CFP BOARD

BY ELECTRONIC SUBMISSION VIA www.regulations.gov

June 1, 2026

The Honorable Daniel Aronowitz
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210

Re: Fiduciary Duties in Selecting Designated Investment Alternatives
RIN 1210-AC38

Dear Assistant Secretary Aronowitz:

On behalf of CFP Board, the professional body that certifies more than 109,000 CERTIFIED FINANCIAL PLANNER® professionals in the United States, I submit these comments on the Department of Labor's (Department or DOL) proposed rule, *Fiduciary Duties in Selecting Designated Investment Alternatives*.[1]

With more Americans responsible for their own retirement security than ever before, there has never been a more important time for the Department to ensure that retirement plan fiduciaries act prudently when selecting designated investment alternatives, including alternative investments that expose retirement savers to increased risk, high fees, and illiquid products. This is particularly important because plan fiduciaries historically have not selected these alternative investments for participant-directed retirement plans, and there is no evidence that retirement savers are demanding greater access to them.

CFP Board appreciates the Department's interest in developing an asset-neutral framework for investment selection decisions. We also support the Department in making clear that fiduciary responsibility for investment selection extends beyond the selection of individual investments and includes the selection of an appropriate lineup of investments for participant direction. Nevertheless, because the proposal falls short of protecting retirement savers under the Employee Retirement Income Security Act of 1974 (ERISA), the

[1] Fiduciary Duties in Selecting Designated Investment Alternatives, 91 Fed. Reg. 16,088 (proposed Mar. 31, 2026).

Department must make significant changes to the rule and issue a revised proposed rule for public comment.

Most importantly, any final rule should explicitly require a plan fiduciary to act in accordance with the proposal's non-exhaustive list of factors (the "act accordingly" requirement), and confirm that a plan fiduciary continues to have an obligation to exercise reasonable and appropriate judgment when selecting investments. A plan fiduciary who "considers" these factors should not benefit from a safe harbor when the plan fiduciary's decision falls outside the range of reasonableness (*i.e.*, a facially prudent process that results in imprudent selections does not satisfy ERISA). The final rule also should not create incentives for plan fiduciaries to select alternative investments (such as a perceived decrease in litigation risk when the proposal may have the opposite effect), or appear to endorse outcomes that are not grounded in a plan-specific, participant-focused prudence analysis. Our other concerns (including the Department's authority to establish the safe harbor), are significant both individually and collectively, and are catalogued below.

Who We Are

CFP Board operates the CERTIFIED FINANCIAL PLANNER® certification program and is accredited by the National Commission for Certifying Agencies.[2] Today, approximately one-third of all retail financial professionals are CFP® professionals. As a condition of certification, CFP® professionals commit to CFP Board to act as fiduciaries and therefore to act in the best interests of their clients at all times when providing financial advice. CFP® professionals serve millions of American households and small businesses in all 50 states and several U.S. territories through investment advisers, broker-dealers, insurance companies, and other firms. Many CFP® professionals also provide advisory and plan administration services to retirement plan fiduciaries for participant-directed individual account plans covered by the proposed rule, particularly for small- and mid-sized businesses. Consistent with its mission to advance competent and ethical financial planning, CFP Board supports a fiduciary standard for all financial advice. It is from that perspective that CFP Board offers the comments below.

EXECUTIVE SUMMARY

The proposed rule addresses the $11.6 trillion of investments in 401(k) and private sector 403(b) assets—savings on which millions of Americans depend for a financially secure retirement. We appreciate the Department's effort to clarify fiduciaries' duties in selecting designated investment alternatives, and we recognize the value of a structured analytical

[2] CFP Board consists of two affiliated non-profit organizations, the Certified Financial Planner Board of Standards, Inc. and the Certified Financial Planner Board of Standards Center for Financial Planning, Inc.

framework. However, the proposal raises significant concerns about participant protections that should be addressed before finalization. In particular, the proposal's emphasis on procedural compliance, its safe harbor framework, and the inclusion of rules-based examples in the operative regulatory text likely will, in practice, diminish the fiduciary judgment that ERISA requires. Without revision, the proposal could facilitate the entry of more complex, higher-cost, and less liquid investments into retirement plans without adequate justification—potentially exposing participants to greater risk while limiting the remedies available to them. We note that plan fiduciaries have historically exercised caution in this area for sound, participant-protective reasons, and there is no indication that retirement savers are seeking greater access to these products in their plans.

The final rule should preserve fiduciary judgment, contain a genuinely asset-neutral process, and provide practical, workable guidance consistent with ERISA's text and its fifty-year regulatory tradition. To that end, the Department should:

- Preserve the "act accordingly" requirement and clarify that ERISA prudence calls for both a careful process *and* an outcome reflecting reasoned, appropriate judgment. The final rule should not reduce the fiduciary duty to a procedural exercise or afford a presumption of prudence based solely on documented consideration of enumerated factors. Where a facially prudent process produces imprudent investment selections, that should continue to constitute a breach of ERISA, and participants should retain a meaningful remedy.
- Revisit provisions of the proposal that may be difficult to reconcile with ERISA, including the phrase "maximize risk-adjusted returns,"which may be read as imposing a duty to pursue the highest possible performance outcome rather than applying a standard of prudent judgment, as well as the phrase "maximum discretion,"which is not defined or limited in the proposed rule's text beyond the exclusion of illegal investments.
- Remove the rules-based examples from the operative regulatory text and instead issue them as sub-regulatory guidance. As drafted, the examples may function as *de facto* requirements—potentially creating litigation risk on both sides: in other words, failure to follow a specific example could be treated as a *per se* breach, while adherence to an example could inappropriately shield fiduciaries from scrutiny of additional relevant facts. At a minimum, the Department should state prominently that the examples are illustrative only, do not establish exclusive pathways to prudence, and should yield to fact-specific fiduciary judgment.
- Revise the six enumerated factors to provide clearer, more workable guidance on performance, fees, liquidity, valuation, benchmarking, and complexity.
- Add participant characteristics, conflicts of interest, and risk as stand-alone factors, and acknowledge that, in some circumstances, fiduciaries may need to consider factors

beyond those enumerated and should retain the flexibility to weigh factors differently based on the specific investment and plan.

- Explain the Department's authority to establish the proposed safe harbor and use the term "presumption" rather than "safe harbor," which may give fiduciaries the mistaken impression that their decisions are insulated from review.
- Ensure that the final rule remains genuinely asset neutral. Certain aspects of the proposal—including the examples, the emphasis on long time horizons, and the permissive treatment of illiquidity—could be read as encouraging fiduciaries to favor alternative assets, private funds, or particular product types. Any investment selection should be grounded in a plan-specific, participant-centered justification that reflects the actual needs and circumstances of plan participants.
- Consider the likelihood that the proposed rule's complexity and prescriptiveness will increase reliance on 3(38) investment managers—particularly among small- and mid-sized plans—with corresponding increases in plan costs and a shift of decision-making away from fiduciaries with direct knowledge of their participants. The Department should account for these potential costs and burdens in its Economic Impact Analysis.

I. **Background**

A. A CFP® Professional's Duties to Clients

As part of their certification, all CFP® professionals commit to CFP Board to uphold the standards set forth in the *Code of Ethics and Standards of Conduct* (*Code and Standards*), including the fiduciary duty and the duty of competence, among other obligations to clients.

1. The Fiduciary Duty

CFP Board's fiduciary duty applies whenever a CFP® professional provides financial advice to a client. To satisfy that duty and therefore act in the client's best interests, a CFP® professional must fulfill the duty of loyalty, the duty of care, and the duty to follow client instructions.

Under the *Code and Standards*, the duty of care requires a CFP® professional to act with the care, skill, prudence, and diligence that a prudent professional would exercise in light of the client's goals, risk tolerance, objectives, and financial and personal circumstances. The duty of loyalty requires a CFP® professional to place the client's interests above the interests of the CFP® professional and the CFP® professional's firm; to avoid conflicts of interest or, when a material conflict is not avoided, to disclose the conflict fully to the client, obtain the client's informed consent, and manage the conflict properly; and to act without regard to the financial or other interests of the CFP® professional, the CFP® professional's firm, or any

other individual or entity besides the client. In other words, even when a conflict exists, the CFP® professional remains obligated to act in the client's best interests and to place the client's interests first.

CFP Board deliberately adopted these principles-based duties to allow CFP® professionals flexibility in developing business practices that fit their circumstances. To help CFP® professionals fulfill their ethical obligations, CFP Board has developed prudent processes for satisfying the Duty of Care when providing Financial Planning and Financial Advice that does not require Financial Planning.[3] While CFP® professionals have found these processes helpful in fulfilling their fiduciary duty, none of these processes creates a safe harbor or rebuttable presumption that a CFP® professional has satisfied the fiduciary duty. To the contrary, the process requires a CFP® professional to determine which courses of action satisfy the Duty of Care and thus may be prudently recommended to the client. The Duty of Care guide emphasizes that if a CFP® professional does not follow the delineated process, then it will be difficult to comply with the duty of care that the *Code and Standards* requires.

2. The Duty of Competence

A CFP® professional also must satisfy the duty of competence when providing financial advice. Under the *Code and Standards*, that duty requires a CFP® professional to provide advice with the relevant knowledge of the financial assets at issue and the skill necessary to apply that knowledge to the client's circumstances. Some financial assets have attributes and features that require specialized knowledge or expertise, including assets that are complex, involve longer time horizons, carry higher fees, are less liquid, have unique or specialized features, or are subject to different regulatory standards and disclosure regimes.

Developing competence with regard to certain financial assets is often no small undertaking. CFP Board's *Code and Standards* stresses that a CFP® professional who lacks competence to provide financial advice must either gain competence, obtain the assistance of a professional whom the CFP® professional has a reasonable basis to believe is competent, limit or terminate the engagement with the client, or refer the client to another professional whom the CFP® professional has a reasonable basis to believe is competent.

[3] *See* CFP Board, *Code of Ethics and Standards of Conduct* (Financial Planning Practice Standards), https://www.cfp.net/ethics/code-of-ethics-and-standards-of-conduct, https://www.cfp.net/ethics/code-of-ethics-and-standards-of-conduct, and Guide to Satisfying the Duty of Care When Providing Financial Advice that Does Not Require Financial Planning, https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/compliance-resources/duty-of-care-guide.pdf.

B. The Regulation Should Make Clear that ERISA Requires Plan-Specific, Participant-Focused Prudence

The *Code and Standards* does not require—nor does it prohibit—a CFP® professional to provide financial advice about any particular financial asset. Rather, CFP® professionals must provide financial advice to clients in accordance with the *Code and Standards*, including the duties described above, in a manner that enables them to satisfy the terms of the engagement. This flexibility is intentional. It was designed to create durable standards for a CFP® professional's provision of financial advice.

Accordingly, CFP Board's *Code and Standards* does not address alternative assets—or any other category of investment—in product-specific terms, and it does not prohibit CFP® professionals from recommending alternative assets when doing so is consistent with their duties under the *Code and Standards*. That may include circumstances in which a CFP® professional provides advice regarding such assets to clients who meet applicable eligibility requirements, such as accredited investor status. Many CFP® professionals currently provide that type of advice to eligible individual clients in a manner consistent with CFP Board's ethical standards.

The absence of a prohibition on recommending alternative assets is not equivalent to an expression of preference for alternative assets. Among other things, alternative assets are not appropriate for all investors (and not appropriate in substantial allocations) because they lack transparency and may be expensive, illiquid, unregulated, and difficult to value. These characteristics also make alternative assets particularly inappropriate for most participant-directed defined contribution plans, as many retirement savers are unprepared to meaningfully evaluate alternative investments and are at heightened risk of making poorly informed decisions. Instead, these retirement savers need liquidity, transparency, accessibility, and low costs.

This is what ERISA has offered for more than 50 years. ERISA has imposed standards of conduct for plan fiduciaries. It does not catalog every duty but rather establishes four basic duties, including the duty of prudence and the duty of loyalty, while prohibiting fiduciaries from causing plans to engage in transactions likely to cause harm to participants and beneficiaries. ERISA also does not treat alternative investments according to different protective standards than traditional assets. Plan fiduciaries today are permitted to select these types of investments.

Generally speaking, however, plan fiduciaries have not selected these types of investments for participant-directed retirement plans. Litigation risk may have played a role in that result, but so too has fiduciaries' recognition of the risks associated with exposing retirement

savings to investments that may be complex, costly, opaque, and illiquid. Tax-subsidized employer-sponsored participant-directed retirement plans are typically viewed as intended to provide a stable source of income in retirement, not a place for individuals to be exposed to greater risk, higher costs, less liquidity, and more complexity.

Nor is there evidence that retirement savers are demanding access to these products in their retirement plans. In fact, AARP research published last fall found that Americans generally did not view access to private market investments and cryptocurrency in workplace retirement savings accounts as important.[4]

The stakes of this proposal are substantial for participants, fiduciaries, and the alternative asset industry alike. As of December 31, 2025, Americans held $10.1 trillion in 401(k) plans and $1.5 trillion in private sector 403(b) plans.[5] Even a relatively small reallocation of these plan assets into alternative investments would generate significant fee revenue for private fund managers and other market participants. This underscores the importance of ensuring that the final rule does not create incentives or appear to endorse outcomes that are not grounded in a plan-specific, participant-focused prudence analysis.

II. **DOL Must Preserve Strong Participant Protections and Outcomes**

We appreciate the Department's effort to articulate a structured analysis for fiduciaries selecting designated investment alternatives. A disciplined framework can be useful if it does not weaken participant protections and fiduciary decision-making across asset classes.

But the proposal's prescribed process and accompanying safe harbor also create a serious risk that prudence will be reduced to a check-the-box exercise. ERISA's fiduciary protections depend on substance, not form. Any delineated process must reflect genuine diligence, critical scrutiny, and reasoned judgment—not mere completion of procedural steps. The final rule therefore must be clear, flexible, and workable in real-world settings, and it should be judged by whether it maintains participant protections and enhances participant outcomes, not by whether it makes it easier to channel assets into particular products or to insulate fiduciaries from challenges to their fiduciary decision-making.

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[4] AARP Research. Americans' Knowledge of Private Market Investments and Cryptocurrency and Interest in Their Inclusion in Workplace Retirement Savings Accounts. Nov. 2025. https://www.aarp.org/content/dam/aarp/research/topics/work-finances-retirement/financial-security-retirement/private-market-and-cryptocurrency-investments.doi.10.26419-2fres.01022.001.pdf. ("Most adults do not think it's important to have the ability to invest in private market investments (61%) or cryptocurrency (73%) within their workplace retirement savings account.")

[5] Investment Company Institute. 2026. "Release: Quarterly Retirement Market Data, Fourth Quarter 2025." March 26, 2026. https://www.ici.org/statistical-report/ret_25_q4.

In this context, we offer the following comments regarding the proposal.

A. We Appreciate the Proposal's Position that Prudence Requires Consideration of "All Relevant Factors", but the Proposal's Check-the-Box Process, Examples, and Accompanying Safe Harbor Risk Elevating Form over Substance

1. The Department should clarify that a fiduciary continues to be responsible for exercising reasonable and appropriate judgment or participants may be deprived of the remedy for imprudent decisions under ERISA

To satisfy ERISA's prudence requirement, the proposal describes a process that requires appropriate consideration of "all relevant factors" and sets forth "a nonexhaustive list of factors, when applicable, that a plan fiduciary that is responsible for establishing and maintaining a plan investment menu of designated investment alternatives for a participant-directed individual account plan must objectively, thoroughly, and analytically consider, and make determinations on, when selecting each such designated investment alternative for the plan investment menu." 91 Fed. Reg. 16,095. When a plan fiduciary does so, the plan fiduciary's judgment with respect to the particular factor or factors, including the relationship between the factors, is presumed to have met the fiduciary duties under section 404(a)(1)(B) of ERISA and is entitled to significant deference. This is described in the proposed rule as a "safe harbor." The proposed rule's six specific factors include Performance, Fees, Liquidity, Valuation, Performance Benchmark, and Complexity.

We appreciate the Department's statement in the proposed rule that the duty of prudence requires appropriate consideration of all factors relevant to the particular designated investment alternative, which reflects current law and practices under ERISA. We are also pleased to see the Department refer to its list of six specific factors as "non-exhaustive."

However, the proposed rule does not make clear that even after consideration of the enumerated factors, the facts and circumstances may require plan fiduciaries to do more, or something different, from what is specifically outlined, to meet their fiduciary obligations. As the Department itself seems to acknowledge in the preamble (noting that the identified factors apply to "the vast majority" of designated investment alternatives, implying that they may not apply to all, *see* 91 Fed. Reg. 16,096), any given factor may not apply to every type of investment. Further, different investments, especially as they evolve over time, may require consideration of additional or different factors than what is in the proposed rule. However, given that plan fiduciaries only receive safe harbor protection for the specified factors, the proposed rule risks plan fiduciaries being hesitant to go beyond the enumerated factors or viewing it risky to consider other factors because doing so could expose them to additional litigation risk.

Furthermore, the proposed rule does not require that the proposed factors be evaluated correctly or accurately, instead requiring only "consideration" of factors. "Consideration" could be defined as simply reviewing a memorandum or presentation or noting that a discussion occurred. It does not require independent scrutiny or encourage the necessary discourse that may challenge manager or adviser claims.

In the proposal, the Department makes clear that it is not "intended to disturb" the 1979 Investment Duties regulation, *see* 91 Fed. Reg. 16,089, which states that a plan fiduciary's duty of prudence is satisfied if two conditions are met. 29 C.F.R. § 2550.404a-1(b)(1). First, a 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 or investment course of action involved, 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." *Id*. Second, the fiduciary must have "acted accordingly."[6] *Id*.

The Investment Duties regulation also provides that:

> A fiduciary's determination with respect to an investment or investment course of action must be based on factors that the *fiduciary reasonably determines are relevant* to a risk and return analysis, using appropriate investment horizons consistent with the plan's investment objectives and taking into account the funding policy of the plan established pursuant to section 402(b)(1) of ERISA. Risk and return factors may include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action. Whether any particular consideration is a risk-return factor depends on the individual facts and circumstances. The weight given to any factor by a fiduciary should *appropriately reflect a reasonable assessment* of its impact on risk-return.

29 C.F.R. § 2550.404a-1(b)(4) (emphasis added). By contrast, the proposed rule creates a "safe harbor" with regard to a fiduciary's *consideration* of each of six factors, without specific regard to whether the decision the fiduciary made after consideration of the six factors was reasonable or appropriate, or whether any action was taken at all after consideration of the six factors. 91 Fed. Reg. 16,136. While the proposed rule does not explicitly state that it is eliminating the Investment Duties regulation's substantive requirements, it does not include

[6] The preamble to the Investment Duties regulation states that paragraph (b)(1) was revised in the final rule in response to comments received to "make clear that the fiduciary's acts do not satisfy the 'prudence' rule solely because the fiduciary had previously given consideration to relevant facts and circumstances." 44 Fed. Reg. 37,223. The release states that the revisions were adopted because commenters had "questioned whether, under the regulation as originally proposed, a fiduciary might be deemed to be 'immunized' once he had given such consideration, notwithstanding the nature of his subsequent acts." *Id*.

the qualitative adjectives found in that regulation requiring that a fiduciary exercise "reasonable" or "appropriate" judgment. We are concerned this is an effort to amend the Investment Duties regulation without an explicit statement that the Department is doing so.

The proposal's preamble correctly emphasizes that there is "no one single right answer" and that there is a "range of reasonable judgments" fiduciaries could make, *see* 91 Fed. Reg. 16,091-92, but this should not mean that any decision whatsoever is permissible, so long as it was preceded by consideration of the six factors. The proposed rule appears to give fiduciaries a safe harbor for each of the six enumerated factors for any decision they make, no matter whether or where it falls within the range of reasonableness, so long as the proposed rule's process requirements are met. The Department should clarify the fiduciary's responsibility to make reasonable or appropriate judgment remains.[7] Otherwise, the effect of the regulation will not be participant protection but rather depriving participants of the remedy for imprudent decisions under ERISA because substantially all of the information available to overcome the presumption is in the hands of the plan fiduciaries. A prudent process that leads to an imprudent result is still a breach of ERISA.

2. The Proposed Rule Risks Being A Roadmap for Fiduciary Litigation, Rather than a Deterrent

The Department asks how the proposed rule could change fiduciary litigation and about potential impacts on the cost of fiduciary insurance and the scope of coverage (*e.g.,* lower self-insured retentions). 91 Fed. Reg. 16,111. While intended to encourage innovation by plan fiduciaries while decreasing litigation risk, the proposal may have the opposite effect. As drafted, the proposed rule's reliance on enumerated factors, examples, and a safe harbor could be viewed as creating a roadmap for fiduciary litigation, with the failure to satisfy any one of the "required" factors being treated as a *per se* fiduciary breach. The rules-based examples in the operative text of the proposed regulation further suggest that conduct that does not strictly follow the examples could be viewed as a fiduciary breach.

As discussed below in Section G, the Department should remove the examples from the operative text of the proposed regulation and issue sub-regulatory guidance with various examples of prudence or imprudence to assist fiduciaries in fulfilling their duties. At a minimum, the Department should prominently say that the examples are only that—examples—and that there may be other ways to prudently satisfy the particular factor.

[7] For example, DOL could adopt a process similar to the process CFP Board outlined in its Duty of Care guide described above. Rather than a "check-the-box" list of factors with corresponding safe harbors, the rule could state that if a fiduciary does not follow the factors in the rule, it would be difficult to meet the duty of prudence.

B. The Department's Emphasis on Asset Neutrality is Consistent with ERISA, but DOL Should Further Define What it Means to "Have *Maximum Discretion* to Select Investments"

We agree that any proposal to clarify plan fiduciaries' decision-making process under ERISA should be asset neutral and preserve fiduciaries' flexibility to select investment alternatives. However, the phrase "maximum discretion" used to describe fiduciaries' decision-making in the proposed rule, *see* 91 Fed. Reg. 16,136, is not a defined term in the proposal, in ERISA itself, or elsewhere to our knowledge. It also is not limited in the proposed rule's text, other than to exclude "illegal" investments. *Id*. This will likely lead to confusion and, possibly, more litigation, which the proposal is explicitly designed to minimize.

This is exacerbated by the examples in the operative language of the proposed rule. For example, within the Performance factor, the proposed rule suggests that fiduciaries must consider the characteristics of the plan participants by considering the participants' time horizon. *See* 91 Fed. Reg. 16,137. This requires clarification. How should fiduciaries determine the age of the workforce? Numerical age of all plan participants is one thing, but the age of those participants most impacted by decision-making is another. Furthermore, given that the median job tenure in the United States is just four years, time horizon may not be correlated with age at all.

This raises the question of whether the plan participant characteristics are a limiting factor on "maximum discretion" (or if, as discussed below, the examples should be read as amending the language of the factors itself). The Department should provide further guidance on the fiduciary responsibility for selecting investment types including the limits on "maximum discretion" above and beyond illegal investments.

C. We Support the Department's Clarification that ERISA's Duty of Prudence Applies to the Investment Menu, but DOL Should Clearly Define "Maximize Risk-Adjusted Returns"

We support the DOL for making clear in the proposed rule that fiduciary responsibility for investment selection extends beyond the selection of individual investments and includes the selection of an appropriate lineup of investments for participant direction. 91 Fed. Reg. 16,136. While we believe fiduciaries have viewed this to be the case and have been acting in this manner, we appreciate the Department's intention to clarify this requirement as it will encourage more thoughtful processes about developing the lineup, including further focus on developing investment menus that are appropriate to the specific group of covered employees.

Unfortunately, however, neither the preamble nor the proposed rule explain the considerations for fiduciaries in designing the investment menu for participant direction. Guidance would be helpful to fiduciaries because, while they may informally be making those decisions, there is no commonly applied defined process. For example, should a primary factor be the needs and circumstances of the covered participants?

The preamble solicits comments on whether future guidance should address the question of what process is required to curate a prudent menu of investments overall or whether the regulation implementing ERISA section 404(c) continues to be best practice. 91 Fed. Reg. 16,094. That regulation states that plans should offer a "broad range" of investments and discusses including at least three investment options that allow participants to create appropriate balanced portfolios in their accounts. *See* 29 CFR § 2550.404c-1. However, the world of participant-directed private sector plans has moved far beyond just three investment options; today those plans often include 10, 15, or even 20 investment options, making the design of the investment menu far more complex than the discussion in the 404(c) regulation. Future guidance about this requirement would be helpful to fiduciaries in determining the process and criteria for establishing an appropriate investment menu for their plan.

Similar to the proposed rule's use of the phrase "maximum discretion," its statement that the investment menu must "maximize risk-adjusted returns" is also confusing and potentially inconsistent with ERISA and the balance of the proposed rule. 91 Fed. Reg. 16,136. That phrase reads less like a prudence standard and more like a mandate to pursue the highest possible performance outcome.

ERISA does not impose that obligation. The proposal, as drafted, could be read to undermine the principle in the proposal of asset neutrality by encouraging investment in risk-seeking assets. The Department should revise this language to make clear that fiduciaries must seek a prudent and appropriate menu of investments that allows participants to obtain returns that reasonably reflect the market performance of the relevant asset classes and investment styles, rather than suggesting a legal duty to maximize returns.

The provision also appears to mandate that risk-adjusted returns be used; however, this is not the only way for a fiduciary to prudently select investments. As an example, in the small- and mid-size plan markets, fiduciaries often use actual returns to select and monitor investments in a manner that is prudent under current standards, but would not appear to be prudent under a rule that risk-adjusted returns must be used.

D. The DOL Should Clarify Its Authority to Establish the "Safe Harbor"

The proposal's reliance on the Department's general rulemaking authority under 29 U.S.C. § 1135 to establish a fiduciary safe harbor also warrants further explanation. 91 Fed. Reg. 16,136. Section 1135 authorizes the Department to issue regulations necessary to carry out Title I of ERISA, and traditionally has been used to interpret and implement the statute's requirements. Here, however, the proposal appears to do more than clarify existing obligations. By creating a process-based safe harbor that affords a presumption of prudence based on consideration of specified factors that should be given "significant deference," the proposal may be understood as attaching outsized legal significance to completion of enumerated steps. The Department should explain more directly how that approach is grounded in ERISA's text and how it remains consistent with the Department's longstanding interpretive role.

This issue is closely related to how the proposed safe harbor interacts with ERISA section 404(a)(1)(B), and the Department's existing Investment Duties regulation. As the Department has long recognized, the duty of prudence requires fiduciaries to give appropriate consideration to all relevant facts and circumstances and to act accordingly based on a reasoned assessment of risk and return. 29 CFR § 2550.404a–1. The proposed safe harbor, by contrast, would afford a presumption of compliance based on consideration of specified factors, without clearly requiring that the fiduciary's ultimate determination be reasonable in light of those factors or the broader context of the plan. To the extent the proposed rule could be read in this way, it risks narrowing the application of the prudence standard by placing greater emphasis on adherence to a prescribed process than on the quality of the fiduciary's judgment. Insofar as it could be read as saying that the requirement to make a reasoned and prudent decision ("to act accordingly") continues to be the case, and that the presumption simply increases the burden on assertions of breaches of ERISA's prudence standard, the final regulation should include a provision that explicitly affirms that. Clarifying that the duty of prudence continues to require both a careful process and an outcome that reflects a prudent evaluation of the relevant facts and circumstances would help ensure that the final rule remains consistent with ERISA's core fiduciary protections while still providing the certainty the Department seeks to achieve.

Furthermore, DOL should use the word "presumption" instead of "safe harbor." A "safe harbor" may mislead plan fiduciaries into thinking that their decisions cannot be contested if they follow the process prescribed in the proposed rule. However, even though a presumption as described in the proposed rule may provide some protection for fiduciaries, it is not a true "safe harbor." Additionally, DOL should eliminate the words "significant

deference" with regard to the presumptions in the proposed rule text and let the courts decide the value or merit of the presumption.

E. The Department Should Supplement the Non-Exhaustive List of Enumerated Factors with Additional Specific Factors

The Department invites comment on whether additional factors should be included in the framework. 91 Fed. Reg. 16,094. This is an important question. As discussed above, although the proposal correctly states that prudence requires consideration of "all relevant factors" and describes the six identified factors as non-exhaustive, the rule does not sufficiently acknowledge that, in some circumstances, fiduciaries may need to consider additional factors or weigh the enumerated factors differently in order to act prudently.

To the extent the final rule includes a specified list of enumerated factors, there are several additional factors that the Department should include in the final rule to ensure that the framework fully reflects the range of factors that fiduciaries "know or should know are relevant" in evaluating designated investment alternatives. *See* Investment Duties regulation, 29 C.F.R. § 2550.505a-1(b)(1). First, the Department specifically requests comment on whether **participant profiles or characteristics** should be included as a stand-alone factor. 91 Fed. Reg. 16,096. We believe that they should be, and that this factor is relevant across all designated investment alternatives, and particularly Qualified Default Investment Alternatives (QDIAs). As the Department's own examples reflect, participant demographics, investment horizons, and risk capacity are central to determining whether an investment is appropriate within a plan's lineup. Explicitly recognizing participant characteristics as a stand-alone factor would better align the rule with how prudent fiduciaries evaluate investment options in practice and would reinforce the importance of considering the needs and circumstances of plan participants.

Second, the Department should include consideration of **conflicts of interest** as a stand-alone factor. Although the proposal appropriately notes that compliance with section 404(a)(1)(B) of ERISA does not relieve fiduciaries of their separate duty of loyalty under section 404(a)(1)(A)[8] and conflicts of interest are discussed in some of the examples, conflicts of interest are of significant importance in the investment selection context. The proposal's negative valuation example itself illustrates the concern, stating that "[w]here those conflicts could impact risk-adjusted return on investment, the duty of prudence generally requires a fiduciary to take appropriate steps to understand and mitigate any such adverse impacts and make a determination that the conflict of interest has not and will not

[8] 91 Fed. Reg. 16,136 ("Consistency with 404(a)(1)(B) of ERISA . . . does not, however, excuse a fiduciary from complying with its additional obligations under ERISA, including under section 404(a)(1)(A).")

render the designated investment alternative's valuation inaccurate." 91 Fed. Reg. 16,101. Conflicts—whether arising from compensation structures, affiliations with investment providers, or the use of proprietary or otherwise financially incentivized products—can materially affect both the process and the outcome of a fiduciary's decision-making. Explicitly identifying conflicts of interest as a distinct factor would help ensure that fiduciaries systematically identify, evaluate, eliminate or appropriately mitigate such conflicts as part of their decision-making process, reinforcing the principle that the duty of prudence and the duty of loyalty operate together in the selection of designated investment alternatives.[9]

Third, the Department should include **risk** as a stand-alone factor. While the proposal refers to "risk-adjusted returns" in connection with anticipated performance, it does not clearly require a distinct and independent assessment of the types and magnitude of risk associated with a designated investment alternative. In practice, a prudent fiduciary must evaluate risk as a foundational component of the decision-making process, including consideration of factors such as volatility, liquidity constraints, valuation uncertainty, and downside exposure, in light of the plan's objectives and the needs of its participants. Treating risk primarily as an input into return projections may underemphasize its importance and could lead to inconsistent analysis. Explicitly identifying risk as a separate factor would clarify that fiduciaries are expected to evaluate whether an investment's risk profile is appropriate for inclusion in the plan's investment menu, consistent with the Department's longstanding interpretation of the duty of prudence.

F. <u>The Proposal Should Remind Fiduciaries of Their Obligation to Determine the Weight to be Given to a Factor</u>

As noted above, the Investment Duties regulation, which the Department says is not disturbed, provides that "[a] fiduciary's determination with respect to an investment or investment course of action must be based on factors that the *fiduciary reasonably determines are relevant* to a risk and return analysis...The *weight* given to any factor by a fiduciary should *appropriately reflect a reasonable assessment* of its impact on risk-return." 29 C.F.R. § 2550.404a-1(b)(4) (emphasis added). There is not enough emphasis on this concept in the stated factors or examples within the proposed rule, and the Department should consider adding it.

[9] Unfortunately, plan fiduciaries, particularly for smaller plans, may receive recommendations from non-fiduciary service providers that are not in the best interest of their plan participants.

G. The Rules-Based Examples Within Each Factor Should Be Reserved for Sub-regulatory Guidance. If the Department Retains the Examples, then the Department Should Provide Additional Context Including Examples of Imprudence.

As noted above, the proposed rule's combination of enumerated factors, detailed examples, and an accompanying safe harbor do not necessarily lead to increased clarity. Parties may argue in litigation that a failure to satisfy any one of the identified factors—or to adhere closely to an example set out in the rule text—constitutes a *per se* breach of fiduciary duty. On the flip side, where a plan fiduciary followed the example but there are additional facts not mentioned in the illustration that impact a conclusion of prudence or imprudence, the plan fiduciary may inappropriately shield themselves from litigation.

Fiduciary analysis is inherently fact-specific. Rules-based examples that appear to lead to a prudent result on a limited set of stated facts may lead to the opposite conclusion once additional facts are considered. Calibrating examples so that they take the appropriate amount of risk off the table is challenging, if not impossible. In real-world plan administration, fiduciaries often must weigh a broader and more nuanced record than any regulatory example can capture.

In addition, while the examples address several of the types of alternative asset examples identified in the Executive Order that prompted this proposed rulemaking, the financial product landscape is changing quickly with new innovations emerging every day. Examples run the risk of becoming outdated, and being over- and under-inclusive, in a short period of time. This also applies to the factors and this should be stated clearly in guidance.

For these reasons, the examples should be reserved for sub-regulatory guidance like frequently asked questions, and not the operative text of the regulation itself. At a minimum, if the Department elects to retain examples in the final rule, it should state prominently that they are illustrative only and that there may be other ways for fiduciaries to satisfy the relevant factor prudently or that there may be additional facts that would impact the conclusion of prudence or imprudence for the example. Clear language on this point would help reduce the risk that examples are treated in practice as binding requirements rather than as guidance designed to assist fiduciaries in exercising sound judgment. Also, one of the risks of using examples that may appear to be rules is the creation of rules-based standards to explain a principles-based statute. While principles can evolve as times and circumstances change, rules are static. While they may appear reasonable when drafted, they can in short order become inconsistent with new products and services.

Further, if the Department retains examples, those examples should be balanced, contextual, and designed to illustrate both prudent and imprudent approaches. Examples should not be framed in a way that appears to favor one policy outcome or one type of investment decision. Instead, they should help fiduciaries understand both how to make sound decisions and how to avoid flawed ones. In that regard, additional negative examples of imprudence would be particularly useful. A set of examples that is overwhelmingly permissive may not adequately illustrate the boundaries of prudent conduct or help fiduciaries identify practices that could expose plans and participants to unnecessary risk.

More broadly, if the Department seeks to provide additional practical direction on prudent fiduciary processes, it should consider soliciting further input from the retirement investment adviser community, including practitioners serving small- and mid-sized plans. Additional engagement of that kind could help the Department develop guidance that reflects how prudent monitoring and selection processes function in practice across different plan sizes and structures.

H. Comments on the Enumerated Factors and Illustrative Examples

1. Performance

The proposed rule identifies "Performance" as one of six specified factors, stating that: "The plan fiduciary must appropriately consider a reasonable number of similar alternatives and determine that the risk-adjusted expected returns, over an appropriate time-horizon, of the designated investment alternative, net of anticipated fees and expenses, further the purposes of the plan by enabling participants and beneficiaries to maximize risk-adjusted returns on investment net of fees and expenses." 91 Fed. Reg. 16,136. The text then provides two examples relating to "Return" and "Time Horizon." *Id*. at 16,136-37.

We agree that performance is a relevant factor. But as drafted, the performance factor is too ambiguous and too easily read as prescribing a one-size-fits-all methodology that does not reflect how prudent fiduciaries actually evaluate investments. The final rule should make clear that consideration of "Performance" should focus on the evaluation of the management of the fund, and not simply past performance to determine whether you could reasonably expect a manager to perform similarly in the future.

First, the proposed rule says fiduciaries should consider a "reasonable number" of "similar" alternatives, *id*. at 16,136, but it never explains what those terms mean. That is a serious flaw. Without clearer standards, the examples risk becoming the rule. Through the examples, the proposed rule appears to contemplate review of only three to five alternatives. That could easily be treated in practice as a benchmark for prudence—even though it does not reflect

how fiduciaries and advisers typically evaluate investments, especially in the small- and mid-sized plan market. Fiduciaries often begin with a much broader universe of options and use databases, screening tools, and other analytical methods to narrow the field before conducting deeper diligence. The final rule should state that clearly. It should not imply that reviewing a small fixed number of alternatives is ordinarily enough, and it should not lock fiduciaries into an artificially narrow comparison process that may be both underinclusive and misleading (because, for example, the limited number of options may not represent the larger universe of similar funds). It also should explain what makes a comparator sufficiently "similar," especially for investments or services that do not lend themselves to a clean one-to-one match.

Second, the proposed rule sends mixed messages about the appropriate time horizon and should be revised. In its statement of facts, the second performance example points to a predominantly younger workforce as a reason to use a long time horizon, which in turn implies that an older workforce points toward a shorter one. *Id*. at 16,137. But the analysis then acknowledges the more important principle: because participant-directed retirement plans are long-term savings vehicles, the relevant time horizon may be long depending on the facts and circumstances. *Id*. The Department should adopt that principle more clearly. The proper starting point for investment analysis in participant-directed plans should be a long-term period. The real question is how plan-specific facts bear on that long-term analysis. Fiduciaries may reasonably consider workforce turnover, industry contractions, expected layoffs, withdrawal or force-out patterns, and similar realities in deciding how much volatility is appropriate for a particular lineup or QDIA. For example, a plan for the construction industry facing recession-related layoffs may justify less volatile target date funds than a law firm plan with a more stable workforce during economic downturns. But those are refinements to a long-term framework, not reasons to abandon it. The Department's examples should therefore not suggest that age alone is a sound proxy for time horizon and instead explain that the long-term nature of retirement investing remains the baseline, with plan-specific employment and participant considerations shaping how that baseline is applied.

Third, if the Department wants fiduciaries to consider participant characteristics, it should do so precisely and realistically. Terms such as "risk capacity" are not self-defining, are not interchangeable with risk tolerance, and will create confusion unless the rule explains what they mean. Just as importantly, participant analysis can rarely be reduced to one data point. Fiduciaries may reasonably consider the employer's industry, the stability of the workforce, and the overall retirement structure available to employees. For example, where an employer also maintains a defined benefit pension plan, fiduciaries may reasonably conclude that the pension changes the broader retirement picture and supports a different

view of appropriate volatility in the lineup of the participant-directed plan. This is exactly why the proposal's examples have limited value. Real-world fiduciary judgments turn on multiple interacting considerations, not a short set of stylized facts. Again, the final rule should make clear that the examples are illustrative only and cannot substitute for context-specific fiduciary judgment.

Fourth, the performance factor is disconnected from how fiduciaries actually monitor investments, and, as discussed in Section C above, its emphasis on "maximize risk-adjusted returns" sends the wrong signal. The final rule should not read as though fiduciaries must benchmark every designated investment alternative through a single performance framework. That language risks converting a standard of prudent judgment into an obligation to chase the highest performance outcome. ERISA does not require that.

Finally, and as a more general comment, this standard and its examples suggest that past performance is indicative of future performance. Of course, that is not the case and it should be stated that it is not. In practice, past performance can be indicative of the investment manager's abilities, but it is the evaluation of the investment manager that is critical to determining whether the investment option should be chosen for the plan and its participants. As such, the final regulation should be clear that the process should focus on the evaluation of the investment manager.

2. Fees

The proposal identifies "Fees" as one of the six specified factors, stating: "The plan fiduciary must consider a reasonable number of similar alternatives and determine that the fees and expenses of the designated investment alternative are appropriate, taking into account its risk-adjusted expected returns and any other value the designated investment alternative brings to furthering the purposes of the plan. For this purpose, the term 'value' includes any benefits, features, or services other than risk-adjusted returns. Section 404(a)(1)(B) of ERISA and paragraph (h) of this section are not violated solely because the fiduciary does not select the alternative with the lowest fees and expenses from among the alternatives considered. For example, a prudent plan fiduciary could choose to pay more in exchange for greater services." 91 Fed. Reg. at 16,137.

We agree that fees are central to the prudence analysis. But as drafted, the fee factor is too vague, implies that higher fees are acceptable, and could be read as endorsing examples that are not workable guidance for real-world fiduciaries.

First, as with the performance factor, the proposed rule's reference to a "reasonable number" of alternatives is not a standard unless the Department explains how the comparison process should work in practice. In the fee context, the prudent starting point is

not a short list of three to five options. It is a robust review of a database or comparable universe of investments and share classes that are reasonably available to the plan. That broader review is what allows fiduciaries to understand the real range of costs and fees that may be prudent for the plan to bear in offering participant-directed investments. Only after that market review should fiduciaries narrow the field to those alternatives that warrant closer scrutiny before a final selection is made. Then, the number of finalists may reasonably be two, six, or some other number depending on the facts. The Department's three-to-five range is arbitrary. The final rule should say plainly that prudence turns on the quality of the fiduciary's fee-comparison process and the reasonableness of the resulting assessment, and not on conformity to an implied numerical benchmark drawn from the examples.

Second, the proposed rule should state directly what fiduciaries and advisers already understand: higher fees can be prudent when they buy real additional value for the plan and its participants, so long as the added cost is reasonable and not excessive. That principle is well-settled. The proposal's current example, however, is too vague to be useful. A generic reference to paying more for "greater services" does not identify what services matter, who receives them, or why they justify higher fees. A better example would focus on services that deliver concrete participant benefit, such as a recordkeeper or advisory firm providing more individualized assistance to participants in planning for and achieving a financially secure retirement. By contrast, services directed primarily to the plan sponsor, or distribution-related and sales-related features, do not carry the same fiduciary weight. The final rule should therefore make clear that higher fees are justified only by a reasoned determination that the additional services materially benefit participants or otherwise meaningfully advance the purposes of the plan.

Third, the proposed rule's use of the term "similar" alternatives needs real context. A prudent fee comparison does not consist of lining up products that share a label and calling them comparable. Fiduciaries need to know whether the alternatives are meaningfully comparable in structure, objective, risk profile, share class, and expected participant use. That inquiry must also be tied to the purpose of the plan and the role the investment is expected to play within the menu. In that respect, comparing available share classes of substantially the same investment is a realistic and useful example of prudent fee analysis. By contrast, examples built around ambiguous notions of extra service are far less helpful, particularly when those features may have little practical bearing on participant outcomes or on how designated investment alternatives are actually selected and monitored in defined contribution plans.

Fourth, the proposed rule's lifetime income example underscores the broader problem: the examples are too thin to guide fiduciaries through the decisions the rule purports to regulate.

If the Department wants to use lifetime income products to illustrate prudent fee analysis, it needs a more realistic and complete example. A generic instruction to analyze the market or compare an option only in broad terms is insufficient where lifetime income products can differ materially in structure, guarantees, restrictions, insurer obligations, portability, and actual participant utility. At a minimum, a prudent analysis would ordinarily compare the product to other lifetime income options, not to dissimilar products, and would ask whether the product is likely to provide meaningful benefits to the particular participant population. The final rule should not normalize sales-driven product selection under the guise of fee analysis. It should make clear that fee analysis must remain anchored in participant protection and prudent judgment.

In addition to the foregoing discussion, the discussion of the fee factor (and other factors) should make clear that a given factor may not apply to every type of investment, as noted in Section A.1. above. For example, in the past the Department (and private sector fiduciaries) has found it difficult, if not impossible, to determine the cost of guaranteed investment contracts (GICs) (because, at least in part, the returns are based on assumptions about costs, but not on actual costs). The same difficulty applies to other guaranteed income products, such as annuities.

3. Liquidity

The Department identifies "Liquidity" specifically in the proposed rule, stating: "The fiduciary must appropriately consider and determine that the designated investment alternative will have sufficient liquidity to meet the anticipated needs of the plan at both the plan and individual levels. For example, 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 risk-adjusted return." 91 Fed. Reg. 16,139.

First, we agree that liquidity is a relevant and necessary consideration. But the proposed rule sends the wrong signal when it suggests that a prudent fiduciary process may "regularly" lead to sacrificing liquidity in pursuit of additional risk-adjusted return. The proposal provides examples where fiduciaries may trade liquidity for expected returns, including one in which the fiduciary "determines within its discretion that the lack of liquidity is justified by a commensurate expected increase in the return on investment, certainty with respect to future payments, or both." 91 Fed. Reg. 16,140. Participant-directed retirement plans are long-term savings vehicles, but that does not mean reduced liquidity is ordinarily appropriate. Participants may need access to assets for loans, distributions, transfers,

rebalancing, and other events long before retirement, and fiduciaries must manage a lineup that works in real time, not just in theory over decades.

Second, the proposed rule's examples are too imprecise to guide fiduciaries through the liquidity analysis the rule appears to require. If the Department expects fiduciaries to compare liquidity profiles or product structures, it should explain what makes an alternative sufficiently comparable and what terms such as "substantially similar" mean in this setting.

Third, the proposed rule does not define plan level liquidity. For example, does "liquidity" include reductions in value if an investment is liquidated--which can act as a barrier to liquidity, *e.g.,* a market value adjustment or a contingent deferred sales charge? Given the importance of this issue in the context of alternative assets, the Department should devote more attention to this issue.

Finally, the proposal would allow fiduciaries to rely on written representations by investment managers if, in essence, the fiduciaries review the representations. Specifically, the proposal provides that a fiduciary would be "deemed to have met the consideration and determination requirements" if the fiduciary "obtains a written representation from the person responsible for managing the designated investment alternative," then "reads, critically reviews, and understands any written representation and consults a qualified professional where appropriate," and "does not know, or have reason to know, other information which would cause the fiduciary to question any written representation." 91 Fed. Reg. 16,140. However, many court cases have stated that fiduciaries may not blindly rely on recommendations, even when provided by fiduciary advisors. By analogy, the proposal would allow fiduciaries to heedlessly rely on representations by even conflicted investment managers. Before relying on any representations, fiduciaries should be required to identify and evaluate any conflicts of interest, and decide whether reliance is reasonable. Beyond that, fiduciaries should be required to investigate, at the least, whether it would be reasonable to rely on the representation.

4. Valuation

"Valuation" is one of the six enumerated factors in the Department's proposed rule: "The fiduciary must appropriately consider and determine that the designated investment alternative has adopted adequate measures to ensure that the designated investment alternative is capable of being timely and accurately valued in accordance with the needs of the plan." 91 Fed. Reg. 16,141.

We agree that valuation is an important factor. But as drafted, the valuation factor is too abstract and too forgiving of examples that do not reflect the practical realities fiduciaries must confront in participant-directed plans.

First, the proposed rule should say plainly that, in many (and perhaps almost all) participant-directed plans, satisfying the "needs of the plan" means supporting fair pricing for daily trading. Most plan investments are valued daily. Fiduciaries therefore must ask whether the valuation methodology can produce timely, reliable prices for participant purchases, redemptions, transfers, and other transactions. That is not a technical issue; it goes directly to whether participants are treated fairly. A valuation process is not prudent simply because it can generate a number in the abstract. It must be workable for the plan's actual operations and strong enough to protect participants from manipulation, stale pricing, distorted transaction values, and other unfair results.

Second, the proposed rule's FASB 820-based example is too technical to function as useful regulatory guidance for many fiduciaries, especially those serving small- and mid-sized plans. The proposal provides that "plan fiduciaries may rely on asset valuations that result from the application of generally recognized procedures for measuring the fair value of assets for purposes of disclosure in financial statements prepared in accordance with U.S. generally accepted accounting principles, if applied through a conflict-free, independent process." 91 Fed. Reg. 16,142. A final rule should not read as though ERISA prudence requires mastery of specialized valuation theory. More importantly, the example fails to grapple sufficiently with conflicts of interest. Where an investment manager's compensation depends on asset values, the manager has a built-in incentive to prefer higher valuations. That is an obvious fiduciary concern, and the rule should treat it as such. Fiduciaries should be expected to scrutinize not only the valuation methodology, but also who applies it, what assumptions and controls govern it, and whether the process meaningfully protects against bias. A technically sophisticated valuation process is not enough if the incentives surrounding it point in the wrong direction and are ignored.

Third, as with the liquidity factor, the proposed rule should not imply that fiduciaries can satisfy the valuation factor simply by collecting "written representations"[10] from sponsors, managers, or other service providers. Representations may be relevant inputs, but they are not a substitute for diligence. That is especially true where valuation directly affects manager compensation or otherwise creates incentives to favor a higher value. Particularly in those settings, fiduciaries should be expected to test the methodology, question the assumptions, examine the controls, and assess whether the process is genuinely fit for the plan. The final rule should state that clearly. Otherwise, the example risks turning representations into a

[10] The proposed rule does not adequately define "written representation" or otherwise state whether it must be in a contract or be otherwise enforceable. The Department should clarify what informal and clearly unreliable written representations would not suffice.

substitute for scrutiny and weakening participant protections where careful oversight is needed most.

5. Performance Benchmark

The proposed rule identifies "Performance Benchmark" as one of the six specific factors, stating: "The plan fiduciary must appropriately consider and determine that each designated investment alternative has a meaningful benchmark, and compare the risk-adjusted expected returns of the designated investment alternative 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 'risk-adjusted expected returns' of the designated investment alternative may be determined based on its historical performance unless it has none, in which case they may be determined based on the historical performance of a different investment with similar mandates, strategies, objectives, and risks and that is not the meaningful benchmark. While a plan fiduciary should identify benchmarks that are as meaningful as possible, there is no presumption or preference against new or innovative designated investment alternative designs. Instead, when considering a new or innovative product design, a fiduciary should seek to identify the best possible comparators to it while also scrutinizing the potential value proposition presented by the new or innovative design." 91 Fed. Reg. 16,142.

We agree that performance benchmarking can be a useful part of a prudent fiduciary process. But as drafted, the benchmark factor is too unclear to provide workable guidance for fiduciaries who must apply it in actual plan settings.

First, as discussed above in Section C, the proposed rule risks turning risk-adjusted returns into the governing methodology for benchmarking, even though prudent fiduciaries often use other tools. The final rule should not read as though fiduciaries must benchmark every designated investment alternative through a single performance framework. In practice, benchmarking methods vary based on the investment, the size and sophistication of the plan, and the tools reasonably available to the fiduciary and its advisers. Many fiduciaries prudently rely on a mix of actual returns, peer-group comparisons, style-based comparators, and other forms of analysis. The Department should clearly say that risk-adjusted returns are only one way to measure investment performance and that there are other methods that can be used prudently. The benchmark factor should promote disciplined comparison, not impose a *de facto* mandate to use risk-adjusted return analysis as the exclusive or preferred method in every case.

Second, the proposed rule does not explain what a "meaningful benchmark" actually is. More specifically, it does not state how individualized the benchmark must be. That omission is critical. The Department's own examples point in conflicting directions. The target date fund example appears to contemplate a highly individualized approach by allowing fiduciaries to rely on a benchmark that blends multiple broad-based indices to reflect the fund's actual asset allocation and strategy. But even that example is not clear enough about when that degree of customization is required. The final rule should answer that question directly. In the context of target date suites, for example, it remains unclear whether each vintage needs its own individualized comparator, whether a composite approach can ever suffice across vintages, or how fiduciaries should account for differences among fund families with different glide paths and underlying exposures. The managed account discussion has similar issues. The preamble appears to state that managed account services are treated as designated investment alternatives only when they are used as qualified default investment alternatives. 91 Fed. Reg. 16,103. Even on that reading, however, requiring a truly individualized benchmark for a truly individualized managed account is not workable as a practical matter, since individualized investment strategies and allocations are just that—individualized, and can change as the participant's circumstance change. The Department should describe the degree of benchmark individualization it expects in different contexts.

Third, the proposed rule is ambiguous about how fiduciaries are supposed to identify and use benchmarks in the first place. It is not enough to say that a benchmark must be meaningful. Fiduciaries need to know how the analysis is supposed to proceed. Must the fiduciary first identify the investment's strategy and role in the menu and then select a comparator, or does the benchmark itself help define the strategy? Alternatively, is the investment selected first and then a meaningful benchmark developed that is individualized to the selected investment? The proposed rule is not clear. That omission may be misinterpreted, especially for alternative investments and other specialized products, where a conventional benchmark may be a poor fit or no true one-to-one comparator may exist at all. At the same time, the rule should not leave room for opportunistic benchmark selection that obscures an investment's real strategy or overstates its apparent success. If benchmarking is going to be a required factor, the final rule should give fiduciaries a more concrete framework for selecting and evaluating comparators, including in settings where only imperfect benchmarks are available.

Fourth, some investments cannot be meaningfully benchmarked. For example, there are currently no meaningful benchmarks for evaluating anticipated future performance of investments in cryptocurrencies. While the Department should question whether an investment whose performance cannot be benchmarked is appropriate for retirement plans,

at a minimum, the discussion of this, and the other five identified factors in the rule, should clearly state that the factor may or may not apply, given the investment.

6. Complexity

The final enumerated factor in the proposed rule is "Complexity," with the Department stating: "The plan fiduciary must appropriately consider the complexity of the designated investment alternative and determine that it has the skills, knowledge, experience, and capacity to comprehend it sufficiently to discharge its obligations under ERISA and the governing plan documents or whether it must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual." 91 Fed. Reg. 16,143.

We generally agree that complexity is a relevant consideration. But as drafted, the complexity factor is underinclusive and too easily satisfied by formal process rather than real judgment.

First, the reference to a qualified investment advice fiduciary, investment manager, or "other individual" is too vague. If the Department intends to permit reliance on non-fiduciary third parties, it should say who those individuals may be, what qualifications they must have, and what responsibility the fiduciary retains when relying on them.[11] As discussed in Section E, the Department should require fiduciaries to identify and evaluate any conflicts of interest that could affect the quality of the advice and evaluate whether participants can be adequately protected from those conflicts. While the prohibited transaction rules in ERISA and the Internal Revenue Code provide protections from conflicted fiduciary advice, they provide little in the way of protection for conflicted advice by nonfiduciaries. Otherwise, the rule risks suggesting that a fiduciary can satisfy the complexity factor by consulting someone with market familiarity but no fiduciary obligation and no clearly defined accountability to the plan. The final rule should be more demanding. Assistance should come from persons with demonstrable expertise relevant to the investment and, where appropriate, fiduciary responsibility or another clearly defined professional duty.

Second, the factor is incomplete because it focuses only on complexity from the fiduciary's perspective. In a participant-directed plan, complexity also matters at the participant level. Fiduciaries should be expected to consider whether the investment is easily and clearly explainable and whether participants have the knowledge and experience needed to understand the investment and make considered decisions about whether to use it. It seems inconceivable that a prudent fiduciary could offer investments for participant direction that

[11] The proposal acknowledges that "[s]eeking assistance from a professional that is an ERISA fiduciary—such as an investment advice fiduciary as defined in section 3(21)(A)(ii) of ERISA or an investment manager as defined in section 3(38) of ERISA—can provide important benefits to the plan's participants and beneficiaries, as those professionals also must comply with ERISA's fiduciary duties." 91 Fed. Reg. 16,103.

the participants could not understand and/or use appropriately. That is not a peripheral concern. It is central to prudence in a participant-directed plan.

More broadly, the complexity factor highlights a problem that runs throughout the proposal: the risk that the final rule will treat process as the equivalent of prudence. The Department's existing Investment Duties regulation requires fiduciaries not only to consider relevant facts and circumstances, but also to act accordingly. The proposed framework, by contrast, can be read to place dispositive weight on whether a fiduciary completed a prescribed sequence of steps. In the complexity context, that creates an obvious danger. A fiduciary could appear to satisfy the factor by consulting an outside party, documenting that consultation, and moving forward without ever demonstrating a reasoned substantive judgment about whether the investment is appropriate for the plan. The final rule should reject that implication expressly. Obtaining assistance matters only if it enables the fiduciary to make—or to delegate in a prudent manner—a genuinely informed decision. The complexity factor should reinforce informed fiduciary judgment, not weaken it into a paperwork exercise.

In that regard, the proposal can be read to extend the protection of the presumption to investment managers who serve as fiduciary decision-makers. However, it is difficult to imagine that the Department intended to provide this protection to professional investment managers, who should be expected to make decisions that are both informed and reasoned. In either case, though, it should be clarified whether the safe harbor also applies to professional investment managers.

I. Because the Proposed Rule Will Likely Result in Alternative Assets More Frequently Being Included in Funds or Accounts Managed by Advisers, the Department Should Further Define the Responsibilities of Primary Plan Fiduciaries

In the proposed rule, the Department asks for comments on how the proposed rule would affect how plan fiduciaries consider including alternative assets and whether plan fiduciaries would be more likely to include them in response to this proposal, and if so, in what form. 91 Fed. Reg. 16,111. The Department anticipates that "the main channel through which this proposal would lead to greater defined contribution plan investment in alternative assets would be within target date funds." 91 Fed. Reg. 16,119.

If the proposed rule were enacted in its current form, then private funds and other alternative assets will more frequently be included in target date mutual funds, target date collective investment trusts (CITs), and participant accounts that are managed by advisers. As a result, the proposal should devote more attention to the responsibilities of primary plan fiduciaries for (1) the selection of mutual funds that have allocations to alternative assets (in which case the mutual fund managers are not ERISA fiduciaries); (2) the selection of target date CITs that

have allocations to alternative assets (in which case the CIT trustees are ERISA fiduciaries); and (3) the selection of fiduciary advisers acting as 3(38) investment managers for participant accounts. These are the most likely vehicles for inclusion of alternative assets in participant-directed retirement plans and, therefore, where guidance would be the most impactful. For example, where mutual fund managers, CIT trustees, advisers, or 3(38) account managers select investments that are complex, hard to value, or illiquid, plan fiduciaries should consider the competency, experience, and capabilities of those parties to prudently evaluate the investments on those and other factors. It also should be clear that if plan fiduciaries use 3(38) investment managers, they could transfer to those investment managers the responsibility to evaluate all relevant factors, including the six identified factors, in making their investment decisions. In addition, and as discussed above, it should be made clear whether those investment managers would also be entitled to the safe harbor and identified processes in the regulation.

J. The Proposal Is Likely to Increase Reliance on 3(38) Investment Managers—And Plan Costs—Particularly for Small- and Mid-Sized Plans

The Department asks whether this proposal will increase the number of plans that use a 3(21) or 3(38) fiduciary, whether any such increase will be concentrated among plans of a particular size, and how that shift may affect plan costs. 91 Fed. Reg. 16,111. In our view, those questions are important because the proposal is likely to increase reliance on delegated fiduciary support, especially among small- and mid-sized plans that may have fewer internal resources to navigate the rule's more demanding framework.

More specifically, the proposal likely will lead more plan fiduciaries to delegate investment decision-making to 3(38) investment managers, and this shift is likely to increase plan costs. As drafted, the proposed rule and examples are more complex and more demanding than current practice in several respects, particularly for small- and mid-sized plans and their participants. That dynamic is likely to make many fiduciaries more inclined to seek professional delegation rather than retain primary responsibility themselves. This is especially true where alternative assets are under consideration, because those investments raise heightened issues of complexity, valuation, liquidity, benchmarking, and participant fit that many plan fiduciaries may conclude are better handled through delegated fiduciary management. The Department should consider those increased costs and burdens in its Economic Impact Analysis.

III. **Conclusion**

We appreciate the Department's interest in clarifying fiduciaries' duties in selecting designated investment alternatives and providing a more structured framework for investment selection under ERISA.

However, for the reasons set forth above, the Department must revise the proposal and reissue a revised proposed rule for public comment so that any final rule strengthens participant protections, preserves meaningful fiduciary judgment, and provides practical, workable guidance that fiduciaries can apply in real-world plan settings. The final rule should reinforce that ERISA prudence requires more than procedural compliance: it requires reasoned, participant-focused decision-making grounded in the facts and circumstances of the plan.

If you have any questions, please feel free to contact me. Thank you for your consideration.

Sincerely,

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