

# U.S. Department of Labor Proposes Rule to Facilitate Alternative Investments in 401(k) Plans

Process-Based Safe Harbor Would Provide Clarity on How ERISA Fiduciaries May Satisfy Their Duty of Prudence when Selecting Designated Investment Alternatives, Potentially Expanding Investment Opportunities for Retirement Savers and Plan Sponsors and Capital Access for Alternative Asset Managers

## Summary

On March 30, 2026, the U.S. Department of Labor (the “DOL”) proposed a rule under the Employee Retirement Income Security Act of 1974 (“ERISA”) that would establish a safe harbor for ERISA fiduciaries in their selection of designated investment alternatives for participant-directed individual account plans (the “Proposed Rule”).<sup>1</sup>

The Proposed Rule is intended to provide retirement savers with greater access to alternative assets such as private market investments, digital assets, infrastructure and real estate, as directed by an Executive Order issued by the Trump administration in August 2025.<sup>2</sup> In furtherance of this goal, the Proposed Rule sets out a pathway for an ERISA fiduciary to qualify for a legal presumption that its selection process satisfies the duty of prudence under ERISA, alleviating some of the regulatory uncertainty and litigation risk that has discouraged ERISA fiduciaries from including alternative assets as investment options in the vast majority of defined contribution plans.

Notably, the Proposed Rule presents a broad, asset-neutral view of the ERISA fiduciary’s duty of prudence. The procedural framework described in the Proposed Rule would apply to the selection of *any* designated investment alternatives for a retirement plan, regardless of asset class or product type.

For investment managers of funds invested in private markets and other alternative assets, the Proposed Rule is long-awaited and would facilitate a significant market opportunity, in tandem with other recent

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<sup>1</sup> Fiduciary Duties in Selecting Designated Investment Alternatives, U.S. Dep’t of Labor, 91 Fed. Reg. 16088 (proposed Mar. 31, 2026) (to be codified at 29 C.F.R. pt. 2550) (the “Release”).

<sup>2</sup> *Democratizing Access to Alternative Assets for 401(k) Investors*, E.O. 14330 (Aug. 7, 2025), reprinted in 90 Fed. Reg. 38921 (Aug. 12, 2025), available at <https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors> (the “Executive Order”).

regulatory developments and market dynamics that have accelerated retail access to the alternative assets industry. Managers who are able to offer products that fit within the safe harbor and can work with plan fiduciaries to meet the Proposed Rule's procedural requirements (as discussed further in the *Key Takeaways* section below) could benefit from increased access to pools of capital that currently have very limited allocations to alternative investments. As the DOL states in the Release accompanying the Proposed Rule, in 2024 only 4% of defined contribution plans offered alternative investments, and only 0.1% of all defined contribution assets were invested in alternatives.<sup>3</sup> The DOL estimates that plans affected by the Proposed Rule would, in aggregate, have about \$178 billion and 4.5 million participants flowing each year into target date funds with alternative investments.<sup>4</sup>

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### The Duty of Prudence

The Proposed Rule interprets the ERISA fiduciary's duty of prudence<sup>5</sup> as applied to the process of selecting a designated investment alternative for a retirement plan, building upon existing regulation, guidance and case law. The Proposed Rule makes explicit that this duty is asset-neutral, insofar as it neither requires nor restricts any specific type of designated investment alternatives.<sup>6</sup> Fiduciaries must act prudently in both the selection of each designated investment alternative and a plan's collective menu of designated investment alternatives<sup>7</sup> by following a prudent process that gives appropriate consideration to the facts and circumstances relevant to the particular investment.<sup>8</sup> As the DOL explains in the release, the flexibility and lack of clarity with respect to the duty of prudence has been exploited in numerous, often frivolous, lawsuits alleging imprudent selection, many of which focus on the *outcome* of particular fiduciary decisions and "ask courts to infer an imprudent process based on circumstantial, outcome-focused allegations."<sup>9</sup> The Proposed Rule seeks to re-establish the proposition that plan fiduciaries have discretion to select designated investment alternatives without fear of facing litigation, provided they follow the prudent process described in the safe harbor.

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<sup>3</sup> Release, 91 Fed. Reg. 16106.

<sup>4</sup> *Id.* at 16112.

<sup>5</sup> The duty of prudence is stated in section 404(a)(1)(B) of ERISA. In relevant part, this section states: "a fiduciary shall discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

<sup>6</sup> Proposed Rule, 29 C.F.R. § 2550.404a-6, proposed Paragraph (c).

<sup>7</sup> *Id.* at proposed Paragraph (d).

<sup>8</sup> *Id.* at proposed Paragraph (e).

<sup>9</sup> Release, 91 Fed. Reg. 16095 n.31 & 16114.

## Safe Harbor – Procedural Requirements and Six Factors for Consideration

The Proposed Rule’s safe harbor is framed around a non-exhaustive set of six factors—performance, fees, liquidity, valuation, benchmarking and complexity—that the DOL believes to be important to a plan fiduciary’s evaluation of the “vast majority” of designated investment alternatives provided within participant-directed individual account plans.<sup>10</sup> Where the plan fiduciary “objectively, thoroughly and analytically” considers any of these six factors and follows the process required by the Proposed Rule, as summarized below, the fiduciary’s judgment regarding such factor will be presumed to have met the duty of prudence and will be entitled to significant deference.

Notably, a plan fiduciary could satisfy the safe harbor requirements without directly conducting its own evaluation of any or all of these factors. Instead, the fiduciary could rely on the recommendations of a prudently selected investment adviser within the meaning of 3(21)(A)(ii) of ERISA with respect to such factor(s), or prudently delegate compliance with respect to such factor(s) to an investment manager within the meaning of Section 3(38) of ERISA.<sup>11</sup>

| Factor                          | Steps Required of the Fiduciary<br>(directly or by relying on advice of a prudently selected investment advice fiduciary or prudently delegating to an investment manager)   |                                 |  |
|---------------------------------|--|---------------------------------|--|
| 1. Performance                  | <p>Determine that the risk-adjusted expected returns, over an appropriate time-horizon, of the designated investment alternative, net of anticipated fees and expenses, further the purposes of the plan by enabling participants and beneficiaries to maximize risk-adjusted returns on investment net of fees and expenses</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 40%; vertical-align: middle; text-align: center;"> <i>Highlights from examples</i> </td> <td style="vertical-align: top;"> <ul style="list-style-type: none"> <li>• Designated investment alternative with lower absolute returns could be selected as a trade-off for improved risk-adjusted returns (e.g., select a lower-risk investment strategy with a lower expected return due to low correlation with other investments in plan’s menu)</li> <li>• Designated investment alternative with lower returns over the short term may not be as meaningful as the higher long-term returns, given the profile of the plan’s participants and beneficiaries</li> </ul> </td> </tr> </table> | <i>Highlights from examples</i> | <ul style="list-style-type: none"> <li>• Designated investment alternative with lower absolute returns could be selected as a trade-off for improved risk-adjusted returns (e.g., select a lower-risk investment strategy with a lower expected return due to low correlation with other investments in plan’s menu)</li> <li>• Designated investment alternative with lower returns over the short term may not be as meaningful as the higher long-term returns, given the profile of the plan’s participants and beneficiaries</li> </ul> |
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| 2. Fees                         | <p>Determine that the fees and expenses of the designated investment alternative are appropriate, taking into account its risk-adjusted expected returns and any other “value” (i.e., any benefits, features, or services other than risk-adjusted returns) the designated investment alternative brings to furthering the purposes of the plan</p> <table border="0" style="width: 100%;"> <tr> <td style="width: 40%; vertical-align: middle; text-align: center;"> <i>Highlights from examples</i> </td> <td style="vertical-align: top;"> <ul style="list-style-type: none"> <li>• A fiduciary is not required to select the designated investment alternative with the lowest fees and expenses as long as it follows a prudent process that confirms the selected designated</li> </ul> </td> </tr> </table>   | <i>Highlights from examples</i> | <ul style="list-style-type: none"> <li>• A fiduciary is not required to select the designated investment alternative with the lowest fees and expenses as long as it follows a prudent process that confirms the selected designated</li> </ul>  |
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<sup>10</sup> *Id.* at 16095-6.

<sup>11</sup> *Id.* at 16103.

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| Factor                   | <i>Steps Required of the Fiduciary<br/>(directly or by relying on advice of a prudently selected investment advice fiduciary or prudently delegating to an investment manager)</i> |  |
|--------------------------|--|--|
|                          |  | <p>investment alternative furthers the plan's purpose after comparing it to similar investments.</p> <ul style="list-style-type: none"> <li>Fiduciaries in the examples prudently determine that higher fees and expenses are justified after considering the quality of services provided by the investment manager of the designated asset alternative or the designated investment alternative's specific features (such as a lifetime income feature), risk-adjusted expected returns over an appropriate horizon or diversification benefits.</li> </ul>  |
| 3. Liquidity             | <p><i>Highlights from examples</i></p>   | <p>Determine that the designated investment alternative will have sufficient liquidity to meet the anticipated needs of the plan at both the plan and individual levels.</p> <ul style="list-style-type: none"> <li>Fiduciaries will need to ensure (with support from a qualified professional where appropriate) sufficient transparency around the liquidity of a designated investment alternative in order to comply with this factor, including that investment managers of the designated investment alternatives adopt liquidity management plans similar to those required of funds registered under the Investment Company Act of 1940 (the "1940 Act")</li> </ul>   |
| 4. Valuation             | <p><i>Highlights from examples</i></p>   | <p>Determine that the designated investment alternative has adopted adequate measures to ensure that it is capable of being timely and accurately valued in accordance with the needs of the plan.</p> <ul style="list-style-type: none"> <li>Examples focus on whether the sources and processes of valuation are reliable, particularly where market prices are not observable, and emphasize that private or alternative assets require independent, conflict-free valuation processes, consistent methodologies and active fiduciary review of those processes.</li> <li>Alternative assets and other hard-to-value investments require heightened diligence and conflict analysis at times. Managers of such assets may be asked to document and represent to a timely and independent valuation process.</li> <li>Fiduciaries in the examples rely on a range of common valuation procedures, including compliance with the FASB ASC 820 or the valuation requirements in the 1940 Act.</li> </ul> |
| 5. Performance Benchmark | <p><i>Highlights from examples</i></p>   | <p>Determine that each designated investment alternative has a meaningful benchmark,<sup>12</sup> and compare the risk-adjusted expected returns<sup>13</sup> of the designated investment alternative to the meaningful benchmark.</p> <ul style="list-style-type: none"> <li>Complex alternative assets may require specialized benchmarking methodologies and may require the advice of independent investment advice fiduciaries.</li> </ul>   |

<sup>12</sup> A "meaningful benchmark" is an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives and risks to the designated investment alternative.

<sup>13</sup> The "risk-adjusted expected returns" of the designated investment alternative may be determined based on its historical performance unless it has none, in which case it may be determined based on the historical

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| <i>Factor</i>        | <i>Steps Required of the Fiduciary<br/>(directly or by relying on advice of a prudently selected investment advice fiduciary<br/>or prudently delegating to an investment manager)</i>   |  |
|----------------------|--|--|
|                      |  | <ul style="list-style-type: none"> <li>• Fiduciary’s process may be inadequate where benchmarks are misaligned, such as comparing a target date fund to a large capitalization index.</li> <li>• By contrast, for more complex or diversified investments, including those with alternative asset components, fiduciaries may rely on custom or composite benchmarks that combine multiple indices or methodologies to reflect the investment’s underlying allocation and strategy.</li> </ul> |
| <i>6. Complexity</i> | <p>Determine that the plan fiduciary itself has the skills, knowledge, experience and capacity to comprehend the designated investment alternative sufficiently to discharge its obligations under ERISA and the governing plan documents.</p> <p>If a plan fiduciary does not have requisite background to understand a complex investment, it must make a prudent selection of an investment professional for assistance.</p> <p style="text-align: center;"><i>Highlights from examples</i></p> | <ul style="list-style-type: none"> <li>• Fiduciaries must understand each designated investment alternative in a plan and seek expert assistance where needed, especially if considering complex or nontraditional investments.</li> </ul>   |

## Key Takeaways and Implications

### Asset-Neutral Rule

As noted above, the Proposed Rule broadly interprets the duty of prudence under ERISA and would implement a process-based safe harbor for the prudent selection of any designated investment alternatives across the entirety of a fiduciary’s plan’s menu, including traditional and alternative assets. The Proposed Rule explicitly covers both direct and indirect interests in a wide range of alternative investments, including pooled investment vehicles, digital assets, project finance and real estate interests and commodities interests.

The safe harbor is intended to address the complex fiduciary considerations that fiduciaries could face when selecting alternative investments for a plan’s menu.<sup>14</sup> The Proposed Rule may lead fiduciaries to favor alternative investments within traditional regulated products—such as funds registered under the 1940 Act – that allow them to efficiently carry out a prudent process in compliance with the Proposed Rule, while creating challenges for other alternative investment product structures.

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performance of a different investment with similar mandates, strategies, objectives and risks and that is not the meaningful benchmark.

<sup>14</sup> Release, 91 Fed. Reg.16095.

**Reliance on External Investment Professionals**

The Proposed Rule and Release include ample indications that fiduciaries should feel encouraged to rely on investment advice fiduciaries and investment managers in order to satisfy the safe harbor. The Release states that it would be “indicative of a prudent process” if a plan fiduciary reasonably relies on recommendations of a prudently selected investment advice fiduciary, or prudently delegates compliance to an investment manager. However, the Proposed Rule does not specify any particular process that a plan fiduciary must follow in order to establish that it acted prudently in selecting an investment adviser or delegating to an investment manager.<sup>15</sup>

The Release notes that none of the safe harbors *require* a plan fiduciary to seek assistance from an investment advice fiduciary or investment manager, regardless of whether such assistance is referred to in the factual discussion of the safe harbor.<sup>16</sup> With that said, a plan fiduciary must seek assistance from a prudently selected qualified investment advice fiduciary, investment manager, or other individual if the fiduciary determines it does not understand a designated investment alternative well enough to discharge its obligations under ERISA and the applicable plan documents.<sup>17</sup>

**Plan Fiduciaries Developing Processes to Satisfy the Safe Harbor May Face Certain Implementation Challenges**

A likely consequence of the Proposed Rule is that fiduciaries seeking to rely on the safe harbor will revisit their existing processes for selecting plan investment options and seek to maintain a documentary record evidencing the fiduciary’s investment committee’s consideration of each factor within the safe harbor, to the extent applicable, to a selection decision.<sup>18</sup>

Such processes should ensure that plan fiduciaries are able to reliably obtain sufficient information about each investment alternative to understand the designated investment alternative and its attendant risks. Developing the procedures and inputs to conduct a prudent process will likely require coordination among plan fiduciaries, the investment managers of the designated investment alternatives and outside service providers engaged by the plan fiduciaries.

Depending on the type of designated investment alternative and available information, plan fiduciaries and their outside service providers may find implementing certain prongs of the safe harbor more challenging.

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<sup>15</sup> *Id.* at 16127.

<sup>16</sup> *Id.* at 16103.

<sup>17</sup> Proposed Rule, § 2550.404a-6, proposed Paragraph (I).

<sup>18</sup> The Release states that “plans are under no obligation to use the safe harbor or to change their plan investment menu in response to the Proposed Rule.” Release, 91 Fed. Reg. 16128.

- *Fees and Performance Benchmarks.* Both the fees and performance benchmark prongs of the safe harbor require the plan fiduciary to identify similar alternatives to the contemplated designated investment alternative. To comply, a plan fiduciary must not only identify similar investments but also obtain information on their fees and risk-adjusted expected returns. Given the lack of publicly available, standardized reporting for certain types of alternative assets, it may be challenging to obtain sufficient information about the fee structure or identify a meaningful benchmark for certain investments and obtain the risk-adjusted returns of such benchmarks.
- *Liquidity.* As noted above, the Proposed Rule would require fiduciaries to consider whether a designated investment alternative has sufficient liquidity to meet the plan's and its participants' anticipated needs. The Proposed Rule's examples provide that fiduciaries may satisfy this requirement by ensuring that the designated investment alternative has adopted a written liquidity risk management program similar to those required under rule 22e-4 under the 1940 Act, either by obtaining a representation from the investment manager of the designated investment alternative or performing appropriate due diligence on such plan. If implemented, the Proposed Rule will likely limit designated investment alternatives to those with rule 22-4- compliant liquidity management or similar programs, even though certain aspects of such programs, such as illiquid asset limits may limit the nature and amount of alternative assets that may be included in a plan.
- *Valuation.* Under the valuation prong, fiduciaries must confirm that the designated investment alternative has adopted adequate measures to provide timely and accurate valuations. Fiduciaries, investment managers of the designated investment alternatives and any other necessary qualified outside service providers may work collaboratively to determine how to best apply the standard valuation procedures identified in the Proposed Rule's examples to value the designated investment alternatives under consideration by the plan fiduciary.

### **Alternative Managers May Need to Consider Adjustments to Their Own Practices in Order to Facilitate Fiduciaries' Compliance with Safe Harbor**

As noted above, the Proposed Rule encourages plan fiduciaries to increase their reliance (through prudent selection processes) on investment managers for the designated investment alternatives and other qualified outside service providers, but also underscores that such reliance must be grounded in prudent decision-making and diligence conducted by the fiduciary. Notably, a majority of the Proposed Rule's examples involve the plan fiduciary hiring or consulting with a qualified outside service provider, such as a professional investment adviser or investment manager, to advise the plan fiduciary on its selection of a potential designated investment alternative. The examples repeatedly state that as part of such prudent process, the plan fiduciary must critically review and determine that it actually understands the investment advice provided by such qualified outside service provider.

A foreseeable result of this dynamic is that investment managers will increasingly be requested to provide written representations and facilitate due diligence on performance, fees and expenses, valuation methodologies, liquidity management, benchmarking and conflicts of interest. In addition, managers may need to adjust their reporting and disclosure practices and otherwise update their documentation and policies (such as conflict policies) of the designated investment alternatives and, where appropriate, their underlying assets, in order to support plan fiduciaries' efforts to avail themselves of the safe harbor.

**Implications for Magnitude of, and Fiduciaries' Ability to Manage, Their Litigation Risk**

The DOL notes that variation in plan fiduciaries' procedures for selecting plan investments exposes plans to litigation risk, particularly when plan offerings are atypical.<sup>19</sup> It is the DOL's view that fiduciaries who objectively, thoroughly, and analytically consider and make a determination regarding the safe-harbor factors should be able to confidently rely on that determination without undue litigation risk. This deference could meaningfully simplify how courts assess a plaintiff's claim that a plan fiduciary breached its duty of prudence in selecting an investment, particularly as plaintiffs generally bear the burden of proof.<sup>20</sup> The Release states that Proposed Rule's deference to a plan fiduciary's judgment after a prudent process should carry persuasive weight to courts under *Skidmore* deference,<sup>21</sup> but it remains unclear how courts will interpret and apply the safe harbor and deference to the DOL if the Proposed Rule is adopted. Moreover, as discussed further below, the safe harbor only applies to the selection of designated investment alternatives, which is but one fact of the duty of prudence, and the Proposed Rule is expressly not intended to address an ERISA fiduciary's duties aside from the duty of prudence.

**Decisions and Actions Not Covered by the Safe Harbor**

The Proposed Rule does not specify the process for how a fiduciary may prudently curate an overall menu of designated investment alternatives and the DOL invites comment on whether future guidance should address the process.

The duty of prudence applies to both a plan fiduciary's selection and ongoing monitoring of designated investment alternatives. The safe harbor, however, does not cover a fiduciary's prudent ongoing monitoring of designated investments alternatives after they are included in a plan menu.<sup>22</sup> The DOL plans to issue

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 16092.

<sup>21</sup> *Id.*

<sup>22</sup> The duty to monitor was the recent subject of two Supreme Court decisions, which affirmed the DOL's long-held position that ERISA fiduciaries have a continuing obligation to monitor all plan investments—not just a subset—and to remove options that the fiduciary determines, after a rigorous process, are no longer appropriate. *Hughes v. Nw. Univ.*, 595 U.S. 170, 176 (2022); *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015).

interpretive guidance on a fiduciary's obligations under ERISA to continue to monitor designated investment alternatives and expects that a fiduciary that follows the processes set forth in the Proposed Rule—including the illustrative safe-harbor examples—during appropriately established monitoring cycles will meet ERISA's monitoring requirements.<sup>23</sup>

In addition, the safe harbor does not apply to “brokerage windows,” “self-directed brokerage accounts,” or similar plan arrangements that allow participants to select investments beyond the plan menu. The Proposed Rule's definition of “designated investment alternatives” explicitly carves out these arrangements.<sup>24</sup> The Release notes that the application of fiduciary principles to these plans “may be somewhat different.”<sup>25</sup> It is unclear from the Release whether further guidance on a fiduciary's obligations with regard to these plans is forthcoming.

As noted above, the safe harbor does not expressly extend to a fiduciary's selection of, or delegation to, a third-party service provider (such as an investment advice fiduciary or investment manager). A fiduciary that acts imprudently in this selection or delegation decision will, as a threshold matter, be precluded from qualifying for the safe harbor for any selection of investment alternatives made in reliance on such outside service provider. The Release states that there is “too great a chasm between the processes for selecting designated investment alternatives and the processes for selecting and assessing contracts with service providers” for both to be covered by the Proposed Rule's safe harbor.<sup>26</sup>

Relatedly, the Proposed Rule makes clear that nothing in the proposed regulation excuses a fiduciary from complying with its obligations to act loyally and avoid prohibited conflicts of interest under sections 404(a)(1)(A) or 406 of ERISA, respectively. These duties are separate requirements that ERISA fiduciaries must comply with, and are not impacted by the Proposed Rule. The DOL states in the Release that it does not intend to relax the loyalty requirement or waive any conflict prohibitions in relation to a fiduciary evaluation of alternative assets.<sup>27</sup>

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The Supreme Court emphasized that offering a broad menu of investment choices does not excuse fiduciaries from breaches if some options are poorly managed. 575 U.S., at 529–530.

<sup>23</sup> Release, 91 Fed. Reg. 16093-16094.

<sup>24</sup> Proposed Rule, § 2550.404a-6, proposed Paragraph (m).

<sup>25</sup> Release, 91 Fed. Reg. 16103.

<sup>26</sup> *Id.* at 16127.

<sup>27</sup> *Id.* at 16095.

## Next Steps

The Proposed Rule is open for public comments, which are due on June 1. Comment is specifically invited on the comprehensiveness and applicability of the six factors, as well as the impact of the rule on, among other topics, how plan fiduciaries consider the inclusion of alternative assets, fiduciary litigation and cost, outside service providers, including investment and retirement professionals, and scope of a plan's insurance needs and costs. In addition, stakeholders are encouraged to identify any additional factors that could enhance the proposed framework.<sup>28</sup> Plan sponsors and fiduciaries, asset managers and other industry participants and stakeholders should carefully review the Release and Proposed Rule, evaluate their potential implications and consider engaging in this comment process.

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<sup>28</sup> *Id.* at 16096.

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