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Beyond Alternative Assets: DOL's New Investment Selection Rule Sets the Bar for All Fiduciary Investment Decisions

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On March 31, 2026, the Department of Labor ("DOL") published a proposed regulation on investment selection under ERISA (*"Selection of Designated Investment Alternatives—relevant factors and determinations for fiduciaries of individual account plans to satisfy their prudence requirement,"* 29 CFR 2550.404a-6). Before delving into the details, there are two important points that every plan fiduciary should understand about this proposed regulation:

> **Not Limited to Alternative Assets.** While the proposed regulation was prompted by an Executive Order that focused on increasing access to investments in alternative assets within defined contribution retirement plans, it is applicable to almost all plan investment decisions. Plan fiduciaries need to be aware of the DOL's guidance in the proposed regulations regardless of whether alternative assets will be included in a plan's investment lineup.
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> **"Safe Harbor" may be a Minimum Baseline.** The proposed regulation sets forth a process-driven, so-called "safe harbor" that offers plan fiduciaries substantial—but not absolute—procedural defenses against litigation. By following a clearly documented process as described in the proposed regulation, fiduciaries may be able reduce litigation risk related to plan investment decisions. However, if fiduciaries do not follow the process laid out by the DOL in the proposed regulation, they may increase their litigation risk.

These foundational points set the stage for the discussion that follows. This client alert will break down the core elements of the DOL's proposed regulation and put these key takeaways into practical context for plan fiduciaries navigating the evolving ERISA landscape.

I. Background and Regulatory Context

The DOL's proposed regulation on selecting designated investment alternatives (DIAs) in participant-directed retirement plans was issued in response to Executive Order 14330, "Democratizing Access to Alternative Assets for 401(k) Investors," but its application is intentionally much broader. Rather than

focusing solely on alternative assets, the rule adopts an asset-neutral approach: ERISA does not require or prohibit any particular type of DIA, except where an investment would be illegal (*e.g.*, an investment in certain foreign adversaries on lists administered by the US Office of Foreign Asset Control).1 This means fiduciaries retain discretion to include or exclude any asset class—public equity, private equity, real estate, digital assets, or others—provided they follow a prudent, documented process.

The regulation recognizes that "prudence" may require special considerations for more complex or less liquid investments, emphasizing thorough consideration of liquidity, valuation, fees, complexity, participant demographics, time horizons, and the potential need for specialized fiduciary advice in these areas.2 Crucially, these standards govern the selection of all DIAs, not just those with alternative asset components.

The DOL's core message is that ERISA's prudence standard is process-driven, not outcome-based, and ERISA imposes no categorical restrictions on investment types as long as fiduciaries' determinations are appropriate and based on careful, well-documented reviews. The DOL aims to clarify how fiduciaries can meet their ERISA duty of prudence, principally through a process-based, so-called "safe harbor" focused on six non-exhaustive factors: performance, fees, liquidity, valuation, benchmarking, and complexity. This safe harbor is intended to reduce regulatory uncertainty and litigation risk but does not create categorical rules for or against any asset class. Rather, the DOL believes there should be a presumption of prudence when fiduciaries properly follow and document the process.

The proposed regulation is poised to become an important benchmark for both courts and practitioners navigating ERISA fiduciary duties in a changing investment landscape. The proposed regulation seeks to reshape litigation risk for plan fiduciaries by introducing a process-based "safe harbor" framework: if fiduciaries follow the prescribed procedural steps in selecting DIAs, their investment decisions may be entitled to significant deference in litigation. However, unlike IRS safe harbors, this protection is not absolute—plan fiduciaries may still face challenges if the process is found wanting under the specific facts and circumstances, and courts will retain discretion to scrutinize whether the safe harbor was genuinely satisfied. The DOL expressly anticipates that its guidance will be evaluated under *Skidmore* deference, meaning the weight of its judgments will depend on the thoroughness, reasoning, and consistency of the regulation, rather than its binding authority.3 In effect the proposed regulations do not attempt to establish a safe harbor that could excuse fiduciaries who short-change their investment selection process in any way. Rather they are intended to provide a process-driven roadmap for fiduciaries that they can use to demonstrate their prudence.

The DOL's goal is that litigation risk will be shaped less by investment outcomes and more by the quality

and documentation of fiduciary decision-making processes. While the new regulation should reduce regulatory uncertainty and provide meaningful procedural defenses, plan fiduciaries must continue to prioritize robust, well-documented processes and remain vigilant, as compliance with the safe harbor does not guarantee immunity from suit or adverse outcomes.

II. The Six Safe Harbor Factors—What Fiduciaries Must Do

The DOL's so-called "safe harbor" is process-driven, focusing on six non-exhaustive factors that fiduciaries must objectively and thoroughly consider when selecting any DIA: performance, fees, liquidity, valuation, benchmarking, and complexity. While not every factor will apply equally to every investment, the DOL makes clear that prudent, well-documented consideration of these factors is the cornerstone of procedural compliance.

a. Performance

Fiduciaries must objectively consider a reasonable range of similar alternatives and determine that each option's risk-adjusted expected returns, over an appropriate time horizon and net of fees, best serve participants' needs. 4 Importantly, the focus is not on maximizing returns at any cost, but on prudent process—considering economic, market, sector, and investment-specific risks, as well as the plan's participant demographics, risk capacity and long-term objectives. For example, selecting a target date fund with lower volatility (even if its expected returns are lower than alternatives) may be prudent if it aligns with the risk profile and needs of the participant population—underscoring that process, not outcome, is paramount.5

b. Fees

A plan fiduciary must consider a reasonable number of similar alternatives and determine that the fees and expenses of the DIA are appropriate considering the risk-adjusted expected returns, net of fees and expenses, and any other relevant features of the investment option.6Importantly, while fiduciaries must evaluate fees across comparable alternatives, the lowest fee is not always determinative. Instead, fiduciaries should document how the fees are justified by the value provided—such as enhanced services or unique plan features—ensuring that each decision is grounded in a thorough, process-driven analysis For example, it may be prudent to select an investment option from among a set of options with similar strategies that has relatively higher fees but also relatively higher ratings for customer service and communication.7 However, the proposed regulations also reflect that investment fiduciaries are responsible for ensuring the plan is invested in the lowest cost share class of a fund it qualifies for because there is no advantage to paying higher fees for an otherwise identical investment option.8

c. Liquidity

Fiduciaries must ensure each investment alternative has sufficient liquidity to meet both plan- and

participant-level needs—an especially important consideration for alternative assets.[9] Fiduciaries should pay especially close attention to liquidity when considering alternative asset investments, which are often less liquid than mutual funds. This requires weighing the benefits of enhanced returns or guarantees versus the potential issues with illiquidity. For non-mutual fund options, a fiduciary should consider whether to request a representation from the manager of the investment alternative that it has adopted and implemented a written liquidity risk management program similar to those required for mutual funds registered under the Investment Company Act, or should otherwise perform appropriate due diligence with respect to such alternative to assess and manage its liquidity risk. For investment options that include insurance components, such as lifetime income or stable value products, the investment fiduciary should consider the potential for market value adjustments in its due diligence.

d. Valuation

A DIA selected by an investment fiduciary must have adopted adequate measures to ensure that it is capable of being timely and accurately valued.[10] Fiduciaries may rely on valuations derived from public exchanges as well as independent valuations done in accordance with Financial Accounting Standards Board (FASB) Accounting Standards Codification 820 and SEC rules. Reliance on proprietary valuation methodologies that may have conflicts of interest is unlikely to be prudent, especially for alternative asset investments. Valuation is typically not an issue with traditional investment alternatives consisting of publicly traded securities but warrants special consideration for investment alternatives with exposure to private equity or other alternative investments.

e. Benchmarking

Investment fiduciaries must identify a "meaningful benchmark" for each DIA against which to compare risk-adjusted expected returns. The meaningful benchmark may be an investment strategy or index with "similar mandates, strategies, objectives and risks to the designated investment alternative". Named fiduciaries may rely on advice from investment advisers in identifying meaningful benchmarks for DIAs, especially for investment funds with complex or innovative designs. However, examples in the regulation emphasize that prudence requires that the named fiduciary must have "read, critically reviewed, and understood" the investment adviser's explanation of the meaningful benchmark.

The meaningful benchmark requirement in the investment selection regulations differs from the benchmarks that must be used to compare investment performance in participant disclosure regulations under 29 C.F.R. § 2550.404a-5.The participant disclosure regulations require use of benchmarks that are "broad-based security market indices."[11] The SECURE 2.0 Act of 2022 directed the DOL to modify the participant disclosure regulations to permit benchmarks that are composed of blended broad-based securities market indices for multi-asset class funds, such as target date funds, although the DOL has not yet implemented these changes to the participant disclosure regulations. In contrast, examples in the

investment selection regulations clarify that not only should fiduciaries use blended benchmarks for multi-asset class funds, but also that it may be appropriate to use custom benchmarks that are not based on broad-based securities benchmarks for DIAs that include non-publicly traded securities, such as a private equity sleeve in a multi-asset class fund. This type of custom benchmark would not satisfy the benchmark requirement of the participant disclosure regulation because it would not be based on a broad-based securities market index. However, participant disclosures are permitted to include a secondary benchmark in addition to a broad-based securities market index as long as the secondary benchmark is not inaccurate or misleading.[12] Including disclosures regarding the "meaningful benchmark" identified by the investment fiduciary may be helpful in the event of participant claims. For example, the Ninth Circuit, in dismissing investment performance claims, found it notable that plaintiffs did not compare investment performance to the custom benchmarks that were disclosed and explained to participants.[13]

f. Complexity

Fiduciaries may select complex or sophisticated investments, but only if they have—or obtain via expert advice—the skills and knowledge to fully understand the products' risks, fees, and operations. Delegating to an investment advice fiduciary (ERISA § 3(21)) or investment manager (ERISA § 3(38)) is permitted but does not relieve the plan fiduciary of ongoing monitoring duties. The fiduciary must have the skills, knowledge, experience, and capacity to understand an investment sufficiently to discharge its obligations under ERISA and the governing plan documents. With investment options that involve greater levels of complexity, fiduciaries may need expert investment advice to conclude that the option is prudent and the fees are reasonable.

III. Notable Exclusions and Pending Guidance

a. Exclusion of Brokerage Windows

The DOL's proposed regulation expressly excludes brokerage windows and self-directed brokerage accounts from the definition of "designated investment alternative." This is because the DOL has taken the view that the application of fiduciary principles to investments made by participants through these arrangements is different from other investment options. However, the fiduciary duties of loyalty and prudence still apply to the decision to implement or retain a brokerage window in a plan. As a result, plan fiduciaries should still consider brokerage windows using similar criteria as other plan services, such as the type and quality of services provided and associated fees and expenses.

b. Ongoing Monitoring Not Addressed

The proposed regulation also does not address the fiduciary duty to monitor DIAs after their selection. However, the DOL acknowledge ERISA's "well-established" duty for fiduciaries to continue to monitor DIAs at regular intervals following selection. This fiduciary duty to monitor previously selected

investment options has been recognized and affirmed by the Supreme Court.[14]

The DOL anticipates issuing guidance in the near future concerning the fiduciary duty to monitor DIAs after their selection. In the interim, the DOL is of the view that the same (or substantially similar) factors and processes described in the proposed regulation also apply to the ongoing duty to monitor. In other words, a fiduciary who follows the process outlined in the proposed regulation during monitoring cycles should meet ERISA's ongoing monitoring obligations. The DOL invites comments on the best practices for monitoring default investment alternatives, particularly from individuals with expertise in portfolio monitoring.

c. Menu Curation

The proposed regulation generally provides that a fiduciary has a duty to act prudently when establishing a diversified menu of DIAs by enabling participants to maximize risk-adjusted returns (net of fees) across their entire portfolio. However, the proposed regulation does not provide detailed guidance regarding how a fiduciary can prudently curate a menu of investments overall and the DOL indicates that this is beyond the scope of this rule. The DOL acknowledges that many participant-directed individual account plans follow the requirements of the regulations under ERISA Section 404(c), which generally require the investment menu to offer a wide range of investment alternates meeting certain diversification and risk and return requirements. The DOL invites comments on whether future guidance should address overall investment menu design or whether the regulations under ERISA Section 404(c) "continue to be best practice."

IV. Practical Takeaways and Action Steps

Plan fiduciaries should promptly review and update their investment selection policies, procedures, and committee charters to align with the six-factor process set forth in the DOL's proposed regulation. Each selection of a DIA—whether traditional or alternative—should be supported by documented analysis o performance, fees, liquidity, valuation, benchmarking, and complexity, as detailed in the safe harbor framework.[15] Maintaining comprehensive records of committee deliberations and the rationale for each investment decision is essential, as the proposed safe harbor's protections are contingent on objectively and thoroughly completing these steps.

Committees should also reevaluate their engagement with investment advice fiduciaries (ERISA § 3(21)), investment managers (ERISA § 3(38)), and other advisors, ensuring sufficient expertise to address complex or novel assets.

Given the regulation's emphasis on fee structures, liquidity constraints, and the use of "meaningful" benchmarks, fiduciaries should expect increased attention not only from regulators but also from potential litigants. To mitigate risk and enhance defensibility, fiduciaries should consider implementing

the following best practices to strengthen their ability to demonstrate a prudent process if challenged:

1. Integrate the six-factor framework into all investment selection and monitoring processes.
2. Engage qualified third-party experts where appropriate.
3. Rigorously document all committee discussions, analyses, and decisions.
4. Regularly benchmark investment options using comparators that align with the investment's strategy and risk profile.
5. Provide ongoing fiduciary training for committee members on evolving legal and regulatory issues.

Finally, fiduciaries should remain vigilant for legal and regulatory developments. As previously noted, the DOL has indicated that further interpretive guidance on ongoing monitoring and investment menu curation is forthcoming.16 As the regulatory environment evolves, plan fiduciaries and their advisors should be prepared to adjust their practices to maintain alignment with updated DOL guidance and emerging judicial standards.

V. Conclusion

The DOL's proposed regulation marks a significant shift toward a process-driven, so-called "safe harbor" for ERISA fiduciaries, emphasizing thorough documentation and deliberate analysis over rigid asset-based rules. By embedding these six factors into their investment selection and monitoring practices—and maintaining robust records—plan investment fiduciaries can meaningfully reduce litigation risk and regulatory uncertainty. However, compliance with the safe harbor does not guarantee immunity from challenge, so ongoing vigilance and adaptability remain essential as the regulatory landscape evolves. Fiduciaries should be prepared to adjust their processes as further DOL guidance and court decisions emerge.

Footnotes

191 Fed. Reg. 16,088, 16,105 (Mar. 31, 2026).

291 Fed. Reg. at 16,096, 16,115, 16,136 (Mar. 31, 2026).

3See Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024). See also Bussian v. RJR Nabisco, Inc., 21 F. Supp. 2d 680 (S.D. Tex. 1998) (DOL opinion letters and similar documents are entitled to respect under [the U.S. Supreme Court's] decision in Skidmore v. Swift & Co., … but only to the extent that those interpretations have the power to persuade) (internal quotations and citations omitted).

4See 91 Fed. Reg. at 16,096 (Mar. 31, 2026).

5The example also reinforces the principle that selection must be rooted in a prudent, well-documented

process.See Tibble v. Edison Int'l , 575 U.S. 523 (2015) (holding that fiduciaries have a continuing duty to monitor investments and remove imprudent ones).

6See 91 Fed. Reg. at 16,097 (Mar. 31, 2026).

7See id.Courts have generally deferred to fiduciaries who follow documented, reasonable processes when making fee-related decisions.

8See 29 C.F.R. § 2550.404a-6(h)(2);91 Fed. Reg. at 16,137 (Mar. 31, 2026).

9See91 Fed. Reg. at 16,098 (Mar. 31, 2026).

10See91 Fed. Reg. at 16,100 (Mar. 31, 2026).

1129 C.F.R. § 2550.404a-5.

12See DOL Field Assistance Bulletin 2012-02R, Q&A-16.

13See Anderson v. Intel Corp. Inv. Policy Comm., 137 F.4th 1015, 1025–26 (9th Cir. 2025).

14See Tibble v. Edison Int'l , 575 U.S. 523, 529 (2015); Hughes v. Nw. Univ., 595 U.S. 170, 176 (2022).

15See91 Fed. Reg. at 16,136–44 (Mar. 31, 2026).

1691 Fed. Reg. at 16,135 (Mar. 31, 2026).