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## Prudence Redefined: A Six-Factor Safe Harbor Framework for Selecting Any Retirement Plan Investment Option

On March 30, 2026 the U.S. Department of Labor (the “DOL”) released a proposed rule titled “Fiduciary Duties in Selecting Designated Investment Alternatives” (the “Proposed Rule”). The Proposed Rule responds to the President’s August 2025 Executive Order directing the DOL to revisit its stance on the suitability of alternative investments (e.g., private equity and cryptocurrency) for 401(k) plans.

The Proposed Rule is asset-neutral. It outlines a process-driven framework for fiduciaries to follow in selecting **any** designated investment alternative. If followed, fiduciaries obtain safe harbor protection pursuant to a **presumption** of prudence.

### Safe Harbor (Six Nonexhaustive Factors)

Under the Proposed Rule, **a fiduciary that objectively, thoroughly, and analytically considers, and makes determinations on**, the following six factors is presumed to have met their duty of prudence. Each factor must be considered with respect to a reasonable number of similar investment alternatives. A fiduciary should determine that:

- 1. Performance** of the selected investment option will further the plan purpose of providing participants the opportunity to maximize risk-adjusted returns on investments. A fiduciary need not select an investment with the highest (net of fees) returns for any specific time period. Rather, the fiduciary should determine the appropriate level of risk and appropriate time horizon for the plan.
- 2. Fees** and expenses of the investment option are appropriate considering its risk-adjusted expected returns and value. A fiduciary need not select the cheapest investment alternative, provided risk-adjusted return or added value of the alternative justifies the additional expense. Through examples, the Proposed Rule makes clear that regular share class reviews are required of fiduciaries and allowing participant choice between passive and actively managed funds in the same asset class is permissible.
- 3. Liquidity** will be sufficient to satisfy participant and plan liquidity needs. Generally, both liquidity requirements are deemed satisfied in the case of a mutual fund. Less-liquid investments like annuities and other pooled investment vehicles may require a fiduciary to obtain, critically review, and understand the liquidity risk associated with a non-mutual fund investment.
- 4. Valuation** of the alternative will be completed timely and accurately to meet the needs of the plan. Generally, where an investment is valued on a recognized public exchange, the valuation requirements are deemed satisfied. Where a fiduciary selects an investment without a publicly recognized valuation, additional due diligence is needed. This additional due diligence extends to mutual funds with underlying securities that do not price publicly. The examples in the Proposed Rule illustrate how to meet the requirements and they give deference to generally recognized methods for measuring fair value.



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5. **Performance Benchmarks** are such that each investment option's risk-adjusted returns are compared to a "meaningful benchmark." A meaningful benchmark can be another investment, strategy or index, and its meaningfulness is derived from its similarity in strategy, objective and risk. The DOL notes that new or innovative investment alternatives may not lend themselves to as meaningful of benchmarks as established commonly used investments. In examples, the Proposed Rule approves practices including custom and/or composite benchmarks for multisleeved investment options created by advisors independent of the investment option.

6. **Complexity** of the investment option must be understood. Fiduciaries must determine that they (or their investment advisor) have the skill, knowledge and experience to adequately understand an investment's complexity.

### Duty To Monitor

Where fiduciaries follow the processes described above in making investment selection decisions, such decisions would be "presumed to be reasonable" and "entitled to significant deference" according to the DOL. The DOL limits the Proposed Rule to the **selection** of investment options because it anticipates issuing guidance soon on a fiduciary's obligations to regularly monitor an investment once it is selected. Until such time, fiduciaries should consider using the Proposed Rule to satisfy their ongoing duty to monitor.

### Role of Service Providers, Including Investment Advisors

The Proposed Rule explicitly provides that fiduciaries may utilize, and rely on, fiduciary investment advisors. The Proposed Rule expands on prior guidance by providing a number of examples of steps fiduciaries should take to utilize service providers in performing adequate diligence. For example, fiduciaries should obtain written explanations from investment advisors on whether benchmarks are meaningful, critically review written representations from investment managers related to meeting these new safe harbors, and be attentive to conflicts that may arise when working with alternative investments. In this way, the Proposed Rule emphasizes that blind reliance on advisors is not sufficient.

### Reaffirmation of Prudence Is About Process, Not Results

In many respects the Proposed Rule is a statement to the courts (and plaintiffs' bar) about existing fiduciary practices that the DOL finds acceptable and legal allegations against fiduciaries that the DOL finds unacceptable. The Proposed Rule's main focus is on the steps fiduciaries should take (process) and not the results of those decisions measured with the benefit of hindsight.

### What Should Fiduciaries Do Now?

The Proposed Rule is subject to a 60-day notice-and-comment period, and what ultimately comes from its finalized version may deviate from what was proposed. However, we recommend fiduciaries consider incorporating the following into their standard diligence processes in the meantime:

- Document a critical review of relevant factors and consider how the six-factor safe harbor is addressed in your current process;
- Ensure that all fiduciaries **read, analyze and understand** all information and representations received from the plan's investment professionals;
- Evaluate the plan's investment professionals for conflicts of interest and expertise in any particular investment alternative; and
- Stay up-to-date with changing requirements once the final rule is issued.

If you have questions or need assistance, please reach out to a member of our [Employee Benefits and Executive Compensation practice group](#).

