May 14, 2026

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Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

RIN 1210-AC38

Docket No. EBSA-2026-0166-0001

Re: *Fiduciary Duties in Selecting Designated Investment Alternatives*

Introduction

We, the undersigned organizations, appreciate the opportunity to comment on the Employee Benefits Security Administration's (EBSA) proposed rule on *Fiduciary Duties in Selecting Designated Investment Alternatives*,[1] implementing Executive Order 14330, *Democratizing Access to Alternative Assets for 401(k) Investors*.[2]

We strongly support the proposed rulemaking and urge the Department to finalize the rule. The proposal correctly identifies and addresses the regulatory ambiguity and litigation risk that have prevented over 90 million Americans who rely on 401(k)-style defined-contribution plans from accessing the same alternative investment opportunities that defined-benefit plan participants have enjoyed for decades. By clarifying the fiduciary standard and establishing a process-based safe harbor, the Department would restore the original intent of ERISA: prudent stewardship of retirement assets without discouraging flexibility and investment choice for plan sponsors and participants alike.

The Need for Greater Alternative Investment Access

The retirement system has drifted away from the segments of the capital markets where a growing share of value creation now occurs. Defined-benefit plans, which have long maintained allocations to private equity and other alternative assets, have consistently outperformed defined-contribution plans.[3] Meanwhile, most 401(k) participants have been largely confined to publicly traded equity and bond indices, placing them at a structural disadvantage relative to institutional investors who have been deploying capital into private markets for years and have benefited from the compounding returns.

[1] 91 FR 16088 (March 31, 2026); RIN 1210-AC38
[2] *Executive Order 14330, Democratizing Access to Alternative Assets for 401(k) Investors* (August 7, 2025)
[3] Investment Returns: Defined Benefit vs. Defined Contribution Plans (Center for Retirement Research at Boston College)

The evidence supporting the outperformance of alternative investments is substantial. A study of 1,600 U.S. buyout funds found approximately 2.1% in added annual risk-adjusted returns relative to public equities, indicating the advantage extends beyond raw return to return per unit of risk.[4] Crucially, even lower-quartile buyout funds still outperformed public equity benchmarks, demonstrating that the gains are broad-based and not limited to a handful of elite managers—a critical consideration for retirement savers evaluating the downside risk of less established funds.[5] Another alternative asset class, private credit, has outperformed the Bloomberg USD High Yield Corporate Index in 14 of 20 years from 2005 through 2024, while suffering lower loss rates during periods of stress, including the 2008 financial crisis.[6]

A Georgetown Center for Retirement Initiatives study found that reallocating just 10% of assets from public stocks to private equity would have increased annual returns by 0.22% over 2011–2020, while a 10% shift into a mix of private equity and other private assets would have added 0.15% annually—an improvement estimated at $35 billion per year across all defined-contribution assets and equivalent to roughly a 5% increase in annual spending power for individual participants.[7]

Alternative investments also provide meaningful diversification benefits. Because private equity and other alternative asset classes are not perfectly correlated with public markets, incorporating them into a retirement portfolio helps smooth out the effects of market downturns. When included in portfolios, alternative assets can help improve risk-adjusted returns. The risk-adjusted benefits of investing in real estate and private credit funds have also been shown to be increasing over time.[8] This reduction in volatility is particularly valuable for retirees, whose dependence on timely withdrawals makes them acutely vulnerable to market drawdowns and volatility drag.

The Safe Harbor Process Shields Against Frivolous Litigation

The most useful component of the proposed rulemaking is the process-based safe harbor under ERISA.[9] The safe harbor is essential because it affirms that the evaluation of fiduciary prudence stems from the diligence process and not unforeseeable outcomes as has been established in numerous case law examples.

[4] Committee on Capital Markets Regulation, *Expanding Opportunities for U.S. Investors and Retirees: Private Markets (2025)*. pp.18
[5] Committee on Capital Markets Regulation, *Expanding Opportunities for U.S. Investors and Retirees: Private Markets (2025)*. pp.19
[6] Committee on Capital Markets Regulation, *Expanding Opportunities for U.S. Investors and Retirees: Private Markets (2025)*. pp.26
[7] Georgetown Center for Retirement Initiatives (2023) pp.14
[8] How Alternative are Private Markets? (2019)
[9] 29 CFR § 2550(f)

The Department successfully wrote the rulemaking in alignment with the statutory intention of ERISA, which never recognized categorical restrictions on any investment type; rather, the Department correctly understands that Congress "crafted a statute intended to encourage employers to offer benefit plans". ERISA cannot accomplish its objective to encourage employers to offer benefit plans without curtailing litigation risk. One particular case showed "congress knew that if it adopted a system that was too 'complex', then 'administrative costs, or litigation expenses, [would] unduly discourage employers from offering… benefit plans in the first place."[10]

In rectifying the long-persisting gap in regulatory clarification, the proposed rule will enable a safe harbor for fiduciaries seeking to offer alternative investment options. Fiduciaries who undertake a documented, prudent evaluation of alternative investments—considering factors such as fees, liquidity constraints, valuation methodology, manager expertise, and overall portfolio fit—will be granted a presumption of prudence based on the information available to them at the time of decision-making. This ensures that fiduciaries will not be held liable solely because an investment later underperforms, provided their decision-making process meets the criteria for a presumption of prudence.[11]

This protection directly addresses the disincentives generated by ERISA-related litigation.[12] Under ERISA's prudent expert standard, investment decisions are frequently second-guessed in court, particularly when investments underperform, carry higher fees, or involve complex structures—characteristics inherent to alternative assets. Plaintiffs' firms have increasingly targeted plan sponsors by arguing that higher fees or perceived risks violate fiduciary duties, even when the underlying strategy is reasonable over a long-term horizon.

This litigation environment has pushed fiduciaries toward defensive decision-making, where minimizing legal exposure has become as important as maximizing participant outcomes. The result is a narrowing of investment menus and a reluctance to innovate that has left 401(k) participants shut out of asset classes institutional investors routinely use to achieve a secure and comfortable retirement.

By clearly defining what constitutes a defensible process, the proposed safe harbor reduces legal ambiguity and restores the focus to prudent process rather than hindsight-driven outcome evaluation. This creates a meaningful incentive for fiduciaries to expand their offerings and restores the original intent of ERISA—prudent stewardship without discouraging well-reasoned investment innovation.

[10] *Varity Corp.* v. *Howe,* 516 U.S. 489, 497 (1996)
[11] 91 FR §16088 pp.1
[12] 91 FR §16088 pp.19

Potential Areas for Improvement

The DoL should consider removing the application of SEC rule 22e-4 with regards to the written liquidity risk management program to assess and manage liquidity risk in the final rule. SEC rule 22e-4 primarily applies to mutual funds and limits the inclusion of illiquid investments in such funds to 15% of net assets.[13] Collective Investment Trusts (CITs) are the expected primary vehicle to allow for private asset investments in 401(k)s. CITs are regulated by the Office of the Comptroller of the Currency (OCC) and carry no inherent cap on private asset inclusion. The White House Council of Economic Advisers (CEA) released a report citing the benefits of private equity inclusion in portfolios by simulating portfolio allocations of up to 30% in private equity for young workers.[14] The DoL should be careful to not import SEC regulations and add red tape that may impede the implementation and execution of the rule in alignment with the president's executive order.

Secondly, the DoL should pay careful attention to the "conflict-free" requirement for fiduciary evaluation, whereby "[fiduciary] reliance on this valuation method is considered prudent because the process for determining value was conflict-free, independent, and relies on the application of widely recognized and utilized accounting standards."[15] Since private funds are typically evaluated by the fund manager, valuations cannot be totally conflict-free and independent since that may be viewed as a conflict of interest, as the general partner or investment manager responsible for determining Net Asset Value (NAV) is also the party whose management and performance fees are calculated on the basis of that valuation. Publicly traded securities benefit from continuously observable market pricing, whereas private fund assets are valued with internal models. The Department should fully clarify how plan fiduciaries are expected to satisfy the "conflict-free" standard or consider omitting the language used to avoid imposing unnecessary regulations on certain private assets.

Conclusion

This rulemaking represents an important step toward restoring the principle that retirement savers, not regulators, determine how they invest. The regulatory posture towards alternative assets under the Biden administration was remarkably exclusionary, creating a wedge in investment access between defined-benefit and defined-contribution plans. This reform will help level the playing field between 401(k) investors and defined-benefit plans that have long benefited from alternative asset allocations.

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[13] 17 CFR 270.22e-4(b)(1)(iv)
[14] Unlocking Retail Access to Private Equity Investments through Defined Contribution Plans, (2026)
[15] https://www.federalregister.gov/d/2026-06178/p-152

We strongly encourage the Department of Labor to finalize the proposed rule as expeditiously as possible. The rulemaking correctly affirms that ERISA is a process-based statute, that fiduciaries possess maximum discretion to select investments that further the purposes of the plan, and that prudent fiduciary decision-making is entitled to a presumption of deference. **By providing a clear safe harbor framework, the Department would remove the unintended barriers that have prevented millions of American workers from accessing a broader and more effective investment universe for their retirement savings. This rule would increase investment choice for retirement savers, enhance returns and diversification, and fulfill the intention of Executive Order 14330 to fully democratize access to alternative assets.**

Sincerely,

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