

A low-angle, upward-looking photograph of several modern skyscrapers with glass facades. The buildings are set against a clear blue sky. The perspective creates a sense of height and scale. The text is overlaid on the left side of the image.

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DOL PROPOSED RULE: FIDUCIARY DUTIES IN SELECTING DESIGNATED INVESTMENT ALTERNATIVES

APRIL 2026

BACKGROUND – EXECUTIVE ORDER: DEMOCRATIZING ACCESS TO ALTERNATIVE ASSETS FOR 401(K) INVESTORS

- **Date of Release:** August 7, 2025
- **Order Summary:**
 - Alternative Assets Defined: Alternative assets subject to the order are private market investments (e.g., private equity and hedge funds), real estate, digital assets, commodities, infrastructure finance and lifetime income investment strategies, including longevity risk-sharing pools.
 - Directed DOL to Review Past and Present Guidance: DOL must review past and present guidance regarding fiduciary duties associated with making alternative assets available for investment by retirement plan participants.
 - Required DOL to Issue New Guidance:
 - Required DOL to issue guidance “clarifying” its position on alternative assets and the fiduciary process associated with offering them as investment options.
 - The DOL was encouraged to identify criteria fiduciaries may rely upon when evaluating potentially higher expenses against the objectives of obtaining greater long-term net returns and broader diversification of investments.
 - The order contemplates that the agency(ies) could issue safe harbors that fiduciaries may rely upon when they evaluate alternative assets as well as actions to curb litigation.
 - Promotes Interagency Cooperation (DOL and SEC)
 - Directs SEC to Facilitate Access: The SEC must consider ways to facilitate access to alternative assets, which may result in revisions to SEC accredited investor and qualified purchaser standards.
- Order Does **NOT**:
 - Change ERISA Fiduciary Standards
 - Require Inclusion of Alternative Assets in Retirement Plan

SUMMARY OF PROPOSED RULE – FIDUCIARY DUTIES IN SELECTING DESIGNATED INVESTMENT ALTERNATIVES

- **Date of Release:** March 30, 2026
- **Overview:**
 - Supplements **1979 Investment Duties Regulation**, which stated the duty of prudence was met by giving appropriate consideration to relevant facts and circumstances and acting accordingly.
 - Provides a safe harbor for satisfying an ERISA fiduciary’s **duty of prudence** when selecting “designated investment alternatives” for participant directed, qualified defined contribution retirement plans (e.g., 401(k) plans).
 - Identifies a non-exhaustive list of **six factors** for a plan fiduciary to objectively, thoroughly, and analytically consider and make determinations about when selecting designated investment alternatives for the plan menu.
 - Performance
 - Fees
 - Liquidity
 - Valuation
 - Benchmarking
 - Complexity
 - “**Designated Investment Alternatives**” means any investment alternative available to plan participants and beneficiaries, including qualified default investment alternatives (QDIAs).
 - Clarifies the DOL maintains an **asset-class neutral position**, meaning the proposed rule applies to any legal, designated investment alternatives, not just alternative assets listed in the prior Executive Order

SAFE HARBOR FACTORS WHEN SELECTING DESIGNATED INVESTMENT ALTERNATIVE

- 1. Performance:** risk-adjusted expected returns of the designated investment alternative over an appropriate **time horizon** and **net of anticipated fees and expenses**; must consider **risk exposure and investor risk capacity**, not just expected returns.
 - *Examples of Acceptable Performance Factor Analysis:*
 - selection of target date fund with lower expected returns, but also lower expected risk
 - relying most heavily on 10-year historical performance data in selecting target date fund due to long-term nature of retirement savings
- 2. Fees:** designated investment alternative fees and expenses, taking into account **risk-adjusted expected returns**, net of fees and expenses, and **any other value** (i.e., benefits, features, or services other than returns) as **compared to reasonable alternatives**
 - *Examples of Acceptable Fees Factor Analysis:*
 - selection of designated investment alternative with higher fees compared to reasonable alternatives because of exemplary customer service
 - selection of a designated investment alternative with higher fees because it offered a lifetime benefit option to the plan
 - modification to target date fund strategy resulted in higher expense ratio but expected higher risk-adjusted returns
 - inclusion of one passively-managed and one more expensive actively-managed small cap fund to provide diversification
 - *Examples of Unacceptable Fees Factor Analysis:*
 - selection of the higher-cost share class when a lower-cost, otherwise identical, share class of is available

SAFE HARBOR FACTORS WHEN SELECTING DESIGNATED INVESTMENT ALTERNATIVE

3. **Liquidity:** sufficient liquidity to meet the anticipated needs of the plan at **both the individual participant and plan level**; does not prohibit illiquid investment options

▪ *Examples of Acceptable Liquidity Factor Analysis:*

- written representation(s) from a collective investment trust that it maintained a liquidity risk management program comparable to SEC required programs for mutual funds
- process under which the plan fiduciary assures itself that the designated investment alternative has adopted and implemented a liquidity risk management program and is likely to be able to meet liquidity expectations, even in cases when the plan promises daily liquidity and the designated investment alternative holds illiquid assets
- annuity investment option that has penalties for immediate withdraws still appropriate because it provides for increase in value of guaranteed payments
- balancing designated investment alternative appropriately balances future liquidity needs on plan termination or merger with ability to achieve increased risk-adjusted return

4. **Valuation:** capability to be **timely and accurately valued** in accordance with the needs of the plan

▪ *Examples of Acceptable Valuation Factor Analysis:*

- reliance on valuations derived from public exchanges
- designated investment option including some public and some non-public securities but provides representation that fund performs valuations through a conflict-free, independent process that complies with FASB, even if process allows for an adjustment to process in the event of a temporary emergency
- mutual fund including some public and some non-public securities and maintains reasonable valuation procedures adopted to comply with SEC rules

SAFE HARBOR FACTORS WHEN SELECTING DESIGNATED INVESTMENT ALTERNATIVE

5. **Performance Benchmarking:** identify **meaningful benchmark** (i.e., one with similar mandates, strategies, objectives, and risks) and **compare the risk-adjusted expected returns**, net of fees
 - *Examples of Acceptable Benchmarking Factor Analysis:*
 - creation of a custom composite benchmark (i.e., combined historical performance of multiple investment options) for a target date fund that consists of both publicly traded investments and provide equity investments
 - *Examples of Unacceptable Benchmarking Factor Analysis:*
 - selection of a large cap index fund as a benchmark for a target date fund when a more similar potential benchmark was available

6. **Complexity:** plan fiduciary must determine it has the **skills, knowledge, experience, and capacity to understand** any designated investment alternative's complexity or whether it must **prudently select a third-party advisor**; must secure sufficient information to understand an investment and its risks
 - *Examples of Acceptable Complexity Factor Analysis:*
 - pooled investment vehicle with target positions in private assets which employ fee-based incentive structures were analyzed and understood by hiring a sophisticated third-party advisor and/or seeking representations from the investment vehicle

SPECIFIC REQUESTS FOR COMMENTS WITHIN 60 DAYS

- **Monitoring Best Practices:** Any input on best practices for portfolio monitoring and menu maintenance to comply with fiduciary standards, particularly from subject matter experts.
- **Additional Safe Harbor Factors:** Whether there are any additional factors that should be added to the proposed rule
- **Avoiding Conflicts of Interest:** Whether there are any best practices for avoiding conflicts of interest.
- **Prevalence of Use of Advisors:** Whether use of 3(21) and/or 3(38) fiduciaries will increase and, if so, whether it will only be for plans of certain sizes and whether it will impact plan costs.
- **Off-the-Shelf Investment Line-Ups:** What share of plans use off-the-shelf plan designs with set investment line-ups? How does usage vary by plan size? Does these plans utilize 3(21) or 3(38) fiduciaries?
- **Litigation Impact:** How would the proposed rule effect fiduciary litigation and/or the cost and scope of fiduciary insurance?
- **Alternative Asset Impact:** How would the proposed rule affect how plan fiduciaries consider including alternative assets?
- **Financial Benefit:** What is the magnitude of the financial benefits in connection with use of alternative assets?
- **Quantifiable Risks / Costs:** Are there quantifiable risks or costs associated with the increased use of alternative assets that are not captured in the proposed rule preamble?

TOPICS EXPLICITLY NOT ADDRESSED

- **Defined Benefit Plans:** The proposed rule is applicable only to participant-directed, individual account plans; however, it may still be informative when reviewing defined benefit plan investments.
- **Self-Directed Brokerage Windows / Accounts:** The proposed rule specifically excludes brokerage windows, self-directed brokerage accounts, or similar plan arrangements from the definition of designated investment alternative.
- **Duty of Loyalty:** The proposed rule explicitly states it does not address the duty of loyalty and that additional guidance is expected on this topic.
- **Duty to Monitor:** The proposed rule explicitly states it does not address the duty to continue to monitor investment alternatives after selection, although it does request comments on best practices for this point.
- **Avoiding Conflicts of Interest:** The proposed regulation states it does not exclude a fiduciary from complying with its obligations to avoid prohibited conflicts of interest under ERISA.
- **Curating Investment Menu:** Despite alluding to the need for diversification in a few different instances, the proposed rule refers plan fiduciaries to ERISA Section 404(c) of the accompanying regulations for guidance on curating an appropriate menu of investment options.
- **Plan Design Features:** The proposed rule explicitly states it does not address plan design features addressed in a non-fiduciary capacity.
- **Any SEC Regulations / Guidance:** The proposed rule does not address the Executive Order's directed the SEC to provide additional guidance.

CONSIDERATIONS FOR PLAN FIDUCIARIES

- **Asset Neutral Application:** While most plan fiduciaries already analyze the six, listed factors in their current investment selection process, plan fiduciaries should review their investment selection process and consider designing it to clearly identify how each factor was analyzed for ALL plan designated investment alternative, not just alternative assets.
- **“Non-Exhaustive” List:** The proposed rule explicitly states this is a non-exhaustive list, leaving room for additional factors to be considered prudent when analyzing a designated investment alternative.
- **Business Negotiations / Market Standards:** Many of the factors and related examples discuss receiving representations from or otherwise diligencing certain aspects of potential investment alternatives. It remains to be seen whether alternative asset investments will be amenable to items such as liquidity programs, special withdrawal rights, neutral third-party valuations, etc.
- **Application of Deference Standard:** While the proposed rule states courts should give plan fiduciaries significant deference when the safe harbor is used in selecting designated investment alternatives, existing case law may not support this position (see, e.g., *Chevron*).
- **Focus on Service Provider Role:** The preamble to the proposed rule and many of the examples provided focus on the importance of engaging sophisticated and neutral investment advisors to assist in the diligence and selection of designated investment alternatives. Plan fiduciaries should review request for proposal materials to ensure services providers are appropriately vetted for this purpose.
- **Understand All Asset Classes:** Many, if not all, of the alternative asset classes may be new to plan fiduciaries since they historically have not been included as investment options in defined contribution plans. Plan fiduciaries should work with their investment advisers to understand the strategy, underlying assets, risk profile, liquidity opportunities, valuation considerations, fees and other costs associated with the alternative assets, etc. as the proposed rule caveats several references with a statement that the plan fiduciary critically read and understood provided information.
- **Target Date Funds:** It appears the first place alternative assets may become prevalent is target date funds. Plan fiduciaries should discuss with their current investment advisers whether there are any anticipated alternative asset-related changes to the plan’s target date fund line-up.
- **Political Pendulum:** While the current administration has put forth this proposed rule, agency rules can vary depending on any given administration's political leanings. Plan fiduciaries should continue to apply a general prudent fiduciary process that they believe will withhold scrutiny, even in the absence of the safe harbor.

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