CLIENT ALERT | March 31, 2026

DOL Proposes New ERISA Safe Harbor for Alternative Investments in Retirement Plans

Key takeaways for investment fund managers offering alternatives to 401(k) plans

On March 30, 2026, the Department of Labor's (DOL) Employee Benefits Security Administration proposed a regulation (the Proposal) creating a new process-based safe harbor for Employee Retirement Income Security Act of 1974 (ERISA) fiduciaries that select designated investment alternatives for 401(k) and other participant-directed individual account plans. The Proposal implements President Trump's Executive Order 14330, "Democratizing Access to Alternative Assets for 401(k) Investors." It is designed to encourage inclusion of alternative assets, such as private equity and real estate, in plan investment lineups to provide retirement account holders access to these types of investments.

Currently, only about 4% of defined contribution (DC) plans offer alternative investments, and just 0.1% of DC plan assets are allocated to alternatives. The DOL estimates this rule will substantially expand that universe, with an estimated $178 billion (across 4.5 million participants) being allocated annually to target date funds with alternative investments. While the Proposal underscores a fiduciary's obligation to maintain a prudent process, it also affords fiduciaries meaningful discretion and flexibility in their investment-selection decisions.

Summary of Proposed Safe Harbor & Litigation Protection

The Proposal focuses on the importance of a prudent process for fiduciaries to satisfy their duties by providing a six-factor safe harbor that plan fiduciaries can rely on when selecting designated investment alternatives. While the proposal states that these six factors are not intended to be exhaustive, it provides a process framework. To benefit from the safe harbor, a plan fiduciary must objectively, thoroughly, and analytically evaluate:

1. **Performance:** Fiduciaries must assess whether an alternative's risk-adjusted expected returns (net of fees) further the plan's purpose.

2. **Fees:** Fiduciaries must consider similar alternatives to determine the reasonableness of fees, but the Proposal does not categorically require the selection of the lowest-fee option.

3. **Liquidity:** Fiduciaries must confirm that the alternative maintains adequate liquidity for the plan and its participants.

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4. **Valuation:** Fiduciaries must confirm that the alternative is able to be timely and accurately valued.

5. **Benchmarking:** Fiduciaries must benchmark the alternative's risk-adjusted expected returns (net of fees) against a meaningful benchmark.

6. **Complexity:** Fiduciaries must be able to understand the alternative to satisfy their obligations under ERISA. Where an alternative's complexity exceeds the fiduciary's capacity to evaluate it, the fiduciary must engage professional advisors to ensure a prudent assessment.

The Proposal provides examples of each of the six prongs of the safe harbor.

Additionally, the Proposal considers the impact of ERISA litigation on fiduciaries' selection of investments and particularly alternatives. The Proposal states that this safe harbor will benefit fiduciaries by providing added protection from litigation risk. It establishes a presumption of reasonableness and, in the DOL's view, is intended to afford substantial judicial deference to fiduciaries who satisfy the safe harbor requirements.

Key Takeaways for Investment Fund Managers

1. Target Date Funds Will Be the Primary Channel

The DOL expects the main channel through which alternative assets enter DC plans will be within target date funds and other asset allocation funds. About 84% of DC plan participants already use target date funds, and 90% of large plans offer them. Investment managers should anticipate that the most commercially viable path to 401(k) assets will be packaging alternative strategies as sleeves within target date funds or similar asset allocation vehicles, rather than as standalone menu options.

2. Fees, Liquidity, and Valuation Are the Critical Hurdles

The fees, liquidity, and valuation prongs of the safe harbor may prove challenging for alternative asset managers. Fiduciaries are not required to select the investment options with the lowest fees, but there must be a justification of the value (i.e., greater services, diversification, or better risk-adjusted returns). This requires fiduciaries to conduct rigorous comparative analysis. One safe harbor example notes a positive scenario where a fund manager internalizes underlying fees and charges only a flat asset-based fee, which may be attractive to plan fiduciaries. Managers should expect increased demand for fee transparency and simplified pricing structures that can be easily evaluated against benchmarks.

Additionally, fiduciaries must determine that an alternative has "sufficient liquidity" at both the participant level (withdrawals, loans, and reallocations) and plan level (terminations and recordkeeper changes). Importantly, the rule does not require that fiduciaries select only fully liquid products. A prudent fiduciary may sacrifice some liquidity in pursuit of additional risk-adjusted return. Fund managers may find it challenging to provide adequate transparency regarding both fees and liquidity and should carefully consider the most effective approaches for

doing so. With respect to valuation, fiduciaries must determine that the investment has adopted adequate measures to ensure timely and accurate valuation. Investment managers offering illiquid or hard-to-value investments will need to demonstrate robust liquidity risk management programs and independent valuation processes.

3. Investment Advice Fiduciaries and Investment Managers Will be Key

Plan fiduciaries, including QPAMs and investment advisers, will be the gatekeepers under the new framework. The safe harbor explicitly contemplates reliance on "prudently selected" investment advice fiduciaries. For fiduciaries to satisfy the safe harbor under the Proposal, there may be more intensive due diligence requests, including detailed requests for information on fee structures, liquidity terms, valuation methodologies, and benchmark construction.

4. Litigation Protection May Encourage Investment

As stated above, the Proposal provides for a presumption of reasonableness for fiduciaries that follow the safe harbor. This means that if a fiduciary follows the safe harbor, plaintiffs would likely face a higher burden to challenge the selection of an alternative investment.

5. Fund Managers May Be Required to Provide Written Representations

The Proposal creates a specific pathway under the liquidity and valuation prongs whereby fiduciaries can satisfy the safe harbor by obtaining written representations from the person responsible for managing the designated investment alternative. Fund managers should expect these written representation requests to become standardized and should begin considering how they will respond.

6. Market Outlook: Where We Expect the Market to Go

If finalized, the Proposal could significantly expand demand for and access to alternative assets in 401(k) plans and other participant-directed account plans. The DOL expects that the additional clarity provided by the Proposal and its safe harbor will lead additional firms to develop and provide such products, and market participants are already positioning themselves for this shift.

Even so, we do not expect this market to develop overnight as product innovation is required, fiduciaries will need to be educated on process and investments, and many plans will look to their service providers to design compliant investment options before taking action. Larger plans may be first movers given their in-house expertise and resources, but all parties should consider their relationships with target date fund providers, recordkeepers, and other fiduciary advisors, as the roughly 5,350 service providers that guide the vast majority of plans will be key gatekeepers for channeling alternative investments into the DC market.

Next Steps and Timeline

The proposal is now subject to a 60-day public comment period. We expect significant industry engagement, followed by DOL review and issuance of a final rule. While the Proposal does establish a process-based safe harbor, it does not provide a safe harbor with respect to a fiduciary's obligation under

ERISA to monitor designated investment alternatives following their inclusion on a plan's investment menu. The DOL will issue guidance regarding the duty to monitor under separate cover.

For more information on how this Proposal may affect you, please contact a member of our Executive Compensation, Employment & Benefits team.

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