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Proskauer Benefits Brief: DOL Issues Proposal on Alternative Assets in 401(k) Plans

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In this episode, Justin Alex and Adam Scoll discuss the U.S. Department of Labor's recently issued proposed regulation regarding ERISA fiduciary duties in selecting designated investment alternatives offered under participant-directed defined contribution plans, such as 401(k) plans. They examine the parameters of the proposal's safe harbor, which reinforces ERISA's focus on process over outcomes and highlights six key factors for fiduciary consideration when selecting designated investment alternatives. The proposal is designed to facilitate the inclusion of alternative assets within designated investment alternatives.

Justin Alex: Welcome to the Proskauer Benefits Brief: Legal Insight on Compensation and Benefits. I'm Justin Alex, a Partner at Proskauer.

Adam: And I am Adam Scoll, also a partner at Proskauer, and today we will be discussing the Department of Labor's recent issuance of a much-anticipated proposed regulation that would facilitate the inclusion of alternative assets (including crypto, private equity, private credit and real estate) within designated investment alternatives offered under participant-directed defined contribution plans such as 401(k) plans. These developments have been highly focused on and can have significant implications for so many different constituencies – including plan sponsors responsible for setting their plan's investment lineup and obviously their plan participants, 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 defined contribution plans (or are thinking about doing so).

Justin Alex: The proposed regulation implements President Trump's recent August 2025 Executive Order which directed the DOL to relieve the regulatory burdens and litigation risk that have impeded investments in alternative assets by 401(k) plan participants. However, consistent with the DOL's historical practice of providing investment-neutral guidance, the proposed regulation applies to a plan fiduciary's selection of any type of designated investment alternative (or "DIA") and not just those that include alternative assets. Importantly, the guidance does not apply to the selection of a brokerage window or self-directed brokerage account.

Adam Scoll: A critical piece of the proposed regulation is the inclusion of a process-based safe harbor that is intended to curb litigation risks and fiduciary fears with respect to the selection of DIAs. To that end, the proposed regulation identifies a non-exhaustive list of six factors for a plan fiduciary to consider when selecting DIAs, and 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 regulation further provides that a plan fiduciary's judgment regarding any such factor will be presumed "prudent" and entitled to significant deference to the extent the fiduciary follows the applicable safe harbor process for such factor.

Justin Alex: By way of background, 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. 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."

Adam Scoll: And in 1979, the DOL issued an investment duties regulation providing 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."

Justin Alex: Right, and the proposed regulation supplements and expands on that 1979 regulation

in the context of a plan fiduciary's selection of DIAs by demonstrating what it means for a fiduciary to "act accordingly" (and therefore, "prudent") for such purposes.

Adam Scoll: In the preamble, the DOL noted that the proposed regulation is built on three foundational principles. First, ERISA is a process-based law and prudence is assessed based on a fiduciary's process conducted in connection with making an investment decision, not in hindsight based on results. Second, ERISA gives plan fiduciaries maximum discretion and flexibility in selecting DIAs, and so no per se rule prohibits any asset class within a DIA, unless it is otherwise illegal. And third, when fiduciary decision-making follows a prudent process (like the one set forth in the proposed regulation's safe harbor), the fiduciary should be entitled to a presumption that it acted prudently.

Justin Alex: As previously noted, the proposed regulation identifies six non-exhaustive factors that are integral to the vast majority of DIAs 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.

The first factor is **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. Importantly, the proposal specifies 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.

Adam Scoll: The second factor is **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 proposal acknowledges that a fiduciary is not necessarily always required to pick the lowest cost alternative.

Justin Alex: The third factor is **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.

Adam Scoll: The fourth factor is **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.

Justin Alex: The fifth factor is **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. The proposed regulation 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 when analyzing the new design's value proposition.

Adam Scoll: And the sixth and last factor is **Complexity**. The fiduciary must consider the DIA's complexity and determine whether she has the skills, knowledge, experience, and capacity to understand it sufficiently or whether she must seek assistance from an expert.

Justin Alex: The DOL is seeking comments from interested parties on the proposed regulation, and those comments are due by June 1, 2026. As you can imagine, if adopted, the proposed regulation could have significant implications on a broad array of parties that directly or indirectly manage, advise or invest the assets of 401(k) plans (or are considering doing so).

Adam Scoll: But for now, these are just proposed regulations and many questions remain unanswered, and so we will keep you posted on any new developments.

If you found this useful, be sure to follow us and subscribe on Apple Podcasts, Spotify, and YouTube so you do not miss the next episode. And if you are interested in hearing more from us live on this topic, be sure to reach out about attending Proskauer's Compensation and Benefits Symposium taking place in our NY office on Thursday, April 30th.

I am Adam Scoll.

Justin Alex: And I am Justin Alex. Thanks for listening to the Proskauer Benefits Brief.

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