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ERISA Litigation Alert

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Proposed safe harbor for fiduciary selection of 401(k) investment options

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We summarize the proposed rule's key provisions and highlight what plan sponsors, fiduciaries, and their counsel should be doing now to prepare.



What's the impact?

- The DOL published a proposed regulation establishing a process-based safe harbor for plan fiduciaries selecting designated investment alternatives for participant-directed individual account plans.
- The proposed rule gives fiduciaries "maximum discretion" to include alternative assets on plan menus.
- Following the safe harbor's six-factor framework is likely to establish a presumption of prudence.
- Plan sponsors and their counsel should begin aligning investment selection and monitoring processes with the six-factor framework now.

The DOL's proposed safe harbor for 401(k) investment selection—issued in response to Executive Order 14330—could fundamentally reshape fiduciary litigation defense by creating a

presumption of prudence and “significant deference” for plan sponsors who follow a six-factor process when selecting designated investment alternatives for their plans. For plan sponsors that have faced, or are at risk of, ERISA breach of fiduciary duty litigation, the proposed rule offers the most concrete framework to date for defending investment selection decisions.

Clarifying ERISA fiduciary duties

On August 7, 2025, President Trump issued Executive Order 14330, “Democratizing Access to Alternative Assets for 401(k) Investors,” directing the DOL to propose regulations—including “appropriately calibrated safe harbors”—clarifying ERISA fiduciary duties when alternative asset investments are made available in defined contribution plans, and to “prioritize approaches that are designed to curb litigation risk.” The executive order cited regulatory burdens and litigation risk as key factors preventing many 401(k) participants from accessing alternative investments.

The DOL’s proposed regulation puts hard numbers behind what plan sponsors already know:

- / Plaintiffs’ firms have filed over 500 ERISA breach of fiduciary duty cases against plan sponsors since 2016,
- / There have been more than \$1 billion in settlements, and
- / Defense costs often total \$4 to \$8 million per case through summary judgment alone.

Notably, the DOL acknowledges that much of this litigation has targeted “well-designed plans with prudent processes, with the challenges often ultimately failing, but not before significant resources have been expended in defense.” Industry surveys show that 94% of plan sponsors and 96% of service providers have expressed concern about this litigation, with 38% and 61%, respectively, deciding against offering certain services or investment options as a result. The litigation landscape has only intensified in recent years, with a wave of class actions targeting investment underperformance in target-date funds and other core plan menu options—a trend that makes the proposed rule’s illustrative examples in these areas especially timely. Research cited by the DOL confirms the chilling effect on plan design: a 10% increase in the likelihood of litigation was associated with a 3.5% decrease in the likelihood of offering high-volatility investment options.

Scope of the proposed rule

Although Executive Order 14330 focused specifically on asset allocation funds containing alternative assets, the DOL chose not to limit the proposed rule to such funds. Instead, the proposed rule addresses the duty of prudence when selecting any designated investment alternative for a participant-directed individual account plan. The DOL explained that only providing guidance for funds investing in alternatives could create the impression that those

funds are either favored or disfavored, which would be inconsistent with the Department's historically asset-neutral posture.

A "designated investment alternative" includes any investment alternative designated by the plan—including qualified default investment alternatives (QDIAs)—but excludes brokerage windows, self-directed brokerage accounts, and similar arrangements that allow participants to select investments beyond those designated by the plan. The proposed rule also does not cover the ongoing duty to monitor investments after their initial selection, although the DOL stated that it anticipates issuing separate interpretive guidance on monitoring obligations in the near term and is "generally of the view" that the same or substantially similar factors and processes would apply.

Key provisions

NO INVESTMENT IS PER SE PRUDENT OR IMPRUDENT

A foundational principle of the proposed rule is that ERISA section 404(a)(1)(B) "does not require or restrict any specific type of designated investment alternative," except insofar as the investment might be otherwise illegal (for example, investments in foreign adversaries in violation of the Trading With the Enemy Act or the OFAC Specially Designated Nationals and Blocked Persons List). This means there is no per se rule respecting investment in alternative assets, including private market investments, real estate, actively managed digital asset vehicles, commodities, infrastructure, or lifetime income strategies.

THE SIX-FACTOR SAFE HARBOR FRAMEWORK

The heart of the proposed rule is a process-based safe harbor built around six factors that a fiduciary must "objectively, thoroughly, and analytically consider, and make determinations on" when selecting each designated investment alternative. These six factors are:

Performance

The plan fiduciary must consider a reasonable number of similar alternatives and determine that the risk-adjusted expected returns, over an appropriate time horizon and net of anticipated fees and expenses, further the purposes of the plan. The proposed rule makes clear that fiduciaries need not select the investment with the highest returns; it may be prudent to choose a lower-risk investment strategy with a lower expected return. Consistent with well-established case law, the proposed rule reinforces that prudence is assessed based on the fiduciary's process at the time of the investment decision—not in hindsight, based on results.

Fees

The fiduciary must consider a reasonable number of similar alternatives and determine that the fees and expenses of the selected investment are appropriate, taking into account its risk-adjusted expected returns and any other value the alternative brings, such as customer service, investment features, or services. The proposed rule is explicit that a fiduciary does not violate the duty of prudence solely because it selects an investment with higher fees than other alternatives with comparable risk-adjusted returns, and there is no duty to scour the market for the lowest-cost option. The DOL provides a range of illustrative examples—including share class analysis, active versus passive management, and the value of additional features, such as lifetime income or customer service—demonstrating that higher fees may be appropriate when supported by a prudent analysis of the investment’s value proposition.

Liquidity

The fiduciary must consider and determine that the designated investment alternative will have sufficient liquidity to meet the anticipated needs of the plan at both the plan and individual levels. Importantly, there is “no requirement that a fiduciary select only fully liquid products.” Indeed, the DOL notes that “a prudent fiduciary process may regularly lead to a decision to sacrifice some plan- or individual-level liquidity, or both, in pursuit of additional risk-adjusted return.” This provision is particularly significant for alternative investments, which are often less liquid than publicly traded stock and bond funds, and the DOL notes that many retirement savers—particularly younger workers with long time horizons—can benefit from an illiquidity premium.

Valuation

The fiduciary must consider and determine that the designated investment alternative has adopted adequate measures to ensure it is capable of being timely and accurately valued in accordance with the needs of the plan. The proposed rule includes examples addressing valuation of publicly traded securities, assets valued under FASB ASC 820 fair value standards, SEC-regulated mutual funds, and continuation funds with potential conflicts of interest in valuation. Fiduciaries may generally rely on asset valuations derived from national securities exchanges or resulting from generally recognized fair value procedures, provided they read, critically review, and understand relevant written representations and have no reason to question them.

Performance benchmark

Under the proposed rule, the fiduciary must consider and determine that each designated investment alternative has a “meaningful benchmark” and compare the risk-adjusted expected returns of the alternative to that benchmark. A “meaningful benchmark” is defined in the proposed rule as an investment, strategy, index, or other comparator that has similar mandates,

strategies, objectives, and risks to the designated investment alternative. No single benchmark is meaningful for all alternatives on a plan menu. For new or innovative products, the fiduciary should seek to identify the best possible comparators while also scrutinizing the product's potential value proposition; there is "no presumption or preference against new or innovative designated investment alternative designs."

Complexity

The fiduciary must consider the complexity of the designated investment alternative and determine whether the fiduciary has the skills, knowledge, experience, and capacity to understand the investment sufficiently, or whether it must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual. If the fiduciary determines it lacks the requisite expertise, it must seek such assistance. The DOL notes that seeking assistance from a professional that is itself an ERISA fiduciary—such as a section 3(21)(A)(ii) investment advice fiduciary or a section 3(38) investment manager—provides important benefits, as those professionals are also subject to ERISA's fiduciary duties.

Presumption of prudence and significant deference

When a fiduciary follows the safe harbor process with respect to the six factors—including by relying on recommendations of a prudently selected section 3(21) investment advice fiduciary or delegating compliance to a section 3(38) investment manager—the fiduciary's judgment is "presumed to have met the duties under section 404(a)(1)(B) of ERISA" and "is entitled to significant deference." The DOL states that a fiduciary who objectively, thoroughly, and analytically considers and makes a determination regarding any or all of the six factors "should be able to confidently rely on that determination without undue fear of litigation." It is the DOL's position that plaintiffs bear the burden of proof on both breach and loss causation, meaning a plan sponsor that can affirmatively demonstrate compliance with the safe harbor should be well-positioned to defeat claims at the pleading or summary judgment stage.

The DOL argues that this regulation should carry persuasive weight under *Skidmore* deference, citing its prior safe harbors (such as the annuity provider selection safe harbor under 29 C.F.R. 2550.404a-4) and the consistency of the prescribed process with existing case law. Plan sponsors should not, however, take the legal durability of this safe harbor for granted. The DOL's own track record in this space counsels caution; its most recent attempt to update the regulatory framework for fiduciary investment advice was vacated by federal courts in 2024 on the grounds that it exceeded the agency's statutory authority under ERISA. An earlier version of those rules met the same fate in the Fifth Circuit in 2018. More broadly, the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*—which eliminated *Chevron* deference for agency interpretations of statutes—has accelerated a judicial trend toward heightened scrutiny of federal rulemaking, even under the more limited *Skidmore* standard the DOL invokes here. Plan sponsors should, therefore, treat this proposed safe harbor as a valuable supplement to—not a

substitute for—a fiduciary process that is independently defensible under ERISA’s statutory text and existing case law.

Loyalty and conflict prohibitions would remain intact

The proposed rule provides that compliance with its prudence framework does not excuse a fiduciary from its duty of loyalty under ERISA section 404(a)(1)(A) or the prohibited transaction rules of section 406. The DOL states that it “does not intend to relax the loyalty requirement or waive any conflict prohibitions in relation to a fiduciary evaluation of alternative assets.” Plan sponsors should be aware that even a fully compliant safe harbor process will not insulate decisions tainted by conflicts of interest.

Key takeaways for plan sponsors and fiduciaries—regulatory and litigation implications

The proposed rule represents a marked shift in the DOL’s posture toward defined contribution plan investments. The rescission of the 2021 Supplemental Statement—which had cautioned fiduciaries against private equity in 401(k) plans—combined with this proposed safe harbor, signals a clear regulatory green light for plan fiduciaries to consider a wider array of investment vehicles. Nearly 70% of defined benefit plans invest in alternative assets, but only 4% of defined contribution plans do—a gap the DOL expressly aims to narrow.

The proposed safe harbor may be the most consequential development for plan sponsors facing ERISA fiduciary claims in years. If finalized, the presumption of prudence could give plan sponsors a powerful tool at the motion-to-dismiss stage—the critical inflection point where, as the DOL itself now acknowledges, the cost of proceeding to discovery alone often compels meritless settlements. The DOL has also taken the position in a recent amicus briefing that inferential, outcome-focused claims—which form the basis of many excessive fee complaints—“must be subjected to careful, context-sensitive scrutiny,” and that a purported lack of information about the fiduciary process is “no excuse from the rigorous requirements of a well-pleaded complaint.” For plan sponsors currently facing or anticipating such claims, the proposed rule—combined with this enforcement posture—could meaningfully raise the bar plaintiffs must clear to survive early dismissal. The DOL estimates that the proposed rule could save plans nearly \$600 million annually in litigation-related costs.

That said, the safe harbor is a presumption—not an absolute shield—and plan sponsors should expect plaintiffs’ firms to probe its limits aggressively. The proposed rule includes several “negative” examples illustrating flawed processes: failure to evaluate share class fee differences, selection of a misaligned benchmark, acceptance of a conflicted valuation methodology in a continuation fund transaction, and failure to understand how a managed account service delivers value relative to a lower-cost target-date fund. Plan sponsors should review these

examples closely and assess whether any analogous gaps exist in their own investment selection processes, and address them before they become the basis for a complaint.

Plan sponsors should also know that the safe harbor's legal foundation may itself be tested. The Supreme Court's 2014 decision in *Fifth Third Bancorp v. Dudenhoeffer* unanimously eliminated a judicially created presumption of prudence for ESOP fiduciaries, holding that ERISA's text does not support such a presumption. Whether the DOL can accomplish by regulation what the Supreme Court declined to permit as a matter of judicial doctrine—creating a presumption of prudent conduct for fiduciaries who follow a prescribed process—is an untested question of statutory authority. The proposed rule's asset-neutral construction that applies the same framework to all investment types rather than carving out special treatment for alternatives may bolster the DOL's position that the safe harbor is a reasonable exercise of its interpretive authority. Prudent plan sponsors, however, should not build their entire fiduciary defense around a regulation whose legal footing remains uncertain. The most effective approach is to build fiduciary processes that satisfy both the proposed safe harbor and the independent requirements of ERISA's statutory prudence standard, so that investment decisions are defensible regardless of whether the regulation ultimately survives judicial review. Outside ERISA counsel can add significant value in designing a process that achieves both objectives.

Recommended action items

Plan sponsors and their counsel should consider taking the following steps now:

AUDIT CURRENT INVESTMENT SELECTION PROCESSES AGAINST THE SIX-FACTOR FRAMEWORK

Before the proposed rule is finalized, fiduciaries should assess whether their existing processes address performance, fees, liquidity, valuation, benchmarking, and complexity for each designated investment alternative. Aligning with the framework will strengthen fiduciary defenses regardless of the proposed rule's final form, and may prove persuasive to courts even in the interim.

ENGAGE QUALIFIED INVESTMENT PROFESSIONALS

The proposed rule repeatedly emphasizes the value of enlisting section 3(21) investment advice fiduciaries or section 3(38) investment managers, particularly for complex or novel investments, and expressly incorporates reliance on such professionals into the safe harbor. How these relationships are structured and documented can have significant implications in litigation—an area where experienced ERISA counsel can provide valuable guidance.

BUILD A LITIGATION-READY RECORD

Because the safe harbor is process-based, the strength of any future defense will depend on the quality of contemporaneous documentation. Fiduciaries should ensure that fiduciary committee meetings, due diligence files, and decision memoranda explicitly address each of the six factors. The proposed rule repeatedly uses the phrase “read, critically review, and understand” to describe the standard for evaluating written representations from investment managers—language that will likely become the benchmark against which courts assess fiduciary conduct in discovery. The specific documentation practices that will best position a plan to invoke the safe harbor and withstand discovery will depend on the plan’s size, investment menu, and governance structure, and are worth discussing with counsel.

REASSESS PLAN MENUS WITH CONFIDENCE

For plan sponsors that have avoided alternative assets or innovative investment options out of litigation concerns, the proposed rule is designed to provide the regulatory cover needed to broaden plan menus. The safe harbor is not a mandate to add alternatives, but it may affect the litigation risk calculus for plan sponsors that have historically been deterred from doing so. Counsel can help evaluate how specific investment options would fare under the six-factor framework and identify potential vulnerabilities before they become litigation targets.

MONITOR THE RULEMAKING AND SUBMIT COMMENTS

The comment period runs 60 days from the date of publication in the Federal Register, which occurred on March 31, 2026. Comments may be submitted through the Federal eRulemaking Portal at [regulations.gov](https://www.regulations.gov) under RIN 1210-AC38. The DOL has requested comments on a number of topics, including whether participant profiles or characteristics should be an additional factor, whether future guidance should address the process for curating a prudent investment menu overall, and the comprehensiveness of the six enumerated factors. Plan sponsors with significant litigation exposure should consider whether submitting comments—either individually or through industry groups—could help shape a final rule that maximizes defensive protections.

PREPARE FOR FORTHCOMING MONITORING GUIDANCE

The DOL stated that it anticipates issuing separate interpretive guidance on the duty to monitor designated investment alternatives and stated that the same or similar factors and processes from the proposed safe harbor would likely apply. Fiduciaries should be alert for that guidance and should consider how their current monitoring practices may need to evolve. Nixon Peabody can assist in designing monitoring protocols that align with both the proposed safe harbor selection and anticipated monitoring standards.

Nixon Peabody’s ERISA Litigation team has extensive experience defending plan sponsors and fiduciaries in excessive fee and investment selection litigation. We are closely monitoring this

rulemaking and stand ready to help clients evaluate litigation exposure under the proposed framework, audit fiduciary processes, prepare rulemaking comments, and build defensible governance practices. For more information, please contact the authors of this alert or your Nixon Peabody attorney.

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