

United States  
Congress  
WASHINGTON, DC 20510-4504

June 1, 2026

The Honorable Keith E. Sonderling  
Acting Secretary of Labor  
U.S. Department of Labor  
200 Constitution Ave.  
Washington, D.C. 20210

**Re: Comments on Fiduciary Duties in Selecting Designated Investment Alternatives—RIN  
1210-AC38**

Dear Acting Secretary Sonderling,

We write today to express our opposition to the Department of Labor's (Department or DOL) Fiduciary Duties in Selecting Designated Investment Alternatives proposal. The proposed rule would establish a so-called safe harbor for fiduciaries who offer alternative investments in retirement plans. This would strip long-held investor protections from retirement savers and encourage the use of more risky, complex, and expensive investments.<sup>1</sup>

The proposed rule is harmful to American workers and counter to statute, Congressional intent, existing regulations, and case law. Under this proposal, a fiduciary meets the supposed safe harbor by checking the box that they merely considered a limited list of factors: performance, fees, liquidity, valuation, benchmarks, and complexity.<sup>2</sup> This proposal would create new, unfounded, and extreme deference standards to plan sponsors and fund managers, while giving mere lip service to the investors protections Congress established in the *Employee Retirement Income Security Act* (ERISA). Additionally, the Trump Administration is rife with conflicts of interest in this area, which leaves us with genuine questions about whether any Administration official may financially gain from this proposal.

We urge the Department to rescind the proposal and retain its long-held legal and regulatory investor protections.

**I. The Proposed Rule Exposes Retirement Savings to Risky, Expensive Asset Classes, including Private Equity, Private Credit, Digital Assets, and other Alternative Investments.**

In the richest country in the history of the world, a secure and dignified retirement should be available to every American, not just the extremely wealthy. Yet today, according to the Organisation for Economic Cooperation and Development (OECD), more than 22.8 percent of seniors in the United States live in poverty — compared to just 5.1 percent in Denmark, 5.8 percent in France, 12.6 percent in Germany and 14.8 percent in Canada.<sup>3</sup> Nearly 50 percent of our nation's seniors are living on less than \$30,000 annually and over one in five survive on less than \$15,000 per year.<sup>4</sup> Workers today are too often retiring into poverty, if they can afford to retire at all, while the wealthy benefit from retirement tax breaks.

Federal efforts to expand retirement income must prioritize cost-effectiveness, stability, and safety to avoid exposing seniors to major losses and financial instability.

But the DOL's proposal would compound, rather than address, the problem. The Department seeks to make available the estimated \$14.2 trillion workers *do* have in retirement savings to private equity, digital assets, private credit, high-cost annuities, and other types of alternative investments.<sup>5</sup> These investments have more expensive fees and are more complex, opaque, and volatile than traditional investments held by retail investors in 401(k) plans—exposing seniors to greater financial risk. The rule would also enable plans to include other non-alternative investment options that are riskier or more costly because the new guidance would apply to all asset classes.

a. The proposed rule exposes retirement savers to high-risk assets that show signs of structural deficiency.

The rule would expose workers' retirement assets to private equity and private credit funds. These underregulated assets are at best misaligned with the needs of retail investors, and at worst are exhibiting structural cracks.<sup>6</sup>

According to recent studies, institutional investors are increasingly seeking to exit these funds.<sup>7</sup> Evidence suggests that recent significant growth in private markets is unsustainable: “In the 2010s, buyout firms could often generate double or even higher returns over five years...Now, that tailwind is gone...”<sup>8</sup>

Morningstar describes the same issue with private credit, where “fund managers globally hauled in \$1.3 trillion of new capital from 2021 through [2025]...But that bonanza is grinding to a halt amid a wave of investors seeking to pull their money out.”<sup>9</sup> These exits appear, in part, driven by poor returns.

According to one study, the fifteen large private equity-focused evergreen funds -- including some managed by private equity giants Apollo, Blackstone, KKR, Carlyle Group, and Ares Management -- generated a median return of 11.97 percent last year, which is significantly less than the S&P 500 Index, which returned 17.43 percent in 2025.<sup>10</sup>

Private equity and private credit funds are also experiencing record low fundraising, which, when combined with the investor rush to the exits, puts further pressure on the ability to return cash to investors. For example, new money going into private equity in early 2026 indicates the industry is on track for its worst fundraising year since 2016.<sup>11</sup> This comes after a four-year fundraising slump.<sup>12</sup> Private credit has also experienced a similar downturn, and many experts worry it is a growing source of instability in the financial system. Multiple private credit funds in recent weeks have marked down their net asset values and reduce the dividends paid to shareholders.<sup>13</sup> Americans' retirement savings should not be exposed to such risky investments.

The proposed rule expressly contemplates “continuation funds”—vehicles managed by an entity that has recently acquired, or contemplates an imminent acquisition of, assets from another fund managed by the same entity or an affiliate—as designated investment alternatives. In other words, the rule sanctions the precise mechanism by which sophisticated institutional limited partners are now exiting stale private equity positions at manager-set valuations, with the underlying assets rolled into a new vehicle that 401(k) participants would be sold to. The proposal itself acknowledges that the “potential for the Manager to rely on a conflicted or self-serving valuation is particularly acute” in these arrangements, yet provides no prohibition on the underlying transaction.<sup>14</sup> At a moment when continuation-fund volume has exceeded

\$75 billion annually, this provision builds an exit ramp from sophisticated investors directly to working families' retirement savings.

- b. The proposal authorizes a daily-liquidity and illiquid-asset mismatch that has already failed in retail markets.

Participants in 401(k) plans depend on daily liquidity for in-service hardship withdrawals, plan loans, reallocation, and rollovers upon employment changes. Private equity, private credit, real estate, and other alternative assets cannot reliably provide that liquidity. The proposed rule's response is to permit fiduciaries to satisfy the liquidity factor through a "written representation" from the product manager about its liquidity risk-management program.<sup>15</sup> The proposed rule then expressly contemplates that "diversified designated investment alternatives may temporarily deviate from their target asset allocations" to meet withdrawals.<sup>16</sup> This a special allowance to the manager; when redemptions hit, the manager will sell the liquid public-market tranche first, leaving remaining participants disproportionately exposed to the illiquid tranche precisely when markets are most stressed. This is the pattern that resulted in Blackstone's BREIT, Starwood's SREIT, and Cliffwater's CCLFX limiting their investors' ability to retrieve their investments between 2022 and 2026.<sup>17</sup> The proposal does not require any prophylactic features to minimize this dynamic such as gating disclosures or side-letter prohibitions.

- c. The proposal exposes retirement savers to highly volatile assets.

The proposed rule would also expose retirement accounts to exceptionally volatile assets, like digital currency. *The Wall Street Journal* describes cryptocurrency assets as so "notoriously volatile"<sup>18</sup> that even the "\$Trump memecoin, launched in January [2025], initially soared and then collapsed."<sup>19</sup> A recent Government Accountability Office (GAO) study found that from 2021 to 2023, available crypto investments in 401(k) plans were significantly more volatile than the S&P 500—ranging from approximately four times more volatile for Bitcoin to twelve times more volatile for Solana.<sup>20</sup>

The Employee Benefits Security Administration (EBSA) Assistant Secretary's own comments to the House Education and Workforce Committee in April of this year show that the investments discussed in this proposal are questionable. At the hearing, Representative Summer Lee (D-PA) asked EBSA Assistant Secretary Aronowitz if the Department's alternative investments proposal took into account the riskiness of cryptocurrency being added to 401(k) plan investment line ups, and his response was illuminating:

We absolutely put guidance so that plan fiduciaries *can* assess whether it's risky or not. And we put out guidance that says that plan fiduciaries just objectively, thoroughly, and analytically review. So, if they want to review crypto, it needs to meet a rigorous test. *I don't even know if there's a current product that can meet our rigorous test.*<sup>21</sup>

Note that the Assistant Secretary says that fiduciaries *can* address risk of crypto—not that they must. Additionally, due to the lack of regulation and safeguards, crypto assets are increasingly subject to scams and fraud. The Federal Bureau of Investigation's (FBI) 2025 Internet Crime Report shows that cyber-enabled crimes defrauded Americans of nearly \$21 billion that year, with cryptocurrency scams being one of the worst offenders.<sup>22</sup>

The Trump Administration has exacerbated these problems by weakening enforcement agencies that previously "led the charge in curbing crypto-related fraud and abuse."<sup>23</sup> The DOL's efforts to weaken safeguards that deter retirement saving funds from being invested into volatile and largely unregulated

digital assets would jeopardize Americans' hard earned income and benefit the digital asset industry<sup>24</sup> at the cost of Americans' retirement savings.<sup>25</sup>

d. The proposal would strip retirement savers of vital investor protections.

On top of their volatility and structural weaknesses, these alternative investments also lack the necessary investor protections that typically accompany public securities, such as publicly traded equities and mutual funds. The regulatory framework that governs our capital markets has historically allowed securities reserved for institutional and sophisticated investors to bypass full investor protections. This proposed rule is counter to those statutes, expanding access to retail investors and small plan sponsors without necessary safeguards.

For example, this proposal is an end-run around the accredited-investor framework that Congress and the Securities and Exchange Commission (SEC) have used for nearly a century to keep everyday investors out of private offerings. Section 5 of the Securities Act of 1933 and Regulation D under the SEC's rules permit private offerings only to investors who meet specific income, net worth, or sophistication thresholds. The Department's proposal would bring tens of millions of non-accredited 401(k) participants into those same offerings through the target date fund backdoor. The SEC has never endorsed that outcome through its periodic accredited-investor rulemakings, and Congress has not authorized it. The Department cannot use a duty-of-prudence regulation to evade the SEC's long-standing investor-protection perimeter.

Private funds, for example, have few disclosure requirements for investors, no standardized valuation metrics across the industry, and minimal rules for third-party audits. In its rulemaking on the topic, the SEC said,

Private fund investments are opaque, and advisers do not frequently or consistently provide investors with sufficiently detailed information about the terms of advisers' relationships with funds and their investors. For example, there are no specific requirements of the information that private fund advisers must disclose to private fund investors about the funds' investments, performance, or incurred fees and expenses...<sup>26</sup>

Furthermore, private credit loans are not subject to the strict underwriting requirements expected of traditional banks and lenders, which means that the assets and business activities underlying the loans may be more likely to underperform and result in borrower default. The application of securities laws to crypto assets is rapidly evolving, and many securities law protections that investors have for public securities may not be available for crypto. This lack of sufficient guardrails is likely to harm investors.

e. The proposal exposes savers to high-cost investments that will erode retirement savings.

Savers exposed to alternative investments under the Administration's proposal are likely to face higher fees that accompany more complex investment products. This is problematic, as recent studies show that retirement investors often experience better after-fee returns by using less complex, lower fee investments.<sup>27</sup> Research shows that even seemingly small fees matter. According to the Department's own analysis, a 100-basis point (one percentage point) increase in fees and expenses reduces the money a worker has to retire on by 28 percent over his or her lifetime.<sup>28</sup> High fees erode long-term returns for retirement savers.

Numerous studies confirm the expensive nature of alternative investments. Private market investments will often charge a management fee, performance fee, underlying portfolio fees, and transaction fees.<sup>29</sup> For example, while mutual fund fees typically charge under one percent, private funds usually charge around a two percent fee, with the ability to take an even larger cut—around 20 percent—when gains exceed a certain amount.<sup>30</sup> Any supposed outperformance is difficult to measure at best (and illusory at worst), as performance numbers are often skewed by misleading metrics.<sup>31</sup> Private equity firms set the value of the assets they own; there is no market value. This has led to what some are calling a “Darwinian era” for private equity, where: “[f]alling returns, investment exit worries, longer holding periods and tougher fundraising conditions are hobbling the private equity industry, with experts warning that only the strongest will survive.”<sup>32</sup>

Cryptocurrency investments can include fees for trading, blockchain wallet fees, and built-in transaction fees.<sup>33</sup> Currently, these “costs are automatically baked into the transaction price, so they’re largely invisible to the buyer and seller” and vary based on demand.<sup>34</sup>

Similarly, through its examples on lifetime income, the proposed rule would make it easier for fiduciaries to divert retirees’ savings towards opaque, high-fee annuities that benefit brokers at the expense of seniors. Annuity fees range from the following in the retail, private market today:<sup>35</sup>

Potential Annuity Fees	Amount
Commissions	1-8%
Administrative fees	0.3%
Surrender charges	0 to 10%
Mortality expenses	0.5% to 1.5%
Expense ratios	0.06% to 3%
Riders	0.25% to 1%
Rate spreads	2%

The previous Administration estimated that the cost of conflicted advice in retail sales of just one product—fixed index annuities—may cost Americans as much as \$5 billion in retirement savings per year.<sup>36</sup>

More troubling still, the proposed rule authorizes managers to “internalize” the underlying fees of alternative-asset vehicles and charge plans a single flat “AUM-based” fee.<sup>37</sup> In other words, performance fees, carried interest rights, transaction fees, and underlying portfolio fees can all be bundled into one number, defeating the fee transparency the Department’s own participant-disclosure regulation has required since 2012.<sup>38</sup> According to the Department’s own projections, \$178 billion will flow into target-date funds that offer alternative-asset sleeves each year under this rule.<sup>39</sup> At even a one-percent fee premium over vanilla target date funds, that represents approximately \$1.78 billion per year in additional fees borne by participants. This does not seem to be a concern in the rule’s cost-benefit analysis, which instead claims net savings predicated on shorter investment committee meetings.

- f. Justification for inclusion of these assets in retirement plans is lacking.

The Department attempts to justify these costs by saying *any* additional benefit, right, or feature can add value and thus warrant increased fees.<sup>40</sup> Concerningly, it does not call for a cost benefit analysis of the purported value added to a retirement plan. One example of this is in the proposal's language around annuities. Given the aforementioned cost of annuities, it is glaring that the proposal states additional fees are warranted for the inclusion of annuities in a retirement plan without saying those costs must be reasonable or appropriate.<sup>41</sup>

It is also notable that many of these untested alternative assets do not have meaningful, reasonable comparators or benchmarks. Instead of requiring the assets to meet the stringent standard of ERISA, the Department proposes to allow fiduciaries to rely on "the best possible comparator."<sup>42</sup> In other words, when appropriate investment comparisons are unavailable (perhaps due to risk or novelty), merely what is available will suffice under this rule. This proposal might allow an investment manager to use poorly performing products in a particular asset class as the best possible comparator so the manager's products always look as if they perform well; or, a manager might rely on data that mirrors only what they invest in—ignoring a more fulsome analysis. This would insulate the investment manager and plan sponsor from liability but deprive participants of valuable information.

Similarly, this rule would allow for the use of virtually any public exchange in determining valuations for complicated assets.<sup>43</sup> For example, investment managers could potentially rely on a partisan or Administration-affiliated alternative asset exchange to determine a valuation.

Disclosure is also an acute concern. The Department itself notes how difficult it *already* is for both employers and employees to navigate the changing investment landscape:

It is common for plans to have a number of service providers, such as recordkeepers, custodians, consultants, attorneys, accountants, and others. But their services are not free and often are passed through to the workers themselves.

In recent years, arrangements for how services are provided to retirement plans and how service providers are compensated have become increasingly complex... the complexity has made it more difficult for many plan sponsors and fiduciaries... to understand how, how much, and by whom service providers are compensated.<sup>44</sup>

If the Department acknowledges that investments and fees are already complicated for workers and employers to understand, why does it now want to make it easier to ratchet up cost and complexity? As one consumer advocate describes the proposal:

The private equity industry is eager to dump overvalued assets onto retirement savers as well-heeled investors snub these dubious assets and head for the exits. Opening 401(k)s to these products risks turning workers' retirement savings into a Ponzi-like scheme that throws a lifeline to an industry scrambling for fresh cash.<sup>45</sup>

At a minimum, the Department should make clear that plan sponsors must clearly and accurately communicate to participants whether any of the investments in its lineup include alternative investments and provide them with a clear and understandable analysis of risk and fee adjusted returns.

In summation, these assets are misaligned with the goals and needs of retirement savers, making it hard to imagine how sponsors could meet their fiduciary duties to include them in a plan. Given this combination of high risk and poor disclosures, it is unsurprising that the Department feels the only way 401(k)

participants could access these investments would be by lowering fiduciary standards. Yet, we do not see appropriate justification that these investments are in the best interests of their workers *even within* the *lowered standards* of the proposed regulation.

- g. The proposal accelerates the decline of public capital markets at the expense of investor protection.

The number of U.S. public companies has declined by 33 percent between 2000 and 2023, while the number of private-equity backed private companies has grown by a staggering 460 percent during that same period.<sup>46</sup> The Department treats this decline not as a regulatory concern to be remedied but as a justification for channeling retirement capital into private vehicles. This inverts the policy calculus.

Public markets exist because Congress and the SEC determined that registered offerings better protect ordinary investors given the investor protections that accompany them, including robust disclosure obligations, Sarbanes-Oxley internal controls, strict liability imposed on corporate insiders for providing inaccurate financial statements, and shareholder voting rights. Adding \$178 billion per year of 401(k) capital to private markets reduces the incentive for companies to go public.<sup>47</sup> Fewer IPOs means less price discovery, less retail access to growth-stage companies through registered offerings, and a deeper bifurcation between institutional investors who can access private deals on favorable terms and ordinary workers. A rule that purports to “democratize” access in fact entrenches a two-tier capital market, with retirement savers occupying the inferior tier.

## **II. The Proposed Rule Is Inconsistent with ERISA, and Prevailing Case Law.**

As the Department itself notes, “[t]he passage of [ERISA] in 1974 launched a new era of financial security for America's workers, providing critical protections that have safeguarded their retirement...”<sup>48</sup> This was a consequence of the infamous collapse of the Studebaker pension plan, which left thousands of workers without the pension they earned over a lifetime.

Congress reacted accordingly, passing ERISA to protect workers from losing their hard-earned retirement income. The Congressional record is clear on this fact:

Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient *to safeguard employee benefit plan assets* from such abuses as self-dealing, *imprudent investing*, and misappropriation of plan funds... Accordingly, the legislation *imposes strict fiduciary obligations* on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets.<sup>49</sup>

The courts have followed suit for decades, stating for example that “the duties charged to an ERISA fiduciary are the highest known to law.”<sup>50</sup>

Yet, the impetus for this proposal is not investor protection. Instead, the preamble explicitly states that the “overarching goal of the proposed regulation is to alleviate certain regulatory burdens and litigation risk...” on the part of plan sponsors and providers.<sup>51</sup> In other words, the proposal seeks to loosen decades of investor protections and hundreds of years of trust law.

- a. The proposal sets a new standard for prudence, contradicting Supreme Court precedent.

The proposal does this by creating a new rubric for prudence. The existing regulation, which was promulgated in 1979 and has stood the test of time, states that prudence is satisfied where a fiduciary completes a rigorous analysis and acts accordingly:

“(i) Has given *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; and

(ii) Has *acted accordingly*.”<sup>52</sup>

The existing 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... The weight given to any factor by a fiduciary should *appropriately reflect a reasonable assessment* of its impact on risk-return.”<sup>53</sup>

By contrast, the proposed rule creates a new safe harbor where a fiduciary is entitled to “maximum discretion,” “significant deference,” and a “presumption of prudence”<sup>54</sup> – a concept which the Supreme Court already unanimously rejected in a 2014 case regarding fiduciaries’ responsibility to retirees:

[W]e do not believe that the presumption at issue here is an appropriate way to weed out meritless lawsuits or to provide the requisite “balancing.” The proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious... Such a rule does not readily divide the plausible sheep from the meritless goats. That important task can be better accomplished through careful, context-sensitive scrutiny of a complaint’s allegations.<sup>55</sup>

In other words: to make it easier for fiduciaries to invest workers’ savings in high-risk, high cost assets, the rule undermines a decades-old legal standard and court precedent.

Instead, the Department relies on a brand new, unsettled case: *Anderson v. Intel Corp. Investment Policy Committee*.<sup>56</sup> The Department cites *Anderson* multiple times in the preamble to support inclusion of hedge funds and private equity within target date funds.<sup>57</sup> The Supreme Court granted *certiorari* in *Anderson* on January 16, 2026, meaning the very case on which the Department builds its legal theory is currently under Supreme Court review. The Department should not finalize a rule of this magnitude resting on an unsettled legal foundation that may shortly be reversed or narrowed by the Court itself.

b. The proposal’s check the box exercise is inappropriate for retirement plans.

Further, the proposal can be read as the Department calling for a mere “check the box” exercise with respect to the above-mentioned six factors listed by the Department for a fiduciary to obtain the so-called “safe harbor.” The safety of workers’ retirement savings warrants much more than mere rote consideration of a preapproved list of factors. ERISA requires consideration of all investments—especially alternative assets—with skilled, thoughtful, meaningful, and appropriate consideration of, and action upon, all relevant factors. Most notably, consideration of fee and risk adjusted returns must go hand in hand. Yet, the proposal isolates these concepts in the examples.

The preamble emphasizes that there “no single right answer” and that there is a “range of reasonable judgments” fiduciaries could make.<sup>58</sup> We agree that there is no single right answer on what belongs in an investment lineup. However, the notion that a prudent fiduciary could reasonably arrive at more than one decision does not mean that any choice is permissible, so long as it is not illegal and was preceded by mere consideration of the six factors. Would this analysis allow plan assets to be invested in lottery tickets? What about Trump meme coins or World Liberty Financial? Or prediction markets and sports betting?

c. The proposal’s new standard for experts is counter to case law and logic.

This proposal would allow unquestioning reliance on experts. The Department states that the prudence safe harbor would apply where fiduciaries have considered the listed factors, which may include relying on recommendations of a prudently selected investment advice fiduciary.<sup>59</sup> However, this is not consistent with caselaw, which recognizes fiduciaries need to do more than just hire an expert:

[I]ndependent expert advice is not a whitewash. Our [courts] recognize this by not simply requiring that the fiduciary (1) probe the expert’s qualifications and (2) furnish the expert with reliance and complete information, but also requiring it to (3) make certain that reliance on the expert’s advice is reasonably justified under the circumstances.<sup>60</sup>

In other words, the courts currently hold that relying on expert advice will not absolve a fiduciary of liability unless that fiduciary has made sure his or her reliance was *reasonable* under the circumstances. This is a rational and necessary protection for consumers.

d. The proposal includes inconsistent logic regarding environmental, social, and governance (ESG) investing.

In addition, the Department has repeatedly pronounced that fiduciaries, “not DC bureaucrats,” should make investment decisions for retirement plans.<sup>61</sup> The Department has stressed the importance of empowering fiduciaries this includes Assistant Secretary Aronowitz stating that this proposal is “not an alts rule. It is an investment selection rule with a safe harbor, so that plan fiduciaries can do their jobs with undue fear of being sued.”<sup>62</sup>

However, the Administration takes an inconsistent approach. It clearly believes fiduciaries should *not* be empowered when it comes to decision-making related to ESG. ESG factors are categories of data about companies that inform investors, including retirement plans, of potential risks and opportunities when evaluating a company for inclusion in an investment portfolio. ESG investing can be viewed as a risk mitigation strategy enabling retirement plans to consider investments that account for companies’ negative externalities, such as high liability risks, fossil fuel dependent business practices, and poor treatment of workers. These are among the factors that would cause stocks to suffer over decades, which is precisely the time horizon of retirement investing. We believe that retirement plans should be able to consider ESG factors when making investment decisions for plan participants.

Regrettably, the Trump Administration appears to see things differently. The Department and its staff have singled out these investments as the “disloyal pursuits of ESG (environmental, social and governance), or its sister acronym DEI (diversity, equity and inclusion).”<sup>63</sup> Similarly, a senior policy adviser at EBSA recently stated that ESG is “nothing but a Marxist march through corporate culture.”<sup>64</sup>

Assistant Secretary Aronowitz is fond of saying the Department should not put its thumb on the scale in favor of one investment or against any other investment.”<sup>65</sup> Apparently, that is no longer true when it comes to investments the Administration does not like.

e. Given the above, the proposed rule is unlikely to be upheld in court.

DOL’s proposed interpretation is particularly problematic because it is unlikely to stand up to a legal challenge in court. These flaws include the proposal’s failure to incorporate and address key concepts in ERISA itself. For example, the following statutory and case law requirements discussed above are lacking in the proposal’s *operative* text:

1. Prudence requires appropriate and reasonable consideration of all relevant factors by fiduciaries, including but not limited to those listed in the proposal, and actions taken in accordance. Since the preamble calls for appropriate consideration of facts and circumstances, providing clarity that the substantive and procedural prudence standard remains despite the DOL’s focus on process should be simple to add in the operative text. Further, this clarification is in line with decades of case law.
2. Reliance by a fiduciary on an expert’s advice must be reasonably justified under the circumstances.
3. Any additional benefit, right, or feature added to the plan must be weighed in terms of its value, cost, and risk to participants.
4. Benchmarks must always be meaningful and reasonable. If such a benchmark or comparator is not available, the investment is inappropriate for retirement savings governed by ERISA, which warrants the most stringent consumer protections.
5. Documentation of a fiduciary’s determination to include an alternative asset must be made available to plan participants upon request, including an assessment of fee and risk adjusted returns. Plan sponsor documentation must be thoughtful and well-reasoned. It should not be limited to templates, boilerplate language, or AI analysis. It must not be a check-the-box exercise.
6. Communication to participants regarding these investments must be clear and accurate so that workers can easily tell if they are investing in alternatives; plan sponsors must also provide an analysis of risk and fee adjusted returns.
7. The duty to monitor should be clearly reaffirmed. Instead, the proposal severs selection from monitoring in a manner the Supreme Court has expressly forbidden.<sup>66</sup> It provides safe harbor for selection, but expressly defers the monitoring framework to future, undefined “interpretive guidance,” meaning fiduciaries could place private equity, private credit, hedge fund, and digital-asset products on plan menus today and have no clear standard governing the duty to remove them tomorrow. This sequencing is foreclosed by *Hughes*.<sup>67</sup>

Further, the Department’s own cited evidence undermines its conclusions. The preamble cites a Center for Retirement Research study finding that, since 2010, alternative-asset allocations have had a negative effect on public pension portfolio performance.<sup>68</sup> Conversely, the DOL also cites a National Bureau of

Economic Research study that finds no statistically significant association between private equity investments and pension fund performance once risk aversion is properly accounted for.<sup>69</sup> The Department recites these findings and then proposes a rule that contradicts them, without explaining the contradiction. This is the very definition of arbitrary and capricious agency action under the Administrative Procedure Act.<sup>70</sup>

### **III. The Rule Expands Opportunities for Conflicts of Interest—Including Conflicts in the Trump Administration—and Consumers Will Pay the Price.**

The change to the prudence standard described above expands opportunities for President Trump and his family to profit at the expense of taxpayers, workers and retirees. According to the Wall Street Journal, since the start of this Administration “the Trump family notched as much as \$5 billion in paper wealth... after its flagship crypto venture opened trading of a new digital currency.”<sup>71</sup> In fact, the Journal reports that President Trump’s crypto business has the potential to outpace his real estate holdings as a wealth generator.<sup>72</sup> Similarly, President Trump’s son-in-law, Jared Kushner, is representing the U.S. government in negotiations in the Middle East while “simultaneously seeking to raise at least \$5 billion in additional foreign capital for his private equity firm...”<sup>73</sup> In the midst of these egregious conflicts, the DOL’s proposed rule has the potential to boost the President’s bottom line at the expense of ordinary workers and retirees. How can the American people trust regulations proposed by an Administration that conceivably stands to profit from them?

Given this, it is unsurprising that investors protections to guard against conflicted advice with respect to investment decisions have been systemically narrowed over the last year. This proposal compounds the problem by curtailing ERISA’s duty of prudence when a fiduciary selects the investments that a retirement plan may offer.

ERISA’s duty of loyalty, which is excluded from the scope of this proposed regulation, is insufficient on its own to combat conflicts of interest and self-interested conduct.<sup>74</sup> The duty of loyalty itself has been significantly weakened by recent caselaw.<sup>75</sup> Courts have required proof that the fiduciary’s subjective motivation was self-interested, finding that self-dealing alone, or actions that incidentally benefit the fiduciary, are insufficient evidence of conflicts of interest.<sup>76</sup> Consumers are unlikely to ever have the documentation they need to make effective duty of loyalty claims in court since fiduciaries will not put self-interested motives in writing. Absent a whistleblower who can speak to the duty of loyalty, attacking conflicts on the basis of prudence becomes essential. Thus, the weakening of the duty of prudence is immensely harmful to consumers.

## **II. Conclusion**

Under this proposal, the financial security and lifetime savings of tens of millions of American workers are at stake. Fiduciaries should not get a free pass for any decision they make, no matter where it falls in the range of reasonableness, simply because a few procedural boxes were checked. These decisions must be analytical, thoughtful, and reasonable. They must be communicated to plan participants. And most importantly—decisions made by fiduciaries must always put plan participants first. We urge the Department to rescind its proposal.

Sincerely,



Bernard Sanders  
United States Senator  
Ranking Member, Committee  
on Health, Education, Labor,  
and Pensions



Elizabeth Warren  
Ranking Member  
Committee on Banking,  
Housing, and Urban Affairs



Robert C. "Bobby" Scott  
Ranking Member  
House Committee on  
Education and Workforce

<sup>1</sup> Economic Policy Institute, "Department of Labor proposes regulation encouraging retirement plans investing in crypto and private equity," (Apr. 1, 2026) <https://www.epi.org/policywatch/executive-order-to-encourage-retirement-plans-investing-in-crypto-and-private-equity/>.

<sup>2</sup> U.S. Dep't of Labor, Fiduciary Duties in Selecting Designated Investment Alternatives, 91 Fed. Reg. 16088, (Mar. 31, 2026) (to be codified at 29 C.F.R. pt. 2510), <https://www.federalregister.gov/documents/2026/03/31/2026-06178/fiduciary-duties-in-selecting-designated-investment-alternatives>. (Hereafter "Alternatives Proposal").

<sup>3</sup> OECD, "Poverty Rate," <https://www.oecd.org/en/data/indicators/poverty-rate.html>.

<sup>4</sup> United States Census Bureau, "Current Population Survey," (2023) <https://www.census.gov/programs-surveys/cps.html>.

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