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A New Playbook for Prudence: DOL Proposes Process-Based Safe Harbor for Selection of Both Traditional and Alternative 401(k) Investments

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On March 30, 2026, the U.S. Department of Labor (DOL) released its long-awaited proposed regulation entitled "Fiduciary Duties in Selecting Designated Investment Alternatives" (the "Proposed Rule"), in response to President Trump's Executive Order that calls for expanded access to private equity and other alternative investments for 401(k) plans and their participants. However, rather than limiting its scope to asset allocation funds that invest in alternative assets, the Proposed Rule offers an expansive view of fiduciary prudence under ERISA with respect to the selection of ***any*** designated investment alternative,[1] which is consistent with the DOL's historically neutral posture that neither favors nor disfavors any particular type of investment or investment strategy. Accordingly, the Proposed Rule establishes a process-based safe harbor to protect fiduciaries of participant-directed individual account plans for the selection of designated investment alternatives—effectively providing a yardstick that all plan fiduciaries can use to gauge their actions and decision-making through the lens of prudence under ERISA.

It identifies six non-exclusive factors (performance, fees, liquidity, valuation, benchmarking, and complexity) that, when objectively, thoroughly, and analytically considered and utilized to make determinations, give rise to a presumption that fiduciaries have met their duties under ERISA and are entitled to significant deference. The Proposed Rule's safe harbor seeks to restore ERISA plan fiduciary decision-making to the statute's essence: empowering fiduciaries to exercise their own

judgment and diligence in making what they consider to be prudent decisions that will be in the best interests of plan participants—without undue fear of litigation over every good faith judgment call.

This Alert explores some of the notable aspects and themes of the Proposed Rule that all ERISA plan fiduciaries should consider.

I. Proposed Rule's Safe Harbor

The Proposed Rule represents the most significant development in ERISA fiduciary investment guidance since the DOL's 1979 Investment Duties Regulation.[2] As noted above, its detailed process framework and safe harbor apply across the full investment menu—not only to alternative investments. Accordingly, plan fiduciaries should maintain a clear, documented record demonstrating that they have walked through and considered each element of the safe harbor guidance, to the extent applicable, for ***every*** investment decision—whether the investment in question is a traditional index fund or a CIT with an alternatives sleeve.

The Proposed Rule's safe harbor is structured around the following ***non-exhaustive*** list of six factors when it comes to establishing and maintaining a plan investment menu of designated investment alternatives for a participant-directed individual account plan:

FACTOR	DESCRIPTION
1. Performance	• The fiduciary must appropriately consider a reasonable number of similar alternatives and determine that the risk-adjusted expected returns, over an appropriate time horizon and net of anticipated fees and expenses, further the purposes of the plan by enabling participants to maximize risk-adjusted returns. • Notably, the Proposed Rule makes clear that fiduciaries

	need not select the investment with the highest returns, should not focus solely on expected returns, and that, given the long-term nature of retirement savings, it is often prudent to give greater weight to long-term historical performance over short-term performance. This example makes it clear that fiduciaries have genuine discretion to choose the applicable considerations in exercising judgement for investments.
2. Fees	• The fiduciary must consider a reasonable number of similar alternatives and determine that fees and expenses are appropriate, taking into account risk-adjusted expected returns and any other value the investment brings to furthering the purposes of the plan. For this purpose, "value" includes benefits, features, or services beyond risk-adjusted returns. • The Proposed Rule expressly states that a fiduciary does not violate its duties solely because it does not select the alternative with the lowest fees and expenses—for example, a fiduciary may prudently choose to pay more in exchange for greater services or risk-mitigation features where it determines they are appropriate for the specific plan participant population.
3. Liquidity	• The fiduciary must appropriately consider and determine that the investment will have sufficient liquidity to meet the plan's anticipated needs at both the plan and individual levels. • The Proposed Rule's examples separately address participant-level events triggering immediate liquidity

	needs (retirement, separation from service, financial hardship withdrawals, loan requests, and investment reallocations) and plan-level considerations involving temporal restrictions on redemptions. • In several examples, the fiduciary may satisfy this requirement by relying on written representations from the investment manager that the fund has adopted a liquidity risk management program substantially similar to those required for mutual funds under the Investment Company Act of 1940.
4. Valuation	• The fiduciary must appropriately consider and determine that the investment has adopted adequate measures to ensure it is capable of being timely and accurately valued in accordance with the needs of the plan. • The examples apply this standard to different fund types, including mutual funds and funds with alternative assets, and address scenarios where conflicts of interest could impact valuations. • Fiduciaries may rely on asset valuations derived from recognized procedures such as national securities exchanges, FASB ASC 820 fair value measurement standards, or Investment Company Act compliance, but must ensure the valuation process is "conflict-free and independent".
5. Performance Benchmarks	• The fiduciary must appropriately consider and determine that each investment has a meaningful benchmark and compare the risk-adjusted expected returns to that benchmark.

	• A “meaningful benchmark” is defined as an investment, strategy, index, or other comparator with similar mandates, strategies, objectives, and risks. While there may be more than one meaningful benchmark, no single benchmark is meaningful for all investments. • The Proposed Rule also accommodates innovation, stating there is no presumption against new or innovative product designs and that fiduciaries should identify the best possible comparators while scrutinizing the value proposition of new or innovative designs.
6. Complexity	• The fiduciary must appropriately consider the investment's complexity and determine that it has the skills, knowledge, experience, and capacity to comprehend the investment sufficiently to discharge its obligations under ERISA and the governing plan documents—or whether it must seek assistance from a qualified investment advice fiduciary, investment manager, or other professional. • If the fiduciary lacks the requisite expertise, the Proposed Rule makes clear that the duty of prudence requires hiring independent professional advisors.

Notably, the Proposed Rule's safe harbor applies to investment selection; however, it does not address the fiduciary duty to monitor designated investment options at regular intervals after their selection. The DOL states that it “anticipates issuing interpretive guidance in the near term concerning fiduciary obligations under ERISA to monitor designated investment alternatives following their inclusion on a plan's investment menu.” That said, the DOL generally is of the view that the factors and processes (or substantially similar factors and processes) outlined in the Proposed

Rule—including the illustrative safe harbor examples—apply to this ongoing dut

II. Key Themes for Asset Managers and Advisors

1. The Proposed Rule's Process Framework Applies Across the Full Investment Menu—Not Just to Alternatives

One of the most consequential features of the Proposed Rule is its breadth. Although the rulemaking was prompted by the Order's directive to facilitate access to alternative assets, the safe harbor's detailed fiduciary process framework is designed to apply to the selection and monitoring of all designated investment alternatives on a plan's menu—not only to products offering exposure to private equity, private credit, real estate, or other alternative strategies.

This is a deliberate design choice, and it carries practical significance. The DOL has historically maintained that a plan fiduciary must "engage in an objective, thorough, and analytical process that considers all relevant facts and circumstances" when evaluating any designated investment alternative. The Proposed Rule builds upon this principle by articulating a structured set of substantive considerations that fiduciaries should address—and, critically, should document—with respect to each investmer on the plan's lineup, whether it is a traditional index fund, a target date fund (TDF), a managed account, a stable value product, or a diversified asset allocation fund with an alternatives sleeve.

For plan fiduciaries, the practical takeaway is clear: the Proposed Rule provides a roadmap for demonstrating prudence across the entire investment menu, not merely for the subset of investments that are new or unfamiliar. We expect that fiduciary committees will review their existing processes for all current plan investment options against the Proposed Rule's framework and maintain a clear, documented record showing that the committee has considered each element of the safe harbor guidance to the extent applicable to every investment decision. This exercise will both position the committee to take advantage of the safe harbor's protections when selecting

alternative investments and strengthen the defensibility of the plan's investment lineup as a whole against the wave of class action litigation that has targeted plan sponsors in recent years.

2. Due Diligence and Representations from Investment Managers and Advisors Are Central to the Safe Harbor Framework

The Proposed Rule expressly contemplates that plan fiduciaries may rely on written representations from the underlying investment managers and the plan's investment advisors or otherwise perform appropriate due diligence in order to satisfy the safe harbor's requirements. This is a practical acknowledgment by the DOL that plan fiduciaries cannot be expected to independently verify every factual predicate underlying an investment decision, particularly when the investment involves complex asset classes with limited publicly available information.

We believe this feature of the Proposed Rule will prove to be among its most important for plan fiduciaries. In prior guidance, the DOL emphasized that fiduciaries must "secur[e] sufficient information to understand the investment, and its attendant risks, prior to making the investment," and that a fiduciary who lacks the requisite expertise should "seek assistance from a qualified investment manager or other investment professional." The Proposed Rule carries this principle forward by specifying the matters they should appropriately diligence and the types of representations that fiduciaries may obtain to demonstrate compliance with each element of the safe harbor.

Plan sponsors will want to take proactive steps to memorialize their due diligence process.

We expect that fiduciary committees will become more focused on a documentation-focused approach that is consistent with the longstanding principle that, in ERISA fiduciary litigation, "prudence is process," and documenting one's process is an important protective measure. In particular:

- **Develop a standardized questionnaire or due diligence template** – Identify each element of the safe harbor and prepare a standardized questionnaire or due diligence template to solicit written responses from the applicable investment managers and advisors.

- **Ensure written representations, if any, are comprehensive and detailed** – Any written representations received from investment managers should address the specific factors identified in the Proposed Rule (e.g., the fund's approach to liquidity and valuation).

- **Review and amend existing contractual arrangements, as needed** – Review existing investment advisory agreements to confirm that the plan's advisor is contractually obligated to provide the types of analyses, diligence information, and/or representations contemplated by the safe harbor, and amend those agreements where necessary.

- **Implement diligent recordkeeping practices** – Maintain a comprehensive record of all diligence materials and representations received, the dates on which they were obtained, and the committee's evaluation of such materials and/or representations as part of its fiduciary process file.

3. The Rule Is Investment-Type Agnostic and Expressly Addresses Conflicts of Interest in Direct Asset Management

Consistent with the DOL's historically neutral approach to plan investment selection, the Proposed Rule does not favor or disfavor any particular asset class. Instead, it leaves it to the plan fiduciary to engage in a "context-specific" analysis that considers all relevant facts and circumstances, which is no different from the standard that applies to the evaluation of any plan investment under ERISA.

Of particular note, the Proposed Rule expressly permits both direct and indirect investments in a broad range of asset categories—including private market investments "where the managers of such investments, if applicable, seek to take an

active role in the management of such companies," as well as "direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate", among others. This language acknowledges a practical reality of investing in real assets, private equity, and other alternative asset classes: investment managers frequently hold related interests in, or exercise operational control over, the buildings, companies, or other assets in which they invest.

The Proposed Rule addresses this by requiring that the fiduciary's evaluation process account for potential conflicts of interest that may arise from these arrangements. Plan fiduciaries evaluating real estate funds, infrastructure investments, or private equity strategies where the manager has an operational role should ensure that their diligence process specifically examines the nature and scope of any such related interests, the policies and procedures the manager has in place to manage conflicts, and the extent to which the manager's compensation structure (including performance fees) could create misaligned incentives. Additionally, fiduciaries should assess whether any aspects of the investment arrangement could give rise to a prohibited transaction under Section 406 of ERISA and, if so, whether an applicable exemption is available.

This investment-type agnosticism reinforces what we have long advised: ERISA does not prohibit any particular asset class, and "the universe of permissible investments for an ERISA plan is wide." The question for plan fiduciaries is not what to invest in, but how the evaluation and selection process is conducted and documented.

4. Branching Safe Harbors Require Express Documentation of Which Branch Applies and Why

At several junctures in its safe harbor, the Proposed Rule provides multiple pathways —alternative routes a fiduciary may follow depending on the nature of the investment, the plan, and the circumstances. For example, the Proposed Rule offers branching approaches for evaluating complex or layered fee structures, for assessing the appropriateness of investments that may prioritize longer-term performance horizons over short-term benchmarking, and for determining the level and type of

participant disclosure that should accompany different investment alternatives.

This structure reflects the DOL's recognition that a one-size-fits-all approach to the fiduciary process is neither practical nor desirable. The Executive Order itself directed the DOL to "identify the criteria that fiduciaries should use to prudently balance potentially higher expenses against the objectives of seeking greater long-term net returns and broader diversification of investments." The Proposed Rule implements this directive by expressly contemplating decisions such as prioritizing longer-term performance—consistent with the longer time horizon of retirement savings—c emphasizing the level and quality of services provided over the selection of the lowest-cost option.

We believe the better practice is to be explicit in the documentation about which branch of the safe harbor a fiduciary is relying on and the reasoning for that choice. The Proposed Rule's branching structure provides important flexibility, but that flexibility is only protective to the extent the fiduciary has clearly articulated—in contemporaneous process records—why a particular pathway was selected and how the relevant criteria were satisfied. A fiduciary committee that, for example, determines that a higher-fee asset allocation fund with an alternatives sleeve is justified by the potential for enhanced long-term risk-adjusted returns should state that conclusion expressly and document the analysis supporting it, including referencing due diligence factors that resulted in such conclusion, any representations from the plan's investment advisor and the fund manager's track record and strategy.

This approach is consistent with the lesson of *Anderson v. Intel Corp. Investment Policy Committee, 137 F.4th 1015 (9th Cir. 2025), cert. granted, No. 25-498 (Jan. 16, 2026):* the more detailed the rationale for selecting a class of investments, the harder it will be for plaintiffs to claim that a different, lower-cost option should have been selected instead.

5. A Meaningful Recalibration of Fiduciary Litigation Risk—Not a Blank Check

The Proposed Rule should not be read as an unlimited license to invest plan assets in any asset class without constraint. Rather, it reflects a well-designed and thoughtful —though non-exhaustive—set of substantive considerations that, when genuinel followed and documented, should provide plan fiduciaries with a meaningful degree of protection against litigation challenging their investment decisions.

This represents a significant recalibration. Over the past decade, class action lawsuits targeting 401(k) and 403(b) plans have proliferated, with plaintiffs alleging fiduciary defects in investment menu design, excessive fees, and fund underperformance. These cases have often settled for large sums, and the prospect of such litigation has historically made plan sponsors reluctant to offer access to products containing private equity and other alternatives, which may carry higher fees and greater complexity than traditional investment options. As we have discussed in prior commentary (See for example, “RETAIL INVESTMENTS IN PRIVATE FUNDS: Regulatory Obstacles and Opportunities,” available here), this trend toward conservatism in 401(k) plan menu design has had the perverse consequence of depriving plan participants of opportunities to obtain the greater investment diversification and potentially higher-performing options that are routinely available to defined benefit plan participants and institutional investors.

The Proposed Rule, read in conjunction with the Order's express directive to the DOL to “prioritize actions that may curb ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants,” signals a clear policy intent to reassert the primacy of fiduciary process over after-the-fact second-guessing. Consistent with longstanding ERISA precedent, the standard for evaluating fiduciary conduct is “whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment,” not whether the investment produced optimal results in hindsight.

This framework is also consistent with the post-*Loper Bright* landscape, in which agency guidance and rulemaking—while no longer entitled to Chevron deference

—remains entitled to persuasive weight under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to the extent the agency's reasoning is thorough, well-considered, and persuasive. We believe the Proposed Rule's detailed, process-oriented safe harbor framework is well-positioned to carry significant weight with courts evaluating fiduciary conduct, particularly where a plan sponsor can demonstrate faithful adherence to the safe harbor's requirements.

Significantly, the Proposed Rule could still materially alter the economics of ERISA litigation. With a regulatory presumption of prudence for fiduciaries that document compliance with the safe harbor framework, defendants will have a stronger basis to argue that allegations of underperformance, higher fees, or limited liquidity, standing alone, do not plausibly state an imprudence claim. In other words, once a fiduciary can show a disciplined, contemporaneously documented process, the focus should shift away from hindsight criticism of outcomes and towards whether the complaint pleads facts sufficient to call that process into question. While that would not eliminate prohibited transaction or loyalty claims, which remain analytically distinct, it could materially narrow the core prudence theory that drives many ERISA class actions.

Perhaps more importantly, the Proposed Rule could provide courts with a natural basis for phased or otherwise constrained discovery. Rather than immediately opening broad merits discovery into every aspect of a committee's deliberations, a court could first focus on the threshold question of whether the fiduciary in fact followed the rule's six-factor process in a sufficiently objective, thorough, and analytical manner for the presumption to attach. That inquiry is comparatively bounded and document-driven, centering on committee minutes, consultant analyses, due diligence materials, and, to the extent applicable written manager and advisor representations. If courts adopt that approach, the cost of defending prudence claims could decline significantly even in cases that survive the pleadings.

The most realistic effect of the Proposed Rule, however, may be downstream: a change in settlement dynamics and, over time, litigation volume. In practice,

settlement decisions in ERISA fiduciary cases are heavily influenced by fiduciary liability insurers, whose analysis turns on expected exposure, defense costs, and the probability of plaintiff success on the merits. To the extent the Proposed Rule makes success on prudence claims less likely by reinforcing the primacy of a documented fiduciary process, insurers may become less willing to authorize early or outsized settlements. Lower expected settlement values, in turn, could reduce the financial attractiveness of filing marginal cases in the first place. That possibility is especially notable given that Assistant Secretary Aronowitz came to the DOL's Employee Benefits Security Administration from the fiduciary liability insurance world and is well positioned to understand how changes in merits risk can reshape the litigation landscape.

For plan fiduciaries, the core message is this: the Proposed Rule does not eliminate the risk of litigation—no safe harbor can—but a rigorous process demonstrating tha all relevant substantive factors were genuinely considered should provide significant support for defeating litigation in most circumstances. For fiduciaries that meticulously follow a sound and well-documented process, they should be able to make investment decisions—including decisions to offer products with exposure to alternative asset classes—without fear of suit over every judgment call.

III. Conclusion

The Proposed Rule represents a watershed moment in ERISA fiduciary investment guidance. By establishing a detailed, process-based safe harbor structured around six key factors, the DOL has provided plan fiduciaries with an actionable framework for demonstrating prudence across the entire investment menu, not merely for the subset of investments involving alternative assets. Critically, the Proposed Rule reflects the DOL's historically neutral position that ERISA does not favor or disfavor any particular asset class, and it expressly contemplates that fiduciaries may satisfy the safe harbor's requirements through different means. Its branching safe harbor structure affords important flexibility, but that flexibility is only protective to the extent a fiduciary has clearly documented which pathway was selected and why. At

the same time, the Proposed Rule should not be read as an unlimited license—it reflects a meaningful recalibration of fiduciary litigation risk designed to reassert the primacy of process over hindsight judgment.

The Proposed Rule is subject to a 60-day notice-and-comment period, and its final form may differ from what has been proposed. Nonetheless, the following steps can help to guide decision making in the interim:

- **Review and strengthen fiduciary governance processes.** Assess existing investment selection and monitoring procedures against the Proposed Rule's framework, and update investment policy statements as appropriate to reflect the safe harbor criteria.

- **Build comprehensive documentation practices.** Maintain detailed, contemporaneous records of the committee's deliberations, including which safe harbor branch was relied upon, the committee's evaluation of due diligence findings and, to the extent applicable, any representations obtained from investment managers and advisors, and the rationale for each investment decision.

- **Proactively solicit information from investment managers and advisors.** Prepare standardized due diligence questionnaires that map to the safe harbor's requirements and ensure that all responses are documented in the committee's fiduciary process file.

- **Evaluate conflicts of interest.** For investments involving real assets or strategies where the manager has an operational role, ensure the diligence process addresses the nature and management of potential conflicts.

- **Engage with investment advisors on benchmarking.** Given the current lack of established benchmarks for alternative asset allocation products, work with investment advisors to develop or source appropriate benchmarks that reflect the fund's aims and risk profile.

- **Monitor developments closely.** Asset managers and plan fiduciaries should continue to monitor the rulemaking process and the Supreme Court's forthcoming decision in *Intel*, both of which will shape the fiduciary landscape going forward.

If you would like to discuss the impact of these developments on your plan's investment processes, product design strategy, or litigation risk management, please reach out to the authors or your regular Ropes & Gray advisor. For further information on the broader emerging landscape of alternative investments in retirement plans, please visit our collective investment trusts & 401(k) access webpage, which includes a library of thought leadership resources and insights on the latest market developments.

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1. The Proposed Rule defines this term as "any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, including a qualified default investment alternative within the meaning of 29 CFR 2550.404c-5." Note, the Proposed Rule expressly excludes brokerage windows, self-directed brokerage accounts, and similar arrangements from the "designated investment alternatives" definition.
2. The 1979 Investment Duties Regulation, which is codified at 29 CFR 2550.404a-1 *et seq.*, provides that ERISA's duty of prudence is satisfied by a plan fiduciary when selecting an investment if the fiduciary meets two conditions:

    1. The fiduciary must 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."
    2. The fiduciary must have "acted accordingly."

    These rules do not define "acted accordingly," but they do provide that "appropriate consideration" shall include, "but is not necessarily limited to" a "determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties) or menu, to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks.