Alternative Investments May Be The Headline, But Process Is The Story

On March 30, 2026, the Department of Labor released its proposed rule, "*Fiduciary Duties In Selecting Designated Investment Alternatives*" implementing President Trump's Executive Order 14330, titled *Democratizing Access to Alternative Assets for 401(k) Investors,* from August 2025, requesting the DOL create a pathway for plan fiduciaries to offer participants in 401(k) plans opportunities to invest in alternative investment types that present the possibility for higher returns than traditional defined contribution plan investments. These types of alternative investments, which include private equity, real estate assets, and investment vehicles, digital assets, and currencies like Crypto, commodities, infrastructure development projects and lifetime income strategies, have historically provided greater gains on average than traditional defined contribution plan investments such as mutual funds, target date funds, and index funds.

Note – although the above-mentioned Executive Order refers to alternative investments, as discussed below, the proposed rule applied to all plan investments, not just "alternative investments." With this rule, the DOL proposes a regulatory safe harbor from which the acts of plan fiduciaries of defined contribution plans will be given the presumption of prudence. The comments period has now closed and nearly 45,000 comments were filed, with some comments providing substantive suggestions to improve the implementation of the rule and other comments objecting to the rule because of concern that it will encourage the inclusion of risky, complex, and higher cost investment options, and result in less protection for Americans' retirement savings. It remains to be seen how the DOL will respond to these comments but there appears to be consensus that the DOL is under pressure from the administration to approve a final rule as soon as possible.

Practical Tips

Any proposed or adopted change to fiduciary rules is an occasion for plan fiduciaries to do some "good governance" housekeeping, including, but not limited to, taking the actions below. These reviews will be critical if the final rule is substantially similar to the proposed rule:

1. **Review of Investment Menus**. Proactive and continuous review of investment menus to confirm adequate breadth and depth of exposure to the market and alignment with participant needs.
2. **Evaluation of Investment Policy Statements and Committee charters**. Evaluation of Investment Policy Statements and Committee charters to reflect commitment to objectively, thoroughly, and analytically consider current and potential investment options.

3. **Regular communication with co-fiduciaries**. Establishing and maintaining regular communication with plan sponsors, plan fiduciaries, and third-party advisors.

4. **Documenting the process**. Documentation of a prudent process strengthens the protections offered under the "safe harbor" and existing ERISA jurisprudence and creates a defensive record in the event of litigation.

These tips are generally applicable to ERISA plan fiduciaries and take on heightened importance in the context of the proposed regulation, as discussed further below.

ERISA as "Process Grounded Law"

The proposed regulation is grounded in three essential premises:

1. affirming the Employee Retirement Income Security Act of 1974 as "a law grounded in process";

2. confirming the "maximum discretion and flexibility" plan fiduciaries' wield when selecting designated investment alternatives (DIAs), including the alternative investments described in Executive Order 14330; and

3. asserting the presumption of prudence to be granted by arbiters of disputes to ERISA fiduciary decision-making when a prudent process (as defined in the proposed regulation) is followed by plan fiduciaries.

The regulation is framed as a clarification of existing duties owed by ERISA fiduciaries to plan participants with respect to the selection of investment opportunities across all asset classes (not just alternative investment types), rather than an expansion or novation. Viewed in this light, whether the proposed regulation is adopted in substantially the same form as initially proposed or is revised in response to public comments or internal DOL deliberations, we suggest investment fiduciaries consider committing to a fulsome and well-documented process with regard to the evaluation, selection and monitoring of all investment options under defined contribution plans for which they serve as advisors, sponsors or recordkeepers. The following is a summary of the key aspects of the proposed regulation.

The Six Factors

The proposed rule identifies a non-exhaustive list of six factors a prudent plan fiduciary must objectively, thoroughly, and analytically consider in order to earn the presumption of prudence when deciding whether to include a DIA:

1. Performance;

2. Fees;

3. Liquidity (both for the plan and individually);

4. Valuation;
5. Benchmarking; and
6. Complexity.

Per the proposed rule, fiduciaries should review each investment with respect to each factor by appropriately considering a "reasonable" number of "similar" investment alternatives. These are not the only factors which a fiduciary may need to consider with respect to their specific plan and there is no specific weight to be given to any particular factor.

- The rule is clear that the "facts and circumstances" of a particular plan will vary and must be taken into account when determining whether investment alternatives are "similar" (as to the type of and underlying volatility of the type of underlying asset or instrument). The terms "reasonable" and "similar" are subjective; despite the DOL's intentions that this rule will result in less litigation, there will be plenty for plaintiff attorneys and defendant fiduciaries to argue over. Nonetheless, the rule establishes practices and principles which, if followed diligently, will support a fiduciary's position that the selection of a DIA was prudent.

Factor #1 – Performance

The proposed regulations provide that fiduciaries should measure the performance of a potential investment as compared to a "reasonable number" of similar alternatives over an appropriate time horizon to determine whether the risk-adjusted expected returns of the DIA, net of anticipated fees and expenses, further the purposes of the plan by enabling participants and beneficiaries to maximize risk-adjusted returns on investment net of fees and expenses. Under the proposed rule, it is not enough to merely look at the advertised expected returns, as these estimates are subject to bias and may be overstated; fiduciaries should consider the investment option across economic, market, investment-specific, and risk-tolerance axes. To moderate the risk borne by plan sponsors and fiduciaries, the rule suggests that fiduciaries may wish to retain an investment advice fiduciary (i.e., an ERISA §3(21) advisor) to understand and evaluate the historical and prospective performance of an investment. There is no one set formula for measuring the performance of a potential investment alternative; instead, fiduciaries should be thorough in documenting the metrics they use when comparing alternatives. Many alternative investments may have short histories and predicting actual performance over variable time horizons that are meaningful to a particular plan's participants will be challenging.

Factor #2 – Fees

The proposed rule provides that fiduciaries must objectively, thoroughly, and analytically consider a reasonable number of similar alternatives to determine whether the fees and

expenses of the designated investment alternative are appropriate, taking into account the expected returns, net of fees and expenses, and any other "value" the DIA brings to furthering the purposes of the plan. "Value" includes any benefits, features, or services other than risk-adjusted returns net of fees associated with the investment, including diversification, downside protection, access to unique asset classes, and participant education services. The text of the proposed rule explains that the lowest fees and expenses do not necessarily equate to the more prudent option. In one example of this factor, a fund that offers knowledgeably staffed call centers dedicated to retirement plan investors, short wait times, clearly written investor communications, safe and easy online access for participants, and published surveys and ratings that demonstrate an exceptional commitment to customer service could be favored over a similar fund (i.e., with a similar investment thesis and with approximately the same anticipated returns) that has higher fees. All other things being equal, the DOL posits that there would be no violation of fiduciary duty merely on the basis that a reasonable alternative with the lowest fees and expenses is not selected.

Factor #3 – Liquidity

A major concern from skeptics of the DOL proposed rule is that, while most investment classes currently relied upon by defined contribution plans and included in investment menus (e.g., stocks, bonds and mutual funds) are publicly listed and traded (and therefore capable of being easily liquidated to meet participant's needs), many private and alternative investment options include lock-ups and holding conditions that could prevent participants from being able to receive distributions from their plan accounts, even in the case of hardship or upon the occurrence of a major life event, such as death or disability. While the proposed rule states that fiduciaries must appropriately consider and determine that a DIA will have "sufficient" liquidity to meet the anticipated needs of the plan at both the plan and individual levels, this introduces a new workstream for fiduciaries, i.e., balancing the individual redemption needs of participants against the risk- adjusted aggregate portfolio liquidity needs of the plan. We note that this balancing has been necessary historically with respect to the inclusion of stable value funds among plan investment options, as these funds typically include certain wrapper contracts and exit provisions to restrict large-scale withdrawals and also grant issuers the ability to impose market value adjustments in the event of a plan's exit from a stable value fund to reflect the impact of the withdrawal on the fund's pricing. The safe harbor clarifies that plans do not need to offer fully liquid investments. The DOL states as follows in the preamble:

"A prudent fiduciary process may regularly lead to a decision to sacrifice some plan- or individual-level liquidity, or both, in pursuit of additional risk-adjusted return."

Additionally, under the proposed rule, plan fiduciaries could reasonably determine that younger workers, who do not anticipate needing access to most of their retirement savings for many years, will have an appetite for less liquid investments that exhibit relatively greater risk-adjusted returns over time than more traditional retirement plan offerings. The "facts and circumstances" nature of the DOL's evaluation means that fiduciaries need to consider their particular population's liquidity needs, including with respect to retirement, required minimum distributions, separation from service, hardship withdrawals, asset reallocations, and plan loans. The Liquidity factor is complex because different types of investments imply different standards and expectations for liquidity.

How is this factor satisfied?

Under the proposed regulation, fiduciaries will be deemed to have met this factor's requirements and ERISA Section 404(a)(1)(B) where the plan fiduciary evaluates, including, if appropriate, with the advice of a third-party 3(21) investment advice fiduciary:

- the maximum that the DIA will allocate to illiquid investments;
- the time until such investments could likely be sold without reducing their value;

- the time until such investments will return capital to their investors; and
- the required advance notice plans must give before exiting the designated investment alternative.

Following this evaluation, a prudent plan fiduciary could conclude that the DIA will appropriately balance the future liquidity needs of the plan, the ability of the DIA to achieve increased risk-adjusted return on investment, and the ability to maintain its asset allocation targets even if there were redemptions from multiple plans or non-plan investors.

There are certain types of DIAs for which the liquidity factor will be deemed satisfied without requiring the above evaluation. For instance, a DIA (including one that holds a percentage of assets that are not securities, non-publicly traded securities, or securities acquired in exempt offerings) that is a mutual fund registered as an open-end management investment company with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 is required by the Act's rules to adopt and implement a written liquidity risk management program that is designed to assess and manage their liquidity risk.

In the case of DIAs that do not fit within the mutual fund description, the proposed rule provides that a plan fiduciary will be deemed to have met the consideration and determination requirements if:

1. The fiduciary obtains a written representation from the person responsible for managing the DIA, or otherwise performs appropriate due diligence, that the DIA has adopted and implemented a liquidity risk management program that is substantially similar to a program that meets the requirements of such Act;
2. The fiduciary reads, critically reviews, and understands any written representation and consults a qualified professional where appropriate; and
3. The fiduciary does not know, or have reason to know, other information which would cause the fiduciary to question any written representation.

Again, the facts and circumstances of each particular plan and participant are relevant, and it is possible that a fiduciary will act prudently even if deciding to include illiquid assets, e.g., annuities are not precluded. For instance, a lifetime income product that provides lifetime payments beginning at 65, penalizes withdrawals before 65 by charging a penalty and adjusting the market value of the portion of the annuity that will begin at 65 and yields greater monthly payments at age 65 can be an acceptable DIA.

Plan Level Liquidity

Plan fiduciaries also need to consider liquidity needs at the plan level, to ensure that there is adequate liquidity in the event of (i) plan terminations (which trigger payout of all vested accounts), (ii) changes in recordkeepers or investment providers (which can lead

to changes in fees and expenses) and (iii) corporate transactions involving plan sponsors.

Note that the proposed regulation also includes a lengthy discussion of the construction and maintenance of a "liquidity sleeve," a mechanism that plan fiduciaries will need to design, create and implement (implicitly in coordination with fiduciary advisors), essentially modeled on the structure of a collective investment trust in which the private and comparatively less liquid component is buttressed by an appropriate proportion of the plan's assets kept in liquid investments. The size and composition of the sleeve is to be tailored to the user base.

Factor #4 – Valuation

It can be challenging to obtain accurate, real-time valuation of alternative investments, particularly where there is no public market establishing and publishing pricing information. The proposed rule would require plan fiduciaries to "appropriately consider" and determine if the issuer of the DIA has adopted "adequate" measures to ensure that the DIA is capable of being timely and accurately valued in accordance with the plan's needs. Fiduciaries can rely on public exchanges if applicable to an investment alternative, provided that the alternative's organizational documents or prospectus indicate that its value is determined in all material respects by reference to the price of the security as reflected on the exchange at the time of the valuation. A valuation method is deemed to be prudent if the process for determining value is conflict-free, independent, and relies on the application of widely recognized and utilized accounting standards, e.g., if the seller of an investment vehicle conducts its own conflict free valuation on an at least quarterly basis pursuant to Financial Account Standards Board Accounting Standards Codification 820. But, if the DIA is not available on a public exchange, fiduciaries will have to conduct their own diligence with respect to the valuation of the investment. To the extent the fiduciary has (a) read, critically reviewed, and understood the issuer of the investment alternative's written representations; (b) consulted a qualified investment professional (if appropriate); and (c) determined that there is no reason to question the written representations of such issuer with respect to the investment alternative, the fiduciary will be deemed to have satisfied the valuation factor under the proposed regulation. Conversely, if the fiduciary cannot assess whether the assets have been or will be valued through an "independent, conflict-free valuation process," the valuation factor is not satisfied.

A bit more granularly, plan fiduciaries selecting designated investment options governed by the Investment Company Act may rely on asset valuations that result from the application of reasonable valuation procedures adopted to comply with the Act and rule 2a-5 thereunder.

Assuming that the final regulation is adopted in substantial similar form as the proposed language, fiduciaries need to be mindful of conflicts of interest that could impact the assessed valuation of the risk-adjusted return on investment. The prudence requirement

of ERISA means that fiduciaries must take appropriate steps to understand and mitigate any such adverse impacts and make a determination that the conflict of interest has not and will not render the designated investment alternative's valuation inaccurate. We further note that the determinations required of fiduciaries under the proposed regulation (and, indeed, under ERISA generally) are often collaborative in nature, requiring coordination among plan sponsors, investment committees and third-party advisors who will have different degrees of responsibility and capability to evaluate the relative strengths and weaknesses of a particular investment option. Document communications, ask investment professionals for explanations and memorialize decisions to exclude asset categories or particular investments as well as to include them.

Factor #5 – Performance Benchmark

A fiduciary must appropriately consider and determine that each DIA has a meaningful benchmark and compare the risk-adjusted expected returns, net of fees, of the DIA to the meaningful benchmark. A "meaningful benchmark" is defined as "[a]n investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative." The idea is to provide a comparator that has sufficient "likeness" to a DIA. There can be more than one meaningful benchmark for a particular investment, and no single benchmark can be a meaningful benchmark for all the DIAs on a plan investment menu. With respect to this factor, the DOL states:

"While a fiduciary should try to identify benchmarks that are as meaningful as possible, 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 simply seek to identify the best possible comparators to it while also assessing the potential value proposition presented by that design."

This is a broad factor that will require plan fiduciaries to take different approaches depending on the nature of the particular DIA. The following examples from the rule illustrate the outline of this factor:

- Fiduciary may rely on a benchmark created by a prudently selected investment advice fiduciary that is independent of the manager of the DIA. A named fiduciary need not be more expert in benchmark construction and analytics than the investment advice expert hired by the named fiduciary to assist in the selection process.
- A named fiduciary, including in the context of the selection of an asset allocation fund which includes a sleeve of alternative assets, may rely on the expertise of an investment advice fiduciary in benchmark construction and analytics, so long as it reads, critically reviews, and understands the investment advice fiduciary's explanation.

- Plan fiduciaries may, if appropriate under the circumstances because the fiduciary reviewed and understood the benchmark and because the custom composite shares similar traits with the DIA, rely on benchmarks that blend multiple broad-based securities market indices to represent the asset allocation used to implement the target date fund's strategy.

While the DOL says that fiduciaries should "simply" seek to identify appropriate comparators, this obscures the difficulty in determining whether a benchmark is meaningful in comparison to a proposed investment opportunity. The Supreme Court is expected to hear arguments in the ongoing *Anderson v. Intel Corporation Investment Policy Committee* matter, regarding the plaintiff's allegation of imprudence by plan fiduciaries in choosing to allocate a portion of plan assets to hedge funds and private equity funds that, according to the complaint, underperformed against the plaintiff's comparator group (conveniently identified by the plaintiff post-hoc). The *Anderson* case originated in 2019 in the Northern District of California and fiduciaries are eager for its resolution, and for judicial guidance as to the parameters that should be followed when identifying meaningful benchmarks.

Factor #6 – Complexity

One barrier to the inclusion of investment alternatives has been the relative complexity of such types of investments. The proposed regulation clarifies that plan fiduciaries are not precluded from prudently selecting sophisticated investment strategies that may be complex, although they do bear the responsibility of understanding the investment or engaging with an investment professional who can fill the comprehension gap. Specifically, a fiduciary must appropriately consider the complexity of the DIA and determine that the fiduciary has the skills, knowledge, experience, and capacity to comprehend it sufficiently to discharge its obligations under ERISA and the governing plan documents or whether it must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual, on either a 3(21) (investment advice) or 3(38) (investment manager) basis. Where it is necessary or advisable to engage the assistance of an investment professional, the selection of the advisor must be prudent, considering all relevant circumstances, including the knowledge, skill, and compensation of the investment professional. Note that a plan fiduciary who has engaged a 3(38) investment manager will generally not bear fiduciary responsibility for the decisions of that investment manager but will be responsible for the prudent selection of the investment manager.

Note: There is no explicit requirement that a plan fiduciary seek assistance from an investment advice fiduciary or investment manager with respect to any of the safe harbor factors discussed in the proposed regulation. However, the standard of care associated with evaluating and monitoring alternative investment categories may require a higher degree of knowledge and care than fiduciaries are accustomed to. Prior to and following the issuance of these proposed regulations, it remains the case that

plan fiduciaries are required to disclose performance data, benchmarks, and fee and expense information to participants. It remains to be seen whether additional guidance around how to disclose this information with respect to alternative investment types will be forthcoming.

Conclusion – What can be done now?

Although not yet formally adopted, the proposed rule is useful as an indication of the DOL's analytical process, but in many ways, despite the DOL's intentions, we do not anticipate that the "safe harbor" will spell the end of ERISA fiduciary lawsuits in relation to plan participant losses due to the inclusion or exclusion of particular investment option. Plaintiffs can still argue that the process was not followed or was insufficient from a prudence, negligence, or loyalty perspective in a particular case. Because the proposed Alternative Investments regulation and the "safe harbor" rules articulated therein are expressly intended to be a clarification of the existing ERISA principle of prudence, not just in relation to "alternative investments," some suggested actions that may be helpful, regardless of whether the proposed regulation is adopted as initially presented, include:

1. **Look at Investment Menus for Appropriate Exposure**. Investment committees can be proactive by reviewing their menu of investment options to determine what exposure may be missing from the lineup and determine whether and how private market investments can be added to fill the gap. Even if the plan or participant population in question has historically maintained a more conservative menu roster of investments, in light of the proposed regulation and the increasing demand for higher returns on retirement savings, fiduciaries are on notice that, if no alternative investment is ultimately selected for inclusion, they should be prepared to explain that a prudent process of regular review was undertaken and resulted in the affirmative decision to include the selected options;

2. **Evaluate Investment Policy Statements and Committee Charters**. Investment Policy Statements and Committee charters can be evaluated to ensure that committees have a commitment to objectively, thoroughly, and analytically consider current and potential investment options across each of the enumerated six factors (and other factors that may be relevant to a particular organization or participant population). If there is no Investment Committee or no Investment Committee Charter, these should be created;

3. **Communicate with Co-fiduciaries Regularly**. Investment advisors should establish and maintain regular communication with plan sponsors regarding the performance of current investment options and should educate investment committees periodically as to a wider swath of potential asset categories to bridge the knowledge gap and ensure that decisions are made from an informed perspective; and

4. **Document the Process**. It has been and will remain the case that maintaining records of the deliberations, processes and policies that result in the construction and modification of investment menus presents a continuous challenge for plan fiduciaries of all kinds. Err on the side of documenting a prudent process; this will not only serve to strengthen the protections offered under the "safe harbor" (and, even absent the rule, existing ERISA jurisprudence) and create a defensive record in the event of litigation but will also facilitate explanations of the relative merits of the selected investment options to participants.

We Are Here to Help

We continue to monitor public comments and retirement industry professionals' responses to the proposal. We have experience helping plan sponsors, investment committees, and financial advisors to plans to navigate ERISA prudence requirements. We understand that the safe harbor rules, in whatever final form results following the comment period, will raise new questions as to adequacy of process and documentation of that process. If you have any questions regarding the proposed regulation, please reach out to your Boutwell Fay attorney.