U.S. DOL Proposes Process-Based Safe Harbor: A Roadmap for Prudence and Selection of 401(k) Plan Investment Options

1 The Proposed Rule

On March 30, 2026, the U.S. Department of Labor (DOL) issued a proposed rule (the Proposed Rule) that would establish a six-factor, process-based safe harbor for fiduciaries of plans subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA), to satisfy their duty of prudence when selecting designated investment alternatives for participant-directed defined contribution retirement plans (such as 401(k) plans). The public comment period closes on June 1, 2026.

The Proposed Rule responds to Executive Order 14330, issued by President Trump on August 7, 2025. The Executive Order directed the Secretary of Labor to propose rules, regulations, or guidance, including appropriately calibrated safe harbors, clarifying the duties a fiduciary owes to plan participants under ERISA when deciding whether to make available an asset allocation fund that includes investments in alternative assets, and to prioritize actions that may curb ERISA litigation.

2 Affirming Existing ERISA Principles

The Proposed Rule affirms ERISA's longstanding principle of investment-type neutrality: ERISA does not favor or disfavor any particular asset class, and no investment is per se prudent or per se imprudent. The Proposed Rule aims to provide plan fiduciaries with a framework for investment selection decision-making while reducing unnecessary litigation risk.

As proposed, the safe harbor addresses only the selection of designated investment alternatives and does not address a fiduciary's ongoing duty to monitor. The DOL has indicated that it anticipates issuing separate interpretive guidance on monitoring obligations in the near term.

A central focus of the Proposed Rule is to address the sharp increase in ERISA class action litigation over the past decade, and the litigation risk associated with plan fiduciaries' selection of investment options. By prescribing a documented, process-based safe harbor, the DOL aims to reduce this litigation risk and strengthen fiduciary defenses, while acknowledging that the safe harbor will not eliminate litigation risk entirely.

3 The Six-Factor "Safe Harbor"

The Proposed Rule does not create new law. It clarifies and reinforces what ERISA has always required: that fiduciary prudence is a matter of process, not outcome. When a fiduciary follows the framework and appropriately documents the process, the Proposed Rule provides a rebuttable presumption that the fiduciary has satisfied the duty of prudence under Section 404(a)(1)(B) of ERISA, and the fiduciary's judgment is entitled to significant deference.

The safe harbor takes the form of a process-based framework that builds on the 1979 Investment Duties Regulation. It identifies the following six non-exhaustive factors that plan fiduciaries "must objectively, thoroughly, and analytically consider, and make determinations on" when selecting designated investment alternatives for the plan investment menu for a participant-directed individual account plan: (1) performance, (2) fees, (3) liquidity, (4) valuation, (5) performance benchmarks, and (6) complexity. The weight and relevance of each factor will depend on the particular facts and circumstances, though the DOL believes all six factors are "integral to the vast majority of designated investment alternatives." Notably, the Proposed Rule provides that plan fiduciaries may rely on the recommendations of a prudently selected investment adviser (within the meaning of Section 3(21)(A)(ii) of ERISA) with respect to the factors or prudently delegate compliance with respect to such factors to an investment manager (within the meaning of Section 3(38) of ERISA)–and suggests that an evaluation of these factors may require reliance on the recommendations of a prudently selected investment advice fiduciary.



Factor	Description and Considerations
Performance	> Plan fiduciaries must appropriately consider a reasonable number of similar alternatives and determine that the risk-adjusted expected returns, over an appropriate time horizon, net of anticipated fees and expenses, further the plan's purposes by enabling participants to maximize risk-adjusted returns. > Makes clear that fiduciaries do not need to select the investment with the highest historical returns or aim to achieve the highest possible returns. > Notes that performance should be evaluated in light of various risk metrics, and, given the long-term nature of retirement savings, it is often prudent to give greater weight to long-term historical performance over short-term performance.
Fees	> Plan fiduciaries must consider a reasonable number of similar alternatives and determine that the fees and expenses of the investment option are appropriate, taking into account its risk-adjusted expected returns and any other value the investment option brings to furthering the plan's purposes. Value, for this purpose, includes benefits, features, or services other than risk-adjusted returns. > This factor does not impose a duty to select the lowest-fee option, nor does it require fiduciaries to consider every similar alternative available in the market. The determination of what constitutes a reasonable number and what alternatives are similar is dependent on the specific facts and circumstances of each case. > Plan fiduciaries may appropriately conclude that higher-fee options are prudent where there is a clear, documented value proposition. For example, higher fees may be justified where an option offers enhanced participant services, diversification (e.g., actively managed and passive funds within the same strategy), superior risk management or mitigation features, or lifetime income guarantees.
Liquidity	> Plan fiduciaries must appropriately consider and determine that an investment option will have sufficient liquidity to meet the anticipated needs of the plan at both: – the individual participant level (to accommodate expected participant activity such as withdrawals, loans, transfers, and reallocations), and – the plan level (to address events such as plan terminations or other plan changes). > The Proposed Rule does not require that all designated investment alternatives be fully liquid and states that "a prudent fiduciary process may regularly lead to a decision to sacrifice some plan- or individual-level liquidity, or both, in pursuit of risk adjusted return." > The Proposed Rule provides that plan fiduciaries will be deemed to have met this requirement in the following circumstances: – *Mutual Funds*. If the investment option is a mutual fund registered as an open-end management investment company under the Investment Company Act of 1940, as amended ("Investment Company Act"), the fiduciary may rely on the fact that such mutual funds are required to adopt and implement a written liquidity risk management program.



Factor	Description and Considerations
	– *Other Investments*. If the plan fiduciary (i) receives written representations from the person responsible for managing the investment option (or otherwise confirms through appropriate due diligence) that such investment option has adopted and implemented a liquidity risk management program substantially similar to the requirements of the Investment Company Act, (ii) reads, critically reviews, and understands any written representation, and consults a qualified professional where appropriate, and (iii) does not know, or have reason to know, other information which would cause the fiduciary to question any written representation.
Valuation	> Plan fiduciaries must determine that an investment option has adopted adequate measures to ensure timely and accurate valuation in accordance with the needs of the plan. > Plan fiduciaries may rely on recognized valuation frameworks and sources, including national securities exchanges or other established trading venues, valuation policies and procedures grounded in Financial Accounting Standards Board Accounting Standards Codification Topic 820 (FASB ASC 820) applied through a conflict-free, independent process, or Investment Company Act compliance procedures. > Similar to the liquidity factor, the valuation factor also includes deemed satisfaction of the valuation requirement for non-publicly traded securities if: (i) the plan fiduciary reads, critically reviews, and understands the written representation or otherwise performs appropriate due diligence on the valuation process, and consults a qualified professional where appropriate, and (ii) the fiduciary does not know, or have reason to know, any information which would cause the named fiduciary to question any written representation.
Performance Benchmarks	> Plan fiduciaries must appropriately consider and determine that each investment option has a meaningful benchmark and compare the risk-adjusted expected returns of the investment option to that benchmark. There may be more than one meaningful benchmark for a designated investment alternative; however, no single benchmark is a meaningful benchmark for all designated investment alternatives on a plan investment menu. > A ‘‘meaningful benchmark’’ is an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative. The ‘‘risk-adjusted expected returns” of the designated investment alternative may be determined based on its historical performance unless it has none, in which case it may be determined based on the historical performance of a different investment with similar mandates, strategies, objectives, and risks and that is not the meaningful benchmark. > Custom composite benchmarks are expressly permitted. There is no presumption or preference against new or innovative designated investment alternative designs. Instead, when considering a new or innovative product design, a fiduciary should seek to identify the best possible comparators to it while also scrutinizing the potential value proposition presented by the new or innovative design.
Complexity	> Plan fiduciaries must appropriately consider the complexity of the investment option and determine that they have the skills, knowledge, experience, and capacity to comprehend it sufficiently to discharge their obligations under ERISA and the governing plan documents or whether they must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual.



The Proposed Rule expressly permits plan fiduciaries to satisfy the safe harbor requirements by relying on written representations from underlying investment managers and the plan's investment advisers, or by otherwise conducting appropriate due diligence. In doing so, the DOL recognizes that fiduciaries cannot, as a practical matter, verify every factual basis for an investment, particularly where the investment involves complex or less transparent asset classes. This approach builds on prior DOL guidance that fiduciaries must obtain sufficient information to understand an investment and its risks and seek support from qualified professionals where they lack expertise, while now specifying the diligence topics and the types of representations that can evidence compliance with each element of the safe harbor.

As a matter of best practice, fiduciaries should clearly identify in their records which factor of the safe harbor framework they are relying on in making an investment decision and the rationale supporting that choice. The structure of the Proposed Rule, which in several instances offers alternative means of satisfying a given factor, provides valuable flexibility. That flexibility, however, is only protective if the fiduciary maintains contemporaneous documentation that clearly articulates why a particular pathway was selected and how the relevant criteria were met. For example, where a fiduciary modifies a target date fund to include hedge funds and private equity in place of a portion of publicly traded stocks and bonds, thereby increasing the fund's expense ratio, the fiduciary's records should expressly state that the higher fees are justified by the improved risk-adjusted expected returns and downside protection, identify the fees and performance factors as those being relied upon, and document the supporting analysis, including any simulations or models projecting estimated risk-adjusted returns across a range of possible market conditions and the basis for concluding that the modification furthers the purposes of the plan. Absent such specificity, the presumption of prudence afforded by the safe harbor may be more difficult to sustain in the event of a challenge.

Plan sponsors should therefore proactively formalize and record their diligence processes as part of the record for the chosen safe harbor pathway. Fiduciary committees are likely to place greater emphasis on documentation, consistent with the longstanding principle in ERISA litigation that prudence is rooted in process, and that a well-documented process is a key protective measure.

4 The Rebuttable Presumption of Prudence

The duty of prudence requires fiduciaries to undertake an objective, thorough, and analytical evaluation of an investment, taking into account all relevant facts and circumstances. This process-based approach is consistent with how courts have long assessed fiduciary conduct under ERISA. The focus is on the quality of the process at the time of the decision, not on investment outcomes in hindsight.

In alignment with that approach, the six-factor framework operates as a structured articulation of what a prudent process should entail. If a fiduciary follows the framework, the Proposed Rule affords a rebuttable presumption that the fiduciary has satisfied the duty of prudence. That presumption applies when fiduciaries follow the framework in good faith, apply it to the specific characteristics of the investment, and maintain contemporaneous documentation of the analytical process.

5 Scope and Limitations of the Proposed Rule

Importantly, the Proposed Rule does not alter the duty of loyalty under Section 404(a)(1)(A) of ERISA or the prohibited transaction rules under Section 406, which remain separately applicable regardless of whether a fiduciary satisfies the safe harbor.

The Proposed Rule is consistent with the broader, process-based trend in ERISA fiduciary oversight, under which regulators and courts focus on how decisions are made rather than on the investment results themselves. The safe harbor framework may also meaningfully shift the litigation landscape by strengthening fiduciary defenses at the pleading and summary judgment stages of prudence claims.

Fiduciaries should also be aware that, following the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, which overruled Chevron deference, the Proposed Rule if finalized would not receive automatic judicial deference. However, its grounding in longstanding DOL positions and statutory authority should carry persuasive weight under the Skidmore standard.[1]

[1] Under the framework established in *Skidmore v. Swift & Co.*, courts may credit an agency's interpretation based on the thoroughness of its reasoning, the consistency of its position over time, and its overall persuasiveness. Because the Proposed Rule codifies principles that courts have historically applied in evaluating fiduciary conduct under ERISA and is consistent with longstanding DOL interpretive positions, it is well positioned to carry persuasive weight under Skidmore. Compliance with the safe harbor, while establishing a rebuttable presumption of prudence, may nonetheless not be treated as dispositive in all litigation contexts.

6 Action Steps for Fiduciaries

To position themselves to benefit from the safe harbor, fiduciaries should consider taking the following action steps. Fiduciaries should also consider submitting comments to the DOL before the June 1, 2026, deadline.

- **Review and update governance frameworks.** Governance structures, including investment committee charters and investment policy statements, should be reviewed and updated to align with the six-factor analytical framework.
- **Develop standardized due diligence questionnaires.** Fiduciaries should develop standardized questionnaires aligned with the six-factor analysis. Where the Proposed Rule offers alternative pathways, for example on liquidity or valuation, fiduciaries should clearly document which pathway was selected and the reasoning. All documentation should be contemporaneous.
- **Enhance recordkeeping practices.** Fiduciary process files should capture the full decision-making records, including committee deliberations (e.g., materials and minutes), written representations from investment managers, consultant reports, and the fiduciary's evaluation of all due diligence materials and identified risks.
- **Engage advisors on benchmarking and complex investments.** For complex or opaque alternative investments, fiduciaries should consider engaging expert advisers, including investment advice fiduciaries within the meaning of Section 3(21)(A)(ii) of ERISA (whose engagement is repeatedly referenced in the examples of prudent process in the Proposed Rule) and, where appropriate, appointing an independent Section 3(38) investment manager under ERISA. A properly appointed Section 3(38) manager can help address complexity and may insulate the appointing fiduciary from liability for individual investment decisions made by that delegated fiduciary, though prudent selection and monitoring obligations remain.
- **Evaluate and document conflicts of interest.** Fiduciaries should implement a structured process to identify, assess, and document conflicts of interest associated with proposed investment alternatives, including conflicts affecting valuation processes. Fiduciaries should establish procedures to address how identified conflicts are mitigated or managed.
- **Monitor ongoing rulemaking and related litigation.** Fiduciaries should continue to monitor the rulemaking process and related judicial developments. In particular, fiduciaries should follow *Anderson v. Intel Corp. Investment Policy Committee*, currently pending before the U.S. Supreme Court. That case presents the question of whether ERISA fiduciaries may be held liable for losses attributable to the selection of specific investments within a designated investment alternative, such as the underlying holdings of a target-date fund, rather than the selection of the designated investment alternative itself. The outcome of *Anderson* may have significant implications for the scope of fiduciary liability in connection with multi-asset investment options and could inform how the safe harbor framework is applied in practice.

7 Key Takeaways

The Proposed Rule is best understood as a return to ERISA's foundations: a codified, process-driven roadmap that restates and clarifies what ERISA has always required of plan fiduciaries. It provides meaningful, although not absolute, protection. Core fiduciary obligations, including the duty of loyalty under Section 404(a)(1)(A) and the prohibited transaction rules under Section 406 of ERISA, remain separately applicable and are not displaced by the safe harbor.

For plan fiduciaries, the key takeaway from the Proposed Rule is that process remains paramount. A well-documented, objective, and analytically robust process remains the strongest defense against fiduciary and prudence challenges and the most effective means of managing fiduciary exposure under ERISA. While no safe harbor can fully insulate fiduciaries from the risk of litigation, carefully documenting that all substantive factors were thoughtfully evaluated should significantly strengthen the defense against most claims. Fiduciaries who diligently apply a disciplined analytical framework should be able to implement investment decisions without materially increasing litigation risk with each exercise of fiduciary discretion.

We will continue to monitor developments related to the Proposed Rule and ERISA fiduciary investment guidance more broadly. Please reach out to our ERISA and Executive Compensation and Employee Benefits team for guidance on how these developments may affect your benefit plans and for support in evaluating next steps.

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