KIRKLAND & ELLIS
Kirkland Alert

Proposed DOL Regulation Aims to Expand Access to Alternative Assets for 401(k) Plan Participants

07 April 2026

Following President Trump's August 7, 2025, executive order, the U.S. Department of Labor (DOL), on March 30, 2026, issued a proposed regulation that, if adopted, would expressly allow fiduciaries of defined contribution (DC) plans, including 401(k) plans, to offer investment options that provide exposure to a broad range of alternative assets and sets forth a detailed "process-based safe harbor" for fiduciaries to follow when considering offering such investment options.

The proposed regulation is intended to clear a path for DC plan fiduciaries to offer plan participants investments with exposure to alternative assets by reducing the risk of frivolous litigation where DC plan fiduciaries follow specific guidelines when choosing those investments. In particular, the proposed regulation aims to bestow a presumption of prudence on DC plan fiduciaries who follow a particular process when selecting designated investment alternatives and qualified default investment alternatives (together, DIAs), including those that offer participants and beneficiaries exposure to alternative assets.

Public comments on the proposed regulation are due on or before June 1, 2026. Given the DOL's specific requests for comment on a range of issues, including the types of vehicles that DC plans would use to offer exposure to alternative assets and appropriate assumptions about take-up rates, fund managers offering products with exposure to alternative assets might consider submitting comments — or working with industry groups preparing to submit comments — that address these questions from a practical, market-informed perspective.

Key Provisions

The proposed regulation provides detailed guidance on how fiduciaries can meet ERISA's standard of prudence when choosing a DIA for DC plans, including when the DIA includes exposure to private equity, private credit or other alternative assets. Following the guidance in the proposed regulation does not provide an absolute defense against litigation for fiduciary breach, but would entitle the fiduciary to a presumption of having satisfied the duty of prudence and to significant deference with respect to its decisions.

- **Asset Neutrality**: The DOL chose not to limit the proposed regulation to alternative assets, instead adopting an asset-neutral approach that applies to the selection of any DIA. The proposed regulation emphasizes that ERISA does not favor or disfavor any particular type of investment or investment strategy. Accordingly, there is no per se rule against DC plan investments in alternative assets, including private market investments (including direct and indirect interests in equity, debt or other financial instruments not traded on public exchanges, real estate (including real estate-backed debt), holdings in actively managed investment vehicles that invest in digital assets, commodities, projects financing infrastructure development and lifetime income strategies).
- **Process-Based Safe Harbor**: The heart of the proposed regulation is a "process-based safe harbor" that identifies a nonexhaustive list of six factors relevant to the selection of a DIA. Under the proposed regulation, when a fiduciary objectively, thoroughly and analytically considers the six factors, to the extent applicable, in the manner described in the proposed regulation, the fiduciary is entitled to a presumption of reasonableness and significant deference. The DOL believes that each of the six factors is integral to the vast majority of DIAs. The six factors are as follows:
  - *Performance*: When assessing a DIA's performance, a fiduciary must appropriately consider a reasonable number of similar alternatives and determine that the risk-adjusted expected returns, over an appropriate time horizon and net of anticipated fees and expenses, further the purposes of the plan. The proposed regulation states that fiduciaries need not select the investment with the highest returns and may prudently select a lower-risk strategy, including one that holds alternative assets, if doing so maximizes risk-adjusted expected returns.
  - *Fees*: The fiduciary must determine that fees and expenses associated with a DIA are appropriate, taking into account risk-adjusted expected returns, net of fees and expenses, and any other value the DIA brings to furthering the purposes of the plan. The proposed regulation provides that selecting the lowest-fee option is not required and that a fiduciary may prudently pay higher fees when justified by increased value, such as higher expected risk-adjusted returns or diversification

benefits. The proposed regulation and its examples make clear that neither the proposed regulation nor ERISA's duty of prudence requires a fiduciary to compare an investment alternative with every similar alternative available in the market. The proposed regulation includes a specific example addressing a target date fund that targets specific percentages of hedge fund and private equity fund allocations while reducing target allocations of publicly traded stocks and bonds, concluding that the resulting higher expense ratio was appropriate given improved risk-adjusted expected returns over a time horizon determined to be appropriate for the target date fund.

- *Liquidity*: A fiduciary must appropriately consider and determine that a given DIA will have sufficient liquidity to meet the anticipated needs of the plan at both the plan and participant levels. However, there is no requirement to select only fully liquid products, and a prudent fiduciary may sacrifice some liquidity in pursuit of additional risk-adjusted return. For example, the proposed regulation addresses investments with redemption restrictions and provides several different "safe harbor" avenues for a fiduciary to have prudently considered whether the investment satisfies the plan's liquidity needs, including obtaining written representations from the manager of the DIA that a DIA has adopted and implemented a liquidity risk-management plan that is substantially similar to a program that meets the requirements of the Investment Company Act of 1940, provided that the fiduciary has read, reviewed and understood such representations (including with the assistance of a qualified professional, where appropriate), and did not know or have reason to know other information that would cause the fiduciary to question their accuracy.
- *Valuation*: The fiduciary must appropriately consider and determine that the DIA has adopted adequate measures for timely and accurate valuation in accordance with the plan's needs. The proposed regulation provides examples addressing valuation of non-publicly traded securities, including reliance on generally accepted U.S. accounting principles applied as part of a conflict-free, independent process. The proposed regulation states that such a process is not demonstrated where assets lack observable market prices but are valued by the manager based on proprietary methods.
- *Benchmarking*: The fiduciary must appropriately consider and determine that each DIA has a "meaningful benchmark" and compare risk-adjusted expected returns of each DIA against such benchmark. A meaningful benchmark is defined as an investment, strategy, index or other comparator with similar mandates, strategies, objectives and risks. The proposed regulation includes a specific example involving an asset allocation fund with a private equity or private credit sleeve, concluding that a composite benchmark using the internal rate of return method and a public market equivalent method both satisfied the benchmarking

requirement. The example confirms that standard public market benchmarks may not be appropriate for alternative assets.

    - *Complexity*: The fiduciary must appropriately consider the complexity of the DIA and determine whether it has the skills, knowledge, experience and capacity to comprehend the investment sufficiently, or whether it must seek assistance from a qualified investment advice fiduciary, investment manager or other professional. The proposed regulation includes a detailed example involving a pooled investment vehicle with private asset holdings employing variable fee-based incentive structures, including management fees and carried interest, and provides two illustrative scenarios under which a fiduciary can satisfy this requirement by conducting: (i) its own analysis (consulting a third party if necessary) and determining that the fee structure will deliver increased value that outweighs the variability or unpredictability of the amount and timing of fees; or (ii) due diligence, or obtaining a written representation from the manager of the DIA, confirming that the plan will only pay a flat assets under management-based fee to the manager. These and other examples provided by the proposed regulation to illustrate the complexity factor underscore that comprehension of a DIA's design and value proposition is essential.

- **Monitoring and Reliance on Expert Advice**: The DOL notes throughout the proposed regulation that a DC plan fiduciary may enlist the help of service providers, including investment advice fiduciaries, and may rely on recommendations of prudently selected investment advice fiduciaries. In the preamble, the DOL states that a fiduciary who tracks the process during "appropriately established monitoring cycles" will satisfy the monitoring requirements, but in the proposed regulation itself, it does not provide a safe harbor applicable to the ongoing duty to monitor investment alternatives after selection. Instead, it indicates in the preamble that it anticipates issuing separate interpretive guidance in the near term that will address a fiduciary's obligation under ERISA to monitor DIAs and service providers.

Limits of the Proposed Regulation

Even if adopted in its current form, following the guidance in the proposed regulation does not provide a shield against litigation for fiduciary breach, but instead entitles the fiduciary to a presumption of having satisfied the duty of prudence and to significant deference with respect to its decisions. The proposed regulation does not alter in any way ERISA's duty of loyalty or rules on prohibited transactions, which would still need to be considered by fiduciaries deciding whether to add alternative assets to their investment offerings.

Potential Legal Challenges to the Regulation

After the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), federal courts need not afford mandatory deference to agency guidance, including regulations. In its place, most circuit courts will apply a standard of judicial review called *Skidmore* deference (for the case *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)), under which the courts will not automatically defer to agency guidance, but instead will give such guidance persuasive weight based on whether the guidance is well-reasoned, consistent with the existing case law and past departmental practice, and based on genuine expertise. As a result, it is easier to successfully bring legal challenges to regulations. The proposed regulation (once finalized) may be challenged in court and will not receive deference, except to the extent the agency's reasoning is persuasive. Perhaps in anticipation of that lowered standard, in the preamble to the proposed regulation, the DOL includes a preemptive defense of the proposed regulation, emphasizing its reliance on key principles underlying historical DOL guidance regarding prudent process. Notably, the preamble does not squarely address significant Supreme Court jurisprudence seemingly at odds with the proposed regulation, such as *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), which broadly rejected the concept of a presumption of prudence. Ultimately, it remains to be seen whether the proposed regulation, once finalized, will survive legal challenges in a post-*Loper Bright* world.

Litigation Risk for Fiduciaries and the Impact of Anderson

A central concern for DC plan fiduciaries considering adding alternative asset exposure to their plan menus has been the risk of ERISA litigation, particularly claims alleging imprudence based on underperformance or excessive fees. Because the right to bring a private action to enforce ERISA is explicitly set forth in the statute, the DOL's ability to curtail this right is limited without congressional action.

Against this background, it is important to note that the Supreme Court granted *certiorari* in January 2026 to review *Anderson v. Intel Corp.*, No. 25-498. In *Anderson*, Intel 401(k) plan participants challenged the inclusion of private equity, hedge funds and other alternative assets in Intel's 401(k) plan, alleging that these allocations resulted in higher fees and underperformance compared to traditional investments. The U.S. Circuit Court of Appeals for the Ninth Circuit upheld the district court's dismissal of the claims, holding that plaintiffs must identify a meaningful benchmark when alleging imprudence. The Supreme Court is now set to decide whether

allegations of underperformance alone, without a "meaningful benchmark," are sufficient to state a claim that a fiduciary breached its duty of prudence under ERISA.

The proposed regulation's safe harbor directly incorporates and reinforces the meaningful benchmark concept, defining a "meaningful benchmark" as "an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative." If the Supreme Court affirms the Ninth Circuit's ruling in favor of Intel, the plaintiffs will be required to provide robust, meaningful comparators to survive a motion to dismiss, making it more difficult to bring successful claims based solely on underperformance or fee comparisons. This may reduce the litigation risk associated with offering private equity, private credit or other alternative assets as DIAs. Nevertheless, such litigation is unlikely to cease entirely, and future litigation may focus on the appropriateness of particular benchmarks, including composite benchmarks.

Market Implications and Opportunities

The proposed regulation, once finalized, is expected to accelerate the development and adoption of target date funds and other funds with allocations to alternative assets, often in the form of collective investment trust funds.[1] Industry participants have already begun collaborating to design products that meet the regulatory requirements and address the operational and disclosure challenges unique to DC plans. It will remain important for fund managers marketing their products to DC plan fiduciaries to emphasize both the general benefits of products with exposure to alternative assets (e.g., competitive returns, asset diversification and downside protection), as well as any specific features that make a product an appropriate fit for DC plan participants (e.g., clear disclosure, reasonable fees, favorable long-term track records and liquidity provisions). Fund managers looking to attract DC plan investment should also seek to design products with features that make it as straightforward as possible for fiduciaries to demonstrate satisfaction of the safe harbor for each of the six factors outlined in the proposed regulation.

---

1. Private fund investment options into Section 3(c)(1) or Section 3(c)(7) private funds and implemented through participant-directed collective investment trust funds cannot be offered directly to all plan participants due to Investment Company Act look-through investor counting or qualification requirements. Exceptions may apply if the participant is offered more generic investment options without allowing self-direction into specific private funds. ↩

Authors

Sabrina C. Glaser

Partner / New York

Joseph A. Lifsics

Partner / Chicago

Christine S. Matott

Partner / Chicago

Theodore Brown

Partner / Chicago

Claire S. Rosa

Partner / Boston

William P. Lane

Partner / Washington, D.C.

Christopher E. Palmer

Partner / Washington, D.C.

Nicole M. Runyan, P.C.

Partner / New York

Related Services

Practices

- Investment Funds
- Executive Compensation, Employment & Benefits

Suggested Reading

- 12 December 2025 Kirkland Alert ILPA White Paper Explores the Growing Presence of Retail Investors in Private Markets
- 23 October 2025 Kirkland Alert EU and UK Regulatory Update for Fund Sponsors
- 08 August 2025 Kirkland Alert President Trump Issues Executive Order to Allow for 401(k) Plans to Invest in Private Equity and Other Alternative Assets

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.
© 2026 Kirkland & Ellis LLP.