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(Safe) Harbor-ing Presumptions for 401(k) Plan "Alternatives": Will DOL Proposal Calm the Fiduciary Waters?

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On March 31, 2026, the Department of Labor (DOL) issued a highly anticipated proposed regulation (Proposed Regulation) that followed an executive order issued by President Trump on August 7 of last year (Executive Order). The Executive Order was intended to expand access to alternative assets (such as private equity, real estate, private credit and digital assets, collectively referred to herein as Alternative Assets) in participant-directed defined contribution plans such as 401(k) plans (Plans) under the Employee Retirement Income Security Act of 1974, as amended (ERISA). The Executive Order also sought to address "regulatory overreach" and "litigation risks" that the Executive Order describes as having limited the offering of Alternative Assets in such Plans.

Speculation varied as to how the DOL would approach this Presidential directive. Some hoped that regulatory action would not only assuage Plan sponsors' litigation-related fears associated with their selection of Plan investments with Alternative Assets exposure but also open structural pathways to direct investments in Alternative Assets, which for a variety of reasons have served to limit those investments.[1] Realists were more measured in their expectations, understanding the potential legal and structural obstacles associated with direct Plan investments in Alternative Assets and that potential legal limitations work across multiple regimes at cross purposes. They understood that these structural aspects and the fact that daily liquidity had become, for better or worse, a near universal feature of Plan operations effectively meant that Alternative Assets were unlikely to be delivered to Plans other than through a component of a broader balanced, "target-date" (target-date funds are also referred to herein as TDF) or "life-cycle" investment, or other multi-asset class product (sometimes referred to herein as Allocator strategies).

Indeed, there were, and still are, many potential policy options not only for consideration by the DOL, but also regulators such as the US Securities and Exchange Commission (SEC), the Treasury Department and the Internal Revenue Service (IRS). The Executive Order contemplates this and there was no specific pathway that was preordained for the DOL. Hence, there was much interest, handicapping. and waiting.

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Safe Harbor Approach

The DOL decided to issue a Proposed Regulation for Plan fiduciaries that employs a safe harbor—or more accurately, a presumption relating to—compliance with ERISA's duty of prudence "in connection with the selection of designated investment alternatives for a participant-directed individual account plan, including asset allocation funds that include investments in alternative assets." The DOL wished to clarify that "ERISA gives fiduciaries (not opportunistic trial lawyers) the discretion and flexibility to determine when designated investment alternatives, including those that contain alternative investments, offer the opportunity for participants to maximize risk-adjusted returns on their retirement assets net of fees."

The DOL stated that "three principles form the bedrock of the Proposed Regulation." First, the "need to affirm ERISA as a law grounded in process." Second, that ERISA "gives maximum discretion and flexibility to plan fiduciaries in selecting designated investment alternatives" including Alternative Assets. Third, "when ERISA fiduciary decisionmaking follows a prudent process—such as the process reflected in the Proposed Regulation—arbiters of disputes should defer to fiduciaries under a presumption of prudence." The DOL also noted that it "has clear statutory authority under Section 505 of ERISA to promulgate safe harbors, including safe harbors regarding the fiduciary duty of prudence"—an attempt not only to anchor its proposal in statutory authority, but also likely having an eye on the recent developments in administrative law, and the repeal of the "Chevron" doctrine.[2]

Under an early regulation issued by the DOL in the 1970s, ERISA's duty of prudence is satisfied by a plan fiduciary when selecting an investment if the fiduciary meets two conditions.[3] First, the fiduciary must give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment... including the role the investment or investment course of action plays in that portion of the plan's investment portfolio or menu with respect to which the fiduciary has investment duties."[4] Second, the fiduciary must have "acted accordingly." As to the second prong, the regulation stipulates that "appropriate consideration" shall include, "but is not necessarily limited to" a "determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties) or menu, to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks[.]"[5] The regulation further requires that in certain cases, the plan fiduciary must specifically consider diversification, liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan, and projected return of the portfolio relative to the funding objectives of the plan.[6]

The preamble to the Proposed Regulation states that the Proposed Regulation "supplements and expands" the existing regulation "in the context of selecting designated investment alternatives for participant-directed individual account plans. The Proposed Regulation would accomplish this, first, by identifying six relevant factors, and second, by demonstrating what it means for a fiduciary to 'act accordingly'—and therefore to be prudent—in the circumstances addressed in the examples." To do that, the Proposed Regulation would add a new section dealing specifically with determinations associated with the selection of designated investment alternatives.[7] Subsection (a) of the Proposed Regulation would restate the basic principles of a fiduciary's duty under Section 404(a) and subsection (b) would confirm that the selection of a designated investment alternative is a fiduciary act. Importantly, subsection (c) would indicate that Plan fiduciaries

have ***maximum discretion to select investments to further the interests of the Plan***, and subsection (d) would identify that a Plan fiduciary has a duty to act prudently to further the purposes of the Plan by ***enabling participants and beneficiaries in such plan to maximize risk-adjusted returns, net of fees, on investment across their entire portfolios in their Plan.*** [Emphasis supplied].

Subsection (e) of the Proposed Regulation reincorporates the language already in the existing regulations. That is, a Plan fiduciary "must follow a prudent process under which it gives appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment responsibility or authority, the fiduciary knows or should know are relevant to the particular designated investment alternative." However, unlike the existing regulations, the Proposed Regulations do not merely copy and paste the former regulations' requirement to "act accordingly." Instead, subsections (g) through (l)—"set forth six relevant factors and safe harbor examples demonstrating what it means for a fiduciary to 'act accordingly'—and therefore to be prudent—in the circumstances addressed in the examples." Subsection (f) of the Proposed Regulation "introduces a process-based safe harbor for Plan fiduciaries to use when selecting designated investment alternatives. By referencing paragraphs (g) through (l) of the Proposed Regulation paragraph (f) would identify a non-exhaustive list of six factors for a Plan fiduciary to objectively, thoroughly, and analytically consider and make determinations about when selecting designated investment alternatives for the plan menu."

The DOL's approach here can thus be seen as going beyond the original mandate of the Executive Order in that it would apply to the selection of ***any*** investment alternative offered on a Plan investment menu into which Plan participants and beneficiaries may direct the investment of their individual account—not just those with exposure to Alternative Assets. In fact, while the Executive Order was intended to reduce structural and cultural friction associated with Plans' inclusion of Alternative Assets, the DOL's approach under the Proposed Regulation is more holistic. Thus, while the Proposed Regulation may have been motivated by Alternative Assets related considerations, it is not directed specifically to, nor limited by the Alternative Assets related concerns that seems to have been the specific focus of the Executive Order. At the same time, in furtherance of the specific directives of the Executive Order, the approach in the Proposed Regulation would facilitate the selection of exposure to Alternative Assets by a Plan fiduciary; and several of the examples reinforce that specific point of the DOL's efforts.

These six factors are now discussed in greater detail below.

The Six Factors

The Proposed Regulation seeks to address what the Executive Order regards as "burdensome lawsuits that seek to challenge reasonable decisions by loyal, regulated fiduciaries," "stifling Department of Labor guidance," and rules that promote the "encouragement of lawsuits filed by opportunistic trial lawyers," while exploring ways to help fiduciaries prudently balance potentially higher expenses against the objectives of seeking greater long-term net returns and broader diversification of investments.

As noted, to do this, the Proposed Regulation sets out six non-exclusive factors that the DOL believes are important to empower Plan fiduciaries to exercise their own judgment and diligence in making what they consider to be prudent decisions in the best interests of Plan participants without undue fear of litigation over each good faith judgment decision. It believes those factors are "integral [in the evaluation of] the vast majority of designated investment alternatives provided within participant-directed individual account plans." The DOL intended that it "identified these six factors through a thorough consideration of its experience, a comprehensive review of pertinent case law, existing regulations, previous sub-regulatory guidance"

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as well as the Executive Order and "valuable stakeholder input."

The six factors are:

1. **Performance.** The 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 by enabling participants to maximize risk-adjusted returns.
2. **Fees.** The fiduciary must appropriately consider a reasonable number of similar alternatives and determine that fees and expenses are appropriate, taking into account risk-adjusted expected returns and any other value the investment brings to furthering the purposes of the Plan. For this purpose, "value" includes benefits, features, or services beyond risk-adjusted returns.
3. **Liquidity.** The fiduciary must appropriately consider and determine that the designated investment alternative will have sufficient liquidity to meet the Plan's anticipated needs at both the Plan and individual levels.
4. **Valuation.** The fiduciary must appropriately consider and determine that the designated investment alternative has adopted adequate measures to ensure it is capable of being timely and accurately valued in accordance with the needs of the Plan, and free of conflicts of interest.
5. **Benchmark.** The fiduciary must appropriately consider and determine that each designated investment alternative has a meaningful benchmark and compare the risk-adjusted expected returns to that benchmark. The DOL notes that "while there may be more than one meaningful benchmark for a designated investment alternative, no single benchmark is a meaningful benchmark for all designated investment alternatives on a plan investment menu."
6. **Complexity.** The fiduciary must appropriately consider the designated investment alternative's complexity and determine that it has the skills, knowledge, experience, and capacity to comprehend the investment sufficiently to discharge its obligations under ERISA and the Plan documents, or whether it must seek assistance from a qualified investment advice fiduciary, investment manager, or other professional.

Observations

It is important to note that the Proposed Regulation would make clear that only decisions with respect to the selection of designated investment alternatives are in scope. The ***monitoring*** of those selections is not covered, although the DOL indicates in the preamble that many of the associated principles involved in the safe harbor would be applicable in that case. The DOL also stated that it may issue future guidance on the topic.[8] Moreover, the Proposed Regulation would provide that the construction of and maintenance of the appropriate designated investment alternative lineup or menu is a separate inquiry and must be constructed to "enable participants and beneficiaries in such plan to maximize risk-adjusted returns, net of fees, on investment across their entire portfolios" in the Plan.

There are certain important watchwords and concepts that are present in the operative language of the Proposed Regulation, as well as the accompanying examples. Perhaps most important is what appears to be a foundational principle of the entire effort—applicable not only to an investment menu, as discussed above, but also as designated investment alternatives: Plan fiduciaries should select designated investment alternatives, net of anticipated fees and expenses, to further the purposes of the Plan to enable participants and beneficiaries to maximize risk-adjusted returns on investments net of fees and expenses. While there are places in the Proposed Regulations and the preamble that use that formulation with some variation, it would appear that it remains the cornerstone of the DOL's thinking.[9] The words "risk adjusted" and "net of anticipated

fees and expenses" are particularly noteworthy and appear to be central.

In addition, there appears to be a strong nod to Plan fiduciaries' use of independent investment advice ERISA fiduciaries (that is, those who are "advice" fiduciaries under Section 3(21) of ERISA, and presumably, those who take management and control under Section 3(38) of ERISA). Indeed, many of the examples would appear to suggest that satisfaction may be impacted by the presence of such a fiduciary. It is arguably likely that the DOL intended only to indicate that the use of independent fiduciaries may be advisable, and not that they are required for relief in the examples. The DOL may wish to address this by "zooming out" and referring to the use of an independent fiduciary only in the operative language, making it clear that a Plan fiduciary's use is dependent on its own judgment and assessment of need. This concept is discussed further below.

The Proposed Regulations also emphasize the importance of a "meaningful benchmark," but that may not align cleanly with the SEC's performance presentation framework. Under the SEC's Tailored Shareholder Report requirements, mutual funds and ETFs generally must present performance against a broad-based market index as the primary benchmark (for example, S&P 500), rather than a sector-specific or blended multi-asset comparator. As a result, TDFs often use broad-based equity or fixed income benchmarks (by vintage) as their primary benchmark even when that index does not reflect the TDF's specific strategy. In addition, as the DOL itself notes, there may be some tension between the use of composite benchmarks—which may be of particular use where Allocator strategies have exposure to Alternative Assets—and the DOL's 404a-5 regulations, which call for the use of a broad-based securities market index. Although, as the DOL also comments, the purposes of these two rules may be different, one could see how some Plan fiduciaries may prefer a more consistent approach. While many will find the concept of a benchmark *de facto* reasonable, there are some who may question the utility of a benchmark as a standalone safe harbor factor especially if it leads not only to Plan fiduciary but also Plan participant confusion. Benchmarking is a tool used to evaluate performance and fees and value but standing alone some may not jump to the immediate conclusion that it is best characterized as a separate prudence factor.

The Examples

The Proposed Regulations contain not only operative language, but also a fair number of examples that are intended to help illustrate the principles articulated in the six factors. Many will likely find some of them helpful; but there are others that may strike some market participants as confusing or difficult to meet. As noted above, the DOL states that the Proposed Regulations seek to "supplement and expand" current regulatory guidance in connection with the selection of designated investment alternatives "first, by identifying six relevant factors, and second, by demonstrating what it means for a fiduciary to 'act accordingly'—and therefore to be prudent—" in the circumstances addressed in the examples. But it is essentially clear that no set of examples can cover all facts and circumstances; and so, it is almost a logical given that they are merely illustrative of the broader principles embodied by the operative language. Nevertheless, the context of each example is important, as are its facts and assumptions. What follows below are samples that highlight some details that may escape the initial inspection of some, but which may give rise to interpretative and operational challenges.

- **Higher Fee Investment Alternatives May Be Prudent... but Facts Are Limited to Passive Funds That Track the Same Index.** An example provides that a Plan fiduciary may choose an investment alternative with higher fees among "alternatives with comparable risk-adjusted return" because "customer service [is regarded as] an enhancement to the value proposition."

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However, it is unclear what weight should be given to the fact that the example refers to "five stock funds that follow similar strategies in passively tracking the same index."

- **Offering Passive and Active Strategies in the Same Asset Classes May Be Prudent... but Facts Involve the Use of an Independent Fiduciary.** Another example demonstrates that a Plan fiduciary may choose to include both passive and active strategies for the same asset class and style. However, the example indicates that the decision is based on the advice of an independent fiduciary adviser who advises that gaining exposure to both active and passive strategies "increases participants' risk adjusted returns on investment net of additional fees charged by the actively managed funds."
- **A Target Date Fund May Be Prudently Selected Even if It Has Lower Expected Returns but Lower Expected Risk, Measured by Volatility... but Facts Presuppose the Use of an Independent Fiduciary Using Specified Measures.** The example involves the consideration of three target date funds "working with a third-party investment advice fiduciary." The investment advice fiduciary "presents various risk measures for the named fiduciary to consider" including the Sharpe Ratio, a commonly used measure to assess risk-adjusted performance, and a risk-adjusted return measure that subtracts a risk penalty from returns." The independent fiduciary explains its methodologies and the Plan fiduciary selects a product that does not feature the highest expected returns.
- **Plan Fiduciaries May Select Target-Date Funds with Alternative Assets... but the Example Contemplates That the Plan Already Has an Identical Target-Date Fund—Without Alternatives Exposure.** Where a Plan fiduciary chooses either exposure to Alternative Assets or lifetime income (that is, an annuity) in the context of a target-date fund or similar product, the examples speak of a pre-existing investment alternative on the Plan menu without any Alternative Assets exposure or any lifetime income option. It contemplates that both the original target date fund and a new separate "clone" be offered, with the clone being the same in all respects except that it also offers Alternative Assets exposure or, alternatively, a lifetime income option. In addition to the facts indicating that both the original and the "clone" continue to be offered, the examples also presuppose the use of an independent advice fiduciary, which, in the case of an Alternative Assets sleeve advises the Plan fiduciary that "the expense ratio [of the existing target-date fund] would increase slightly over the existing investment alternative, but [result in an] improvement in risk-adjusted expected returns, net of fees, over the time horizon indicated for the target-date fund"; and in the context of the lifetime annuity option advises that the expense ratio is the same but that the additional fee occasioned by the additional lifetime income feature secures "more favorable annuity conversion rates throughout the life of the contract than would be available outside the contract" and that "maintaining both such options is not unreasonable."

  No less important is the potential implication that the incorporation of an Alternative Assets sleeve into a Plan's pre-existing target-date or similar product would appear to require *de novo* review comparable to picking a new designated investment alternative in a completely different strategy. No doubt there are some Plan sponsors who may question such an implication, instead focusing on whether the addition of the Alternative Asset component somehow materially justifies such a review. Certainly, there may be cases in which minor adjustments to existing allocations should not require a de novo wholesale review of the fund marketplace.
- **The Proposed Regulations Aspire to Be Product and Legal Regime Agnostic... but the Examples May Favor Specific Regulatory**

Requirements. The Proposed Regulation contains several examples concerning both Plan-level and participant-level liquidity considerations and also with respect to valuation. The examples highlight two particular regimes: (1) Rule 22e-4 under the Investment Company Act of 1940, as amended (the 40 Act) and (2) FASB 820 concerning valuation—with which some may not be fully familiar. This is illustrative of a likely unintended over-emphasis in the examples of open-end registered funds. Because Plans invest not only in those funds, but other products such as collective investment trusts (CITs) and managed accounts (particularly for Allocator arrangements), the DOL may wish to adapt the existing examples in a way that is more product and legal regime neutral—for example, by highlighting the use of CITs. This could help avoid any unintended implications that registered mutual funds (whether as a standalone strategy or an Allocator product) are preferred. While examples should be just that and only that, the more that they correspond to market realities, the better served the Plan fiduciary and participant community will be.

- — **Rule 22e-4 as Norm?** For instance, examples in the Proposed Regulation contemplate that Plan fiduciaries obtain representations or perform due diligence on a given designated investment alternative's liquidity program to ensure that it is substantially similar to Rule 22e-4. While applicable to funds registered under the 40 Act, Rule 22e-4 is not mandated (nor necessarily utilized) by managed accounts or CITS—even though in those cases, they are governed by ERISA and its extraordinarily high level of care (not to mention its prohibited transaction restrictions).
- — **"Conflict Free" as Standard?** Some of these examples call for a "conflict free" valuation process, which is likely unattainable. It arguably goes beyond even the duties of an ERISA fiduciary's standard of care, and certainly those under the 40 Act. For example, SEC Rule 2a-5 reduces valuation conflicts in registered funds primarily through governance, oversight, and separation-of-duty mechanisms, rather than prohibiting conflicts outright.
- — **FASB 820 as Prerequisite?** Financial Accounting Standards Board (FASB) 820 provides conventions pursuant to which assets or liabilities are measured at "fair value." However, the use of FASB 820 may not be as standardized across investment products as the Proposed Regulations may assume, and some products that utilize other equally rigorous standards may find themselves at a disadvantage if required to adopt these standards when not otherwise required to do so.

- **Examples Call for Examination of Liquidity and Valuation... but May Not Apply the Considerations at the Right Level.** It is also unclear which level of a product the DOL intends the Plan fiduciary to focus on for purposes of considering a given designated investment alternative's valuation and liquidity Take for example, "Allocator" products—those like target-date, life-cycle or similar multi-asset class product where a given investment manager (Allocator Manager) allocates to products across different asset classes (some of which may include Alternative Assets). It would make most sense that a Plan fiduciary considers the reasonableness of the valuation protocols implemented at the Allocator Manager level and also consider the Allocator Manager's parameters for assuring the product's expected liquidity. In most cases, for such Allocator products, the Allocator Manager will already be subject to ERISA or the 40 Act. Thus, consideration of factors such as valuation and liquidity should likely be centered on the Allocator Manager's policies associated with compliance with those duties. It would

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appear harder to justify a Plan fiduciary's examination of the Allocator product's constituent component investments.

- **Example Illustrates Impermissible Conflicts... but Uses a Potentially Anomalous Product.** To illustrate the importance of "conflict free" valuation, an example involves a continuation fund managed or controlled by a manager that recently has acquired or contemplates an imminent acquisition of assets from an investment vehicle, such as another fund or vehicle with Alternative Assets, that is managed or controlled by the manager or an affiliate and the assets of the investment vehicle to be purchased do not trade on a public exchange and lack readily observable market prices. In our experience, one would be hard pressed to find a continuation fund as a stand-alone designated investment alternative. Where they may be accessed through 401(k) Plans would be in small allocations in Allocator products. The use of this product to illustrate the point thus may leave some confused.
- **Examples Indicate Safe Harbor Is Satisfied... but Where Plan Fiduciary Obtains Written Representations.** Several examples appear to provide positive outcomes where the Plan fiduciary obtains representations from the product sponsor. For instance, one example includes facts where the Plan fiduciary obtains a written representation from the person responsible for managing the designated investment alternative that the designated investment alternative has adopted and implemented a liquidity risk management program. In another involving a pooled investment vehicle with an investment strategy involving target positions in particular types of assets, which includes holdings of private assets, the facts indicate that the Plan fiduciary receives representations from the product manufacturer that none of the underlying fees will be passed through to the Plan, and that, instead, the Plan will pay an appropriate, flat, AUM-based fee, to the person responsible for managing the designated investment alternative, who will then internalize the underlying fees. Some Plan sponsors may find that this type of risk-shifting is unnecessary and inappropriate, particularly where ERISA or the 40 Act otherwise offer other permissible fee structures.

  Others may be concerned about the prospect of creating significant inefficiencies in the market, with product sponsors expending substantial time and resources on what are likely to be bespoke negotiations with Plan fiduciaries requesting individualized representations. Some may suggest that it might be better if the Plan fiduciary instead considered the information provided by the product sponsor on these items or consult other materials the sponsor makes available through disclosure—rather than imply that representations may be a necessary prerequisite for success. Separately it is unclear what kind of private assets are contemplated by the pooled investment example. And if the exposure is to Alternative Assets strategies delivered through an Allocator, it is uncertain whether it is meant to cover either affiliated, third-party or other components. And different fee and commercial arrangements may result (legally) under each of the 40 Act and ERISA, respectively, depending on the answer, not all of which strictly require the internalization of the fees. Where the exposure is more direct (that is, a co-investment in a portfolio company), it is also uncertain how the example is meant to apply.

Commentators may have different interpretations or positions on the examples as a whole. Some may even prefer that reliance on the operative language alone is more conducive to the goals sought by the DOL. Others may prefer more surgical refinement. Assuming that the examples are retained, the DOL may wish to make it clear in the operational language itself that the examples are in fact simply that. Doing so would likely inspire the most confidence for Plan fiduciaries otherwise concerned

about opportunistic and stifling litigation. Where so retained, the DOL may wish to consider adjusting the examples to conform with the suggestions below designed to produce a "safer" harbor. Because of the complexities of Allocator products—especially where there is an allocation to Alternative Assets—the DOL may consider adding a specific illustration (as included in the accompanying footnote) that provides comfort to those Plan fiduciaries who objectively believe that adding such an alternative is in the Plan's best interests, but who may be disinclined to do so because of the threat of opportunistic litigation.[10]

A "Safer" Harbor?

The DOL makes clear that the Proposed Regulation's aim is to "decrease plan fiduciary uncertainty about whether they are satisfying their duty of prudence when making such a selection and reduce the associated litigation risks of that selection." Moreover, it also indicates that it deliberately selected a safe harbor approach so that "a plan fiduciary that objectively, thoroughly, and analytically considers and makes a determination regarding any or all of the six factors should be able to confidently rely on that determination without undue fear of litigation, much like how plan fiduciaries can rely on the judicial deference the Supreme Court has acknowledged they can receive in the circumstances addressed in *Firestone Tire & Rubber Co. v. Bruch*." The DOL's approach here was to implement the Executive Order by "prioritiz[ing] approaches that are designed to curb litigation risk that may constrain fiduciaries from applying their best judgment in offering investment opportunities to plan participants." The selection of these six factors represents a very important step for Plan fiduciaries and for the advancement of the purposes of the Executive Order. As noted above, the DOL already has indicated that they are "integral to the vast majority of designated investment alternatives provided within participant-directed individual account plans" and it has "identified these six factors through a thorough consideration of its experience, a comprehensive review of pertinent case law, existing regulations, previous sub-regulatory guidance" as well as the Executive Order and "valuable stakeholder input." To underscore the point, which is likely intended by the DOL, that while a Plan fiduciary should always feel free to consider factors it believes are appropriate in making decisions concerning designated investment alternatives, it will usually (that is, in "the vast majority" of situations) be deemed to meet the Proposed Regulation as a whole if it considers the delineated six factors. The DOL could consider adding a single sentence at the end of subsection (f) to make this clear. Doing so may make a safe harbor even safer.[11]

The Proposed Regulation is structured as a traditional safe harbor, in the sense that Plan fiduciaries seeking its protections need to consider the six prescribed factors described above. However, within each of those factors the Proposed Regulation reserves considerable judgment and discretion to Plan fiduciaries. In this sense, some may be inclined to regard the Proposed Regulation as a safe harbor set of categories, each of which needs to be evaluated on a principles-basis. For example, while it is important that a Plan fiduciary consider "performance" as one of the six categories, left to the Plan fiduciary is to "appropriately consider a reasonable number of similar alternatives." In the same category, a fiduciary is also responsible for concluding what the "appropriate time horizon" is for purposes of measuring performance. Similar considerations apply with respect to the fee category. A Plan fiduciary is also charged with reaching conclusions about "a reasonable number of similar alternatives." Indeed, it seems that the architecture of the Proposed Regulation appears to represent a hybrid approach: one that provides a safe harbor of categories for consideration, but perhaps a series of "buoys" to assist Plan fiduciaries to make the decisions left to its discretion.

This architecture no doubt furthers the stated intent of the DOL to "decrease plan fiduciary uncertainty about whether they are satisfying their duty of prudence." But one could arguably see how some Plan fiduciaries might fail to reach the intended level

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of comfort. Moreover, as noted above, while there are examples that may be helpful, others may inadvertently fail to soothe some of those concerns that the DOL has identified. There may be opportunities for the DOL to consider improvements while still adhering to ERISA's primary blueprints and policy. One place to start may be the role of independent experts used by Plan fiduciaries.

Indeed, one theme throughout the examples is the use of independent fiduciaries. Some of the examples include them in the facts; while others appear to suggest that they may be optional (but perhaps suggested); while in still others they are absent. The DOL no doubt seeks to reinforce the position that Plan fiduciaries should feel empowered to use outside experts when they themselves do not have the requisite expertise. But Plan fiduciaries could arguably be forgiven for being confused when independent fiduciaries may be required (or strongly suggested) as a predicate for satisfying the relevant factor. One way to address this concern—without encroaching on the basic architecture and intended goals of the Proposed Regulation—is to remove references to independent fiduciaries in the examples and instead include them in the operative language where they are now—making it clear in the preamble that a Plan fiduciary's choice to use one is based on traditional considerations, including whether the Plan fiduciary believes it may be deficient in the expertise sufficient to make the applicable decisions. Many Plan fiduciaries are sufficiently sophisticated, even with respect to Alternative Assets, and have substantial experience, knowledge and skills about the investment universe. Some may have direct experience in dealing with Alternative Assets investments for the sponsor's defined benefit plans.

Although, not necessary for purposes of achieving the desired results of the Proposed Regulation, if the DOL wishes to reinforce the positive role independent fiduciaries can play for Plan fiduciaries, it could also consider a regulatory "nudge" (channeling Cass Sunstein and Richard Thaler's seminal popular book on behavioral economics, *Nudge*). Including a provision in the operative language that gives Plan fiduciaries a "bonus"—an element that weighs in the Plan fiduciary's favor when consideration of the factors may be indeterminate—could help "nudge" Plan fiduciaries to use independent fiduciaries. Such an approach would not impugn Plan fiduciaries' self-reliance but would help incentivize Plan fiduciaries to seek independent advice—particularly for cases at the margin, especially when doing so weighs in favor of the safe harbor. It may help to make the safe harbor a "safer" harbor.

A "safer" harbor might also include operative language that a Plan fiduciary will be entitled to rely on the recommendations of properly selected independent ERISA fiduciaries. Reliance on an independent fiduciary is akin to the relief provided in all of the "status-based" class exemptions, such as the so-called "QPAM Exemption" (PTCE 84-14), bank-maintained collective investment fund exemption (PTCE 91-38), and insurance company separate account exemptions (PTCE 90-1)... An example in the Proposed Regulation already illustrates this concept ("In determining whether a particular benchmark is a meaningful benchmark, a named fiduciary may rely on a benchmark created by a prudently selected investment advice fiduciary that is independent of the manager of the designated investment alternative.")[12] But for such an important concept, it may be most useful to generalize the concept in the operative language itself rather than merely relegating it to the examples. Such a provision could, for example, indicate that the relevant factor is met where the Plan fiduciary acts in reliance on the recommendation of an independent fiduciary ***and*** the independent fiduciary does not make recommendations that would violate prohibitions on its own self-dealing under ERISA.

Separately, a "safer" harbor could avoid conditioning relief on a Plan fiduciary's specific determination or on a specific outcome and adjusting wording that could inadvertently be interpreted as being more in the nature of a *diktat* (that is, "a Plan fiduciary must...") than in the form of a safe harbor. A "safer" harbor may

be to change such formulations to emphasize deemed compliance: for example, "The Plan fiduciary will be deemed to meet this factor if...". That language may be more consistent with traditional safe harbor formulations, may be preferable for Plan fiduciaries seeking greater confidence of safe harbor reliance, and may be more consonant with the stated goals of both the Proposed Regulation and the Executive Order. Several formulations that are consistent with this approach have been offered by market participants and in the academic literature, in anticipation of the preparation of the Proposed Regulations. These could be revisited and leveraged for this purpose.[13] Indeed, Congress enacted such an approach recently in the context of lifetime annuity options that has been thought to be an appropriate model.[14]

Such an adjustment would not limit a Plan fiduciary's operational discretion. For example, in several places, the Proposed Regulations call for the Plan fiduciary's assessment of a "reasonable number of similar" candidate designated investment alternatives, or a determination of those options "over an appropriate time of horizon." In other places, examples call for determinations of "a given level of appropriate risk, consistent with the participants' likely needs over the course of the anticipated investment." Clearly, a Plan fiduciary needs to act solely in the best interests of Plan participants and beneficiaries under general ERISA principles, and consideration of the six factors are intended to supply the fiduciary with a proper rubric for analysis. It is unlikely given the purpose of the Proposed Regulation that such decision points were intended to create avenues for noncompliance, or for plaintiffs' bar "gotchas." Indeed, one of the examples illustrates what may be a "safer" approach: "[a] plan fiduciary selecting the designated investment alternative ***should consider*** the appropriate time horizons for retirement savings."[15] [Emphasis supplied]. Tightening such language across the Proposed Regulation to conform to being consideration-based rather than determined-focused would help avoid misinterpretation and further the aims of the Executive Order while still ensuring that Plan fiduciaries give due attention to those factors that are important. A "safer" harbor may address this by highlighting process—***consideration*** of "appropriate," "reasonable number" and similar terms, rather than *outcomes.* A written record of an independent fiduciary's advice as to a matter could be deemed to be adequate "consideration" for these purposes, without being mandated, a sufficient but not necessary condition to the "safer" harbor.

Indeed, that is a potentially fair reading of the DOL's intent. First, by "identifying six relevant factors, and second, by demonstrating what it means for a fiduciary to "act accordingly"—and therefore to be prudent—"in the circumstances addressed in the examples" the DOL is actualizing what is already in subsection (b)(2) of the current rule: that the Plan fiduciary take "into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks." When coupled with the Proposed Regulation's stated goal of "further[ing] the purposes of the Plan to enable participants and beneficiaries to maximize risk-adjusted returns on investments net of fees and expenses," consideration of such terms within the safe harbor factors would not limit the "maximum discretion of the Plan fiduciary" as indicated in the Proposed Regulation's subparagraph (c), but instead be read as consistent with it.

To be sure, this is not the only interpretation. But it would be the one that makes the most sense given the directive of the Executive Order, the stated goals and undertakings by the DOL, and the balancing of tension between providing an objective safe harbor on the one hand, while preserving Plan fiduciary "maximum discretion" on the other in connection with the selection of designated investment alternatives. Assuming the intentions described above are indeed those of the DOL, it could also consider minor changes to the operative language to provide more clarity. For example, the "reasonable

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number of similar" investment alternatives for consideration under the performance factor could be improved where either a Plan fiduciary is required to consider what is a "reasonable number" of similar investment alternatives, or, as another pathway, considers at least three comparable investment choices that the fiduciary determines are available. The latter approach would not mean that a Plan fiduciary would be constrained by considering only three such "comparables." But it would provide comfort that a Plan fiduciary's consideration of three comparable choices is sufficient. To strengthen the foundations of the effort, the DOL could make it clear that "comparables" be appropriately defined; for example, a comparable would include only those strategies with the same asset class. Given the somewhat special nature of target date, life cycle and other Allocator strategies, "comparables" could include only those investment options that have similar asset class composition, including whether or not there is a sleeve for Alternative Assets. Those that have an allocation to any Alternative Asset strategy should be compared with others that have allocations to Alternative Assets broadly; and those that do not should be compared with those that do not. Alternatively, an independent fiduciary's determination of what is "comparable" could be sufficient for entitling a fiduciary to rely on a safer harbor.

Similarly, where the Plan fiduciary is asked to determine the "appropriateness" of an investment alternative's time horizon, the language could make clear that the Plan fiduciary must consider whether the investment alternative's time horizon is consistent with the expectations of the purpose for which it is established. And, even though the Proposed Regulations offer support for greater weight on longer-term performance in some instances, perhaps the operative language could be modified so that for most investment strategies other than, perhaps, short-term liquid cash management products, and especially for target date, life cycle and similar Allocator products, the consideration of 10-year (as opposed to one-year) is entitled to greater consideration. After all, Plans are designed to be long term investment vehicles.

To give voice to this idea combining these concepts, the operative language for the performance factor could be modified to read something like the following:

> The plan fiduciary will be deemed to have met this factor if it considers at least three Comparables to the extent the fiduciary determines them to be available and it determines that in comparing such Comparables the selected designated investment alternative's expected or targeted risk-adjusted returns, measured under time horizons the fiduciaries have considered as relevant for the product or investment strategy, net of anticipated fees and expenses, and inclusive of the benefits of diversification furthers the purposes of the plan to enable participants and beneficiaries to maximize expected or targeted risk-adjusted returns on investment net of fees and expenses. A product will not fail to be an alternative to which Comparables may be evaluated (or a Comparable evaluated against another Comparable) because it is new or has a short period of performance. In such a case, a plan fiduciary will be deemed to appropriately identify such an alternative or Comparable where it considers the product's strategy, portfolio management team's experience and prior history, the underlying mechanics of the strategy, investment process and risk management.[16]

In the same spirit, a "safer" harbor might also dispense with formulations of "should seek to maximize returns over a given level of appropriate risk" which are "consistent with the participants' likely needs" analyzed "over the course of the anticipated investment," and instead adapt a more process-based formula. Many Plan fiduciaries may find it difficult to gauge any given

an individual participant's specific "likely needs," let alone "over the course of the anticipated investment" particularly because each individual participant is different, circumstances change over a participant's working life (as do macroeconomic considerations), and the individual participant's investment decision to allocate his or her Plan account to the given designated investment alternative may not be static. The participant may choose to reallocate his or her account away from the chosen designated investment alternative at any given time. Moreover, even on an aggregate basis, a Plan fiduciary cannot be expected to anticipate the future demographics of its participant and beneficiary base which may shift over time.

These elements may be even harder to determine when the requirement of determining a "given level of appropriate risk" is layered on top. "A given level of appropriate risk" may be regarded as too subjective, if not fundamentally inconsistent with a traditional safe harbor. Moreover, it is uncertain whether a prudence analysis requires conclusions about risk-adjusted returns, as opposed to expected or targeted risk-adjusted returns net of fees. It is unlikely that the DOL wished to hamstring Plan fiduciaries here, and so it may be more appropriate to emphasize that the Plan fiduciary consider the given product's potential to maximize returns over a selected level of risk, after considering what level of risk may be appropriate. Again, when evaluated across the right "comparables," and judged in light of the overall desire to maximize the Plan's expected or targeted risk-adjusted returns net of fees, requiring a Plan fiduciary's consideration of this element is more likely consistent with a traditional safe harbor approach and the separate intent of the DOL and the Executive Order.

In this regard, the DOL could consider a series of slight adaptations to such currently proposed language. For example, it could slightly alter the language wherever these formulations occur, including in the examples, to say that a Plan fiduciary "will be deemed to meet this factor if it considers the product's viability of maximizing returns over a given level of risk;" or "will be deemed to meet this factor if it considers the product's viability of maximizing returns over a given level of risk, consistent with the purposes for which the product has been designed."

Consistent with the formulations suggested above for other prongs (and the earlier observation concerning potential inadvertent conflicts with existing SEC rules), the benchmark factor could be adjusted to move away from unintentional *diktats* to instead say:

> *(k) Performance benchmark*. A plan fiduciary will be deemed to meet this factor if it considers whether the investment alternative has a meaningful benchmark against which to compare returns and then considers the expected or targeted risk-adjusted returns of the designated investment alternative relative to the meaningful 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 "expected or targeted risk-adjusted 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 what the plan fiduciary considers to be similar mandates, strategies, objectives, and risks and that is not the meaningful benchmark. While a plan fiduciary should identify benchmarks that it considers are meaningful comparisons to the designated investment alternative, there is no presumption or preference against new or innovative

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designated investment alternative designs. Instead, when considering a new or innovative product design, a fiduciary should consider the potential value proposition presented by the new or innovative design for purposes of measuring performance. When considering a target-date, life-cycle or other multi-asset class alternative a plan fiduciary will be deemed to meet this factor where it considers one or more composite benchmarks that reflect the asset class composition in the alternative (that is equities; fixed income; alternative assets) or a custom composite index or other comparators provided by the target-date, life-cycle, or other multi-asset class fund manager. Notwithstanding the foregoing, with respect to an investment alternative that is an investment company or exchange traded fund registered under the Investment Company Act of 1940, a "meaningful benchmark" shall include (1) an "appropriate broad-based securities market index" applicable to such fund as contemplated by Form N-1A (registration form for open-end investment companies) and Form N-2 (registration form for closed-end investment companies) as may be amended or updated from time to time and (2) such other performance indices or benchmark(s) as may be disclosed by the fund in its registration statement, shareholder reports or marketing materials; and for other products subject to the Act, a "meaningful benchmark" shall include such benchmarks or other comparators provided by the product sponsor where the plan fiduciary considers how they are constructive and maintained.

Similarly, with respect to the liquidity factor, a "safer" harbor approach might emphasize the consideration by the Plan fiduciary of a designated investment alternative's liquidity parameters at the Plan level. In the context of Allocator strategies involving Alternative Assets the Plan fiduciary could be required to consider whether its selection may further the purposes of the Plan to enable participants and beneficiaries to maximize expected or targeted risk-adjusted returns on investment net of fees and expenses with a specific focus on the consideration of the Allocator manager's ability to manage liquidity, and the Plan's historic net cash flows, participant withdrawal rates and transfer activity among designated investment alternatives offer under the Plan. For example:

> A fiduciary will be deemed to meet this factor if it considers the designated investment alternative's liquidity parameters to meet the anticipated needs of the plan as described herein. Because participant-directed individual account plans are long-term retirement savings vehicles, particularly for participants early in their careers, there is no requirement that a fiduciary select only fully liquid products. Indeed, a prudent fiduciary process may regularly lead to a decision to sacrifice some plan- or individual-level liquidity, or both, in pursuit of additional expected or targeted risk-adjusted or other return. Where a plan fiduciary considers whether the inclusion of a target-date, life-cycle, or other multi-asset class designated investment alternative, with an allocation to one or more "alternative assets" (as contemplated by Exec. Order. No. 14,330, 3 CFR 14,330 (2025), *reprinted* in 90 Fed. Reg. 38,921) "sleeves," the fiduciary shall be deemed to meet this factor where it considers whether such investment may further the purposes of the plan to enable participants and beneficiaries to maximize expected or targeted risk-adjusted returns on investment net of fees and expenses, inclusive of the benefits of diversification, where it considers the plan's historic net cash flow, participant withdrawal rates and

transfer activity among designated investment alternatives offered under the plan, and also considers the liquidity management requirements mandated by applicable law (i.e., the Investment Company Act of 1940, as amended in the case of registered investment companies; 12 C.F.R. § 9.18 and other guidance promulgated by the Office of Comptroller of the Currency or State provisions similar to such promulgations in the case of collective investment trusts; etc.) and where it considers the manager's liquidity risk management program. For such products, the plan fiduciary will be deemed to meet this factor after it has considered such factors, and concluded that the offering of such a product in the plan furthers the purposes of the plan to enable participants and beneficiaries to maximize expected or targeted risk-adjusted or other returns on investment net of fees and expenses because it offers the opportunity to achieve higher expected or targeted risk-adjusted or other returns inclusive of the benefits of diversification by including alternative assets with low correlations to stocks and bonds in its investment portfolio, thereby reducing the volatility of returns.

In sum, a "safer" harbor would modify the Proposed Regulation's existing language to demonstrate that it is the Plan fiduciary's prudent ***consideration*** of many of these questions rather than a stated or implied ***determination or outcome*** that is required. Such an approach would sacrifice neither a Plan fiduciary's "maximum discretion" nor its fiduciary duty to appropriately consider those factors which have been longstanding parts of subsection (b)(2) of the current regulation. Such an approach is not new for the DOL and has been incorporated in important exemptive relief in Prohibited Transaction Class Exemption (PTCE) 2020-02.[17]

There may be other areas to make the safe harbor even "safer." An example in the Proposed Regulation attempts to illustrate that a Plan fiduciary may choose a designated investment alternative that may be slightly more expensive where there is other value (i.e., customer service) conferred. Ignoring the inherent limitations of the example (that is, five stock funds that follow similar strategies in passively tracking the same index—and all within a 25 basis point fee range), the DOL could clarify in the operative language that a fiduciary will be deemed to have met the fee factor where it takes into account a given designated investment alternative's (i) expected or target risk-adjusted returns, net of fees and expenses in concert with (ii) any other non-risk-adjusted return related benefit, feature or service of value. This is appropriate because customer service, risk mitigation and diversification benefits for Plan participants as a whole across an investment menu reinforces the overall value proposition.

As suggested above in the specific context of the liquidity factor, a "safer" harbor approach may more generally make it clear that the level of a Plan fiduciary's consideration of the six factors in the context of target date, life cycle and other Allocator products is to be performed at the Allocator Manager level, and not below that level at its component elements. Where the Allocator is a product subject to the 40 Act or is a managed account or CIT that would be subject to ERISA, the Allocator would already be subject to substantial rules governing its behavior.[18] The Proposed Regulation's factors of liquidity, valuation and complexity (of fees) are likely best read in the context of such an understanding. Independent of whether the given target date, life cycle or other Allocator product had any sleeves dedicated to Alternative Assets, the Allocator would be responsible not only for the prudent management of the underlying components and "glidepath," it would also be required to operate in a highly regulated environment that already addresses liquidity, valuation and fee-related conflicts. Even in so-called co-branded arrangements, where an Allocator manager and

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given Alternative Assets' "sleeve" manager partner with each other in connection with a given Allocator product, the Allocator manager must holistically manage liquidity, valuation and fee related conflicts in line with the strict statutory provisions applicable and the product's objectives and it is that that should be the central consideration for the Plan fiduciary in assessing the product. The Allocator manager, after all, will need to understand the Alternative Assets strategy, liquidity and valuation terms and translate them into what it means for the Allocator and its investors.

Such Allocator products are not new, and in fact have been around for decades. Some strategies designed as mutual funds registered under the 40 Act utilize a "fund of funds" approach that have been staples of Plans for many years. In such cases, Plan fiduciaries have relied upon the Allocator mutual fund level (and the Allocator sponsor) through highly prescribed disclosure in the fund's prospectus, statement of additional information and other materials to inform a Plan sponsor about the material terms and conditions of the product. In this respect, it is no different from a single strategy mutual fund registered under the 40 Act. In each case, the Plan sponsor looks to the manager of the product in which the Plan's assets are invested directly, whether the single strategy mutual fund, or the mutual fund that serves as an Allocator.

Similarly, managed accounts or CITs often utilize "fund of funds" structures and CIT trustees (and sub-advisors) are adept at assuring compliance with ERISA's prudence and fiduciary responsibility and prohibited transaction rules—along with, of course, the robust rules of other prudential regulators at the Federal and State levels. Again, the Plan fiduciary typically looks at the Allocator level as to whether the Allocator has the appropriate controls over the product to justify investment. Because as an ERISA fiduciary (and a fiduciary under applicable Federal or State banking law) the Allocator manager in such a case is subject to some of the highest standards of behavior at law (if not the highest), valuation, fee related conflicts and liquidity concerns are all subject to, and should be evaluated with respect to those parameters.

The Proposed Regulation attempts to offer some helpful standards for Plan fiduciaries on valuation and liquidity. Specific references such as FASB 820 and Rule 22e-4 are good examples of this thoughtful attempt to offer yardsticks. However, these standards are specific to particular regimes and are not employed universally in the market. Adopting them as an expectation runs the risk of making Plan fiduciaries' (and product sponsors') lives needlessly more difficult without a commensurate benefit. An unstated but implied expectation that standards, say, for 40 Act funds, are needed when Plan fiduciaries consider products, like CITs, that do not adopt them, will likely burden rather than enhance Plan sponsor choice. Instead of sacrificing product and legal regime neutrality, it would be perhaps be better to concentrate on the fact that products that are regulated by the 40 Act or ERISA are sufficient.[19] Where the Allocator is subject to ERISA or the 40 Act, the standards are already high and sufficient to the task.

No less important is the Proposed Regulations' references to "conflict-free [and] independent" standards. "Conflict free" may be confusing or unintentionally rigid, and plan fiduciaries should be entitled to take comfort from decades of robust protections afforded by the 40 Act and ERISA without adding new ones. Similar concerns arise with respect to the fact patterns' apparent requirement to obtain what will almost certainly be cumbersome representations. Currently, few Plan fiduciaries believe it necessary to obtain special representations for widely distributed products such as 40 Act registered mutual funds. This is because of the strength of the 40 Act's disclosure regime and its robust regulatory structure. It would almost certainly be a burden for both Plan fiduciaries and product sponsors to suddenly become expected to negotiate bespoke representation letters for such products. The same is true of CITs which are also increasingly widespread and

widely distributed, occupying an increasingly large share of the participant-directed defined contribution plan market.[20]

For Allocators subject to the 40 Act (for registered funds) or ERISA (for managed accounts, and CITs), and Section 9.18 (Regulation 9) under regulations issued by the Office of the Comptroller of the Currency (12 CFR § 9.18) or such similar standards as may be adopted for State chartered institutions (for CITs), a "safer" harbor for the valuation factor could rest on such a Plan fiduciary's consideration of the protections of the 40 Act, ERISA, and Regulation 9 (or similar State provisions) as applicable, and the specific valuation policies that the Allocator manager has adopted.

Such an approach would also be consistent in the context of the "complexity" factor, as it pertains to fees. A "safer" harbor would give recognition to the fact that fee structures are not uniform but do follow certain prescribed patterns under applicable laws such as the 40 Act or ERISA. For example, under ERISA, CIT fiduciaries and managed account fiduciaries must broadly avoid impermissible conflicts on fees, going so far as to assure that, for example, they themselves do not have the power to manipulate the inputs that determine their incentive fees in their own interests. Although it may not be immediately obvious, according to the DOL, potential prohibited transactions may arise where a manager merely has the power to value a plan account's illiquid positions for this purpose—even when under ERISA separately, it is charged to act solely in the best interest of the plan assets account. The entire universe of DOL guidance on incentive fees is contained in four advisory opinions, and in all of them, only a small portion of the investments of the portfolio subject to the incentive fee had readily available market price quotations. For this small remainder that did not have readily available market quotations an independent appraiser approved up-front by the plan account was required.[21] Moreover, the prohibition on a fiduciary using its authority to manipulate its own compensation (intentionally or not) also applies to the timing of its compensation—a concern also articulated in such guidance. A separate set of restrictions concerning fees applies to investments in affiliated funds – even where the investment is objectively in the best interests of the plan. Fiduciaries of managed account Allocators for example are unable to charge an investment management, investment advisor or similar fee for the Allocator level and any affiliated component mutual fund level to which they allocate the top-level account. Where the components are third party funds, presumably there would not generally be any fee conflicts because the Allocator's decision as to where to allocate the assets does not impact its compensation. Aside from these specific conflicts prohibited by ERISA, it is important to remember that as a general principle under ERISA, a fiduciary is not permitted to receive direct or indirect compensation that arises out of its conduct as a fiduciary, save very limited exceptions.[22] While avoiding impermissible conflicts, as mentioned above, the Allocator would be under a strict duty of prudence to assure the monitoring of any such unaffiliated third party components, including the assessment of the component's own liquidity, valuation and other protocols. With such protections already inherent in the structure of such products, it would thus perhaps be beneficial for the DOL to clarify that the relevant inquiry for the Plan fiduciary is at the product level into which the Plan's assets make their direct investment (that is, in the case of an Allocator product, the Allocator level, and not the constituent components).

For all of these reasons, it would thus not be inconsistent with the purposes of the Proposed Regulation if the complexity factor could be deemed to be met if the product (or Allocator) was subject to 40 Act regulation or subject to ERISA and fees are disclosed as required by those regimes, as applicable. A Plan fiduciary will be best able to perform its duties envisioned by Section 404 and the existing regulation generally, and the Executive Order and the Proposed Regulation specifically with such protections without having to reinvent the proverbial wheel.

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Finally, the above conceptual points and suggested alterations to the existing language should flow through comprehensively, certainly to the operative language, and to the extent so retained, the examples. Once again, if retained in any form, many will likely believe it important for the DOL to clarify in the operative language itself that the examples are just that: examples. They are not intended to limit or otherwise prejudge outcomes but are instead "buoys" to help Plan fiduciaries find their way into the "safe harbor" and navigate it appropriately—even where some new comprehensive examples could be crafted, as proposed in one of the notes hereto, that illustrate important principles and which provide meaningful comfort for Plan fiduciaries especially in the context of Allocators with exposure to Alternative Assets.[23] Plan fiduciaries are likely best served by not only understanding that the buoys are there as markers, but also that Plan fiduciaries can successfully navigate safe harbors without them so long as they consider the six prongs and the factors involved. Those already inclined to be critics of a safe harbor approach will undoubtedly be dismissive of a safer harbor approach. They will argue that the protections afforded to participants arising from the efforts of the plaintiff's bar to bring litigation will be undercut, to the detriment of the goal of increased retirement savings. There is no doubt about the desirability of the goal, but the current rules fail to establish the appropriate regulatory balancing to realize that goal. That balancing, established by the governing statute, is to provide fiduciaries, who are closest to the participants and best understand their needs, with the maximum flexibility to make the judgments required by the statute and to facilitate the unlimited types of asset classes in which Plans can invest, as contemplated by the statute. They are currently constrained from doing so by the litigation environment, which imposes significant costs to establishing prudence, frequently based on misguided comparisons and concerns about liquidity and other matters before those risks have materialized and notwithstanding the fact that they may never materialize. The realization of investment profits is not possible without the investor taking risk. The current litigation environment, which effectively is an ERISA "market failure," must be fundamentally reformed so as to avoid skewing the risk/return relationship and enabling the statute to operate as intended.

Other Approaches

As helpful as they may be in the minds of some, the Proposed Regulations taken alone, if finalized as currently drafted, are probably insufficient to result in immediate sweeping or transformative changes to Plan fiduciary behavior. That is because of numerous factors such as conflicting regulatory regimes, product design considerations, cultural expectations of daily liquidity as normative, and perhaps above all, the fear of litigation.[24] The Proposed Regulations go a long way of addressing the last point, but as discussed herein, there are things the DOL could consider that may maximize the intended impact. Other potential actions can be taken by both the DOL and other regulators that may have accretive effects. For example, changes to certain ERISA prohibited transaction exemptions (that is, Prohibited Transaction Class Exemption 77-4, so that is applied on a product agnostic basis) as well as reconsideration of certain interpretative positions associated with ERISA's application to business development companies (BDCs) could be considered.[25] Modifications to SEC related definitions, or the application of those definitions, with respect to unregistered funds also could have significant impacts.[26] DOL and the Treasury could consider other changes with respect to rules which impact Plans' tax qualification status or which enable companies so inclined to offer increased access to Alternative Assets in Plans through employer contributions.[27] The challenges associated with Plan access to Alternative Assets are complex and in some cases mutually reinforcing: attempts to solve for one pressure point often results in increased tension on other fronts.[28] Although the DOL indicated that it

"consulted with the Department of the Treasury, the Staff of the SEC, and the Pension Benefit Guaranty Corporation in developing this proposed regulation" the Proposed Regulation should not be regarded as the only source of improvement or the only permissible path forward.

Given the multifarious dimensions of the technical challenges that historically have been involved, a combination of several proposals, ideally applied across different regulators, would result in the most effective way to achieve the policy objectives of the Executive Order. The most successful approach likely would be one in which the relevant regulators not only coordinate on their initiatives but also act in concert with a common purpose. This is not the place to assess whether any given suggestion or area of exploration included below may need to address any such challenges of Constitutional or statutory authority; it is, however, to make clear that it is important and that policymakers will need to be mindful of it.

Aside from technical and structural changes to existing rules, decisions in the courts may have a meaningful impact in shifting cultural expectations. As discussed in the immediately succeeding section, the DOL has in fact been activist in trying to shape the legal landscape through several key cases. In many respects, these efforts can be said to work in tandem with the Proposed Regulation and in parallel with its aims and purposes. If Plans are under-demanding exposure to Alternative Assets in ways that are objectively sub-optimal for their participants, a sort of ERISA "market failure" may be said to be occurring. If so, such a failure will likely only be corrected when a sufficient number of Plans and Plan sponsors come to conclude that the "fear factor" was (channeling Franklin D. Roosevelt) more about fearing fear than fear itself. Market participants, Plan sponsors and others will likely not know (or experience) the drivers of any changes in behavior unless and until this is solved. Each of the Proposed Regulations and the DOL's efforts in the courts (discussed below) are steps in that direction.

The DOL's Full "Court" Press

As noted above, the Proposed Regulation should not be viewed in a vacuum. In fact, the DOL has been relatively activist in the courts in ways that complement the stated purposes of the Proposed Regulation. Indeed, Assistant Secretary of Labor Daniel Aronowitz was reported to have underscored that "[w]e want to restore ERISA ***as a law process***, and we want to push back on regulation by litigation..."[29] This focus on "process" was buttressed with comments by DOL Acting Secretary Keith Sonderling in the *Wall Street Journal*: "We have an industry living in fear... that a judge or lawyer is going to second guess decisions.... We have to eliminate that."[30]

Most recently, the US Supreme Court has granted *certiorari* in *Anderson v. Intel Corp*, which presents the question of whether ERISA plaintiffs alleging imprudent investment decisions based on fund underperformance must plead a "meaningful benchmark" at the motion-to-dismiss stage. In that case, the Intel plan offered customized target date funds and a customized global diversified fund with allocations to Alternative Assets including hedge funds and private equity.[31] The case may help clarify what suffices as a benchmark—something addressed in the Proposed Regulation. Certainly, the potential for a landmark decision on ERISA's pleading standards concerning plaintiffs' allegations of imprudent investment decisions could be very important not only generally, but also for purposes of those strategies that involve Alternative Assets.

In addition, the DOL has been active in filing *amicus* briefs in a number of other important Federal cases, whose outcome may bear on the legal and overall cultural milieu in which Plan sponsors effect decision-making. In one recently filed brief to the Supreme Court concerning a Plan sponsored by Home Depot, it argued that Plan participants should be required to prove harm when accusing Plan sponsors or investment committees of breaches of fiduciary duty.[32] In the past and, in particular, in this very case when argued before the Eleventh Circuit, the DOL had maintained the exact opposite.[33]

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The plaintiffs in this case chose to drop their challenge of the Eleventh Circuit's decision. DOL officials apparently believed that their *amicus* brief had the decisive effect.[34] Similarly, in another recent case, the DOL submitted an *amicus* brief to the Supreme Court concerning the pleading standards for a class action challenging a Plan sponsor's selection of a target-date fund.[35] There it recently argued that the Sixth Circuit erred when it permitted the case to proceed even though the plaintiffs did not provide a comparable benchmark (other than a S&P target-date fund index) to support the allegation that the investment option underperformed.[15] Most recently, the DOL has taken a similar position in a Second Circuit case involving Yale University, reversing an earlier Biden Administration amicus brief in 2023.[36]

In addition, while in the early stages, there is at least one legislative proposal that would make the Executive Order have the force of law.[37] Congress also continues to consider several possible reforms that may address these issues, in whole or in part. For example, Representative Randy Fine (R-FL) has introduced a bill called the "ERISA Litigation Reform Act" which would, among other matters, change the burdens of proof for those raising non-exempt prohibited transaction claims under Section 406(a) of ERISA and mandate limitations on discovery unless "particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party."[38] This proposal was advanced by the House Committee on Education on Workforce on March 17, 2026, and awaits consideration by the full House.

Recently, the Senate also has conducted hearings on the future of benefits security which have touched on the issues raised by the Executive Order and the matters contained in the Proposed Regulation.[39]

Likely Commercial Impacts

Given the tangled web of multiple regulatory theatres of operation, it is unlikely that the Proposed Regulations will usher in an immediate rush of substantial product innovation with respect to Plans and Alternative Assets. Moreover, the expectation of daily (or near-daily) liquidity will continue to remain a headwind even if the Proposed Regulation (or its final form) is adopted. Thus, the familiar contours of what has been feasible for decades—target-date, life-cycle and other "Allocator" strategies of which Alternative Assets are a component—will continue to be the likely arena of operations for the near future.[3] And it is impossible to predict with certainty what will in fact happen. That said, the Proposed Regulations are likely to be cheered by Plan sponsors and market participants (and deservedly so). Cultural shifts take time. The Proposed Regulations represent a meaningful step forward in a deliberate policy that is goal-driven and process-centric. Cabined by appropriate deference to statutory authority, the Proposed Regulation, if enacted in its current or improved (as suggested herein) form will likely go far in depressing the so-called fear factor. The outcome of various high-profile cases in the courts also have the potential for multiplier effects.

Meanwhile, Plan sponsors and fiduciaries, as well as product manufacturers, are paying active attention to developments. Fortune favors not only the bold, but also the well-prepared. Those financial institutions that already have done the hard work (and it is hard in our experience) developing, testing, and launching desirable Alternative Asset targeted products for Plan use, and those who have found the partners with which to work in bringing them to market, will likely continue to enjoy an outsized "first mover" benefit. But as more Plan assets seek balanced investment alternatives, opportunities may grow, not shrink. And new structures continue to arise in response to other initiatives.[40] The dynamic environment in which today's Plan participant invests his account is one which assumes daily liquidity, but also increasingly is funneled to "set it and forget it" strategies such as target date funds, life cycle funds and similar structures. If Allocators are to continue to grow, it would appear that the case for Alternative Assets would rise concomitantly.

Conclusions

The DOL indicates that "[a] plan fiduciary that objectively, thoroughly, and analytically considers and makes a determination regarding any or all of the six factors [of the Proposed Regulation] should be able to ***confidently rely on*** that determination without undue fear of litigation." [Emphasis supplied]. It additionally declares that "a defendant fiduciary that complies with the proposed regulation's safe harbor factors should, to that extent, be confident that it has fulfilled its fiduciary duty of prudence. And given where the burden lies, a fiduciary that can actively demonstrate that compliance should be able to confidently rely on it to successfully defend its actions." The Proposed Regulations go a long way towards reducing concerns by Plan fiduciaries about opportunistic litigation arising out of selection of designated investment alternatives. The Proposed Regulations represent the first significant regulatory step addressing what has been referred to as a "fear factor" or "ERISA market failure" when it comes to the underutilization of otherwise objectively prudent investment choices made on behalf of Plan participants.[41] This is particularly the case for Alternative Assets strategies. It also more broadly offers a roadmap for compliance by Plan fiduciaries with respect to the selection of any designated investment alternative.

There are potential opportunities for improvement, assuming the intent by the Proposed Regulation is to safeguard Plan fiduciaries from opportunistic lawsuits while still retaining maximum discretion in their decisionmaking abilities under ERISA. In addition, there are other policy changes, by DOL and by other regulators, that could have additional favorable impacts for those seeking to increase Plan access to Alternative Assets. For the foreseeable future, the most viable commercial means of delivery of those strategies is not through direct one-to-one access (although there are some exceptions), but as a component through an Allocator product. While such products have received considerable fanfare in the mainstream and financial press of late, the structures are not in fact new or novel. Nevertheless, the receptivity by Plan fiduciaries of such arrangements may increase as a result of a constellation of factors, some of which are macro-driven, others of which may be more impacted by cultural shifts in the appetite for risk-based solutions. While it is hard to predict this evolving future, the DOL has taken an important leap implementing the aims of the Executive Order. It seeks to instill greater confidence in Plan fiduciary decisionmaking where the process of that decisionmaking is otherwise consistent with ERISA's exacting standards. It does so while leaving open the opportunity for fiduciaries to make the decisions that they believe are in the best interest of their Plan participants. Some Plan sponsors may increasingly feel more ready to pull up anchor, and sail into new safe harbors. The Proposed Regulations are an important step in widening the berth, but that would not necessarily preclude the opportunity to consider additional shipping lanes. Providing much needed help to make Plan fiduciaries feel less "adrift" in the ERISA market failures arising out of the fear of opportunistic lawsuits may not only make fiduciaries' voyages safer but, most importantly, may help enhance the likelihood that Plan participants reach their desired destination—the possibility of larger retirement account balances. The DOL is likely going to be commended by many Plan sponsors, Plan participants and financial services product manufacturers for its efforts. And deservedly so. It is not known whether a tidal wave of excitement will follow, but one thing is clear: the DOL is charting a new course that it hopes will promote smoother sailing. Those who may wish to take the wind out of the sails of the initiative are likely best served by considering its many benefits and working to get everyone on board rowing in the same direction. Retirement security is worth it.

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NOTES

1 For a discussion of these legal, structural and commercial limitations see Steven W. Rabitz, "Will the Trump Administration Re-'Order' 401(k) Plan 'Alternatives'?—Part 1," 32 *Investment Lawyer* No. 12 (Dec. 2025) (hereinafter Rabitz I); Steven W. Rabitz, "Will the Trump Administration Re-'Order' 401(k) Plan 'Alternatives'?—Part 2." 33 *Investment Lawyer* No. 1 (Jan. 2026) (hereinafter Rabitz II). A summary of the Executive Order and the immediate past history may be found in Rabitz I and Steven W. Rabitz, John W. Schuch and Brie Michaelson, "New Order 'Targets' 401(k) Plan 'Alternatives': President Takes Aim at Legal Barriers and Litigation Risk, *Dechert LLP OnPoint* (Aug. 11, 2025), available at *https://www.dechert.com/knowledge/onpoint/2025/8/new-order—targets—401-k—plan—alternatives—president-takes-.html.*

2 Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984), which established that courts must defer to reasonable federal agency interpretations of ambiguous statutes. Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) overturned Chevron, which at the risk of oversimplification, dictates that courts must now exercise independent judgment when interpreting ambiguous statutes and cannot automatically defer to a federal agency's interpretation. The general view as of this writing is that while certainty may be elusive on how courts may utilize such independent judgment, courts will be much more likely to give greater weight to formal rulemaking than to less formal guidance. The DOL addresses this by stating that:

> The Departmental explication of a prudent process is entitled to *Skidmore* deference (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) as persuasive authority regarding what constitutes a prudent process. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). *Loper-Bright* cites *Skidmore* with approval. *Id.* at 402. Other courts have adhered to this principle. *See, e.g.*, *Lopez v. Garland,* 116 F.4th 1032, 1039 (9th Cir. 2024) (agency interpretation entitled to due respect when well-reasoned). And while the Fifth Circuit has questioned the continuing role of *Skidmore*, *see Mayfield v. United States Dep't of Labor*, 117 F.4th 611, 619 (5th Cir. 2024), the Fifth Circuit implied that to the extent *Skidmore* has weight it is when the Department has clear statutory authority and has exercised it consistently. Here, the Department has promulgated safe harbors regarding a prudent process in the past (*e.g.*, selection of annuity providers), and the prudent process described herein is consistent with both the balance of existing caselaw and past Departmental practice. Accordingly, this regulation should carry persuasive weight to courts under *Skidmore* such that fiduciaries that comply with the regulation should be found to have followed a prudent process with the result that their judgment with regard to the particular factor at issue (including the relationship of that factor to the other factors) is respected.

3 29 CFR 2510.404a-1.

4 29 CFR 2550.404a-1(b)(2).

5 *Id*.

6 29 CFR 2550.404a-1(b)(2)(ii)

7 To be added as 29 CFR 2550.404a-6.

8 The preamble notes that "a plan fiduciary that tracks the process in the proposed regulation during appropriately established monitoring cycles will meet ERISA's monitoring requirements." The DOL

also called for commenters, "particularly those with expertise in portfolio monitoring and menu maintenance, and fiduciary standards" to provide input on best practices in this area.

[9] Where this formulation is not used, but otherwise intended, commentators may wish to suggest adaptations.

[10] A fact pattern like the following could be used in the context of an Allocator product with Alternative Assets exposure to illustrate how a Plan fiduciary has appropriately considered all the factors in paragraphs (g) through (l) and is thus presumed to have met its fiduciary duties under Section 404(a)(1)(B) of ERISA entitling it to significant deference. The fact pattern of the proposed example contemplates a sleeve for Alternative Assets and deliberately highlights for illustrative purposes the considerations deemed appropriate for each factor. The Plan fiduciary in the example compares performance across three different target date candidate funds: two are CITs, and one is a registered fund (under current law, likely a closed-end registered fund).

(i) *Example—Target Date Fund*. A plan fiduciary concludes that adding a target-date fund with an allocation to alternative assets would further the purposes of the plan by enabling participants to invest in a diversified portfolio spanning a full risk-and-return spectrum, after having considered the fund's expected risks and returns. The fiduciary considers three target-date funds having exposure to similar asset classes (i.e., equities, fixed income, and alternative investments), all of which allocate across multiple funds or vehicles, and also considers the expected or targeted risk-adjusted returns of each candidate target date fund, including each fund's allocation to alternative assets using time horizons that the fiduciaries have considered as relevant for the product. One of the target-date funds is a collective investment trust maintained by a bank (within the meaning of Section 3(c)(11) of the Investment Company Act of 1940 (the "Investment Company Act")), subject to the fiduciary responsibility and prohibited transaction rules of the Act, as well as Section 9.18 ("Regulation 9") under regulations issued by the Office of the Comptroller of the Currency (12 CFR § 9.18), while another is a collective investment trust also maintained by a bank (within the meaning of Section 3(c)(11) of the Investment Company Act), subject to the Act and state laws that are similar to those of Regulation 9. The third target-date fund is an investment company registered under the Investment Company Act.

Each of the three target-date fund managers is responsible for managing the "glidepath" of the target-date fund, including monitoring the performance of the "sleeves" comprising the target date fund, maintaining appropriate liquidity for the target date fund consistent with its stated objectives as well as assuring proper valuation. Each target date fund manager has provided the plan fiduciary with a custom composite index or other comparators which the fiduciary considers as having a similar mandate, strategy, objectives and risks as the target-date fund product and information concerning the target date fund manager's liquidity management, valuation, and fee-related conflict mitigation policies that are applicable to the target date fund. The fee structures of the target date funds under consideration are compliant with applicable law and are disclosed to the plan fiduciary in conformity therewith. The amount of fees, or the formulas, percentages and breakpoints necessary to calculate the amount of fees, are disclosed to the plan fiduciary.

The plan fiduciary also considers the plan's historic net cash flow, participant withdrawal rates and transfer activity among designated investment alternatives offered under the plan, and further considers the requirements and protections of (i) the Investment Company Act, or (i)(a) the Act and Regulation 9 or (b) the Act and state law, as applicable, with respect to the target-date fund manager's duties, including with respect to its fiduciary responsibility generally and concerning liquidity management, valuation, and fee-related conflicts and concludes that they are effective for purposes of those factors. It also considers each such manager's liquidity risk management

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program, and each target date fund manager's portfolio management team's experience and prior history, the underlying mechanics of the strategy, investment process and risk management. The fiduciary selects the target-date fund that it considers best furthers the purposes of the plan to enable participants and beneficiaries to maximize expected or targeted risk-adjusted returns on investment net of fees and expenses, inclusive of the benefits of diversification. It then compares the risk-adjusted expected returns of the selected target-date fund against the custom composite index or other comparators provided.

11 As an example, "A fiduciary may consider other factors it determines are prudent in light of its fiduciary duties; but where it considers the factors in paragraphs (g) through (l) and by following the process described therein, a fiduciary's judgment concerning the selection of a designated investment alternative shall be presumed to have met its duties under Section 404(a)(1)(B) of ERISA and is entitled to significant deference."

12 Subsection (k); Example 2.

13 *See*, for example, "Will the Trump Administration Re-'Order' 401(k) Plan 'Alternatives'?—Part 3," 33 *Investment Lawyer* No. 3 (Feb. 2026) (hereinafter Rabitz III); Expanding Opportunities for U.S. Investors and Retirees: Private Markets," *Committee on Capital Markets Regulation* (Aug. 2025), available at *https:// capmktsreg.org/wp-content/uploads/2025/08/CCMR-Expanding-Access-to-Private-Markets-08.07.25-Final. pdf*.

14 Section 404(e) of ERISA provides:

Safe harbor for annuity selection

(1) In general. With respect to the selection of an insurer for a guaranteed retirement income contract, the requirements of subsection (a)(1)(B) will be deemed to be satisfied if a fiduciary—

(A) engages in an objective, thorough, and analytical search for the purpose of identifying insurers from which to purchase such contracts;

(B) with respect to each insurer identified under subparagraph (A)—

(i) considers the financial capability of such insurer to satisfy its obligations under the guaranteed retirement income contract; and

(ii) considers the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features of the contract and administrative services to be provided under such contract; and

(C) on the basis of such consideration, concludes that—

(i) at the time of the selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract; and

(ii) the relative cost of the selected guaranteed retirement income contract as described in subparagraph (B)(ii) is reasonable.

(2) Financial capability of the insurer. A fiduciary will be deemed to satisfy the requirements of paragraphs (1)(B)(i) and (1)(C)(i) if—

(A) the fiduciary obtains written representations from the insurer that—

(i) the insurer is licensed to offer guaranteed retirement income contracts;

(ii) the insurer, at the time of selection and for each of the immediately preceding 7 plan years—

(I) operates under a certificate of authority from the insurance commissioner of its domiciliary State which has not been revoked or suspended;

(II) is in accordance with the laws of its domiciliary State under applicable statutory accounting principles;

(III) maintains (and has maintained) reserves which satisfies all the statutory requirements of all

States where the insurer does business; and

(IV) is not operating under an order of supervision, rehabilitation, or liquidation;

(iii) the insurer undergoes, at least every 5 years, a financial examination (within the meaning of the law of its domiciliary State) by the insurance commissioner of the domiciliary State (or representative, designee, or other party approved by such commissioner); and

(iv) the insurer will notify the fiduciary of any change in circumstances occurring after the provision of the representations in clauses (i), (ii), and (iii) which would preclude the insurer from making such representations at the time of issuance of the guaranteed retirement income contract; and

(B) after receiving such representations and as of the time of selection, the fiduciary has not received any notice described in subparagraph (A)(iv) and is in possession of no other information which would cause the fiduciary to question the representations provided.

(3) No requirement to select lowest cost. Nothing in this subsection shall be construed to require a fiduciary to select the lowest cost contract. A fiduciary may consider the value of a contract, including features and benefits of the contract and attributes of the insurer (including, without limitation, the insurer's financial strength) in conjunction with the cost of the contract.

[15] Section (g), Example (2), (iv).

[16] Note that the term "Comparable" is not defined here and is used merely as a "placeholder." The term would need to be defined, and preferably, in a manner suggested in the text above; where the fiduciary determines it is available, and with reference to a strategy with the same asset class, and the special rules for Allocator strategies discussed herein. An alternative would be for the Plan fiduciary to make comparisons among the number of Comparables the fiduciary determines appropriate.

[17] Prohibited Transaction Class Exemption (PTCE) 2020-02 contains a list of prescriptive considerations associated with an investment advice fiduciary's recommendation of a plan-to-individual retirement account (IRA) rollover. Ignoring recent *vacaturs* of aspects of that exemption by courts, the DOL's development of a list of considerations for fiduciaries is instructive. It is the considerations that form the predicates for the ultimate basis of a recommendation as to whether it is in the client's best interest to effect a rollover. In similar fashion, these Proposed Regulations could emphasize considerations more than determinations, as the considerations will invariably form the predicates for a Plan fiduciary's choice.

[18] DOL regulations, as modified by Section 3(42) of ERISA, define when entities in which plans and accounts subject to the fiduciary responsibility and prohibited transaction rules of ERISA or those of Section 4975 of the Code have an equity interest become subject to ERISA and Section 4975 of the Code. 29 CFR 2510.3-101, as modified by Section 3(42) of ERISA. CITs are "plan assets" at the very first investment of ERISA investor money. 29 CFR 2510.3-101(h).

29 CFR 2510.3-101(h) reads:

Specific rules relating to plan investments. Notwithstanding any other provision of this section—

(1) Except where the entity is an investment company registered under the Investment Company Act of 1940, when a plan acquires or holds an interest in any of the following entities its assets include its investment and an undivided interest in each of the underlying assets of the entity:

(i) **A group trust which is exempt from taxation under section 501(a) of the**

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Internal Revenue Code pursuant to the principles of Rev. Rul. 81-100, 1981-1 C.B. 326,

(ii) **A common or collective trust fund of a bank,**

(iii) A separate account of an insurance company, other than a separate account that is maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan and to any participant or beneficiary of the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account. [Emphasis supplied].

Thus, CITs are always subject to ERISA with the first investment of any account subject to ERISA. They are generally structured to avoid becoming subject to the 40 Act by reason of one or more SEC exemptions, and most generally, Section 3(c)(11) of the 40 Act. As noted in Rabitz II, p.14:

CITs may be offered as a stand-alone strategy of Alternative Assets. They may be accessed not only directly by Plans, but by managers of Allocator products structured as collective investment trusts at a "top" or allocating level. Such Allocator products may include asset allocation funds like target-date or life-cycle funds as well as other vehicles designed to access Alternative Assets strategies as a component of an overall diversified strategy. In addition to a multi-strategy Allocator, this category could also include a fund-of-funds approach that is strategy specific: for example, a bank collective fund that invests solely in private equity funds. In all of these Allocator arrangements, there is an "allocator" which in the context of a target-date or life-cycle fund is often referred to as a "glidepath" manager. As collective investment trusts presuppose for both SEC and other (that is, OCC or state banking or trust law) purposes that the trust be maintained by a bank (or trust company), only banks or trust companies may sponsor these vehicles. That said, it is common as of this writing for many bank- or trust-company sponsored institutions to engage sub-advisers where prudent so long as the trustee still retains the requisite management and control. Collective investment trusts have been widely used by Plan investors for decades and available evidence suggests they will continue to grow in market share, particularly for defined contribution plans. While such funds have historically accommodated many traditional strategies, their recent growth has been at least in part due to target-date life-cycle and similar allocation strategies that have found collective investment funds to be particularly advantageous. [Citations omitted].

Similarly, as noted in Rabitz II (p. 15):

Collective investment trusts also offer other structural advantages, including flexibility on fees and comparatively less expense on certain items when viewed against registered funds. These include marketing expenses and distribution costs. Some have also found them better able to provide customized solutions when compared with registered fund products. . . . Collective investment trusts may also enjoy advantages in terms of speed with which they may be brought to market as against registered funds

[19] Although the definition of "designated investment alternative" is itself quite broad and includes all types of investment products, some may be confused by language in the preamble which could arguably be read to imply that the only managed accounts permitted are those that are qualified default investment alternatives, under the regulations for such investments. See 29 CFR 2550-404c-5.

The definition of "designated investment alternative" in the proposal would extend to managed account services that are qualified default

investment alternatives.... Given the prevalence of qualified default investment alternatives in participant-directed individual account plans, extending the fiduciary safe harbors in the proposal to all types of qualified default investment alternatives, including managed account services, is particularly important.

Such concern is likely unwarranted, but the DOL may wish to clarify the point in any final regulation to avoid any lingering misunderstanding.

[20] *See* Ted Godbout, "CITs Lead Over Mutual Funds Grows," *Plan Sponsor Council of America*, (Feb. 13, 2025), available at *https://www.psca.org/news/psca-news/2025/1/cits-lead-over-mutual-funds-grows*; Ted Godbout, "More Than $5 Trillion in Assets in TDFs," *American Association of Pension Professionals and Actuaries* (Feb. 26 2026), available at *https://www.asppa-net.org/news/2026/2/more-than-$5-trillion-in-assets-in-tdfs/*; Emily Boyle, "Rapid Growth in CITs Fueled by Small Plan Adoption," *planadviser* (Sept. 2 2025), available at *https://www.planadviser.com/exclusives/rapid-growth-in-cits-fueled-by-small-plan-adoption/*; Cerulli Associates, "CITs Assert Greater Dominance in Defined Contribution Plans," (Jun. 17, 2024), available at *https://www.cerulli.com/press-releases/cits-assert-greater-dominance-in-defined-contribution-plans*. As of 2017, according to one report, roughly 25 percent of all defined contribution plan assets were invested in CITs. *https://thehedgefundjournal.com/us-collective-investment-trusts-cits/*. That number has surely grown, with some estimating the percentage to be above 40 percent in 2026.

[21] DOL Advisory Opinion 89-28A (Sept. 25, 1989); DOL Advisory Opinion Op. 86-20A (Aug. 29, 1986); DOL Advisory Opinion Op. 86-21A (Aug. 29, 1986); and DOL Advisory Opinion Op. 99-16A (Dec. 9, 1999). The DOL has also separately granted individual exemptive relief in certain cases.

[22] To illustrate the point, consider the case of "soft dollar" research. But for the statutory relief afforded by Section 28(e) of the Securities Exchange Act of 1934, as amended, which pre-empts ERISA, a manager could likely not execute a transaction on behalf of a plan assets fund and receive research credits unless the research would only be used for the exclusive benefit of that account itself. Information being fungible, this is often easier said than done, since once obtained, it may be utilized for other clients across the franchise—or the franchise itself. See, A. Richard Susko & Steven W. Rabitz, "ERISA Aspects of Soft Dollar Arrangements," *Practising Law Institute, Pension Plan Investments: Confronting Today's Issues* (1999).

[23] *See supra* n.10.

[24] *See* Rabitz II.

[25] *See* Rabitz III.

[26] *Id*.

[27] *Id*.

[28] *See* Rabitz II.

[29] Brian Croce, "DOL wants to end 'regulation by litigation,' issue more ERISA guidance, legal briefs," *Pensions & Investments* (Jan 7. 2026).

[30] *Id.*

[31] Anderson v. Intel Corp. Investment Policy Committee *et al*., 22-16268 (9th Cir. May 22, 2025).

[32] Brief for the United States as Amicus Curiae, Pizarro v Home Depot, No. 24-620 S. Ct.

[33] Pizarro v. Home Depot, Inc., 11th Cir., No. 22-13643, amicus brief 2/10/23 at 11-20 (stating that "[t]he district court incorrectly placed the burden of proof on the participants to show loss causation, when it should have applied a burden-shifting framework, adopted from trust law, that places the burden to disprove loss causation on the fiduciary after a plaintiff demonstrates a fiduciary breach and a related loss"). In response to invitations from the Supreme Court, the DOL has also weighed in similarly: U.S. Amicus Br. at 7-12, Putnam Invs., LLC v. Brotherston, 587 U.S. 959 (2019) (No. 18-926); U.S. Amicus Br. at 8-11, RJR Pension Inv. Comm. v. Tatum, 575 U.S. 902 (2015) (No. 14-656), and has also submitted other amicus briefs in response to the question over the

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past 35 years. Brief for the United States as Amicus Curiae, *Pizarro v Home Depot*, No. 24-620 S. Ct at p. 18, note 3.

34 US Department of Labor statement on withdrawal of Supreme Court petition in Pizarro v. Home Depot, Jan. 9, 2026, available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20260109.*

35 Brief for the United States as Amicus Curiae, Parker-Hannifin Corp. v. Johnson, No. 24-1030 S. Ct

36 Vellali v. Yale Univ., 2d Cir., No. 23-1082, motion docketed 1/5/26; Jacklyn Willie, "Labor Department Repudiates Pro-Worker ERISA Brief in Yale Case," *Bloomberg Law* (Jan. 5. 2006).

37 H.R. 5748, 119th Cong. (2025).

38 H.R. 6084, 119th Cong. (1st Sess) (Nov. 18, 2025), available at *https://www.congress.gov/bill/119th-con-gress/house-bill/6084/text/ih?overview=closed&format= xml.*

39 Senate HELP Comm., *The Future of Retirement* (Hearing, Dec. 2025).

40 *See*, for example, recent changes to closed-end registered funds as discussed in Rabitz II.

41 *See* Rabitz I, Rabitz II, and Rabitz III.

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