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Investment Management

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The Department of Labor's Proposed Safe Harbor for Alternative Investments in 401(k) Plans

The U.S. Department of Labor ("DOL") proposed a landmark regulation on March 30, 2026, that could fundamentally reshape the investment landscape for America's 401(k) plans. The proposed rule, titled "Fiduciary Duties in Selecting Designated Investment Alternatives," would create a process-based safe harbor under the Employee Retirement Income Security Act of 1974 ("ERISA") for plan fiduciaries selecting investment options—including alternative investments such as private equity, infrastructure, digital assets, and commodities—for participant-directed defined contribution retirement plans. If finalized, the proposed rule could provide plan fiduciaries a framework to offer investment options that reach beyond the familiar world of mutual funds, index funds, and target date funds, potentially opening the floodgates to trillions of dollars in retirement savings for alternative asset managers.

The proposed rule is currently in the review and comment stage, and a finalized rule is expected later this year or early next year. There are a number of actions that plan sponsors can take to start preparing on the audit, compliance, and tax fronts including reviewing compliance frameworks and policies to identify potential updates and additions. It will also be important to review any plan fiduciary concerns associated with offering alternative investments as an option.

Key Takeaways

- The DOL's proposed "Fiduciary Duties in Selecting Designated Investment Alternatives" rule would create a safe harbor for 401(k) plans evaluating all investment alternatives.
- There are six factors of the safe harbor termed "The Prudence Prism" through which a plan fiduciary must focus its analysis when selecting an alternative investment including expected performance, fees and expenses, liquidity, valuation, benchmarking, and complexity.
- The proposed rule carries practical implications for 401(k) plan fiduciaries: safe harbor is process-based; at least initially, target date funds are likely to be the primary vehicle for alternative assets in 401(k) plans; litigation risk is reduced, not eliminated; plan fiduciaries should engage qualified investment advisors when evaluating investment alternatives; and fee transparency is non-negotiable.

A BRIEF HISTORY: HOW WE GOT HERE

To understand the significance of the proposed rule, one must appreciate the regulatory landscape that has kept alternative investments on the sidelines of 401(k) plans for

decades. The DOL's 1979 Investment Duties Regulation, codified at 29 C.F.R. § 2550.404a-1, established that a plan fiduciary satisfies its duty of prudence by giving "appropriate consideration" to all relevant facts and circumstances, but its framework was general and did not specifically address alternative investments in participant-directed plans. Over the following decades, the DOL issued supplementary guidance—addressing derivatives in 1996 and hedging strategies in 2006—affirming ERISA's neutrality on investment types while requiring fiduciaries to consider how nontraditional assets fit within a plan's portfolio. The pivotal moment came in June 2020, when the DOL issued an information letter concluding that a fiduciary could offer a professionally managed asset allocation fund with a private equity component as a designated investment alternative for a 401(k) plan, identifying complexity, fees, valuation, and liquidity as relevant factors—a framework that foreshadowed the current proposal.

However, the regulatory pendulum swung under the Biden administration. In December 2021, the DOL cautioned plan fiduciaries against selecting designated investment alternatives with a private equity component for a "typical" 401(k) plan, and in March 2022, directed fiduciaries to exercise "extreme care" before adding cryptocurrency options to plan menus. The current Trump administration reversed course decisively: in May 2025, the DOL rescinded the 2022 cryptocurrency guidance, noting its "extreme care" standard was "not found in ERISA," and in August 2025, rescinded the 2021 supplemental statement on private equity. That same month, President Trump signed Executive Order 14330, titled "Democratizing Access to Alternative Assets for 401(k) Investors," declaring it the policy of the United States that "every American preparing for retirement should have access to funds that include investments in alternative assets" and directing the DOL to propose regulations, including "appropriately calibrated safe harbors," designed to "curb litigation risk."

THE LITIGATION PROBLEM

The proposed rule did not emerge from a policy vacuum. DOL's preamble makes clear that the surge in ERISA litigation is a central motivating force. Industry reports document that ERISA class action filings reached "all-time highs" in 2024, and since 2016, over half of plans with more than $1 billion in assets have been targeted by at least one lawsuit. The result has been a powerful incentive for plan fiduciaries to avoid anything outside the conventional mix of mutual funds, index funds, and target date funds.

WHAT THE PROPOSED RULE SAYS

The proposed rule would add a new regulation at 29 C.F.R. § 2550.404a-6. Its central architecture is a process-based safe harbor: a plan fiduciary that "objectively, thoroughly, and analytically evaluates" the factors listed in the proposed rule when selecting a designated investment alternative would be entitled to a legal presumption of prudence, and such a determination would receive "significant deference."

Critically, the proposed rule is asset-class neutral. The proposal states that ERISA "does not require or restrict any specific type" of investment, so long as it is legal. Said differently, there is no per se rule prohibiting private equity, digital assets, real estate, commodities, infrastructure, or lifetime income strategies. The safe harbor applies to all investment selections—not just alternatives—though it was plainly prompted by the desire to clear the path for nontraditional investments.

THE PRUDENCE PRISM: SIX FACTORS OF THE SAFE HARBOR

At the heart of the proposed rule is a framework the authors of this article have termed "The Prudence Prism"—six factors through which a plan fiduciary must focus its analysis when selecting any designated investment alternative. These six factors separate the broad duty of prudence into distinct, manageable, and examinable elements, and together, they form the analytical lens through which plan fiduciaries can demonstrate that their decision-making process was thorough, objective, and defensible. The six factors are non-exhaustive, meaning a plan fiduciary should still consider any other factors "the fiduciary knows or should know are relevant to the particular designated investment alternative."

1. **Expected Performance**
   The plan fiduciary must consider ""a reasonable number of similar alternatives" and evaluate the investment's risk-adjusted expected returns for the purposes of the plan. This factor reinforces the principle that prudence requires comparative analysis, not merely a review of the investment in isolation. Importantly, the proposed rule recognizes that an appropriate time horizon for retirement savings may be a long-term one, reflecting the nature of retirement savings itself.

2. **Fees and Expenses**
   The plan fiduciary must consider a reasonable number of similar alternatives and determine that the fees and

expenses of the investment are "appropriate, taking into account its risk-adjusted expected returns, net of fees and expenses, and any other value the designated investment alternative brings to furthering the purposes of the plan." Notably, the proposed rule defines "value" to include benefits, features, or services other than investment returns, which could permit higher fees where the investment offers ancillary benefits to participants or the plan. This is significant because alternative investments already tend to carry higher and more complex fee structures than traditional funds.

3. **Liquidity**
   The plan fiduciary must consider whether the investment "will have sufficient liquidity to meet the anticipated needs of the plan at both the plan and individual levels." One step further, the proposed rule recognizes that because 401(k) plans are long-term retirement savings vehicles, "there is no requirement that a fiduciary select only fully liquid products." Therefore, it is plausible that a plan fiduciary may decide it is prudent to invest in less liquid assets in hopes of achieving additional risk-adjusted return. It will, however, be necessary to have enough liquidity to pay out former employees who request distributions from the plan, along with anyone who has a distributable event based on the plan's provisions.

4. **Valuation**
   The plan fiduciary must determine that the investment "has adopted adequate measures to ensure that the designated investment alternative is capable of being timely and accurately valued in accordance with the needs of the plan." This factor addresses one of the most significant operational challenges of including alternative assets in 401(k) plans: most such plans operate on a daily valuation cycle, while many alternative investments are valued only quarterly.

5. **Benchmarking**
   The plan fiduciary must consider whether "each designated investment alternative has a meaningful benchmark" and compare the investment's risk-adjusted expected returns to that benchmark. This factor takes on added significance in light of the Supreme Court''s grant of certiorari in *Anderson v. Intel Corporation Investment Policy Committee*, which will address whether an investor claiming a breach of fiduciary duty under ERISA predicated on a fund's underperformance requires pleading a "meaningful benchmark." This issue matters even more right now because the Supreme Court is about to decide whether ERISA plaintiffs must show a proper benchmark when claiming a plan investment underperformed.

6. **Complexity**
   The plan fiduciary must appropriately consider the complexity of the investment and determine whether it has the skills, knowledge, experience, and capacity to comprehend it sufficiently or whether it must seek assistance from a qualified professional.

IMPLICATIONS FOR 401(K) PLAN FIDUCIARIES

Even at the proposal stage, the rule has meaningful and immediate practical implications.

Process remains paramount. At its core, the safe harbor is a process standard. It neither favors nor disfavors any particular investment type; what it rewards is rigor and documentation. Plan fiduciary committees should embed the six Prudence Prism factors into every investment selection and monitoring cycle, confirm that meeting minutes reflect substantive deliberation, and maintain a clear evidentiary record that their process was objective, thorough, and analytical.

The playing field is widening. The proposed rule's asset-class neutrality and its recognition that full liquidity is not required signal that plan fiduciaries may now more confidently consider investments such as private equity sleeves within target date funds, real estate funds, infrastructure strategies, and even digital asset exposure. Target date funds are likely to be the primary vehicle through which alternative assets enter 401(k) plans. According to 2024 data from Vanguard, approximately 84 percent of defined contribution plan participants already use target date funds, and target date fund structures can embed an alternatives allocation within a diversified, professionally managed portfolio.

Litigation risk is reduced, not eliminated. The proposed safe harbor creates a presumption of prudence, but it does not provide absolute immunity. Moreover, in a post-*Chevron* world, the Supreme Court has removed deference for agency rules, meaning the regulation would carry only "persuasive authority" rather than binding deference. The safe harbor framework also creates the risk, as to both alternative and conventional investment assets, that individuals may argue that a failure to diligently follow the evaluation process not only takes plan fiduciaries out of the safe harbor, but can be used as evidence of imprudent decision-making.

Professional help may be necessary. Where a Plan Fiduciary lacks the skills, knowledge, experience, and capacity to comprehend the complexity of a designated investment alternative sufficiently to discharge its obligations under ERISA and the governing plan documents, the Plan Fiduciary should engage a qualified investment advice fiduciary or investment manager. This threshold is particularly relevant for smaller plans, whose fiduciary committees are often composed of company executives or human resources ("HR") professionals without specialized investment expertise, rather than dedicated investment staff or standing investment consultants.

Fee transparency is non-negotiable. 401(k) plans are subject to participant fee disclosure requirements, and plan fiduciaries must determine that every designated investment alternative offers complete fee transparency and that the fees and expenses are appropriate in relation to its risk-adjusted expected returns and the value it brings to the plan. Because plan fiduciaries must comprehend and evaluate the full cost structure, fund managers offering alternative products to 401(k) plans will need to provide clear, comparable fee disclosures to support that analysis.

WHAT PLAN FIDUCIARIES SHOULD CONSIDER IN PREPARING FOR THE FINAL RULE

Plan service providers are encouraged to begin taking action now to prepare for implementation of the final rule. From an audit, compliance, and tax perspective, 401(k) plan fiduciaries can take several steps to position themselves ahead of the final requirements and to be ready to offer alternative investments within their plans, including:

1. Begin to consider how the safe harbor factors can map into existing investment processes and where changes may need to occur.

2. Think about what will constitute a reasonable benchmark for alternative investments, and how that will be established as a part of the assessment process.

3. Start to develop an assessment framework for considering alternative investments, including how this process will be documented to demonstrate compliance with the safe harbor provisions.

4. Review policies to map out where updates or new policies may be required for issues such as liquidity, valuations, and fees.

5. Assess procedures around the use of third-party advisers and how they evaluate and recommend complex and alternative assets.

6. Continue to monitor developments from the DOL as well as the Supreme Court (*Anderson v. Intel Corp.*) and other governmental branches and regulators.

The most significant plan audit challenge involves valuation and timing. In practice, audited financial statements of alternative investments such as limited partnerships are not available when plan custodians such as banks and trust companies complete annual financial reporting packages for employee benefit plans. Therefore, the valuation of equity interests are often based on stale information, and adjustment is required to properly reflect the value held at the plan's year end. Plan fiduciaries should begin to consider how a plan bridges that gap, whether through trustee recertification (related to ERISA Section 103(a)(3)(C) audits), updated net asset value statements, or other means, and assess whether controls related to that process are sufficient to support reliance on the reported values.

Plan fiduciaries who anticipate including alternative investments into their plans, should also consider the increased expenses that may come from their inclusion. It is likely that the inclusion of alternative investments will affect plan audit fees, given the additional procedures and disclosures required, and may elevate overall plan risk. Further, if a flan fiduciary needs to hire an outside investment adviser to help evaluate an investment option, that would be another added cost.

LOOKING AHEAD

The comment period for the proposed rule closed on June 1, 2026, and the final rule could be issued by the end of the year. For plan fiduciaries, the message is clear: the regulatory environment is shifting to accommodate a broader universe of investment options, but the fundamental obligation of prudent process remains unchanged. Whether the proposed rule is finalized in its current form or modified in response to comments, the Prudence Prism framework offers a valuable roadmap for plan fiduciaries considering how—and whether—to open their plan menus to alternative investments. The plan fiduciaries who document a thorough, objective, and analytical evaluation of performance, fees, liquidity, valuation, benchmarking, and complexity will be best positioned to withstand scrutiny, regardless of where the regulatory landscape ultimately settles.

SEC RULEMAKING

SEC Proposes Amendments to Small Entity Definitions for Investment Companies and Investment Advisers

The SEC proposed amendments to the rules that define which registered investment companies, investment one billion dollars in assets under management.

Key Questions Plan Sponsors Should be Asking:

- Do we have a process for obtaining audited financial statements from our alternative investment managers on a timely basis?
- Where a quarter lag exists, have we obtained trustee recertification or updated valuations, and are those controls documented?
- Can we clearly explain to our auditors how each alternative investment is valued, what the reporting cycle is, and how any gap period is addressed?
- Do our investment committee minutes reflect that we understood the complexity, fees, liquidity, and valuation methodology of each alternative investment before selecting it?
- Have we engaged a qualified investment advisor with expertise in alternative investments to support our fiduciary decision-making?
- Are our participant fee disclosures current and accurate, including the full cost structure of any alternative investment options?
- Have we clearly disclosed to participants any liquidity restrictions, lock-up periods, redemption limitations, or withdrawal penalties associated with alternative investment options, and are those disclosures reflected in the plan's summary plan description and fee disclosure notices?
- Do participants have sufficient information to understand how restrictions on alternative investments may affect their ability to access their account balances, take loans, or receive hardship distributions?

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