

The Department of Labor Proposes ERISA Safe Harbor Regarding Investing in Alternative Investments in Defined Contribution Plans

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On March 30, 2026, the Department of Labor (the “DOL”) proposed a rule that would clarify how fiduciaries satisfy their fiduciary duties when selecting designated investment alternatives for participant-directed individual account plans (e.g., 401(k) plans) as well as asset allocation funds that include investments in alternative assets. The proposed rule, titled “Fiduciary Duties in Selecting Designated Investment Alternatives,” was issued in response to President Trump’s August 2025 executive order entitled “Democratizing Access to Alternative Assets for 401(k) Investors,” which directed certain federal agencies, including the DOL, to expand the ability of defined contribution plans to invest in “alternative assets” (which include private market, real estate, digital asset, commodity, infrastructure, and lifetime income investments). The proposal includes a process-based safe harbor to satisfy an ERISA fiduciary’s duty of prudence that is centered around six factors: performance, fees, liquidity, valuation, benchmarking, and complexity. It is important to note that at this point, the rule is only proposed and cannot be relied on by plan fiduciaries. If the rule is finalized, a plan fiduciary that follows the safe harbor rules will be deemed to have complied with its fiduciary duties under ERISA. The rule will be finalized (and could be very different) after the DOL considers comments, which interested stakeholders must provide to the DOL by June 1, 2026.

Executive Summary

In response to President Trump’s August 2025 executive order, the DOL has issued a proposed rule that provides a safe harbor that investment fiduciaries of participant-directed individual account plans may follow in order to invest in certain investments, including “alternative asset” investments (note that the rule applies broadly to all investments, not only to alternative asset investments). Although employers have technically always been free to offer alternative asset investment options in their retirement plans, very few have done so due to fiduciary concerns, regulatory risk, and litigation liability. This rule does not require employers to add alternative assets to their defined contribution or other participant-directed retirement plans. Fiduciaries that elect to add such investments must follow a careful and analytical process outlined in the rule in order to rely on the safe harbor. If an investment fiduciary objectively, thoroughly, and analytically considers six factors set forth in the proposed rule, in addition to giving appropriate consideration to the facts and circumstances that the fiduciary knows or should know are relevant to the particular investment and how it interacts with the plan’s investment portfolio or menu, such fiduciary will be deemed to comply with ERISA’s fiduciary duty of prudence. The six factors are performance, fees, liquidity, valuation, benchmarking, and complexity. The DOL clarified that the duty of prudence is asset-class neutral.

Although the proposed rule does not specifically address interval funds, in several of the proposed rule’s examples, the investment vehicle has characteristics similar to the characteristics found in interval funds. Accordingly, as is the case with any other investment vehicle, it appears that the intent of the proposed rule is that, as long as the interval fund satisfies the requirements outlined in the rule’s six factors, an interval fund investing in alternative assets may be designated an investment alternative in a defined contribution plan. Interval funds may also serve as components of asset allocation funds (such as target-date funds), which is expected to be the primary commercial channel through which alternative exposure reaches defined contribution plan participants.

While plan fiduciaries and investment professionals should be considering these rules and their processes, it is important to understand that it may be several months before the rule is finalized and becomes effective (the DOL has indicated it is aiming for the end of the 2026 calendar year to finalize the rule). It is also not clear how the final rule will differ from the proposed rule. Finally, even with a final safe harbor rule, given plaintiffs’ attorneys’ focus on

types and costs of plan investments, until courts begin ruling favorably, it is not clear how comfortable employers will be to incorporate alternative assets in their 401(k) plans' investment lineups.

What Plans and Products Are Covered

Applicability to participant-directed individual account plans

The proposal would apply to the fiduciary act of selecting "designated investment alternatives" for participant-directed individual account plans governed by ERISA (*i.e.*, defined contribution plans). The DOL indicated that the rule supplements its longstanding 1979 "investment duties" regulation by specifying how fiduciaries satisfy their ERISA duty of "prudence." The 1979 regulation required fiduciaries to satisfy their duty of prudence by demonstrating that they have engaged in a process that has given appropriate consideration to relevant facts and circumstances when making selection decisions for menu options and have "acted accordingly." The proposed six factors have been created to replace the requirement to "act accordingly" with a process-based safe harbor. The proposal does not address defined benefit pension plan investing. Importantly, the proposed rule also does not address the monitoring of designated investment alternatives following their inclusion on a plan's investment menu. The DOL has indicated it will issue separate guidance on the duty to monitor. The DOL specifically provided that compliance with the rule does not negate a fiduciary's requirement to comply with ERISA's fiduciary duty of loyalty or ERISA's prohibited-transaction rules.

Definition of designated investment alternative

The proposed rule provides that ERISA does not restrict any specific type of "designated investment alternative." For example, there is no specific rule respecting investments in "alternative assets," such as (1) private market investments, including direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the managers of such investments, if applicable, seek to take an active role in the management of such companies, (2) direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate, (3) holdings in actively managed investment vehicles that are investing in digital assets, (4) direct and indirect investments in commodities, (5) direct and indirect investments in projects financing infrastructure development, and (6) lifetime income investment strategies including longevity risk-sharing pools. The rule defines a "designated investment alternative" broadly as any plan-designated option into which participants may direct assets.

The Safe Harbor and the Six Factors

Structure of the safe harbor and presumption of reasonableness

In general, to satisfy its duty of prudence under ERISA when selecting a designated investment alternative, a plan fiduciary must use a prudent process. The process must consider the relevant facts and circumstances that, given the scope of the fiduciary's investment responsibility or authority, the fiduciary knows or should know are relevant to the particular designated investment alternative. The proposal supplements the DOL's 1979 "investment duties" regulation, removes the previous guidance language that required fiduciaries to "act accordingly," and replaces such language with a process-based (as opposed to a result-based) safe harbor for plan fiduciaries to use when they select designated investment alternatives. The safe harbor identifies six factors for fiduciaries to consider.

The six factors are performance, fees, liquidity, valuation, benchmarking, and complexity. It is important to note that these six factors are non-exhaustive, and a fiduciary should still consider other factors that the fiduciary knows or should know are relevant to the particular designated investment alternative. Under the rule, when a fiduciary objectively, thoroughly, and analytically considers these factors, the fiduciary's judgment on a particular factor is presumed to be reasonable and entitled to significant deference, and its judgment regarding a factor or factors is presumed to have met the fiduciary's duties under ERISA.

Performance

The performance factor would require fiduciaries to consider a reasonable number of similar investment alternatives and determine that 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 their risk-adjusted return on investment, net of the fees and expenses. The rule's preamble provides that prudence does not require a fiduciary to choose an investment with the highest expected returns if, for example, a lower-volatility option better serves participants. An example in the proposed rule indicates that it may be prudent to select a lower-risk strategy with a lower expected return by using alternative assets that have low correlations to stocks and bonds for the purposes of improving risk-adjusted returns. In addition, the rule provides that a fiduciary need not select the highest returns during the most recent period of time. In another example, the DOL provides that given the long-term nature of retirement savings, it is often prudent to give greater weight to the long-term historical performance of possible investment alternatives over short-term performance.

Fees

The fees factor would confirm that fiduciaries are not required to select the investments with the lowest fees and expenses. Instead, they must determine that fees and expenses are appropriate in light of expected risk-adjusted net returns and the other commensurate value an investment option provides. For example, a prudent plan fiduciary could choose to pay more in exchange for greater services. In an example in the rule, a fiduciary examines five different funds that follow similar investment strategies in tracking the same index and selects the fund with the highest fees and highest rating for customer service and communication. This fund offers knowledgeable staffed call centers dedicated to retirement plan investors, short wait times, clearly written investor communications, safe and easy online access for participants, and published surveys and ratings that demonstrate an exceptional commitment to customer service. The difference between the funds with the lowest and highest fees is one quarter of one basis point. The example concludes that the fiduciary was prudent by considering and determining that the higher fees and expenses are appropriate considering the value of increased customer service and communication. An example provides that higher fees may be justified when a variable annuity with a lifetime income feature is compared to a similar annuity without such a lifetime income feature. Another example in the rule provides that the incorporation of alternative assets with a higher expense ratio may be justified if the purpose of the inclusion of alternative assets was to mitigate the risk of large losses during a market downturn. Finally, yet another example provides that a fiduciary was prudent when it selected an actively managed fund with higher fees instead of a passively managed fund because the actively managed fund provided greater diversification. The DOL also notes that a fiduciary should not select a higher-cost share class of a fund when an identical lower-cost share class is available.

Liquidity

The liquidity factor would require fiduciaries to consider and determine that an option will have sufficient liquidity to meet anticipated needs at both the participant and plan levels. Participants and plans have cash needs due to, for example, distributions, withdrawals, loans, and rollovers. The DOL recognizes that some investment alternatives are less liquid but provides that plans need not necessarily offer only fully liquid products. For non-mutual fund vehicles, the DOL provides two pathways to satisfy the liquidity requirement: fiduciaries may critically review written representations that the product has adopted and implemented a liquidity risk management program that is substantially similar to the SEC-required registered mutual fund regime, or they may conduct an objective and thorough analysis of redemption mechanics, time to sell illiquid holdings without impairing value, capital-return timelines, notice periods, and the product's ability to maintain target allocations after large outflows.

Notably, while the proposal acknowledges the inherent tension between participants who could benefit from an illiquidity premium, particularly those early in their careers with long investment time horizons, and those who may need liquidity imminently due to retirement, separation from service, or financial hardship, and acknowledges the highly variable needs of plans that, among other things, depend on factors such as the type of plan at issue, its features, and the overall profile of the participants and beneficiaries of the plan as a whole, it does not provide a general methodology or framework for how fiduciaries should model or quantify the differing liquidity needs of a heterogeneous participant population spanning multiple career stages. Instead, it provides some specific examples that may or may not work in specific situations. In one example, the proposal points to the SEC's requirement for

registered funds to provide a written liquidity risk management program. With respect to non-registered investments, it provides that a plan fiduciary could rely on a written representation that the investment fund has adopted and implemented a substantially similar liquidity risk program. The example also recognizes that a plan fiduciary may otherwise perform appropriate due diligence regarding the designated investment alternative's liquidity risk management program that would satisfy the safe harbor even in the absence of obtaining a written representation for designated investment alternatives that are not mutual funds. The conclusion in this example depends on the plan fiduciary reading and critically reviewing any written representation (independently or with assistance of a qualified investment professional if necessary) and not knowing (or having reason to know) other information that would cause the fiduciary to question any written representation. It also provides that the plan fiduciary can rely on an investment fiduciary's representation. Although the rule's examples provide some general guidance, they leave open the question of how fiduciaries should specifically weigh the liquidity needs of participants, especially for a diverse plan population. This may be a useful subject for comment.

Valuation

The valuation factor would emphasize timely and accurate pricing consistent with the plan's needs. The proposed rule provides an example where, because an investment's holdings all trade on public exchanges, reliance on such exchange prices would, of course, be permitted. However, in another example, for investments with non-public holdings, the proposal recognizes that it would be prudent to rely on a conflict-free, independent, well-accepted fair-value process such as the procedures set forth in FASB ASC 820, with valuations performed no less frequently than quarterly. For registered mutual funds that contain some securities for which there is not a generally recognized market, fiduciaries may rely on audited, publicly available financial statements, provided that they have no reason to doubt the veracity of such audited financial statements. Lastly, the proposed rule provides an example where a valuation performed by a related party to the manager of a fund was relied on by the fiduciary of a plan when making an investment decision. In this instance, the valuation would not meet the requirements under the proposed rule.

Benchmarking

The benchmarking factor would require fiduciaries to determine that each option has a meaningful benchmark and to compare the expected risk-adjusted returns, net of fees, of the designated investment alternative to that benchmark. A meaningful benchmark is defined as an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to those of the designated investment alternative. The rule offers examples that demonstrate that fiduciaries can construct meaningful benchmarks for a diversified product by using a blended, or composite, benchmark developed by an investment fiduciary. However, the plan fiduciary must read, critically review, and understand the benchmark description and determine that the custom composite benchmark is a meaningful benchmark. Among other things, the plan fiduciary must compare the historical performance of the investment fund to the historical returns of the custom composite benchmark as a means of evaluating the risk-adjusted expected returns of the target-date fund. Importantly, the DOL recognizes that there is no presumption against new or innovative designated investment alternative designs that might not have any clear existing benchmarks. In those cases, fiduciaries should identify the best available comparators while scrutinizing the new design's value proposition.

Complexity

The complexity factor would make clear that sophisticated strategies can be prudent selections if the fiduciary determines that it has the skills, knowledge, experience, and capacity to comprehend the designated investment alternative 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 individual in evaluating the designated investment alternative. The fiduciary must understand how an investment option works, what participants receive, and what the plan pays, or the fiduciary must prudently retain qualified experts who do understand the foregoing. The DOL noted that this principle is not new, but is particularly relevant for investment options that contain alternative assets.

Implications of the Proposed Rule for Interval Funds

Background

We understand that many investment professionals are developing or plan to develop “interval funds” that hold alternative assets to be used as a designated investment alternative for defined contribution plans. Interval funds are registered closed-end funds that are governed primarily by Rule 23c-3 under the Investment Company Act of 1940 and periodically offer to repurchase their shares from shareholders at net asset value (“NAV”) at stated intervals of three, six, or twelve months (with some funds obtaining SEC exemptive relief to offer monthly repurchases). Unlike open-end mutual funds, which must provide daily redemptions and must hold a minimum of 85% of their portfolios in highly liquid investments, interval funds are not subject to those liquidity constraints, which permits them to invest more freely in illiquid alternative assets such as private equity, private credit, real estate, and infrastructure. Interval funds continuously offer new shares at NAV, and their shares are generally not listed on a securities exchange.

Why interval funds fit the proposal’s asset-neutral, process-based framework

Although the proposed rule does not specifically mention interval funds, the rule’s asset-neutral framework and liquidity and valuation examples encompass products with plan-level redemption restrictions and sleeves of illiquid private assets. An example in the rule involves a pooled vehicle that permits only quarterly redemptions at the plan level while providing daily participant-level liquidity, which is analogous to how an interval fund that conducts quarterly repurchase offers could be structured for use in a retirement plan. Within this framework, even though “interval funds” are not specifically mentioned, the proposal appears to contemplate that interval funds can be selected as designated investment alternatives or incorporated into diversified options such as target-date funds and managed accounts when a fiduciary documents an objective, thorough, and analytical process addressing the six safe harbor factors. Because interval funds are registered investment companies, they benefit from certain structural advantages under the proposal: the DOL’s examples for registered mutual funds, including reliance on audited financial statements under the Investment Company Act for valuation purposes, may offer interval funds a more accessible path to satisfy the valuation and liquidity safe harbor factors than unregistered vehicles do. Given that interval funds may become a common vehicle for investing in alternative assets within ERISA plans, it is possible that comments to the proposed rule will raise specific questions about interval funds, and a clarifying example or specific discussion of interval funds in the final rule would be beneficial.

Liquidity determinations for interval funds at participant and plan levels

As noted above, the proposal’s liquidity factor requires fiduciaries to determine that an option will have sufficient liquidity to meet anticipated participant-level and plan-level needs. For open-end mutual funds, the proposal points to the SEC’s liquidity risk management program as a ready path to satisfy participant-level liquidity determinations. Interval funds, though registered under the Investment Company Act, are not subject to the SEC’s liquidity risk management program in the same manner as open-end mutual funds and therefore fall into the non-mutual fund category under the proposed rule. Accordingly, for fund vehicles, which would include interval funds, the DOL provides two pathways: fiduciaries may critically review written representations that the fund has adopted and implemented a liquidity risk management program that is substantially similar to the mutual fund regime, or they may conduct an objective and thorough analysis (either on their own or with the help of a third-party investment advice fiduciary) of redemption mechanics, time to sell illiquid holdings without impairing value, capital-return timelines, notice periods, and the fund’s ability to maintain target allocations after large outflows. Consequently, a plan considering an interval fund will need to either obtain and critically review written representations from the fund’s manager regarding its liquidity program or conduct an independent analysis under the factors described above. A key practical point for interval funds is that, under Rule 23c-3, an interval fund is generally required to repurchase between 5% and 25% of its outstanding shares per repurchase offer, and the fund may not suspend or postpone a scheduled repurchase offer except in limited circumstances requiring board approval. These mandatory repurchase obligations, and any fund-level gates or proration mechanics that apply when repurchase requests exceed the repurchase offer amount, are directly relevant to the plan-level liquidity analysis and should be carefully documented by plan fiduciaries. The DOL’s example specifically contemplates quarterly plan-level redemptions paired with daily

participant-level liquidity and concludes that fiduciaries can prudently select such a structure when the redemption mechanics are appropriate to plan needs and the expected net risk-adjusted benefits justify the plan-level tradeoffs.

Valuation and pricing for portfolios with private holdings

The proposal's valuation factor emphasizes timely and accurate pricing and offers two relevant routes for interval funds that invest in private market assets. One route is reliance on conflict-free, independent fair-value processes that apply widely used accounting standards, such as FASB ASC 820, with valuations performed no less frequently than quarterly, coupled with fiduciary review of the manager's written representations. The other route, illustrated for registered mutual funds, is reliance on audited financial statements and valuation-related disclosures adopted to comply with the Investment Company Act, after a critical fiduciary review. As registered investment companies, interval funds are required under the Investment Company Act and SEC rules to maintain formal fair-value procedures, strike NAV for periodic repurchases, and publish audited annual financial statements. This registration framework places interval funds in a comparatively favorable position relative to unregistered private fund vehicles. A plan fiduciary evaluating an interval fund's valuation practices can rely on the fund's SEC-registered status, its compliance with Investment Company Act fair-value requirements (including Rule 2a-5 under the Investment Company Act, which governs fund fair value determinations), and its audited financial statements, *provided* the fiduciary critically reviews those disclosures and has no reason to doubt their accuracy. However, fiduciaries should remain attentive to the fact that the quarterly valuation cycle typical of interval funds investing in illiquid assets may present challenges for plans that require daily pricing for participant transaction processing, and they should ensure that the fund's valuation and pricing policies can accommodate the plan's daily operational needs. This approach aligns with the DOL's broader recognition that timely, accurate valuation for non-public holdings is achievable through well-designed, independent processes.

Benchmarking interval funds that allocate to private equity and other alternatives

The proposal requires that each option have a meaningful benchmark and that fiduciaries compare expected net risk-adjusted returns to that benchmark. For interval funds investing in private equity or other alternatives, this will typically require composite or custom benchmarks that reflect both the public and private sleeves of the strategy. The DOL's examples endorse benchmarks that share mandates, strategies, objectives, and risks with the product, and they warn against comparisons to broad public-equity indices that do not reflect the product's structure. For interval funds, a prudent benchmarking approach might blend broad-based public indices with private-market performance measures where appropriate and document how these components mirror the fund's investment program and risk characteristics. Private market benchmarks present particular challenges because private equity and private credit performance data are typically reported on a lagged basis, IRR-based return metrics are not directly comparable to time-weighted returns used for public market indices, and there is no single universally accepted private markets benchmark. Plan fiduciaries should be prepared to document their rationale for selecting particular private market comparators and for constructing the blended benchmark, including the weighting methodology. The key is that the benchmark be genuinely comparable to the interval fund's objectives and constraints, including its periodic-liquidity design.

Fee structure, share class selection, and layering considerations

The proposal's fees and complexity factors are directly relevant to interval funds that allocate to private funds or other strategies with performance-based fees. The DOL explains that fiduciaries are not required to choose the lowest-fee option but must determine that fees are appropriate in light of expected net risk-adjusted returns and any commensurate value. The examples caution against selecting a higher-cost share class when an identical lower-cost class is available and emphasize understanding layered fees and incentive arrangements. For interval funds, this means documenting how underlying investment management fees, any performance-based incentives (including carried interest or performance fees passed through from underlying private fund sleeves), fund-level expenses, and any distribution or placement fees affect net outcomes for participants and, where possible, selecting institutional share classes that avoid unnecessary distribution charges. Fiduciaries should also be aware that interval funds may charge redemption fees of up to 2% of the repurchase proceeds under Rule 23c-3; while such fees are paid to the fund and are generally intended to offset costs related to the repurchase, fiduciaries should evaluate whether they are appropriate for the plan's participants. The proposal also recognizes structures in which managers internalize

underlying fees while charging a flat asset-based fee to plans; while that arrangement may not always be available for registered products, fiduciaries should evaluate whether such a fee structure is appropriate given the strategy's expected benefits.

Practical use cases and operational considerations for plan lineups

The DOL anticipates that many plans will provide alternative exposure through diversified vehicles, especially target-date funds and professionally managed accounts, and this is expected to be the primary channel for interval fund investment in defined contribution plans. Interval funds can contribute to these channels by serving as a component within a diversified strategy where public-market liquidity can help satisfy participant-level cash-flow needs while preserving the interval fund's strategic allocation. The proposal's liquidity examples expressly contemplate plan-level redemption restrictions for pooled vehicles with private-asset sleeves combined with participant-level daily liquidity. This construct supports the operational feasibility of offering interval funds directly as designated investment alternatives when the plan, recordkeeper, and product provider can coordinate to align daily participant liquidity with periodic plan-level repurchases, and it supports indirect exposure through a diversified default that holds an interval fund sleeve.

A critical operational issue for interval funds in defined contribution plans is recordkeeper readiness: most defined contribution plan recordkeeping platforms are built around daily mutual fund trading infrastructure, and interval funds' periodic repurchase windows, proration mechanics, and non-daily settlement cycles require customized systems and workflows. Notably, Empower, one of the largest recordkeepers in the country, issued a statement supporting the proposed rule, characterizing it as taking "a balanced, investment-neutral approach" that "reinforces that those responsible for managing retirement plan investments should follow a thoughtful, disciplined process focused on delivering the best interests for participants, while maintaining flexibility in how investment decisions are made." Empower's endorsement is a meaningful signal that at least some large recordkeepers are prepared to engage with the operational changes needed to accommodate interval funds and other alternative investment products on their platforms. Plan fiduciaries should coordinate with recordkeepers and product sponsors early in the evaluation process to confirm operational compatibility and to ensure daily valuation feeds, trade-cutoff practices, and cash-management buffers are consistent with the proposal's liquidity and valuation standards and are documented through the written representations the rule envisions.

Conclusion

The proposal does not endorse any asset class or investment vehicle. Instead, it provides a principles-based, asset-neutral safe harbor that offers direction to fiduciaries on how to demonstrate prudence when selecting designated investment alternatives in participant-directed plans, including options with exposure to alternative assets. The proposal does not provide specific procedures, processes, and documentation to satisfy ERISA's duty of prudence, but the six factors and the examples supply some guidance for documenting determinations in areas that have generated litigation and uncertainty, such as liquidity management for illiquid sleeves, fair-value practices for non-public holdings, composite benchmarking for diversified strategies, and understanding of performance-based fees and managed-account designs. It should also be noted that the proposed rule does not address the duty to monitor designated investment alternatives after they have been selected for inclusion in a plan's menu and that separate DOL guidance on monitoring is anticipated. Plan sponsors and fiduciaries should continue to monitor developments in this area, including comments made during the comment period ending June 1, 2026, potential congressional action, and the Supreme Court's pending decision in *Anderson v. Intel Corporation Investment Policy Committee*, which may address the standard for evaluating ERISA fiduciary breach claims predicated on fund underperformance (*i.e.*, when a plaintiff relies on underperformance or excessive fees to infer imprudence, must the complaint identify a "meaningful benchmark"—a comparator with sufficiently similar aims, risks, and objectives, rather than a peer group and index comparisons). Finally, while the proposed rule is designed to provide meaningful litigation protection, some market participants remain cautious about the extent to which courts will actually defer to the safe harbor in practice. Because the Supreme Court eliminated Chevron deference for agency rules in 2024, the DOL acknowledges that the rule will serve as "persuasive authority" rather than binding law. This underscores a broader sentiment among some plan sponsors and their advisors that the safe harbor's practical value will ultimately be determined not by the DOL, but by how federal courts apply it in ERISA class action litigation.

For More Information

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