

The Next Step: U.S. Department of Labor Proposes Safe Harbor that Would Allow Selection of Alternative Assets in 401(k) Plans

April 6, 2026

The Proposed Rule

In response to a 2025 Executive Order from President Trump¹ directing the U.S. Department of Labor (the “DOL”) to evaluate its guidance to modernize retirement plan investment options by encouraging the availability of alternative assets in participant-directed defined contribution retirement plans, and discouraging meritless litigation against plan fiduciaries, the DOL has proposed a rule (the “Proposed Rule”) under the Employee Retirement Income Security Act of 1974 (“ERISA”) that would address the application of ERISA’s fiduciary duty of prudence to the selection of designated investment alternatives (“DIAs”) in plans. That duty, as the DOL notes in the preamble to the Proposed Rule, has been a frequent source of litigation by plan participants alleging that the inclusion of a particular DIA was imprudent and therefore represented a fiduciary breach on the part of the plan’s fiduciary.

In support of the policy goal of making alternative asset classes available in plans, the Proposed Rule states unequivocally that ERISA’s duty of prudence neither favors nor disfavors any type of asset intrinsically; “traditional asset” classes, such as publicly traded stocks and bonds, are not presumptively more appropriate DIAs than “alternative assets” (i.e., everything else, from private funds to project finance and cryptocurrency to commodities). The Proposed Rule also clarifies, reinforces and gives regulatory support to the DOL’s long-standing guidance that prudence is evaluated on the basis of the process that led the fiduciary to make an investment decision, and not on the basis of the decision’s outcome.

Accordingly, the Proposed Rule packs a powerful one-two punch that plan fiduciaries and the financial service industry generally should welcome—it both recognizes the validity of including alternative assets in plans² and provides a detailed prudence

¹ Debevoise Client Alert: [Executive Order Clears Path for Alternative Assets in 401\(k\) Plans](#).

² In the preamble to the Proposed Rule, the DOL notes that “[w]hile the performance and diversification benefits of adding alternative assets to a portfolio would depend on the asset itself, the macroeconomic environment,

roadmap to support and defend plan fiduciaries' selection of alternative asset classes. If the rule has its intended effect and is given appropriate weight by the courts, it should have the salutary benefit of reducing the meritless prudence litigation that has weighed down use of alternative asset classes by plan fiduciaries.

The core of the Proposed Rule is an unusually detailed safe harbor process for selection of DIAs.³ Proper evaluation of six specific factors outlined in the Proposed Rule is intended to afford a fiduciary's selection of a DIA a presumption of prudence and therefore significant deference in litigation. Notably, the Proposed Rule suggests in several instances that a proper evaluation of one or more of these factors will likely require reliance on recommendations of a prudently selected investment advice fiduciary. As to each of the six factors, the Proposed Rule includes detailed analysis and guidance as to its proper application, and the conclusion of prudence to be reached.

The six factors are:

- *Performance.* Plan fiduciaries must consider a reasonable number of similar alternatives and determine that the risk-adjusted expected returns of the DIA, over an appropriate amount of time and net of the associated fees and expenses, further the purpose of the plan by enabling participants to maximize their risk-adjusted returns. In selecting a DIA, a plan fiduciary need not aim to achieve the highest possible absolute return; rather plan fiduciaries should evaluate performance in light of the risk associated with such returns, taking into account the risk capacity of plan's participants and the time horizon of the anticipated investment.
- *Fees.* Plan fiduciaries must consider a reasonable number of similar alternatives and determine that any fees and expenses of the DIA are appropriate. In making that determination, the plan fiduciary must consider performance and any other value the DIA brings to further the purposes of the plan. As described in the Proposed Rule, value for this purpose includes any benefits, features, or services other than risk-adjusted returns. Importantly, choosing a DIA with higher fees and expenses is not a violation of the duty of prudence if a plan fiduciary determines that higher fees may provide greater value or otherwise further the purposes of the plan (for example, by including both actively managed and passive funds within the same

and the characteristics of the rest of the portfolio, the research suggests that incorporating alternative assets may result in more resilient portfolios.”

³ In the preamble to the Proposed Rule, the DOL notes that it expects to issue interpretive guidance concerning fiduciary obligation to monitor DIAs following their inclusion on a plan's investment menu, but expects that the factors and processes discussed in the Proposed Rule for selecting DIAs would likewise apply to their ongoing monitoring.

strategy that provide for an opportunity for diversification across the plan's investment menu, even where the actively managed funds charge higher fees).

- *Liquidity.* Plan fiduciaries must consider and determine that the DIA will have sufficient liquidity to meet the needs of the plan for both the plan itself and the plan's participants. The Proposed Rule notes that a plan is not required to offer fully liquid investment options, but fiduciaries must ensure that investments can deliver on any promises of liquidity made to plan participants. Further, the Liquidity factor includes what is effectively a safe harbor within the safe harbor: if a DIA is an open-end management investment company under the Investment Company Act of 1940, as amended ("Investment Company Act"), the fiduciary may rely on the fact that such funds are required by Rule 22e-4 under the Investment Company Act to adopt and implement a written liquidity risk management program; for other types of DIAs, e.g., collective investment trusts, the fiduciary will be deemed to have satisfied the Liquidity condition if it receives representations from the person responsible for managing the DIA (or otherwise confirms through appropriate due diligence) that such DIA has adopted and implemented a liquidity risk management program substantially similar to the requirements of Rule 22e-4.
- *Valuation.* Plan fiduciaries must consider and determine that the DIA has adopted adequate measures to ensure the capability for timely and accurate valuation in accordance with the needs of the plan. As with the liquidity factor, this factor also includes its own safe harbor for DIAs that include non-publicly traded securities alongside publicly traded securities. This requires the manager of the DIA to represent that non-publicly traded securities are valued at least quarterly in accordance with Accounting Standards Codification 820 on Fair Value Measurement ("ASC 820") on the basis of a "conflict-free" independent valuation process. Notably, the Proposed Rule provides that this safe harbor is not defeated solely because the manager of the DIA retains the ability, acting in good faith, to adopt alternative valuation procedures during a documented temporary emergency to protect remaining investors from harm, such as when standard procedures would produce an inflated valuation that could disadvantage non-redeeming investors. Finally, similar to the Liquidity factor, plan fiduciaries selecting DIAs registered under the Investment Company Act may rely on asset valuations that result from the application of reasonable valuation procedures adopted to comply with the Investment Company Act and Rule 2a-5 thereunder. As a result, for a DIA that is a registered investment company or a business development company, a fiduciary will be deemed to have satisfied this factor if it reviews such issuer's publicly available audited financial statements and valuation-related disclosures prepared in compliance with Rule 2a-5 and the fiduciary does not know or have reason to know information that would cause it to question their veracity.

- *Comparative benchmarks.* Plan fiduciaries must consider and determine that each DIA has a meaningful benchmark, and compare the risk-adjusted expected returns, net of fees, of the DIA to the meaningful benchmark. More than one meaningful benchmark may be applicable and a benchmark is meaningful if its investment, strategy, index or other comparative factor has similar mandates, strategies, objective and risks as the DIA. Custom composite benchmarks are expressly permitted. For example, in the case of an asset allocation fund containing a private equity sleeve in addition to publicly traded stocks and bonds, the Proposed Rule contemplates a composite benchmark that, for the publicly traded stock and bond sleeves, blends the performance of broad-based securities market indices relative to and in proportion to the stock and bond holdings of the DIA, and for the private equity sleeve, uses a combination of methodologies commonly used by investment professionals, including internal rate of return method and public market equivalent method.
- *Complexity.* Plan fiduciaries must consider the complexity of the DIA and determine if they have the requisite skills, knowledge, experience, and capacity to comprehend the DIA to sufficiently discharge their obligations under ERISA and the governing plan documents.

Commentary

Effectiveness of the Safe Harbor Construct

The general principles that serve as the foundation for the six factor framework set forth in the Proposed Rule are grounded in case law and DOL guidance regarding the duty of prudence and the primacy of process in evaluating adherence to this duty. In that regard, the Proposed Rule does not create a new or novel framework for plan fiduciaries in their selection of DIAs; rather, it is better viewed as a regulatory imprimatur of a comprehensive list of prudence best practices under the law derived from decades of experience. The Proposed Rule's collection, codification and analysis into the safe harbor should provide plan sponsors with a potent defensive weapon if their investment decisions are later challenged.

Because prudence is essentially a facts and circumstances inquiry, demonstrating compliance with any of the six factors will be based on the facts and circumstances of the specific case, and so the success of the safe harbor will likely depend on whether the courts embrace its rigor. At the outset, a primary benefit would appear to be the potential to limit discovery, at least initially, to questions regarding adherence to the six factors. If a plan sponsor can effectively demonstrate that adherence to the satisfaction of a fact finder, that should be the end of inquiry. The Proposed Rule would afford the plan fiduciary a significant amount of deference if these processes are followed. Viewed

through that lens, it would be advisable for plan sponsors to adopt the safe harbor processes and establish an effective manner of documenting their compliance with the factors that can be used to defend against any prudence litigation that may arise.

Implications for Alternative Investments

While the Proposed Rule's safe harbor is not specifically tailored for investment in alternative assets, the implications for managers of various alternative asset classes and investment products should be profound if the safe harbor is successful and has the intended effect of mitigating the litigation fear factor that hangs over efforts to modernize the menu of investment options available to defined contribution participants.

Allocating a portion of a diversified investment portfolio to private equity, hedge, private credit and other alternative investment classes and products has long been an important part of the strategy employed by sophisticated investors with long-term investment horizons such as endowments and defined benefit pension plans. Investments in alternative investment strategies have become particularly important to institutional investors as the number of public company opportunities has become less robust. While institutional investors do not represent an apples-to-apples comparison to the participant-directed defined contribution investor set, the central observation of the Proposed Rule is undoubtedly correct—limiting defined contribution plan participants to investments in publicly traded stocks and bonds deprives these investors of access to growing and important asset classes and opportunities to appropriately diversify their retirement portfolios and achieve superior risk-adjusted returns in the same manner that has long been available to institutional investors.

By expressly acknowledging that alternative investments may be considered as part of a fiduciary investment selection process, that potential risk adjusted return should be evaluated net of fees, and plan fiduciaries may take into account value elements other than those returns, and that benchmarking is not a one-size-fits-all exercise, the DOL has offered a compelling path toward allowing plan fiduciaries to conclude that inclusion of alternative investments in a DIA menu can be effected in an ERISA-compliant manner.

It would appear, at least initially, that the most credible path for this inclusion will be one that follows a 2020 DOL Information Letter⁴ that was supportive of alternatives as part of a professionally managed, diversified asset allocation vehicle, such as a target date fund or balanced fund with (for example) private equity or private credit sleeves. This type of product would provide the benefits of alternatives exposure managed by

⁴ <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020>

expert investment managers who can appropriately manage the return and liquidity profile of that DIA for plan participants. This type of product aligns with a broader theme running through the Proposed Rule: the repeated emphasis on the role of the investment advice fiduciary within the meaning of ERISA Section 3(21)(A), whose engagement appears in virtually every positive safe harbor example and whose involvement the DOL appears to regard as strongly indicative of a prudent process.

Areas of Potential Friction in the Proposed Rule

The Proposed Rule offers a helpful path toward the modernization of how plan sponsors curate their DIA menu for plan participants and enabling the thoughtful inclusion of alternative assets for diversification, enhanced-risk adjusted returns and risk mitigation. However, there are certain elements of the Proposed Rule that merit further attention during the comment period, both to strengthen the safe harbor's effectiveness and to address areas where the current framework may inadvertently create new litigation vulnerabilities.

- *Valuation and Conflicts of Interest.* The Proposed Rule's Valuation factor requires that non-publicly traded securities be valued through a "conflict-free" independent valuation process in accordance with ASC 820, which on its face appears more stringent than under current law (which permits valuation to take into account and weigh conflicts). For example, complete independence when valuing alternative assets is not always achievable. Alternative asset managers routinely possess proprietary information about portfolio investments that is unavailable to third-party valuation agents, and the interaction between manager inputs and independent oversight is a feature of a valuation practices, not a deficiency. As a result, DOL should consider an analytical framework which evaluates the independence of the oversight process as one factor in a holistic assessment rather than imposing a categorical independence requirement.
- *The Role of Investment Advice Fiduciaries.* The positive and frequent reference in the Proposed Rule to third-party professional investment advice fiduciaries (sometimes called "3(21)" fiduciaries), might be interpreted by plan fiduciaries as a *de facto* condition of safe harbor compliance, even though the regulatory text does not formally require it and as result, giving plaintiffs a hook in a lawsuit where they have not been used. The final rule should clarify more explicitly that the engagement of a 3(21) fiduciary is one factor of a prudent process but that its absence does not create a negative inference, if for example, the fiduciary can provide its own expertise through the Complexity factor.
- *Monitoring.* The Proposed Rule also offers no guidance on prudent monitoring of DIAs after their selection, which is another gap that could seek to be exploited by the

plaintiffs' bar (but DOL notes that monitoring is expected to be addressed in a subsequent rulemaking). In the Proposed Rule, DOL invites commenters, particularly those with expertise in portfolio monitoring and menu maintenance, and fiduciary standards, to provide input on best practices in the area of monitoring plan investments.

- *Non-Exhaustive Factors.* The Proposed Rule's six factors are said to be "non-exhaustive," raising the prospect that other factors may be required to be taken into account to demonstrate prudence. The DOL itself has invited comment on whether participant profiles or characteristics should be added as an additional factor, particularly in the context of target date funds and managed accounts.
- *Liquidity and the Tilt Toward Open-end Registered Funds.* Finally, a special note should be made as to liquidity, as it has been a specific area of focus leading up to the issuance of the Proposed Rule. By tying the Liquidity factor of the safe harbor to Rule 22e-4's liquidity risk management program requirement applicable to open-end funds registered under the Investment Company Act, the Proposed Rule arguably tilts the playing field in favor of that specific investment product, which cuts against the expressed agnostic embrace of various investment products in the Proposed Rule. The safe harbors within the Liquidity factor offered by the DOL are certainly beneficial, but an appropriate level of liquidity in a DIA should be subject to the same general fiduciary discretion afforded other aspects of the safe harbor. In addition, Rule 22e-4 imposes a requirement that no more than 15% of a fund's net assets are comprised of illiquid investments, as defined under rule.⁵ The final rule should clarify that references to Rule 22e-4 are illustrative of the type of liquidity risk management framework a fiduciary may consider, and are not intended to require that fiduciaries incorporate the substantive requirements of the Rule, including the 15% illiquid asset limitation, when evaluating the liquidity factor for a DIA.

The DOL will accept comments on the Proposed Rule through June 1, 2026.

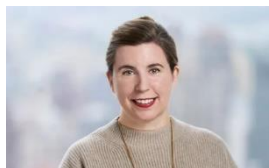
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Please do not hesitate to contact us with any questions.

⁵ Rule 22e-4 defines an illiquid investment, in relevant part, as any investment that a fund reasonably expects cannot be sold or disposed of in current market conditions in seven calendar days or less without the sale or disposition significantly changing the market value of the investment, as determined pursuant to the provisions of the Rule.



Vadim Avdeychik
Partner, New York
+1 212 909 6867
vavdeychik@debevoise.com



Lorna Bowen
Partner, New York
+1 212 909 6993
lbowen@debevoise.com



Jonathan F. Lewis
Partner, New York
+1 212 909 6916
jflewis@debevoise.com



Frank Mitchell
Partner, New York
+1 212 909 6104
flmitchell@debevoise.com



Sheena Paul
Partner, Washington, D.C.
+1 202 383 8178
spaul@debevoise.com



Marc Ponchione
Partner, Washington, D.C.
+ 1 202 383 8290
mponchione@debevoise.com



Justin Storms
Partner, New York
+1 212 909 6973
jstorms@debevoise.com



Lawrence K. Cagney
Counsel, New York
+1 212 909 6909
lkcagney@debevoise.com



Douglas M. Hirn
Counsel, New York
+ 1 212 909 6490
dmhirn@debevoise.com



Christopher A. Johnson
Associate, New York
+1 212 909 6637
cajohnso@debevoise.com

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