Proskauer

DOL Issues Proposed Rule and Safe Harbor Intended to Facilitate the Inclusion of Alternative Assets in 401(k) Plans

Compensations & Benefits Blog on **March 31, 2026**

On March 30, 2026, the U.S. Department of Labor ("DOL") issued a much-anticipated proposed regulation ("Proposed Rule") that would facilitate the inclusion of alternative assets within designated investment alternatives ("DIAs") offered under participant-directed defined contribution plans such as 401(k) plans ("DC Plans").

The Proposed Rule implements President Trump's recent Executive Order (discussed here) directing the DOL to relieve the regulatory burdens and litigation risk that have impeded investments in alternative assets by DC Plan participants. In order to avoid creating an impression that certain types of investments are either favored or disfavored (which would be inconsistent with the DOL's historical practice of providing neutral guidance), the Proposed Rule clarifies (and provides a safe harbor for) a DC Plan fiduciary's selection of any type of DIA (other than a brokerage window or self-directed brokerage account).

The Proposed Rule also provides for a process-based safe harbor intended to curb litigation risks and fiduciary fears with respect to making such investment decisions. To that end, the Proposed Rule identifies a non-exhaustive list of six factors (i.e., performance, fees, liquidity, valuation, performance benchmarks and complexity) for a DC Plan fiduciary to consider when selecting DIAs. The Proposed Rule includes numerous of examples of how and when the safe harbor would or would not apply to certain investment scenarios and fact patterns. The Proposed Rule further provides that the fiduciary's judgment regarding any such factor will be presumed "prudent" and entitled to significant deference to the extent the fiduciary follows the prescribed process for such factor.

Comments on the Proposed Rule are due 60 days after publication in the Federal Register.

ERISA's Fiduciary Duty of Prudence

ERISA plan fiduciaries are required to act in accordance with the fiduciary responsibility provisions of Title I of ERISA, including the fiduciary duty of prudence set forth in Section 404(a)(1)(B) of ERISA. The ERISA fiduciary duty of prudence requires a fiduciary to discharge its duties with respect to a plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

1979 "Investment Duties" Regulation

The DOL's "Investment Duties" regulation issued in 1979 provides in relevant part that ERISA's duty of prudence is satisfied by a plan fiduciary when selecting an investment if the fiduciary (i) gives "appropriate consideration" to those facts and circumstances that, given the scope of the fiduciary's investment duties, it knows or should know are relevant to the particular investment, and (ii) the fiduciary "acted accordingly."

The Proposed Rule

The Proposed Rule supplements and expands on the 1979 "Investment Duties" regulation in the context of a DC Plan fiduciary's selection of DIAs by demonstrating what it means for a fiduciary to "act accordingly" (and therefore, "prudent") but otherwise is not intended to disturb the 1979 regulation.

Foundational Principles

The Proposed Rule is built on three foundational principles:

1. *ERISA is a process-based law.* Prudence is assessed based on a fiduciary's investigation and process conducted in connection with making an investment decision, not in hindsight based on results. Furthermore, the same principles of prudence apply to any investment decision, regardless of the nature of the investment.
2. *Maximum fiduciary discretion.* ERISA gives plan fiduciaries maximum discretion and flexibility in selecting DIAs. No per se rule prohibits any asset class within a DIA (including alternatives, such as private equity, real estate, digital assets, commodities, infrastructure and lifetime income strategies), unless otherwise illegal.

3. *Presumption of prudence.* When fiduciary decision-making follows a prudent process, including the prudent process reflected in the Proposed Rule's safe harbor discussed below, the DOL's view is that arbiters of disputes should defer to the fiduciary's judgment under a presumption of prudence.

The Safe Harbor Framework

The Proposed Rule identifies six non-exhaustive factors that a plan fiduciary must objectively, thoroughly, and analytically consider when selecting DIAs. A fiduciary who follows the prescribed process is entitled to a presumption of having acted prudently and to significant deference. Each factor's applicability depends on the particular facts and circumstances, though the DOL believes all six are integral to the selection of the vast majority of DIAs. Helpfully, the Proposed Rule provides numerous examples of prudent and imprudent behavior for several different fact patterns involving various types of investment decisions and processes.

1. Performance

The fiduciary must consider a reasonable number of similar alternatives and determine that the DIA's risk-adjusted expected returns, over an appropriate time horizon and net of anticipated fees and expenses, further the plan's purposes by enabling participants and beneficiaries to maximize risk-adjusted net returns. Giving a nod to the long-term nature of many alternative assets, the Proposed Rule specifically provides that an appropriate time horizon for retirement savings may be long-term and that a fiduciary is not necessarily required to only consider recent performance. Similarly, it may be prudent for a fiduciary to select an alternative with a lower expected return if it also provides for lower expected risk.

2. Fees

The fiduciary must consider a reasonable number of similar alternatives and determine that the DIA's fees and expenses are appropriate, considering its risk-adjusted expected returns and any other "value" the alternative provides. "Value" includes benefits, features, or services beyond risk-adjusted net returns. Accordingly, the Proposed Rule acknowledges that a fiduciary is not necessarily always required to pick the lowest cost alternative.

3. Liquidity

The fiduciary must consider and determine that the DIA will have sufficient liquidity to meet the plan's anticipated needs at both the plan and individual participant levels. The Proposed Rule provides several examples for making such determination with respect to different types of investments, illustrating the different process that may be required in each case.

4. Valuation

The fiduciary must consider and determine that the DIA has adopted adequate measures to ensure timely and accurate valuation in accordance with the plan's needs.

5. Performance Benchmarks

The fiduciary must consider and determine that each DIA has a meaningful benchmark and compare the DIA's risk-adjusted expected returns, net of fees, to that benchmark. A "meaningful benchmark" is an investment, strategy, index, or other comparator with similar mandates, strategies, objectives, and risks. While multiple meaningful benchmarks may exist for a DIA, no single benchmark is meaningful for all DIAs. The Proposed Rule accommodates innovation by clarifying that there is no presumption against new or innovative DIA 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.

6. Complexity

The fiduciary must consider the DIA's complexity and determine whether she has the skills, knowledge, experience, and capacity to comprehend it sufficiently to discharge her ERISA and plan document obligations, or whether she must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual.

Proskauer's Perspective

The Proposed Rule, if adopted, could have significant implications not only for the ERISA plan fiduciaries responsible for setting their plan's investment lineup, but also for all other fiduciaries, consultants, investment managers, private investment funds, mutual funds and any other investment vehicles or accounts that directly or indirectly manage, advise or accept investments from DC Plans (or are considering doing so). Please watch for further communications from your Proskauer team.

- **Adam W. Scoll**
  Partner
- **Alyssa Swanstrom**
  Associate
- **Russell L. Hirschhorn**
  Partner