Technical Release 2026-01, the DOL addressed whether proxy advisory firms are plan fiduciaries. The DOL determined that, if the proxy advisory firm is providing advice regarding how to vote for a fee, it may constitute an investment advice fiduciary under the five-part test discussed above. Where the proxy advisory firm actually has discretion and authority to vote the proxies itself, it will be a functional fiduciary.

ESG Factors

For more than three decades, Republican and Democratic administrations have been going back and forth regarding whether, and to what degree, it is appropriate for plan fiduciaries to consider environmental, social, and governance objectives (“ESG”), sometimes referred to as “non-pecuniary factors,” when selecting plan investments. Over the years, the gap between the sides’ positions has narrowed, but differences remain. In Field Assistance Bulletin 2026-01, which sets forth the DOL’s enforcement priorities, the current DOL took its latest swipe at ESG, emphasizing that it generally considers ESG goals to be unrelated to participants’ best interests and a breach of the fiduciary duty of loyalty, which it identified as a focus of DOL investigations.

Presumably, however, a plan fiduciary may continue to consider ESG factors within a prudent risk-return analysis in the following situations (which are permitted under existing regulations):

1. Where ESG considerations can impact financial performance (e.g., shift to electric vehicles reducing returns for oil companies);
2. As a tie-breaker for otherwise equal investments; or
3. In response to participant preferences in a participant directed plan.

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Practical Take-Aways for Plan Sponsors

As with so much of ERISA, these developments highlight the importance of having a good fiduciary process. This is a good reminder for Plan sponsors to check in on their investment selection process and determine whether there are opportunities for improvement. For example, does the sponsor know which plan service providers are fiduciaries? Has the sponsor evaluated whether the plan's investment policy statement, selection/monitoring process, and menu are consistent with the proposed safe harbor?

We will continue to monitor these developments. Should you have any questions or wish to discuss, please reach out to your Miller Canfield attorney or the authors of this alert.