

Dear Prudence: Does the DOL’s Proposed Rule Signal a Brand-New Day for 401(k)s and Alternative Assets?

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On March 30, 2026, the U.S. Department of Labor (the DOL) published its heavily anticipated proposed rule entitled “Fiduciary Duties in Selecting Designated Investment Alternatives” (the Proposed Rule).¹ Over the years, sponsors of private funds and other investment vehicles (fund sponsors) have been laying the groundwork to enable 401(k) plans to gain greater access to alternative assets. Notwithstanding these efforts, many 401(k) plan fiduciaries have been reluctant to offer investment options with alternative asset exposure due to unclear regulatory guidance and risks relating to participant litigation. The Proposed Rule aims to clarify the application of ERISA’s duty of prudence to the selection of 401(k) investment options. If adopted as written, the Proposed Rule has the potential to establish more defined pathways for plan fiduciaries to consider investment options with greater alternative asset exposure, and for fund sponsors and investment managers to develop tailored alternative asset-focused options for those fiduciaries to evaluate.

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¹ See the Proposed Rule available at <https://www.federalregister.gov/documents/2026/03/31/2026-06178/fiduciary-duties-in-selecting-designated-investment-alternatives>.



What Prompted the DOL to Issue the Proposed Rule?

On August 7, 2025, the Trump Administration released an Executive Order, “Democratizing Access to Alternative Assets for 401(k) Investors” (the Executive Order), which directed the DOL to reexamine its past guidance regarding the investment of 401(k) plans in alternative assets and to issue clarifying guidance as appropriate. The Proposed Rule is a direct response to the Executive Order, which articulated the position that without access to investments in alternative asset classes, the more than 90 million 401(k) plan participants are missing out on the “potential growth and diversification opportunities associated with alternative asset investments” currently afforded to institutional investors, high-net-worth individuals, and retirement plans for government workers.²

What is the Scope of the Proposed Rule?

While the Executive Order directed the DOL to revisit its past guidance relating to alternative assets in 401(k) plans, the Proposed Rule provides guidance with respect to the selection of *all* investment options; it does not separately define “alternative assets” or provide special rules relating thereto. In support of the broad applicability of the Proposed Rule, the DOL cited the “asset neutral” approach under the Employee Retirement Income Security Act of 1974, as amended (ERISA), which does not favor (or prohibit) any particular asset class or investment strategy (except in the case of illegal investments, which are clearly prohibited). As part of this discussion, the DOL stated that “there is no *per se* rule respecting investment in alternative assets generally or the inclusion of private market investments,” referencing direct or indirect interests in equity, debt, real estate (including real estate related debt), commodities, project financing infrastructure development, and actively managed vehicles investing in digital assets. However, the DOL did not provide guidance regarding whether any of the

foregoing investments should be included as part of a 401(k) plan investment line-up.

What Falls Outside the Scope of the Proposed Rule?

Notwithstanding its broad applicability to all investment options, the Proposed Rule is narrowly drafted and only addresses the duty of prudence as it applies to plan fiduciaries selecting investment options. The Proposed Rule does not address the roles and responsibilities of other relevant parties, including managers of investment options regarding how they may navigate the complexities of including alternative assets (e.g., with respect to liquidity and valuation). Further, the Proposed Rule does not address considerations relating to ERISA’s reporting requirements, conflict of interest and prohibited transaction rules, or the “plan asset” regulations, each of which may be relevant with respect to the offering and structuring of investment options with alternative assets.

While somewhat obvious, it is worth noting that the Proposed Rule only applies to the prudent process under ERISA applicable to plan fiduciaries. It does not address securities laws and other considerations applicable to structuring and offering or investment options, and these must be separately considered.

The Proposed Rule expressly does not apply to self-directed brokerage windows “or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan and shall not include investments acquired or available through any such arrangements.”³ Accordingly, investments made through self-directed brokerage windows should not be impacted by the Proposed Rule.

How Does the Proposed Rule Fit Within ERISA’s Existing Framework?

² See the Executive Order available at [https://www.whitehouse.gov/presidential-](https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/)

[actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/](https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/).

³ See the Proposed Rule.

To properly contextualize the Proposed Rule, it is useful to revisit a fiduciary's duties under ERISA's duty of prudence relating to the selection of 401(k) investment options. ERISA obligates plan fiduciaries to prudently⁴ select and monitor⁵ investment options for 401(k) plans, and fiduciaries can be held liable for losses resulting from their failure to do so. Under the DOL's current guidance, when selecting an investment option, plan fiduciaries are obligated to (i) "give appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment . . . including the role the investment or investment course of action plays in that portion of the plan's investment portfolio or menu with respect to which the fiduciary has investment duties" and (ii) "act accordingly" (which is not defined).⁶ The Proposed Rule is intended to supplement and expand this existing guidance.

What Does the Proposed Rule Do?

The Proposed Rule seeks to (i) establish a "safe harbor" process that, if followed by a fiduciary in connection with the selection of an investment option, is intended to create a rebuttable presumption of prudence, and (ii) provide a clearer regulatory framework for 401(k) plan fiduciaries to prudently select investment options. The Proposed Rule is a mix of regulatory principles and examples designed to illustrate the applicability of these principles to various situations.

What is the "Safe Harbor" and Presumption of Prudence?

Echoing concerns set forth in the Executive Order, the DOL stated "that the prevailing climate of litigation poses significant challenges for plan sponsors and

fiduciaries... [and] much of this litigation has focused on well-designed plans with prudent processes, with the challenges often ultimately failing, but not before significant resources have been expended in defense."⁷ In an effort to address the foregoing, the Proposed Rule sets forth a non-exhaustive list of six factors that, if objectively, thoroughly and analytically considered by a plan fiduciary, give rise to a presumption of prudence. While the DOL labeled this a "safe harbor," it is important to note that it does not completely insulate fiduciaries from litigation-related risks associated with the selection of investment options. In practice, plaintiffs claiming that a fiduciary breached its duty of prudence when selecting an investment option may now need to specifically address deficiencies relating to the factors set forth in the "safe harbor."

The six factors set forth in the Proposed Rule are as follows:

1. *Performance*: The fiduciary must consider a reasonable number of similar investment options and conclude that the selected option enables participants to maximize risk-adjusted returns over an appropriate time horizon (net of anticipated fees and expenses). In short, fiduciaries should prioritize risk-adjusted outcomes over appropriate timelines instead of chasing the highest returns.
2. *Fees*: The fiduciary must consider a reasonable number of similar investment options and determine that the relevant fees and expenses are appropriate taking into consideration risk-adjusted returns and any other "value" (e.g., benefits, features or other services). The examples emphasize that the analysis relating to fees is value-driven, not purely a cost-minimization exercise, permitting higher-fee options where

⁴ ERISA's duty of prudence requires fiduciaries to act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person 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. See Section 404(a)(1)(B) of ERISA.

⁵ In the preamble to the Proposed Rule, the DOL stated that it intends to issue additional guidance relating to the duty to

monitor investment options. Once finalized, the principles set forth in the Proposed Rule will govern the duty to monitor until additional guidance is released. See preamble to Proposed Rule.

⁶ See 29 C.F.R. 2550.404a-1 and the Proposed Rule.

⁷ See Proposed Rule.

supported by enhanced features but treating as imprudent failure to account for identical lower-cost alternatives.

3. *Liquidity*: The fiduciary must determine that the investment option provides sufficient liquidity to meet the needs of the 401(k) plan and the individual participants.⁸ The examples provided by the DOL clarify that the liquidity analysis is context-specific and two-tiered (participant and plan level), allowing for investments with redemption restrictions or illiquid assets where fiduciaries evaluate liquidity risk through regulatory frameworks, independent diligence, or comparable risk management programs, and balance those constraints against the investment's value proposition. This determination may also require consideration of operational constraints, including participant transaction frequency. The examples cite the plan fiduciary's ability to rely on written representations from the manager of the investment option regarding liquidity characteristics.
4. *Valuation*: The fiduciary must determine that the investment option is capable of being timely and accurately valued in accordance with the underlying needs of the 401(k) plan. The DOL emphasized that fiduciaries must ensure that valuation processes are reliable, timely, and independent, with particular support for reliance on market-based pricing, audited fund disclosures, or independent valuation frameworks (referencing ASC 820⁹ for illiquid assets). Conversely, processes that rely on conflicted or proprietary valuations without independent safeguards are unlikely to satisfy this factor.
5. *Performance Benchmarks*: The fiduciary must determine that the investment option has a meaningful benchmark and compare the risk-

adjusted returns to such benchmark. The DOL's examples illustrate that benchmarks must be truly comparable in strategy, risk and objectives, rather than generic indices, and fiduciaries may utilize custom or composite benchmarks (including for alternative assets) where necessary to enable an appropriate comparison.

6. *Complexity*: The fiduciary must assess whether they have the skill, knowledge, experience and capacity to evaluate the investment option and, if not, should retain a third-party investment manager or advisor (under Sections 3(21) or 3(38) of ERISA) who is sufficiently experienced with respect to such investment option. In essence, fiduciaries are not precluded from selecting complex investment options, but must be able to demonstrate that they have met the prudence threshold. Under the examples, engaging qualified third-party fiduciaries may, in certain cases, be indicative of a prudent process.

Under ERISA, documentation is an important element of demonstrating compliance with the duty of prudence. With the introduction of the "safe harbor," plan fiduciaries will want to document consideration of (and determinations relating to) the factors described above in order to preserve the presumption of prudence.

What Regulatory Clarifications are Set Forth in the Proposed Rule?

The Proposed Rule does not require plan fiduciaries to incorporate any specific type of asset or asset class into a 401(k) plan's investment line-up. Instead, the Proposed Rule provides that, so long as a fiduciary follows a prudent process, there are no *per se* rules relating to alternative assets generally. Under the Proposed Rule, a 401(k) plan fiduciary must select an

⁸ With respect to participant-level liquidity, the examples address liquidity in the context of a mutual fund registered as an investment company with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 by reference to a written liquidity risk management program required by rule 22e-4. In the context of other

funds, including "collective investment trusts," the example references utilizing a "substantially similar" liquidity risk management program. *See* the Proposed Rule.

⁹ The Financial Accounting Standards Board Accounting Standards Codification 820, titled *Fair Value Measurement*.

investment line-up that allows participants to maximize risk-adjusted returns across the investments held in their plan accounts.

Consistent with existing guidance, the DOL emphasized the need for fiduciaries to engage in a prudent process and to consider all relevant facts and circumstances. In connection with these principles, the DOL emphasized that, where a fiduciary lacks the skill, knowledge or expertise to prudently evaluate an investment option, they should retain a third-party fiduciary (i.e., an investment manager and/or advisor under Sections 3(21) and 3(38) of ERISA). ERISA has long required fiduciaries to retain advisors/managers where they lack the requisite expertise to be prudent. However, the Proposed Rule contains an implicit (and, at times, nearly direct) message that the use of a third-party advisor/manager in certain situations can be indicative of a prudent process.

What Comes Next?

While the Proposed Rule represents a significant development, it also raises several ambiguities and questions. The Proposed Rule is subject to a 60-day comment period, which will end on June 1, 2026. We hope to see many of these questions constructively addressed during this comment period. The DOL has specifically asked for commentators to address a number of questions, including the interaction between the “safe harbor” requirements and the protection provided by Section 404(c) of ERISA, which is designed to insulate plan fiduciaries from liability arising out of the investment decisions made by participants. The DOL also asked for comments around various questions relating to the six factors identified in the “safe harbor.” In addition to proposing additional or alternative factors relating to the “safe harbor,” commentators may raise the following:

- One of the examples in the Proposed Rule states that a “collective investment trust” (a CIT) may demonstrate satisfaction of the liquidity factor by representing that it maintains a liquidity program that is “substantially similar” to what is required of mutual funds under the Investment Company Act of 1940 (the 40 Act). CITs are regulated by the

Office of the Comptroller of the Currency (the OCC) and are not otherwise subject to the 40 Act. Commentators may ask the DOL to consider providing an alternative path for CITs (e.g., under the OCC) and other non-mutual funds to satisfy the liquidity factor under the “safe harbor.”

- The DOL may be encouraged by commentators to consider adding more examples addressing the concept of “other value” in the context of an evaluation of fees under the “safe harbor.”
- The DOL may be asked to provide additional guidance regarding valuation in the context of non-mutual fund investment options such as CITs.

What Does This Mean for Fund Sponsors and Other Investment Managers?

The Proposed Rule does not usher in any immediate regulatory changes and, as highlighted above, there are several outstanding questions that we hope will be addressed by the DOL prior to issuing a final rule. Against this background, consider the following:

1. *Increased Opportunities for Fund Sponsors and Investment Managers:* Fund sponsors and investment managers now have a better roadmap for structuring alternative asset-focused investment options tailored specifically for 401(k) plans. Increased interest and demand for investment options with alternatives will present opportunities for fund sponsors and investment managers to potentially gain significant additional assets under management.
2. *Impact of the Safe Harbor:* The inclusion of the “safe harbor” in the Proposed Rule will likely accelerate the formation of partnerships between fund sponsors, investment managers, and traditional 401(k) platform providers even before a final rule is released. The inclusion of the presumption of prudence in the Proposed Rule may be enough to clear the way for more collaboration. In particular, the new presumption provides a much clearer pathway for 401(k) plan fiduciaries to approve the inclusion of alternative

asset-focused investment options for 401(k) plan participants.

3. *Safe Harbor Factors*: In order to facilitate greater partnership with traditional 401(k) platform providers, fund sponsors may want to incorporate the various “safe harbor” factors into their product development process for any funds or other products targeting 401(k) plans. That would include framing the valuation process for any such investment options to mirror the requirements of ASC 820, and to utilize third party valuation resources where applicable. Similarly, with respect to any such products and funds, fund sponsors may want to consider whether to incorporate a clear methodology to manage liquidity, balancing a liquid bucket and available borrowings to offset the illiquid nature of its expected portfolio of alternative asset investments. Finally, fund sponsors may want to start to consider ways in which the “safe harbor” factors (e.g., benchmarking and liquidity) can be incorporated into existing marketing materials, legal documentation (including written representations (e.g., with respect to liquidity management) and reporting processes, where applicable.
4. *Increased Demand for Third Party Fiduciary Advisors and Managers*: The DOL’s emphasis on the retention of third party advisors and/or managers (under Sections 3(21) and 3(38) of ERISA) may create opportunities for investment managers and advisors in this space beyond merely managing potential investment options that plan fiduciaries may select. We expect this may create new opportunities for managers with the relevant expertise who may not currently provide services in this space and for smaller, mid-sized managers that are familiar with the alternative asset space, but may lack the size or financial resources to launch tailored investment options to specifically target 401(k) plans.
5. *Plan Asset Considerations*: The assets of 401(k) plans constitute “plan assets” subject to ERISA. In connection with the development of strategies that facilitate investment by 401(k) plans, fund

sponsors, and investment managers may find themselves managing or advising vehicles that are subject to ERISA and/or that need to rely on less familiar “plan asset” exceptions (e.g., the “publicly offered securities” exception instead of the “venture capital operating company” and/or “less than 25%” exceptions). Fund sponsors and investment managers exploring this market and the related developments may wish to familiarize themselves with the compliance considerations involved in operating a “plan asset” ERISA fund (or relying on alternative “plan asset” exceptions noted above), as well as weigh the benefits and challenges of navigating this regulatory terrain.

If You are a Fiduciary of a 401(k) Plan, What Does This Mean for You?

The Proposed Rule does not require 401(k) plan fiduciaries to take any immediate action. However, there are a few items to consider:

1. *Assessing Current Plan*: Review current governing documents, investment policy statements, and investment line-ups to determine whether investment options with exposure to alternative assets are permitted and/or currently held by the 401(k) plan.
2. *Review Documentation Practices*: Consider whether processes and procedures may need to be enhanced to adequately document fiduciary deliberations and comparisons across the “safe harbor” factors (e.g., in committee materials and minutes).
3. *Evaluating Fiduciary Capabilities*: Evaluate whether the 401(k) plan’s current fiduciaries (e.g., retirement committee or third-party investment advisor/manager) have the requisite expertise to select, evaluate, and monitor investment options with exposure to alternative assets.
4. *Consult with Current Advisors*: Consult with current advisors and/or managers of the 401(k) plan regarding the impact of the Proposed Rule on the 401(k) plan and to discuss next steps in anticipation of a final rule.

In Conclusion

Commentators will engage with the DOL in the coming months regarding these and other considerations relating to the Proposed Rule. The 60-day comment period presents a narrow but important window to shape the final rule. If you have specific concerns or considerations you would like raised during the comment period, reach out to our team to discuss.

Whether you are a fund sponsor, investment manager, or 401(k) plan fiduciary, our team is ready to help you assess the impact of the Proposed Rule on your business and to develop a strategy to position yourself ahead of the final rule. Please contact any of the authors listed or the Cleary Gottlieb attorney with whom you regularly work.

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