

Alternative Assets in 401(k) Plans — A Proposed DOL Safe Harbor

WRITTEN BY

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KEY POINTS

- The DOL has proposed regulations intended to clarify and expand prior regulations addressing ERISA's fiduciary duty of prudence for the selection of directed investment alternatives (DIAs) in participant-directed defined contribution plans (such as 401(k) plans).
- The proposed regulations include an optional safe harbor intended to create a presumption of reasonableness for fiduciaries, which the DOL intends to reduce ERISA fiduciary litigation risks for the selection of DIAs, including DIAs with alternative assets such as private market investments, lifetime income products, etc.
- The proposed ERISA prudence safe harbor applies only to the selection of DIAs, not to brokerage windows, settlor plan design features, or ongoing monitoring obligations.
- To obtain the presumption of reasonableness under the proposed safe harbor, plan fiduciaries must objectively, thoroughly, and analytically consider six factors — performance, fees, liquidity, valuation, performance benchmarks, and complexity — and document their process for each relevant factor.
- The proposal states that it is intended to be asset-neutral but is expressly aimed at “democratizing access to alternative assets” in 401(k) and similar defined contribution plans, as directed by a 2025 executive order.
- Even if finalized, the DOL's proposed prudence safe harbor is expected to face litigation risk, including potential challenges to the rule itself and to fiduciaries' application of the six-factor framework, as well as separate claims alleging breaches of the duty of loyalty or prohibited transactions.

Building on Executive Order 14330 “Democratizing Access to Alternative Assets for 401(k) Investors,” the Department of Labor's (DOL) Employee Benefits Security Administration has issued a proposed regulation under ERISA that would give plan fiduciaries a structured prudence safe harbor for selecting designated investment alternatives in participant directed retirement plans.

WHAT DID THE DOL PROPOSE?

In March 2026, the DOL's Employee Benefits Security Administration proposed amendments to its investment duties regulation under ERISA §404(a)(1)(B).[1] The proposal is intended to implement Executive Order 14330 (the executive order), which directs DOL to remove unnecessary barriers to “democratizing access to alternative assets” for 401(k) investors.[2]

The proposed rule is explicitly asset neutral but is clearly intended to reduce the litigation “chill” that the DOL asserts has discouraged the use of alternative assets — such as private markets, real estate, infrastructure, commodities, and certain digital asset and lifetime income strategies — in 401(k) and similar plans.[3] The proposed rule seeks to accomplish this goal by clarifying how the duty of prudence applies when fiduciaries select

designated investment alternatives in participant-directed individual account plans, such as 401(k) plans. The central feature of the proposed rule is an optional prudence safe harbor built around six specific factors and detailed examples, discussed in more detail below.

The DOL notes that the “appropriate consideration” framework in the 1979 investment duties regulation^[4] remains in effect — the proposed rule builds on and clarifies the 1979 guidance but does not replace it. The proposed rule also has limits. It addresses the selection of designated investment alternatives (DIAs), not the fiduciary duties related to ongoing monitoring of the DIAs. The DOL states that monitoring obligations remain governed by existing law and anticipates separate guidance on monitoring. The proposed rule also does not alter the duty of loyalty or prohibited transaction rules.

WHICH PLANS AND INVESTMENTS ARE COVERED?

The proposed rule covers participant-directed individual account plans subject to ERISA, such as 401(k) plans, ERISA-covered 403(b) arrangements, and similar defined contribution arrangements that allow participants to direct investments.

The duty of prudence safe harbor set forth in the proposed rule relates to the selection of DIAs — that is, investment options the plan specifically designates for participant direction. This includes core menu options, qualified default investment alternatives (QDIAs), and managed account services when used as QDIAs.

The proposed rule does not apply to:

- Brokerage windows or self-directed brokerage accounts and investments made only through those windows; or
- Pure plan design features chosen by the employer as settlor (for example, a built-in longevity/risk/sharing pool implemented in the benefit formula rather than via an investment product on the menu).

HOW DOES THE PRUDENCE SAFE HARBOR WORK?

Under the proposed rule, a fiduciary’s selection of a DIA is entitled to a presumption of reasonableness — and “significant deference” — if the fiduciary:

- **Objectively, thoroughly, and analytically considers** each of six specified factors to the extent relevant to the decision;
- Makes a **reasoned determination** with respect to each relevant factor; and
- **Documents** the process.

The six factors are: (1) performance, (2) fees, (3) liquidity, (4) valuation, (5) performance benchmarks, and (6) complexity. The safe harbor is applied factor-by-factor. You do not have to check every box for every DIA, but to the extent a factor is relevant for a particular DIA, a clearly documented analysis should establish a prudent fiduciary decision. The proposed rule illustrates application of each factor with a series of examples, many of which focus on various forms of alternative investments. The following highlights how the proposed rule addresses each factor, including a high-level review of the examples used for each factor.

1. Performance: Risk-Adjusted, Net of Fees, Over the Right Time Horizon. The performance factor asks

whether selecting a DIA helps participants maximize risk-adjusted expected returns, net of fees, over an appropriate time horizon. Under this factor, fiduciaries should compare the expected risk-adjusted returns for each DIA to a reasonable number of similar alternatives, not to the entire universe of investments.

The first example for this factor illustrates how the DOL expects fiduciaries to think about returns in a safe harbor world: not “which fund is hottest,” but which option offers the best risk-adjusted expected outcome for the plan’s participants, net of fees, over an appropriate time horizon. In this example, a fiduciary prudently selects a target date fund with somewhat lower projected returns but markedly lower volatility and better downside protection than higher-octane peers. That decision is treated as consistent with prudence because it is grounded in a comparative, forward-looking analysis that recognizes retirement as a long-term objective and participants’ limited capacity to bear large drawdowns.

In the other example for this factor, the DOL notes that emphasizing longer-term performance (e.g., 10-year data for reviewing the performance of a target date fund) may be consistent with prudence.

Both examples note the potential importance for the plan fiduciary to obtain performance-related analysis and advice regarding risk-adjusted returns from an ERISA 3(21) investment-advice fiduciary.

2. Fees: Appropriate for Value, Not a Race to the Bottom. The fee factor focuses on whether the DIA’s fees and expenses are appropriate in light of:

- Risk-adjusted expected returns, net of fees; and
- Additional value the option provides (e.g., better diversification, downside protection, guarantees, or bespoke services).

The proposed rule includes four examples to illustrate application of this factor. Together, these four examples show that under the proposed rule:

- Fiduciaries are not locked into the lowest-cost option, but
- They must be able to explain and document why any higher fee is appropriate relative to the value delivered (services, guarantees, risk-mitigation, diversification), and
- They must avoid plainly unjustified higher costs (like ignoring cheaper identical share classes) and use a structured, analytical process, especially when alternatives or complex guarantees are involved.

One of the examples relates to a DIA that includes a lifetime income feature provided through a variable annuity contract. In this example, the plan already offers a diversified asset-allocation fund as a DIA. A new version of that same fund is offered through a variable annuity contract that adds a guaranteed lifetime income benefit, with an extra fee layered on top of the base fund’s expense ratio. The fiduciary hires an ERISA 3(21) investment-advice fiduciary to analyze the annuity market, break-even ages, and whether the added fee is reasonable relative to the benefit for this plan’s participants, then critically reviews and adopts that analysis. The example demonstrates that a lifetime income guarantee can justify higher total fees if the fiduciary can show that the guarantee’s value (for retirement-income security) is commensurate with the extra cost.

3. Liquidity: Look to Both Plan-Level and Participant-Level Needs. The liquidity factor requires fiduciaries to determine that a DIA has enough liquidity to:

- Meet participant-level needs (e.g., loans, withdrawals, exchanges, rebalancing), and
- Weather plan-level events (e.g., large redemptions, plan terminations, mergers, or removal of an option).

Crucially, the DOL acknowledges that many alternative assets are inherently less liquid, but that plans are not required to limit themselves to fully liquid investments. Illiquidity can be a source of return — an illiquidity premium — if managed appropriately.

The liquidity examples illustrate that prudence does not require every DIA to be daily liquid; instead, liquidity must be “enough” relative to participant and plan needs, given the DIA’s design and role in the lineup. One example involves a pooled vehicle with illiquid holdings but a robust liquidity risk-management program modeled on registered mutual fund practices. The fiduciary reviews written materials describing how that program handles participant flows and plan-level events, seeks professional input where needed, and, finding no red flags, concludes that the fund’s liquidity profile is appropriate. That process satisfies the safe harbor, even though the underlying assets are not all readily tradable.

Another example involves a DIA structured as a lifetime income annuity that offers a guaranteed stream of payments in retirement through a deferred annuity contract but restricts interim withdrawals or imposes meaningful surrender limitations. In the example, the fiduciary evaluates the annuity-based DIA alongside more traditional, fully liquid options on the menu. Applying the liquidity factor, the fiduciary examines both participant-level needs (e.g., expected withdrawals, rebalancing, and transfers) and plan-level events (e.g., asset flows, potential plan changes). The example concludes that the fiduciary can satisfy the liquidity factor — even though the annuity DIA itself has limited withdrawal rights — because the plan as a whole maintains sufficient liquidity and the trade-off (restricted access in exchange for guaranteed lifetime income) is well understood and documented.

4. Valuation: Independence, Methodology, and Conflicts. The valuation factor focuses on whether a DIA can be timely and accurately valued consistent with plan needs.

The valuation examples draw a spectrum from simple to complex and show when fiduciaries can rely on existing valuation infrastructures and when they must be wary. At the straightforward end, a DIA invested solely in widely traded securities on regulated exchanges may generally be valued using market prices, consistent with its governing documents, absent contrary information. More complex examples address private vehicles using ASC 820-compliant fair value processes, where an independent, conflict-managed body applies a consistent methodology at least quarterly. In those cases, the fiduciary can satisfy the valuation factor by reading and understanding the manager’s description, possibly with expert help, and confirming that there is a credible governance structure around pricing.

By contrast, a final example highlights continuation funds and similar structures where the sponsor essentially “marks its own book” with proprietary methods and heavy reliance on internal inputs, without strong conflict controls. Those are treated as red-flag scenarios that may fail the valuation factor unless conflicts are significantly mitigated.

5. Performance Benchmarks: Meaningful Comparators, Not Apples to Oranges. Each DIA should have at least one “meaningful benchmark” — one that shares similar mandate, strategy, objectives, and risk profile. The benchmark examples refine what it means to use a “meaningful” benchmark when evaluating a DIA’s

risk-adjusted expected returns, net of fees. The core lesson is that benchmarks must be genuinely comparable in mandate, strategy, objectives, and risk profile; there is no universal index that fits every situation.

One example shows that treating a large-cap equity index as the primary benchmark for a diversified target date fund is inappropriate, because the index does not reflect the TDF's multiasset composition, glidepath, or risk management. In that scenario, the fiduciary's chosen benchmark is not "meaningful" and undercuts the performance analysis. Conversely, another example endorses creating a custom or composite benchmark for multiasset and alternative-inclusive strategies. The example considers the appropriate benchmark for a target date fund or balanced fund that blends public equities, fixed income, and private markets. In the example, the plan fiduciary, with assistance from its ERISA 3(21) investment-advice fiduciary, establishes a custom blended benchmark — combining equity and bond indices with appropriate private-market metrics or proxies. The custom benchmark satisfies the safe harbor if the methodology is sound and documented.

Together, the examples support the use of innovative products, making clear that fiduciaries should select the best available comparators, even if imperfect, and may rely on benchmarks developed by a qualified adviser so long as they understand how those benchmarks are constructed and how they will be used.

6. Complexity: Know What You're Buying — or Hire Someone Who Does. Finally, the complexity factor requires fiduciaries to assess whether:

- They personally have the skills, knowledge, experience, and capacity to understand the DIA well enough to fulfill their ERISA duties; or
- They need to engage an ERISA 3(21) investment-advice fiduciary, 3(38) investment manager, or another expert.

The examples in the proposed rule also confront the reality that many types of alternative investments are not simple. The DOL's message is not that complexity is disqualifying, but that fiduciaries must either genuinely understand it or retain someone who does.

One example involves a DIA investing across varied private assets with sophisticated performance-based fees, including management fees and performance fees. In one variant, the named fiduciary has the expertise and capacity to analyze the structure directly and documents that understanding; in another, the fiduciary prudently acknowledges its limits and engages an ERISA 3(21) or 3(38) expert, then critically reviews the expert's analysis. Both paths are consistent with the safe harbor because the fiduciary confronts the complexity and can explain how the fee and risk profile translates into value for participants.

A contrasting example uses a managed account QDIA that charges more than an existing target date fund but, in practice, produces very similar allocations because the plan provides only minimal participant data and the fiduciary does not understand the algorithm driving the portfolios. There, the fiduciary cannot articulate what the higher fee is buying and has not meaningfully evaluated the product's design; the complexity factor is not satisfied, and the selection is treated as imprudent.

WHAT DOES THE PROPOSAL SAY ABOUT ALTERNATIVE ASSETS?

The proposal is explicitly asset-neutral, but the preamble leans heavily on the executive order's focus on

alternative assets, and the examples in the proposed rule especially focus on application of the safe harbor to various types of alternative assets.

The DOL's release accompanying the proposed rule expresses several policy conclusions supporting the potential use of alternative assets in DIAs. The release states that defined contribution plans currently have minimal direct exposure to alternative assets, especially compared with public and corporate defined benefit plans. Modern portfolio theory suggests that constraining the investment universe to liquid public stocks and bonds may not result in an optimal long-term investment portfolio. The release cites academic studies and simulations suggesting that modest allocations to private markets and other alternative assets in target date funds can increase median retirement income.

At the same time, the DOL emphasizes that alternative strategies bring real risks — illiquidity, valuation complexity, return smoothing, manager dispersion — and are not guaranteed to improve outcomes. They note that research on defined benefit plans' actual experience is mixed; governance failures and agency issues can erode potential benefits.

Ultimately, the proposed rule's safe harbor structure with its six-factor checklist is the DOL's way of saying plan fiduciaries can use alternatives assets in 401(k) plans, but only if they treat them with the same rigor and transparency they would apply to any other DIA — possibly more.

WHAT COMES NEXT?

A public comment period for the proposed rule runs through June 1, 2026. The DOL release also includes several related topics for which the DOL has requested comments.

After the comment period, the DOL will review and analyze the comments, potentially revise the rule text or examples in response to those comments, and decide whether to issue a final regulation. There is no statutory deadline by which DOL must finalize the rule, although the executive order encourages quick regulatory action.

Separately, the release indicates that the DOL expects to issue additional interpretive guidance on monitoring investment options in the future, since the current proposal focuses on selection, not ongoing monitoring obligations.

The big question is whether the DOL's efforts will, in fact, spur increased use of alternative assets in 401(k) plans. The proposed rule certainly should reduce some of the friction in the system, but even with the prudence safe harbor in place, litigation is likely. Plaintiffs could challenge the rule itself, under a *Loper Bright* theory of improper executive action. Or they could challenge the factual underpinnings of specific fiduciary deliberations for each of the six factors, including whether a factor was relevant or whether the fiduciary met the rules' standards — *i.e.*, did the fiduciary in fact objectively, thoroughly, and analytically consider each relevant factor and reach a reasoned determination. Finally, depending on the facts, plaintiffs might still allege breaches of the duty of loyalty or prohibited transactions. More to come.

[1] *Fiduciary Duties in Selecting Designated Investment Alternatives*, 91 Fed. Reg. 16,088 (proposed Mar. 31, 2026) (to be codified at 29 C.F.R. pt. 2550) ([here](#)). The DOL has also published a Fact Sheet summarizing the proposal ([here](#)).

[2] See President Donald Trump, *Democratizing Access To Alternative Assets For 401(K) Investors*, August 7, 2025 ([here](#)).

[3] The DOL release and economic analysis accompanying the proposed rule—drawing on data and consultation with Treasury, IRS staff, SEC staff, and the PBGC—frame the rule as largely deregulatory, aimed at reducing litigation driven distortions in plan investment decisions.

[4] *Investment Duties*, 44 Fed. Reg. 37,221 (June 26, 1979) (codified at 29 C.F.R. § 2550.404a?1).

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