

June 1, 2026

Assistant Secretary Daniel Aronowitz  
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:

I write on behalf of the Public Investors Advocate Bar Association (“PIABA”), an international bar association comprised of attorneys who represent investors in securities litigation, to comment on the Department of Labor’s (“Department”) proposed rulemaking, Fiduciary Duties in Selecting Designated Investment Alternatives (the “Proposal”)<sup>1</sup> which implements the President’s directive in Executive Order 14330, “Democratizing Access to Alternative Assets for 401(k) Investors.”<sup>2</sup>

### **PIABA is Well Positioned to Evaluate the Proposal**

Since its formation in 1990, PIABA has promoted the interests of public investors in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members represent and advocate for investors harmed by fraud, misconduct, and the damage caused by members of the securities industry who put their interests ahead of their clients. As a result of representing the public investors, PIABA is in the unique position to uncover patterns of conduct and regulatory inefficiencies that lead to retirement account owners being misled, misinformed, or mistreated and abuses in the arbitration and dispute resolution of customer disputes.

Our members and their clients have a strong interest in rules promulgated by the Department of Labor (“DOL”) related to retirement accounts – the average American’s largest financial asset. We urge the DOL to stay true to its mission to “foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States” and “assure work-related benefits and rights.”<sup>3</sup>

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<sup>1</sup> Fiduciary Duties in Selecting Designated Investment Alternatives, 91 Fed. Reg. 16,088 (proposed Mar. 31, 2026).

<sup>2</sup> Exec. Order No. 14330, 90 Fed. Reg. 38,921 (Aug. 12, 2025).

<sup>3</sup> “About Us,” <https://www.dol.gov/general/aboutdol>, accessed May 26, 2026.

## ERISA's Purpose is to Protect American Workers

Congress enacted the Employee Retirement Income Security Act of 1974 (“ERISA”) to protect the retirement assets and financial security of American workers and their families. ERISA was designed to establish uniform federal standards governing employee benefit plans and to ensure that plan fiduciaries act solely in the interest of participants and beneficiaries with the care, skill, prudence, and diligence of a prudent person familiar with such matters. The statute reflects Congress’s recognition that retirement investors are uniquely dependent on fiduciaries to safeguard assets accumulated over decades of work and savings. Indeed, ERISA was enacted in the aftermath of pension failures that left workers with a fraction of what they had earned and been promised.<sup>4</sup>

ERISA’s fiduciary framework emphasizes loyalty, prudence, transparency, and accountability, while providing participants with meaningful avenues for redress when fiduciaries fail to meet those obligations.<sup>5</sup> These protections are especially critical in the defined contribution context, where individual workers bear the ultimate investment risk associated with retirement plan assets. American workers are already worse off compared with the bygone era when many American employers funded defined benefit plans to care for their employees when they could no longer work and reward them for their years (and decades) of service and loyalty. The Proposal will significantly weaken their protections even further, deeply impacting the retirement security of millions of Americans who scrimped and saved their hard-earned money for the future.

### The Proposal

The Proposal would effectively establish a “safe harbor” for fiduciaries who select investment options offered in 401(k) plans. If a fiduciary considers six factors – i.e. performance, fees, liquidity, valuation, benchmarks, and complexity – when selecting *any* investment option, including alternative assets such as private equity, private credit, real estate, or cryptocurrency to a plan menu, the Proposal would treat the fiduciary as meeting ERISA’s prudence standard with respect to those factors, and according to the Proposal, would entitle the fiduciary to deference from any reviewing court.

### PIABA Strongly Opposes the Proposal

We respectfully oppose the Proposal. While framed as a principles-based, asset-neutral clarification of fiduciary duties, the proposal would substantially weaken investor protections in practice, reduce accountability, and increase the likelihood of harm to retirement plan participants—particularly through expanded exposure to complex and illiquid alternative investments. These types of investments are at issue in many of our members’ cases, so we have seen the financial devastation they can cause when retirement account holders are least able to recover from their loss. We are confident in saying that the Department should not provide a

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<sup>4</sup> See generally James Wooten, *The Most Glorious Story of Failure in the Business: The Studebaker-Packard Corporation and the Origins of ERISA*, 49 Buffalo Law Review 683 (2001).

<sup>5</sup> See, e.g., ERISA § 404(a)(1)(A); 29 U.S.C. § 1104 (requiring that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries,” which necessarily requires paying special heed to risk, cost, transparency, and liquidity); ERISA § 409; 29 U.S.C. § 1107 (providing personal liability for fiduciaries who breach their duties under ERISA).

sanctioned avenue to sell ever-more complex and illiquid alternative investments to a broader swath of the American public. A proposal that weakens fiduciary protections, particularly surrounding complex and illiquid investment products, would put many billions of dollars worth of American workers' retirement savings at risk.

## **I. The Proposed Rule Improperly Elevates Process Over Outcomes in a Way That Significantly Undermines ERISA**

The proposal emphasizes a “process-based safe harbor” under which fiduciaries who follow certain procedural steps are presumed to have acted prudently and are afforded significant deference. While ERISA has long recognized that prudence is evaluated based on process, the proposed rule goes further by effectively insulating fiduciaries from meaningful scrutiny so long as they can document a checklist-style review. Under this proposed framework, fiduciaries could receive protection even when the ultimate decision made, and the investments thereby approved for a retirement plan, expose participants to unnecessary, inappropriate, significant and avoidable risks. This approach creates a dangerous gap between formal compliance and substantive investor protection. Moreover, it undermines the fiduciary duties owed to plan participants, converting fiduciaries who exercise solid judgment with participants always foremost in their mind into clerks with a rubber stamp.

To be clear, fiduciaries' decisions about which investments can be held in a retirement account are critical. Retirement account holders are by and large not capable of analyzing prospectuses and financial statements to determine what investments meet their risk tolerances and investment objectives. The vast majority of 401k participants simply do not have the information, education, or experience needed to assess the risks, costs, and tradeoffs involved. That's why an average Joe plumber or waitress or receptionist or cashier or musician need fiduciaries to narrow the vast scope of possible investments into a select roster to choose from. Even choosing among that roster of approved investments can be beyond many workers' capabilities, which is why many plans offer investment advice and management services. Simply put, Americans need ERISA's protections to be executed on their behalf by true fiduciaries. The Proposal virtually ensures that they will not receive those protections and instead insulates fiduciaries at the expense of protecting the American worker.

In our experience representing investors, many of the most harmful investment decisions—including those involving proprietary products, high-fee funds, and complex structured or alternative investments—are accompanied by superficially adequate documentation. A rule that elevates process to a near-conclusive presumption of prudence risks encouraging “box-checking” rather than genuine due diligence, limiting the ability of harmed participants to obtain redress, and undermining judicial and arbitral scrutiny of fiduciary conduct.

## **II. The Proposal's prescribed process is vague and invites abuse.**

In addition to elevating process above substance, the Proposal relies heavily on undefined or ambiguous concepts, including “risk-adjusted expected returns,” “sufficient liquidity,” “meaningful benchmarks,” and “participants' likely needs.” In practice, these ambiguities will provide those who are inclined to abuse investors for their own gain with substantial discretion to

approve investments that are more in line with the interests of alternative investment issuers and sponsors than with retirement plan participants. In such circumstances, it is not difficult to see how fiduciaries' incentives can be influenced and abuse can flourish. Moreover, rather than decrease "burdensome lawsuits,"<sup>6</sup> vague terms and procedures will needlessly increase litigation and arbitration.

### **III. The expansion of alternative investments in retirement plans raises significant investor protection concerns.**

The Proposal is intended to facilitate increased access to alternative assets such as private markets, real estate, and infrastructure investments. As the Executive Order underlying the Proposal stated, alternative investments "are an increasingly large portion of the portfolios of public pension and defined-benefit retirement plans and offer competitive returns along with diversification opportunities."<sup>7</sup> However, the proportion of alternative investments in defined benefit plans are inherently limited by the plans' obligations to provide specific benefits to their participants. In a defined contribution plan like a 401(k), the participant chooses investments among the roster selected by the fiduciary, and there is no guardrail against them overconcentrating in alternative investments.

There is a good reason a host of analysts have pointed out the risk of certain assets, such as private equity, exposing typical retail investors to a "systemic risk machine"<sup>8</sup> Expert analysts have also long pointed out the ultimate cost to investors including losses and substantial underperformance of these more complex investments. For instance, one analysis from more than a decade ago analyzed less than eighty-one non-traded REITs and compared the less liquid and more opaque investments with their publicly traded counterparts and identified investor shortfalls in the non-traded market to exceed \$45 billion.<sup>9</sup> Exposing American investors to substantially increased allocations of complex investments is a recipe for disaster. Moreover, the characteristics of alternative investments are fundamentally misaligned with the needs of retirement account owners.

*Liquidity:* Alternative investments often involve long lock-up periods, redemption restrictions, or gating mechanisms that limit access to capital.<sup>10</sup> These features are not incidental – they are inherent to the structure of many private market investments. Introducing such constraints into participant-directed plans exposes individuals to the risk that they may be unable to access their savings when needed, undermining a core function of these accounts. Indeed, some of the most

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<sup>6</sup> White House Executive Order: Democratizing Access to Alternative Assets for 401(k) Invests, <https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/>.

<sup>7</sup> *Id.*

<sup>8</sup> Dave Gilson, "The Democratization of Private Equity Could Create a 'Systemic Risk Machine,'" Insights by Stanford Business (Aug. 19, 2025), <https://www.gsb.stanford.edu/insights/democratization-private-equity-could-create-systemic-risk-machine>.

<sup>9</sup> Brian Henderson, Joshua Mallett, and Craig McCann, An Empirical Analysis of Non-Traded REITs, SLCG (2015), <https://www.slcg.com/files/research-papers/Henderson%20Mallett%20McCann%20non-traded%20REITs.pdf>.

<sup>10</sup> Daniel Dimitrov, "The Challenge of Asset Allocation with Illiquid Private Investments," *SUERF Policy Brief*, No. 1122 (March 2025), [https://www.suerf.org/wp-content/uploads/2025/03/SUERF-Policy-Brief-1122\\_Dimitrov.pdf](https://www.suerf.org/wp-content/uploads/2025/03/SUERF-Policy-Brief-1122_Dimitrov.pdf).

egregious cases our members have arbitrated on behalf of investors involve illiquid investments sold into retirement accounts held by retirees who need access to their savings to live on now.

*Fees and cost transparency:* Alternative investments typically involve layered and opaque fee structures, including management fees, performance fees, administrative costs, and valuation expenses. These costs are often more difficult to identify and compare than those associated with traditional investments. Over time, even modest fee increases can reduce a worker's retirement savings by 20% over a career.<sup>11</sup> The Proposal does not adequately address how fiduciaries can meaningfully evaluate fee reasonableness where cost structures lack transparency and comparability. In practice, this creates a substantial risk that participants will bear higher costs without commensurate benefits.

*Valuation:* Many alternative assets do not have readily observable market prices and instead rely on periodic appraisals or internal valuation models. These approaches can obscure true asset values, delay the recognition of losses, and create a misleading appearance of stability. In some cases, valuations may only be updated quarterly or less frequently, even where underlying asset values fluctuate significantly over shorter time horizons.<sup>12,13</sup> This lack of timely and transparent pricing is difficult to reconcile with the needs of participants, who depend on accurate and current information to make investment decisions and plan for retirement. Again, some of our members' most heartbreaking cases involve retirees who thought they had a solid plan in place, only to find out their retirement savings have dissipated once the true value is revealed and that they cannot afford to stay in their home or even live in their town, let alone travel or enjoy their retirement years.

*Benchmarking:* Establishing meaningful benchmarks for alternative investments presents significant challenges. Unlike publicly traded securities, many alternative assets lack widely accepted, standardized benchmarks that allow for accurate performance comparisons. Fiduciaries of alternative assets often utilize peer group or composite benchmarks to measure performance, even though they are generally inaccurate. For example, "peer groups are widely used and generally considered the best option available" for alternative assets even though they are "not considered the best practice."<sup>14</sup> Additionally, custom composite benchmarks are often ineffective for alternative assets because "[q]uite often these benchmarks are very basic in their construct, and not reflective of the fund's objectives and scope."<sup>15</sup> On the other end of the spectrum, composite

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<sup>11</sup> The White House, "FACT SHEET: President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Investment Advice," October 31, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announcenew-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/>.

<sup>12</sup> Rob Price, *Bitcoin Valuation: Four Methods*, CFA Inst. (Nov. 30, 2023), <https://rpc.cfainstitute.org/blogs/enterprising-investor/2023/bitcoin-valuation-four-methods>.

<sup>13</sup> Neeli Kohan and John Minella, "Addressing Valuation Challenges in the Expanding Private Credit Market," *Ankura Insights*, October 29, 2024, <https://ankura.com/insights/addressing-valuation-challenges-in-the-expanding-private-credit-market>.

<sup>14</sup> *Guidance Statement on Benchmarks for Asset Owners*, CFA Inst. (June 30, 2023), <https://www.gipsstandards.org/wp-content/uploads/2023/04/guidance-statement-benchmarks-asset-owners.pdf>.

<sup>15</sup> Sebastian Cheek, *Funds-of-Funds Benchmarks Face Scrutiny for Confusing Investors*, *Portfolio Advisor* (Aug. 12, 2020), <https://portfolio-adviser.com/funds-of-funds-benchmarks-face-scrutiny-for-confusing-investors/>.

benchmarks may also be too convoluted to comprehend.<sup>16</sup> Nonetheless, fiduciaries will likely use these imperfect benchmarking processes to seek refuge under the safe harbor rule. The absence of reliable benchmarks complicates fiduciaries' ability to evaluate performance in a manner consistent with ERISA's prudence requirements.

*Limited regulatory oversight:* The proposal also fails to acknowledge that alternative investments often lack independent, regulatory oversight. In a traditional setting, public equity operates "under strict regulatory frameworks."<sup>17</sup> However, managers of alternative investments have "fewer reporting obligations, such as exemptions from Sarbanes-Oxley requirements."<sup>18</sup> The Proposal permits the implementation of these private, unregulated alternative assets, so long as various written representations are made by the manager of the fund regarding valuation and liquidity risk.<sup>19</sup> Even with these representation requirements, alternative assets operate in an opaque, unregulated area that places senior investors and retirement savers at a greater risk than traditional assets.

Annuities further illustrate this issue. Variable annuities are subject to the federal securities laws; fixed annuities are not. The status of fixed index annuities, according to the SEC, "may or may not" be a security.<sup>20</sup> Broker-dealers providing recommendations on an array of annuities could find themselves subject to Regulation BI for some of them but not others. And in the case of fixed index annuities, even the advice provider may not be sure whether the Best Interest standard applies. While the National Association of Insurance Commissioners (NAIC) Model Rule would impose some obligations on those selling fixed annuities, the standard has not been universally adopted, reflects more of a "suitability" test than a "best interests" standard, and excludes cash and non-cash compensation in determining material conflicts (which is the very source of many conflicts).<sup>21</sup>

Similarly, many cryptocurrencies operate in fragmented or evolving regulatory environments, with inconsistent federal standards and significant gaps in investor protections. Cryptocurrency is highly volatile, subject to manipulation, and opaque for most Americans. Losses in 2025 exceeded \$11 billion in 2025, according to the FBI.<sup>22</sup> While some federal agencies assert jurisdiction over portions of the market, the absence of a comprehensive, uniform regulatory framework leaves substantial uncertainty around valuation, custody, fraud prevention, and market integrity.<sup>23</sup> This lack of clarity is compounded by ongoing legislative proposals that could preempt state-level

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<sup>16</sup> *Id.*

<sup>17</sup> Greg McFarlane, *Understanding Private v. Public Equity: Key Differences Explained*, Investopedia (Nov. 6, 2025), <https://www.investopedia.com/articles/investing/030415/difference-between-private-and-public-equity.asp>.

<sup>18</sup> *Id.*

<sup>19</sup> Fiduciary Duties in Selecting Designated Investment Alternatives, 91 Fed. Reg. 16,088 (proposed Mar. 31, 2026).

<sup>20</sup> See Annuities, Investor.gov, SEC, last visited May 26, 2026, <https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities> ("Variable annuities are securities regulated by the SEC. An indexed annuity may or may not be a security; however, most indexed annuities are not registered with the SEC. Fixed annuities are not securities and are not regulated by the SEC.").

<sup>21</sup> See National Association of Insurance Commissioners, "Suitability in Annuity Transactions Model Regulation," Spring 2020, <https://content.naic.org/sites/default/files/model-law-275.pdf>.

<sup>22</sup> Federal Bureau of Investigation, 2025 Internet Crime Report (2026), [https://www.ic3.gov/AnnualReport/Reports/2025\\_IC3Report.pdf](https://www.ic3.gov/AnnualReport/Reports/2025_IC3Report.pdf)

<sup>23</sup> Financial Industry Regulatory Authority (FINRA), "Crypto Assets," accessed May 26, 2026, <https://www.finra.org/rules-guidance/key-topics/crypto-assets>.

protections, potentially weakening important consumer safeguards. In practice, allowing cryptocurrency exposure in retirement plans—based largely on manager representations rather than robust, standardized oversight—places retirees and American workers at heightened risk of losses in an opaque and rapidly evolving market.

Certain real estate investments, including non-traded real estate investment trusts (REITs) and other privately offered real estate vehicles, present similar concerns. These assets are often characterized by limited transparency, high fees, and constrained liquidity, making them difficult for retirement savers to evaluate and access funds when needed. Unlike publicly traded real estate securities, which are subject to ongoing disclosure and market discipline, private real estate investments typically face fewer reporting obligations and rely heavily on sponsor-provided valuations.<sup>24</sup> This creates a risk of pricing inaccuracies, conflicts of interest, and delayed recognition of losses. For senior investors who may need predictable access to their savings, these liquidity constraints and valuation uncertainties are particularly problematic.

In sum, cryptocurrencies, fixed annuities, REITs, and other alternative assets are insufficiently regulated and expose retirement savers to unique and substantial risks. Permitting such assets based on internal representations alone does not sufficiently mitigate these risks and instead exposes retirement savers to complex, less-regulated investment structures that may not meet their needs for stability and transparency.

In our experience representing investors, we firmly believe that there is a fundamental mismatch between alternative investments and the structure of defined contribution plans. The very characteristics that define many alternative assets – illiquidity, complexity, limited transparency, price discrimination, inconsistent valuation, and high costs – are in tension with the features that retirement savers need most: accessible funds, clear and transparent pricing, low costs, and understandable investment options.

#### **IV. There are far more pressing areas of concern for investors.**

For all of these reasons, expanding access to alternative investments within retirement accounts will reduce fiduciary accountability and will benefit financial industry insiders and those inclined to abuse the public – not investors. To fulfill its mission to “foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States” and “assure work-related benefits and rights,”<sup>25</sup> the Department should instead focus on closing existing regulatory gaps.

For example, investors are covered by a patchwork of inconsistent standards of care depending on the type of account, advisor, product, or transaction involved – all technical characteristics that investors by and large do not comprehend until something has gone wrong and they need to consult with one of our members. Investors often reasonably believe that financial professionals are required to act in their best interest across all interactions. But in reality, the applicable standard

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<sup>24</sup> Financial Industry Regulatory Authority (FINRA), “REITs: Alternatives to Ownership,” accessed May 21, 2026, <https://www.finra.org/investors/insights/reits-alternatives-to-ownership>.

<sup>25</sup> “About Us,” <https://www.dol.gov/general/aboutdol>, accessed May 26, 2026.

of care is often less than a fiduciary standard. These inconsistencies create confusion, undermine trust, and expose individuals to conflicted advice at critical decision points.

Another area is the fragmented regulation of different types of investments. As just one example, it is sometimes unclear who regulates various types of annuities and life insurance products, and what standard of care applies to sales of these products into retirement accounts.

And of most concern to our members and their clients is the litany of different litigation and arbitration fora that the financial industry requires claims to be filed in. This patchwork leads to inconsistent, unpredictable, inefficient, incredibly expensive, and overall “burdensome” dispute resolution. The net effect is to reduce access to justice where investors most need it.

In short, the Department could better use its time and resources to address many more pressing problems affecting retirement investors in today’s marketplace, rather than increasing the complexity and potential for abuse.

### **Conclusion**

While the proposed rule is framed as a modernization of fiduciary guidance, it would weaken protections for retirement investors and increase the likelihood of harm to the American public. For these reasons, we respectfully urge the Department to withdraw or substantially revise the proposal.

Respectfully submitted,



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Public Investors Advocate Bar Association