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CLIENT ALERT

Prudence Reimagined: DOL Proposes New Safe Harbor for Fiduciary Investment Selection in ERISA 401(k) Plans

April 9, 2026

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The Department of Labor (the "DOL") has issued its much-anticipated proposed regulation (the "Proposed Rule") clarifying, and providing a "safe harbor" for, a fiduciary's duty of prudence under Section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA") in connection with selecting designated investment alternatives, including but not limited to alternative assets, for participant-directed individual account plans, such as 401(k) plans.[1]

The Proposed Rule implements, but goes beyond, Section 3(c) of President Trump's 2025 Executive Order 14330, titled "Democratizing Access to Alternative Assets for 401(k) Investors," which directed the DOL to propose regulations or other guidance, including appropriately calibrated safe harbors, that clarify the ERISA fiduciary duties owed to plan participants when offering asset allocation funds with investments in alternative assets in a

[1] *Fiduciary Duties In Selecting Designated Investment Alternatives*, RIN 1210-AC38.

participant-directed plan.[2] The Executive Order also directed the DOL to prioritize approaches designed to curb litigation risk that may constrain ERISA fiduciaries from applying their best judgment in offering investment opportunities to plan participants. A recurrent point in the Executive Order is the purported disparity in the investment options used by defined benefit plan sponsors and those made available in participant-directed plans, which the Administration seeks to harmonize.

Background

The DOL's existing regulatory framework for evaluating ERISA fiduciary investment decisions dates back to its 1979 Investment Duties Regulation, which provides that the ERISA duty of prudence is satisfied when a fiduciary gives "appropriate consideration" to relevant facts and circumstances and "acts accordingly."[3] While the DOL has supplemented this framework over the years through sub-regulatory guidance addressing specific types of investments — including mortgage loans to plan participants,[4] derivatives,[5] liability-driven investment strategies, asset allocation funds with private equity components,[6] and lifetime income products — there has long been a lack of a comprehensive regulatory safe harbor. The Proposed Rule attempts to create one through a non-exhaustive six-factor ERISA fiduciary review, which would apply to all investments in participant-directed individual account plans, regardless of asset class, including alternative investments.

Six-Factor Safe Harbor Framework

The Proposed Rule introduces a process-based "safe harbor" for 401(k) plan fiduciaries that lets forth a non-exhaustive list of six factors that a plan fiduciary must objectively, thoroughly, and analytically consider when selecting designated investment alternatives, including alternative assets and other asset classes.[7] When a plan fiduciary satisfies this process, the Proposed Rule provides that the fiduciary's judgment is presumed to have met the duty of prudence under ERISA and is entitled to significant deference.[8] The six factors are:[9]

1. **Performance**. The plan fiduciary must appropriately consider a reasonable number of similar investment alternatives and determine that the risk-adjusted expected returns, over an appropriate time horizon, net of anticipated fees and expenses, further the purposes of the plan by enabling participants and beneficiaries to maximize risk-adjusted returns. The Proposed Rule makes clear that plan fiduciaries need not select an investment with the highest returns or aim to achieve the highest possible returns, but rather should seek

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2 90 FR 38921 (Aug. 12, 2025).

3 29 CFR § 2550.404a-1.

4 Advisory Opinion 81-12A.

5 *See* Proposed Rule, Preamble § 2.3.2 (citing *Information Letter from Olena Berg, Assistant Sec'y of Labor, to Eugene Ludwig* (Mar. 21, 1996)).

6 *See* Proposed Rule, Preamble § 2.3.4 (citing *Information Letter to Jon W. Breyfogle* (June 3, 2020)).

7 Proposed Rule § 2550.404a-6(f). The term "designated investment alternative" is broadly defined in the Proposed Rule to include any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets in their individual accounts, but a "designated investment alternative" does not include brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

8 *See* Proposed Rule, Preamble § 4.5 (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)).

9 Proposed Rule §§ 2550.404a-6(g) through (l).

to maximize returns for a given level of appropriate risk, consistent with the plan participants' likely needs over the course of the anticipated investment.[10]

2. **Fees**. The plan fiduciary must consider a reasonable number of similar investment alternatives and determine that the fees and expenses of the investment are appropriate, taking into account risk-adjusted expected returns and any other value the investment brings to furthering the purposes of the plan. "Value" means any benefits, features, or services other than risk-adjusted returns. A fiduciary does not violate its duty of prudence solely because it does not select the lowest-cost option.[11]

3. **Liquidity**. The plan fiduciary must appropriately consider and determine that the investment will have sufficient liquidity to meet the anticipated needs of the plan at both the plan level and at the individual participant level. Because participant-directed individual account plans are long-term retirement savings vehicles, particularly for participants early in their careers, there is no requirement that a fiduciary select only fully liquid products. A prudent fiduciary process may lead to a decision to sacrifice some liquidity in pursuit of additional risk-adjusted returns.

4. **Valuation**. The plan fiduciary must appropriately consider and determine that the investment has adopted adequate measures to ensure timely and accurate valuation. Fiduciaries may rely on asset valuations derived from public exchanges, or from applications of generally recognized procedures for measuring fair value in accordance with FASB Accounting Standards Codification 820, or from compliance with the Investment Company Act. However, fiduciaries must be alert to potential conflicts of interest in valuation processes.

5. **Benchmarking**. The plan fiduciary must appropriately consider and determine that each investment has a meaningful benchmark and must compare risk-adjusted expected returns of the investment to such benchmark. A "meaningful benchmark" is an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative.[12] A fiduciary may use more than one benchmark, but no single benchmark is appropriate for all designated investment alternatives on a plan's investment menu. There is no presumption or preference against new or innovative designated investment alternative designs.

6. **Complexity**. The plan fiduciary must appropriately consider the complexity of the investment and determine that it has the skills, knowledge, experience, and capacity to discharge its obligations under ERISA and the relevant plan documents, or must seek assistance from qualified professionals in doing so.

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[10] *See* Proposed Rule, Preamble § 2.4.3 (citing *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 137 F.4th 1015, 1024 (9th Cir. 2025), *cert. granted*, No. 25-498 (Jan. 16, 2026)).

[11] *See* Proposed Rule, Preamble § 6.1, at n.37 (citing *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022); *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009)).

[12] *See* Proposed Rule, Preamble § 9.1, at n.48 (citing *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022)) (describing the need for a "meaningful benchmark").

If a plan fiduciary determines that it lacks the requisite skills or knowledge, it must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual.

Presumption of Prudence and Deference Under the Proposed Safe Harbor

Under the Proposed Rule, when an ERISA plan fiduciary objectively, thoroughly, and analytically considers and makes investment determinations based upon these six factors for the fiduciary's participant-directed individual account plan, the plan fiduciary's judgment is presumed to have met the duty of prudence under ERISA and is entitled to significant deference.[13] The Proposed Rule indicates that a plan fiduciary that can actively demonstrate compliance with the safe harbor should be able to confidently rely on it to successfully defend its actions against litigation claims. In doing so, the DOL notes that its explication of the prudent process is intended to carry persuasive weight to courts under the *Skidmore* deference standard,[14] consistent with the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*.[15]

Amplification of Existing ERISA Principles

While the overarching goal of the Proposed Rule is to "alleviate certain regulatory burdens and litigation risk that interfere with the ability of American workers to achieve, through their retirement accounts, the competitive returns and asset diversification necessary to secure a dignified and comfortable retirement,"[16] the Proposed Rule relies on certain "bedrock" principles of ERISA to get there.

First, the Proposed Rule reiterates that ERISA's duty of prudence is grounded in process. Fiduciaries must follow a prudent process when selecting designated investment alternatives for inclusion in plan menus by giving appropriate consideration to facts and circumstances that the plan fiduciary knows or should know are relevant to the particular investment. The defining characteristic of the duty of prudence is that it is "largely a process-based inquiry," focused on a fiduciary's investigation at the time of the investment decision and not in hindsight based on investment results.

Second, the Proposed Rule notes that ERISA gives plan fiduciaries maximum discretion and flexibility in selecting designated investment alternatives for participant-directed plans, including alternative assets. The Proposed Rule is asset-neutral: it clarifies that ERISA does not require or restrict any specific type of designated investment alternative for individual account plans, except insofar as such investment might be otherwise illegal.[17] Accordingly, the Proposed Rule states that ERISA plan fiduciaries may include non-publicly traded assets — such as products focused on private markets, digital assets, and lifetime income — in their 401(k) plans, provided that they follow a prudent process in evaluating and selecting such assets.

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13 Proposed Rule § 2550.404a-6(f).

14 *See* Proposed Rule, Preamble § 4.5 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

15 *See* Proposed Rule, Preamble § 4.5 (citing *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which "cites Skidmore with approval," *id*. at 402).

16 Proposed Rule, Preamble § 1 (Executive Summary).

17 Proposed Rule § 2550.404a-6(c).

Third, the Proposed Rule posits that ERISA fiduciary decision-making is entitled to a presumption of prudence by arbiters of disputes when such decisions follow a prudent process — such as the process reflected in the Proposed Rule.

Key Observations

The Proposed Rule is just that—a proposal only. The Proposed Rule has a 60-day comment period, which began on March 31 and ends on June 1. If finalized in its current form, it will provide opportunities and challenges for ERISA plan sponsors, ERISA plan product sponsors, and ERISA plan investment professionals. A few of these follow.

Plan Sponsors

Although Executive Order 14330 included a heavy emphasis on alternative assets, the Proposed Rule is asset-neutral and describes a process that individual account plan fiduciaries should follow when considering *any* designated investment alternative for their plans. That said, the Proposed Rule makes clear that ERISA plan fiduciaries may include non-publicly traded assets — such as products focused on private markets, digital assets, and lifetime income — in their plans, provided that they follow a prudent process, as described in the Proposed Rule's six-factor fiduciary analysis.

The Proposed Rule responds directly to industry concerns about ERISA fiduciary litigation risk when selecting non-traditional asset classes in 401(k) plans.[18] The six-factor approach to prudent selection of designated investment alternatives may give 401(k) plan fiduciaries greater comfort in selecting many different types of assets for their plans, including alternative assets. However, it remains to be seen whether courts will respect the Proposed Rule's "presumption of prudence," especially in the wake of the *Loper Bright* Supreme Court decision, which eliminated Chevron deference to agency interpretations. The DOL posits that the Proposed Rule should carry persuasive weight under *Skidmore*, given the DOL's statutory authority under ERISA to promulgate safe harbors. But *how much* persuasive weight will in fact be given to the Proposed Rule is unclear.

Additionally, while the Proposed Rule addresses an ERISA 401(k) plan fiduciary's initial selection of designated investment alternatives, it does not address the fiduciary's ongoing duty to monitor those alternatives. The DOL notes that it anticipates issuing interpretive guidance in the near term concerning ERISA fiduciary monitoring obligations but is generally of the view that the factors and processes outlined in the Proposed Rule apply to this ongoing duty as well. Plan sponsors should continue to maintain robust monitoring processes in the interim.

Product Sponsors

The DOL anticipates that the main channel through which the Proposed Rule will lead to greater defined contribution plan investment in alternative assets will be within target date funds. The Proposed Rule provides a roadmap of factors and risks product sponsors should consider in designing new products for 401(k) plans and other participant-

[18] *See* Proposed Rule, Preamble § 4.5, at n.30 (citing *Letter from American Retirement Ass'n et al. to Lori Chavez-DeRemer, Sec'y of Labor* (Dec. 4, 2025); *Letter from Am. Benefits Council to Daniel Aronowitz, Assistant Sec'y of Labor for Employee Benefits* (Dec. 5, 2025)).

directed plans. Additionally, insurance companies that market life annuity products, private equity firms, hedge funds, and firms that market investments related to digital assets may see increased demand for their products.

The Proposed Rule effectively necessitates that product sponsors be transparent with ERISA plan fiduciaries and their investment professionals about the rights, benefits, and features of designated investment alternatives. Plan sponsors will need to understand various product features, including liquidity, valuation, and fees, and product sponsors will need to provide the information necessary for plan fiduciaries to satisfy the safe harbor's six-factor analysis. This may provide opportunities for product sponsors and financial services professionals to educate plan fiduciaries regarding product features, in an effort to support plan fiduciaries' reliance on the six-factor prudence analysis contemplated in the Proposed Rule. For example, product sponsors may need to provide written representations regarding liquidity risk management programs, valuation methodologies, and fee structures to enable plan fiduciaries to meet the consideration and determination requirements of the safe harbor. Product sponsors also may consider assisting plan fiduciaries in benchmarking their products against other similar alternatives to the extent possible, including with respect to investment performance. In short, while plan fiduciaries are responsible for undertaking the prudence analysis required by the Proposed Rule, product sponsors and other professionals can be important partners to plan fiduciaries in doing so.

ERISA Plan Investment Professionals

The Proposed Rule strongly encourages, though does not require, ERISA 401(k) plan fiduciaries to enlist the services of professional asset managers and advisers — including non-discretionary investment advice fiduciaries and discretionary investment managers — in their investment selection process. The Proposed Rule notes that seeking assistance from an ERISA fiduciary — such as an investment advice fiduciary under Section 3(21)(A)(ii) of ERISA or an investment manager under Section 3(38) of ERISA — can provide important benefits to a plan's participants and beneficiaries, as those professionals are also subject to ERISA's fiduciary duties. Importantly, if a named fiduciary of an ERISA plan appoints an investment manager within the meaning of Section 3(38) of ERISA, the named fiduciary is responsible for the prudent selection and ongoing retention of that manager but generally is not liable for the individual investment decisions of that manager. As plans consider complex alternative investments, the demand for qualified investment professionals with expertise in evaluating these asset classes — including their unique liquidity, valuation, and fee characteristics — may grow significantly.

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