

Beyond the Perimeter: How Retirement Plans Are Re-Entering a Deregulated Marketplace



AUTHORED BY:

Erik Daley, CFA

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Chapter 1

Beyond the Perimeter: How Retirement Plans Are Re-Entering a Deregulated Marketplace

Over the last 80+ years, the U.S. has built a robust investor-protection architecture ('33/'34 Acts, Investment Company Act of 1940, ERISA, public company disclosure). Those regimes were intentionally designed to protect retail investors from fraud, abuse, and information asymmetry, but they come with real costs.

In retirement plans, especially defined contribution (DC) plans, assets are increasingly moving into structures that live outside the strictest “retail” regimes (CITs, private equity, insurance separate accounts, alternative vehicles). This is not classic “deregulation by repeal” but functional deregulation via product migration: the same unsophisticated investor, a different regulatory bucket.

Why This Matters for Plan Sponsors and Fiduciaries

- Plan participants are being exposed to complex, less transparent products through vehicles and wrappers originally designed for institutional investors.
- The fiduciary overlay under ERISA is stronger than it’s ever been—but it may not fully compensate for diminished product-level protections.
- There is a real risk of unintended downstream consequences: participant harm, litigation, and a policy backlash.

What This Paper Will Do

- Describe how the investor-protection architecture was built and what it was meant to solve.
- Show where and how the perimeter is shifting in the retirement marketplace.
- Provide a practical framework for fiduciaries to evaluate “non-40 Act” and private-market exposures in DC plans.
- Suggest policy and industry responses that balance innovation with durable investor protections.

Chapter 2:

The Regulatory Perimeter: How Investor Protections Were Designed and Where They Stop

How We Got Here: The Investor-Protection Architecture

The Problem to Be Solved: Retail Investors as a Protected Class

Modern U.S. financial regulation starts with a simple observation: left to their own devices, markets tend to disadvantage small, unsophisticated investors.

The 1929 crash and the Great Depression exposed three core problems:

1. Information asymmetry – issuers and intermediaries knew far more than buyers.
2. Conflicted distribution – products were sold with heavy conflicts and little disclosure.
3. Fraud and manipulation – there were few effective guardrails on market conduct.

Congress' response in the 1930s and 1940s was to treat retail investors as a protected class and to design a regulatory regime that forces issuers and pooled vehicles to provide “full and fair disclosure” of material information before and after securities are sold, regulates trading venues and intermediaries (exchanges, broker-dealers) rather than the instruments, and imposes structural and governance constraints on pooled vehicles like mutual funds, so they cannot easily be used to extract value from small investors.

Later, with ERISA in 1974, Congress extended that logic to the workplace retirement system, explicitly to “provide protection for individuals” in private retirement and health plans, even though in 1974, participants had little direct exposure to investment products. The majority was held in defined benefit pension plans, where investment decisions were made by the fiduciary of the sponsoring employer.

For purposes of this paper, it's useful to think in terms of a regulatory perimeter. Inside the perimeter sit public companies, registered funds, and ERISA plans, subject to heavy disclosure and fiduciary standards. Outside the perimeter are private funds, insurance balance sheets, and bespoke vehicles with lighter or different rules, assumed to be the domain of “sophisticated” capital. The core question we'll return to is: **what happens when retail investors' money pushes toward the edge of, or outside, that perimeter?**

The Public Markets Regime

The Securities Acts of 1933 and 1934

The public markets regime rests on two foundational statutes:

1. **The Securities Act of 1933 governs the offering of securities.** The Securities Act of 1933 requires issuers to register public offerings with the Securities and Exchange Commission (SEC) and provide investors with financial and other significant information. Its twin objectives are to ensure that investors receive material information and to prohibit deceit, misrepresentation, and other fraud in the sale of securities.
2. **The Securities Exchange Act of 1934 governs the trading of securities and the ongoing life of public companies.** The Securities Act of 1934 regulates exchanges and over-the-counter markets and seeks to prevent “inequitable and unfair practices” on those markets. It empowers the SEC to require periodic

reporting—annual, quarterly, and current reports—so that investors receive updated information over time, not just at issuance.

This framework is intentionally disclosure-based rather than merit-based. The government generally doesn't tell investors what a "good" or "bad" investment is; it forces issuers and intermediaries to provide standardized information and prohibits fraud.

The Investment Company Act of 1940: Mutual Funds as a Regulated Answer

The Investment Company Act of 1940 ('40 Act) brought pooled investment vehicles, primarily mutual funds and ETFs, firmly inside the perimeter. The key features, many of which matter to retirement savers:

- **Registration and structure.** Funds with more than 100 investors generally must register with the SEC and comply with detailed rules on capital structure, operations, and disclosures.
- **Governance requirements.** At least 40% of a fund's board must be independent of the adviser and affiliates; affiliated transactions and self-dealing are sharply restricted.
- **Custody and asset protection.** Strict rules on custody, reconciliation, and fidelity bonding are designed to prevent theft or misuse of fund assets.
- **Liquidity and pricing.** Daily NAV, "forward pricing," and detailed valuation requirements make it harder to game the timing of purchases and redemptions.
- **Standardized disclosure.** Prospectuses, statements of additional information, and periodic reports must follow SEC formats and are subject to review and enforcement.

For retail investors, the mutual fund was meant to be the regulated answer to pooled investing: constrained in how it can be run, transparent in what it holds and charges, and overseen by both a board and the SEC.

The Public Company Disclosure Framework

Overlaying all of this is a dense public company disclosure regime. Public issuers (companies) must file detailed registration statements and ongoing reports (Forms S-1, 10-K, 10-Q, 8-K, etc.) that include audited financial statements, descriptions of the business, risk factors, management biographies, and executive compensation. The SEC periodically modernizes and expands these obligations, including recent examples of climate risk, cyber risk, and other thematic disclosures, thereby increasing the breadth and cost of reporting.

The intended outcome is that any member of the public can, in principle, pull up an issuer's filings on the SEC's website and see:

- What the company does
- How it makes money
- How it is financed
- Who runs it and how they are paid
- What are the major risks

From an investor-protection standpoint, this is the high-water mark: frequent, standardized, public, and enforceable disclosures backed by the threat of SEC enforcement and private litigation.

Chapter 3:

ERISA in a DC World: When Participants Became Their Own CIOs

The Retirement Regime

ERISA and the Fiduciary Overlay

The Employee Retirement Income Security Act of 1974 (ERISA) applied a different set of tools to retirement assets held in employer plans.

At its core, ERISA provides:

- Minimum standards for participation, vesting, funding (for defined benefit plans), and reporting.
- Fiduciary duties imposed on those who manage plan assets or have discretionary authority over plan administration:
 - Exclusive benefit and loyalty: act solely in the interests of participants and beneficiaries.
 - Prudence: act with the care, skill, prudence, and diligence of a knowledgeable expert.
 - Diversification: avoid unnecessary concentration of risk.
 - Adherence to plan documents consistent with ERISA.
- Enforcement and remedies through the Department of Labor (DOL) oversight and a private right of action for participants.

Where the securities laws primarily regulate issuers and intermediaries, ERISA regulates the stewards of other people's money, such as plan sponsors, investment committees, trustees, and investment managers. In practice, this means a retirement plan can hold a wide range of vehicles (mutual funds, CITs, separate accounts, private funds), but those who choose and monitor them must meet a high fiduciary standard in doing so.

The Shift from Defined Benefit to Defined Contribution

In 1974, when ERISA was enacted, the retirement landscape was dominated by defined benefit (DB) plans. Over the subsequent decades, the U.S. has experienced a profound shift toward DC plans, such as 401(k), 403(b), and 457(b).

- Among private-sector workers with access to an employer plan, only about 15% had access to a DB plan in 2021, versus 65% with access to a DC plan; some had access to both¹.
- Survey of Consumer Finances data show the share of workers covered by DB plans falling from roughly 59% in 1989 to 21% in 2022, while DC coverage rose from 55% to 83%.²
- As of early 2025, roughly half of private-sector workers saving for retirement are doing so through 401(k) plans, with access and participation boosted by auto-enrollment and new mandates.³

This shift fundamentally changed who bears risk and who makes investment decisions. In DB plans, sponsors and their advisers made asset allocation decisions, and participants bore relatively little market risk. In DC plans, participants bear investment and longevity risk directly, often through participant-directed accounts where they select from a menu of options or default into target-date or balanced funds.

ERISA's fiduciary standards were crafted initially with DB plans in mind, with minimal adjustments made to reflect the reality of the defined contribution role. Today, these are applied to a world in which participants are effectively their own CIOs, even if they default into QDIAs, and the investment menu is populated by a growing mix of vehicles, some

¹ A Visual Depiction of the Shift from Defined Benefit (DB) to Defined Contribution (DC) Pension Plans in the Private Sector. Congress.gov, December 27, 2021

² Pension or 401(k)? Retirement Plan Trends in the U.S. Workplace. Michael T. Owyang, Julie Bennett, Brooke Hatthorn. Federal Reserve Bank of St. Louis, March 20, 2025

³ The 401(k) Has Reached a Tipping Point in Its Takeover of American Retirement. Anne Tergesen. Wall Street Journal, February 5, 2025

squarely inside the “Regulatory Perimeter” and an increasingly large number outside of it.

That mismatch between participant sophistication and product complexity is the backdrop for the deregulation questions we’ll explore later.

The Cost of Protection

None of these protections are free. The public markets and retirement regimes impose direct and indirect costs on issuers, pooled vehicles, and intermediaries, which in turn manifest as fees, operational overhead, and, at times, a lower willingness to use the most heavily regulated structures.

Examples of cost layers:

1. **Public company reporting.** Preparing and auditing financial statements; producing 10-Ks, 10-Qs, 8-Ks, and proxy materials; implementing internal controls; and responding to SEC comments all require significant legal, accounting, and internal staff resources. Studies and policy analyses routinely cite increased disclosure and governance requirements as a key driver of the decline in the number of public companies, and the SEC’s own estimates for implementing new disclosure rules run into the billions of dollars.⁴
2. **’40 Act fund compliance.** Registered funds must maintain compliance programs, designate a chief compliance officer reporting to the board, and implement detailed policies for trading, valuation, liquidity, derivatives, custody, and advertising. Prospectus updates, shareholder reports, board meetings, and regulatory filings add recurring legal, printing, and distribution costs.
3. **ERISA governance and litigation risk.** Plan sponsors and fiduciaries bear ongoing costs for committee governance, expert advice, benchmarking, vendor oversight, and preparing participant disclosures. The risk of fiduciary litigation has increased, prompting many sponsors to devote more resources to process, documentation, and insurance.

From a policy standpoint, these are features, not bugs: robust protections require real work and real money. But for manufacturers and intermediaries facing fee compression, this also creates a strong incentive to stay private rather than go public; to prefer vehicles and structures with lighter or different regulatory obligations; and to innovate in ways that preserve economics while skirting the heaviest retail-oriented rules.

That incentive structure is a key driver of the “functional deregulation” dynamic we see today in the retirement marketplace: the search for lower regulatory overhead and higher margins by moving participant assets away from the most heavily regulated regimes, even as ERISA fiduciary expectations tighten.

⁴ Regulatory costs of being public: Evidence from bunching estimation. Michael, Ewens, Kairong Xiao, Ting Xu, Journal of Financial Economics, March 2024

Chapter 4:

CITs vs. Mutual Funds: Optimization or Functional Deregulation?

Shifting the Perimeter: What's Happening in Today's Retirement Marketplace

CITs vs. Mutual Funds: Same Portfolios, Different Regimes

What Is a CIT?

A collective investment trust (CIT) is a pooled investment vehicle maintained by a bank or trust company that commingles assets from multiple tax-qualified retirement plans and certain other institutional investors.

Key structural points:

- **Bank-administered trust.** CITs (often called collective investment funds or CIFs in banking regulations) are established and operated under banking laws and regulations, as well as relevant state banking rules, for state-chartered institutions.
- **ERISA and tax-qualified focus.** They are designed primarily for ERISA plans and other tax-qualified arrangements and are generally exempt from federal income tax under Internal Revenue Code section 584 if regulatory conditions are met.
- **Not registered mutual funds.** CITs typically rely on exemptions from registration under the Securities Act of 1933 and the Investment Company Act of 1940, meaning they are not “registered investment companies” in the mutual fund sense.
- **Limited eligibility and access.** Participation is generally restricted to eligible retirement plans and certain institutional accounts; they are not offered directly to the general retail public.

From a participant's vantage point on a 401(k) website, a CIT can look almost identical to a mutual fund with the same strategy label, same benchmark, and same daily value on the statement. But the regulatory chassis underneath is fundamentally different.

Why CITs Have Grown in DC Plans?

Over the last decade, CITs have moved from niche to mainstream in defined contribution plans, particularly as the underlying vehicle for target-date funds. Several data points illustrate the shift. Morningstar data show that by mid-2024, CIT-based target-date series held just over half of all target-date assets (about 50.5%), up from roughly half that share a decade earlier.⁵ Sway Research and industry coverage indicate that by early 2025, CIT target-date assets reached roughly \$2.0 trillion, edging past mutual-fund-based TDFs at about \$1.95 trillion, out of nearly \$4 trillion in combined TDF assets.⁶

Why plan sponsors and consultants have moved in this direction - cost and fee compression. CITs generally avoid some of the distribution, marketing, and shareholder-servicing costs embedded in mutual funds (e.g., 12b-1 fees, certain transfer-agency and platform fees). They can pass some of those savings through in lower expense ratios. They can offer multiple unit classes with tailored pricing for large plans, accommodating different revenue and fee-level arrangements more flexibly than a single retail share class.

CITs also facilitate flexibility in design and implementation. CITs can be customized more easily than registered funds, allowing white-label structures, bespoke glide paths, or plan-specific overlays without launching a new mutual fund

⁵ Morningstar. 2025 Target-Date Fund Investment Strategy

⁶ Sway Research. State of the Target-Date Market: 2025

registration. They can incorporate changes (e.g., manager changes, benchmark adjustments) with fewer public filing frictions.

At least as importantly, CITs change the economics of recordkeepers and asset managers. Increasingly, recordkeepers are launching proprietary CIT “replicates” of popular institutional mutual funds. These structures allow recordkeepers to receive undisclosed asset-based compensation on investment products managed by third parties.

The result is that CITs have become the default institutional chassis for many DC investment strategies, particularly where scale and fee negotiation are paramount.

Key Differences in Protections and Transparency

CITs and mutual funds can hold the same underlying portfolio, often managed by the same firm. The difference lies in which regulatory framework applies and what that means for participant protections.

The contrasts can be grouped into several dimensions:

1. **Regulatory regime and primary overseer.** Mutual funds are registered investment companies under the Investment Company Act of 1940 and overseen by the SEC, with detailed statutory requirements for structure, governance, disclosure, and shareholder rights. CITs are bank-maintained trust funds governed primarily by bank regulators (e.g., OCC under 12 CFR 9.18), state banking authorities, and ERISA/DOL rules for plan assets, with SEC involvement limited and indirect.
2. **Eligibility and distribution.** Mutual funds are broadly available to retail investors; shares can typically be bought directly or through brokerage and retirement platforms. CITs are restricted to eligible retirement plans and certain institutional accounts; they cannot be marketed as retail products to the general public.
3. **Disclosure and data availability.** Mutual funds must produce statutory prospectuses, Statements of Additional Information (SAIs), and annual/semiannual reports; these documents are filed with the SEC and are freely available on public databases. CITs do not file SEC prospectuses. Instead, they typically offer trust documents, participation agreements, and fact sheets directly to plan sponsors and participants. Disclosure to participants is mediated through ERISA and DOL rules—primarily the 404a-5 participant disclosure regime, which requires standardized fee and performance information for all designated investment alternatives, including CITs. Public third-party data on CITs (e.g., in retail fund databases and research tools) is improving but remains less comprehensive and less standardized than mutual fund data.
4. **Governance and investor rights.** Mutual fund shareholders elect boards (with independent director requirements), receive proxy materials, and have voting rights on certain fundamental matters. CIT investors are beneficiaries of a bank-administered trust; governance is exercised by the trustee under trust documents and banking/ERISA fiduciary standards, not by participant-level voting.
5. **Valuation, pricing, and operations.** Both CITs and mutual funds typically strike daily values and provide daily liquidity in DC platforms, but valuation, pricing, and operational controls for CITs are overseen through banking supervision and fiduciary obligations rather than through the mutual fund rulebook (e.g., 2a-5 valuation rules).

For plan participants, DOL’s 404a-5 regime narrows some of these gaps at the point of decision—fee tables, benchmarked performance, and website disclosures can look similar whether the option is a mutual fund or a CIT. But at the infrastructure level, the protections, rights, and enforcement mechanisms are not identical.

Case Example: Target Date Funds in CIT Form

Target date funds (TDFs) are the dominant default in 401(k) plans, making their choice of vehicle a powerful illustration of functional deregulation. Total TDF assets in the U.S. retirement market now exceed \$3.8–4.7 trillion, depending on the source and cutoff date. Within that, CIT structures have gone from a minority share to more than

half of target-date assets, recently surpassing their mutual fund cousins.

In practice, that means many default options labeled “2040 Retirement Fund” or “Target Retirement 2050” on a participant’s statement are now CIT-based rather than mutual-fund-based. The underlying asset allocation and manager may be identical (e.g., the same glide path implemented in a mutual fund and a CIT). However, the legal wrapper, primary regulator, disclosure regime, and investor rights are different.

From a fiduciary perspective, the question is not whether CIT-based TDFs are inherently better or worse—they often deliver real fee savings at scale—but whether committees fully appreciate the regime shift that has occurred beneath the label “target-date fund,” especially when these options are used as QDIAs for large participant populations.

Is This Deregulation or Optimization?

CIT adoption in DC plans can be told as either a success story or a deregulation story, depending on what you emphasize. Both narratives have truth to them.

Optimization narrative (what the industry emphasizes)	Deregulation narrative (what this paper is probing)
<ul style="list-style-type: none"> ▪ CITs are pitched as an institutional chassis that delivers lower fees and greater flexibility while still subject to ERISA fiduciary standards and bank regulatory oversight. ▪ DOL’s 404a-5 rules mean participants see broadly comparable fee and performance disclosures at the plan level, regardless of whether an option is a CIT or a mutual fund. ▪ Governance proponents argue that bank trustees administering CITs are themselves ERISA fiduciaries for the plan assets in the trust, adding an additional fiduciary layer to the sponsor’s own oversight. 	<ul style="list-style-type: none"> ▪ By moving from 1940 Act mutual funds to CITs, participant assets leave the most mature, retail-focused product regime and enter a more bespoke, bank-supervised trust regime. ▪ Public transparency and third-party scrutiny are reduced; analysts, journalists, and independent researchers have less uniform data to review and compare. ▪ Participants themselves have fewer direct rights (e.g., no fund-shareholder voting) and must rely more heavily on fiduciary intermediaries (plan committees, trustees, consultants) to interpret and police the structure on their behalf.

This paper’s thesis is not that CITs are “bad.” In many cases, they are a sensible optimization within the existing rules. The concern is that, at scale, they are part of a broader pattern. Over time, cost and competitive pressures are pulling retirement assets away from the most stringent retail regimes and into alternative structures. That shift may be rational at the plan level. Still, it is, in effect, a soft form of deregulation for the end participant, who now depends more on fiduciaries and less on standardized product-level protections.

CITs, particularly in target-date form, are the clearest early example of that trend. The next sections examine how the same dynamics are now playing out across private equity, private credit, and other non-traditional exposures in DC plans.

Chapter 5:

Private Equity and Private Credit in DC Plans: The Next Phase of the Perimeter Shift

Private Equity and Private Credit Inside DC Plans

The Policy Opening: A Regulatory Arc in Four Acts

For most of ERISA's history, private equity and similar private-market strategies were effectively confined to defined benefit plans and large institutional investors. That began to change with the DOL's June 3, 2020, information letter, and what followed is a regulatory arc now entering its fourth, and most consequential, phase.

Act One: The 2020 Information Letter. On June 3, 2020, the DOL issued an Information Letter in response to a request from Pantheon and Partners Group, addressing whether a fiduciary of a participant-directed individual account plan (such as a 401(k)) could offer professionally managed asset allocation funds that include a private equity component (such as a custom target-date, target-risk, or balanced fund) using a sleeve of private equity accessed through a collective trust or similar vehicle.

In their 2020 Information Letter, the DOL made the following points:

- A plan fiduciary may offer an asset allocation fund with a private equity component without automatically violating ERISA, provided the decision is prudent and in participants' best interests.
- The analysis was limited to private equity exposure embedded in a diversified multi-asset fund, not offered as a standalone option on the core menu. Direct participant investment into private equity funds presents distinct legal and operational issues for fiduciaries of ERISA-covered individual account plans.
- Fiduciaries are expected to undertake an "objective, thorough, and analytical process" to evaluate diversification, expected risk/return net of all fees and carried interest, liquidity, valuation, and the capabilities of the manager before adding such a fund.

In effect, the DOL "opened the window slightly" for private equity in DC plans, under tightly framed conditions and with a strong emphasis on fiduciary process. Notably, the letter provided permission and process language, but no structured framework for how that analysis should be conducted or documented.

Act Two: The 2021 Supplemental Statement. In Dec. 2021, the DOL walked back some of the industry's more enthusiastic interpretations of the 2020 letter. In the supplemental statement, the DOL:

- Reiterated that the Information Letter did not endorse or recommend private equity in 401(k) plans; it merely described circumstances under which it might be prudent.
- Expressed concern that the original letter had presented private equity's potential benefits largely from the industry's perspective, without balancing them against independent research or counterarguments.
- Emphasized that direct application to typical small DC plans was not presumed appropriate, stating that for "the majority of cases," fiduciaries of smaller individual account plans were unlikely to have the expertise to evaluate these investments as designated alternatives.

The tone was unmistakably cautionary: proceed only in limited circumstances, and only with substantial expertise and advisor support.

Act Three: The 2025 Executive Order and Rescission. In August 2025, a new Executive Order directed the DOL to facilitate broader access to alternative investments (private equity, private credit, real estate, and other private

assets) in 401(k) plans. Within days of the Executive Order, the DOL rescinded the 2021 Supplemental Statement, explicitly noting that it had a “chilling effect” and was inconsistent with a neutral, principles-based approach to fiduciary investment decisions.

Act Four: The 2026 Investment Selection Rule. On March 30, 2026, the DOL released its long-anticipated proposed rule: Fiduciary Duties in Selecting Designated Investment Alternatives (the "Investment Selection Rule"). This is the formal rulemaking deliverable from the August 2025 Executive Order, and it closes the regulatory arc that began with the 2020 Information Letter.

The rule is notable for what it is and for what it is not.

What it is: an asset-neutral, process-focused codification of the fiduciary standard for selecting designated investment alternatives of any kind. The rule identifies six factors that fiduciaries must "objectively, thoroughly, and analytically consider" when selecting investments:

1. Performance
2. Fees
3. Liquidity
4. Valuation
5. Performance benchmarks
6. Complexity

This six-factor framework effectively operationalizes the analytical process that the 2020 Information Letter described but never structured. Committees evaluating private-market options now have DOL-endorsed analytical architecture to point to, a meaningful procedural advance over the prior "objective, thorough, and analytical process" standard, which left the specific dimensions of that process largely undefined.

What it is not: a judicially validated litigation safe harbor. The rule does not guarantee that a fiduciary who follows the six-factor framework will be protected from an ERISA breach-of-prudence claim. The DOL expressly lacks authority to immunize fiduciaries from private litigation, and the rule's comment period leaves its final form uncertain. Analysts at TD Cowen captured the critical limitation plainly: the rule appears to represent what the DOL can do within its regulatory authority, but sponsors and their counsel should not expect it to meaningfully insulate them from litigation until courts have concurred that compliance with this framework constitutes a successful prudence defense. That judicial validation could take years.

As of this writing, the Investment Selection Rule is proposed, not final. It may be modified in response to comments before finalization, and it carries the same administration-change vulnerability as the guidance it replaced.

The Litigation Cloud: *Anderson v. Intel*

Layered over the Investment Selection Rule is a more immediate uncertainty: the Supreme Court's pending decision in *Anderson v. Intel Corp.* The Ninth Circuit allowed ERISA fiduciary-breach claims challenging private equity allocations within a target date structure to survive the pleading stage. This is a meaningful development, since prior case law had made it difficult to bring such claims at all. The Supreme Court granted certiorari on Jan. 26, 2026. The implications are significant. *Anderson* will likely clarify whether ERISA plaintiffs can challenge private-market allocations embedded in diversified defaults as imprudent per se, or whether fiduciaries can defend such allocations on process grounds. The Investment Selection Rule's six-factor framework is essentially a process defense, and its utility as legal protection depends entirely on whether courts accept process compliance as a sufficient response to outcome-based challenges.

Until *Anderson* is decided, the litigation ceiling has not moved. The Investment Selection Rule lowers the regulatory ambiguity floor; it does not change the exposure a plan sponsor faces if a private-markets sleeve in their QDIA underperforms, gates, or results in adverse participant outcomes. Sponsors and their outside counsel who are waiting for judicial clarity before proceeding are making a rational choice that no regulatory guidance can currently displace.

Industry Response: Private Markets as the “Next Frontier” for DC

Asset managers and recordkeepers have read the regulatory signals as an invitation to build new DC products that incorporate private markets into TDFs and multi-asset defaults, which dominate asset collection in defined contribution plans.

A few examples and data points:

- BlackRock has publicly laid out its vision for integrating private equity, private credit, infrastructure, and real estate into TDFs, positioning “private markets in target date funds” as a way to enhance retirement outcomes. Its materials describe a purpose-built TDF design with calibrated private-asset sleeves and an explicit focus on liquidity, fees, and transparency.
- In mid-2025, BlackRock announced a new TDF series, built with Great Gray Trust, that will allocate roughly 5–20% of assets to private markets over the glidepath, with launch targeted for the first half of 2026.
- Other large firms—Apollo, Franklin Templeton, Goldman Sachs, among others—have announced or are developing DC solutions with private equity or private credit exposures, typically accessed through CITs or fund-of-funds structures embedded in TDFs or managed accounts.

The adoption curve is still early but steepening. A 2025 BlackRock/industry survey cited in trade coverage found that roughly 21% of DC plan advisors expected to add private market investments to plans they manage, with target-date strategies as the preferred delivery mechanism. A late-2025/early-2026 adviser survey reported that about one-quarter of plan advisers already recommend, or expect to recommend, alternative investments in DC menus following the 2025 policy shift. Among those, 43% mentioned private equity and 42% private credit as categories they recommend or expect to recommend.

The marketing proposition is straightforward:

- Return enhancement and diversification. Firms such as BlackRock estimate that adding private assets could improve TDF returns by on the order of 50 basis points per year, which compounded over a 40-year horizon could raise participant balances by around 15%.
- “Institutionalization” of DC portfolios. By incorporating private equity and private credit—assets long used by DB plans and endowments—TDFs are pitched as giving DC participants access to the same opportunity set as large institutions.

In short, private equity and private credit are being framed as the “next frontier” for DC plan innovation, but one that comes with nontrivial complexity and cost.

How Private Equity and Private Credit Regimes Differ from Public Equity

From a participant’s statement, a TDF with a private markets sleeve looks like any other diversified fund. Under the hood, however, private equity and private credit operate under regimes very different from those that govern public equity and traditional mutual funds.

Key differences include:

Structure and time horizon

- Private equity and private credit funds are typically closed-end, limited-partnership vehicles with multi-year investment and harvest periods, often 8–12 years or longer. Investors commit capital upfront, which is drawn

down over time through capital calls and repaid as investments are exited.

- There is generally no daily liquidity at the underlying fund level; transfers are restricted, and secondary sales, if available, are negotiated, not exchange-traded.

By contrast, public-equity mutual funds and ETFs offer daily dealing at NAV, with underlying securities traded on public markets and subject to exchange and reporting rules.

Disclosure and transparency

- Private funds typically rely on exemptions from Securities Act registration (e.g., Regulation D) and from 1940 Act registration. They provide offering memoranda and periodic investor reports, but there is no standardized, public filing regime comparable to mutual fund prospectuses and shareholder reports.
- Information on holdings, portfolio companies, and performance methodologies is often limited and available only under confidentiality restrictions, making independent third-party analysis harder.

Public-equity funds, by contrast, must comply with SEC-specified disclosure formats, publish holdings with some regularity, and file reports that are publicly accessible and subject to enforcement.

Valuation and pricing

- Private equity and private credit positions are typically valued quarterly (or less frequently) using appraisal-based methodologies, discounted cash flows, or comparable multiples rather than exchange prices. Valuations involve significant judgment by the manager and its valuation committees.
- DOL's 2020 letter acknowledges this, emphasizing that fiduciaries must consider the valuation approach and whether the asset-allocation fund has features to handle capital calls and participant liquidity needs.

Public-equity portfolios, while not free from valuation questions, benefit from observable market prices and daily pricing of the fund itself.

Fees and costs

- Private equity and private credit funds generally charge management fees plus performance allocations (carried interest), and may layer on transaction, monitoring, and other portfolio-company-level fees. A DC participant's exposure is often further layered through a fund-of-funds or CIT structure.
- Industry analyses highlight that, even after some institutional fee breaks, private strategies tend to increase the total expense ratio of TDFs that include them, relative to all-public-market counterparts.

Mutual funds and ETFs, by contrast, face intense fee competition and a mature disclosure regime for expense ratios and trading costs.

Governance and oversight

- Investors in private funds typically have limited governance rights. They may serve on limited partner advisory committees, but operational decisions remain with the general partner, subject to the partnership agreement.
- There is no independent board governed by the 1940 Act, nor the same style of SEC oversight; instead, protections rely on contract, general anti-fraud rules, and, for retirement assets, ERISA fiduciary duties at the plan and product-design level.

For DC participants, the practical implication is that when private equity or private credit is embedded in a TDF or other default, they are indirectly exposed to an asset class whose legal and operational norms are materially different from the public-equity world they're used to.

Participant-Facing Implications

From the participant's vantage point, private equity and private credit typically show up as invisible components of a familiar-looking option: "2045 Retirement Fund," "2050 Target Retirement," or a "Balanced Growth Fund." The private sleeve is not a menu choice; it is an ingredient.

That has several implications:

- 1) Limited ability to assess or act on the exposure. Participants do not select "private equity" or "private credit" directly; they select a TDF or balanced fund that happens to include these assets at the design level. As a result, participants cannot adjust, increase, or decrease the private-markets sleeve specifically; their only lever is to move out of the entire default or TDF, requiring them to make more ongoing and affirmative elections about the investments in their account. Yet, the characteristics of that embedded sleeve (higher fees, illiquidity, valuation practices) can materially influence long-term outcomes.
- 2) Communication and comprehension challenges. The DOL's 2020 letter assumes that fiduciaries and managers will design products that maintain sufficient liquidity to handle participant contributions, exchanges, and withdrawals. The letter expects that the private-equity allocation is limited and calibrated to participants' horizons and plan demographics and that disclosures appropriately describe the strategy, including its risks and fees. Turning that into clear participant communications, however, is nontrivial. Plain-language explanations of what it means to own illiquid assets through a daily-priced fund, how valuations are determined, and why fees are higher but allegedly justified, are difficult to deliver in a two-page fact sheet or a short web module, particularly for participants with low financial literacy. Additionally, ERISA's focus on additional disclosures has done little more than prove that most disclosures are not read by participants and, as a result, don't impact behavior.
- 3) Expectation and trust risk. Because the product label and participant experience (daily balance updates, familiar risk descriptors) look similar to traditional TDFs, there is a risk of expectation mismatch. Participants may assume "this is just like any other mutual fund" when, in reality, a portion of the portfolio behaves very differently in stress scenarios. If private exposures underperform, are gated, or exhibit valuation surprises, participants may feel blindsided, eroding trust not just in the specific product but in the plan as a whole.

Fiduciary Burden and Litigation Risk

For plan sponsors and investment committees, the decision to embed private equity or private credit in DC options is not a simple product selection; it is a governance and risk decision with long-tail implications.

The Investment Selection Rule's six-factor framework establishes a cleaner process architecture than fiduciaries previously had, and that is a genuine improvement. Committees can now structure their due diligence explicitly around the DOL's own framework, document against each factor, and point to the regulatory authority for the process they followed. That is worth something, particularly in establishing that the committee approached the decision seriously and consistently.

What the rule does not provide is outcome protection. As noted above, judicial validation of the six-factor framework as a sufficient prudence defense does not yet exist, and *Anderson v. Intel* may define that boundary before the rule is even finalized. The ERISA standard has not changed; what has changed is the procedural clarity around how to meet it. Any fiduciary who reads the Investment Selection Rule as a green light rather than as a minimum threshold is misreading both the rule and the litigation environment.

The 2025 rescission of the 2021 supplemental statement removed a chilling signal, and the Investment Selection Rule adds a process framework, but neither development altered the underlying ERISA standard or the willingness of plaintiffs' firms to challenge private-market allocations. The recent wave of DC fee and investment-option litigation

has already shown that plaintiff firms are willing to challenge choices that deviate from simple, low-cost public-market solutions. In the event of litigation, courts examine the process: what committees knew, what they considered, and how they documented their decisions.

If a plan adopts a TDF with a private-markets sleeve, and that sleeve significantly underperforms or creates liquidity or valuation stress, plaintiffs can be expected to argue that the added complexity and cost were imprudent, especially if simpler alternatives were available.

Even if litigation risk does not materialize, adverse headlines around “401(k) private equity blow-ups” or “locked-up retirement assets” would carry material reputational costs for sponsors.

Private equity and private credit can be integrated into DC defaults, but doing so moves fiduciaries into a higher-stakes prudence regime. The legal standard has not changed; what changes is the level of expertise, documentation, and governance required to credibly defend the decision when, not if, it is tested.

In the next section of the paper, we will step back from private markets specifically and look at the broader economic and structural forces that are pushing DC assets toward the edges of the traditional investor-protection perimeter.

Chapter 6: Insurance, Crypto, and the Edges of the DC Investment Menu

Insurance Separate Accounts and General Account Products

Insurance-based structures like stable value funds and guaranteed lifetime income (GLI) / group annuity products are another way DC assets move outside the familiar 1940 Act mutual fund regime into a different regulatory universe: state insurance law and ERISA.

Stable value and group annuity structures in DC plans

In most large DC plans, “stable value” is delivered through insurance company contracts, broadly falling into three buckets:

- 1) Traditional guaranteed investment contracts (GICs).
 - The plan holds a contract with an insurer that guarantees a fixed rate of return backed by the insurer’s general account.
 - The insurer owns the underlying assets; participants see only a book-value crediting rate.
- 2) Separate account contracts.
 - Assets supporting the contract are held in a legally segregated separate account, distinct from the insurer’s general account.
 - The contract may guarantee a rate of return or credit a rate tied to the performance of the separate account’s underlying portfolio.
- 3) Synthetic GICs and wrapped portfolios.
 - The plan (or a commingled fund) owns a portfolio of fixed income securities; one or more insurers provide “wrap” contracts that smooth returns and guarantee book-value withdrawals under specified conditions.

GLI products and in-plan annuities often piggyback on similar insurance structures:

- **General account GLI** - The insurer guarantees income based on its general account, with participant benefits an obligation of the insurance company.
- **Separate account GLI** - Income promises are supported by a separate account that may hold a mix of fixed income and other assets, with performance passed through to policyholders.

In regulatory terms, these contracts are insurance products, governed by state insurance regulation and ERISA (to the extent plan assets are involved), not by the 1940 Act mutual fund regime. Where a separate account’s performance is passed through to plans, ERISA’s fiduciary responsibility rules apply to the insurer with respect to those assets.

Protection tradeoffs vs. mutual funds

From a participant’s perspective, stable value funds and GLI options often present as “conservative,” “capital-preserving,” or “income” choices. Under the hood, the protection profile is different from a registered fund.

Credit and counterparty risk - General-account stable value and GLI benefits are promises of the insurer; they depend on the insurer’s solvency and claims-paying ability. Separate accounts can mitigate this somewhat by segregating assets, but contract terms still govern the extent of protection.

Transparency into underlying assets. Participants typically see a crediting rate and an account value, not a portfolio of observable securities or a prospectus with holdings and risk disclosures. Detailed asset-level information may be available to the plan sponsor or consultant under NDAs, but not to participants or the broader market.

Liquidity terms and restrictions. Stable value contracts often include put provisions, market value adjustments, or exit conditions if a plan freezes contributions or changes recordkeepers. Participants often experience “daily liquidity at book value,” but that liquidity is conditional on the plan remaining in good standing with the contract.

Regulatory and oversight regime. Oversight rests with state insurance departments and ERISA fiduciary rules, not the SEC’s mutual fund governance and disclosure framework.

The net effect: these products can provide valuable capital preservation and income smoothing, but they do so through a regime that is less transparent and more dependent on contractual promises than a 1940 Act bond fund.

Functional deregulation?

Stable value and GLI options illustrate a pattern similar to CITs in which participant-facing communications and statements suggest a conservative, low-volatility option, often sitting beside registered bond and money market funds, but the underlying structure is an insurance contract backed by a general or separate account, operating outside the mutual fund rulebook.

It is not that these products are unregulated; they are heavily regulated as insurance products. The concern, from an investor-protection standpoint, is that participants may believe they hold a “fund-like” conservative option, when in reality, they hold a claim on an insurer’s balance sheet or a contract with complex terms that would be difficult for a typical retail investor to fully evaluate on their own.

That dependence on intermediary fiduciaries such as plan sponsors, consultants, and insurers, rather than standardized, public product-level protections, is a hallmark of the perimeter shift.

Crypto and Digital Assets in Retirement Plans

Cryptoassets are a different, more volatile frontier, but they raise the same core question: how far can DC plans stray from traditional, regulated asset classes before investor protections become inadequate for typical participants?

DOL’s “extreme care” guidance and its rescission

In March 2022, the DOL’s Employee Benefits Security Administration (EBSA) issued Compliance Assistance Release 2022-01, titled “401(k) Plan Investments in ‘Cryptocurrencies.’”

That release warned that EBSA had become aware of firms marketing crypto investments to 401(k) plans as potential menu options and directed plan fiduciaries to exercise “extreme care” before considering adding a cryptocurrency option, citing concerns about extreme price volatility; valuation difficulties; custody and recordkeeping challenges; and susceptibility to fraud and theft. The release went further, suggesting that offering crypto could, in some cases, be inconsistent with ERISA’s duties of prudence and loyalty. Although the release did not ban crypto in 401(k)s, the “extreme care” standard had a significant chilling effect, and most sponsors and recordkeepers chose to avoid crypto options altogether.

In May 2025, EBSA issued Compliance Assistance Release 2025-01, rescinding the 2022 guidance. The agency stated that it was returning to a neutral stance on particular investment types and that fiduciaries (not regulators) should evaluate whether crypto belongs in a plan menu, under the usual ERISA prudence standard.

The rescission:

- Removed the “extreme care” language, which had no direct analog in ERISA,

- Did not endorse crypto; rather, it reiterated that fiduciaries must evaluate risks and suitability like any other asset.

Crypto as a perimeter stress test

Cryptoassets magnify many of the themes in this paper.

- **Regulatory fragmentation and uncertainty** - Crypto's regulatory treatment straddles securities, commodities, banking, and payments law, with evolving standards for what constitutes a security token vs. other forms of digital assets. Investor-protection regimes are still being built; there is no settled, mutual-fund-like framework for many crypto exposures.
- **Extreme volatility and valuation challenges** - Crypto prices can experience double-digit percentage swings in short periods; valuations may depend on thinly traded markets on lightly regulated exchanges.
- **Custody and operational risks** - Safekeeping digital assets requires specialized custody arrangements, with risks around hacking, key management, and operational errors that are qualitatively different from holding stocks and bonds.

The 2022 DOL release explicitly tied these features to potentially “devastating” impacts on participants’ retirement savings if misused. Even after the 2025 rescission, those risk factors have not changed; only the regulatory messaging has. Neutrality restores discretion to fiduciaries, but it also removes a bright, cautionary signal that many sponsors relied on to justify a firm “no.”

Implications for participants and fiduciaries

In theory, crypto in retirement plans could appear in several forms as a standalone menu option (e.g., a crypto fund or trust), as an allocation within a multi-asset fund that includes digital assets as a sleeve, or through brokerage windows that allow participants to access crypto-related securities or ETPs.

In each case, the perimeter question is sharp:

- **Participant comprehension** - It is difficult to explain, in plain language, how crypto works, why prices move, what could cause a permanent loss of value, and how custody risks are managed.
- **Suitability and risk concentration** - Left unconstrained, some participants might allocate large portions of their retirement savings to crypto, attracted by past price spikes, without appreciating the downside.
- **Process and documentation** - Fiduciaries considering crypto must build a record that they understood and evaluated these risks, assessed fees and platform arrangements, and considered alternatives.

From the perspective of this paper’s thesis, crypto is a stress test of the system. If we allow highly speculative, lightly settled assets into DC plans at scale, relying primarily on fiduciary process and generic disclosure, we are pushing retirement savers well beyond the environment for which the historical protection architecture was designed.

Whether sponsors embrace or reject crypto, the policy arc from DOL’s 2022 “extreme care” warning to its 2025 neutral stance illustrates how quickly regulatory signals can change, even as the core challenge remains: matching complex, edge-of-perimeter assets with the realities of retail investors’ understanding and risk-bearing capacity.

Chapter 7:

Why the Pendulum Is Swinging: Economics, Regulation, and Behavioral Pressure

Why the Pendulum Is Swinging: Motivations Behind the Shift

Understanding why DC plans are drifting toward the perimeter requires looking at three distinct but reinforcing forces: economic pressure, regulatory and structural incentives, and behavioral and political dynamics. None of these forces are new. What is new is how they have converged, and how the regulatory environment has begun to formalize, rather than merely tolerate, the drift.

Economic Pressures

As with nearly every aspect of the retirement savings industry, the most straightforward driver is economic: the traditional public-market, mutual-fund-based business model is under sustained fee pressure, and providers are looking for ways to restore margins.

Over the last two decades, broad equity and fixed income markets have increasingly been delivered via low-cost index funds and ETFs, with expense ratios measured in single-digit basis points for core exposures. Active managers have responded with lower fees, performance-based fee structures, and consolidation, but the net effect is clear: less revenue per dollar of public-market AUM.

DC recordkeeping fees have also been driven down by competitive bidding, litigation, and sponsor bargaining power. Asset-based fees have declined; per-participant charges are often heavily negotiated. Where revenue sharing and higher fund expense ratios once subsidized recordkeeping, shifts to lower-cost share classes, CITs, and explicit fee arrangements have squeezed that cross-subsidy.

In this environment, private equity, private credit, and other alternative strategies offer significantly higher fee potential at the product level and across the broader asset/recordkeeping relationship. Even when “institutional discounts” are applied, private strategies typically carry multiples of the fees charged by core equity and bond index funds. Similarly, insurance-based products (stable value, GLI, group annuities) and specialty vehicles (interval funds, non-traded REITs, BDCs) often support higher embedded margins than plain-vanilla mutual funds.

CITs have been used to deliver lower-fee implementations of core strategies, which is positive for participants, but they also enable more tailored revenue structures and unit classes that can preserve economics in ways that are harder to replicate in simple retail share classes.

From an industry perspective, then, moving away from the pure public-market mutual fund chassis is, at least in part, about defending profitability in a world where “beta is nearly free.” That economic pressure is not inherently sinister, but it does create an incentive to favor products and structures where pricing power and opacity are greater, especially when wrapped in a narrative of innovation and diversification.

Regulatory and Structural Incentives

Alongside pure economics, the shape of the regulatory landscape creates structural incentives to favor vehicles at the edge of, or outside, the traditional retail regimes.

The 1940 Act and public issuer regime are mature and prescriptive. Registered mutual funds and public companies operate under well-defined but heavyweight rulebooks: board composition rules, detailed disclosure requirements, liquidity and derivatives regulations, marketing and advertising constraints, and frequent SEC reporting.

These regimes are relatively inflexible. Adjusting strategies, launching new share classes, or incorporating non-traditional assets can trigger lengthy filing, review, and compliance processes.

Alternative regimes offer more flexibility.

- Bank trust law (CITs): Allows faster product customization, multiple unit classes, white-labeling, and easier structural changes without the full securities-registration overhead. Insurance regulation (separate and general accounts) focuses on solvency and policyholder protections, but generally does not require the same portfolio-level transparency and standardized reporting that mutual funds provide.
- Private fund exemptions (Reg D, 3(c)(1), 3(c)(7)): Permit offerings to accredited or qualified purchasers with greatly reduced public-disclosure burdens, relying heavily on contractual arrangements and general anti-fraud provisions.

The path of least resistance for innovation runs outside the tightest regimes. When firms want to introduce new asset classes (private equity in TDFs, private credit, specialty real assets), the regulatory path of least resistance often leads them toward CITs, separate accounts, or private fund sleeves rather than pure mutual fund structures. Even under the 1940 Act, vehicles such as interval funds and non-listed BDCs are used to accommodate less liquid assets while relaxing the daily-redemption discipline that has historically constrained mutual funds.

The Investment Selection Rule formalizes the "neutral but open" posture. Prior to the rule, the DOL's position on alternatives in DC plans was assembled from a patchwork: the 2020 Information Letter, the 2021 Supplemental Statement, the 2025 rescission of that statement, and the August 2025 Executive Order. Each piece sent a signal. The rule consolidates those signals into a single, formal regulatory posture: the DOL will not tell you what to buy, but here is the framework for how to decide.

That framing is defensible as a regulatory philosophy. It is also structurally significant because "neutral but open, with a clear process framework" sends a different signal to asset managers, recordkeepers, and product developers than "neutral but open" alone. The rule effectively says: if you can build a product that a fiduciary can evaluate against these six factors and document compliantly, the regulatory path is clear. That lowers the product development barrier for complex structures in a meaningful way, not by changing the ERISA standard, but by removing the ambiguity that previously made risk-tolerant product innovation harder to justify internally.

The combined effect is a structural one: it is simply easier and more attractive to innovate outside the most mature retail regimes. That doesn't guarantee bad outcomes, but it shifts where experimentation happens and where the limits of the investor-protection architecture are tested.

Behavioral and Political Drivers

Not all of the momentum is structural; a meaningful share is psychological and political. Human factors on both the supply and demand side exert a quiet but powerful pull toward complexity and novelty.

Plan sponsors and committees do not want to be seen as behind the curve. Offering "institutional-caliber strategies" (private equity, private credit, alternatives) feeds an understandable desire to appear sophisticated and aligned with what endowments and large DB plans use. Consultants and asset managers reinforce this with messaging that frames these moves as modernization of DC menus, not as boundary-pushing.

It is easier to tell a compelling story about "unlocking value in private companies", "direct lending to the engine room of the economy," or "owning infrastructure that underpins everyday life" than about owning another low-cost index fund.

Narratives about "illiquidity premia" and "diversification benefits" resonate with committees eager to demonstrate

that they are actively improving participant outcomes, even if the empirical evidence is mixed.

Investment committees often benchmark themselves not just on returns and fees, but on menu design relative to peers. If a peer plan of similar size adopts a private-markets sleeve in its TDFs, or a sophisticated-looking stable value or GLI solution, it can create subtle pressure: "Are we missing something? Will we look unsophisticated if we do not consider this?" The Investment Selection Rule, paradoxically, may amplify this pressure slightly: now that a process framework exists, the implicit argument becomes "there is no longer a process excuse not to evaluate this."

The political framing of the Investment Selection Rule deserves particular scrutiny. The rule was prompted by an Executive Order titled "Democratizing Access to Alternative Assets for 401(k) Investors." This language positions regulatory perimeter expansion explicitly as empowerment, not deregulatory risk-taking. Policymakers across the spectrum have endorsed variants of this idea: expanding worker access to "the same opportunities as institutions and wealthy investors," democratizing private markets, and using retirement assets to support infrastructure, climate transition, or small-business lending.

The Investment Selection Rule's asset-neutral framing is, in this context, a politically sophisticated construction. By refusing to endorse or discourage any asset class, the DOL accomplishes two things simultaneously: it delivers on the Executive Order's mandate to clear the path for alternatives, while insulating itself from the criticism that would come with explicitly blessing crypto or private equity in 401(k) defaults. The rule outsources the endorsement to the fiduciary process, meaning that if a plan adopts private equity and it goes badly, the fiduciary made a bad process decision, not the regulator a bad policy decision.

This is a form of policy responsibility diffusion. It is not necessarily cynical; the ERISA framework has always operated on the principle that fiduciaries, not regulators, make investment decisions, but it should be understood clearly for what it is. The Investment Selection Rule does not share the downside risk with sponsors. It gives them a process framework and steps back. The consequence is that sponsors and their advisers absorb the governance burden, the litigation exposure, and the reputational risk of what follows.

These narratives make it politically attractive to reframe regulatory perimeter expansion as empowerment. For committees under time pressure and bombarded with attractive pitches, saying "no" can feel more difficult than saying "yes with caveats," even when the prudent course would be to stick to simpler, better-understood structures. The Investment Selection Rule, well-intentioned as a process codification, may inadvertently lower the psychological barrier to "yes" for committees that read regulatory clarity as regulatory endorsement, which it is absolutely not.

Is This Regulatory Arbitrage?

A natural question, and one that many plan sponsors are reluctant to ask explicitly, is whether these trends amount to regulatory arbitrage: the deliberate use of alternate structures to secure economic benefits by sidestepping more demanding rules. The answer is nuanced.

When an asset manager runs economically identical strategies in a mutual fund and a CIT, but favors the CIT for DC because it avoids certain distribution constraints and disclosures while preserving higher fee flexibility, that has a regulatory-arbitrage flavor even if the underlying investment process is the same.

When private equity exposure is delivered via opaque fund-of-funds or multi-layered structures, in part because that is the only way to insert it into a DC-appropriate wrapper without triggering a full-blown 1940 Act registration or detailed participant-level reporting, the structure is as much about circumventing friction as it is about diversification.

In many cases, the shift is less about dodging regulation and more about adapting to constraints.

- CITs solve genuine problems in fee compression and customization.

- Stable value solves a real participant’s need for capital preservation in a low-yield environment.
- Interval funds address the illiquidity of certain assets while still providing some regulated framework.

Here, the “arbitrage” is a byproduct: the most practical solution happens to sit outside the most stringent retail regime, even if that was not the primary design goal.

What does the Investment Selection Rule change in this calculus? The rule does not eliminate regulatory arbitrage dynamics; if anything, it provides a cleaner process defense that could make arbitrage-adjacent structures easier to justify. A product that previously lived in regulatory gray space can now be evaluated against a DOL-endorsed six-factor framework, documented compliantly, and presented to a committee with a veneer of regulatory authority. That is useful for fiduciaries acting in good faith. It is also useful for manufacturers acting primarily in their own economic interest, as long as the process documentation is thorough.

For fiduciaries, intent matters less than outcome. ERISA does not punish or reward motive; it focuses on process and prudence. From a fiduciary standpoint, the key questions are:

- What protections are we giving up by using this vehicle instead of a simpler, more regulated alternative?
- Are the incremental benefits (net of all fees, complexity, and operational risk) sufficient to justify those tradeoffs for our participants?
- Can we explain those tradeoffs in language that a typical participant would recognize as reasonable?

The Investment Selection Rule provides a framework for answering those questions more rigorously. It does not change the questions or the consequences of answering them poorly.

Regardless of motive, the cumulative effect of these decisions is a form of functional deregulation: More participant assets reside in vehicles where direct product-level protections, transparency, and public scrutiny are weaker. More of the protection burden is shifted onto intermediaries’ fiduciary processes and internal controls, which are harder for participants and even regulators to monitor in real time.

In that sense, “regulatory arbitrage” may be too narrow a term. The more accurate description is that economic and structural incentives systematically favor the edges of the regulatory perimeter, and the system has not yet fully grappled with whether the traditional investor-protection architecture can comfortably stretch that far while still serving retail savers well.

Chapter 8:

A Risk Map for Modern DC Plans: What Could Go Wrong?

A Risk Map: What Could Go Wrong?

The previous chapters described the forces pushing DC plans toward the perimeter: economic pressure, regulatory architecture, behavioral dynamics, and now a formal process framework that normalizes that drift without fully resolving its risks. This chapter maps what those risks look like in practice.

The risks fall into three layers: participant-level, fiduciary, and plan-sponsor-level, and system-level. They are distinct but not independent. Participant harm generates fiduciary liability. Fiduciary failures at scale generate systemic fragility. And systemic fragility, if it materializes in ways that feel like betrayal to ordinary savers, erodes the legitimacy of the retirement system itself.

The Investment Selection Rule, finalized or not, does not eliminate any of the risks described below. In some cases, lowering the adoption barrier may accelerate the timeline for testing those risks.

Participant-Level Risks

At the ground level, all of this shows up not as “regulatory perimeter drift,” but as ordinary people making choices inside their 401(k)s. The first set of risks is about whether participants can realistically understand and bear what we’re asking them to hold.

Complexity vs. financial literacy

The academic and practitioner literature is blunt. Many workers struggle with even basic investment concepts (risk/return, diversification, inflation). Surveys consistently find that a large share of eligible workers can’t correctly define core terms or answer simple literacy questions.

Financial literacy and retirement outcomes are correlated: more literate workers are more likely to participate, contribute adequately, and hold equity, while those with lower literacy are more sensitive to framing and more likely to under-save.

Against that backdrop, we are introducing:

- CITs with bank-trust governance
- TDFs with 10–20% allocations to private assets under certain design assumptions
- Stable-value/GLI structures backed by insurer balance sheets
- Interval funds with gated redemptions
- Non-traded REITs/BDCs, and potentially crypto sleeves

The information burden is pushing in the opposite direction of participant capacity. Participants see familiar labels (“Target 2045,” “Stable Value,” “Alternative Income”), daily account values, and simple risk icons, but the underlying mechanics are increasingly complex. That gap is the starting point for most participant-level risk.

The Investment Selection Rule's "complexity" factor implicitly acknowledges this problem. It asks fiduciaries to analytically evaluate how complex a product is before selecting it. But the rule provides no mechanism for resolving the complexity once selected. There is no plain-language disclosure standard, no participant-level comprehension test, and no requirement that the product be explainable in terms a participant could actually evaluate. Regulatory acknowledgment of complexity as a risk factor is not the same as protection against it.

Illiquid assets inside vehicles that promise frequent liquidity create classic mismatch risks. Recent commentary on private assets in open-end structures (and SEC guidance) notes that funds holding private capital and offering frequent redemptions are vulnerable to runs when redemptions outstrip the ability to sell assets without fire-sale discounts. This is not a theoretical risk. In 2008, the largest private real estate product available to 401(k) plans had to be gated and queued through well into 2010 due to market liquidity risks. Stable value as an asset class experienced a similar crisis in 2008–2009. Many stable funds saw market values fall below book values, with wrap providers and sponsors forced to manage transfer restrictions and covenant tensions behind the scenes.

For a participant who only sees “\$1 stable value” or a smooth TDF line on a chart, the non-obvious risk is that in stress scenarios:

- Redemptions may be limited, pro-rata, or subject to delays
- Crediting rates may reset lower
- The NAV may gap down after a long period of apparent stability

These are entirely rational outcomes given the structures, but they feel like a betrayal of expectations to participants who believed they had daily liquidity and low risk. Going back to the 2008 period, not only were participant expectations not met, but litigation ensued.

As we layer in private equity, private credit, non-traded vehicles, and structured solutions, total costs will inevitably rise. Analyses of private-asset allocations in TDFs acknowledge that, even with institutional pricing, private assets increase expense ratios relative to all-public-market designs; their case for inclusion is explicitly “higher expected net returns despite higher fees.”

Non-traded REITs/BDCs routinely embed high upfront and ongoing fees, with Research documenting sales loads and offering costs that can consume 10–15% of invested capital.

For a participant, that fee drag is largely invisible. They see a single TDF expense ratio or a stable-value crediting rate. They have no insight into the layered management/performance fees, transaction fees, and wraps broken out in a way they can interpret.

The Investment Selection Rule requires fiduciaries to evaluate fees at every layer analytically, not just the headline expense ratio. That is a meaningful process requirement. But process requirements operate at the committee level, not the participant level. A committee that satisfies itself that the all-in fee load is justified still leaves the participant holding a product whose true cost they cannot see. Over a multi-decade horizon, an extra 30–70 bps of all-in cost on a default can erase a significant portion of the theoretical return benefit from private or complex assets. If the realized returns are merely average, participants end up worse off than in a simpler, cheaper design.

Complex products raise stakes around behavior and trust. Behavioral finance research demonstrates the human tendency toward impatience and myopia. Investors prefer near-term gratification and react negatively to salient shocks. If a default that promised “institutional diversification” delivers an unexpected loss, delayed redemption, or headline scandal (e.g., crypto losses, a troubled private credit sleeve), participants may overreact by de-risking permanently, disengage from the plan, or reduce contributions; lose confidence not just in the product but in the employer and the system.

Once trust is impaired, it is extremely hard to rebuild.

Fiduciary and Plan Sponsor Risks

The second set of risks sits with plan sponsors, committees, and named fiduciaries. As the product set moves toward the perimeter, the legal and governance risks increase even if the headline ERISA standard does not change.

The DC litigation wave of the last decade has shown a clear pattern. Class actions have focused on excessive fees and imprudent investment options, including higher-cost share classes when cheaper ones were available, custom TDFs that underperform off-the-shelf series, and lineups concentrated in expensive active funds that trail simple index benchmarks. More recently, 2025 litigation surveys highlight that stable value funds have become a primary target, with plaintiffs alleging below-market crediting rates and underperformance versus allegedly comparable conservative alternatives.

This is all happening before most plans have meaningful private equity, private credit, or crypto exposures. Add those, and you are layering new, harder-to-explain, higher-fee, less-transparent risks into an environment where plaintiffs and courts already scrutinize deviation from low-cost, simple benchmarks, and any underperformance or “surprise behavior” is likely to be second-guessed with hindsight.

The Investment Selection Rule does not close the litigation gap. The rule's six-factor framework is a process defense. A committee that documents its analytical evaluation of performance, fees, liquidity, valuation, performance benchmarks, and complexity has followed the regulatory playbook. Whether that documentation actually insulates the committee from a successful ERISA breach-of-prudence claim remains unanswered, because no court has yet evaluated the rule's framework as a prudence defense, and the rule has not yet been finalized.

The TD Cowen assessment is worth repeating here: the DOL appears to have gone as far as it can within its regulatory authority to protect fiduciaries, but that protection is only meaningful if courts concur. Until they do, the Investment Selection Rule is a process map with uncertain legal weight. Sponsors who treat it as a safe harbor are making an optimistic assumption that plaintiff firms and federal courts may not share.

Anderson v. Intel raises the stakes. The Supreme Court's decision to grant certiorari in *Anderson v. Intel* on January 26, 2026, has created a direct collision between the litigation environment and the regulatory permissiveness the Investment Selection Rule represents. The Ninth Circuit's ruling, that ERISA fiduciary-breach claims challenging private equity allocations in a target-date structure can survive the pleading stage, established that these cases can be brought. What *Anderson* will determine is how courts evaluate the prudence standard when it is applied to complex, private-market allocations in retail DC defaults.

If the Supreme Court rules that outcome-based challenges to private-market allocations in TDFs can proceed even when fiduciaries followed a documented process, the Investment Selection Rule's value as legal protection is substantially diminished. If it rules that a well-documented process defense is sufficient at the pleading stage, it validates the rule's approach. Either outcome will define the risk calculus for plan sponsors more precisely than any regulatory guidance can. Until that decision, sponsors operating under the rule's framework are accepting an unquantified judicial risk alongside its regulatory clarity.

The "removing a red light" problem. Recent DOL moves such as rescinding the 2021 private-equity supplemental statement, rescinding the 2022 crypto "extreme care" release, and now issuing an asset-neutral process rule are often interpreted as green lights. They are better understood as the sequential removal of red lights, with the Investment Selection Rule replacing those lights with a process checklist.

In a neutral posture, the DOL and plaintiffs' lawyers can treat any adverse incident (losses, gating, operational missteps, fee surprises) as evidence that a fiduciary failed to live up to the standard they voluntarily chose to test. The argument available to plaintiffs in that environment is pointed: you chose to push into complex, perimeter-edge assets when simpler, well-understood options were available; show us that your six-factor analysis was not a post-hoc rationalization. Neutrality restores discretion; it does not remove after-the-fact scrutiny. If anything, it gives courts more room to ask: "You chose this path. Show us the record."

Governance capacity is not keeping pace. For many mid-sized sponsors, the governance burden associated with perimeter-edge products is a real capacity problem. The Investment Selection Rule implicitly assumes that committees can conduct rigorous, documented analytical evaluations of performance, fees, liquidity, valuation, benchmarks, and complexity for each non-traditional option in their lineup. That assumption is reasonable for large plans with dedicated investment staff, external discretionary advisers, and well-resourced committees. It is not reasonable for the median plan sponsor, whose investment committee members are human resources professionals, finance generalists, and senior executives with competing priorities and limited private-markets expertise.

The governance bandwidth required to responsibly oversee perimeter-edge products, including ongoing monitoring, stress-testing, benchmark review, and escalation protocols, may simply not exist for many sponsors without adding staff or outsourcing more decisions to external fiduciaries. The rule does not address this capacity gap. It defines what a good process looks like without grappling with whether typical sponsors can actually execute it.

Reputational exposure. Beyond courts and regulators, sponsors face reputational consequences that no regulatory framework can preempt. If a default with private markets or crypto sleeves is later portrayed as a "risky experiment with workers' retirement savings," the employer is likely to see damage to its employer brand, distrust in HR and benefits leadership, and pressure from unions, works councils, or internal advocacy groups. This is particularly salient for public employers and mission-driven organizations, where reputational capital is both fragile and central to stakeholder relationships, and where the populations most likely to be harmed by complex defaults are often the least financially sophisticated participants in the plan.

System-Level and Policy Risks

Finally, there are system-level risks that go beyond any single plan. How does widespread perimeter drift affect the resilience and legitimacy of the retirement and financial systems as a whole?

Concentrated exposure to private credit and other shadow-banking channels

A significant share of the "new" risk in DC plans is likely to come through private credit and other non-bank lending. Research on the rise of private credit emphasizes that the shift of corporate borrowing from regulated banks into largely unregulated private funds creates uncertain but potentially significant systemic risks, particularly if credit standards loosen and risk management erodes in the hunt for yield and market share.

If DC defaults increasingly allocate to private credit through CITs, interval funds, or fund-of-funds structures, retirement assets become a large, sticky capital base supporting this shadow-banking system.

This can create feedback loops. In a downturn, pressure on private credit portfolios may coincide with participant risk aversion, amplifying stress in vehicles that already have liquidity constraints. Conversely, persistent inflows from DC assets could help mask growing fragility in private markets until an abrupt repricing occurs.

Liquidity mismatches at scale

What looks manageable at the single-plan level can become more problematic when adopted system-wide. A Darden/SEC-focused analysis⁷ recently highlighted that open-end funds holding private assets are particularly vulnerable to redemption pressure and run dynamics when many investors seek to exit at once. If a meaningful share of the \$10-plus trillion DC market ends up in structures that depend on disciplined, staggered redemption behavior, the system becomes more fragile to macro shocks, policy changes, or loss of confidence.

The risk is less about a classic "bank run" and more about market plumbing under stress: delayed redemptions, swing pricing, gates, and valuation adjustments that can propagate uncertainty across plans and providers.

⁷ Financial Economists Roundtable. (2025). Expanding Access to Private Capital Markets: Proceed with Caution.

Policy whiplash and politicization

The last few years have shown how quickly policy signals can flip.

- DOL went from “extreme care” on crypto to a neutral posture in just over three years.
- An August 2025 Executive Order explicitly presses regulators to expand the availability of alternative assets in 401(k)s, including crypto and private equity, framing this as an access and growth policy.

When retirement plan investment policy becomes a political football tied to administrations’ views on crypto, private markets, ESG, or industrial policy, the system inherits regulatory uncertainty for sponsors (what is encouraged today may be criticized tomorrow) and the risk that product design choices become proxies for political alignment, amplifying controversy and reducing the focus on participant outcomes.

Erosion of confidence in the retirement system

The cumulative effect of the risks above is a confidence problem. If participants experience losses, illiquidity, scandals, or confusing communications tied to “sophisticated” options they did not knowingly choose, they may become skeptical of employer-sponsored plans, the advice and guidance they receive, and the fairness of the system itself.

Retirement savings are uniquely sensitive to trust because we have developed a system where contributions are mandatory or strongly nudged, horizons are long, and the system rests on the assumption that people will accept complexity because the rules and fiduciary structures protect them.

If enough participants conclude that the system is too complex, too risky, or too captured by industry interests, they are more likely to under-save, opt out, or seek to withdraw assets into vehicles with even less protection (e.g., speculative retail platforms). That is the ultimate system-level risk: a degradation not just of portfolios, but of participation and faith in the architecture we’ve spent decades building, and data shows is working.

Chapter 9:

A Practical Framework for Fiduciaries Evaluating Perimeter-Edge Products

A Practical Framework for Plan Fiduciaries

This section assumes you will be pitched CITs, private markets, insurance solutions, interval funds, and “alts” for your DC plan. It also assumes you are operating in the regulatory environment that now exists: an asset-neutral DOL posture, an Investment Selection Rule that provides a six-factor process framework but no judicial safe harbor, a pending Supreme Court decision in *Anderson v. Intel* that may define the litigation boundaries of private-market allocations in DC defaults, and an industry actively building products designed to satisfy that framework.

The goal is not to provide a yes-or-no answer for each product type, nor is it simply to restate the Investment Selection Rule's six factors as a checklist. The rule is a necessary but insufficient foundation for prudent decision-making. What follows is a broader architecture. One that treats the rule's framework as the floor of your process, not the ceiling, and that builds the additional layers of analysis, documentation, and governance judgment that the rule itself does not supply.

If your process begins and ends with the six factors, you have met the regulatory minimum. Whether you have met the ERISA prudence standard depends on what surrounds that minimum.

Step One: Establish the Regulatory Regime Before Evaluating the Investment

Before debating performance charts or marketing narratives, and before applying the Investment Selection Rule's six factors, start with a foundational question that the rule itself does not require but that your legal exposure demands: under what regulatory and fiduciary regimes does this option live, and how do those regimes compare to a plain-vanilla 1940 Act mutual fund?

This is the regime-comparison step, and it belongs at the beginning of your process, not as a footnote after you have already become interested in a product.

Identify the chassis clearly. Is the option a 1940 Act mutual fund or ETF, a CIT, a group annuity or insurance separate account, an interval fund, a private fund sleeve, or a hybrid structure? Ask the provider to state this in plain language at the top of any proposal. If they cannot or will not, that is the first red flag.

Map the key regimes. For each candidate option, document:

- Primary regulator(s): SEC, OCC, or state banking authority, state insurance department, or exempt or private
- Applicable product laws: 1940 Act, banking regulations, insurance codes, private fund exemptions, or some combination
- ERISA status: Is the vehicle itself an ERISA plan asset look-through vehicle? Who, if anyone, is an ERISA fiduciary at the product level, not just at the plan level?

Compare protections to a mutual fund baseline. Relative to a simple mutual fund, identify what is stronger, what is weaker, and what is simply different. Contractual guarantees or additional fiduciary layers may represent genuine protection enhancements. Reduced disclosure requirements, less public data, and the absence of shareholder voting represent genuine reductions. Bank trust oversight in place of an independent fund board is different in ways that matter under stress.

Document what participants give up and gain. In one short paragraph each, what protections and rights are reduced

or altered under this chassis relative to a mutual fund? What expected benefits, net of all fees and complexity, justify those tradeoffs? This is not a rhetorical exercise. It is the core of the prudence record you will need if this decision is ever examined in litigation.

Check for alignment with your plan's profile. Does this structure make sense given your participant demographics, plan size, and governance capacity? Would a typical participant reasonably assume they are getting more protection with this option when, in fact, they may be getting less?

If you cannot complete this regime comparison on one page, or if the provider cannot or will not help you fill it in, you do not yet have an investable product; you have a research project. The regime comparison is a gate, not a formality.

Step Two: Apply the Investment Selection Rule's Six-Factor Framework Rigorously

Once you have established the regulatory regime, you can apply the DOL's Investment Selection Rule framework. The six factors:

- Performance
- Fees
- Liquidity
- Valuation
- Performance benchmarks
- Complexity

These represent the analytical categories the DOL has identified as essential to a prudent investment selection decision. They are well-chosen. Applied rigorously, they will surface most of the significant issues with a perimeter-edge product.

The word "rigorously" carries weight here. The six-factor framework is only as useful as the depth of analysis behind it. A committee that checks six boxes without genuinely engaging the substance of each factor has created documentation, not prudence. Courts examining process records will look not just at whether the factors were addressed, but at the quality of the analysis and whether it was capable of revealing the risks that subsequently materialized.

Performance. This is not simply a question of historical returns. For private-market products, historical return data is often limited, non-comparable across managers, or constructed using methodologies that do not translate directly to public-market benchmarks. Your performance analysis should address:

- What is the realistic expected return net of all fees, carry, and layered costs?
- How confident are you in that estimate, given the available data?
- What is the dispersion of outcomes?
- How sensitive is the return case to the specific manager, vintage, and credit cycle?

A performance analysis that produces a single expected-return number without engaging these questions is inadequate.

Fees. The Investment Selection Rule's fee factor requires analytical evaluation of the total cost participants will bear, not just the headline expense ratio, but every layer:

- Management fees
- Performance fees
- Carried interest
- Wrap or guarantee charges
- Fund-of-funds or platform fees

- Transaction costs are material
- Revenue-sharing or compensation arrangements

For complex structures, this all-in calculation can be genuinely difficult to produce. If it is difficult to produce, that difficulty is itself informative. Document the all-in cost in basis points, compare it explicitly to the cheapest available alternative that could serve a similar portfolio function, and explain why the incremental cost is justified by incremental benefit. If you cannot make that case in writing, the fee analysis is not complete.

Liquidity. Liquidity evaluation for perimeter-edge products has two distinct dimensions that must both be addressed. The first is structural liquidity: what does the vehicle's legal and contractual framework actually promise, and under what conditions can those promises be suspended or modified? The second is stress liquidity: how does the vehicle's actual liquidity behave in adverse market conditions, high-redemption environments, or plan-specific stress scenarios such as a large Reduction In Force (RIF), a plan merger, or a recordkeeper transition?

For products with private-asset sleeves or insurance wrappers, the answers to these questions are often hidden in contract language that is not participant-facing and not easily summarized. Pull the contract. Read the withdrawal restrictions, the market value adjustment provisions, and the gating conditions. Model the participant flow scenarios your plan might realistically encounter. If the product cannot survive those scenarios without impairing participant interests, you have a liquidity problem that no amount of expected-return premium will resolve.

Valuation. For public-market products, valuation is largely settled: observable market prices, daily NAV, standardized methodologies. For private-market products, valuation is where the risk is often most concentrated and least visible. Your valuation analysis should address:

- How frequently are underlying assets valued, and by whom?
- What methodologies are used, and are they independently verified?
- How are stale prices, hard-to-value positions, and model risk handled?
- Does the product use smoothing mechanisms that could cause the reported value to diverge materially from economic reality in a stress scenario?

The 2008 experience with stable value and private real estate products demonstrated that valuation smoothing, well-intentioned in normal markets, can create a cliff effect in stress environments where the gap between reported value and market value closes suddenly and painfully. Your valuation analysis should identify where that cliff exists in the product you are evaluating.

Performance benchmarks. Benchmark selection for private-market products is genuinely contested terrain. Public-market equivalents, PME calculations, peer quartile comparisons, and custom blended benchmarks each have methodological strengths and limitations, and managers have strong incentives to select benchmarks that flatter their performance. Your benchmark analysis should engage this complexity directly: what benchmark is the manager proposing, why did they choose it, and does it fairly represent the risk exposures participants are bearing? Require the manager to show performance against multiple benchmarks, including simple public-market alternatives that a participant could have held at lower cost. If the risk-adjusted performance advantage over those alternatives is thin or disappears entirely under reasonable methodological assumptions, the benchmark analysis is telling you something important about the return premium you are actually purchasing.

Complexity. The complexity factor is where the Investment Selection Rule most clearly acknowledges the participant-protection concerns at the heart of this paper. Your complexity analysis should operate on two levels. The first is operational complexity: how many structural layers exist between the participant and the underlying assets? How many counterparties, contractual relationships, and regulatory regimes are involved? What are the operational dependencies (custody arrangements, capital call mechanics, valuation agents, liquidity providers), and what happens

if any of them fail? The second is communication complexity: can you explain this product to a typical participant in plain English on one page? If you cannot, the complexity analysis should be weighing heavily against adoption, particularly if this product is a candidate for the default.

Step Three: Build the Documentation Architecture

The Investment Selection Rule's value as a process defense depends entirely on the quality of your documentation. A well-designed analytical process that is poorly documented is nearly indistinguishable, from a litigation standpoint, from a poorly designed one. Your documentation architecture should do three things: create a contemporaneous record of your reasoning, demonstrate that the committee genuinely engaged the substance of each factor, and establish a monitoring baseline against which future behavior can be measured.

Meeting minutes should reflect the analysis, not just the outcome. Minutes that record "the committee reviewed the proposed TDF and approved its inclusion" provide almost no process protection. The minutes should describe the regime comparison performed, the all-in fee calculation, and how it compared to alternatives, the liquidity stress scenarios modeled, the benchmark methodology evaluated, and the specific complexity concerns raised and addressed to create a record that can be defended.

The regime comparison and factor analysis should exist as standalone documents. Do not bury them in meeting minutes or presentation appendices. Produce a discrete analytical document for each non-traditional product under consideration, structured around the regime comparison and the six factors, with explicit conclusions and identified risks. This document should be updated each time the product is reviewed in the monitoring cycle, not just at adoption.

Document the alternatives considered and rejected. One of the most powerful elements of a prudence defense is demonstrating that the committee considered simpler alternatives and made an affirmative, reasoned choice to accept the complexity of a perimeter-edge product. If you considered a plain-vanilla public-market TDF alongside a private-assets-enhanced version and chose the latter, document why, specifically, in terms of expected net benefit to participants, not in terms of institutional positioning or peer benchmarking.

Create a monitoring framework with defined triggers. Adoption documentation is necessary but not sufficient. Ongoing monitoring is where many fiduciary failures actually occur. Define, at adoption, the key risk indicators you will monitor: allocation to illiquid assets, redemption queue length, valuation deviation from modeled expectations, fee drift, tracking error, manager stability, and any product-specific metrics identified in the due diligence. Define the conditions that will trigger a watch-list designation, a freeze on new contributions, and an exit analysis. Build those triggers into your IPS and your monitoring calendar so that action is required, not discretionary, when they are breached.

Step Four: Conduct Governance Capacity Assessment

Even if a product passes the regime comparison and the six-factor analysis, and even if your documentation architecture is sound, there is a prior question that the Investment Selection Rule does not ask but that honest fiduciary practice requires: does your committee have the expertise and bandwidth to responsibly oversee this product on an ongoing basis?

This is not a question about whether the product is theoretically appropriate for DC plans. It is a question about whether your plan, with your committee, your adviser relationships, and your governance infrastructure, is capable of exercising the heightened oversight that perimeter-edge products demand.

Be honest about expertise. Does your committee include members with genuine private-markets experience? Not familiarity with the marketing narrative, but operational knowledge of how private equity and private credit funds actually work, how valuations are constructed, how capital calls and distributions interact with plan cash flows, and how these strategies have behaved historically in stress environments? If the honest answer is no, that is a significant governance constraint on your ability to credibly oversee these structures.

Be realistic about bandwidth. The six-factor framework, applied rigorously and documented thoroughly, requires meaningful committee time; not just at adoption but in every subsequent monitoring cycle. For a committee that meets quarterly and devotes the majority of its meeting time to recordkeeping oversight, participant communication, and plan administration, adding a private-markets sleeve to the default is not a simple line-item addition. It is a meaningful expansion of the committee's oversight obligation. If that expansion cannot be resourced, either through committee composition, adviser support, or dedicated staff, it is prudent to acknowledge that constraint rather than accept a governance obligation you cannot fulfill.

Consider whether delegation is necessary and sufficient. If your committee lacks the expertise to independently evaluate and monitor a perimeter-edge product, delegating investment discretion to a 3(38) investment manager may appear to solve the problem. It may, but that process requires its own analysis. The 3(38) manager's expertise, independence, conflicts of interest, and monitoring practices must themselves be evaluated. Delegation shifts the investment decision; it does not eliminate the fiduciary's obligation to select, monitor, and, if necessary, replace the delegate. A poorly chosen 3(38) manager can create as much liability as a poorly made direct investment decision.

Step Five: Apply the Participant Lens

After completing the regime comparison, the six-factor analysis, the documentation review, and the governance capacity assessment, apply one final lens before making a decision: the participant lens.

This is not a separate analytical framework. It is a discipline of re-anchoring every conclusion you have reached to the people who will actually live with the consequences of your decision.

The one-page test. Can you produce a plain-language, one-page description of this product? In this summary, can you cover the product's purpose, its key risks, its fee structure, what could go wrong, and under what circumstances a participant's experience might differ from their expectations? Is that summary capable of communicating to a typical participant with average financial literacy in a way that could be genuinely understood? If you cannot, the complexity factor should be weighing heavily against adoption. If you can, that document serves as the basis for participant communication and should be tested against actual participants before the product is adopted as a default.

The demographic alignment test. Does the complexity and risk profile of this product match the financial sophistication, investment horizon, and risk tolerance of your actual participant population? A private-markets-enhanced TDF may be defensible for a plan populated by long-tenured, financially sophisticated employees with high account balances and long investment horizons. It may be deeply problematic for a plan with high turnover, low average balances, a significant near-retiree population, or participants who primarily interact with the plan through auto-enrollment and never actively review their investment elections.

The deposition test. Embed this question in your committee minutes at the point of decision: if this product underperforms or behaves unexpectedly; if the private-markets sleeve is gated, if valuation gaps emerge, if fees prove higher than projected, if participants experience outcomes materially worse than a simpler alternative would have produced, could we sit across from a participant, or a judge, and calmly explain why the tradeoffs we made were prudent and necessary, given the simpler alternatives we chose not to use? If the committee cannot answer that question with confidence today, the default decision should be to decline or defer until the structure, the evidence, or your governance capacity improves.

When to Say No

A robust framework needs a clear recognition that “no” is sometimes the most prudent answer, even when a product is permissible and marketed as a best practice.

Practical “stop” criteria include:

You can’t explain it to a participant on one page

If, after working with the provider, you cannot craft a one-page, plain-language summary that a typical participant could reasonably understand, the product is likely too complex for a core DC role, especially as a QDIA.

You can’t calculate or compare the all-in fee load

If you cannot express, in basis points, the total participant cost (including performance fees, wraps, embedded vehicles), and compare it to a simpler alternative that could serve a similar function, you don’t have enough information to judge prudence.

The six-factor analysis does not produce a clear participant benefit

If the expected incremental return over a simpler, cheaper alternative is modest, highly uncertain, or dependent on assumptions that do not survive stress-testing, the additional complexity, cost, and governance burden are not justified. The case for perimeter-edge products must be affirmative and specific, not narrative and aspirational.

Your governance structure isn’t ready

If your committee (and advisers) lack credible experience with the asset class or structure, and you’re not prepared to add or hire that expertise, it is prudent to wait. If your internal risk management, legal, or audit teams express discomfort that they can’t resolve, take that seriously.

Exit paths are unclear or unacceptably constrained

If you cannot unwind the exposure in a reasonable time frame and on reasonable terms, should conditions change, you may be locking participants into a decision you can’t reverse—especially problematic for defaults.

The decision is being driven primarily by “optics”

If, in honest conversation, the dominant reasons to proceed are: “Our peers are doing it,” “It looks sophisticated,” “We’re being pressured by a key provider,” rather than a clear, documented benefit for participants, that is a sign to stop.

Embedding This Framework in Your Governance Infrastructure

The framework described above is not a one-time exercise. Its value depends on being institutionalized in the governance structures that govern investment decisions over time.

Update your Investment Policy Statement to define permissible vehicle types and the conditions under which they are appropriate. Require the six-factor analysis and regime comparison as standing prerequisites for any non-1940 Act product, not as discretionary supplements.

Reflect these expectations in your committee charter: who is responsible for complex-product oversight, how often each perimeter-edge product is reviewed, what triggers escalation, and what authority exists to freeze flows or initiate an exit without convening a full committee meeting.

Build the deposition test into your standard minutes template. Make it a recurring question at each monitoring review, not just at initial adoption. The discipline of asking “could we defend this decision today” is most valuable not

at the moment of adoption when enthusiasm is highest, but twelve, twenty-four, and thirty-six months later, when the product has accumulated a track record and the stress scenarios you modeled have either materialized or not.

The Investment Selection Rule has given fiduciaries a cleaner process architecture than existed before. Used well, it is a genuine improvement in the governance toolkit. Used as a compliance exercise rather than an analytical discipline, it is a liability; a documented record of a process that satisfied the regulatory minimum without meeting the deeper standard that ERISA, and your participants, actually require.

Chapter 10:

Innovation with Guardrails: Re-Centering the Retirement System on Participants

Policy and Industry Recommendations

The previous chapters have built a case in layers. The investor-protection architecture that governs DC plans was designed for a simpler product universe. Economic, regulatory, and behavioral forces are systematically pulling participant assets toward the edges of that architecture. The Investment Selection Rule has formalized a process framework for operating at those edges, which is a meaningful improvement over the prior patchwork of guidance, information letters, and rescissions, but one that raises the quality of fiduciary process without resolving the structural gap between what participants are being asked to hold and the protections designed to safeguard them.

This chapter does not argue for turning back. We are not going back to a world of only plain-vanilla mutual funds in DC plans, and the policy debate is not served by pretending otherwise. Private markets, CITs, insurance structures, and complex wrappers are already in the mix, and the Investment Selection Rule has made their continued adoption more procedurally accessible. The question is not whether these products belong in the conversation, but whether the protection architecture is being upgraded at the same pace at which the product universe is expanding.

The honest answer, as of this writing, is no. The Investment Selection Rule advances the fiduciary process layer. It does not advance the product-level protection layer, the disclosure layer, or the systemic resilience layer. What follows are the recommendations for regulators, for industry, and for the investment committee sitting in a conference room evaluating its next private-markets pitch, that would bring those layers into better alignment.

Recommendation One: Build Vehicle-Neutral Baseline Protections for Retail-Facing Capital

The most fundamental structural problem the Investment Selection Rule does not address is this: participant protections in DC plans currently depend on the chassis of the investment vehicle, not on the nature of the capital being invested. A participant in a mutual fund has one set of protections. A participant in a CIT with an identical underlying portfolio has a different, lighter set. A participant in a private-asset-enhanced TDF has a third. The participant, in all three cases, is the same person with the same retirement at stake.

The Investment Selection Rule's asset-neutral posture is the right philosophical framework for fiduciary evaluation. It is not, by itself, a vehicle-neutral protection framework for participants. Applying the same six-factor process to a mutual fund and a private-equity-enhanced CIT does not make the participant protections equivalent; it makes the fiduciary's evaluation process equivalent. That is a meaningful but insufficient step.

A more coherent approach would define a category of "retail-facing retirement capital" and attach a minimum set of baseline protections to that capital, regardless of the vehicle in which it travels. Concretely, the DOL and SEC could pursue the following:

1) Clarify a baseline disclosure package for all "designated investment alternatives."

DOL's 404a-5 rules already require comparative charts of fees and performance for designated investment alternatives in participant-directed DC plans. That framework could be tightened and modernized so that any option on the core menu (mutual fund, CIT, stable value, GLI, interval fund, private-asset TDF) must clearly disclose, in a standardized format:

- Vehicle type and underlying regulatory regime (bank trust, insurance, 1940 Act, private fund exemption).
- All-in fees (including estimated embedded performance fees, wraps, and insurance charges).
- Liquidity profile: redemption frequency, gates, notice periods, and conditions under which withdrawals

can be restricted.

- Use of illiquid or hard-to-value assets and the basic valuation approach.

2) Require a “regime comparison” for defaults and complex options.

Investment Selection Rule asks fiduciaries to evaluate complexity as one of six factors. A stronger approach — which the comment period on the proposed rule provides an opportunity to advance — would require that fiduciaries document, for any QDIA or any option containing private assets, a formal regime comparison that identifies what protections differ from a mutual fund baseline and what expected benefits justify those differences. This documentation requirement would serve two purposes: it would sharpen fiduciary thinking at the point of decision, and it would create a record against which courts and regulators could evaluate prudence more precisely than the current six-factor framework allows.

3) Extend baseline protections to IRAs and similar retail retirement accounts.

Where financial professionals serve as fiduciaries or under a best-interest standard, a similar “vehicle-neutral” disclosure package should follow the advice, not just the plan type. This would reduce the temptation to route retail retirement assets into the least transparent structures simply because they sit outside 401(k)/404a-5 coverage.

The goal is not to equalize all rules across vehicles but to ensure that participants don’t lose basic comparability and visibility simply because sponsors chose a different wrapper.

Recommendation Two: Upgrade Data and Disclosure for CITs and Other Non-Registered Vehicles

CITs now hold nearly 30% of DC plan assets, up from about 13% a decade ago, and more than \$5 trillion as of early 2025. They are fast becoming the default DC chassis, especially for target-date funds. At the same time, academic work has flagged that lower CIT fees often come “at the expense of transparency and disclosure, including public disclosure about CIT fees.”⁸

The Investment Selection Rule's fee and performance factors implicitly require fiduciaries to assemble this information in their due diligence process. But requiring individual fiduciaries to independently reconstruct data that should be publicly available is an inefficient and uneven solution. What is needed is structural improvement in the data ecosystem, not just in the fiduciary process that operates within it.

Create a centralized public data hub for DC CITs. Require bank trustees offering CITs to DC plans above a modest asset threshold to file standardized data (strategy, fees, performance, benchmarks, asset mix, vehicle characteristics) with DOL or SEC. Make this accessible in a public database, similar in spirit to mutual fund data, so third parties (researchers, journalists, advisors) can monitor and compare options.

Standardize CIT fact sheets and reporting for DC use. Working with banking regulators, DOL could promulgate a model DC CIT disclosure template that mirrors the 404a-5 comparative chart but adds: vehicle type, regime, valuation frequency, and liquidity mechanics. Industry associations could adopt this template voluntarily in advance of regulation, signaling a good-faith commitment to transparency.

Encourage plain-language explanations of fee structures and unit classes. Because CIT pricing often involves custom fee schedules and multiple unit classes, trustees should be required (or strongly encouraged) to provide a one-page, plain-English fee summary for each plan, including any revenue-sharing or platform payments so that sponsors can compare apples to apples with mutual funds and other CITs.

Extend similar expectations to other non-registered DC vehicles. Group annuity separate accounts, GLI products, and

⁸ Overtaking Mutual Funds: The Hidden Rise and Risk of Collective Investment Trusts. Natalya Shnitser. The Yale Law Journal (2025)

private-asset sleeves in CITs should be expected to meet comparable data and disclosure standards when used in participant-directed DC plans, even if their underlying regulatory regimes remain distinct.

The aim is not to shut down CITs—they often provide real fee benefits—but to eliminate the “black box” perception and reduce the monitoring burden on individual sponsors by making high-quality information broadly available.

Recommendation Three: Resolve the DOL-SEC Coordination Gap — and Use the Investment Selection Rule Comment Period to Begin

The DOL developed the Investment Selection Rule in response to an Executive Order. The SEC component of that same Executive Order focused on expanding retail access to private funds, potentially including changes to accredited investor definitions and the structures available for DC plan investment, and remains largely unresolved. The result is a regulatory environment in which the DOL has provided a fiduciary process framework for selecting alternatives in DC plans, while the SEC has not yet provided the structural framework that determines what alternatives are actually available to select from, and on what terms.

This coordination gap creates predictable problems. Product manufacturers designing DC-appropriate private-market vehicles must navigate two agencies with different authorities, different timelines, and potentially different views on what adequate investor protection looks like in this context. Plan sponsors and their advisers receive process guidance from one agency and product governance from another, with no joint framework defining how those pieces fit together. The comment period on the Investment Selection Rule is an opportunity to press for explicit DOL-SEC coordination as a condition of the rule's effective implementation.

A joint DOL-SEC framework for private-market exposure in DC plans should accomplish four things that neither agency's current guidance achieves independently:

- Define what “good” looks like for private-asset use in defaults.
- Create safe harbors tied to concrete conditions, not asset labels.
- Coordinate data collection and risk monitoring.
- Provide consistent messaging to sponsors.

Without alignment, sponsors remain caught between political pressure to innovate and legal incentives to stay simple; the unsurprising outcome is confusion and uneven risk-taking.

Recommendation Four: Establish Structural Guardrails Around the Retailification of Institutional Strategies

The Investment Selection Rule's process framework is, in essence, a mechanism for case-by-case fiduciary evaluation of perimeter-edge products. It is not a structural guardrail. It does not prevent the accumulation of systemic risk through individually prudent-seeming decisions. It does not protect participants who are defaulted into complex products without meaningful comprehension of what they hold. And it does not address the asymmetry between the sophistication of the products being introduced and the financial literacy of the participants bearing their risks.

Structural guardrails would:

Setting soft or hard caps on illiquid/private exposure in QDIAs. For default options, regulators could establish a recommended maximum range for illiquid/private assets (e.g., 10–15% of the fund, varying by age cohort and horizon), with higher levels requiring special justification. This would require disclosure of the maximum targeted illiquid/private allocation and actual range over time. This would preserve room for diversification benefits while reducing the tail risk of over-concentration in hard-to-value assets.

Tier access based on plan size and governance capacity. For small plans with limited governance resources, DOL could signal that certain structures (e.g., private-asset TDFs, complex GLI solutions) are strongly discouraged unless

plan assets and committee expertise meet clearly specified thresholds. Conversely, large plans with documented private-markets expertise and robust external advice could operate under more flexible guidelines.

Mandate simple, standardized risk labeling for complex strategies. Similar to nutrition labels, participant-facing materials for any option with private assets, leverage, or non-daily liquidity should include a simple risk panel describing:

- Liquidity (daily / periodic / gated),
- Use of hard-to-value assets,
- Fee tier (e.g., low/medium/high relative to plan options),
- Historical or modeled worst-case drawdowns.

Align incentives: complexity should require lower, not higher, margins. Regulators and industry can work toward a norm that complexity does not automatically justify higher fees in DC defaults. For example:

- Require committees, when using private assets in a default, to demonstrate that all-in fees are within a specified range of a high-quality public-market alternative.
- Consider supervisory scrutiny where providers appear to use complexity primarily to reclaim margin lost in core public-market products.

Reserve a default “plain-vanilla” path. Even as private-asset and alt-enhanced defaults emerge, regulators could explicitly support (and perhaps prefer) plain-vanilla QDIAs, low-cost, broadly diversified public-market portfolios, for sponsors that choose not to take perimeter risk. This matters politically as well as financially: it creates space for sponsors who want to keep their plans simple without appearing regressive or negligent in light of pro-alternative policy pushes.

In combination, these recommendations aim to re-center the system on the participant: ensuring that innovation in product design and capital markets does not outpace the protections, disclosures, and governance structures that small investors reasonably expect when they hand over a percentage of every paycheck to their retirement plan.

Conclusion

The story this paper has tried to tell is simple, even if the mechanics are not. Over the past century, the U.S. built an elaborate investor-protection architecture largely aimed at protecting unsophisticated savers from fraud, abuse, and information asymmetry.

In today’s retirement marketplace, we are not tearing down that architecture. Instead, we are routing more and more participant assets around its most protective features into bank-maintained CITs, insurance separate accounts, private funds, interval structures, and other vehicles that were not designed with retail investors as the primary audience.

This is happening for understandable reasons: fee compression, the search for diversification and return, product innovation, and political enthusiasm for “access” to private markets. But the cumulative effect is a form of functional deregulation for the end participant, even as formal fiduciary standards grow stricter.

None of that leads to a conclusion that innovation is bad or that DC menus should be frozen in a 1990s mutual-fund world. It does lead to a different, more pointed question. **Are we thoughtfully modernizing investor protections to match the new product universe, or are we silently deconstructing them via product design and distribution choices that participants cannot see or evaluate?**

Re-centering on the Participant

From a participant’s point of view, the label on the screen still says “2045 Retirement Fund” or “Stable Value.” Account balances still update daily. Risk is still shown on a 1–5 scale. Behind those familiar visuals, however, the nature of the promise has changed:

- Less reliance on standardized, public-facing disclosure regimes;
- More reliance on internal models, contractual terms, and opaque fee structures;
- More dependence on committees, trustees, and insurers to translate complexity into something that is effectively safe for people who will never read a trust document or partnership agreement.

If the system is going to lean more heavily on fiduciaries and less on product-level protections, then fiduciary process and governance must realistically be up to that task.

A participant-centric approach requires three shifts:

1. Treat the regulatory regime as a core part of the investment decision, not an afterthought.
2. Demand vehicle-neutral baseline protections for any product used as a default or core option.
3. Be explicit and transparent about what is being traded away in liquidity, transparency, and fees when moving outside the mutual-fund paradigm.

Innovation with Guardrails, Not Defaults with Surprises

Innovation in capital markets and product design is not inherently at odds with investor protection. Private markets, insurance solutions, and semi-liquid structures can all have a legitimate place in long-horizon retirement portfolios if:

- Their use is constrained (by allocation limits, liquidity controls, and design principles);
- The governance infrastructure—expertise, monitoring, stress-testing—is commensurate with the complexity;
- The economic case (net of all fees and operational risk) is clearly stronger than simpler alternatives; and
- Participants are not exposed by surprise to risks they never had a reasonable chance to understand.

The wrong model is “everything that is legally permissible is presumptively appropriate for DC defaults.” The right model is closer to “complexity is earned, not assumed” and is earned through demonstrable participant benefit, robust evidence, and governance that is capable of carrying the weight.

A Challenge to Fiduciaries and Policymakers

For fiduciaries, the near-term challenge is practical:

- Embed a regime comparison step in your process.
- Apply a consistent risk/benefit and governance capacity test to any non-40 Act or private-market product.
- Be willing to say “no” or “not yet” when the tradeoffs are not clearly in participants’ favor, even when policy winds or peer behavior are pushing in the other direction.

For policymakers and industry leaders, the challenge is structural:

- Build vehicle-neutral protections that follow the participant wherever their capital is deployed.
- Improve data and transparency for CITs, insurance vehicles, and private-asset wrappers so that sponsors and participants are not flying blind.
- Coordinate across agencies to set clear, conditional guardrails for the use of institutional strategies in retail retirement channels.

The DC system has become the primary retirement engine for tens of millions of workers. It can accommodate innovation. It cannot afford a slow drift into a world where participants carry institutional risks without institutional protections, and where the next crisis reveals that we asked too much of governance frameworks designed for a simpler product set.

The final test is the same one we suggested for committees, applied at the system scale. If, 10 years from now, a cohort of participants looks back after a period of stress and asks, “Why did you put my savings into these structures instead of simpler, cheaper, more transparent alternatives?”, will we be able to answer in a way that is both factually defensible and intuitively fair?

If the honest answer today is “not yet,” then the path forward is not to halt innovation, but to slow it down, tighten the guardrails, and upgrade the architecture until the protections are once again aligned with the people the system is meant to serve.