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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AC38

Fiduciary Duties In Selecting Designated Investment Alternatives

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: This document contains a proposed regulation that clarifies, and provides a safe harbor for, a fiduciary's duty of prudence under the Employee Retirement Income Security Act of 1974 (ERISA) in connection with selecting designated investment alternatives for a participant-directed individual account plan, including asset allocation funds that include alternative assets. This proposal implements section 3(c) of President Trump's Executive Order 14330, *Democratizing Access to Alternative Assets for 401(k) Investors.*

DATES: Comments are due on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 1210-AC38, by one of the following methods:

- *Federal eRulemaking Portal:* http://www.regulations.gov. Follow the instructions for submitting comments.
- *Mail or personal delivery:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

Instructions: All submissions received must include the agency name and Regulation Identifier Number (RIN) for this rulemaking. Comments received, including any personal information provided, will be posted without change to http://www.regulations.gov and

http://www.dol.gov/ebsa, and made available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, 200 Constitution Avenue NW, Washington, DC 20210. Persons submitting comments electronically are encouraged not to submit paper copies. We encourage commenters to include supporting facts, research, and evidence in their comments. When doing so, commenters are encouraged to provide citations to the published materials referenced, including active hyperlinks. Likewise, commenters who reference materials which have not been published are encouraged to upload relevant data collection instruments, data sets, and detailed findings as a part of their comment. Providing such citations and documentation will assist us in analyzing the comments.

Warning: Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records posted on the internet as received and can be retrieved by most internet search engines.

Docket: Go to the Federal eRulemaking Portal at https://www.regulations.gov for access to the rulemaking docket, including the plain-language summary of the proposed rule of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023.

FOR FURTHER INFORMATION CONTACT: Fred Wong, Office of Regulations and Interpretations, Employee Benefits Security Administration, Department of Labor, at 202-693-8513. This is not a toll-free number.

Customer service information: Individuals interested in obtaining general information from the Department of Labor concerning Title I of ERISA may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the Department's website (www.dol.gov/agencies/ebsa).

SUPPLEMENTARY INFORMATION:

1. Executive Summary.

This document contains a proposed regulation that clarifies, and provides a safe harbor for, a fiduciary's duty of prudence under the Employee Retirement Income Security Act of 1974

(ERISA) in connection with the selection of designated investment alternatives for a participant-directed individual account plan, including asset allocation funds that include investments in alternative assets.

The overarching goal of the proposed regulation is to alleviate certain regulatory burdens and litigation risk that interfere with the ability of American workers to achieve, through their retirement accounts, the competitive returns and asset diversification necessary to secure a dignified and comfortable retirement. This goal can be achieved only by clarifying that ERISA gives fiduciaries (not opportunistic trial lawyers) the discretion and flexibility to determine when designated investment alternatives, including those that contain alternative investments, offer the opportunity for participants to maximize risk-adjusted returns on their retirement assets net of fees.

In support of this overarching goal, three key principles form the bedrock of the proposed regulation. First, there is a need to affirm ERISA as a law grounded in process. Second, ERISA gives maximum discretion and flexibility to plan fiduciaries in selecting designated investment alternatives, including the alternative investments described in Executive Order 14330, titled *Democratizing Access to Alternative Assets for 401(k) Investors*.[1] Third, when ERISA fiduciary decision-making follows a prudent process—such as the process reflected in the proposed regulation—arbiters of disputes should defer to fiduciaries under a presumption of prudence.

2. Background.

2.1. The Duty of Prudence Under Section 404(a)(1)(B) of ERISA.

ERISA's fiduciary responsibilities are in Part 4 of Title I of ERISA. Most pertinent to this rulemaking, ERISA's duty of prudence is found in section 404(a)(1)(B) of ERISA. This section, in relevant part, states: "a fiduciary shall discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man

[1] E.O. 14330 (Aug. 7, 2025), reprinted in 90 FR 38921 (Aug. 12, 2025).

acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

2.2. 1979 Investment Duties Regulation.

Today's proposed regulation is not the first Department regulation to address the application of the duty of prudence to fiduciaries of ERISA-covered plans. In 1979, the Department published a regulation on this topic, titled Investment Duties (hereinafter 1979 Investment Duties Regulation).[2]

The 1979 Investment Duties Regulation, in relevant part, provides that ERISA's duty of prudence is satisfied by a plan fiduciary when selecting an investment if the fiduciary meets two conditions. First, the fiduciary must give "appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment . . . including the role the investment or investment course of action plays in that portion of the plan's investment portfolio or menu with respect to which the fiduciary has investment duties."[3] And second, the fiduciary must have "acted accordingly."[4]

While the 1979 Investment Duties Regulation does not define "acted accordingly," it does clarify that "appropriate consideration" shall include, "but is not necessarily limited to" certain factors depending on the type of plan.[5] That regulation makes clear that the fiduciary of any plan must take "into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks[.]"[6] In addition, it explains that under certain circumstances the fiduciary also must

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[2] 29 CFR 2550.404a-1.
[3] 29 CFR 2550.404a-1(b)(1)(i).
[4] 29 CFR 2550.404a-1(b)(1)(ii).
[5] 29 CFR 2550.404a-1(b)(2).
[6] *Id.* The 1979 Investment Duties Regulation states that the term "appropriate consideration" shall include, "but is not necessarily limited to" a "determination by the fiduciary that the particular investment or investment course of

specifically consider diversification, liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan, and projected return of the portfolio relative to the funding objectives of the plan.[7]

As explained further below, today's proposed regulation supplements and expands on the 1979 Investment Duties Regulation in the context of selecting designated investment alternatives for participant-directed individual account plans. It does this, first, by identifying six relevant factors, and second, by demonstrating what it means for a fiduciary to "act accordingly"—and therefore to be prudent—in the circumstances addressed in the examples. Nothing in today's proposed regulation is intended to disturb the 1979 Investment Duties Regulation.[8]

2.3. Relevant Historical Departmental Subregulatory Guidance.

On several occasions since the 1979 Investment Duties Regulation, the Department has provided supplementary guidance addressing and identifying appropriate relevant factors with respect to types of investments or investment strategies.

2.3.1. Mortgage Loans to Participants as Investments.

In Advisory Opinion 81-12A (Jan. 15, 1981), the Department considered whether a defined benefit plan's fiduciary could offer mortgage loans to plan participants and beneficiaries

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action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties) or menu, to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks[.]" *Id*.

[7] 29 CFR 2550.404a-1(b)(2)(ii). In a 2022 rulemaking, in response to commenters' confusion about the application of the term "portfolio," as used in the 1979 Investment Duties Regulation, to construction of a participant-directed individual account plan's investment menu, the Department agreed that certain factors in paragraph (b) of the 1979 Investment Duties Regulation, such as "the composition of the portfolio with regard to diversification," do not apply to menu construction for such a plan. *See* 87 FR 73822, 73828 (Dec. 1, 2022). In explaining the 1979 Investment Duties Regulation's focus on "portfolio," the Department noted that the practice followed by some jurisdictions at common law of judging the prudence of an investment alone without regard to the role that the investment plays within the overall investment portfolio would not be improper for evaluating the prudence of an investment or investment course of action under ERISA. 43 FR 17480, 17481 (Apr. 25, 1978).

[8] The safe harbor with respect to ERISA's prudence requirement in paragraph (b) of the Investment Duties Regulation, as well as the guidance with respect to ERISA's loyalty requirement in paragraph (c) of that Regulation, would not be affected by this proposal. The Department also notes that its most recently published Regulatory Agenda includes a regulatory project related to revision of the 1979 Investment Duties Regulation.

(a form of plan investment) consistent with its duty of prudence.[9] The Department recognized that "ERISA's federalized prudence requirement, although based upon the common law of trusts, does depart from traditional trust law in some respects." The Department stated that it "interprets section 404 as providing *greater flexibility*, in the making of investment decisions by plan fiduciaries, than might have been provided under pre-ERISA common and statutory law in many jurisdictions."[10] After discussing the list of factors in the 1979 Investment Duties Regulation, the Department considered several additional specific factors the requester deemed relevant to a fiduciary's consideration of the possible mortgage financing program and agreed that those factors could be appropriately considered by plan fiduciaries in their investment deliberations, along with and in relation to the list of factors in the 1979 Investment Duties Regulation.

2.3.2. Derivatives Contracts as Investments.

In an Information Letter to Eugene Ludwig dated March 21, 1996, the Department considered whether a defined benefit plan fiduciary could invest in derivatives, such as futures, options, options on futures, forward contracts, swaps, structured notes and collateralized mortgage obligations, consistent with the duty of prudence.[11] Speaking to ERISA's neutrality on investments, the letter clarifies that plan fiduciaries are required to engage in the same general procedures and undertake the same type of analysis that they would in making any other investment decision, focusing on factors such as: how the investment fits within the plan's investment policy, what role the particular derivative plays in the plan's portfolio, and the plan's potential exposure to losses.

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[9] U.S. Dep't of Labor, Employee Benefits Security Admin., Advisory Opinion 81-12A (Jan. 15, 1981), available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/1981-12a.pdf.

[10] *Id.* at 1 (emphasis added). The existing standard to which ERISA provides greater flexibility was already quite discretionary. *See, e.g.*, Restatement (Second) of Trusts § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.").

[11] U.S. Dep't of Labor, Employee Benefits Security Admin., Information Letter to Eugene Ludwig (Mar. 21, 1996), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/03-21-1996.

Additionally, the Information Letter clarifies that investments in certain derivatives, such as structured notes and collateralized mortgage obligations, may require a higher degree of sophistication and understanding on the part of plan fiduciaries than other investments, and that plan fiduciaries with the authority for investing in derivatives are responsible for securing sufficient information to understand the investment prior to making the investment, including information regarding the associated market risks. Finally, with respect to such investments, the letter clarifies that the duty of prudence requires plan fiduciaries to determine the appropriate methodology to be used for evaluating market risk and the information that must be collected to do so, which, among other things, would include, where appropriate, stress simulation models showing the projected performance of the derivatives and of the plan's portfolio under various market conditions.

2.3.3. Liability Driven Investment Strategy.

In Advisory Opinion 2006-08A (Oct. 3, 2006), the Department considered whether a fiduciary of a defined benefit plan may, consistent with the requirements of section 404 of ERISA, consider the liability obligations of the plan and the risks associated with such liability obligations in determining a prudent investment strategy for the plan.[12] The plan fiduciary proposed to "risk manage" the assets of defined benefit plans by better matching the risks of a plan's investment portfolio assets with the risks associated with its benefit liabilities, with a goal toward reducing the likelihood that liabilities will rise at a time when the assets decline. The Department concluded that nothing in the statute or the 1979 Investment Duties Regulation limits a plan fiduciary's ability to take into account the risks associated with benefit liabilities or how those risks relate to the portfolio management in designing an investment strategy. In reaching that conclusion, the Department observed that, within the framework of ERISA's

[12] U.S. Dep't of Labor, Employee Benefits Security Admin., Advisory Opinion 2006-08A (Oct. 3, 2006), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2006-08a.

prudence, exclusive purpose, and diversification requirements, plan fiduciaries have *broad discretion* in defining investment strategies appropriate to their plans.

Although Advisory Opinion 2006-08A dealt with defined benefit plans and today's proposed regulation applies to defined contribution plans, which do not have the same sort of benefit liabilities, the controlling concept in the advisory opinion still applies, meaning that a plan fiduciary has broad discretion to consider how to reduce volatility in plan investments when participants are most likely to need their benefits for retirement. Indeed, target date funds, which most defined contribution plans offer,[13] explicitly attempt to manage volatility as participants near the age when they will need to draw down their money in retirement.

2.3.4. Asset Allocation Fund with Private Equity Component.

In an Information Letter to Jon W. Breyfogle, Esq., dated June 3, 2020, the Department considered whether plan fiduciaries of individual account plans could include designated investment alternatives with private equity components in individual account plans consistent with their duty of prudence.[14] The Department concluded that a fiduciary would not violate its duties under sections 403 and 404 of ERISA solely because the fiduciary offers a professionally managed asset allocation fund with a private equity component as a designated investment alternative for an ERISA-covered individual account plan in the manner described in the letter.

Citing the 1979 Investment Duties Regulation, the Information Letter stated that in evaluating a particular investment alternative for consideration as a designated investment alternative, the fiduciary must engage in an objective, thorough, and analytical process that considers all relevant facts and circumstances and then act accordingly. The letter identified complexity (of both organizational structures and investment strategies), time horizons,

[13] In 2022, EBSA analysis of BrightScope data for audited retirement plans found 91 percent of 401(k) plans offered at least one TDF.

[14] U.S. Dep't of Labor, Employee Benefits Security Admin., Information Letter to Jon W. Breyfogle (June 3, 2020), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020.

performance (risks and benefits) net of fees, fees, valuation, regulatory oversight, diversification, and liquidity as relevant factors. The Department further noted that the plan fiduciary should consider whether it has the skills, knowledge, and experience to make these determinations or whether it needs to seek assistance from a qualified investment adviser or other investment professional to make these determinations.

In so doing, though, the Department was careful not to weigh in on whether "a particular fund or investment alternative" is permitted or forbidden for a plan, because the appropriateness of any given investment option for a particular plan "is an inherently factual question" that depends on numerous "relevant facts and circumstances" that must be considered by a fiduciary through "an objective, thorough, and analytical process."

On December 21, 2021, the Department issued a supplemental statement on private equity investments which cautioned fiduciaries against selection of a designated investment alternative with a private equity component for a typical 401(k) plan, absent the plan fiduciary having experience evaluating private equity investments for a defined benefit pension plan. The Department subsequently rescinded the supplemental statement on August 12, 2025, because the statement deviated from the Department's historically neutral and principles-based approach to fiduciary investment decisions creating a potentially costly chilling effect on the market.[15]

2.3.5. Lifetime Income Product as a Qualified Default Investment Alternative.

In Advisory Opinion 2025-04A, the Department considered whether a program, involving investment management services and guaranteed lifetime withdrawal benefits offered through a variable annuity contract, met the requirements to be a "qualified default investment alternative" (QDIA) in an individual account plan. In concluding that the program as described in the opinion satisfied the requirements to be a QDIA under 29 CFR 2550.404c-5(e), the

[15] U.S. Dep't of Labor, *US Department of Labor Rescinds 2021 Supplemental Statement on Alternative Assets in 401(k) Plans* (Aug. 12, 2025), https://www.dol.gov/newsroom/releases/ebsa/ebsa20250812 (rescinding U.S. Dep't of Labor, *U.S. Department of Labor Supplement Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives* (Dec. 21, 2021), www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement.

Department noted that whether a plan fiduciary has satisfied the duty of prudence in selecting a lifetime income program, or any other investment alternative, as a QDIA for any particular plan would depend on the facts and circumstances in that particular case.[16]

2.4. Case Law.

The fiduciary duty of prudence under section 404(a)(1)(B) of ERISA has been examined in a number of court cases, as discussed below. These cases also have informed the development of the Department's proposal.

2.4.1. Duty of Prudence Applies to Selection of Designated Investment Alternatives.

Under section 404(a)(1)(B) of ERISA, plan fiduciaries must discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). This duty of prudence applies to plan fiduciaries in selecting and monitoring the designated investment alternatives in an individual account plan. *See Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015).

2.4.2. Duty of Prudence Focuses on Process at the Time of the Decision.

The defining characteristic of the duty of prudence is that it is "largely a process-based inquiry." *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022); *see also Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) (noting that for the duty of prudence, "[t]he process is what ultimately matters"). Thus, prudence is assessed based on a fiduciary's investigation at the time of the investment decision, and not in hindsight based on the investment results. *See, e.g.*, *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 107 (2d Cir. 2021) (stating that courts "must judge a fiduciary's actions based upon information available to the fiduciary at the

[16] *See also* U.S. Dep't of Labor, Employee Benefits Security Admin., Information Letter to Christopher Spence (Dec. 22, 2016), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/12-22-2016; U.S. Dep't of Labor, Employee Benefits Security Admin., Information Letter to J. Mark Iwry (Oct. 23, 2014), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/12-22-2016.

time of each investment decision and not from the vantage point of hindsight" (internal quotations omitted)); *Harris v. Amgen, Inc*., 788 F.3d 916, 936 (9th Cir. 2015) ("[T]he proper question" in evaluating an ERISA claim "is not whether the investment results were unfavorable, but whether the fiduciary used appropriate methods to investigate the merits of the transaction." (internal citation and quotations omitted)), *rev'd and remanded on other grounds*, 577 U.S. 308 (2016); *PBGC ex rel. Saint Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc*., 712 F.3d 705, 716 (2d Cir. 2013) (focusing "on a fiduciary's conduct in arriving at an investment decision, not on its results" (citation omitted)); *DiFelice v. U.S. Airways, Inc.,* 497 F.3d 410, 424 (4th Cir. 2007) ("[W]hether a fiduciary's actions are prudent cannot be measured in hindsight . . . [T]he prudent person standard is not concerned with results; rather it is *a test of how the fiduciary acted* viewed from the perspective of the time of the challenged decision." (emphasis added) (internal citations and quotations omitted); *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) (stating that the duty of prudence focuses on "a fiduciary's *conduct in arriving at an investment decision*, not on its results, and asking whether a fiduciary employed *the appropriate methods* to investigate and determine the merits of a particular investment" (emphasis added)). In short, this duty "requires prudence, not prescience." *DeBruyne v. Equitable Life Assur. Soc'y of U.S.*, 920 F.2d 457, 465 (7th Cir. 1990) (internal citation omitted); *see also Reetz v. Aon Hewitt Inv. Consulting, Inc.*, 74 F.4th 171, 182 (4th Cir. 2023) ("Prudence does not mean clairvoyance.").

2.4.3. The Duty of Prudence Does Not Contain Categorical Restrictions on Investments.

The same principles of prudence apply to any investment decision, regardless of the nature of the investment. For example, in *Anderson v. Intel Corp. Investment Policy Committee,* 137 F.4th 1015 (9th Cir. 2025), cert. granted, No. 25-498 (Jan. 16, 2026), the court's dismissal of the plaintiff's claim suggested that a fiduciary's inclusion of investments in hedge funds and private equity funds, as part of a diversified target date fund, was not inconsistent with prudence because

the plan followed a prudent process in determining that the use of the products as part of the plan's risk reduction strategy with long-term conservative growth goals was appropriate. *Id.* at1024. *See also Carlisle v. Teamsters Board of Trustees*, No. 25-511-cv, 2025 WL 3251154, at *3 (2d Cir. Nov. 21, 2025) (dismissing fiduciary breach claim based on a theory that private market investments are imprudent because allegations did not indicate that fiduciaries did more than engage in the normal practice of weighing "tradeoffs" and selecting from a "range of reasonable judgments" in the circumstances). Similarly, in *Taylor v. United Technologies Corp.*, the court rejected the argument that actively managed funds (i.e., funds with portfolio managers that pick and choose investments in pursuit of the fund's performance objectives) were necessarily imprudent simply because some evidence tended to show that passively managed funds (also referred to as index funds because such funds seek to track the returns of a market index) generally outperformed actively managed funds. No. 3:06CV1494, 2009 WL 535779 (D. Conn. Mar. 3, 2009), *aff'd*, 354 F. App'x 525 (2d Cir. 2009).

It is not surprising that ERISA contains no categorical restrictions on investment type. When Congress enacted ERISA, it did not require employers to establish benefit plans. Rather it crafted a statute intended to encourage employers to offer benefit plans while also protecting the benefits promised to employees. *See, e.g.*, *Conkright v. Frommert*, 559 U.S. 506, 516 (2010); *see also* H.R. Rep. No. 93-533 at 9 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4647 (noting that ERISA "represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations").[17]

[17] In fact, when Congress considered requiring plans to offer at least one index fund on plan menus, the proposal failed. *See* H.R. 3185, 110th Congress (2007). And the Department concurred and continues to concur with that decision. 401(k) Fee Disclosure: Helping Workers Save for Retirement: Hearing Before the S. Comm. On Health, Education, Labor, and Pensions, 110th Cong. 15 (2008) (statement of Bradford P. Campbell, Assistant Sec'y of Labor) ("Requiring specific investment options would limit the ability of employers and workers together to design plans that best serve their mutual needs in a changing marketplace.").

Indeed, Congress knew that if it adopted a system that was too "complex," then "administrative costs, or litigation expenses, [would] unduly discourage employers from offering . . . benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Congress also knew that plan sponsors and fiduciaries must make a range of decisions and accommodate "competing considerations," often during periods of considerable market uncertainty. H.R. Rep. No. 96-869, at 67 (1980), reprinted in 1980 U.S.C.C.A.N. 2918, 2935. As a result, Congress designed a statutory scheme that affords plan sponsors and fiduciaries considerable flexibility.[18]

2.4.4. Decisions Based on a Prudent Process are Entitled to Significant Deference Including Under the Proposed Regulation's Safe Harbor Factors.

Assessing the duty of prudence is naturally deferential and context specific, reflecting a fiduciary's discretion and flexibility in selecting among a range of options. *See Donovan v. Cunningham,* 716 F.2d 1455, 1467 (5th Cir.1983) (stating that the prudence requirement is "a flexible standard," such that the adequacy of a fiduciary's independent investigation and ultimate investment selection is evaluated in light of the "'character and aims' of the particular type of plan he serves"); *Vigeant v. Meek*, 953 F.3d 1022, 1028 (8th Cir. 2020) (same). In other words, under a prudence inquiry, there is no one single right answer given the almost innumerable appropriate options available to fiduciaries. *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006) (ERISA does not require a fiduciary to take "any particular course of action" so long as the fiduciary's decision meets the prudent person standard). Therefore, the Supreme Court has instructed the courts to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise," as "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs." *Hughes v. Northwestern University*, 595 U.S. 170, 177 (2022). And, as discussed above, a fiduciary must act based on "the circumstances as they reasonably

[18] This flexibility extends to other areas of ERISA fiduciary decision making that are not discussed, in detail, in this proposed regulation. For example, plan fiduciaries of participant-directed individual account plans have discretion to make decisions, often involving "difficult tradeoffs," *Hughes v. Northwestern University*, 595 U.S. 170, 177 (2022), when considering, the size of plan investment menus, investment styles, the structure of investment options, and default investment options for plan participants who have not made a decision about how to allocate their individual investment accounts.

appear to [the fiduciary] at the time when he does act and not at some subsequent time when his conduct is called into question." *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1164 (6th Cir. 2022) (quoting Restatement (Second) of Trust section 174 cmt. B (1959)). In other words, subjecting a fiduciary to constant Monday morning quarterbacking over its decisions, with the benefit of 20/20 hindsight, would eviscerate the discretion that is at the core of the statutory framework.

In an action alleging a breach of fiduciary duty, as in other forms of litigation, the Supreme Court's default rules apply meaning plaintiffs bear the burden of proof and persuasion on the elements of their claim. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58 (2005) ("[P]laintiffs bear the burden of persuasion regarding the essential aspects of their claims"). This is true not just with respect to the existence of a breach (as relevant here, whether a fiduciary failed to follow a prudent process) but also, in the view of the Department, and some courts, with regard to whether the alleged breach caused a loss to the plan. *See, e.g.*, *Pizarro v. Home Depot*, 111 F.4th 1165 (11th Cir. 2024); *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Trust* v. *Alerus Fin., N.A.*, 858 F.3d 1324, 1336 (10th Cir. 2017) (rejecting burden-shifting as to causation of loss), *petition for cert. dismissed*, 585 U.S. 1056 (2018). Consequently, a defendant fiduciary that complies with the proposed regulation's safe harbor factors should, to that extent, be confident that it has fulfilled its fiduciary duty of prudence. And given where the burden lies, a fiduciary that can actively demonstrate that compliance should be able to confidently rely on it to successfully defend its actions.

Some courts have even suggested that, under an extension of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), fiduciaries should receive deference for their investment determinations or other decisions (in addition to the decisions regarding benefit claims that were at issue in *Firestone*), if they are exercising discretion in interpreting and applying plan terms. For example, in *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014), the Eighth Circuit found that there is "no compelling reason to limit *Firestone* deference to benefit claims," and thus held that

the district court should have applied a "deferential standard of review in evaluating whether the [plan] fiduciaries, at the time they made their investment decisions, breached their fiduciary duties in . . . …evaluating and selecting Plan investment options in accordance with the Plan," and the investment policy statement. *Id.* at 335, 338; *see also Armstrong v. LaSalle Bank Nat. Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006) (finding that the standard of review for "a decision that involves a balancing of competing interests under conditions of uncertainty," such as an ESOP redemption price valuation, is abuse of discretion); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 711 (6th Cir. 2000) (finding "no barrier to application of the arbitrary and capricious standard in a case such as this not involving a typical review of denial of benefits," but rather interpretation of a plan term regarding lump sum payments).

To further assist plan fiduciaries, the Department is proposing this regulation with safe harbors. The Department has clear statutory authority under ERISA section 505 to promulgate safe harbors, including safe harbors regarding the fiduciary duty of prudence (such as, for example, the selection of annuity providers under 29 CFR 2550.404a-4). *Cf. McNeil v. Time Ins. Co.*, 205 F.3d 179, 190 (5thCir. 2000) ("ERISA's section 505 granted the Secretary of Labor the authority to promulgate regulations for implementation of ERISA, and the Secretary has created an exemption for certain group or group-type insurance programs from the scope of ERISA." (citations and footnotes omitted)).

The Departmental explication of a prudent process is entitled to *Skidmore* deference (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) as persuasive authority regarding what constitutes a prudent process. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). *Loper-Bright* cites *Skidmore* with approval. *Id.* at 402. Other courts have adhered to this principle. *See, e.g.*, *Lopez v. Garland,* 116 F.4th 1032, 1039 (9th Cir. 2024) (agency interpretation entitled to due respect when well-reasoned). And while the Fifth Circuit has questioned the continuing role of *Skidmore*, *see Mayfield v. United States Dep't of Labor*, 117 F.4th 611, 619 (5th Cir. 2024), the Fifth Circuit implied that to the extent *Skidmore* has weight, it

is when the Department has clear statutory authority and has exercised it consistently. Here, the Department has promulgated safe harbors regarding a prudent process in the past (*e.g.*, selection of annuity providers), and the prudent process described herein is consistent with both the balance of existing caselaw and past Departmental practice. Accordingly, this regulation should carry persuasive weight to courts under *Skidmore* such that fiduciaries that comply with the regulation should be found to have followed a prudent process with the result that their judgment with regard to the particular factor at issue (including the relationship of that factor to the other factors) is respected.

3. Executive Order 14330.

3.1. Section 3(c).

On August 7, 2025, President Trump issued Executive Order EO 14330, *Democratizing Access to Alternative Assets for 401(k) Investors*.[19] The Executive Order (EO 14330) pointed out that, currently, many Americans in employer-sponsored defined contribution plans do not have the opportunity to participate in the potential growth and diversification opportunities offered by alternative asset investments. EO14330 cited regulatory burdens and litigation risk as factors that may impede access to these investments. EO14330 stated it is the policy of the United States that "every American preparing for retirement should have access to funds that include investments in alternative assets when the relevant plan fiduciary determines that such access provides an appropriate opportunity for plan participants and beneficiaries to enhance the net risk-adjusted returns on their retirement assets."

EO 14330 contains a definition of alternative assets which includes the following:

- private market investments, including direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the

[19] 90 FR 38921 (August 12, 2025).

managers of such investments, if applicable, seek to take an active role in the management of such companies;

- direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate;
- holdings in actively managed investment vehicles that are investing in digital assets;
- direct and indirect investments in commodities;
- direct and indirect interests in projects financing infrastructure development; and
- lifetime income investment strategies including longevity risk-sharing pools.

Alternative assets are highly varied, as the executive order demonstrates, and alternatives include nearly all investments other than those typically considered to be "traditional" asset classes—i.e., publicly-traded stocks, bonds and cash. Alternative assets sometimes are less liquid and harder to value than traditional asset classes, and the fee structures for alternative investments are often more sophisticated and performance-driven than for traditional investments.

For example, private market investments are often set up as partnerships in which a general partner manages money on behalf of limited partners, with a 10-year commitment before the limited partners expect to see a return of their capital and any profits. These private investment structures can help limited partners diversify their portfolios, but such diversification sometimes comes with reduced day-to-day insight into the value of their investments than investments in traditional assets. These partnerships may also use private debt, which generally refers to direct lending to private entities, often with customized structures to meet the specific needs of the borrower or other financial investments.

Real estate may include land, buildings, or natural resources such as timberland and farms. No two properties are the same, and valuation must take this into account in contrast to market-traded stocks or bonds.

Digital assets are a new form of investing that includes a wide variety of assets that can be stored and transmitted digitally, including cryptocurrencies such as Bitcoin and other tokens.

Commodities, ranging from metals to corn, do not generate any cash, but allow investors to benefit from price increases or to hedge other investments. Commodity investments are often operationalized with derivatives (contracts based on the price of an underlying asset) to avoid the actual cost of storing physical commodities.

Infrastructure investments include everything from water treatment plants to airports to highways and may be considered a type of real estate investment.

Lifetime income investment strategies are designed to provide individuals with a predictable stream of income for their lives, and have sometimes been referred to as a form of monthly paycheck during retirement. A typical example of a lifetime income solution is an annuity. The Department has also added guidance on lifetime income longevity-sharing pools, which are a risk-sharing mechanism that can incorporate many investment strategies, rather than itself constituting an alternative asset.

Section 3(c) of EO 14330 directed the Department to propose regulations or other guidance, including appropriately calibrated safe harbors, that clarify the ERISA fiduciary duties owed to plan participants when asset allocation funds with investments in alternative assets are made available as investment options.[20] In carrying out EO 14330's directives, the Department is to prioritize approaches that are designed to curb litigation risk that may constrain fiduciaries from applying their best judgment in offering investment opportunities to plan participants.[21]

[20] Consistent with paragraph (d) of section 3 of the Executive Order, the Department consulted with the Department of the Treasury, the staff of the Securities and Exchange Commission (the "SEC"), and the Pension Benefit Guaranty Corporation in developing this proposed regulation.

[21] The Executive Order also directed the Department to reexamine its existing guidance regarding ERISA fiduciary duties owed to plan participants when making available asset allocation funds with alternative assets, and consider rescinding the December 21, 2021, Supplemental Private Equity Statement, discussed above.

3.2. Application of Executive Order 14330 to Selection of Designated Investment Alternatives.

Although EO 14330 directed the Department to focus guidance on fiduciary responsibilities in connection with offering an asset allocation fund that includes investments in alternative assets, the Department has decided not to limit the proposed rule to such funds. While the proposed regulation does provide the exact guidance contemplated by EO 14330, providing guidance *only* with respect to those asset allocation funds that invest in alternative assets could create the impression that those asset allocation funds are either favored or disfavored. They are not. They are subject to the same requirements as any other investment. This is consistent with the Department's historical practice of providing neutral guidance that does not favor or disfavor any particular type of investment or investment strategy. The Department therefore has decided to address in this proposal ERISA's fiduciary duty of prudence with respect to the selection of any designated investment alternative, as discussed in more detail below. That said, the Department expects that by focusing on the factors and examples—often in the context of the selection of alternative assets—described more below, the Department has fully addressed EO 14330, showing how a good fiduciary process can justify and support the discretionary investment decisions of plan fiduciaries, including when they choose to select asset allocation funds that contain alternative assets.

4. Detailed Discussion of the Proposed Regulation.

4.1. Scope – Proposed Paragraphs (a) and (b).

The scope of this proposed regulation is delineated in paragraphs (a) and (b). These provisions collectively limit the proposed regulation's applicability to ERISA's duty of prudence, specifically as it pertains to a plan fiduciary's selection of a designated investment alternative within a participant-directed individual account plan.

Paragraph (a) of the proposed regulation recites the duty of prudence as set forth in the statute. In relevant part, it provides that a fiduciary shall discharge its duties with respect to the

plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Paragraph (b) of the proposed regulation sets forth the Department's longstanding position that the selection of a designated investment alternative for a participant-directed individual account plan is a fiduciary act.[22] Paragraph (b) also clarifies that such a selection is governed by ERISA's duty of prudence as set forth in paragraph (a) of the proposed regulation. As described in detail in section 11 of this preamble, the term "designated investment alternative" refers generally to the investment options on the plan's menu chosen by a plan fiduciary and available to participants and beneficiaries for investment of their retirement benefits.

The proposed regulation does not address ERISA's well-established duty for fiduciaries to monitor designated investment options at regular intervals after their selection. In *Hughes v. Northwestern University*,[23] the Supreme Court unanimously affirmed that ERISA fiduciaries have a continuing obligation to monitor all plan investments—not just a subset—and to remove options that the fiduciary determines, after a rigorous process, are no longer appropriate. The Court clarified that offering a broad menu of investment choices does not excuse fiduciaries from breaches if some options are poorly managed. The Department anticipates issuing interpretive guidance in the near term concerning fiduciary obligations under ERISA to monitor designated investment alternatives following their inclusion on a plan's investment menu. The Department generally is of the view that the factors and processes (or substantially similar factors and processes) outlined in the proposed regulation—including the illustrative safe harbor examples—apply to this ongoing duty. Put differently, a plan fiduciary that tracks the process in the

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[22] *See, e.g.*, Employee Benefits Security Administration, Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, (codified at 29 CFR 2550.404a-5(f)) ("Nothing herein is intended to relieve a fiduciary from its duty to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan.").

[23] *Hughes v. Nw. Univ.*, 595 U.S. 170, 176 (2022).

proposed regulation during appropriately established monitoring cycles will meet ERISA's monitoring requirements. Accordingly, the Department invites commenters, particularly those with expertise in portfolio monitoring and menu maintenance, and fiduciary standards, to provide input on best practices in this area.

4.2. Fiduciaries Have Maximum Discretion to Select Investments to Further the Purposes of the Plan – Proposed Paragraph (c).

Paragraph (c) of the proposed regulation addresses the question of whether any designated investment alternative is *per se* prudent or imprudent under section 404(a)(1)(B) of ERISA. The text of section 404(a)(1)(B) of ERISA is plainly neutral to types or classes of designated investment alternatives that a fiduciary selects for the plan menu, so long as the fiduciary's selection process adheres to section 404(a)(1)(B)'s articulated standard of care.[24] Thus, plan fiduciaries have maximum discretion to select investments to further the purposes of the plan. Paragraph (c) of the proposed regulation adopts this foundational principle, providing, in relevant part, that section 404(a)(1)(B) of ERISA "does not require or restrict any specific type of designated investment alternative."[25] However, the investment discretion ERISA confers on plan fiduciaries is not a license to ignore other applicable laws. Paragraph (c) of the proposed regulation reflects this basic principle by clarifying that maximum discretion notwithstanding, a plan fiduciary is prohibited from selecting a designated investment alternative that is otherwise illegal. For example, as paragraph (c) of the proposed regulation clarifies, an investment in a

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[24] *See* Uniform Prudent Investor Act § 2(e) (Nat'l Conference of Comm'rs on Unif. State Laws 1995) (clarifying "that no particular kind of property or type of investment is inherently imprudent"); *see also* Restatement (Third) of Trusts § 90, comment f(2) (Am. L. Inst. 2007).

[25] Paragraph (c) also makes clear, for example, that there is no *per se* rule respecting the inclusion of actively managed investment vehicles that are investing in digital assets. In this regard, the Department recently announced a return to its historically neutral position with respect to particular investment types and strategies which neither endorses, nor disapproves of, plan fiduciaries that conclude that the inclusion of cryptocurrency in a plan's investment menu is appropriate. See U.S. Dep't of Labor, Employee Benefits Security Admin., Compliance Assistance Release 2025-01, *401(k) Plan Investments in "Cryptocurrencies"* (May 28, 2025), https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2025-01. The Compliance Assistance Release rescinded previous guidance issued by the Department in 2022 that directed plan fiduciaries to exercise "extreme care before they consider adding a cryptocurrency option to a 401(k) plan's investment menu for plan participants."

foreign adversary which violates the Specially Designated Nationals and Blocked Persons List administered by the Office of Foreign Assets Control of the United States Department of the Treasury is not permitted.[26]

4.3. Fiduciaries Have a Duty to Act Prudently When Establishing a Plan Investment Menu to Maximize Risk-adjusted Returns – Proposed Paragraph (d).

Paragraph (d) of the proposed regulation provides that a fiduciary with responsibility or authority for selecting designated investment alternatives has a duty to act prudently also when establishing a diversified menu of designated investment alternatives to further the purposes of the plan by enabling participants and beneficiaries in such plans to maximize risk-adjusted returns on investment, net of fees, across their entire portfolio. This in turn allows participants with different risk capacities to maximize their returns for a given level of risk. This provision is intended to serve as an important reminder that each designated investment alternative selected by a plan fiduciary plays a role in the larger investment menu and the fiduciary has a duty to prudently curate the menu of investments overall.[27] Put differently, ERISA's duty of prudence applies not just to the selection of each designated investment alternative but also to the collection of designated investment alternatives as a whole—i.e., to both the individual parts and the sum.

While, as explained in the scope discussion above, the focus of the proposed regulation is on the application of the duty of prudence to a fiduciary's selection of an individual designated investment alternative for a plan's menu, the proposed regulation does not address the question of how to prudently curate a menu of investments overall. This question is beyond the scope of

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[26] *See also* U.S. Dep't of labor, Employee Benefits Security Admin., Advisory Opinion 25-01A (July 21, 2025) (ERISA does not shield fiduciaries from the application of the civil rights laws), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2025-01a.

[27] 29 CFR 2550.404a-1(b)(1) (stating that the duty of prudence is satisfied if the fiduciary 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 . . . [h]as acted accordingly" (emphasis added)).)).

this proposed regulation. In this regard, the Department understands that, to obtain the fiduciary relief available under section 404(c) of ERISA, many participant-directed individual account plans establish menus that seek to comply with the requirements of regulations implementing section 404(c) of ERISA.[28] These regulations, which are optional, generally require the menu to offer a broad range of investment alternatives that meets specified diversification and risk and return requirements.[29] Comments are solicited on whether future guidance should address the question of what process is required to curate a prudent menu of investments overall or whether the requirements of the regulations implementing section 404(c) continue to be best practice.

4.4. Prudence Requires Appropriate Consideration of All Relevant Factors – Proposed Paragraph (e).

Paragraph (e) of the proposed regulation sets forth the general standard of what prudence requires when selecting a designated investment alternative. In relevant part, it provides that to satisfy the duty of prudence when selecting a designated investment alternative, the plan fiduciary must follow a prudent process under which it gives appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment responsibility or authority, the fiduciary knows or should know are relevant to the particular designated investment alternative. This provision mirrors language in paragraph (b)(1) of the 1979 Investment Duties Regulation. Paragraph (e) of the proposed regulation does not, however, contain the "and act accordingly" language that is in paragraph (b)(1)(ii) of the Investment Duties Regulation. In lieu of the "and act accordingly" language, paragraphs (g) through (*l*) of the proposed regulation set forth six relevant factors and safe harbor examples demonstrating what it means for a fiduciary to "act accordingly"—and therefore to be prudent—in the circumstances addressed in the examples. Thus, the proposed regulation supplements and expands on the Investment Duties Regulation in the context of selecting designated investment

[28] 29 CFR 2550.404c-1. A plan fiduciary is not liable for the direct consequences of the investment decisions of plan participants if the fiduciary ensures compliance with this regulation.
[29] *Id.* at (b)(3).

alternatives for participant-directed individual account plans, especially with respect to the six enumerated factors and related safe harbor examples. Further, like many safe harbor examples in the proposed regulation, paragraph (e) of the proposed regulation reinforces the idea that it also may be appropriate for the named fiduciary to enlist the services of professional advisors, to carry out the necessary objective, thorough, and analytical analysis.

Importantly, paragraph (e) of the proposed regulation makes clear that nothing in the proposed regulation excuses a fiduciary from complying with its obligations to act loyally or avoid prohibited conflicts of interest under sections 404(a)(1)(A) or 406 of ERISA respectively. Those are separate requirements, not impacted by the proposed regulation. For the avoidance of doubt, the Department does not intend to relax the loyalty requirement or waive any conflict prohibitions in relation to a fiduciary evaluation of alternative assets.

4.5. Safe Harbor – Paragraph (f).

EO 14330 emphasizes that burdensome lawsuits challenging reasonable decisions made by ERISA plan fiduciaries may inhibit fiduciaries' ability to make sound judgments when offering investment opportunities to plan participants and beneficiaries. This, in turn, hinders American workers' ability to achieve competitive and diversified accounts, affecting their chances of securing a comfortable and dignified retirement. Consequently, EO 14330 instructs the Department to prioritize efforts in developing rules, regulations, or guidance aimed at reducing such litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to plan participants and beneficiaries.

Following the issuance of EO 14330, several stakeholders submitted letters to the Department. They expressed their support for the EO 14330's focus on reducing excessive litigation. The stakeholders noted a significant increase in class-action lawsuits over the past

decade and anticipated even more, especially in light of the Supreme Court's decision in *Cunningham v. Cornell University*.[30]

The Department is concerned that the prevailing climate of litigation poses significant challenges for plan sponsors and fiduciaries. Indeed, much of this litigation has focused on well-designed plans with prudent processes, with the challenges often ultimately failing, but not before significant resources have been expended in defense. *See, e.g.*, *Mattson v. Milliman, Inc.*, No. C22-0037 TSZ, 2024 WL 3024875 (W.D. Wash. June 17, 2024) (disposing of a frivolous case, but only after a bench trial); *Falberg v. Goldman Sachs Grp., Inc*., No. 19 Civ. 9910 (ER), 2022 WL 4280634 (S.D.N.Y. Sept. 14, 2022), *aff'd*, No. 22-2689-CV, 2024 WL 619297 (2d Cir. Feb. 14, 2024) (disposing of a frivolous case, but only after summary judgment).[31] Consistent with EO 14330, stakeholders have indicated that this environment deters employers from establishing, maintaining, or enhancing their retirement plans, stifles the adoption of innovative plan features, and constrains the availability of investment alternatives that could improve participant outcomes, including the kind of exposure to alternative assets contemplated by EO 14330 and described in many of the examples in the proposed regulations.[32] Ultimately, this situation jeopardizes the long-term retirement security of ERISA plan participants.[33]

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[30] Letter from American Retirement Ass'n et al. to Lori Chavez-DeRemer, Sec'y of Labor (Dec. 4, 2025) (alleging that from 2016 through 2024, plaintiffs' attorneys filed more than 500 ERISA "fee cases," and that filings are expected to almost double from 53 new lawsuits in 2024 to an estimated 99 new lawsuits in 2025) *see also* Letter from Am. Benefits Council to Daniel Aronowitz, Assistant Sec'y of Labor for Employee Benefits (Dec. 5, 2025) (citing Thomas R. Kmak, *Protect Yourself at All Times – Emphasize Quality, Service and Value Before Fees*, Nat'l Inst. of Pension Adm'rs, Apr. 11, 2016); *Cunningham v. Cornell Univ*., 604 U.S. 693, 711 (2025) (Alito, J. concurring) (citing CHUBB, Excessive Litigation Over Excessive Plan Fees in 2023 (Apr. 2023)).

[31] These cases rarely include any allegations about process but instead often assert conclusory attacks on the outcome of particular fiduciary decisions and ask courts to infer an imprudent process based on circumstantial, outcome-focused allegations. This approach, as discussed above, is not based in the text or law of ERISA. As discussed by the Department in more detail in its recent amicus brief in *Parker-Hannifin Corp. v. Johnson*, petition for cert. filed (6th Cir. Jan. 2, 2024) (24-1030), these inferential claims must be subjected to careful, context-sensitive scrutiny with a purported lack of information about the fiduciary process as no excuse from the rigorous requirements of a well-pleaded complaint.

[32] Am. Ret. Ass'n et al., *supra* note 30; Am. Benefits Council *supra* note 30.

[33] Lawsuits have a "tremendous power to harass" individual fiduciaries, *Cunningham v. Cornell Univ*., 2018 WL 1088019, at 1 (S.D.N.Y. Jan. 19, 2018), with courts noting that ERISA fiduciaries often find themselves "between a rock and a hard place," *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014), or on a "razor's edge," *Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006), in making reasonable decisions in respect of the investment opportunities they offer to plan participants and beneficiaries.

Paragraph (f) of the proposed regulation, therefore, introduces a process-based safe harbor for plan fiduciaries to use when selecting designated investment alternatives. By referencing paragraphs (g) through (*l*) of the proposal, paragraph (f) identifies a non-exhaustive list of six factors for a plan fiduciary to objectively, thoroughly, and analytically consider and make determinations about when selecting designated investment alternatives for the plan menu. The six subsequent paragraphs (g) through (*l*) of the proposal detail each of these six factors.

When a plan fiduciary objectively, thoroughly, and analytically considers, and makes a determination following the described process with respect to, any of the six factors outlined in the paragraphs, its judgment regarding the factor or factors is presumed to be reasonable and is entitled to significant deference. In the Department's view, a plan fiduciary that objectively, thoroughly, and analytically considers and makes a determination regarding any or all of the six factors should be able to confidently rely on that determination without undue fear of litigation , much like how plan fiduciaries can rely on the judicial deference the Supreme Court has acknowledged they can receive in the circumstances addressed in *Firestone Tire & Rubber Co. v. Bruch*.[34]

While each factor is addressed in detail in the subsequent sections of this preamble, the six factors are as follows: performance, fees, liquidity, valuation, benchmarking, and the complexity of the designated investment alternative. The Department has identified these six factors through a thorough consideration of its experience, a comprehensive review of pertinent case law, existing regulations, previous sub-regulatory guidance, EO 14330, and valuable stakeholder input. The applicability of each factor to a specific designated investment alternative will vary based on the particular facts and circumstances involved. Nonetheless, the

[34] See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989), finding in the ERSIA section 502(a)(1)(B) context that "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers" (citing *Restatement (Second) of Trusts* § 187 (Am. Law. Inst. 1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion.")).

Department believes that each of these six factors are integral to the vast majority of designated investment alternatives provided within participant-directed individual account plans.

The Department invites public comments on the comprehensiveness and applicability of the six factors outlined herein, particularly in light of best practices within the participant-directed individual account market and established investment principles. Stakeholders are encouraged to identify any additional factors that could enhance the proposed framework, providing rationale for their inclusion. For instance, several stakeholders have proposed that participant profiles or characteristics warrant consideration, particularly in the context of target date funds or managed accounts as designated investment alternatives. Furthermore, the relevance of participant profiles to lifetime income solutions has also been highlighted, again in the context of target date funds. The Department specifically requests input from commenters on whether participant profiles or characteristics should be included in the final rule as a stand-alone factor, and if it should be applied to all designated investment alternatives or just with respect to target date funds and managed accounts.

5. Performance.

5.1. The Standard.

Proposed paragraph (g) identifies performance as a factor for fiduciary consideration in selecting a designated investment alternative. The paragraph provides that the fiduciary must appropriately consider a reasonable number of similar investment alternatives and then must determine that the risk-adjusted expected returns of the designated investment alternative, over an appropriate time horizon and net of anticipated fees and expenses, furthers the purposes of the plan by enabling participants and beneficiaries to maximize risk-adjusted return on investment, net of those fees and expenses.

As further illustrated by the examples in paragraphs (g)(1) and (g)(2), discussed below, proposed paragraph (g) makes clear that a fiduciary's consideration of an investment alternative's performance should not focus solely on expected returns. When evaluating

performance, fiduciaries must take into account the risks that investors are exposed to with respect to the designated investment alternative (including, among other risks, economic, market, sector, and investment-specific risks and counterparty risks), as well as the risk capacity of the plan's participants.

Proposed paragraph (g) also references an appropriate time horizon. Plan fiduciaries must consider the time horizon of the plan's participants when evaluating performance. Depending on the age of the workforce, retirement savings can often involve a long time horizon. Evaluation of an investment alternative's performance should take into account the participants' likely needs over the course of the anticipated investment.

Finally, paragraph (g) provides that the consideration of an investment alternative's performance also should occur net of anticipated fees and expenses. This presents the fiduciary with the most accurate information about the investment's performance.

In all these areas, plan fiduciaries may wish to work with an investment advice fiduciary (within the meaning of ERISA section 3(21)(A)(ii)) to understand and evaluate the performance of the investment.

5.2. Performance Examples.

Proposed paragraph (g)(1) provides an example illustrating a fiduciary's consideration of returns. The example describes a named fiduciary that, after considering the risks of the potential investments and the risk capacity of the plan's participants, selects a target date fund series that has lower expected returns, but lower expected risk, as compared to the similar, alternative target date series considered. The lower risk strategy in the example included alternative assets with low correlations to stocks and bonds, which reduced the volatility of returns. In making the selection, the named fiduciary relied on advice from a third-party investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii). The example in paragraph (g)(1) illustrates the principle that plan fiduciaries need not select an investment strategy with the highest returns nor aim to achieve the highest possible returns but rather should seek to maximize returns for a

given level of appropriate risk, consistent with the participants' likely needs over the course of the anticipated investment.[35]

Proposed paragraph (g)(2) provides an example of a fiduciary's consideration of time horizon. In this example, a named fiduciary considers three target date fund series and selects a target date fund after considering the past 1-, 3-, 5-, and 10-year historical performance data, but relying most heavily on the 10-year data. In doing so, the named fiduciary relied on advice from a third-party investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii). The example in paragraph (g)(2) confirms that a plan fiduciary need not select an investment with the highest returns during a short period of time or the most recent period of time. An appropriate time horizon for retirement savings may be a long-term horizon due to the long-term nature of retirement savings.[36]

6. Fees.

6.1. The Standard.

Paragraph (h) of the proposed regulation identifies fees as a factor for fiduciary consideration in selecting designated investment alternatives. It provides that the fiduciary must objectively, thoroughly, and analytically 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, net of fees and expenses, 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 net of fees. Proposed paragraph (h) further provides that section 404(a)(1)(B) of ERISA and paragraph (h) of the proposal are not violated solely because the

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[35] *See Anderson v. Intel Corp. Inv. Pol'y Comm.*, 137 F.4th 1015, 1024 (9th Cir. 2025), cert. granted, No. 25-498 (Jan. 16, 2026) ("'ERISA fiduciaries are not required to adopt a riskier strategy simply because that strategy may increase returns.' To the contrary, courts have routinely rejected claims that an ERISA fiduciary can violate the duty of prudence by seeking to minimize risk." (citations omitted)).

[36] *See Pizarro v. Home Depot*, 111 F.4th 1165, 1179-80 (11th Cir. 2024) (rejecting a claim of failure to prudently monitor investments, stating, "[a] few here-and-there years of below-median returns, however, are not a meaningful way to evaluate a plan's success as a long-term investment vehicle").

fiduciary does not select the alternative with the lowest fees and expenses from among the reasonable number of alternatives considered. For example, a prudent fiduciary could choose to pay more in exchange for greater services.

Paragraphs (h)(1) through (5) of the proposed regulation set forth five examples applying the factor in proposed paragraph (h) to different fact patterns. While the fees of an investment alternative are to be assessed in relation to expected risk-adjusted returns, net of fees, and any other value the alternative brings to furthering the purposes of the plan, the fees of an investment alternative are also to be judged against the fees of a reasonable number of similar alternatives. Whether alternatives are similar, and what constitutes a reasonable number of them, are questions of fact and dependent on the specific facts and circumstances of each case. However, as the examples make clear, neither paragraph (h) of the proposed regulation nor ERISA's duty of prudence require a fiduciary to compare an investment alternative with every similar alternative available in the market.[37]

6.2. Fee Examples.

Paragraph (h)(1) of the proposed regulation provides an example demonstrating that a plan fiduciary is not considered imprudent solely because it selected a designated investment alternative with higher fees than other alternatives that have comparable risk-adjusted returns. Consistent with case law, this example illustrates that the duty of prudence does not include a categorical requirement to always select the alternative with the lowest fees even within a group of alternatives with comparable risk-adjusted return. In this example, the plan fiduciary prudently exemplary customer service as the value proposition of the designated investment alternative with higher fees, compared to the other similar alternatives being considered.

Paragraph (h)(2) of the proposed regulation provides an example that does not demonstrate that the plan fiduciary satisfied section 404(a)(1)(B) of ERISA and paragraph (h) of

[37] A number of court decisions have indicated that there is no duty to scour the market to find the fund with the lowest fees. *See, e.g.*, *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022), *Forman v. TriHealth, Inc*., 40 F.4th 443, 449 (6th Cir. 2012), *Hecker v. Deere & Co*., 556 F.3d 575, 586 (7th Cir. 2009).

the proposed regulation. In this example, which involves a highly rated registered investment company with multiple share classes, the plan fiduciary fails to consider the differences in fee structures among the various share classes of the fund and ultimately selects a more expensive share class that is identical in all respects to another available share class with lower fees. Nor did the fiduciary in this example enlist the assistance of professional advisor, manager, or consultant before making the selection. The example concludes the lower-cost share class appears to have a superior value proposition, and a prudent selection process ordinarily would have reflected that.

Paragraph (h)(3) of the proposed regulation provides an example reflecting the value proposition that a lifetime income benefit option can bring to furthering the purposes of the plan in question. In this example, the plan fiduciary implements the plan settlor's decision to add a lifetime income benefit option to the plan. To do so, the plan fiduciary selects a new designated investment alternative: an asset allocation fund offered through a variable annuity contract. This designated investment alternative is similar in all material respects—such as risk, return, liquidity, and allocation profile—to another designated investment alternative already on the plan investment menu, except that the existing designated investment alternative does not offer a lifetime income through a variable annuity contract. The two designated investment alternatives have the same expense ratio, but the new designated investment alternative offered through the variable annuity contract has an additional fee associated with the ability of participants to select the lifetime income feature. In this example, the plan fiduciary consults with an investment advice fiduciary, as defined in section 3(21)(A)(ii) of ERISA, who analyzes the annuity market generally, as well as the break-even ages and additional fee of the new designated investment alternative. The plan fiduciary then critically evaluates this analysis and adopts it in determining that the new alternative provides commensurate value for the fees charged. The example concludes that the fiduciary satisfied the consideration and determination requirement of paragraph (h) and section 404(a)(1)(B) of ERISA in deciding that the additional fee under the

variable annuity contract is appropriate in relation to the commensurate value it brings in furthering the purposes of the plan.

Paragraph (h)(4) of the proposed regulation provides an example involving a modification to a custom-designed designated investment alternative that is a qualified default investment alternative (target date fund) made for the purpose of risk mitigation—i.e., decreasing volatility and reducing the risk of large losses during a market downturn. The target date fund's existing strategy of targeting specific percentages of publicly traded stocks and bonds would be modified by including investments in specific percentages of hedge funds and private equity funds while reducing the target percentages of publicly traded stocks and bonds. This change would result in an increase in the target date fund's expense ratio. Additionally, under certain market conditions, the fund might underperform compared to its existing strategy, but the change would provide downside protection as added value. The example indicates that because the change in strategy would so clearly implicate the principal objectives of the target date fund, implementing the modification would be tantamount to the selection of a designated investment alternative subject to the proposal.

In this example, the named fiduciary enlisted the services of an investment advice fiduciary, as defined in ERISA section 3(21)(A)(ii), which provided the named fiduciary with a written report that stochastically modeled estimated risk-adjusted returns stemming from the adoption of the modifications and compared the modified target date fund to a reasonable number of similar alternatives. The named fiduciary considered and determined, within its discretion, that the modification to the target date fund to include the risk mitigation strategy furthered the purposes of the plan, including decreasing volatility and reducing the risk of large losses during a market downturn.[38] Furthermore, the named fiduciary considered and determined, within its discretion, that the higher expense ratio associated with the modification was

[38] *See Anderson v. Intel Corporation Inv. Policy Comm.*, 137 F.4th 1015, 1024 (9th Cir. 2025), cert. granted, No. 25-498 (Jan. 16, 2026) (noting, in a similar context, that courts have routinely rejected claims that an ERISA fiduciary can violate the duty of prudence by seeking to minimize risk).

appropriate in light of the estimated higher risk-adjusted expected returns, net of fees and expenses, over an appropriate horizon for the target date fund. The example concludes that the named fiduciary would satisfy the requirements of proposed paragraph (h) and ERISA section 404(a)(1)(B) with respect to the fees and expenses of the modified target date fund. This is entirely consistent with ERISA's statutory purpose, caselaw, and earlier statements from the Department.[39]

Paragraph (h)(5) of the proposed regulation provides an example involving active management, increased fees, and greater diversification benefits. In this example, a plan fiduciary enlists the services of an investment advice fiduciary to analyze several small-cap funds, half of which are actively managed and the other half passively managed. The passive funds are comparably priced to each other, and the actively managed funds are comparably priced to each other. However, the actively managed funds all charge higher fees than the passive funds. The plan fiduciary selected the best-performing active fund and the best-performing passive fund as designated investment alternatives. This example illustrates that a plan fiduciary may choose to offer both an actively managed and passive fund within a particular strategy to secure diversification benefits for participants across the plan investment menu. In so doing, the fiduciary may prudently conclude that the value of these diversification benefits justifies the selection of an actively managed fund that charges higher fees than a passive

[39] *See, e.g.*, S. Rep. No. 92-634, at 21 (1972) (Congress prioritized customization, recognizing it as "essential to achieve the basic objectives of private pension plans because of the variety of factors which structure and mold the plans to individual and collective needs of different workers, industries, and locations."); U.S. Dep't of Labor, Employee Benefits Security Admin., *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* 3 (Feb. 2013) (expressly noting that while off-the-shelf, or "pre-packaged," TDFs are available – often at a very low fee – "custom" TDFs crafted specifically for a particular plan, based on the specific needs of the plan, and often composed of investment options already in the plan line-up "may offer advantages" that fiduciaries may wish to consider despite the additional "costs and administrative tasks involved" in these types of investments); *Anderson v. Intel Corporation Inv. Policy Comm.*, 137 F.4th 1015, 1024 (9th Cir. 2025) (noting, consistent with earlier Department positions, "a fiduciary should act as a prudent investment manager following the principles of modern portfolio theory, which recognizes that while the individual riskiness of a particular investment cannot be eliminated, it can be managed through the diversification of investment assets"); *DiFelice v. U.S. Airways, Inc*., 497 F.3d 410, 423 (4th Cir. 2007) ("[M]odern portfolio theory has been adopted by the investment community and, for the purposes of ERISA, by the Department of Labor." (citing 29 CFR § 2550.404a-1)); *Laborers Nat'l Pension Fund. v. N. Trust Quantitative Advisors, Inc*., 173 F.3d 313, 322 (5th Cir. 1999) ("Since 1979, investment managers have been held to the standard of prudence of the modern portfolio theory by the Secretary's regulations." (citing 29 CFR § 2550.404a-1)).

counterpart. This example is consistent with several court decisions that involve the offering of both actively managed and passive plan investment alternatives.[40]

7. Liquidity.

7.1. The Standard.

Paragraph (i) of the proposed regulation clarifies that a 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.[41] Alternative asset investments are often less liquid than the publicly traded stock and bond funds that are held by funds that plan fiduciaries often make available to plan participants. Illiquid investments generally offer an illiquidity premium to investors who are willing to hold their investment, for some time, without selling it for cash. Many retirement savers, particularly younger workers, have long investment time horizons until retirement and, therefore, fit the profile of an investor who can benefit from a liquidity premium.

To achieve the goal of clarifying that ERISA gives fiduciaries the discretion to offer designated investment alternatives that contain illiquid alternative investments, the regulation also provides that plans do not need to offer fully liquid investment options. Nonetheless, plan fiduciaries must ensure that investments can deliver on any promises of liquidity that are made to participants and beneficiaries. Plan fiduciaries should also consider the liquidity needs of their plan and whether other plans' (or other investors') redemptions might adversely affect the liquidity of the designated investment alternative.

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[40] *See, e.g.*, *Smith v. CommonSpirit Health*, 37 F. 4th 1160 (6th Cir. 2022); *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478 (8th Cir. 2020).

[41] *See Barchock v. CVS Health Corp*., No. CV 16-061-ML, 2017 WL 1382517, at *4 (D.R.I. Apr. 18, 2017) (holding that a fiduciary satisfied the duty of prudence in selecting a liquidity level aligned with the plan's investment objectives), *aff'd*, 886 F.3d 43 (1st Cir. 2018); *Taylor v. United Techs. Corp.*, No. 3:06CV1494, 2009 WL 535779, at *9 (D. Conn. Mar. 3, 2009) (finding that a fiduciary's evaluation and determination of the appropriate level of liquidity for its plan "satisfie[d] the prudent person standard"), *aff'd*, 354 F. App'x 525 (2d Cir. 2009).

7.2. Liquidity Examples.

Paragraph (i)(1) of the proposed regulation contains a positive example of how a plan fiduciary may be deemed to have appropriately considered the participant-level liquidity needs of the plan when selecting a designated investment alternative, including one that holds a portion of illiquid, non-publicly traded securities. The example reflects the reality that some participants contribute to their plan knowing they can take hardship withdrawals or loans because their investments offer daily liquidity. Likewise, the example acknowledges that some plans cover workers with high turnover rates, who, pursuant to the plan terms, often roll their money out of the plan upon separation. The example also posits that when plan terms allow frequent trading, some participants avail themselves of this option. In all these cases, despite the decades they have to save before attaining retirement age, plan participants with long time horizons until retirement may nonetheless expect and need daily liquidity.

The example concludes that one approach available to plan fiduciaries is to obtain a written representation from the person responsible for managing the designated investment alternative regarding the designated investment alternative's liquidity risk management program.[42] For a designated investment alternative that is a mutual fund registered as an open-end management investment company with the SEC under the Investment Company Act (a "mutual fund"), the example notes that mutual funds are required by rule 22e-4 under the Investment Company Act to adopt and implement a written liquidity risk management program that is reasonably designed to assess and manage their liquidity risk.[43] For any designated

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[42] The Department is not prescribing how a fiduciary should evaluate written representations as described in this proposal's examples. The Department believes that important parts of a fiduciary's evaluation under the proposal would include whether the representations are consistent with the terms of the investment alternative's organizational documents and plan's investment agreements, whether those documents or agreements provide a degree of flexibility that effectively cuts back on the matter being represented (*e.g.*, by permitting an investment alternative to suspend investor withdrawal rights established in its organizational documents), and whether the documents or agreements may be amended without the consent of the plan fiduciary. In some instances, a plan fiduciary may need to negotiate a separate agreement to substantiate the matters being represented.

[43] *See* 15 U.S.C. 80a-15(c); SEC Rule 22e-4, 17 CFR § 270.22e-4 ("liquidity risk management programs"), applies to certain investment funds registered with the SEC (generally registered open-end management investment companies) and establishes a regulatory framework intended to reduce the risk that a fund will be unable to meet its

investment alternative not described in the preceding sentence, such as a collective investment trust, the written representation must express that the designated investment alternative has adopted and implemented a liquidity risk management plan that is substantially similar to a program that meets the requirements of such Act. The example also recognizes that a plan fiduciary may otherwise perform appropriate due diligence regarding the designated investment alternative's liquidity risk management program that would satisfy the safe harbor even in the absence of obtaining a written representation for designated investment alternatives that are not mutual funds. The conclusion in this example depends on the plan fiduciary reading and critically reviewing any written representation (independently or with assistance of a qualified investment professional if necessary) and not knowing (or having reason to know) other information which would cause the fiduciary to question any written representation.

In developing this example, the Department understands that participant-level liquidity needs of plans are highly variable, ultimately depending on factors such as the type of plan at issue, its features, and the overall profile of the participants and beneficiaries of the plan as a whole. That variability notwithstanding, the outcome in this example illustrates a deliberative process under which the plan fiduciary assures itself that the designated investment alternative has adopted and implemented a program such that the designated investment alternative is likely to be able to meet the liquidity expectations of the participants and beneficiaries, even in cases when the plan promises participants daily liquidity and the designated investment alternative holds assets it cannot easily sell.

Paragraph (i)(2) of the proposed regulation contains a positive example of how a plan fiduciary may be deemed to have appropriately considered the participant-level liquidity needs of

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redemption obligations and minimize dilution of shareholder interests by promoting stronger and more effective liquidity risk management across funds. It requires funds to establish liquidity risk management programs, which are required to include multiple elements, including: assessment, management, and periodic review of a fund's liquidity risk; classification of the liquidity of fund portfolio investments; determination of a highly liquid investment minimum; limitation on illiquid investments; and board oversight.

the plan when selecting as a designated investment alternative a guaranteed deferred annuity contract that contains substantial restrictions on liquidity at the participant level. The example illustrates that the mechanics of the annuity in the contract at issue are such that monthly participant contributions purchase increments of deferred income with payments for life beginning when the participant reaches age 65. These monthly contributions are fully committed (i.e., not liquid) after 90 days, and any immediate withdrawals by the participant before age 65 would result in a penalty and a market value adjustment to the value of the annuity that begins at age 65.

This example concludes that the plan fiduciary in question would satisfy the consideration and determination requirements of paragraph (i) of the proposed regulation (i.e., the liquidity factor) if the fiduciary, after an objective, thorough, and analytical investigation, concludes that the increase in the value of the guaranteed monthly payments for the lives of the participants and beneficiaries that select to invest in this designated investment alternative and the certainty of the insurer's guarantee under the contract justify the restrictions on liquidity. Put differently, the example demonstrates that the plan fiduciary in this example must balance the restrictions on liquidity under the annuity contract with the value of the guaranteed monthly payments under the annuity contract, recognizing that such guarantees help plan participants manage investment and longevity risk for the rest of their lives, and determine that the lack of liquidity is justified by a commensurate expected increase in the return on investment or certainty with respect to future payments.

Paragraph (i)(3) of the proposed regulation contains a positive example of how a plan fiduciary may be deemed to have appropriately considered the plan-level liquidity needs of the plan when selecting a designated investment alternative, including one that holds a portion of illiquid, non-publicly traded securities. Just as plan participants may want or need liquidity, retirement plans themselves may need to convert a designated investment alternative's assets into cash without a reduction in value. For example, plans may terminate, merge, or the plan

fiduciary may simply decide to liquidate the plan's share in a designated investment alternative if the fiduciary decides to close out the position. Plan-level liquidity considerations also include whether the designated investment alternative manager has the ability to maintain asset allocation targets if other plans (or other investors) demand a redemption.

In traditional pooled investments in publicly traded stocks and bonds, these liquidity needs are typically not hard to meet. Most funds hold securities that can be sold in public markets quickly without lowering the price. In contrast, pooled investments that plan to manage liquidity while also holding sleeves of illiquid assets may impose various kinds of liquidity restrictions (such as requiring advance notice and permitting only incremental redemptions over a period of time) to ensure that they do not stray too far from their asset allocation targets by selling liquid assets to meet redemptions, leaving the funds with an overallocation to illiquid assets relative to the strategy target.

The conclusion in this example illustrates two paths a plan fiduciary may follow to demonstrate that it appropriately considered and determined that the scope and duration of redemption restrictions at the plan level meet the anticipated needs of the plan.

The first path is the same approach discussed in the example in paragraph (i)(1) of the proposed regulation addressing participant-level liquidity needs of the plan. Under this path, a fiduciary may rely on the fact that a mutual fund is required to adopt and implement a written liquidity risk management program that is reasonably designed to assess and manage its liquidity risk under the Act. With respect to designated investment alternatives that are not mutual funds, the plan fiduciary could obtain a written representation that the designated investment alternative has adopted and implemented a liquidity risk management plan substantially similar to a program that meets the requirements of such Act (or otherwise perform appropriate due diligence), provided that the plan fiduciary read, critically reviewed and understood any written representation (independently or with assistance of a qualified investment professional if

necessary) and did not know (or have reason to know) other information which would cause the fiduciary to question any written representation.

Under the second path, plan fiduciaries may instead conduct an objective, thorough, and analytical evaluation, on their own or with the help of a third-party investment advice fiduciary, to assess whether a pooled investment is sufficiently liquid to offer as a designated investment alternative. The plan fiduciary should determine the time it would take a designated investment alternative to sell its illiquid investments in the quantity required by the plan's liquidity needs without reducing their value and the liquidity restrictions the investment manager places on the designated investment alternative. The plan fiduciary must conclude that the designated investment alternative appropriately balances future liquidity needs with the ability of the designated investment alternative to achieve increased risk-adjusted return on investment net of fees and the ability to maintain its asset allocation targets even if the fund faces a significant pull on liquidity from redemption requests.

Paragraph (i)(4) of the proposed regulation provides an example that demonstrates a prudent evaluation of liquidity at both the participant and plan level with respect to a pooled investment vehicle that trades liquidity for the ability to diversify into alternative investments to achieve better risk-adjusted returns net of fees. In this example, the plan fiduciary is considering selecting as a designated investment alternative a fund that only permits quarterly redemptions at the plan level but provides daily liquidity to individual participant investors. This liquidity restriction on the plan provides flexibility for the designated investment alternative's manager, and the fund allocates a portion of its holdings to private assets, some or all of which are illiquid.

The fiduciary obtains representations that the designated investment alternative has adopted and implemented a program that imposes requirements substantially similar to the requirements related to liquidity risk management programs for mutual funds. The timing of the liquidity management is designed to ensure the fund can meet the redemption rights of participating plans while providing plan participants with daily liquidity. Just as in the other

examples, the fiduciary reads and critically reviews the written representations, and the fiduciary consults a third-party investment advice fiduciary. The fiduciary also does not know, or have reason to know, other information which would cause the fiduciary to question the written representations. In this case, the fiduciary, after an objective, thorough, and analytical evaluation, determines that the redemption structure of the product is appropriate for the needs of the plan and its participants, and the plan-level liquidity tradeoffs are worth the expected increase in risk-adjusted return net of fees. As the example notes, this analysis may benefit from the assistance of a professional adviser or advisors.

8. Valuation.

8.1. The Standard.

Paragraph (j) of the proposed regulation identifies valuation as a factor for fiduciary consideration in selecting designated investment alternatives. It provides that 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. For illustrative purposes, paragraph (j) also contains four examples in which plan fiduciaries apply this factor in connection with selecting a designated investment alternative.

8.2. Valuation Examples.

Paragraph (j)(1) of the proposed regulation provides an example involving a designated investment alternative that holds investments that trade daily on a public exchange regulated under section 6 of the Securities Exchange Act of 1934, other than cash and cash equivalents. The example clarifies that plan fiduciaries may rely on asset valuations derived from a national securities exchange or another similar, public exchange to the extent the exchange constitutes a generally recognized market through which the value of the investment is readily and accurately determinable in a timely manner. The example concludes that a fiduciary that relies on valuations derived from public exchanges is deemed to have objectively, thoroughly, and

analytically determined that the designated investment alternative has adopted adequate measures to ensure that it can be timely and accurately valued in accordance with the needs of the plan.[44] This example therefore is consistent with the view that investors, including fiduciaries, may rely on public exchanges to determine the value of an investment because those exchanges generally incorporate all publicly available information.[45]

Paragraph (j)(2) of the proposed regulation provides an example involving a designated investment alternative that contains some securities that trade daily on a public exchange (i.e., publicly-traded securities) and some securities for which there is not a generally recognized market (i.e., non-publicly-traded securities). The named fiduciary in this example receives a written representation that the non-public securities are valued no less frequently than quarterly through a conflict-free, independent process according to valuation techniques that satisfy the Financial Accounting Standards Board (FASB) Accounting Standards Codification 820 on Fair Value Measurement.[46] The fiduciary also receives the current value of each share/unit of or interest in the designated investment alternative in writing. The fiduciary's reliance on this valuation method is considered prudent because the process for determining value was conflict-free, independent, and relies on the application of widely recognized and utilized accounting standards. Consequently, the fiduciary will be determined to have met the consideration and determination requirements of paragraph (j) with respect to the designated investment alternative provided it reads, critically reviews, and understands any written representations and it does not have any information that would cause him to question them.

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[44] *See, e.g.*, *Fifth Third Bancorp. v. Dudenhoeffer*, 573 U.S. 409, 426-27 ("ERISA fiduciaries . . . may, as a general matter, likewise prudently rely on the market price.").

[45] *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 462 (2013) ("[I]t is reasonable to presume that *most* investors—knowing that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information." (emphasis added)).

[46] *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 478 n.3 (S.D.N.Y. 2005) (finding that the FASB is "the designated organization in the private sector for establishing standards of financial accounting and reporting").

Importantly, the conclusion of the example in paragraph (j)(2) of the proposed regulation would not change solely because the manager of the investment, acting in good faith, is permitted to adopt alternative valuation procedures if the manager determines and documents a temporary emergency that could result in a negative impact on investors if the generally applicable valuation procedures are followed. The example identifies such a temporary emergency as arising if investors would be able to redeem their interests based on a valuation that the manager believes is inflated and that would result in significant harm to remaining investors.

Paragraph (j)(3) of the proposed regulation provides an example involving a mutual fund that contains some securities that trade daily on a public exchange and some securities for which there is not a generally recognized market. Under the Investment Company Act and rule 2a-5 thereunder, mutual funds are required to have audited financial statements prepared in accordance with generally accepted accounting principles. These audited financial statements include an auditor's report. As part of its process, the plan fiduciary may seek additional assurance by reviewing a fund's publicly available financial statements and valuation-related disclosures to confirm compliance with all applicable requirements under the Investment Company Act related to pricing and valuation of its shares and by reviewing a fund's Form N-1A prospectus disclosures to confirm that a majority of the fund's board is independent (or "non-interested").[47] The example concludes that the fiduciary will have met the consideration and determination requirement of paragraph (j) with respect to the designated investment alternative if the fiduciary reviews the mutual fund's publicly available audited financial statements, and valuation-related disclosures; consults with a qualified investment professional , if necessary; and the fiduciary does not know or have reason to know information which would cause the

[47] This includes Rules 22c-1 (17 CFR 270.22c-1 (pricing of redeemable securities for distribution, redemption and repurchase)), 2a-4 (17 CFR 270.2a-4 (definition of "current net asset value" for use in computing periodically the current price of redeemable security)), and 2a-5 (17 CFR 270.2a-5 (fair value determination and readily available market quotations)).

fiduciary to question the veracity of the audited financial statements. The example illustrates the principle that plan fiduciaries selecting designated investment options governed by the Investment Company Act may rely on asset valuations that result from the application of reasonable valuation procedures adopted to comply with the Act and rule 2a-5 thereunder.

Paragraph (j)(4) of the proposed regulation provides an example involving a designated investment alternative that is a continuation fund (Fund) managed or controlled by an entity (Manager) that has recently acquired or contemplates an imminent acquisition of assets from an investment vehicle, such as another fund or vehicle with alternative assets, that is managed or controlled by the Manager or an affiliate of the Manager. Because non-publicly traded assets may be purchased for the Fund from a vehicle controlled by the manager or an affiliated investment vehicle, the potential for the Manager to rely on a conflicted or self-serving valuation is particularly acute, potentially diminishing the risk-adjusted returns offered by the designated investment alternative. And instead of ensuring that valuations are obtained through an independent and conflict-free process, the named fiduciary responsible for the selection of the designated investment alternative agrees that a proprietary valuation methodology relying on inputs provided by affiliates of the Manager may be used. This example reflects a flawed selection process that does not demonstrate that the fiduciary appropriately considered and determined that the designated investment alternative had adopted adequate measures to ensure that the designated investment alternative was capable of being timely and accurately valued in accordance with the needs of the plan. Even where designated investment alternatives do not hold plan assets under ERISA, conflicts of interest can exist. Where 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 render the designated investment alternative's valuation inaccurate.

The Department invites comment on whether, and if so how, this rulemaking should be modified to include additional safeguards, consistent with the proposal's asset-neutral, process-based framework and EO 14330, to address risks that may arise in connection with the valuation and asset selection process of certain private asset vehicles, such as continuation funds. The Department welcomes comment on approaches for addressing such risks in a manner consistent with ERISA's fiduciary standards.

9. Performance Benchmark.

9.1. The Standard.

Paragraph (k) of the proposed regulation emphasizes the importance of using a meaningful benchmark as a factor when selecting designated investment alternatives. In relevant part, paragraph (k) of the proposal provides that the fiduciary must appropriately consider and determine that each designated investment alternative has a meaningful benchmark and compare the risk-adjusted expected returns, net of fees, of the designated investment alternative to the meaningful benchmark. This provision reflects the great weight of authority.[48]

Paragraph (k) of the proposed regulation defines "meaningful benchmark" for this purpose as "an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative."[49] The point of this definition is to ensure sufficient likeness between the comparator and the designated investment

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[48] *See, e.g.*, *Matney* v. *Barrick Gold*, 80 F.4th 1136, 1149 (10th Cir. 2023) (describing the need for "an apples-to-apples comparison"); *Matousek* v. *MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) (describing the need for a "meaningful benchmark"); *Davis* v. *Wash. Univ. in St. Louis*, 960 F.3d 478, 483-85 (8th Cir. 2020) ("[T]o create an inference of a 'flawed' process," however, an investment's underperformance must be measured against a "'meaningful benchmark . . . . [c]omparing apples and oranges is not a way to show that one is better or worse than the other.'" (citation omitted)).

[49] *See, e.g.*, *Matney v. Barrick Gold*, 80 F.4th 1136, 1148 (10th Cir. 2023); *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018). The definition in paragraph (k) of the proposed regulation flows from the fact that the federal courts of appeals have recognized that, in evaluating the duty of prudence in the context of comparative performance, "[c]omparing apples and oranges is not a way to show that one is better or worse than the other." *Davis v. Wash. Univ. in Saint Louis*, 960 F.3d 478, 485 (8th Cir. 2020). Moreover, the mere fact that an investment is labelled "as 'comparable' or 'a peer' is insufficient to establish that those [investment options] are meaningful benchmarks." *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 137 F.4th 1015, 1023 (9th Cir. 2025). "The need for a relevant comparator with similar objectives—not just a better-performing plan or investment—is implicit in ERISA's text" such that the statute makes the standard of care that of a hypothetical prudent person acting in a "like capacity" in the conduct of an enterprise "of a like character," and "with like aims." *Id.* at 1022.

alternative. Furthermore, it follows from this definition that while there may be more than one meaningful benchmark for a designated investment alternative, no single benchmark is a meaningful benchmark for all designated investment alternatives on a plan investment menu. Paragraph (k) of the proposed regulation incorporates this unassailable principle.

As indicated, paragraph (k) of the proposed regulation requires the plan fiduciary to compare the risk-adjusted expected returns, net of fees, of the designated investment alternative to the meaningful benchmark. For purposes of this comparison, paragraph (k) of the proposed regulation provides that 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 it 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 fiduciary should try to 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 simply seek to identify the best possible comparators to it while also assessing the potential value proposition presented by that design.[50]

9.2. Benchmark Examples.

Paragraph (k)(1) of the proposed regulation provides an example of a performance benchmark for a designated investment alternative that is a target date fund. The target date fund's strategy and objective involve investing in asset classes that change over time, with different degrees of risk, gradually becoming more conservative over time. The example concludes that the plan fiduciary's use of a benchmark that is an index that tracks the returns of

[50] The Department notes that the standard in proposed paragraph (k)—that a fiduciary must appropriately consider and determine that each designated investment alternative has a meaningful benchmark and compare the risk-adjusted expected returns, net of fees, of the designated investment alternative to the meaningful benchmark—is designed to apply to the fiduciary's prudent process in selecting a designated investment alternative. The benchmark that is selected for disclosure to participants for purposes of the Department's participant-disclosure regulation at 29 CFR 2550.404a-5 has a different purpose, i.e., "for participants to use in assessing the various investment options available under their plans[,]" and is governed by the requirements of that regulation. *Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans*, 75 FR 64910, 64916 (Oct. 20, 2010).

large capitalization U.S. equities (when a more similar potential benchmark was available) would not establish that the fiduciary satisfied the requirements of paragraph (k) of the proposed regulation. A large capitalization index is not a meaningful comparator because it tracks different securities than the target date fund holds. Furthermore, the large capitalization index only adjusts its constituents over time due to changes in the constituent securities' market capitalizations, rather than based on the years until a particular date, as a target date fund does. This example illustrates the principle that a performance benchmark must be a meaningful comparator by sharing similar traits, including mandates, strategies, objectives, and risks to the designated investment alternative.

Paragraph (k)(2) of the proposed regulation contains an example of a performance benchmark for a designated investment alternative that is an asset allocation fund, and which contains a private equity sleeve, as well as publicly traded stocks and bonds. In the example, a prudently selected investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii), who has no affiliation with the asset allocation fund, recommended the designated investment alternative after creating a composite benchmark measuring risk-adjusted expected returns, net of fees, of the two sleeves of the designated investment alternative. For the stock and bond sleeves, the composite blends the performance of broad-based securities market indices relative of and in proportion to the stock and bond holdings of the designated investment alternative. For the private equity sleeve, it uses a combination of methodologies commonly used by investment professionals, including the internal rate of return method and a public market equivalent method (presented with explanations of how to interpret them). The investment advice fiduciary in this example also provides the named fiduciary with a written explanation of the composite benchmark, which the named fiduciary reads, critically reviews, and understands.

The plan fiduciary in this example satisfies paragraph (k) of the proposed regulation and ERISA section 404(a)(1)(B) because it objectively, thoroughly, and analytically considered and determined that the designated investment alternative has a meaningful benchmark and then

compared the risk-adjusted expected returns, net of fees, of the designated investment alternative to the meaningful benchmark. The composite benchmark reflects the strategies and proportions of the underlying assets of the designated investment alternative. The named fiduciary read, critically reviewed, and understood the investment advice fiduciary's explanation of the composite benchmark. This example illustrates the principle that a named fiduciary, including in the context of the selection of an asset allocation fund which includes a sleeve of alternative assets, may rely on the expertise of an investment advice fiduciary in benchmark construction and analytics, so long as it reads, critically reviews, and understands the investment advice fiduciary's explanation.

Paragraph (k)(3) of the proposed regulation provides a positive example of a named fiduciary using a custom composite benchmark to select as a designated investment alternative a target date fund that holds only publicly traded stocks and bonds. The custom composite benchmark is a blend of broad-based securities market indices, which blend represents the asset allocation used to implement the target date fund's strategy. The named fiduciary reads, critically reviews and understands the benchmark description. The named fiduciary compares the historical performance of the target date fund to the historical returns of the custom composite benchmark as a means of evaluating the risk-adjusted expected returns, net of fees, of the target date fund.

The named fiduciary in this example satisfies the requirements of ERISA section 404(a)(1)(B) and paragraph (k) of the proposed regulation by analytically, thoroughly, and objectively considering and determining within its discretion that the designated investment alternative has a meaningful benchmark which shares similar traits, including mandates, strategies, objectives, and risks, and comparing the risk-adjusted expected returns, net of fees, between the designated investment alternative and the benchmark. This example illustrates the principle that plan fiduciaries may, if appropriate under the circumstances because the fiduciary reviewed and understood the benchmark and because the custom composite shares similar traits

with the designated investment alternative, rely on benchmarks that blend multiple broad-based securities market indices to represent the asset allocation used to implement the target date fund's strategy.

10. Complexity.

10.1. The Standard.

Proposed paragraph (*l*) addresses the impact of an investment's complexity on a fiduciary's prudent selection of the investment as a designated investment alternative for a plan's participants. It would make clear that plan fiduciaries are not precluded from prudently selecting sophisticated investment strategies that may be complex. In doing so, the paragraph provides that the 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. In this regard, the Department has previously stated in the case of complex investments, plan fiduciaries are responsible for securing sufficient information to understand the investment, and its attendant risks, prior to making the investment.[51]

If a plan fiduciary determines to seek assistance in selecting a designated investment alternative, the fiduciary must make a prudent selection of an investment professional. The named fiduciary should consider all the relevant circumstances, including the knowledge, skill, and compensation of the investment professional. Seeking 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. Moreover, if a named fiduciary appoints an investment manager

[51] U.S. Dep't of Labor, Employee Benefits Security Admin., Information Letter from Louis J. Campagna to Jon Breyfogle, at n.7 (June 3, 2020) (citing Information Letter from Olena Berg to Eugene A. Ludwig (Mar. 21, 1996) (at www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/information-letters/03-21-1996)).

within the meaning of ERISA section 3(38), the named fiduciary is responsible for the prudent selection of the manager but is not liable for the individual investment decisions of that manager.[52]

As noted in proposed paragraph (*l*), a plan fiduciary must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual if the plan fiduciary determines that it does not have the skills, knowledge, experience, or capacity to understand an investment sufficiently to discharge its obligations under ERISA and the governing plan documents. *See, e.g.*, *Chesemore v. All. Holdings, Inc.*, 886 F. Supp. 2d 1007, 1041-42 (W.D. Wis. 2012), *aff'd sub nom. Chesemore v. Fenkell*, 829 F.3d 803 (7th Cir. 2016) (stating that when fiduciaries "lack the requisite knowledge, experience and expertise to assess the prudence of an investment, the duty of care may require them to hire independent professional advisors"); *Harley v. Minn. Mining & Mfg. Co.*, 42 F. Supp. 2d 898, 907 (D. Minn. 1999), *aff'd sub nom. Harley v. Minn. Min. & Mfg. Co.*, 284 F.3d 901 (8th Cir. 2002) ("[("[I]f]f a fiduciary lacks the education, experience, or skills to be able to conduct a reasonable, independent investigation and evaluation of the risks and other characteristics of the proposed investment, it must seek independent advice."); *Liss v. Smith*, 991 F. Supp. 278, 297 (S.D.N.Y. 1998) ("[("[W]here]here the trustees lack the requisite knowledge, experience and expertise to make the necessary decisions with respect to investments, their fiduciary obligations require them to hire independent professional advisors."). The Department notes that with respect to the other safe harbors proposed herein, to the extent a plan fiduciary reasonably relies on recommendations of a prudently selected investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, or prudently delegates compliance to an investment manager within the meaning of section 3(38) of ERISA, that fact will be indicative of a prudent process. However, none of the safe harbors require a plan fiduciary to seek assistance from an investment advice fiduciary or

[52] However, the named fiduciary must monitor the manager periodically to assure that it is handling the plan's investments in accordance with the appointment.

investment manager, regardless of whether such assistance is referred to in the factual discussion of the safe harbor. Rather, the standard is whether the fiduciary has the skills, knowledge, experience, or capacity to understand an investment sufficiently to discharge its obligations under ERISA and the governing plan documents.

10.2. Complexity Examples.

Proposed paragraph (*l*)(1) provides an example of complexity in the area of fees. As noted in paragraph (h) of the proposed regulation, the plan fiduciary must determine that the fees and expenses of a designated investment alternative are appropriate, taking into account the designated investment alternative's risk adjusted returns and any other value the designated investment alternative brings to furthering the purposes of the plan. Paragraph (*l*)(1) addresses the fiduciary's obligation to understand the complex fees that will be charged to the plan.

The example in proposed paragraph (*l*)(1) describes a pooled investment vehicle that has target positions in private assets which employ variable fee-based incentive structures to drive performance, including management fees and performance fees which include carried interest rights. It then describes two scenarios in which a plan fiduciary is deemed to have met the comprehension requirements. In the first scenario, the plan fiduciary conducts relevant due diligence with respect to understanding the fees and expenses, with the advice of a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, if appropriate. After the evaluation, the plan fiduciary concludes that the fee structure will deliver increased value that outweighs the variability and potential unpredictability of the amount and timing of the fees. In the second scenario, the plan fiduciary determines based on written representations from the fund manager that the manager will internalize the underlying fees and the plan will pay only an appropriate, flat fee based on assets under management in the pooled investment product.

Proposed paragraph (*l*)(2) relates to complexity in the area of participant needs and illustrates an example that would not satisfy paragraph (*l*) and section 404(a)(1)(B) of ERISA. In the example, the named fiduciary selects as the plan's qualified default investment alternative a

managed account service designed to create a customized portfolio targeted to each participant's unique financial circumstances. The named fiduciary, that does not understand the design of the service and does not seek professional advice, provides only the age of each participant to the service and does not provide, or permit participants to provide, additional information about their unique financial circumstances. As a result, the service creates a portfolio for each participant that is materially similar to the portfolio that the participant would obtain through the plan's target date fund, which has substantially lower fees. This example demonstrates a flawed selection process in which the named fiduciary appears to not understand how the designated investment alternative delivered value to the plan and therefore failed to operationalize it accordingly.

11. Designated Investment Alternative Defined.

Paragraph (m)(1) of the proposal generally defines the term "designated investment alternative" to mean any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, including a qualified default investment alternative within the meaning of 29 CFR 2550.404c-5. This proposed definition includes qualified default investment alternatives because, even though participants are defaulted into those investments, they have the opportunity to instead direct investment to other plan options. The Department believes this broad definition is appropriate to implement EO 14330's directive for guidance with respect to a fiduciary's duties "when deciding whether to make available" particular investments. However, because the Department is of the view that the application of fiduciary principles to investments that a plan participant makes through arrangements such as self-directed brokerage windows may be somewhat different, proposed paragraph (m)(2) makes clear that the term "designated investment alternative" does not include "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

The definition of "designated investment alternative" in the proposal would extend to managed account services that are qualified default investment alternatives.[53] In this respect, the term designated investment alternative in the proposal would have broader scope than in the Department's participant-level disclosure regulation at 29 CFR 2550.404a-5, which does not include an investment management service as a designated investment alternative subject to the regulation's investment-related disclosure requirements (although certain other disclosure obligations would apply).[54] The narrower scope of the definition in the participant-level disclosure regulation relates to the practicality of making the investment-related disclosures with respect to a managed account service, as opposed to a determination that managed account services should be distinct for all purposes. Given the prevalence of qualified default investment alternatives in participant-directed individual account plans, extending the fiduciary safe harbors in the proposal to all types of qualified default investment alternatives, including managed account services, is particularly important.[55]

11.1. Settlor Discussion.

Paragraph (m)(3) of the proposed regulation explains that the term "designated investment alternative" does not include plan design features chosen by plan settlors in a nonfiduciary capacity. While, as explained above, the term "designated investment alternative" is defined broadly to include a qualified default investment alternative within the meaning of 29 CFR 2550.404c-5, the Department believes it is important to clarify that the definition does not stretch so broadly as to capture noninvestment features that may be chosen by plan settlors. This is particularly salient for longevity risk-sharing pools which are specifically discussed in EO 14330. While it is true that a longevity risk-sharing pool might be implemented or offered in a

[53] *See e.g.*, proposed paragraph (*l*)(2) discussing application of the proposal to a qualified default investment alternative that is a managed account service.
[54] Field Assistance Bulletin No. 2012-02R, Q27, https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2012-02r.
[55] *See* 29 CFR 2550.404c-5(b)(2) ("Nothing in this section shall relieve a fiduciary from its duties under part 4 of title I of ERISA to prudently select and monitor any qualified default investment alternative under the plan or from any liability that results from a failure to satisfy these duties, including liability for any resulting losses.").

participant-directed individual account plan through a designated investment alternative, it is also true that a longevity risk-sharing pool might be implemented by a plan sponsor through structural changes to a plan design.[56]

12. Regulatory Impact Analysis.

The Department has examined the effects of the proposal as required by Executive Order 13563,[57] Executive Order 12866,[58] the Paperwork Reduction Act of 1995,[59] the Regulatory Flexibility Act,[60] section 202 of the Unfunded Mandates Reform Act,[61] Executive Order 13132,[62] and Executive Order 14192.[63]

12.1. Executive Orders.

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must select a regulatory approach that maximizes net benefits, including potential economic, environmental, public health, and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

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[56] *Compare*, for example, a product like CREF's "variable annuity," which offers longevity risk pooling and could be offered as a designated investment alternative through the prudent process described in the proposed regulation *with* a settlor decision to implement a longevity risk pooling payout feature within the design of a participant-directed individual account plan, separate and apart from any underlying plan investment. *See, e.g.*, *Where Are the Retirement Tontines?*, Larry Pollack, REGULATION (Spring 2023) (explaining how CREF's variable annuity product creates open "longevity pools"); *Individual Tontine Accounts*, Richard K. Fullmer & Michael J. Sabin, JOURNAL OF ACCOUNTING AND FINANCE (Aug. 8, 2018) (describing how longevity risk pooling could be implemented, as a design matter, in an account-based solution, in a way that is wholly agnostic to the underlying investment or designated investment alternative).
[57] 76 FR 3821 (Jan. 21, 2011).
[58] 58 FR 51735 (Oct. 4, 1993).
[59] 44 U.S.C. § 3506(c)(2)(A) (1995).
[60] Pub. L. No. 96-354, 94 Stat. 1164 (1980).
[61] Pub. L. No. 104-4, 109 Stat. 48 (1995).
[62] 64 FR 43255 (Aug. 9, 1999).
[63] 90 FR 9065 (Feb. 6, 2025).

Under Executive Order 12866, "significant" regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities (also referred to as "economically significant");

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This proposal seeks to clarify the relevant factors and determinations that fiduciaries should consider when selecting designated investment alternatives for participant-directed individual account plans under section 404(a)(1)(B). OMB has determined that this proposal is significant within the meaning of Section 3(f)(1) of Executive Order 12866. The Department has provided an assessment of the proposal's potential costs, benefits, and transfers associated with this proposed rule.

Executive Order 14192, *Unleashing Prosperity Through Deregulation,* was issued on January 31, 2025. Section 3(a) of Executive Order 14192 requires an agency, unless prohibited by law, to identify at least ten existing regulations to be repealed when the agency issues a new regulation. In furtherance of this requirement, section 3(c) of Executive Order 14192 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with prior regulations. A significant regulatory action (as defined in section 3(f) of Executive Order 12866) that would impose total

costs less than zero is considered an Executive Order 14192 deregulatory action. This proposed rule, if finalized as proposed, is, therefore, expected to be an Executive Order 14192 deregulatory action. The proposed rule offers plan sponsors more confidence in exercising their choice in provision of designated investment alternatives for the plan, and results in significant time and cost savings for plans.

The Department, as directed by Executive Order 14192, estimates that the perpetual time horizon present value costs would be -$8,155.2 million in 2024 dollars with annualized costs of -$570.9 million.

12.2. Need for Regulatory Action.

On August 7, 2025, the President issued Executive Order 14330, *Democratizing Access to Alternative Assets for 401(k) Investors*.[64] This Executive Order requires the Department to:

(1) Reexamine its guidance on what a fiduciary's duties are under ERISA when considering whether to offer an asset allocation fund with exposure to alternative assets to defined contribution plan participants; and

(2) Clarify its position on alternative assets and what the appropriate fiduciary process would be for a fiduciary to offer asset allocation funds with exposure to alternative assets to defined contribution plan participants.

To this end, Executive Order 14330 urges the Department to propose rules, regulations, or guidance, as appropriate, to clarify the duties that such a fiduciary owes to plan participants and beneficiaries when considering offering an investment fund with exposure to alternative assets. In particular, these clarifications identify the criteria fiduciaries should use to prudently balance potentially higher expenses against the objectives of seeking greater long-term net returns and broader diversification of investments.

[64] 90 FR 38921 (Aug. 12, 2025).

Executive Order 14330 defines alternative assets to include private market investments, direct and indirect interests in real estate, holdings in actively managed investment vehicles investing in digital assets, direct and indirect investments in commodities, direct and indirect interests in projects financing infrastructure development, and lifetime income strategies. This proposed rule, however, is not limited solely to the conditions that must be met for a fiduciary to offer an asset allocation fund with exposure to alternative assets to defined contribution plan participants and beneficiaries. Rather, it clarifies more broadly that section 404(a)(1)(B) of ERISA does not require or restrict any specific type of designated investment alternative, except insofar as a designated investment alternative might be otherwise illegal, provided the fiduciary with responsibility or authority to select designated investment alternatives follows a prudent process when establishing a menu to enable participants and beneficiaries in such plans to help improve risk-adjusted returns on investment.

In addition, Executive Order 14330 directs the Department to "prioritize actions that may curb ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants." Fiduciaries generally adopt a process-driven approach when selecting designated investment alternatives. This process, however, can vary significantly across plans because of the lack of regulatory clarity, with this variation exposing plans to litigation risk when plaintiffs argue that fiduciaries should have selected something else. As a result, when asked, some plans indicated that they opted not to offer services or investment options that other plans did not offer, fearing that atypical offerings would put them at risk of litigation.[65]

By issuing this proposed rule and clarifying the steps fiduciaries should consider taking when making these determinations, as well as providing a safe harbor for fiduciaries fulfilling

[65] Courtney Zinter, Am. Benefits Council, *American Benefits Council Survey Finds: The Proliferating Risk of Baseless Retirement Plan Litigation is Harming Plan Participants and Retirement Security* (Oct. 2, 2025), https://www.americanbenefitscouncil.org/pub/?id=80095a3f-cbb8-e46c-854f-a475d2c68358.

these requirements, the Department will enable responsible plan fiduciaries to consider and exercise their duties with respect to the selection of any investment when making plan investment menu selections.

12.2.1. Clarifying the Standard for Selection of Designated Investment Alternatives.

In recent years, plaintiffs have increasingly pursued legal action related to the alleged imprudent selection of fund options, investment styles, or account structures, and the imprudent selection of service providers and negotiation of fee arrangements. These claims are typically evaluated based on whether the fiduciary engaged in a thorough, independent investigation of the kind that other prudent fiduciaries would have engaged in under similar circumstances.[66] In their review, courts have held that prudence is evaluated "prospectively, based on the methods the fiduciaries employed, rather than retrospectively, based on the results they achieved,"[67] and that "a fiduciary need not take a particular investment course to meet the prudent person standard."[68] But court decisions have been inconsistent, with courts often allowing cases to proceed to discovery, which causes plans to spend millions in defense and creates settlement leverage for plaintiffs.[69]

The Department's 1979 Investment Duties Regulation under section 404(a)(1)(B) of ERISA discusses the duties of the fiduciary when selecting investments, including taking into consideration the risk of loss and the opportunity for gain associated with the investment compared to that of reasonably available alternatives with similar risks. Additionally, it highlights certain factors that should be weighed, including diversification benefits, liquidity, current cash flow relative to the plan's anticipated cash flow, and the projected return. However,

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[66] Vahick A. Yedgarian & Ram Paudel, *Quantitative Analysis of Damages in ERISA Fiduciary Breach Litigation*, Fin. & Inv. Plan. Educator eJournal 1 (Sept. 9, 2025), https://dx.doi.org/10.2139/ssrn.5461234.
[67] *Brief for Encore Fiduciary as Amicus Curiae* at 2, *Parker-Hannifin Corp. v. Johnson*, No. 24-1030 (U.S. May 21, 2025).
[68] Jenner & Block, *Practice Series: ERISA Litigation Handbook* 334 (2021), https://www.jenner.com/a/web/tq6i81QxHmqcsmUPMXCWp5/4k1Xkb/Jenner%20%26%20Block%20-%20ERISA%20Litigation%20Handbook%20(Final%20Version%20-%202021).pdf.
[69] *Brief for Encore Fiduciary as Amicus Curiae* at 22-23, *Parker-Hannifin Corp. v. Johnson*, No. 24-1030 (U.S. May 21, 2025).

the statute is agnostic regarding how a fiduciary demonstrates that it carefully evaluated those issues and acted prudently in its decision to make the selection. As a result, fiduciaries, lacking clarity and guidance, may avoid making selections that could be beneficial to plan participants and beneficiaries but whose selection may be more challenging to justify and, therefore, more vulnerable to litigation. This has particularly been an issue with regards to the inclusion of alternative assets in defined contribution plan investment menus because alternative assets often require different valuation and liquidity considerations than publicly traded stocks and bonds.[70]

12.2.2. Current Use of Alternative Investments in Retirement Plans.

In directing the Department to pursue these objectives, the Executive Order points out that a number of alternative investments are already utilized in some state and local as well as private-sector defined benefit plans. In 2022, 99 percent of state and local government defined benefit pension plans held some share of their portfolio invested in alternative investments—namely private equity, hedge funds, real estate, and commodities—with these alternative investments representing 34 percent of all holdings for public pension funds.[71,72] A 2023 survey of Fortune 1000 defined benefit pension plans found that 68 percent of those plans held alternative investments, which in aggregate represented 18 percent of total holdings. However, the share of holdings for these plans varied significantly by plan size, with larger Fortune 1000 plans allocating more than 4 times as much to alternative assets in 2023 than their smaller counterparts, presumably due to in-house expertise and economies of scale.[73] The experience of

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[70] Taylor D. Nadauld, Berk A. Sensoy, Keith Vorkink & Michael S. Weisbach, *The Liquidity Costs of Private Equity Investments: Evidence from Secondary Market Transactions*, 132 J. Fin. Econ. 158, 158–181 (2019), https://doi.org/10.1016/j.jfineco.2018.11.007.

[71] This analysis was conducted using the *Public Plans Database* (PPD), which consists of roughly 220 major public pension plans (118 state and 100 local) that represent over 95 percent of total U.S. state and local pension assets and membership.

[72] Jean-Pierre Aubrey, *Public Pension Investment Update: Have Alternatives Helped or Hurt?*, Ctr. for Ret. Rsch. at Bos. Coll., Issue in Brief No. 22-20 (Nov. 22, 2022), https://crr.bc.edu/public-pension-investment-update-have-alternatives-helped-or-hurt/.

[73] Mercedes Aguirre & Brendan McFarland, *2023 Asset Allocations in Fortune 1000 Pension Plans*, Insider, Vol. 35, No. 2 (Feb. 2025), www.wtwco.com/-/media/wtw/insights/2025/02/wtw-insider-2023-asset-allocations-in-fortune-1000-pension-plans.pdf?modified=20250225111427.

public plans and private defined benefit plans investing in alternative assets is discussed in greater detail in section 12.7.3.1.4.

In contrast, defined contribution plans are far less likely to hold alternative investments, with only 4 percent of defined contribution plans offering alternative investments in 2024, according to the 2025 PlanSponsor DC Plan Benchmarking Report.[74] When offered in defined contribution plans, alternative investments are typically limited to pooled, professionally managed funds, such as target date funds or managed accounts, and even then only by the largest defined contribution plans with significant resources to conduct due diligence. Smaller plans have generally avoided including these investments in their line-ups, as evaluating the offerings to ensure they meet valuation and liquidity requirements, finding appropriate benchmarks, and justifying complex fee structures has been extremely challenging.[75] As a result, only 0.1 percent of all defined contribution plan assets were in alternative investments in 2024.[76]

This has left defined contribution plans largely absent from an emerging financial sector without access to the fastest growing American companies. Since 2014, global private-equity markets have grown nine-fold, while public markets have only doubled.[77] While assets under management (AUM) in private capital represent only 2.4 percent of total financial assets, the market is growing, driven by an increasing number of U.S. companies remaining private and utilizing private sources to raise revenue.[78] Relatedly, "over the past few decades, there has been a structural shift in the composition of capital markets away from public markets and towards

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[74] PlanSponsor, *2025 DC Survey: Plan Benchmarking* (Jan. 7, 2025).
[75] Jessica Johnson, *The Democratization of Alternative Investments in 401(k) Plans*, DCIO Insights (June 2022), https://www.wagnerlawgroup.com/wp-content/uploads/sites/1101401/2022/06/A0704783.pdf.
[76] Jessica Hall, *Private Equity in 401(k) Plans? Highly Risky for the Average Investor*, MarketWatch (Jan. 11, 2025), https://www.morningstar.com/news/marketwatch/20250111254/private-equity-in-401k-plans-highly-risky-for-the-average-investor.
[77] Sanja Arya, *Breaking Barriers: Redefining Equity Market Portfolios with Venture Capital*, Morningstar Indexes (Nov. 2024), https://assets.contentstack.io/v3/assets/bltabf2a7413d5a8f05/blt1aeeccec6ce5e015/6887a00b8c9c0c3eaeb99ee3/Breaking-barriers-Redefining-equity-market-portfolios-w-VC.pdf.
[78] KKR, *An Alternative Perspective: Past, Present and Future*, Insights Global Market Trends (Sept. 2024), https://www.kkr.com/content/dam/kkr/insights/pdf/2024-september-an-alternative-perspective.pdf.

private markets."[79] By discouraging defined contribution plans from including alternative investments in their line-ups, plan fiduciaries are restricting participants and beneficiaries from potential sources of retirement savings and growth.

12.2.3. Litigation Risk.

Executive Order 14330 also instructed the Department "to prioritize actions that may curb ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants."[80] In the past few decades, litigation alleging fiduciary breaches has surged, "evolving from individual claims to large-scale class-action lawsuits that often target the selection and monitoring of investment options and the negotiation of service provider fees."[81] As a result, the possibility of litigation has become an additional factor when plan fiduciaries consider investment options. A 2025 convenience survey by the American Benefits Council of its defined contribution plan sponsor members found that roughly 29 percent of respondents, "decided against offering services or investment options simply because other similar plans were not doing so, making the additional services or options vulnerable to litigation."[82] This development has raised concerns that plans may be avoiding more novel investment options that could improve participant outcomes because of potential litigation risk.[83]

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[79] Council of Econ. Advisers, *Retail Access to Alternative Investments Via Defined Contribution Plans* (Aug. 2025), https://www.whitehouse.gov/research/2025/08/retail-access-to-alternative-investments-via-defined-contribution-plans/. "As of the end of 2024, there are about 35 million private companies and fewer than 4,000 public companies in the US. From 1997 to 2024, the number of public companies decreased by about 55 percent from around 8,800 while the number of private companies increased by about 67 percent from around 20 million".

[80] 90 FR 38921 (Aug. 7, 2025).

[81] Vahick A. Yedgarian & Ram Paudel, *Quantitative Analysis of Damages in ERISA Fiduciary Breach Litigation*, Fin. & Inv. Plan. Educator eJournal 1 (Sept. 9, 2025), http://dx.doi.org/10.2139/ssrn.5461234.

[82] Am. Benefits Council, *The Proliferating Risk of Baseless Retirement Plan Litigation is Harming Plan Participants and Retirement Security* (Oct. 2, 2025), https://www.americanbenefitscouncil.org/pub/?id=80095a3f-cbb8-e46c-854f-a475d2c68358.

[83] The more that specious complaints survive dismissal, the more a fiduciary might feel they have no choice but to offer, for example, only "a diversified suite of passive investments" – despite "actually think[ing] that a mix of active and passive investments is best." *See* David McCann, *Passive Aggression*, CFO (June 22, 2016), https://bit.ly/2Sl55Yq. "Before the increases in 401(k) plan litigation, some fiduciaries offered more asset choice by including specialty assets, such as industry-specific equity funds, commodities-based funds, and narrow-niche fixed income funds[,] options [that] could potentially enhance expected returns in well-managed and monitored portfolios. ; George S. Mellman & Geoffrey T. Sanzenbacher, *401(k) Lawsuits: What Are the Causes and Consequences?*, Ctr.

The increasing risk of ERISA litigation has been well documented. An industry report documenting trends between 2020 and 2024, concluded that "ERISA class action filings are at a fever pitch" with all-time highs in 2024.[84] As documented in its brief for the *Parker-Hannifin Corp. v. Johnson* appeal, Encore Fiduciary noted that, "[s]ince 2016 over half of plans with $1+ billion in assets have been targeted by at least one such lawsuit."[85] Moreover, no target has been spared with "[a]ll types of plans, plan sponsors, and plan sizes being targeted in these trending ERISA class actions."[86] From the period between 2020 and 2024, ERISA class actions have spread across plan types (*i.e.,* into defined benefit and group health plans) and penetrated deeper into the plan market, with smaller and smaller plans becoming targets.[87]

The costs have been profound on an individual plan level and across the market. Encore Fiduciary discussed the costs to plans of responding to litigation in its brief, arguing that:

> [e]ven prevailing on a motion to dismiss can cost a defendant upwards of $2 million. If a plaintiff beats a motion to dismiss, defense costs skyrocket . . . . In addition to wading through document discovery and depositions, defendants must hire experts, who cost several millions of dollars. In Encore's experience, defense costs through summary judgment can run $5 million to $8 million. Taking a case to trial can cost $10 million or more . . . . Encore's tracking shows that there have been well over $1 billion in settlements since 2020, most for little more than the cost of defense.[88]

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for Ret. Rsch. at Bos. Coll. 5 (May 2018), https://bit.ly/3fUxDR1. Now fiduciaries overwhelmingly choose purportedly "'safe' funds over those that could add greater value." *Id*.

[84] CHUBB, *A Surprise Twist in ERISA Class Action Trends in 2024* (May 2025), https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability/pdfs/2024-fiduciary-infographic-final.pdf.https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability/pdfs/2024-fiduciary-infographic-final.pdf.

[85] *Brief for Encore Fiduciary as Amicus Curiae*, *Parker-Hannifin Corp. v. Johnson*, No. 24-1030 (U.S. May 21, 2025).

[86] CHUBB, *A Surprise Twist in ERISA Class Action Trends in 2024* (May 2025), https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability/pdfs/2024-fiduciary-infographic-final.pdf.

[87] CHUBB, *A Surprise Twist in ERISA Class Action Trends in 2024* (May 2025), https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability/pdfs/2024-fiduciary-infographic-final.pdf.

[88] *Brief for Encore Fiduciary as Amicus Curiae*, *Parker-Hannifin Corp. v. Johnson*, No. 24-1030 (U.S. May 21, 2025).

Separately, CHUBB estimates that attorneys' fees to defend an action through a motion for summary judgement may cost between $4 and $8 million. If the action goes to trial, plans may incur additional attorneys' fees between $2 and $4 million as well as $2 million in experts' fees.[89]

Unsurprisingly, these costs create a powerful incentive to settle even meritless claims, which have been borne out by the data. CHUBB reported that "the significant increase in the number of filings has been accompanied by a substantial uptick in the total annual number of settlements, which has increased six-fold from 2016 to 2022 . . . . At least 20% of the cases filed since 2016 cost more to defend than to settle."[90] As Justice Alito summarized in his concurring opinion for *Cunningham*, "in modern civil litigation, getting by a motion to dismiss is often the whole ball game because of the cost of discovery. Defendants facing those costs often calculate that it is efficient to settle a case even though they are convinced that they would win if the litigation continued."[91]

The result of this litigation to settlement system is, as Justice Alito pointed out in his concurring opinion in *Cunningham*, that "[t]he few plan participants named as plaintiffs and their attorneys get a windfall, and a cost that the administrator incurs may be passed on to the other plan participants."[92] As noted in *Dura Pharmaceuticals, Inc. v. Broudo*, the price of discovery (financial or otherwise) elevates the possibility that a "a plaintiff 'with a largely groundless claim [will] simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the

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[89] CHUBB, *Excessive Litigation Over Excessive Plan Fees in 2023* (2023), https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability/pdfs/excessive-litigation-over-excessive-plan-fees-infographic.pdf.
[90] CHUBB, *Excessive Litigation Over Excessive Plan Fees in 2023* (2023),), https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability/pdfs/excessive-litigation-over-excessive-plan-fees-infographic.pdf.
[91] *Cunningham v. Cornell Univ.*, 604 U.S. 693, 710 (2025) (Alito, J., concurring).
[92] *Id.* at 711; *see also Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 719 (2d Cir. 2013).

[discovery] process will reveal relevant evidence.'"[93] CHUBB estimates that one-third of settlements go to attorneys' fees.[94]

This has had several perverse effects. Resources that could be used for real employee benefits are instead diverted to the defense and settlement costs described above—weakening the retirement security of the American worker by making it more expensive for plan sponsors to offer generous benefits.[95] Compounding this problem, insurers have raised premiums and retentions because they are struggling to build underwriting models that predict litigation exposure.[96] In its brief for the *Parker-Hannifin Corp. v. Johnson* appeal, Encore Fiduciary noted an increase in retentions "from $1 million to as high as $15 million for many policies."[97] Furthermore, because ERISA imposes personal liability on plan fiduciaries, there is a risk that this litigation epidemic will make it hard to find qualified advisers willing to step into that role.[98] Ultimately, with these increases in costs come a decreased likelihood that large employers will continue to offer generous voluntary retirement benefits, and that small employers will feel comfortable taking on the risk of exposure to litigation created by the simple act of voluntarily sponsoring a retirement plan for employees.

The assumption that litigation risk is impacting the menu offerings in participant-directed plans was corroborated by Gropper (2025) , which examined the probability of litigation and its impact on the number and volatility of investment options offered.[99] Using actual court cases to

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[93] 544 U.S. 336, 347 (2005) (second alteration in original).
[94] CHUBB, *A Surprise Twist in ERISA Class Action Trends in 2024* (May 2025), https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability/pdfs/2024-fiduciary-infographic-final.pdf.
[95] Fid Guru Blog, *Has ERISA Class Action Litigation Made a Positive Difference for Plan Participants?* (Oct. 31, 2023), https://encorefiduciary.com/has-erisa-class-action-litigation-made-a-positive-difference-for-plan-participants/.
[96] Ed. Antonucci, CRC GROUP, *Surge in Excessive Fee Litigation is Impacting Fiduciary Liability Insurance* (March. 2021), www.crcgroup.com/Portals/34/Flyers/Tools-Intel/Fiduciary%20Liability%20Excess%20Fee%20Litigation.pdf?ver=2021-03-19-133939-113.
[97] *Brief for Encore Fiduciary as Amicus Curiae*, *Parker-Hannifin Corp. v. Johnson*, No. 24-1030 (U.S. May 21, 2025).
[98] *Id.*
[99] Michael Gropper, *Lawyers Setting the Menu: The Effects of Litigation Risk on Employer-Sponsored Retirement Plans* (Aug. 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393420.

model the likelihood of litigation for plans based on recordkeeper, year, and retirement plan-by-asset class fixed effects (such as state and industry), as well as Form 5500 data on plan investments, Gropper finds that, controlling for plan size, retirement plans with a greater probability of being sued have fewer menu options.[100] He further finds that defined contribution plans with a higher predicted likelihood of being sued are more likely to exclude high volatility investments, indicating that litigation risk does impact the number and type of investments offered to retirement plan investors.[101]

These findings suggest that plan fiduciaries may be excluding more complex investment options from their investment line-ups, not necessarily in response to a prudent assessment of whether the features in those investments are best suited to the needs of plan participants and beneficiaries, but rather because of the risk of litigation if plan fiduciaries depart from more traditional investments in favor of more creative or novel options. Without assurances that the application of a prudent process to select designated investment alternatives will help shield them from the risk of excessive litigation about such selection, defined contribution plan fiduciaries will continue to limit offerings of innovative plan options that would potentially enhance plan participants' and beneficiaries' retirement savings.

12.2.4. Summary.

Defined contribution plans largely rely on the 1979 Investment Duties Regulation when designing their process for selecting designated investment alternatives in their menus. Defined contribution plan fiduciaries have generally avoided including investments that make them more vulnerable to claims of imprudence and potential litigation. As a result, defined contribution plans have severely limited incorporating alternative assets in their investment strategies, restricting the tools plan fiduciaries can employ to improve diversification, including through downside protection, potential net returns, and retirement savings outcomes for plan participants

[100] *Id*.
[101] *Id*.

and beneficiaries. This proposed rule, by providing a safe harbor that is asset neutral, will clarify and provide protection for defined contribution plan fiduciaries in their requirements for prudently selecting investments for their menus. In turn, this will expand the universe of potential investment vehicles considered when choosing designated investment alternatives and potentially enhance the retirement security of participants and beneficiaries.

12.3. Regulatory Baseline.

The obligations of a fiduciary when considering an investment or investment course of action are outlined in the 1979 Investment Duties Regulation. Specifically, for a decision to be deemed prudent, a fiduciary must give appropriate consideration to all facts and circumstances that the fiduciary knows or should know are relevant to the particular investment decision involved. Such factors include risk return, diversification, and liquidity, among others. The fiduciary must then, using all such relevant factors, determine whether the investment is reasonably designed to further the purposes of the plan before adopting it.

The Department has previously stated that it interprets ERISA section 404 as providing greater flexibility in the making of investment decisions by plan fiduciaries than might have been provided under pre-ERISA common and statutory law in many jurisdictions. In particular, the statute does not require or restrict any specific type of designated investment alternative, except insofar as a designated investment alternative might be otherwise illegal. The Department has at times, however, provided additional guidance relating to considerations fiduciaries should apply under this process towards certain investment vehicles.

12.3.1. 2020 Guidance.

On June 3, 2020, the Department issued an information letter responding to an inquiry concerning the use of private equity investments within professionally managed asset allocation

funds that are designated investment alternatives for participant-directed individual accounts.[102] Specifically, the party wished to offer private equity investments as part of a multi-asset class vehicle structured as a custom target date, target risk, or balanced fund and asked if such an investment satisfies the requirements set forth in sections 403 and 404 of ERISA. In its response, the Department acknowledged that plan fiduciaries could offer such a product, but noted that the evaluation process for fiduciaries to include an asset allocation fund with a private equity component as part of the investment lineup for a participant-directed individual account plan is different than that for including private equity investments in the portfolio of a professionally managed defined benefit plan.

In particular, the Department outlined a framework to evaluate whether a particular investment option satisfies the requirements set forth in sections 403 and 404 of ERISA. Defined contribution plan fiduciaries were directed to consider the fund's management and design and whether they are consistent with the characteristics and needs of plan participants. Such considerations include: strategy; fees and other expenses, and the nature and duration of any liquidity restrictions; the participants' and beneficiaries' ability to access funds in their accounts (*e.g.*, loans, and separation); and their ability to potentially change investment selections on a frequent basis. In general, to make such a selection, the Department concluded "the fiduciary must engage in an objective, thorough, and analytical process that compares the asset allocation fund with appropriate alternative funds that do not include a private equity component, anticipated opportunities for investment diversification and enhanced investment returns, as well as the complexities associated with the private equity component." [103] The Department stated at the time that the letter, "should assure defined contribution plan fiduciaries that private equity

[102] U.S. Dep't of Labor, Employee Benefits Security Admin., Information Letter 06-03-2020, (June 2020), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020.
[103] *Id.*

may be part of a prudent investment mix and a way to enhance retirement savings and investment security for American workers."[104]

12.3.2. 2021 Guidance.

In December 2021, the Department issued a supplemental statement, clarifying its interpretation of the June 2020 Information Letter. The statement noted that the Information Letter did not endorse or recommend the use of private equity investments in defined contribution plans, but rather highlighted issues surrounding these investments that can complicate their inclusion in individual account menus. The Department additionally stated, in response to questions from stakeholders following the letter's publication as well as a "Risk Alert" issued by the staff of the Securities and Exchange Commission's Office of Compliance Inspections and Examinations regarding compliance issues in examinations of registered investment advisers that manage private fund assets,[105] that "it should supplement the Information Letter to ensure that plan fiduciaries do not expose plan participants and beneficiaries to unwarranted risks by misreading the letter as saying that [private equity]—as a component of a designated investment alternative—is generally appropriate for a typical 401(k) plan."[106] In particular, the Department warned that plan-level fiduciaries of small, individual account plans are unlikely to have adequate experience to analyze and evaluate the use of private equity as a designated investment alternative in these types of plans and reiterated plan fiduciaries' duties of prudence and loyalty when selecting and monitoring investment options or service providers.[107]

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[104] *Id.*
[105] Risk Alert, *Observations from Examinations of Investment Advisers Managing Private Funds*, staff of the SEC Off. of Compliance Inspections & Examinations (June 23, 2020),), https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf.
[106] U.S. Department of Labor Supplement Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives (December 21, 2021), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statementDec.
[107] U.S. Department of Labor Supplement Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives (December 21, 2021), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statementDec.

Additionally, in March 2022, the Department issued sub-regulatory guidance cautioning plan fiduciaries to exercise extreme care before considering adding an option containing cryptocurrency to a 401(k) plan's menu.[108] In the guidance, the Department expressed concerns related to the prudence of fiduciaries including cryptocurrencies or other products whose value is tied to cryptocurrencies as investment options. The Department further warned that "plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described above."[109]

12.3.3. 2025 Guidance.

In May 2025, the Department rescinded the 2022 cryptocurrency guidance, noting that it had imposed a standard of "extreme care" which "is not found in the Employee Retirement Income Security Act (ERISA) and differs from ordinary fiduciary principles thereunder."[110] By rescinding the prior guidance, the Department reasserted its position that section 404(a)(1)(B) of ERISA does not require or restrict any specific type of designated investment alternative, except insofar as a designated investment alternative might be otherwise illegal, and that, in keeping with the decision from *Fifth Third Bancorp v. Dudenhoeffer,* when evaluating any particular investment type, a plan fiduciary's decision should consider all relevant facts and circumstances and will "necessarily be context specific."[111]

The Department subsequently, and in a similar vein, rescinded the December 2021 supplemental statement on August 12, 2025, because the statement deviated from the

[108] U.S. Dep't of Labor, Employee Benefits Security Admin., Compliance Assistance Release No. 2022-01 (Mar. 10, 2022).
[109] Compliance Assistance Release No. 2022-01.
[110] Compliance Assistance Release No. 2025-01.
[111] *Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 425 (2014).*

Department's historically neutral and principles-based approach to fiduciary investment decisions creating a potentially costly chilling effect on the market.[112]

This current guidance, as well as existing applicable regulations discussed above in the Preamble, serves as the baseline for this proposed rule.

12.4. Summary of Impacts.

In accordance with OMB Circular A–4, Table 1 depicts an accounting statement summarizing the Department's assessment of the benefits, costs, and transfers associated with this regulatory action.

The Department is unable to quantify all benefits, costs, and transfers of the rulemaking but has sought, where possible, to describe these non-quantified impacts. The effects in Table 1 reflect non-quantified impacts and estimated direct monetary costs resulting from the provisions of the proposed regulation.

Table 1.—Accounting Statement
Benefits:
Non-Quantified: The Department expects that the proposed rule would lead to the following benefits: • The process-based safe harbor provided by the proposed rule would decrease plan fiduciary uncertainty about whether they are satisfying their duty of prudence when making such a selection and reduce the associated litigation risks of that selection. • The proposed rule would reaffirm that plan fiduciaries have the discretion to determine whether to include an investment as a designated investment alternative and would clarify that the Department is asset neutral. Removing stigma against certain investments or investment courses of action would free plan fiduciaries to prudently select any designated investment alternatives that improve risk-adjusted returns. • By identifying relevant factors that plan fiduciaries should consider and by providing examples of how they might prudently consider such factors, the proposed rule would ensure that plan fiduciaries are better equipped to evaluate whether they should offer a designated investment alternative with alternative assets to plan participants and beneficiaries. As a result, the proposed rulemaking would increase protections for plan participants beneficiaries.

[112] *US Department of Labor Rescinds 2021 Supplemental Statement on Alternative Assets in 401(k) Plans*, https://www.dol.gov/newsroom/releases/ebsa/ebsa20250812; *see also* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement.

<table>
<tr><td colspan="5">Costs:</td></tr>
<tr><td>Costs</td><td>Estimate</td><td>Year dollar</td><td>Discount Rate</td><td>Period Covered</td></tr>
<tr><td rowspan="2">Annualized Monetized ($million/Year)</td><td>-$577. 9</td><td>2026</td><td>7 percent</td><td>2026-2035</td></tr>
<tr><td>-$579.9</td><td>2026</td><td>3 percent</td><td>2026-2035</td></tr>
<tr><td colspan="5">Quantified Costs:

The Department expects that entities will incur the following costs due to the proposed rule:

• Costs to plans and service providers related to reviewing the rulemaking, total $103.9 million in the first year.
• Costs to plans related to the provision of additional documentation from the independent fiduciary to the named fiduciary, total $1.1 million annually.
• Cost savings related to plans for the reduction of time spent preparing litigation analyses for Investment Committee Meetings, total -$117.8 million annually.
• Cost savings to plans related to the reduction of time spent presenting and discussing litigation analyses for Investment Committee Meetings total -$475.0 million annually.</td></tr>
<tr><td colspan="5">Transfers:</td></tr>
<tr><td colspan="5">Non-Quantified:

The Department expects that the proposed rule will lead to the following transfers:

• A transfer from fiduciary insurance underwriters to plans/plan fiduciaries via a stabilization or reduction of premiums and increase in coverage terms, including lower self-insured retentions.
• A transfer from financial institutions that sponsor stocks and bonds to financial institutions that sponsor alternative investments.</td></tr>
<tr><td colspan="5">Perpetual Time Horizon Costs:</td></tr>
<tr><td colspan="5">Annualized Cost (in 2024 dollars) (EO 14192 accounting): -$570.9 million</td></tr>
</table>

12.5. Request for Comment.

The Department invites comments addressing its estimates of the benefits, costs, and transfers associated with the proposed rulemaking, as well as any quantifiable data that would support or contradict any aspect of its analysis. Specifically, the Department requests comments on:

1. Whether the number of plans using a 3(21) or 3(38) fiduciary will increase under this proposed rule? If so, will this be for all plans or only plans of a certain size? How will this impact plan costs?

2. What share of defined contribution plans use off-the-shelf plan designs with set investment lineups? How does usage vary by plan size? Do these plans utilize 3(21) or 3(38) fiduciaries?
3. How would the proposed rule change fiduciary litigation? How would this affect the cost of fiduciary insurance and the scope of coverage (*e.g.*, lower self-insured retentions)?
4. How would the proposed rule affect how plan fiduciaries consider including alternative assets? Would they be more likely to include them in response to this proposal, and if so, in what form (i.e., asset class, investment vehicle, etc.)?
5. What is the magnitude of financial benefits that will be reaped in connection with the increased use of alternative assets in products for defined contribution plans?
6. Are there any quantifiable risks or costs associated with the increased use of alternative assets in products for defined contribution plans that are not captured in this regulatory impact analysis? If yes, what is the magnitude of those risks or costs?

12.6. Affected Entities.

The proposed rule would likely affect most participant-directed defined contribution plans as well as their participants and beneficiaries, as it broadly describes the factors a plan fiduciary must consider and make determinations on when selecting designated investment alternatives for a participant-directed individual account plan. However, effects on these plans could vary substantially. For instance, larger plans often use in-house expertise and hire outside ERISA counsel and investment advisers to provide additional information regarding investment options as part of their regular selection and monitoring processes. They would find these costs reduced as they simplify their processes under the safe harbor. Smaller plans, on the other hand, often rely on a service provider to design their plan's menu. In such cases, they likely would not utilize the proposed rule directly, though they may still be affected by the proposed rulemaking because many available investment funds would be designed to comply with the safe harbor. The Department anticipates that many service providers would also be affected by the proposed rule.

Beyond affecting how plan fiduciaries consider and make determinations when selecting designated investment alternatives, the proposed rule and its safe harbor would also result in expanded use of alternative assets within plan investment menus by clarifying the process and providing protections associated with the selection of investment options for participant-directed plans. Plans and participants who select these investments, and the financial institutions that develop and sell them, would experience further impacts from the proposal.

12.6.1. Plans Affected by Reduced Litigation Risk.

The Department expects that many plans would benefit from increased clarity and certainty under the proposed rule by using the safe harbor it offers. In particular, by detailing an objective, thorough, and analytical process and means to demonstrate the prudent selection of investment offerings, the safe harbor would provide added protection from litigation risk to plan fiduciaries, including through a reduction in defense costs for frivolous litigation and corresponding lower fiduciary insurance premiums. In response, plans could reduce supplementary actions taken to forestall or defend against legal claims. For instance, plans could reduce costs associated with in-house staff hours or hiring outside professionals to monitor court cases and decisions related to investment selection, such as ERISA attorneys and investment managers.

The Department assumes that some smaller plans use "off-the-shelf" products that include simple, pre-designed menus that they purchase from a service provider.[113] In general, plan fiduciaries for these types of plans likely would not use the safe harbor directly, as they rely on appointed qualified professionals for expert advice and recommendations. However, these plans would still be affected by the proposed rule. As more investment products are developed that comply with the safe harbor, these plans may adopt them as well. It is also possible that their

[113] Elizabeth Harris, *No Matter How Small, Businesses Have Retirement Plan Options*, PlanSponsor (Sept. 3, 2024), https://www.plansponsor.com/in-depth/no-matter-how-small-business-have-retirement-plan-options/.

3(21) or 3(38) adviser may modify their fee structure or recommend changes to their menu because of the overall market effects resulting from the proposed rule.

In 2023 there were approximately 721,000 participant-directed individual account plans, with about 118 million total participants and more than $8.8 trillion in assets.[114] The Department assumes that 85 percent of these plans, or about 613,000 plans, rely on service providers to guide the plan fiduciary.[115]

12.6.2. Plans That Would Hold New Alternative Investments.

The Department anticipates that the proposed rule would lead many individual account plans to adopt new menu options that include alternative investments. While such assets may appear directly as an option on the menu depending on the alternative, a more likely scenario, consistent with the assumptions in Executive Order 14330, is that these alternatives would be included as one part of a menu option. For example, a target date fund might include an annuity feature or an asset allocation fund might invest a portion of its assets in private equity. Similarly, some plans might offer professionally managed accounts that incorporate alternative investments on the glide paths customized for participants. The Department seeks information on what types of vehicles plans would use to offer alternatives and how they would work. 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. Therefore, for purposes of quantifying the effects of this proposal leading to greater investment in alternatives, the Department focuses on the target date fund avenue exclusively.

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[114] EBSA tabulations based on data from U.S. Dep't of Labor, EBSA, *Private Pension Plan Bulletin Abstract of 2023 Form 5500 Annual Reports*, Table D5 (Sept. 3, 2024), https://www.dol.gov/agencies/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan.

[115] The Department assumes that 85 percent of plans will rely on service providers to review and act in the new rule. The remaining 15 percent are assumed to react at the plan level once the rulemaking is finalized. These estimates are based on 5 years of data from the PSCA Annual Survey of Profit Sharing and 401(k) Plans, where an average of roughly 84 percent of surveyed plans (which the Department rounds to 85 percent) indicated they used outside advisers to manage fiduciary matters.

In many respects, offering alternative investments as a portion of a target date fund or other asset allocation fund is an effective way for participant-directed individual account plans to include more sophisticated investment products with the potential to increase risk-adjusted returns on investment. Such an arrangement would permit fiduciaries with concerns about the liquidity and pricing considerations of alternative assets to have them combined with more liquid assets from public markets. This would allow fiduciaries to use the liquid assets from the asset allocation pool, as well as possible inflows, to mitigate any liquidity concerns arising from potential outflows.

Target date funds play a vital role in retirement plans. About 90 percent of large, participant-directed defined contribution plans reported having a target date fund on their Form 5500 filing for 2023.[116] Similarly, a survey conducted by the Plan Sponsor Council of America (PSCA) showed that about 85 percent of all plans offered a target date fund in 2024, though plans with fewer than 50 participants were significantly less likely to offer target date funds, with only about 66 percent reporting them in 2024.[117] Most plans with automatic enrollment use a target date fund as their default investment, which results in a substantial number of participants holding these funds.[118] According to administrative data from Vanguard, about 84 percent of participants in defined contribution plans used target date funds in 2024.[119] Similarly, in 2022 approximately 68 percent of 401(k) participants in the EBRI/ICI 401(k) database held target date funds.[120]

Plans periodically select new investments. At the juncture when a plan fiduciary chooses a new target date fund, it may consider selecting a fund that includes alternative investments.

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[116] EBSA tabulations of audited plans in the BrightScope database.
[117] PSCA, *68th Annual Survey: The Source for 401(k) Plan Benchmarking Data*, Table 81 (2025).
[118] *Id.*, Tables 100 and 128.
[119] Vanguard, *How America Saves*, Figure 79 (2025), https://workplace.vanguard.com/insights-and-research/report/how-america-saves-2025.html.
[120] Sarah Holden, Steven Bass & Craig Copeland, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2022*, EBRI Issue Brief No. 606 (Apr. 30, 2024), https://www.ebri.org/content/401(k)-plan-asset-allocation--account-balances--and-loan-activity-in-2022.

Examining data in this area provides a general sense of how rapidly target date funds with alternatives would be adopted by plans under the proposed rule. The Department estimates that every year, across the roughly 721,000 plans affected by the proposed rule, there would be approximately 51,307 instances when a target date series with alternative investments is added to a menus.[121] Each year this would impact an estimated 47,333 plans because some plans adopting these target date funds with alternative investments would add multiple series.[122] These plans would, in aggregate, have about $178 billion and 4.5 million participants flowing each year into target date funds with alternative investments. While the Department estimated these figures using the detailed data available for large 401(k) plans, it extrapolated the results to the whole population of affected plans, including small plans, non-401(k) plans, and plans with missing data.

In generating these estimates, the Department assumes that plans will continue to adopt new target date funds at the current pace. It is possible, however, that under the proposed rulemaking plan fiduciaries would adopt new target date funds more rapidly, including because they wish to offer alternative investments to their participants.

In order to estimate how many assets and participants would be invested in target date funds with alternative investments, the Department applies estimates observed in the baseline for target date funds generally. The Department assumes that 30 percent of plan assets are invested in a target date fund.[123] However, it is difficult to estimate the share of participants eligible for a participant-directed defined contribution plan who would have an account balance and who would allocate at least some of it to a target date fund. Therefore, the Department assumes that 50 percent of plan participants would invest in a target date fund conditional on it being offered

[121] EBSA tabulations of audited plans in the BrightScope database. Data is only available for large 401(k) plans that have filed a Form 5500 whose investment data has been captured on the Schedule H's attached Schedule of Assets. The estimate includes instances where plans adopt a new TDF to replace an existing TDF, instances where plans are adding another TDF to their menu, and instances where a newly formed plan offers a TDF on its menu.
[122] *Id.*
[123] EBSA tabulations of audited plans in the BrightScope database.

on the menu to generate these estimates. The Department requests information on the assumptions made and estimates developed.

When considering the future path for alternative investments in participant-directed individual account plans, the Department must predict how many plans would adopt alternative investments as a result of the proposal. This requires quantifying how many target date funds would adopt alternative investments under the proposal in comparison to the baseline. It is difficult to know how many target date funds are investing in alternatives in the baseline, but the figure appears to be relatively low. It is also uncertain how many target date funds would invest in alternatives under the proposal. As a result, the Department is illustrating the potential effects by assuming that in instances when a plan adopts a new target date fund, it is 50 percentage points more likely to include investments in alternatives than in the baseline. This assumption encompasses all of the alternative investments referred to in Executive Order 14330, including private market investments, real estate, digital assets, commodities, infrastructure, and lifetime income investment strategies.[124] The Department requests comments on these assumptions.

The Department arrived at this assumption due to the range of responses in surveys exploring this issue. On the low end, a survey by PSCA in 2024 found that only 6 percent of respondents had or were considering adding private equity to their menu, and only 7 percent had or were considering other alternatives.[125] On the high end, a 2025 survey by Empower found that 72 percent of plan sponsors were actively discussing adding private market investments to defined contribution retirement plans with advisers and consultants, and that 96 percent would likely add private market investments if fiduciary and regulatory guidance were clarified.[126]

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[124] 90 FR 38921 (Aug. 7, 2025).
[125] PSCA, *Plan Sponsor Interest in Alternatives, Private Equity, ESG, and More*, Question of the Week (Nov. 18, 2024), https://www.psca.org/news/psca-news/2024/11/plan-sponsor-interest-in-alternatives-private-equity-esg-and-more.
[126] Empower, *Empower Survey Finds Employers Ready to Add Private Market Investments to Retirement Plans* (Sept. 25, 2025), https://www.empower.com/press-center/empower-survey-finds-employers-ready-add-private-market-investments-retirement-plans.

Between these estimates, a BlackRock 2025 survey[127] found that 24 percent of plan sponsors were considering adding alternative investments to their plan, while a Goldman Sachs 2025 survey[128] found that 42 percent of plan sponsors were considering adding private market offerings.

12.6.3. Service Providers.

Service providers play an important role in retirement plan administration and informing and assisting the plan's named fiduciary. For the purpose of estimating the effects of this proposed rulemaking, these parties include 3(21) Investment Advisers, 3(38) Investment Managers, qualified professional asset managers (QPAMs), SEC-registered investment advisers (RIAs), and broker-dealers. This group of investment and retirement professionals allow plans to reduce the cost of plan administration by leveraging the expertise of service providers, who spread the cost of their expertise across the many plans they service. It is important to take these arrangements into account when estimating the costs and benefits of proposals, both at the plan level and in aggregate.

Based on survey data from PSCA spanning their 2021-2025 reports, the Department assumes that roughly 85 percent of defined contribution plans rely on outside service providers to guide the plan's named fiduciary.[129] The Department estimates the number of relevant service providers for this analysis to be approximately 5,350 entities.[130] The Department requests comments on these estimates.

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[127] BlackRock, *2025 Read on Retirement Survey*, Retirement Perspectives (2025), https://www.blackrock.com/us/financial-professionals/practice-management/defined-contribution/insights/retirement-survey.

[128] Goldman Sachs Asset Mgmt., *Retirement Survey and Insights Report 2025* (2025), https://am.gs.com/en-us/institutions/insights/report-survey/retirement-survey.

[129] See PSCA, *64th Annual Survey of Profit Sharing and 401(k) Plans* (2021); PSCA, *65th Annual Survey of Profit Sharing and 401(k) Plans* (2022); PSCA, *66th Annual Survey of Profit Sharing and 401(k) Plans* (2023); PSCA, *67th Annual Survey of Profit Sharing and 401(k) Plans* (2024); and PSCA, *68th Annual Survey of Profit Sharing and 401(k) Plans* (2025).

[130] The Department is aware that the entity definitions often overlap. At the same time, an entity frequently serves in multiple capacities in practice. The Department took these factors into consideration, as well as data trends in the Form 5500, when it developed this estimate of the number of service providers.

12.6.4. Financial Institutions.

Some financial institutions that develop and market products for retirement plans would also be affected by the proposal. Under the proposed rule, firms that sponsor target date funds that include alternative investments may have increased sales. Relatively few firms currently offer target date funds with alternative asset exposure, but the Department expects that the additional clarity provided by this proposal and its accompanying safe harbor will lead to additional firms providing such products. The Department estimates that 56 firms currently provide target date funds, with and without alternative assets, to participant-directed defined contribution plans.[131] As an upper-bound, the Department assumes that all these firms would be affected.

Additionally, insurance companies that market life annuity products would see an increase in demand. The Department estimates that there are 582 life insurers writing annuities in the group market that may be affected.[132]

Some private equity firms and hedge funds, as well as some firms that market investments related to digital assets, may also see increased investment in their products. The Department is unaware of data that would allow it to estimate the number of entities in these categories. It requests information on the number and characteristics of firms that would market to participant-directed defined contribution plans under the proposal.

Insurance companies that provide fiduciary insurance would also be affected by the proposal if reduced litigation risk leads plan fiduciaries to purchase less insurance or if premiums

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[131] EBSA tabulations of audited plans in the BrightScope database.

[132] The 2022 Statistics of U.S. Businesses states that there are 910 direct life insurance carriers. Only life insurers that provide group annuities would be affected by the proposal. According to the National Association of Insurance Commissioners 2024 Market Share Report, only 64 percent of the top 125 life insurance companies are in the group annuity market. The Department assumes that this proportion also applies to small life insurers, which means it estimates that there are 582 life insurers writing annuities in the group market. U.S. Census Bureau, *2022 SUSB [Statistics of U.S. Businesses] Annual Data Tables by Establishment Industry* (Aug. 4, 2025), https://www.census.gov/data/tables/2022/econ/susb/2022-susb-annual.htmlNat'l Ass'n of Ins. Comm'rs, *2024 Market Share Reports for the Top 125 Life and Fraternal Insurance Groups* (2025), https://content.naic.org/sites/default/files/publication-msr-lb-life-fraternal.pdf.

are driven down. However, the Department could not find sufficient data to estimate the number of these entities. The Department requests comments providing additional research or data that could be used to estimate how many of these entities there are and what percentage of them work with participant-directed defined contribution plans.

12.6.5. Summary.

The Department's estimates for the number of affected entities are displayed in Table 2 below. The Department requests information on the quantities and characteristics of the entities that would be affected by the proposal.

Table 2.—*Affected Entities Summary*

Description	Assumption/Estimate
All Participant-Directed DC Plans	
Number of Plans	721,000
Participants	118 million
Assets	$8.8 trillion
Plans Adding Target Date Funds with Alternative Assets Each Year	
Number of Plans flowing in annually	47,333
Participants flowing annually into target date funds with alternative investments	4.5 million
Assets flowing annually into target date funds with alternative investments	$178 billion
Other Affected Entities	
Number of Service Providers[1]	5,350
Target Date Fund Providers to Participant-Directed DC Plans	56
Life Insurers Underwriting Group Annuities	582
Unquantified Affected Entities	
• Private Equity Firms and Hedge Funds • Firms Marketing Investments Related to Digital Assets • Insurance Companies Selling Fiduciary Insurance	

[1] This calculation includes all QPAMS, 3(21) and 3(38) advisers, and Plan Administrators. The estimate also includes the 50 percent of broker-dealers that the Department assumes work with participant-directed defined contribution plans. Due to uncertainty, this estimate is rounded to the nearest 25.

12.7. Benefits.

The proposed rule and safe harbor would provide clarity to defined contribution plan fiduciaries on how to satisfy their obligation of prudence when selecting individual investments

within a plan menu. By describing an objective, thorough, and analytical process to evaluate and determine the selection of an investment that is neutral across product types, the Department believes the proposed rule will enable responsible plan fiduciaries to consider all prudent and appropriate investment vehicles and confidently make menu selections that will improve retirement savings outcomes for plan participants and beneficiaries.

The discussion below identifies the major benefits the proposed rule is expected to generate. The Department welcomes comments on the identified benefits, the Department's characterizations of those benefits, and any additional benefits the Department should consider. The Department would also appreciate comments providing additional research, data, and anecdotal evidence.

12.7.1. Decreased Uncertainty and Litigation Risk for Plan Fiduciaries.

As discussed in the Need for Regulatory Action section, defined contribution plans have faced an increased number of, often frivolous, class action lawsuits. The 1979 Investment Duties Regulation states that plan fiduciaries must follow a prudent process and give appropriate consideration to the relevant facts and circumstances in their consideration of a designated investment alternative. However, what would be deemed a prudent process or appropriate consideration depends on the specific facts and circumstances of the investment and plan characteristics. The context-specific nature of the duty of prudence therefore exposes plan fiduciaries to heightened litigation risk from plaintiffs' attorneys.

The proposed rule addresses this concern by establishing a process-based safe harbor for plan fiduciaries selecting a designated investment alternative for a menu. Accordingly, the proposed rule would decrease plan fiduciary uncertainty about whether they are satisfying their duty of prudence when making such a selection. The proposed rule would reestablish that plan fiduciaries have the discretion to determine whether to include an investment as a designated

investment alternative without fear of facing litigation, provided they follow the prudent process described in the safe harbor.

The Need for Regulation section discussed the Department's concern that the flexibility of ERISA's standard of prudence has been exploited in lawsuits alleging imprudent selection. As discussed below, there is evidence to suggest that the perceived risk of litigation has affected how plan fiduciaries select investments and potentially deterred plan fiduciaries from selecting investments that they would otherwise consider appropriate and whose inclusion would benefit plan participants and beneficiaries financially.

In September 2025, a survey conducted by the American Benefits Council investigated how litigation risks affect the actions of plan sponsors and service providers. They received responses from 119 of their plan sponsor and service provider members, of which 98 percent of plan sponsors and 80 percent of service providers served defined contribution plans.[133] Most defined contribution plan sponsors (94 percent) and service providers (96 percent) surveyed expressed concern about retirement plan litigation, with 51 percent of plan sponsors and 57 percent of service providers considering it to be a "very significant concern."[134] Further, the survey found that this concern has affected offerings in plans. For instance, 38 percent of defined contribution plan sponsors and 61 percent of service providers decided against offering services or investment options due to the risk of litigation over fund fees. Similarly, 29 percent and 61 percent of the surveyed defined contribution plan sponsors and service providers, respectively, decided against offering services or investment options due to the perceived litigation risk of being an early adopter.[135]

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[133] When considering these results, it is important to note that this survey is not based on a representative sample; however, the responses provided strongly suggest that fear of litigation risk is driving investment options in defined contribution plans.

[134] *Id.*

[135] Courtney Zinter, Am. Benefits Council, *American Benefits Council Survey Finds: The Proliferating Risk of Baseless Retirement Plan Litigation is Harming Plan Participants and Retirement Security* (Oct. 2, 2025), https://www.americanbenefitscouncil.org/pub/?id=80095a3f-cbb8-e46c-854f-a475d2c68358.

The concern surrounding litigation risk for plan sponsors is not unwarranted. Over 500 excessive fee cases have been filed since 2016 with over $1 billion paid in litigation settlements by plan sponsors.[136] A review of ERISA class action litigation between 2020 and 2024 found a "sustained high volume of lawsuit filings, a continued focus on excessive fees and investment underperformance, and a pattern of multi-million-dollar settlements. These trends reflect both the maturation of plaintiffs' legal theories and the substantial financial risk that allegations of fiduciary mismanagement pose to plan sponsors and fiduciaries."[137]

Gropper (2023) specifically considered the effect of litigation on menu options. Following the 2015 Supreme Court ruling in *Tibble v. Edison International*, which emphasized a fiduciary's ongoing duty to monitor plan investments, the number of lawsuits related to inappropriate investment choice and excessive fees increased. Gropper used the timing of the ruling to construct a difference-in-differences analysis to assess how increased litigation risk affects menus.

Gropper relied on menu data from the Institutional Shareholder Services BrightScope database between 2006 and 2019. Following legal observers' opinions that large plans with $1 billion or more in assets were most frequently targeted with litigation, Gropper found that these large plans reduced the number of investment options on their plan menus after the 2015 ruling. Specifically, he found that such plans were 2.8 percentage points less likely than smaller plans to include a given asset investment option after the ruling. Moreover, he found that a 10 percentage point increase in the likelihood of being sued was associated with a 3.5 percentage point decrease in the likelihood of offering a high volatility investment option.[138] Further, he estimated that

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[136] PSCA, *What Recent Developments in Litigation and DOL Enforcement Means for Plan Sponsors* (May 1, 2025), https://www.psca.org/news/psca-news/2025/4/what-recent-developments-in-litigation-and-dol-enforcement-mean-for-plan-sponsors/.

[137] Vahick A. Yedgarian & Ram Paudel, *Quantitative Analysis of Damages in ERISA Fiduciary Breach Litigation*, Fin. & Inv. Plan. Educator eJournal 1 (Sept. 9, 2025).

[138] In this study, high volatility investment options include the following asset classes: domestic equity broad market, domestic equity mid cap, domestic equity small cap, domestic equity commodities, domestic equity financials, domestic equity natural resources, domestic equity gold, domestic equity real estate, domestic equity

limiting access to such investments was associated, on average, with a 3 percent reduction in account values of participants and beneficiaries of that plan. The author does acknowledge that large plans likely began adjusting menus prior to the 2015 ruling, cautioning that the analysis may underestimate the effect.[139]

The Department expects that the process-based safe harbor provided in the proposed rule would decrease the litigation risk faced by plan fiduciaries, freeing those fiduciaries to select additional investment options that in turn increase risk-adjusted return on investment, net of fees, for participants and beneficiaries. The Department has discussed the litigation risks faced by plan fiduciaries in greater detail in the Need for Regulation, Costs, and Transfers sections of this analysis.

12.7.2. Increased Protection for Plan Participants.

The 1979 Investment Duties Regulation requires that plan fiduciaries give appropriate consideration to the facts and circumstances that a fiduciary knows or should know are relevant to the investment.[140] The proposed rule and safe harbor identify a non-exhaustive list of factors that a plan fiduciary responsible for establishing and maintaining a menu of designated investment alternatives for participant-directed individual account plans should consider when selecting investment options. These factors include: performance, fees, liquidity, valuation, performance benchmark, and complexity. While these six factors are not exhaustive of all aspects of a given investment that might impact whether its selection and inclusion on a plan's menu is prudent, the Department determined that these factors warranted inclusion in the safe harbor after a comprehensive review of pertinent case law, existing regulations, previous subregulatory guidance, Executive Order 14330, and valuable stakeholder input.

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technology, domestic equity income, foreign equity broad market, foreign equity small cap, foreign equity emerging markets, foreign equity natural resources, and foreign equity real estate.

[139] Michael Gropper, *Lawyers Setting the Menu: The Effects of Litigation Risk on Employer-Sponsored Retirement Plans* (Aug. 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393420.

[140] 29 CFR § 2550.404a-1.

By following the process described in the safe harbor to objectively, thoroughly, and analytically consider and make determinations on those factors, either directly, or through their prudently selected and delegated agents for each investment option considered, plan fiduciaries can be assured that selected investment options meet the standard of prudence. As a result, plan participants can be confident that they have access to designated investment alternatives that promote income generation while meeting plan participant and beneficiary needs with respect to risk, liquidity, and price transparency. Although not explicitly required by it, the proposed regulation's safe harbor factors and examples necessarily require product vendors to be transparent with named fiduciaries and their expert intermediaries, if applicable, about rights, benefits, and features of designated investment alternatives.

Alternative assets can be complicated and require particularized analysis to understand their liquidity, valuation, and fees. For instance, while most publicly traded equities have continuous valuations based on observable market prices, alternative investments, such as private equity funds, are often valued on a quarterly basis utilizing net asset value estimates reported by the fund itself. Such investments require an appropriate valuation process to ensure the accuracy of transaction prices used when investors need to sell shares. Similarly, 401(k) and other defined contribution plans may have liquidity requirements to, for example, address participant loans and withdrawals from the plan. However, alternative investments, such as private debt, private real estate, and private equity, often require multi-year investment horizons which can limit investors' access to their funds outside of set windows. Moreover, alternative investments tend to be associated with higher, more complex fee structures. While returns for alternative investments may be sufficient to justify these fees, their net returns can be hard to compare to traditional investments due to customizable fee structures.[141] When these products are incorporated carefully and intentionally, such risks can be mitigated.

[141] Alternative funds often pay performance fees with many permutations based on the hurdle rate, claw back provisions, and whether the fees are based on each deal in a fund or calculated in aggregate.

There is significant uncertainty as to how the proposed rule would affect the types of designated investment alternatives offered by plans. However, as discussed in the Affected Entities section, one likely area where alternative assets might become more prevalent is through target date funds with alternative asset exposure. Antonelli (2025) estimated that, as of December 31, 2024, the five largest target date fund providers allocated less than five percent of assets to asset classes other than traditional public equity and debt.[142] For target date fund providers hoping to offer target date funds with alternative assets in the future, the proposed rule provides a roadmap of what factors and risks they should consider in new products that they hope to sell as designated investment alternatives. Accordingly, the proposed rule would encourage financial institutions to design new products that are consistent with the factors described in paragraphs (*g*) through (*l*) of the proposed rule and that are appropriate for defined contribution plans and their participants and beneficiaries.

By identifying relevant factors that plan fiduciaries should consider and by providing examples of how they might prudently consider those factors, the Department is ensuring that plan fiduciaries are better equipped to evaluate whether and to what extent they should offer a designated investment alternative with alternative assets to plan participants and beneficiaries. As a result, the proposed rulemaking would increase protections for plan participants and beneficiaries while simultaneously providing them with exposure to investment options with higher risk-adjusted returns net of fees.

12.7.3. The Benefit of Confirming a Neutral Stance on Investments.

As discussed in the Need for Regulation section, ERISA does not restrict plan fiduciaries from considering any type of investment or any asset class. Removing the stigma against certain

[142] Angela Antonelli, *Making the Case: The Effect of Private Market Assets on Retirement Income in Cases of Disrupted Savings* (Aug. 2025), https://cri.georgetown.edu/wp-content/uploads/2025/08/Effect-of-private-market-assets.pdf.

asset classes[143] would free plan fiduciaries to consider a wider range of investment opportunities for plan participants and beneficiaries. Consequently, plan fiduciaries would have more opportunities, through additional diversification, to help improve risk-adjusted returns for plan participants and beneficiaries.

Modern Portfolio Theory provides a helpful framework for considering the benefits of removing investment constraints. Under Modern Portfolio Theory, investors construct a set of risky asset portfolios that have the highest expected return for each risk level. The set of portfolios is visually represented as a curved line, where the vertical axis shows the portfolio's expected returns and the horizontal axis shows the portfolio's risk, measured as its standard deviation. This curve is known as the efficient frontier of risky assets, and the optimal risky portfolio is the portfolio on the efficient frontier that offers the highest risk-adjusted return. When investment constraints are imposed, the efficient frontier typically shifts downward and to the right.[144] This means that, in general, the optimal constrained portfolio will have lower risk-adjusted returns than that of an unconstrained portfolio and that, by removing constraints, retirement investors may have access to designated investment alternatives that have higher risk-adjusted returns.

While the proposed rule provides plan fiduciaries with a detailed approach to satisfy their fiduciary obligations when selecting *any* designated investment alternative, Executive Order 14330 focused specifically on alternative assets. The following discussion explores how removing constraints on alternative assets may benefit retirement investors.

12.7.3.1. What Alternative Assets Can Contribute to a Portfolio.

As discussed in the Regulatory Baseline section, plan fiduciaries have historically received conflicting signals from the Department, in subregulatory guidance, on whether offering

[143] For more information on the stigma, refer to section 7.1, "Decreased Uncertainty and Litigation Risk for Plan Fiduciaries."
[144] Zvi Bodie, Alex Kane & Alan Marcus, Investments (9th ed. 2011).

a designated investment alternative that includes alternative assets is consistent with a fiduciary's duty of prudence. Statements made by industry members suggest that this regulatory ambiguity, in combination with increasing litigation risk, has made plans reluctant to offer alternative investments.[145]

For example, in 2024 only 0.1 percent of defined contribution plan assets were in alternative investments.[146] While not an apples-to-apples comparison,[147] Cerulli reported that in 2023, 24.3 percent of state and local defined benefit assets, 23.8 percent of multi-employer defined benefit assets, and 14.9 percent of single-employer defined benefit assets were invested in private markets, accounting for just a subset of the larger alternative asset category.[148] It is important to note that defined benefit plans and defined contribution plans have different characteristics, including different funding mechanisms, investment time horizons, liquidity needs, and risk considerations. Therefore, investments and investment courses of action that are appropriate for defined benefit plans may not be appropriate for defined contribution plans. However, as summarized by SEC Commissioner Uyeda (speaking in his personal capacity):

> While there might be debate on what is the optimal level of exposure to private investments, what is clear is that the answer is NOT zero. Regulation should not presume that zero percent exposure is inherently safer or preferable. The absence of access is not the same as the presence of protection. A blanket exclusion from defined contribution plans denies both

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[145] Comm. on Capital Mkt. Regul., *Expanding Opportunities for U.S. Investors and Retirees: Private Markets* (Aug. 2025), https://capmktsreg.org/wp-content/uploads/2025/08/CCMR-Expanding-Access-to-Private-Markets-08.07.25-Final.pdf.

[146] Jessica Hall, *Private Equity in 401(k) Plans? Highly Risky for the Average Investor*, MarketWatch (Jan. 11, 2025), https://www.morningstar.com/news/marketwatch/20250111254/private-equity-in-401k-plans-highly-risky-for-the-average-investor.

[147] Interestingly, this has not stopped plaintiffs from faulting plan fiduciaries for not employing the investment strategies that are commonly used in defined benefit plans. *See, e.g.*, First Am. Compl. 189(H), *Beesley v. Int'l Paper Co.*, No. 3:06-cv-00703-DRH-SCW (S.D. Ill. May 1, 2008), ECF No. 169; Pls.' Mem. in Opp. to Defs.' Mot. for Summ. J. at 5, *Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 1:15-cv-09936-LGS (S.D.N.Y. Mar. 5, 2018), ECF No. 192.

[148] Cerulli Assocs., *Unlocking the Potential of Private Investments in Defined Contribution Plans: Leveraging Familiar Solutions to Provide Access to Private Market Exposures*, Exhibit 2 (Sept. 2025), https://www.partnersgroup.com/~/media/files/p/partnersgroup/universal/perspectives-document/20251015-partners-group-unlocking-private-investments-in-dc-plans.pdf.

investment professionals and investors alike the ability to make informed choices about risk and reward.[149]

Executive Order 14330 defines alternative assets to include private market investments, real estate, digital assets, commodities, infrastructure, and lifetime income investment strategies.[150] There is significant variability in the return and risk characteristics of the asset classes within the broader category of alternative assets. Consequently, each would play a different role within a portfolio. This analysis does not attempt to discern whether alternative assets overperform or underperform traditional assets but rather explores how alternative assets may contribute to an investment portfolio through returns and diversification.

12.7.3.1.1. Challenges to Comparing Alternative Asset Performance.

The complexity of alternative assets can make comparing performance across different asset classes more challenging. For example, private market investments and real assets do not have a market price, which means investors must rely on relatively infrequent fair market value assessments. Because alternative investments' prices are not subject to market price fluctuations, they may appear to have artificially low volatility. This results in what is often called return "smoothing." PitchBook warns that if adjustments are not made to account for the smoothing of returns, "private market asset classes will appear more attractive on a risk-adjusted basis because of the understated volatility measures."[151]

Further complicating comparisons, private and public fund performance are often reported using different metrics. Public funds typically report a time-weighted return, or a compounded growth rate over a specified time period. Time-weighted returns do not consider the effects of cash flows on returns, which is appropriate for public funds as investors, but not for

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[149] Comm'r Mark T. Uyeda, *The Diversification Deficit: Opening 401(k)s to Private Markets* (Nov. 2025), https://www.sec.gov/newsroom/speeches-statements/uyeda-remarks-diversification-deficit-opening-401ks-private-markets-112025.
[150] 90 FR 38921 (Aug. 7, 2025).
[151] PitchBook, *Private Capital Indexes: Q2 2025* (Oct. 2025).

fund managers that control the cash flows into and out of the fund. However, in many private funds, the investor receives cash flows based on the decisions of the asset manager. Therefore, a capital-weighted return method is more appropriate for a private fund.[152]

The CFA Institute's Global Investment Performance Standards require that returns for private equity be expressed as the internal rate of return (IRR),[153] a type of capital-weighted return that calculates the return rate necessary to equate the invested capital with the present value of the assets. While the IRR is one of the most commonly referenced performance measures for private funds, it is important to note that it is not directly comparable to a time-weighted return. The IRR is a simple and imperfect measure, and as a result, the research community and industry have developed additional performance metrics for private funds—such as:

(1) the public market equivalent (PME);[154]
(2) the modified IRR (MIRR) which adjusts for timing of investment flows;
(3) the multiple on invested capital (MOIC) which measures the total value returned to investor relative to the total capital invested;[155] and
(4) and the NAV-to-NAV IRR which measures the IRR based on the current net asset value (NAV), allowing for interim performance measures.[156]

Without a single accepted measure of return, it is even more difficult to compare performance across asset classes and studies.

Another complication in being able to compare alternative asset performance to traditional assets is the degree of performance dispersion among managers. As described by Soni

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[152] Callan, *Private Equity Performance Measurement Requires Unique Calculations* (Oct. 2019), https://www.callan.com/blog/pe-measurement/.
[153] CFA Inst., *Guidance Statement on Private Equity*, 4-9 (2012), https://www.gipsstandards.org/wp-content/uploads/2021/03/private_equity_gs_2012.pdf.
[154] Ludovic Phalippou, *A Reality Check on Private Markets: Part II*, CFA Inst. (Nov. 8, 2024), https://blogs.cfainstitute.org/investor/2024/11/08/the-tyranny-of-irr-a-reality-check-on-private-market-returns/.
[155] *Id*.
[156] *Id*.

(2020), while managers in traditional asset classes typically have a well-defined benchmark, this often is not the case for alternative asset managers. Even when using an alternative index, the underlying assets within the index are often not easily investable, meaning that an asset manager would not be able to easily invest in the same underlying assets and could not replicate the index. In addition, alternative asset managers are more likely to have less defined investment mandates. Consistent with these qualities, the study finds that performance dispersion within alternative asset classes is significantly larger than more traditional asset classes. As a result, it is more difficult to generalize performance, which makes asset manager selection more important for alternative asset investments than traditional investments.[157]

Finally, much of the research exploring the performance of alternative assets relies upon alternative asset indices. As discussed above, these indices are typically not investable, limiting their applicability to how incorporating alternative assets may actually affect risk-adjusted returns. In addition, as explained by Aubry (2025), private equity and hedge fund data is reported voluntarily to indices. As a result, indices are more likely to reflect better performers, who have an incentive to report. Moreover, failed funds are removed from indices, creating an inherent survivorship bias that over-weights better performing funds.[158]

The Department expects that further expansion of alternative investment in retirement plans depends on how and to what extent the financial markets can mitigate or overcome these issues. The most likely outcome would be plan sponsors choosing an option that allocates a small proportion of a fund to alternative assets to aid in diversification and potentially offer a higher expected risk-adjusted net return. Asset managers and fund providers will leverage the liquidity of traditional holdings to meet their liquidity needs and those of plan sponsors they service.

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[157] Amit Soni, *Performance Dispersion Risk Assessment in Alternatives and Active Strategies*, J. Alternative Invs. (2020).

[158] Jean-Pierre Aubry, *Public Pension Investment Update: Have Alternatives Helped or Hurt?*, Ctr. for Ret. Rsch. at Bos. Coll., Issue in Brief No. 22-20 (Nov. 2022), https://crr.bc.edu/wp-content/uploads/2022/11/IB_22-20-1.pdf.

More established access to additional capital in retirement plans may entice asset managers to overcome some of the obstacles that cause a relatively higher risk premium when compared to traditional investments, such as illiquidity or information asymmetry. This may allow more alternative assets to be incorporated into plan investments and menus. As this market matures a new equilibrium should be reached where there is a larger pool of viable and vetted investments, expanded by alternative assets, for asset managers to offer to plan sponsors. The tradeoff for this increased market penetration is a reduction in illiquidity premium. As the risks associated with investment in alternative assets falls, so too does the risk premium investors in the assets will enjoy. A determining factor in the rate and magnitude of funds flowing into alternative asset classes via retirement plans is the ability for asset managers to provide options that are able to satisfy the process based standard to meet the monitoring and selection requirements set forth in ERISA.

12.7.3.1.2. Opportunities to Diversify Portfolio Risk.

When considering an investment portfolio, it is important to consider the risk of an investment as well as the return. While a portfolio's return is equal to the weighted average of the returns of each asset in the portfolio, a portfolio's standard deviation—a common measure of portfolio risk—is less than the weighted average of each asset's standard deviation so long as the assets are not perfectly correlated. As summarized by Bodie, Kane, and Marcus, "portfolios of less than perfectly correlated assets always offer better risk-return opportunities than the individual component securities on their own."[159] For this reason, diversification is one of the most important factors of portfolio management.

One of the reasons to include debt in a portfolio is to diversify public equity risk, but the relationship between public equity and debt is not constant. Brixton et al. (2023) analyzed the

[159] Zvi Bodie, Alex Kane & Alan Marcus, Investments (9th ed. 2011).

correlation of U.S. public equity and U.S. Treasury returns between 1900 and 2022.[160] While the returns of U.S. public equity and U.S. Treasuries have been negatively correlated for most of the 21st century, the returns were positively correlated for most of the 20th century. A study conducted by Morningstar in 2025 observed that since 2021, the correlation between U.S. stocks and bonds has once again been positive. The study observed that the U.S. economy has experienced low inflation and declining interest rates for decades, which has resulted in low or negative correlations between stocks and bonds. However, in recent years, the economy has seen rising inflation and interest rates, resulting in positive correlations once again. As a result, the diversification value of debt has decreased.[161] Brixton et al. (2025) summarized: "If the performance of stock and bond allocations becomes more correlated, a 'third allocation'—one that is diversifying to both traditional asset classes—may be able to make up the diversification deficit."[162]

Morningstar's 2025 analysis considered correlations between a wider set of asset classes and the U.S. Stock Market. They found that high quality bonds (*e.g.*, government bonds or investment grade bonds) provide better diversification during periods of low economic growth but are more correlated with U.S. equity during inflationary periods. Conversely, high yield bonds are consistently highly correlated with U.S. equities, providing limited diversification. Beyond public equity and debt, the study finds that commodities have low correlations to most asset classes, particularly during inflationary periods. They note that cryptocurrency may also

[160] Generally during periods of growth, equity prices increase due to expected increases in future cash flows and bond prices fall due to expected increases in interest rates. Conversely, during recessionary periods, equity prices fall due to expected decreases in future cash flows and bond prices rise due to lower yields and investors seeking safer assets. In other words, the asset classes are negatively correlated. Whereas during periods of inflation, equity and debt generally have a positive correlation, as prices for both asset classes tend to decrease. *See* Alfie Brixton, Jordan Brooks, Pete Hecht, Antti Ilmanen, Thomas Maloney, & Nicholas McQuinn, *A Changing Stock-Bond Correlation: Drivers and Implications*, Journal of Portfolio Management, 2023 Multi-Asset Special Issue Vol. 49 Issue 4, pp. 64-80.
[161] Morningstar, *2025 Diversified Landscape* (Apr. 2025).
[162] Alfie Brixton et al., *Stock-Bond Correlation: Drivers and Implications*, J. Portfolio Mgmt., 2023 Multi-Asset Special Issue, Vol. 49, Issue 4, at 64.

provide diversification benefits, although the authors caution that investors should be aware of the volatility of alternative investments.[163]

Morningstar noted that correlations between the U.S. market and private investment sectors vary over time, concluding that private investment markets may not provide reliable diversification to a portfolio.[164] As discussed above, private market returns reflect "smoothing" and as a result may appear to have lower volatility unless returns are adjusted. An analysis by PitchBook on the correlation between public and private market returns, adjusted for the smoothing effect of private markets found that between 2020 and 2025, private equity and private debt exhibited relatively strong correlation with U.S. and global equities and global high yield debt, while venture capital, real estate, and real asset investments were only moderately correlated.[165]

The diversification benefits of alternative assets can be observed in how they performed during market downturns. The table below shows estimated peak-to-trough drawdowns—or the percent loss from the highest price point (peak) to the lowest price point (trough)—for recent market downturns. During these time periods, alternative asset classes generally experienced a smaller loss than public markets, with the exception of real estate during the Great Financial Crisis.[166]

[163] Morningstar, *2025 Diversification Landscape* (Apr. 2025).
[164] *Id*.
[165] PitchBook used a first order autoregression model to adjust private market returns smoothing. This accounts for the smoothing of private capital returns due to less frequent valuation.
[166] PitchBook, *Private Capital Indexes: Q2 2025* (Oct. 2025).

TABLE 3.—*Peak-to-Trough Drawdowns of Asset Class Indices in Select Periods* [a]

Asset Class	Dot-com Bubble	Great Financial Crisis	COVID-19 Pandemic
Public Markets			
S&P 500	-43.8%	-45.8%	-19.6%
Global Markets	-43.1%	-48.7%	-22.1%
Global High Yield	-8.2%	-26.9%	-13.8%
Alternative Assets			
Private Equity	-25.6%	-27.1%	-8.5%
Real Estate	-2.7%	-53.8%	-3.0%
Real Assets	-6.2%	-12.6%	-12.1%
Private Debt	-3.5%	-26.8%	-6.0%

Source: PitchBook, *Private Capital Indexes: Q2 2025* (October 2025).
[a] PitchBook used a first-order autoregression model to adjust private market returns smoothing. This accounts for the smoothing of private capital returns due to less frequent valuation.
[b] Private equity includes buyout, diversified private equity, growth and expansion, and restructuring and turnaround funds.
[c] Real estate includes pools of capital raised for the purpose of investing in the equity of properties that currently have or are intended to have tenants.
[d] Real assets include pools of capital raised for the purpose of investing in the equity of infrastructure, oil and gas, timber, metals and mining, agriculture and other natural resource assets.
[e] Private debt includes pools of capital raised for the purpose of lending to private companies, including those held by private equity funds, venture capital funds, real estate funds, and infrastructure funds.

While the performance and diversification benefits of adding alternative assets to a portfolio would depend on the asset itself, the macro-economic environment, and the characteristics of the rest of the portfolio, the research suggests that incorporating alternative assets may result in more resilient portfolios.

12.7.3.1.3. Opportunities to Enhance Portfolio Returns in Defined Contribution Plans.

With the caveats discussed in section 12.7.3.1.1 in mind, the research literature suggests that alternative assets may offer opportunities to enhance risk-adjusted returns. Brown, Lundblad, and Volkmann (2025) analyzed the performance of nearly 8,000 private asset funds

between 1988 and 2019 across seven common performance metrics.[167] They found that private equity funds generally have outperformed public equity on a risk-adjusted basis.[168] The exception was North American venture capital funds, which underperformed on a risk-adjusted basis despite high returns. Most measures also indicated that private debt funds earned positive excess risk-adjusted returns relative to the benchmarks,[169] although there was less consensus on the risk-levels of private debt funds among the measurements. The authors cautioned that most of the private credit funds in the dataset have not existed through an entire credit cycle and that their estimates may underestimate the riskiness of private credit funds.[170]

Expanding their analysis to real assets, the authors looked at the performance of private real estate and private infrastructure funds. They find that North American private real estate has performed comparably to North American public real estate on a risk adjusted basis, while private real estate in the rest of the world has underperformed public real estate markets.[171] When looking at infrastructure, they find that private infrastructure funds earned consistent excess risk-adjusted returns relative to public infrastructure, across geographies, investment strategies, and performance metrics.[172] The authors attribute this to private infrastructure funds having lower

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[167] To overcome some of the issues acknowledged in section 12.7.3.1.1., the authors considered how the asset classes performed across seven performance metrics: the multiple on investment capital, internal rates of return, the modified internal rates of return, the Kaplan-Schoar public market equivalent, Gredil-Griffiths-Stucke direct alpha, Korteweg-Nagel generalized public market equivalent, and estimates from the Brown-Ghysels-Gredil Now-Casting model. Returns were also adjusted to account for "smoothing."

[168] Private equity performance was benchmarked against the MSCI ACWI Gross Total Return Index for all geographies, CRSP value-weighted total market index for North American, and MSCI EAFE Gross Total Return Index for the rest of the world.

[169] Private debt performance was benchmarked against the Morningstar Global Leveraged Loan Return Index for all geographies, S&P UBS Leveraged Loan Index Total Return Unhedged Index for North America, and the Morningstar European Leveraged Loan Total Return Index for the rest of the world.

[170] Gregory Brown, Christian Lundblad & William Volckmann, *Risk-Adjusted Performance of Private Funds: What Do We Know?*, Inst. for Private Capital (Mar. 2025), https://uncipc.org/wp-content/uploads/2025/03/Private-Risk-Adjusted-Returns-1.pdf.

[171] Private real estate was benchmarked against the FTS EPRA NAREIT Developed Total Return Index for all geographies, and the Dow Jones U.S. Real Estate total Return Index for North America. The benchmark for private real estate in the rest of the world is inferred, assuming the U.S. represent half of the FTSE EPRA Nareit Index.

[172] Private infrastructure was benchmarked against the MSCI World Infrastructure Gross Total Return Index for all geographies, the MSCI USA Infrastructure Gross Return Index for North America, and the MSCI EAFE Infrastructure Gross Total Return for the rest of the world.

risk than public market infrastructure indices.[173] While not all of the alternative asset classes overperformed their respective benchmarks, the study confirmed that there are return-enhancing opportunities in alternative asset funds.

As explained in paragraph (g) of the proposed rule, a plan fiduciary should focus on maximizing risk-adjusted returns, and it may be prudent to select a lower-risk investment strategy with lower expected returns, provided it furthers the purposes of the plan. As such, it is more important to consider how an alternative investment strategy may contribute to risk-adjusted portfolio returns, rather than focusing on the returns alone.

As there has been limited uptake in offering alternatives in defined contribution plans, studies analyzing the effect of adding alternative assets to these plans are limited to simulations. For example, in 2025, the Council of Economic Advisers simulated how removing constraints preventing retirement investors from investing in private equity could affect an individual's annuitized lifetime income.[174] With the estimated optimal portfolio allocation to private equity ranging from 23 percent for those under age 25 to 13 percent for those above age 65, the study found that the addition of private equity to the portfolio increased annuitized lifetime income by 1.3 percent across all age groups. The estimated annuitized income increase ranged from 2.5 percent for those under 25 and less than 0.5 percent for those over age 65.[175]

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[173] Gregory Brown, Christian Lundblad & William Volckmann, *Risk-Adjusted Performance of Private Funds: What Do We Know?*, Inst. for Private Capital (Mar. 2025), https://uncipc.org/wp-content/uploads/2025/03/Private-Risk-Adjusted-Returns-1.pdf.

[174] In this study, annuitized lifetime income refers to the size of annuity that an individual could draw every year from now until death at age 78. For each age cohort, the study used observed retirement account allocations to public equity and safe assets to estimate risk aversion coefficients. Using the estimated risk aversion coefficients, the study estimates (i.e., the portfolio weights that maximize the risk-adjusted return) for each cohort if retirement investors had access to private equity as well as public equity and safe assets. The study relied on the mean, variance, and correlations of portfolio returns between 1998 and 2020, using the Vanguard Total Stock Market Index Fund for public equity, the Vanguard Total Bond Market Index fund for safe assets, and the Cambridge Associates U.S. Private Equity Benchmark Index for private equity.

[175] Council of Econ. Advisers, *Retail Access to Alternative Investments Via Defined Contribution Plans* (Aug. 2025), https://www.whitehouse.gov/research/2025/08/retail-access-to-alternative-investments-via-defined-contribution-plans/.

Similarly, Antonelli (2018) simulated how adding alternative assets to target date funds would affect retirement income outcomes.[176] The study constructed a baseline target date fund, invested in public equities, REITs, commodities, bonds, and cash, and then, to test the effect of adding alternative assets, constructed a "diversified" target date fund with exposure to private equity, real estate, and hedge funds. The diversified target date fund had similar risk levels along the glidepath of the baseline target date fund. Due to the diversification benefits of the alternative assets, a portfolio with an equivalent risk level was able to allocate more to return-seeking assets. By converting a participant's balance into a stream of income at retirement, Antonelli found that the inclusion of alternative assets into the target date fund increased the median annual retirement income by approximately 17 percent.[177]

In a later paper, Antonelli (2022) modified the previous analysis to be more consistent with the timing of introducing alternative assets. Acknowledging that plan sponsors would likely add alternative assets incrementally, the updated analysis considered the benefits of smaller allocations to alternative assets. She also changed the basket of alternative assets to better reflect investments that defined contribution plans might select, replacing hedge funds with private credit and replacing real estate with a broader category of real assets. She found that, even with more modest allocations to alternative assets across the glide path, including alternative assets improved the median annual retirement income by approximately 8 percent.[178]

Further building on this analysis, Antonelli (2025) considered how adding alternative assets to a target date fund might affect five plan participant profiles: the average U.S. worker,

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[176] They modeled 5,000 paths for a full-career employee, with varying salary, contribution, return, and inflation assumptions. *See* Angela Antonelli, *The Evolution of Target Date Funds: Using Alternatives to Improve Retirement Plan Outcomes*, Geo. Univ. McCourt Sch. of Pub. Pol'y Ctr. for Ret. Initiatives (June 2018), https://cri.georgetown.edu/wp-content/uploads/2018/06/WTW71824_WHITE-PAPER_Georgetown-CRI-Target-Date_Jun-18_Final.vs2_626.pdf.

[177] Angela Antonelli, *The Evolution of Target Date Funds: Using Alternatives to Improve Retirement Plan Outcomes*, Geo. Univ. McCourt Sch. of Pub. Pol'y Ctr. for Ret. Initiatives (June 2018), https://cri.georgetown.edu/wp-content/uploads/2018/06/WTW71824_WHITE-PAPER_Georgetown-CRI-Target-Date_Jun-18_Final.vs2_626.pdf.

[178] Angela Antonelli, *Can Asset Diversification & Access to Private Markets Improve Retirement Income Outcomes?*, Geo. Univ. McCourt Sch. of Pub. Pol'y Ctr. for Ret. Initiatives (Dec. 2022), https://cri.georgetown.edu/wp-content/uploads/2022/12/report-asset-diversification.pdf.

the family caretaker, the low-income worker, the job hopper, and the unexpected early retiree. Using a similar approach to Antonelli (2022), she compared the potential income replacement rate for each profile if they invested in a typical target date fund or in an enhanced target date fund with private market exposure. Despite having different savings patterns, she found that each participant profile saw between a 7 percent and 8 percent increase in their income replacement rate by investing in the enhanced target date fund.[179]

Cosic et al. (2021) also simulated how adding private equity to target date funds could affect retirement outcomes.[180] The study relied on the Urban Institute's Dynamic Simulation of Income Model (DYNASIM), which simulates 42 target date funds with different glide paths. The authors modified these target date funds to include private equity investments.[181] Further, acknowledging the uncertainty about future private equity return and risk characteristics, they considered 16 private equity return scenarios, varying private equity performance by expected excess return (alpha), correlation with the market (beta), standard deviation (a common measure of risk), and the maximum share invested in private equity. They find that adding private equity increased assets in retirement savings accounts in all but two of the scenarios, and the effect of adding private equity assets on simulated retirement savings ranged from -0.5 percent to 6.7 percent.[182]

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[179] Angela Antonelli, *Making the Case: The Effect of Private Market Assets on Retirement Income in Cases of Disrupted Savings* (Aug. 2025), https://cri.georgetown.edu/wp-content/uploads/2025/08/Effect-of-private-market-assets.pdf.

[180] Damir Cosic, Karen Smith, Donald Marron, & Richard Johnson, *How Might Investing in Private Equity Funds Affect Retirement Savings Accounts, Urban Inst. Income & Benefits Pol'y Ctr. (Aug. 2021), https://www.urban.org/sites/default/files/publication/104729/how-might-investing-in-private-equity-funds-affect-retirement-savings-accounts.pdf.*

[181] They assume that target date funds would invest a maximum of 15 percent of assets in private equity, funds that hold less than 10 percent in equity would not invest in private equity, and those that hold 90 percent or more in equity would invest in the maximum share of private equity. In addition, they assume that target date funds would increase their exposure to private equity by one percentage point each year until reaching the maximum.

[182] Damir Cosic, Karen Smith, Donald Marron, & Richard Johnson, *How Might Investing in Private Equity Funds Affect Retirement Savings Accounts, Urban Inst. Income & Benefits Pol'y Ctr. (Aug. 2021), https://www.urban.org/sites/default/files/publication/104729/how-might-investing-in-private-equity-funds-affect-retirement-savings-accounts.pdf.*

Similarly, VanDerhei (2021) considered how adding private equity to target date funds might affect retirement income adequacy.[183] This study used the EBRI Retirement Security Projection Model, which uses data on 27 million 401(k) participants and 20 million individuals with individual retirement accounts to simulate the percentage of retirement investors that will have adequate retirement savings.[184] The model assumes that all 401(k) participants invest in target date funds, and so the study considered how introducing private equity into target date funds would change the estimated number of retirement investors with adequate retirement savings.

VanDerhei found that younger cohorts benefited the most from adding private equity. By replacing 15 percent of the public equity exposure for those aged 35 to 39 with private equity, he estimated that the percent with adequate retirement savings would increase by 1.3 percentage points and the retirement savings shortfall—or the present value of simulated total retirement deficits at retirement—would decrease by 4.8 percent. If instead only 5 percent of public equity exposure was replaced with private equity, the percentage with adequate retirement savings would increase by 0.5 percentage points and the retirement savings shortfall would decrease by 1.8 percent. Older cohorts saw smaller but positive benefits. For example, the percentage of those aged 45 to 49 with adequate retirement savings would increase by 0.6 percentage points if 15 percent of their public equity exposure were replaced with private equity and 0.2 percentage points if 5 percent of their public equity exposure were replaced. The retirement savings shortfall for this age group would decrease by 2.8 percent and 1.0 percent if 15 percent or 5 percent of public equity exposure was replaced with private equity exposure, respectively.[185]

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[183] Jack VanDerhei, *The Impact of Adding Private Equity to 401(k) Plans on Retirement Income Adequacy*, Emp. Benefit Rsch. Inst., Issue Brief No. 547 (Dec. 2021).
[184] An individual is considered to have adequate retirement savings if they have enough expected funds from Social Security income and tax-qualified individual accounts to cover expenses.
[185] Jack VanDerhei, *The Impact of Adding Private Equity to 401(k) Plans on Retirement Income Adequacy*, Emp. Benefit Rsch. Inst., Issue Brief No. 547 (Dec. 2021).

These studies demonstrate that adding exposure to alternative assets in defined contribution plans may enhance risk-adjusted returns for plan participants and beneficiaries. They also demonstrate that the impact of doing so depends on the type of assets included and by how much exposure is added and when. Additionally, they acknowledge the uncertainty about how alternative assets will perform in the future.

12.7.3.1.4. Lessons from Public and Private Defined Benefit Plans.

As discussed elsewhere in this analysis, public and private defined benefit plans are already actively investing in alternative assets. While investments and investment courses of action that may be appropriate for public pensions defined benefit plans may not be appropriate for defined contribution plans, the experience of such plans that are investing in alternatives provides important context.

For example, Sethi and Mitchell (2023) looked at historical allocations of private defined benefit plans to examine trends in private equity fund investments.[186] They combined Form 5500 data between 2009 and 2020 on the 20 largest defined benefit plans with private equity exposure with internal rate of return (IRR) data published by Pitchbook for each of the private equity funds invested in by the plans. They found that the percentage of assets allocated to private equity varied significantly across the plans, ranging from less than one percent to nearly 30 percent. They also found that there was no consensus among plans about which private equity funds to invest in. The authors noted that "there are return and diversification benefits to including [private equity] in a portfolio, but the actual results of [defined benefit] pension plans that invest in [private equity] indicate that there is no single approach that can be broadly applied to [defined contribution] plans."[187]

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[186] Jasmin Sethi & Lia Mitchell, *Does Private Equity Enhance Retirement Investment Outcomes? Evidence from the Experience of Pension Funds*, Morningstar Ctr. for Ret. & Pol'y Studies (Dec. 2023).
[187] Jasmin Sethi & Lia Mitchell, *Does Private Equity Enhance Retirement Investment Outcomes? Evidence from the Experience of Pension Funds*, Morningstar Ctr. for Ret. & Pol'y Studies (Dec. 2023).

Aubry (2025) considered how alternative investments have affected public pensions. The author observed that outside of real estate, alternative investments performed better than public equities during the 2008-2009 financial crisis. The authors stated: "This performance, combined with a desire to diversify away from poorly performing stocks and lower yielding bonds, may have led state and local plans to increase their interest in alternatives coming out of the crisis." However, allocations to alternative assets have continued to rise, even as public equities have recovered.[188]

Using data from the Public Plans Database,[189] Aubry (2025) regressed net portfolio returns against the percentage of assets allocated to four alternative asset classes: private equity, hedge funds, real estate, and commodities.[190] When considering the entire time period between 2001 and 2022, he did not find a statistically significant relationship between net returns and allocations to private equity, real estate, or commodities, though allocations to hedge funds were associated with lower portfolio returns. However, when looking at shorter time periods, Aubry found that between 2001 and 2009,[191] alternative assets contributed positively to portfolio returns,[192] but since 2010, alternative assets have had a negative effect on portfolio performance.[193]

Korteweg, Panageas, and Systla (2024) looked more specifically at how private equity investments have contributed to public pension plan performance. They combined data from the Comprehensive Annual Financial Reports on 179 state and local pension plans between 1995 and 2018 with data from Preqin on 1,303 venture capital, buyout, and real estate private equity

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[188] Jean-Pierre Aubry, *Public Pension Investment Update: Have Alternatives Helped or Hurt?*, Ctr. for Ret. Rsch. at Bos. Coll., Issue in Brief No. 22-20 (Nov. 2022), https://crr.bc.edu/wp-content/uploads/2022/11/IB_22-20-1.pdf.
[189] The Public Plans Database collects data on 220 major public pension plans, accounting for more than 95 percent of U.S. state and local pension assets.
[190] This study relied upon indices for this analysis. For a discussion on the drawbacks of relying on indices (*e.g.*, survivorship bias), refer to section 7.3.1.1.
[191] Between 2001 and 2009, he found that higher allocations to private equity, real estate, and commodities were associated with higher portfolio returns; he did not find a statistically significant relationship for hedge funds.
[192] Between 2010 and 2022, allocations to hedge funds and commodities were associated with lower portfolio returns; he did not find a statistically significant relationship for private equity or real estate.
[193] Jean-Pierre Aubry, *Public Pension Investment Update: Have Alternatives Helped or Hurt?*, Ctr. for Ret. Rsch. at Bos. Coll., Issue in Brief No. 22-20 (Nov. 2022), https://crr.bc.edu/wp-content/uploads/2022/11/IB_22-20-1.pdf.

funds.[194] To measure performance, the study relied on the investor portfolio equivalent (IPE)—a modified PME that uses the investor's portfolio return instead of market portfolio returns— and the generalized IPE—a modified IPE that accounts for risk aversion. When accounting for risk aversion, the study did not find a statistically significant association between private equity investments and pension fund performance. Among the fund strategies considered, only buyout funds would have benefited plans.[195]

In addition, when considering plan characteristics, the study found that underfunded plans tended to take on more risk, typically resulting in lower risk-adjusted returns. Similarly, pension plans with more state officials and appointed members on the board tended to take on more risk, again typically resulting in lower risk-adjusted returns. The authors noted that, "[t]hese results are broadly consistent with agency problems within pension plans, such as gambling for resurrection and political influence, playing an important role in investment decisions."[196]

The experience of defined benefit plans cannot be directly applied to defined contribution plans. However, the experience of these plans emphasizes the importance of prudent investment selection when considering adding alternative assets. The simulated benefits of adding alternative assets to defined contribution plans discussed in section 12.7.3.1.3 suggest that most portfolios would benefit from adding alternative assets. The results from these hypothetical simulations, however, should be tempered by the mixed results that defined benefit plans have experienced in practice. While the return and risk characteristics of public equity and debt are generally well understood and easily implemented into a portfolio, alternative assets are highly

[194] The private equity funds included in the analysis are North American private equity funds with $5 million or more in committed capital. They exclude funds with vintages after 2013. They find that approximately 9 out of the 10 identified funds are invested in at least one pension plan.
[195] Arthur Korteweg, Stavros Panageas & Anand Systla, *Private Equity for Pension Plans? Evaluating Private Equity Performance from an Investor's Perspective*, NBER Working Paper No. 33194 (Nov. 2024), http://www.nber.org/papers/w33194.
[196] *Id*.

variable. This underscores the importance of prudent investment selection when considering alternative assets.

12.7.4. Conclusion.

The proposed rule would provide protection to both plan fiduciaries and plan participants and beneficiaries regarding defined contribution plan investments. Plan fiduciaries would have more certainty as to what the duty of prudence requires when considering designated investment alternatives, and consequently, would have less litigation risk in connection with their determinations. In addition, by adopting the process-based approach established by the proposed rule and safe harbor, plan fiduciaries would have assurances that they are fulfilling their duty of prudence, which would ensure that plan participants and beneficiaries have access to designated investment alternatives that promote income generation while also meeting plan participant and beneficiary needs with respect to risk, liquidity, and price transparency.

The proposed rule would reinforce the discretion ERISA grants to plan fiduciaries when considering designated investment alternatives and clarify that the Department maintains an asset-class neutral position. This flexibility would allow defined contribution plan fiduciaries to consider a wider array of financial vehicles and markets when designing menus that prioritize risk-adjusted returns, rather than remaining anchored to a traditional investment approach of public equities and debt. For many plans, such a course of action may still be appropriate for the circumstances and goals of their plan and its participants and beneficiaries. However, this proposed rule would enable plan fiduciaries to consider a wider opportunity set of investments and promote the maximization of risk-adjusted returns while still exercising prudent judgement.

12.8. Costs.

This proposed rulemaking provides a safe harbor for plan fiduciaries predicated on their employing an objective, thorough, and analytical process-based approach when selecting plan investment options. The Department expects the main cost driver of this proposal to be

reviewing and understanding the proposal and its implications. The Department also expects that the reduction in litigation risk resulting from the rulemaking will allow for a reduction in costs associated with managing that risk. The Department expects the rule, when finalized, will reduce costs by $488.0 million in the first year and $591.9 million in subsequent years while also allowing for more flexibility in the provision of the retirement plan.

12.8.1. Rule Review.

The Department assumes that, on average, it will take legal professionals roughly 5 hours to review the proposed rule for those plans that handle plan administration in-house, and 10 hours for service providers.[197] The assumption for service providers is higher because they service many plans with diverse investment policies which dictate a closer, more comprehensive review of the proposal. The Department estimates that reviewing the rule will cost $103.9 million in the first year. The estimation of rule review burden is discussed below.

As presented in the Affected Entities section, the Department estimates that roughly 85 percent of plans will rely on service providers to review the rule with the remaining 15 percent managing their plan investments in-house. The Department estimates there to be roughly 5,350 service providers who may provide or be involved in the provision of relevant services to plans. The Department expects that the service providers will then provide the relevant information to plans during their next Investment Committee Meeting as a course of normal business.

The remaining 15 percent of plans are assumed to use in-house resources and will also discuss the relevant parts of the rule with the plan investment manager or committee at the next

[197] The Department assumes a reading rate of 10 pages per hour, which is based on widely available estimates for technical and learning materials and much lower than the general reading rate, which is typically around 60 pages per hour. The Department also estimates roughly 30 pages of relevant information for a professional to review for the proposed rule. The Department then adds an amount of time to account for the resulting work that may be stimulated, such as writing memos, creating job aids, drafting and sending correspondence and potential meetings of sufficient duration to communicate what is directly resultant from the proposed rule. These estimates are averages with the understanding that some may devote more time to review the rulemaking, while other will rely on service providers to review and summarize the rulemaking.

Investment Committee Meeting. The cost of rule review borne by plans is detailed in Table 4 below.

TABLE 4.—*Cost of Rule Review*

	Plan Count (a)	Time to Review (Hours) (b)	Time Burden to Review (Aggregate) (a x b) =c	Hourly Cost of Legal Professional (d)	Cost of Rule Review (c x d) = e
Plan Review (15% of Plans)	108,159	5	540,795	$174.77	$94,514,742
Service Provider Review	5,350	10	53,500	$174.77	$9,350,195
Total			594,295		$103,864,937

12.8.2. Cost to Provide Information to Plan Fiduciary.

The Department's proposal and safe harbor allow plan fiduciaries to satisfy the consideration and determination requirements for certain factors by obtaining written representations from a person responsible for managing the designated investment alternative and then reading and critically reviewing the representations, consulting a qualified professional if necessary. This is particularly true in cases where the independent fiduciary, either directly or via another qualified party such as an appraiser, is considering information related to the liquidity or valuation of assets in the investment option being considered. As discussed in section 12.6.2, while there are other avenues for inclusion in defined contribution plans, the most likely method is by including them in target date funds or managed accounts. The Department only has sufficient data to broadly estimate the take-up related to target date funds; therefore, this analysis is centered on them. The Department discussed its approach to quantify this activity in section 12.6.2. and estimates that 47,333 plans will select a new target date fund that includes alternative assets each year.

The Department also assumes that the investment options considered will require additional information to ensure qualification for the safe harbor roughly half the time. The Department assumes that the analysis and communication would be similar to current practices; however, a service provider would spend an additional 15 minutes gathering and organizing the pertinent information and then electronically sending the information to the plan to memorialize.

This results in an annual estimated cost of approximately $1.1 million. The estimation process of this potential annual cost is shown in Table 5. The Department requests comments on the assumptions used to develop this estimate.

TABLE 5.—*Estimate of Change in Annual Documentation Costs*

Professional Completing Action	Hourly Cost of Professional	Time per Occurrence (Hours)	Participant Directed DC Plans Selecting a TDF with Alternative Assets	Proportion Requesting Additional Documentation	Number of Plans Requiring Additional Documentation from Service Provider	Total Cost
	(a)	(b)	(c)	(d)	(c x d) = e	(a x b x e) = f
Financial Analyst/Adviser	$192.09	1/4	47,333	50%	23,667	$1,136,525

12.8.3. Cost Savings from Reduced Litigation Risk.

Plans expend significant resources in managing litigation risk. Plans must understand the litigation trends within the defined contribution plan universe and, when appropriate, take actions to minimize risk. This rule is intended to reduce the exposure to litigation risk and therefore will reduce the time spent researching, monitoring, and discussing the topic. The Department assumes that these time reductions will be most felt at Investment Committee Meetings, where litigation trends and their impact on plan investments are routinely discussed.

12.8.3.1. Investment Committee Meetings.

The Department estimates that the safe harbor will meaningfully reduce the resources dedicated to litigation risk management during plans' Investment Committee Meetings. PSCA surveys indicate that in 2024 and 2025, most of the Profit Sharing and 401(k) plans surveyed met quarterly to evaluate their plan's investments. This is the case for plans of all sizes, although small plans were more likely to meet on a less frequent basis, either annually or semi-

annually.[198] Using PSCA's last two surveys' findings as a basis, the Department assumes the meeting frequency factors in Table 6.[199]

TABLE 6.—*Investment Committee Meeting Frequency, by Plan Size*

Meeting Frequency	Small (Fewer than 100 Participants)	Large (100 Participants or more)
Annually	25%	10%
Semi-Annually	20%	15%
Quarterly	55%	75%

The Department anticipates that, following the finalization of the rule and adoption of the safe harbor, less time and focus will be spent on the litigation landscape related to selection of plan investments and the subsequent potential risk exposure for the plan fiduciary. The Department estimates this simplification will result in cost savings in two ways. First, the preparation of legal risk analysis will be simplified, which the Department assumes will reduce legal risk analysis preparation by two hours for each regular Investment Committee Meeting. The responsibility of preparation is assumed to be split in the same manner as applied to the rule review, with service providers servicing 85 percent of plans, and the remaining 15 percent of plans using in-house resources. Second, simplifying the discussion within the Investment Committee Meeting will result in shorter meetings. The Department assumes that the average meeting time for each regular Investment Committee Meeting will be reduced by 30 minutes. The cost savings of these effects taken together are estimated to be $592.8 million each year, which is developed in the following sections.

12.8.3.1.1. Cost Savings, Litigation Risk Analysis Preparation.

To determine the potential cost savings of the proposed rule and safe harbor, the Department first estimates the aggregate time savings due to the reduction in complexity of

[198] PSCA, *67th Annual Survey of Profit Sharing and 401(k) Plans* (2024); PSCA, *68th Annual Survey of Profit Sharing and 401(k) Plans* (2025).

[199] The Department examined the rates reported based on plan size. However, the size classes presented in the survey results do not line up perfectly with Departmental plan size definitions. Generally, the Department averaged the rates by size and rounded to increments of 5%.

fulfilling their fiduciary responsibilities when considering and selecting plan investments for all affected parties, particularly with respect to the time spent in the development of the litigation landscape report and presentation relevant to the plan. The Department assumes the parties responsible will reduce the time taken to research and develop the presentation of the report by an average of two hours per preparer. The Department assumes that this report is routinely prepared or updated for each Investment Committee Meeting occurrence.

Using the 2023 plan count for participant-directed defined contribution plans by plan size presented in the Affected Entities section, the Department applies the factors from Table 5 to distribute plans by meeting frequency and size to arrive at the number of plans estimated to conduct the legislative risk analysis with plan or sponsor resources. This process is displayed in Table 7.

TABLE 7.—*Estimate of Plans Completing Legislative Risk Analysis In-House, by Meeting Frequency*

Monitoring Frequency	Small (100 or Fewer Participants) (a)	Large (More than 100 Participants) (b)	Total Plans, by Meeting Frequency (a + b) = c	Portion of Plans Conducting Function In-House (d)	Number of Plans Affected (c x d) = e
Annually	157,596	9,068	166,664	15%	25,000
Semi-Annually	126,077	13,601	139,678	15%	20,952
Quarterly	346,712	68,007	414,719	15%	62,208
Total	630,385	90,676	721,061		108,159

Next, the Department develops the time- and cost-savings estimates for plans by applying the estimated time savings per instance to plans and service providers to complete the analysis, which are estimated at $117.8 million annually. This process is displayed in Table 8 below.

TABLE 8.—*Cost Savings, Preparation for Investment Committee Meeting*

Monitoring Frequency	Number of Affected Plans, by Meeting Frequency	Number of Service Providers Affected[1]	Number of Analyses Conducted Annually	Change in Legislative Risk Preparation (Hours)	Investment Committee Meeting Preparation Time Savings	Hourly Cost of Legal Professional	Total Cost Savings
(a)	(b)	(c)	[(b + c) x a] = d	(e)	(d x e) = f	(g)	(f x g) = h
Annually	25,000	0	25,000	-2	-49,999	$174.77	-$8,738,360
Semi-Annually	20,952	0	41,903	-2	-83,807	$174.77	-$14,646,914
Quarterly	62,208	5,350	270,231	-2	-540,463	$174.77	-$94,456,684
Total	108,159	5,350	337,134		-674,269		-$117,841,958

[1] All outside service providers are assumed to perform quarterly analyses.

12.8.3.1.2. Savings Associated with Shorter and Less Complex Investment Committee Meetings.

The findings of the litigation analysis and regulatory updates are typically presented during plan Investment Committee Meetings. The Department anticipates this rule will reduce the duration of the meetings by an average of 30 minutes due to the reduced content they need to cover. The Department uses 30 minutes with the understanding that the actual time savings could deviate substantially for individual plans. The Department requests comments on these assumptions.

Using the meeting frequencies developed in the previous section, the Department next estimated the total number of meetings by plan size and meeting frequency. The results of this estimate are presented in Table 9.

TABLE 9.—*Number of Investment Committee Meetings, by Frequency and Plan Size*

	Small (100 or Fewer Participants) (a)	Large (More than 100 Participants) (b)	Total Number of Investment Committee Meetings (a + b) = c
Annually	157,596	9,068	166,664
Semi-Annually	252,154	27,202	279,356
Quarterly	1,386,848	272,028	1,658,876
Total	1,796,598	308,298	2,104,896

Finally, the Department used the estimated number of meetings per year from Table 9 to develop an estimated cost savings based upon the group of likely meeting participants. These results are presented in Table 10 below.

TABLE 10.—*Cost Savings Due to Simplified Investment Committee Meetings*

Plan Size	Meeting Participants	Hourly Cost of Professional	Estimated Reduction in Meeting Duration (Hours)	Total Cost Savings, per Meeting Attended	Meeting Attendees	Total Meetings	Total Savings
		(a)	(b)	(a x b) = c	(d)	(e)	(c x d x e) = g
Small Plans	Legal Professional	$174.77	-1/2	-$87.39	0	1,796,598	$0
	Financial Manager or Investment Professional	$201.38	-1/2	-$100.69	0	1,796,598	$0
	Top Executive	$143.75	-1/2	-$71.88	1	1,796,598	-$129,130,481
	Benefits & Compensation Manager	$179.96	-1/2	-$89.98	1	1,796,598	-$161,657,888
	Administrative Professional	$72.53	-1/2	-$36.27	1	1,796,598	-$65,153,626
Large Plans	Legal Professional	$174.77	-1/2	-$87.39	1	301,821	-$26,940,621
	Financial Manager or Investment Professional	$201.38	-1/2	-$100.69	1	301,821	-$31,042,526
	Top Executive	$143.75	-1/2	-$71.88	1	301,821	-$22,158,919
	Benefits & Compensation Manager	$179.96	-1/2	-$89.98	1	301,821	-$27,740,654
	Administrative Professional	$72.53	-1/2	-$36.27	1	301,821	-$11,180,427
Total Estimated Savings							**-$475,005,142**

Combining the effects of the two anticipated cost savings elements (results from Tables 8 and 10) results in an estimated cost savings of $592.8 million annually.

12.9. Transfers.

The litigation risk associated with ERISA plan fiduciaries performing their fiduciary duties drains resources that could be used for other means. The National Institute of Pension Administrators estimated that between 2009 and 2016, approximately $204 million was paid to

lawyers in breach of fiduciary duty cases.[200] More recent data paints a similar picture: a 2021 AMWINS Market Insights article states that since 2015, over $250 million in attorney fees have been paid by fiduciary insurance carriers. The article goes on to note that fiduciary insurance costs have been rising despite the fact that, at the same time, there have been insurance policy changes that otherwise limit the number of insurable events, thereby reducing the value of the insurance, all other things being equal. Industry and the retirement savings system have been struggling to absorb the cost increases.[201] The Mayer Brown law firm reports that, since 2023, there have been more than 120 class settlements in ERISA excessive fee lawsuits, the most common challenge in recent years, totaling more than $665 million, which gives a sense of the frequency and magnitude of the claims.[202]

This activity has made it more expensive for defined contribution retirement plan fiduciaries to obtain fiduciary insurance, through a combination of higher premiums and lower coverage terms. An Aon article noted that prices stabilized somewhat in 2023, but changes in coverage terms had meaningfully eroded the value the insurance policies once provided.[203] The changes to coverage terms have come in many forms, such as increased retentions, which have ranged from $2.5 to $15 million for large plans, in which the plan is responsible for some predetermined amount before insurance coverage begins; and through reduced liability limits for plan fiduciaries.[204] The increased costs and reduced coverage results in additional plan expenses and limited investment exposure, which in turn impact plan participants and beneficiaries.

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[200] Thomas Kmak, Nat'l Inst. of Pension Adm'rs, *Protect Yourself at All Times—Emphasize Quality, Service and Value Before Fees* (Apr. 11, 2016).
[201] Daniel Aronowitz & Unnamed Exec. Vice President, AMWINS Brokerage, *How Excessive Fee Litigation Is Changing the Fiduciary Insurance Market* (Apr. 2021).
[202] Richard Nowak, Nancy Ross & Brantley Webb, Mayer Brown, *The Evolution of Defined Contribution Plan Class Action Litigation in 2025* (Oct. 2025).
[203] Jay Desjardins, *Fiduciary Liability Insurance—Current Trends and Emerging Issues for Public Companies* (Jan. 2024).
[204] Jay Desjardins, *Fiduciary Liability Insurance—Current Trends and Emerging Issues for Public Companies* (Jan. 2024).

A reduction in litigation risk for plan fiduciaries could result in a further stabilization in insurance costs, an improvement for plan fiduciaries in the coverage terms of the policies, or some combination. The Department lacks sufficient data to quantify this potential transfer from insurers to plan fiduciaries or retirement plans. What can be asserted is that when prices stabilize or fall, a transfer from the insurer to the plan sponsors or retirement plans occurs. Similarly, if the policy terms become more malleable, the plan sponsor could renegotiate their terms to realize savings, again resulting in a transfer. The Department requests comments on this topic.

There would also be a transfer from financial institutions that sponsor stocks and bonds to financial institutions that sponsor alternative investments, such as private equity firms, hedge funds, and insurance companies that sell lifetime income products. This transfer would occur because the proposal would alter plan fiduciary selections for menus, leading participants in aggregate to invest less plan assets in stocks and bonds and more in alternative investments. Financial institutions associated with stocks and bonds would experience a decrease in revenue while financial institutions associated with alternative investments would experience an increase in revenue.

12.10. Regulatory Alternatives.

In accordance with Executive Order 12866, the Department considered several alternative regulatory approaches to achieve the goal of the proposal. A discussion of those options and the Department's rationale for not adopting them follows.

12.10.1. Limiting the Safe-Harbor to Inclusion of Alternative Assets in Asset Allocation Funds.

The Department considered limiting the proposed safe harbor to just alternative assets and their inclusion in an asset allocation fund, such as a target date fund, an adviser managed account, or any other pooled investment vehicle which invests in a diversified pool of assets across multiple asset classes. In fact, in August 2025, the Committee on Capital Market

Regulation recommended that the Department consider a safe harbor for private market asset inclusion in asset allocation funds.[205] Given the existing pervasiveness of such funds, the emergence of some asset allocation funds already investing in alternative investments without a safe harbor, as well as specific attributes of these funds (lower reallocation rates of participants making the investments more stable, multiple asset classes within such funds which facilitates daily liquidity requirements, and the share of investments in any asset class being limited by the plan fiduciary to manage risk), the Department felt there was a strong argument to develop a safe harbor specifically for these funds.[206]

However, the Department decided to take a more expansive approach regarding both the class of investments and the investment vehicles for which the safe harbor applies. By remaining neutral on the types of assets and vehicles, defined contribution plan fiduciaries can apply the specified review methodology outlined in this proposed rule to an array of potential designated investment alternatives. This in turn will provide reassurances to those plan fiduciaries that the investment option is suitable for the plan and its participants and beneficiaries while expanding the universe of options available.

12.10.2. Expanding the Safe Harbor to the Selection of all Investment Options, Products, and Service Providers.

The Department also considered a far broader safe harbor that would extend fiduciary protections to the selection and monitoring of all investment options, products, and service providers. Under this alternative, plan fiduciaries adhering to the processes outlined in the safe harbor to prudently select and monitor not only investment options but also their service providers, would not have any liability under sections 404 or 406 of ERISA regarding the

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[205] Comm. on Capital Mkt. Regul., *Expanding Opportunities for U.S. Investors and Retirees: Private Markets* (Aug. 2025), https://capmktsreg.org/wp-content/uploads/2025/08/CCMR-Expanding-Access-to-Private-Markets-08.07.25-Final.pdf.

[206] Angela M. Antonelli, *Can Asset Diversification & Access to Private Markets Improve Retirement Income Outcomes?*, Geo. Univ. Ctr. for Ret. Initiatives (Dec. 2022), https://cri.georgetown.edu/wp-content/uploads/2022/12/report-asset-diversification.pdf.

selection of a designated investment alternative, service provider, or other products. At least one stakeholder has indicated that such a safe harbor would, in addition to expanding the number and types of investment products offered, dramatically reduce ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants and beneficiaries.[207]

The Department, while acknowledging that such a proposal would provide significant relief to plan sponsors offering employee benefits while also remaining asset-neutral regarding plan offerings, felt there was too great a chasm between the processes for selecting designated investment alternatives and the processes for selecting and assessing contracts with service providers. As such, the Department declined to expand this proposed regulatory action beyond providing a safe harbor to plan fiduciaries for the selection of designated investment alternatives for participant-directed individual account plans.

12.10.3. Including Curation of a Menu of Investments Overall.

The Department's proposal focuses on plan fiduciaries' prudent selection of individual designated investment alternatives for participant-directed individual account plans. However, each designated investment alternative selected by a plan fiduciary also plays a role in the overall investment lineup for the plan – the types of asset classes that participants with a wide range of investment experience and needs can select from to ensure their retirement savings are diversified and are appropriate for their personal level of risk.

The Department considered expanding the proposed regulation to include guidance on how to prudently curate a menu of investments overall to address the fact that ERISA's duty of prudence applies not just to the selection of each designated investment alternative but also to the collection of designated investment alternatives as a whole – i.e., to both the individual parts and the sum. After careful review, the Department decided that addressing the overall menu design is

[207] Am. Benefits Council, Letter to Assistant Secretary Dan Aronowitz (Dec. 5, 2025).

beyond the scope of this proposed regulation and that the question of menu design is better addressed under section 404(c) of ERISA, which provides fiduciary relief for participant-directed individual account plans that offer a broad range of investment options that meet specified requirements.

12.10.4. Monitoring Obligation.

The Department considered incorporating into the proposed rule a safe harbor for a fiduciary's duty to monitor designated investment options at regular intervals after their selection process. Much of the criteria and processes associated with selecting an investment option is relevant to the duty of monitoring said selection, and the courts have been clear that ERISA fiduciaries have a continuing obligation to monitor all plan investments—not just a subset—and to remove options that the fiduciary determines, after a rigorous process, are no longer appropriate.

However, the Department anticipates issuing interpretive guidance in the near term concerning fiduciary obligations under ERISA to monitor designated investment alternatives following their inclusion on a plan's investment menu. As a result, the Department opted not to include these obligations in the proposed rule.

12.11. Uncertainty.

12.11.1. Uncertainty Related to the Number of Plans Selecting Alternative Asset Investments.

One of the objectives of the proposed regulation is to confirm that plan fiduciaries have wide discretion when selecting designated investment alternatives. Menus have generally shrunk in recent years as fiduciaries responded to litigation risk by limiting investment options. This is particularly noticeable in the case of alternative investments, where nearly 70 percent of defined

benefit plans invest in alternative investments [208] but only 4 percent of defined contribution plans do.[209]

By providing a safe harbor that is asset neutral, the proposed rule will clarify and provide protection for defined contribution plan fiduciaries when prudently selecting investments for menus which will, in turn, expand the universe of potential investment vehicles, including alternative investments. The expansion of investment opportunities for plan participants and beneficiaries by offering them enhanced returns and risk mitigation could affect retirement savings, though the impact is sensitive to a number of factors.

In particular, plans are under no obligation to use the safe harbor or to change their plan investment menu in response to the proposed rule. As a result, it is unclear how many plans would adopt alternative assets, what alternative investments would be most likely to be adopted by plans, what the take-up rates of plan participants and beneficiaries for those investment options would be, and how much of their portfolios would be invested in alternative investments. The Department is therefore uncertain how large an impact the proposed rule will have on expanding the offerings of alternative investments in participant-directed defined contribution plans.

12.11.2. Uncertainty Related to Financial Markets

Part of the impetus for the proposed rule and its focus on removing barriers to participant-directed defined contribution plans that want to consider offering alternative investments, is that defined benefit plans have invested in alternative investments for years. However, financial markets are dynamic and constantly changing in response to innovation, demographics, debt, economic movements, and other factors. This means that historical returns are not indicative of future performance for any asset. The uncertainty about the future

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[208] Mercedes Aguirre & Brendan McFarland, *2023 Asset Allocations in Fortune 1000 Pension Plans*, Insider, Vol. 35, No. 2 (Feb. 2025), https://www.wtwco.com/-/media/wtw/insights/2025/02/wtw-insider-2023-asset-allocations-in-fortune-1000-pension-plans.pdf?modified=20250225111427.

[209] PlanSponsor, *2025 PLANSPONSOR DC Survey Plan Benchmarking and Industry Report* (Jan. 2025).

performance of alternative assets is particularly heightened, however, given their liquidity and valuation characteristics. If this proposed rule results in a significant flow of assets into alternative asset classes, this may shift their return characteristics and negate the efforts to improve the retirement savings security of participants and beneficiaries.

13. Paperwork Reduction Act.

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and Federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department is soliciting comments regarding the information collection request (ICR) included in the proposed amendments to the ICRs. To obtain a copy of the ICR, contact the PRA addressee below or go to RegInfo.gov. The Department has submitted a copy of the rule to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronically delivered responses).

Commenters may send their views on the Department's PRA analysis in the same way they send comments in response to the proposed rule as a whole (for example, through the www.regulations.gov website), including as part of a comment responding to the broader proposed rule. Comments are due by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] to ensure their consideration.

ICRs are available at RegInfo.gov (reginfo.gov/public/do/PRAMain). Requests for copies of the ICR can be sent to the PRA addressee:

By mail	PRA Officer Office of Research and Analysis Employee Benefits Security Administration U.S. Department of Labor 200 Constitution Avenue NW Room N-5718 Washington, DC 20210
By email	ebsa.opr@dol.gov

13.1. Affected Entities and Cost Estimate.

The Department's proposal and safe harbor allow plan fiduciaries to satisfy the consideration and determination requirements for certain factors by obtaining written representations from a person responsible for managing the designated investment alternative and then reading and critically reviewing the representations. As discussed in section 12.8.2, the

Department assumes that service providers would spend 15 minutes per plan gathering and organizing the pertinent information, resulting in an annual estimated cost of approximately $1.1 million, which is displayed in Table 11. The Department assumes that the information would be sent electronically and would result in a de minimis burden. Please refer to section 12.8.2 for details related to this estimate.

TABLE 11.—*Cost to Provide Information to Plan Fiduciaries*

Professional Completing Action	Hourly Cost of Professional	Time per Occurrence (Hours)	Participant Directed DC Plans Selecting a TDF with Alternative Assets	Proportion Requesting Additional Documentation	Number of Plans Requiring Additional Documentation from Service Provider	Total Cost
	(a)	(b)	(c)	(d)	(c x d) = e	(a x b x e) = f
Financial Analyst/Adviser	$192.09	1/4	47,333	50%	23,667	$1,136,524

13.2. Summary.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Selection of Designated Investment Alternatives – Relevant Factors and Determinations for Fiduciaries of Individual Account Plans

Type of Review: New collection

OMB Control Number: 1210-NEW

Affected Public: Businesses or other for-profits; not-for-profit institutions.

Respondents: 23,667

Responses: 23,667

Frequency of Response: Annual

Estimated Total Burden Hours: 5,917

Estimated Total Costs: $0.00

14. Regulatory Flexibility Act.

The Regulatory Flexibility Act (RFA)[210] imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of 5 U.S.C. 553(b).[211] Under 5 U.S.C. 603, agencies must submit an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. The Department provides its IRFA of the proposed rule, below.

14.1. Need for and Objectives of the Rule.

As discussed in the Need for Regulatory Action section of the Regulatory Impact Analysis above, Executive Order 14330 directs the Department to issue rules, regulations, or guidance to reexamine and clarify the Department's position on the duty of fiduciaries when offering asset allocation funds with exposure to alternative assets. Executive Order 14330 further directs the Department to prioritize actions to curb ERISA litigation which constrains the ability of fiduciaries to provide investment opportunities when selecting designated investment alternatives.

This additional clarity is crucial in the small plan universe, as smaller plans tend to lag larger plans in adopting novel or complex investment options. For example, in the PSCA's 2014 survey, when target date funds were still being newly adopted, only 50 percent of the survey's smallest plans had a target date fund on their menu, compared to 71 percent of the largest plans. This lag persists in the PSCA's 2025 survey, with 66 percent of the smallest plans offering a target date fund, compared to 92 of the largest plans. Moreover, small plans are also more likely to rely on safe harbors to simplify compliance procedures. For instance, the same survey also found that 68 percent of the smallest plans relied on safe harbor plan design for average deferral,

[210] 5 U.S.C. §§ 601 *et seq.*
[211] 5 U.S.C. §§ 601(2), 603(a).

non-discrimination, and top-heavy contribution tests, versus only 30 percent of the largest plans.[212]

This proposed rule, by providing a safe harbor that is asset neutral, will clarify and provide protection for defined contribution plan fiduciaries in their requirements for prudently selecting investments for their menus which will, in turn, expand the universe of potential investment vehicles considered when choosing designated investment alternatives and enhance the retirement security of participants and beneficiaries.

14.2. Affected Small Entities.

The proposed rule would likely affect most small participant-directed defined contribution plans as well as their participants and beneficiaries, as it broadly describes the factors a plan fiduciary must consider and make determinations on when selecting designated investment alternatives for a participant-directed individual account plan. Many small plans rely on service providers for plan administration and investment menu selection. As such, many of these service providers would design investment menus and alternatives with this proposal and its safe harbor in mind.

According to the Statistics of U.S. Businesses, 97.6 percent of firms in Finance and Insurance are small. As a result, the Department assumes that 97.6 percent of service providers will be small firms.[213] Small plans themselves would then be primarily affected through the additional investment options available to them under the safe harbor, as well as the reduced litigation risk that the safe harbor offers. Additionally, the Department expects that additional costs incurred by service providers to comply with this proposal will eventually be passed on to

[212] PSCA, *57th Annual Survey of Profit Sharing and 401(k) Plans* (2014), and PSCA, *68th Annual Survey of Profit Sharing and 401(k) Plans* (2025).
[213] Average Receipts for firms in NAICS code 52, Finance and Insurance, are below the $47 million for every size category below 100 employees. 97.6 percent of firms in this industry have below 100 employees. *See* U.S. Census Bureau, "Statistics of U.S. Businesses (SUSB)," https://www.census.gov/programs-surveys/susb.html.

small plans in the form of increased administrative fees. As such, all small, participant-directed defined contribution plans would be affected.

As discussed in the Regulatory Impact Analysis, 56 companies providing target date funds will also be affected by the proposal. Because many of these entities are private, assessing revenue sizes is difficult. The Department assumes that the overwhelming majority of these entities are very large. After reviewing publicly available revenue estimates, the Department was only able to identify eight target date fund providers with revenue estimates near or below the $47 million revenue size requirement for Miscellaneous Financial Investment Activities. However, to account for uncertainty, the Department will assume that there are ten small providers of target date funds.

Life insurers providing group annuities will also be affected by the proposal. According to the 2024 Market Share report by the National Association of Insurance Commissioners, 42 life insurers had Direct Issued Premium in excess of $47 million, which is the size requirement for direct life insurers. The Department assumes that all 540 other direct life insurers will be small.

TABLE 12.—*Affected Small Entities Summary*

Description	Assumption/Estimate
All Participant-Directed DC Plans	
Number of Plans	630,385
Number of Participants	13 million
Assets	$0.9 trillion
Plans Adding Target Date Funds with Alternative Assets Each Year	
Number of Plans	41,380
Number of Participants	0.4 million
Assets	$18 billion
Other Affected Entities	
Number of Service Providers[1]	5,224
TDF Providers to Participant-Directed DC Plans	10
Life Insurers Underwriting Group Annuities	540
Unquantified Affected Entities	
• Private Equity Firms and Hedge Funds • Firms Marketing Investments Related to Digital Assets • Insurance Companies Selling Fiduciary Insurance	

[1] This calculation includes all QPAMS, 3(21) & 3(38) & Plan Administrators. The estimate also includes the 50 percent of broker-dealers that the Department assumes work with participant-directed defined contribution Plans. Due to uncertainty, this estimate is rounded to the nearest 25.

14.3. Impact of the Rule.

As discussed in detail in the Regulatory Impact Analysis above, all small plans and their service providers will be affected by rule review, however the Department assumes that most small plans will rely on their service providers to conduct this review. Small plans are also more likely to rely on service providers for menu selection, so many service providers will review the proposed rule in terms of investment selection, fiduciary liability, and menu design. While some small plans will perform these functions in-house, the Department assumes that most of these functions will be performed by service providers, with the associated costs being passed down to small plans.

Small firms that provide target date funds to participant-directed defined contribution plans will also be affected by the proposed safe harbor, which provides additional clarity on features that will enhance the development of target date funds with alternative assets that are

marketed to participant-directed defined contribution plans. As a result, some small firms may provide new asset allocation funds with alternative asset exposure.

Small life insurers writing group annuities, hedge funds, and private equity firms are also expected to be affected due to increased demand for their products, and small insurers providing fiduciary insurance are affected through the reduction in litigation risk provided by this proposal and its safe harbor.

14.3.1. Rule Review.

The Department assumes that 15 percent of plans perform rule review in-house. The cost to small entities and their service providers to review the proposal is displayed below.

TABLE 13.—*Cost of Rule Review*

	Plan Count	Time to Review (Hours)	Time Burden to Review (Aggregate)	Hourly Cost of Legal Professional	Cost of Rule Review
	(a)	(b)	(a x b) =c	(d)	(c x d) = e
Plan Review (15% of Plans)	94,558	5	472,789	$174.77	$82,629,290
Service Provider Review	5,224	10	52,245	$174.77	$9,130,832
Total			525,034		$91,760,122

14.3.2. Cost to Provide Information to Plan Fiduciary.

As presented in greater detail in section 12.8.2 of the Regulatory Impact Analysis, a plan fiduciary selecting an investment that requires additional consideration related to liquidity or valuation of hard-to-value assets can receive written representations related to the relevant topic that would satisfy compliance with the safe harbor of the proposal. The Department expects that this would only be generally relevant when service providers are reviewing asset classes that were exposed to litigation risk before the safe harbor's creation, like asset-allocation funds containing alternative assets.

While there are other avenues for inclusion of alternative assets in defined contribution plans, the most likely vehicle would be a target date fund or managed account. The Department only has sufficient data to broadly estimate the take-up related to target date funds; therefore, this

analysis is centered on them. The Department's estimates for these costs are displayed in Table 14 below.

TABLE 14.—*Estimate of Change in Annual Documentation Costs*

Professional Completing Action	Hourly Cost of Professional	Time per Occurrence (Hours)	Small Participant Directed DC Plans Selecting a TDF with Alternative Assets	Proportion Requesting Additional Documentation	Number of Plans Requiring Additional Documentation from Service Provider	Total Cost
	(a)	(b)	(c)	(f)	(c x d x e x f) = g	(a x b x g) = h
Financial Advisor	$192.09	1/4	41,380	50%	20,690	$993,585.53

The Department estimates that the safe harbor will meaningfully reduce the resources dedicated to preparing and discussing litigation risk management during plans' Investment Committee Meetings. PSCA surveys indicate that in 2024 and 2025 most of the profit sharing and 401(k) plans surveyed met quarterly to evaluate their plan's investments. This is the case for plans of all sizes, although small plans were more likely to meet on a less frequent basis, either annually or semi-annually.[214] Using PSCA's last two surveys' findings as a basis, the Department assumes the meeting frequency factors in Table 15.[215]

14.3.3. Cost Savings from Reduced Litigation Risk and Meeting Preparation.

The Department expects that the additional clarity provided by this proposal and its safe harbor will allow plans to spend less time dedicated to preparing and presenting research on litigation risk management during plans' Investment Committee Meetings. To assess these savings, the Department developed estimates based on how frequently plans meet. The

[214] PSCA, *67th Annual Survey of Profit Sharing and 401(k) Plans* (2024), and PSCA, *68th Annual Survey of Profit Sharing and 401(k) Plans* (2025).

[215] The Department examined the rates based on plan size however the size classes presented in the survey results do not line up perfectly with Departmental plan size definitions. Generally, the Department averaged the rates by size and rounded to increments of 5 percent.

Department's calculations for the number of meetings, as well as the total cost savings for meeting preparation and meeting time, are displayed below:

TABLE 15.—*Investment Committee Meeting Frequency, by Plan Size*

Meeting Frequency	Share of Plans	Number of Plans	Number of Meetings
Annually	25%	157,596	157,596
Semi-Annually	20%	126,077	252,154
Quarterly	55%	346,712	1,386,848
Total			**1,796,598**

TABLE 16.—*Cost Savings for Meeting Preparation*

Monitoring Frequency	Number of Affected Plans, by Meeting Frequency	Number of Service Providers Affected[1]	Number of Analyses Conducted Annually	Change in Legislative Risk Preparation (Hours)	Investment Committee Meeting Preparation Time Savings	Hourly Cost of Legal Professional	Total Cost Savings
(a)	(b)	(c)	(b + c) x a = d	(e)	(d x e) = f	(g)	(f x g) = h
Annually	23,639	0	23,639	-2	-47,279	$174.77	-$8,262,916
Semi-Annually	18,912	0	37,823	-2	-75,646	$179.96	-$13,613,290
Quarterly	52,007	5,350	208,027	-2	-416,054	$201.38	-$83,785,035
Total	**94,558**	**5,350**	**269,490**		**-538,979**		**-$105,661,241**

[1] All outside service providers are assumed to perform quarterly analyses.

TABLE 17.—*Cost Savings for Meeting Time*

Plan Size	Meeting Participants	Hourly Cost of Professional	Estimated Reduction in Meeting Duration (hours)	Total Cost Savings, per meeting attended	Meeting Attendees	Total Meetings	Total Savings
		(a)	(b)	(a x b) = c	(d)	(e)	(c x d x e) = g
Small Plans	Legal Professional	$174.77	-1/2	-$87.39	0	1,796,598	$0
	Financial Manager or Investment Professional	$201.38	-1/2	-$100.69	0		$0
	Top Executive	$143.75	-1/2	-$71.88	1		-$129,130,481
	Benefits & Compensation Manager	$179.96	-1/2	-$89.98	1		-$161,657,888
	Administrative Professional	$72.53	-1/2	-$36.27	1		-$65,153,626
Total Estimated Savings							**-$355,941,996**

14.3.4. Per-Entity Costs

The Department has also analyzed the costs and benefits of the proposal on a per-entity basis, under various per-entity assumptions for both the costs and benefits of the proposal. These scenarios present per-entity effects based on the frequency and functions of their investment committee, as well as what functions the entities perform in-house versus with a service provider to provide a range of estimates. The per-entity costs and savings of the proposal under multiple assumptions are displayed below, including these costs and savings as a share of plan assets.

TABLE 18.—*Per-Entity Costs*

Cost	Average Cost Per-Entity cost estimate	High Per-Entity Cost Estimate
Rule Review[1]	$146	$874
Requesting Additional Documentation from Financial Advisor[2]	$2	$48

[1] The high-cost assumption for rule review presents a plan that does rule review entirely in-house. The average cost assumption assumes that 90 percent of small entities rely on service providers for rule review.
[2] The high-cost assumption for additional documentation presents the costs for a specific plan with a TDF containing alternative assets to request additional documentation if they believe they need it for due diligence. Very few plans currently have these products. The average cost estimate divides these costs across all small entities.

TABLE 19.—*Per-Entity Cost Savings*

Cost	Low Per-Entity Cost Savings[1]	Average Per-Entity Cost Savings[2]	High Per-Entity Cost Savings[3]
Meeting Time Savings-Executive	(-$72)	(-$205)	(-$288)
Meeting Time Savings-Benefits Manager	(-$90)	(-$256)	(-$360)
Meeting Time Savings-Admin. Professional	(-$36)	(-$103)	(-$145)
Meeting Time Preparation	(-$350)	(-$996)	(-$1,398)
Total Savings	(-$548)	(-$1,561)	(-$2,191)

[1] The low-cost savings assumption presents plans with annual investment committee meetings
[2] The average cost-savings assumption uses the average number of annual investment committee meetings per-plan, which is approximately 2.85
[3] The high-cost savings assumption presents plans with quarterly investment committee meetings

TABLE 20—*Total Per-Entity Effect*

Effect	Low Per-Entity Cost Savings[1]	Average Per-Entity Cost Savings[2]	High Per-Entity Cost Savings[3]
Costs	$922	$147	$147
Cost Savings	(-$548)	(-$1,561)	(-$2,191)
Total Per-Entity Costs/Cost Savings	$374	(-$1,414)	(-$2,044)

TABLE 21.—Total *Per-Entity Effect as a share of Plan Assets*

Plan Size	Average Plan Assets	Low Per-Entity Cost Savings[1]	Average Per-Entity Cost Savings[2]	High Per-Entity Cost Savings[3]
1-5 Participants	$243,438	0.15%	(-0.58%)	(-0.84%)
6-10 Participants	$636,975	0.06%	(-0.22%)	(-0.32%)
11-20 Participants	$815,795	0.05%	(-0.17%)	(-0.25%)
20-40 Participants	$1,164,525	0.03%	(-0.12%)	(-0.18%)
40-60 Participants	$1,900,593	0.02%	(-0.07%)	(-0.11%)
60-80 Participants	$2,988,649	0.01%	(-0.05%)	(-0.07%)
80-100 Participants	$4,050,638	0.01%	(-0.03%)	(-0.05%)

14.4. Duplicate, Overlapping, or Relevant Federal Rules.

This proposal narrowly focuses on the duties of fiduciaries selecting designated investment alternatives for plans under ERISA. While other federal rules oversee the practices of investment managers, given the narrow focus of this proposal, the Department is not aware of any other rules that would duplicate, overlap, or be relevant to this proposal.

14.5. Significant Alternatives Considered.

Section 603 of the RFA requires the Department to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. The objective for this proposal is to clarify the standard for the selection of designated investment alternatives, and reduce litigation risk as discussed in the Regulatory Impact Analysis. The Department considered the alternatives presented in the following sections.

14.5.1. Limiting the Safe-Harbor to Inclusion of Alternative Assets in Allocation Funds.

The Department considered limiting the proposed safe harbor to just alternative assets and their inclusion in an asset allocation fund, such as a target date fund, an adviser managed

account, or any other investment vehicle which invests in a diversified pool of assets across multiple asset classes. However, the Department decided to take a more expansive approach regarding both the class of investments and the investment vehicles to which the safe harbor applies. By remaining neutral on the types of assets and vehicles, defined contribution plan fiduciaries can apply the specified review methodology outlined in this proposed rule to an array of potential designated investment alternatives. This reduces the relative compliance burden on plans, including small plans, by allowing them to familiarize themselves with one asset-neutral safe harbor, rather than a specialized safe harbor only for specific asset classes.

14.5.2. Expanding the Safe Harbor to the Selection of all Investment Options, Products, and Service Providers.

The Department also considered a far broader safe harbor that would extend fiduciary protections to the selection of all investment options, products, and service providers. Under this alternative, plan fiduciaries adhering to the processes outlined in the safe harbor to prudently select and monitor not only investment options but also their service providers, would not have any liability under sections 404 or 406 regarding the selection of a designated investment alternative, service provider, or other products. The Department, while acknowledging that such a proposal would provide significant relief to plan sponsors offering employee benefits while also remaining asset-neutral regarding plan offerings, felt there was too great a chasm between the processes for selecting designated investment alternatives and the processes for selecting and assessing contracts with services provider, and that it went beyond the objective of the proposal.

14.5.3. Including Curation of a Menu of Investments Overall.

The Department's proposed rule and safe harbor focuses on plan fiduciaries' prudent selection of individual designated investment alternatives for participant-directed individual account plans. The Department considered expanding the proposed regulation to include guidance on how to prudently curate a menu of investments overall to address the fact that ERISA's duty of prudence applies not just to the selection of each designated investment

alternative but also to the collection of designated investment alternatives as a whole–*i.e.,* to both the individual parts and the sum. After careful review, the Department decided that the question of menu design is better served under section 404(c) of ERISA, which provides relief for many participant-directed individual account plans that offer a broad range of investment options that meet specified diversification and risk and return requirements.

14.5.4. Monitoring Obligation.

The Department considered incorporating into the proposed rule a safe harbor for a fiduciary's duty to monitor designated investment options at regular intervals after their selection process. Many of the criteria and processes associated with selecting an investment option are relevant to the duty of monitoring said selection, and the courts have been clear that ERISA fiduciaries have a continuing obligation to monitor all plan investments—not just a subset—and to remove options that the fiduciary determines, after a rigorous process, are no longer appropriate.

However, the Department anticipates issuing interpretive guidance in the near term concerning fiduciary obligations under ERISA to monitor designated investment alternatives following their inclusion on a plan's menu. As a result, the Department opted not to include these obligations in the proposed rule and safe harbor.

14.5.5. Small Entity Specific Alternatives.

Regulatory Flexibility Act analyses typically consider small entity specific alternatives, such as differing compliance requirements, timetables, specific small entity exemptions, or other scenarios listed in 603(c) of the Regulatory Flexibility Act[216]. However, the Department's proposal does not include any direct requirements from the Department that could be delayed, exempted, or otherwise tailored to small entities.

[216] See 5 U.S.C. 603(c).

The largest costs detailed in the proposal, rule review, are not direct requirements from the Department, but rather an acknowledgement that most plans will review the rule in some form as a part of standard business practices. The timeline and manner of rule review is at the discretion of the plans and, thus, is not something that the Department can exempt or tailor to small entities as a part of the RFA.

The other costs detailed in the RIA and the RFA are the costs on plans with alternate assets to request additional documentation from a financial professional to satisfy the consideration and determination requirements of the safe harbor. Plans are not required to obtain this written documentation by the proposal, but the Department acknowledges that some plans will choose to take this extra step as part of their compliance efforts. Since neither of these costs are mandated by the Department, the Department cannot tailor or exempt small plans from these costs, but small plans can use their discretion to determine the manner and timeline of their rule review and safe harbor compliance procedures. As a result, exempting or delaying implementation of the rule for small entities would also not be feasible. Since there are no direct cost requirements in the proposal, an exemption or delay of the rule as a whole would only prevent small plans from being able to use the safe harbor, which would prevent them from accessing the savings afforded by the updated safe harbor.

15. Unfunded Mandates Reform Act.

The Unfunded Mandates Reform Act of 1995[217] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposal that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.

[217] 2 U.S.C. 1532.

For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposal does not include any Federal mandate that will result in such expenditures.

16. Federalism Statement.

Executive Order 13132 outlines fundamental principles of federalism. Executive Order 13132 requires Federal agencies to follow specific criteria in forming and implementing policies that have "substantial direct effects" on the States, the relationship between the national Government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the proposal.

This proposal does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the final rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and, as such, have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Employee Retirement Income Security Act, Fiduciaries, Investments, Pensions, Securities.

For the reasons set forth in the preamble, the Department is proposing to amend part 2550 of subchapter F of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

SUBCHAPTER F—FIDUCIARY RESPONSIBILITY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

1. The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135, sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 727 (2012) and Secretary of Labor's Order No. 1-2011, 77 FR 1088 (Jan. 9, 2012). Sec. 2550.401c-1 also issued under 29 U.S.C. 1101. Sec. 2550.404a-1 also issued under sec. 657, Pub. L. 107-16, 115 Stat 38. Sec. 2550.404a-2 also issued under sec. 657 of Pub. L. 107-16, 115 Stat. 38. Secs. 2550.404c-1 and 2550.404c-5 also issued under 29 U.S.C. 1104. Sec. 2550.408b-1 also issued under 29 U.S.C. 1108(b)(1). Sec. 2550.408b-19 also issued under sec. 611, Pub. L. 109-280, 120 Stat. 780, 972. Sec. 2550.412-1 also issued under 29 U.S.C. 1112.

2. Amend part 2550 by adding §2550.404a-6 to read as follows:

§2550.404a-6 Selection of Designated Investment Alternatives – relevant factors and determinations for fiduciaries of individual account plans to satisfy prudence requirement.

(a) *General prudence*. Section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), provides, in relevant part, that a fiduciary shall discharge that person's duties with respect to a plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

(b) *Selecting designated investment alternatives is a fiduciary act*. The selection of a designated investment alternative (as defined in paragraph (m) of this section) for a participant-directed individual account plan is a fiduciary act governed by the fiduciary standards of section 404(a)(1)(B) of ERISA.

(c) *Prudent fiduciaries have maximum discretion to select investments to further the purposes of the plan*. Section 404(a)(1)(B) of ERISA does not require or restrict any specific type of designated investment alternative, except insofar as a designated investment alternative

might be otherwise illegal. For example, there is no *per se* rule respecting investment in alternative assets generally or the inclusion of private market investments, including direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the managers of such investments, if applicable, seek to take an active role in the management of such companies, direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate, holdings in actively managed investment vehicles that are investing in digital assets, direct and indirect investments in commodities, direct and indirect interests in projects financing infrastructure development, and lifetime income investment strategies including longevity risk-sharing pools. However, an investment in a foreign adversary in violation of applicable law, such as the Trading With the Enemy Act, or with any such person or other entity or individual appearing on the Specially Designated Nationals and Blocked Persons List administered by the Office of Foreign Assets Control of the United States Department of the Treasury, or any other type of investment in violation of applicable federal law, is not permitted.

(d) *Duty to act prudently when establishing a plan investment menu to maximize risk-adjusted returns*. A fiduciary with responsibility or authority for selecting designated investment alternatives has a duty to act prudently also when establishing a diversified menu of designated investment alternatives to further the purposes of the plan by enabling participants and beneficiaries in such plan to maximize risk-adjusted returns, net of fees, on investment across their entire portfolios in their plan.

(e) *Prudence requires appropriate consideration of all relevant factors*. To satisfy the duty of prudence in section 404(a)(1)(B) of ERISA when selecting a designated investment alternative, the plan fiduciary must follow a prudent process under which it gives appropriate consideration, including, where appropriate, with the benefit of analysis of professional advisors like third-party investment advice fiduciaries within the meaning of section 3(21)(A)(ii) of ERISA, to those facts and circumstances that, given the scope of such fiduciary's investment

responsibility or authority, the fiduciary knows or should know are relevant to the particular designated investment alternative. Consistency with section 404(a)(1)(B) of ERISA or this paragraph does not, however, excuse a fiduciary from complying with its additional obligations under ERISA, including under sections 404(a)(1)(A) and 406.

(f) *Safe harbor*. Paragraphs (g) through (l) of this section set forth a non-exhaustive 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. When a plan fiduciary does so, following the process described in paragraphs (g) through (l) with respect to such factors, which may include relying on recommendations of a prudently selected investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA with respect to a particular factor or factors, or prudently delegating compliance with respect to a particular factor or factors to an investment manager within the meaning of section 3(38) of ERISA, 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 duties under section 404(a)(1)(B) of ERISA of such fiduciary and is entitled to significant deference.

(g) *Performance*. 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.

(1) *Example. Return*--(i) *Facts*. The named fiduciary of a plan (*e.g.,* the plan sponsor or plan investment committee), working with a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, considers three target date fund series. The investment advice fiduciary presents various risk measures for the named fiduciary to consider,

including the Sharpe Ratio, a commonly used measure to assess risk-adjusted performance, and a risk-adjusted return measure that subtracts a risk penalty from returns. The investment advice fiduciary explains these concepts and their implications to the named fiduciary that then relies on this advice to select a target date fund series that has lower expected returns but lower expected risk, as measured by volatility. The named fiduciary makes this selection after considering the risk capacity of the plan's participants. The lower risk strategy that the named fiduciary selects has achieved higher risk-adjusted returns by including alternative assets with low correlations to stocks and bonds in its investment portfolio, thereby reducing the volatility of returns.

(ii) *Analysis*. Plan fiduciaries, with the benefit of third-party investment advice when appropriate, need not select an investment with the highest returns, nor aim to achieve the highest possible returns. It is often prudent to select a lower-risk investment strategy with a lower expected return. Plan fiduciaries may wish to consider selecting investments that hold alternative assets with low correlations to stock and bonds in their portfolios for exactly this purpose of improving risk-adjusted returns.

(iii) *Conclusion*. A plan fiduciary selecting a designated investment alternative should consider various risk metrics when evaluating investments. The plan fiduciary should seek to maximize returns, net of fees, for a given level of appropriate risk, consistent with the participants' likely needs over the course of the anticipated investment. By doing so, including by engaging and relying on third-party investment advice, as appropriate, to analyze and explain how to evaluate risk, the plan fiduciary shall be deemed to have satisfied the requirements of paragraph (g) of this section.

(2) *Example. Time horizon*--(i) *Facts*. The named fiduciary of a plan (*e.g.*, the plan sponsor or plan investment committee) with a predominantly younger workforce, working with a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, considers three target date fund series. The investment advice fiduciary analyzes the historical performance of each series over the past 1-, 3-, 5-, and 10-year periods. After considering the

historical performance data for these periods, the named fiduciary adopts the investment advice fiduciary's recommendation to rely most heavily on the 10-year historical performance data as most probative for purposes of selecting the designated investment alternative.

(ii) *Analysis*. A plan fiduciary, with the benefit of third-party investment advice fiduciaries, when appropriate, need not select an investment strategy with the highest returns during a short or most recent period of time. Given the long-term nature of retirement savings, it is often prudent to give greater weight to the long-term historical performance of possible designed investment alternatives over short-term performance.

(iii) *Conclusion*. A plan fiduciary selecting a designated investment alternative should consider the appropriate time horizons for retirement savings. In so doing, the plan fiduciary should seek to maximize returns for a given level of appropriate risk, consistent with the participants' likely needs over the course of the anticipated investment, which, because of the long-term nature of retirement savings, may be a long time horizon, depending on the particular facts and circumstances. By doing so, including by engaging and relying on third-party investment advice, when appropriate, to analyze and explain how to evaluate past performance, the plan fiduciary shall be deemed to have satisfied the requirements of paragraph (g) of this section.

(h) *Fees*. 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.

(1) *Example. Fees; Customer service*--(i) *Facts*. The named fiduciary of a plan (*e.g.*, the plan sponsor or plan investment committee) considers five stock funds that follow similar strategies in passively tracking the same index. The named fiduciary evaluates the funds with the assistance of a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA and finds that the five funds have had similar historical risk-adjusted returns and liquidity, and that the funds have very different ratings for customer service and communication. The named fiduciary selects the fund with the highest fees and highest rating for customer service and communication. This fund offers knowledgeably staffed call centers dedicated to retirement plan investors, short wait times, clearly written investor communications, safe and easy online access for participants, and published surveys and ratings that demonstrate an exceptional commitment to customer service. The difference between the funds with lowest and highest fees is one quarter of one basis point.

(ii) *Analysis*. A plan fiduciary must consider a reasonable number of similar alternatives before selecting a designated investment alternative. Although the determination of what constitutes a reasonable number is dependent upon the specific facts and circumstances of each case, section 404(a)(1)(B) of ERISA and paragraph (h) of this section do not require a plan fiduciary to consider every similar alternative available in the market. Likewise, whether alternatives are similar is dependent on the specific facts and circumstances of each case. After considering a reasonable number of similar alternatives, a plan fiduciary must determine that the fees and expenses of the designated investment alternative are appropriate, taking into account its expected risk-adjusted returns and the value the designated investment alternative brings in furthering the purposes of the plan. All else being equal, a plan fiduciary must rely on the value proposition of a designated investment alternative with higher fees and expenses than similar alternatives with lower fees and expenses when choosing that designated investment alternative.

(iii) *Conclusion*. The named fiduciary in this example does not fail to satisfy section 404(a)(1)(B) of ERISA and paragraph (h) of this section solely because it did not select the

alternative with the lowest fees and expenses. The named fiduciary enlisted the services of an investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA. The named fiduciary considered and determined that the five specific alternatives were a reasonable number of alternatives to have considered, taking into account the role of the designated investment alternative in furthering the purposes of the plan, their similar strategies, historical performance, and liquidity. In addition, the named fiduciary considered and determined that the higher fees and expenses are appropriate considering the value of increased customer service and communication.

(2) *Example. Fees; Share classes*--(i) *Facts*. A plan sponsor decides to establish a participant-directed defined contribution plan. The plan document specifies that the director of human resources is the named fiduciary of the plan and responsible for the establishment of the plan investment menu and selection and monitoring of designated investment alternatives. The named fiduciary does not enlist the services of an investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, an investment manager within the meaning of section 3(38) of ERISA, or any other type of professional consultant. The named fiduciary purchases a subscription to an independent analysis ratings firm to research investment options before making a selection. The service rates funds overall but does not attach ratings to different share classes of the same fund. After a few years, the named fiduciary decides to replace one of the plan's designated investment alternatives with a new fund, and to move participant investments from the old designated investment alternative to the new fund pursuant to ERISA section 404(c)(4). The new fund selected by the named fiduciary has high ratings from the service to which the named fiduciary subscribes and is a registered investment company within the meaning of the Investment Company Act of 1940. The named fiduciary makes a substantial investment in class R2 shares of the fund. The named fiduciary does not consider any differences in share classes offered by this fund. The fund offers multiple share classes, including multiple R share classes. Class R2 shares have substantially higher fees than class R6 shares. Based on the

amount of the investment, the named fiduciary could have purchased class R6 shares without any negotiation or additional expenditure of plan assets or resources. Except for fee structures, both share classes are identical in terms of shareholder rights and obligations.

(ii) *Analysis*. A 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 the designated investment alternative's risk-adjusted expected returns and any other value the designated investment alternative brings to furthering the purposes of the plan. The named fiduciary failed to give any consideration to the differences in fees between the various share classes of the fund, even though the size of the investment met the fund's criteria for the lower fee share classes without any negotiation or additional expenditure of plan assets or resources. Class R6 shares have a superior value proposition to class R2 shares because both share classes are identical in all respects except that class R6 shares have lower fees.

(iii) *Conclusion*. The facts in this example do not establish that the named fiduciary satisfied section 404(a)(1)(B) of ERISA and paragraph (h) of this section when selecting the designated investment alternative. The selection process appears to be flawed because the named fiduciary failed to consider the difference in fee structures among the various share classes. A prudent selection process would ordinarily uncover the existence of more economical share class options for the plan.

(3) *Example. Fees; Lifetime income*--(i) *Facts*. A plan sponsor makes a plan design decision to add a lifetime income benefit to its existing participant-directed individual account plan. The named fiduciary of the plan selects an asset allocation fund offered through a variable annuity contract to implement the plan sponsor's decision. The new designated investment alternative is similar in all material respects – risk, return, liquidity, and allocation profile – to another designated investment alternative already on the plan investment menu except that the designated investment alternative already on the plan investment menu does not offer lifetime income through a variable annuity contract. The two designated investment alternatives have the

same expense ratio, but the designated investment alternative offered through the variable annuity contract has an additional fee associated with the ability of participants to select the lifetime income feature. The additional fee typically secures more favorable annuity conversion rates throughout the life of the contract than would be available outside of the contract. The named fiduciary consults with an investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA. The investment advice fiduciary analyzes the annuity market generally, as well as the break-even ages and additional fee of the designated investment alternative, which analysis the named fiduciary critically evaluates and adopts in determining, within its discretion, that the designated investment alternative with the lifetime income benefit provides commensurate value for the fees charged.

(ii) *Analysis*. The named fiduciary must act prudently when implementing the plan sponsor's decision to add a lifetime income benefit to the plan. Although the named fiduciary must appropriately consider a reasonable number of similar alternatives, the designated investment alternative already on the plan investment menu satisfies this standard because it is both sufficiently different from the designated investment alternative being added to the plan investment menu due to its lifetime income benefit feature and sufficiently comparable because it is identical in each other material respect. The lifetime income feature has added value to the plan and therefore justifies higher total fees than the designated investment alternative without this feature.

(iii) *Conclusion*. The named fiduciary in this example did not act imprudently by adding the new designated investment alternative to the plan investment menu solely because it has higher fees than the similar designated investment alternative without the lifetime income benefit feature that is already on the plan investment menu. To satisfy the consideration and determination requirements under paragraph (h) of this section, and section 404(a)(1)(B) of ERISA, the named fiduciary considered and determined that the additional fee under the variable

annuity contract is appropriate in relation to the value it brings to furthering the purposes of the plan.

(4) *Example. Fees; Risk mitigation strategies*--(i) *Facts*. A participant-directed defined contribution plan contains a custom-designed designated investment alternative that is a qualified default investment alternative (target date fund), managed by an investment manager within the meaning of ERISA section 3(38), with a strategy that targets specific percentages of stocks and bonds that trade on public exchanges. As part of a review of the plan's investment menu, the named fiduciary with responsibility for selecting the qualified default investment alternative considers the investment manager's proposed modification of the designated investment alternative's strategy to target investment in specific percentages of hedge funds and private equity funds while reducing target percentages of publicly traded stocks and bonds. The purpose of the modification is risk mitigation – meaning, to decrease volatility and reduce the risk of large losses during a market downturn. Under certain market conditions, a potential consequence is the designated investment alternative may underperform as compared to the continued use of the unmodified strategy, but it provides downside protection as an additional value. The named fiduciary enlists the services of a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA to analyze the new target percentages and the hedge fund and private equity funds for investment by the designated investment alternative, as well as detailed information about the investment strategies and fee structures of these funds. The third-party investment advice fiduciary also provides the named fiduciary with a written report stochastically modeling estimated risk-adjusted returns stemming from the adoption of the modifications and comparing the target date fund, as modified, to a reasonable number of similar alternatives. Although the designated investment alternative's expense ratio would increase slightly, the report shows an improvement in the risk-adjusted expected returns, net of fees, over a horizon determined to be appropriate for the target date fund.

(ii) *Analysis*. In this example, the named fiduciary is not making an original selection of a designated investment alternative. Yet because the change in strategy proposed by the investment manager implicates the principal objectives of the target date fund, implementing the described modification is tantamount to selecting a designated investment alternative from scratch. Consequently, the named fiduciary must consider a reasonable number of similar alternatives to the target date fund, as modified, and determine that its fees and expenses are appropriate, taking into account its risk-adjusted expected returns and any other value it brings to furthering the purposes of the plan. That the target date fund is customized does not negate the requirement to appropriately consider a reasonable number of similar alternatives. Whether the alternatives considered are similar depends on the facts and circumstances of the case. Factors commonly used by investment professionals in like circumstances include risk, return, liquidity, and allocation profile.

(iii) *Conclusion*. The named fiduciary in this example satisfies the consideration and determination requirements of paragraph (h) of this section, and section 404(a)(1)(B) of ERISA, with respect to the fees and expenses of the target date fund as modified. The named fiduciary enlisted the services of an investment advice fiduciary. The investment advice fiduciary provided the named fiduciary with a written report stochastically modeling estimated risk-adjusted returns stemming from the adoption of the modifications and comparing the target date fund, as modified, to a reasonable number of similar alternatives. The named fiduciary considered and determined within its discretion that the modification to the target date fund to include the risk mitigation strategy furthered the purposes of the plan, including decreasing volatility and reducing the risk of large losses during a market downturn. In addition, the named fiduciary considered and determined, within its discretion, that the higher expense ratio associated with the modification was appropriate in light of the estimated higher risk-adjusted expected returns, net of fees and expenses, over an appropriate horizon for the target date fund.

(5) *Example. Fees; Active management*--(i) *Facts*. The named fiduciary of a plan (*e.g.*, the plan sponsor or plan investment committee) considers six small-cap stock funds. Three of the funds passively track the same index while three of the funds are actively managed, attempting to outperform the passive index. The passive funds are all comparably priced to each other, and the actively managed funds are comparably priced to each other. However, the actively managed funds all have higher fees and expenses than the passive funds. The named fiduciary evaluates the funds with the assistance of a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA and finds that one of the passive funds has had lower tracking error and fees compared to the other two passive funds and one of the actively managed funds has had outstanding historical risk-adjusted returns compared to all of the passive funds as well as the other two actively managed funds, despite the other two actively managed funds having adopted a similar investment strategy. The named fiduciary selects both the highest performing actively managed fund as well as the passive fund with lowest tracking error and fees based on advice from the third-party investment advice fiduciary that allowing participants to gain exposure to actively managed and passive funds will increase their risk-adjusted return on investment net of the additional fees charged by the actively managed fund.

(ii) *Analysis*. The named fiduciary must consider a reasonable number of similar alternatives to the funds it selects, and determine that their fees and expenses are appropriate, taking into account their risk-adjusted expected returns and any other value they bring to furthering the purposes of the plan. A plan fiduciary may choose to offer both an actively managed and a passive fund within a particular strategy to secure diversification benefits for participants across the plan investment menu. In so doing, the plan fiduciary may conclude that the value of these diversification benefits justifies the selection of an actively managed fund that charges higher fees than a passive counterpart.

(iii) *Conclusion*. The named fiduciary in this example satisfies the consideration and determination requirements of paragraph (h) of this section, and section 404(a)(1)(B) of ERISA,

with respect to the fees and expenses of both funds. The named fiduciary enlisted the services of an investment advice fiduciary. The investment advice fiduciary fully compared and analyzed the profiles of the actively managed and passive funds. The investment advice fiduciary also provided the named fiduciary with professional advice about the benefits of diversified portfolios. The named fiduciary considered and determined, within its discretion, that selecting the highest performing actively managed and passive funds furthered the purposes of the plan by increasing risk-adjusted return through the increased value of additional diversification.

(i) *Liquidity*. 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.

(1) *Example. Participant-level liquidity*--(i) *Facts*. Certain participant-level events, depending on the terms of the plan, may trigger a plan's need for immediate liquidity. Examples of these events include, but are not limited to, participant benefit withdrawals due to retirement, separation from service, or financial hardship, asset reallocations or reinvestments to other designated investment alternatives in the case of plans intended to meet the requirements of section 404(c) of ERISA, and plan loans.

(ii) *Analysis*. Plan fiduciaries must give consideration to the potential for such events when selecting designated investment alternatives, especially qualified default investment alternatives (as defined in 29 CFR 2550.404c-5), for a plan investment menu. Further, on the basis of such consideration, the plan fiduciary must determine that the designated investment alternative, at the time of selection, will have sufficient liquidity to meet the anticipated liquidity needs of the plan.

(iii) *Conclusion*. The participant-level liquidity needs of a given plan depend on the type of plan at issue, its features, and the overall profile of the participants and beneficiaries of the plan as a whole, particularly with respect to a qualified default investment alternative (as defined in 29 CFR 2550.404c-5), as well as, to the extent they are different, the participants and beneficiaries likely to select the particular designated investment alternative under review. A plan fiduciary, however, is deemed to have met the consideration and determination requirements of paragraph (i) of this section, and section 404(a)(1)(B) of ERISA, with respect to the participant-level liquidity needs of a given plan in connection with a given designated investment alternative (including one that holds a percentage of assets that are not securities, non-publicly traded securities, or securities acquired in exempt offerings) that is a mutual fund registered as an open-end management investment company with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940. Such mutual funds are required by rules under such Act to adopt and implement a written liquidity risk management program that is designed to assess and manage their liquidity risk. In the case of a designated investment alternative that is not such a mutual fund, a plan fiduciary will be deemed to have met the consideration and determination requirements of paragraph (i) of this section and section 404(a)(1)(B) of ERISA if three conditions are met. First, the fiduciary obtains a written representation from the person responsible for managing the designated investment alternative, or otherwise performs appropriate due diligence, that the designated investment alternative has adopted and implemented a liquidity risk management program that is substantially similar to a program that meets the requirements of such Act. Second, the fiduciary reads, critically reviews, and understands any written representation and consults a qualified professional where appropriate. Third, the fiduciary does not know, or have reason to know, other information which would cause the fiduciary to question any written representation.

(2) *Example. Participant level liquidity; lifetime income*--(i) *Facts*. The investment policy statement of a participant-directed individual account plan calls for lifetime income options on

the plan investment menu. The named fiduciary selects several designated investment alternatives with such features, including a deferred annuity contract. Allocations to this contract, which are made on a monthly basis, grow at a rate specified under the contract, and monthly payments for life begin when the participant reaches age 65. Allocations to this contract become fully committed after 90 days and any immediate withdrawals by a participant before age 65 result in a penalty and a market value adjustment to the value of the annuity that begins at age 65. The restrictions on liquidity throughout the growth period enable greater monthly payments at age 65.

(ii) *Analysis*. Paragraph (i) of this section clarifies that plan fiduciaries must appropriately consider the potential participant-level events that may trigger a plan's need for immediate liquidity, and must determine that the designated investment alternative, at the time of selection, will have sufficient liquidity to meet the anticipated liquidity needs of the plan. When assessing the liquidity needs of the plan, the plan fiduciary in this example must balance the restrictions on liquidity under the annuity contract with the value of the guaranteed monthly payments under the annuity contract, recognizing that such guarantees help plan participants manage investment and longevity risk. The fact that a designated investment alternative is fully allocated to an illiquid product, like an annuity, does not foreclose its selection, including, for example, where the fiduciary determines within its discretion that the lack of liquidity is justified by a commensurate expected increase in return on investment, certainty with respect to future payments, or both.

(iii) *Conclusion*. In this example, the named fiduciary would satisfy the consideration and determination requirements of paragraph (i) of this section, and section 404(a)(1)(B) of ERISA, with respect to the designated investment alternative in question if the named fiduciary concluded that the increase in the value of the monthly payments and the certainty of the insurer's guarantee under the annuity contract justified the restrictions on liquidity.

(3) *Example. Plan-level liquidity*--(i) *Facts*. Plan terminations, changes in plan recordkeepers or investment providers, and corporate sponsor mergers and acquisitions are

examples of circumstances that may impose relatively short-term liquidity demands on a plan's designated investment alternatives. This is especially true in the case of a designated investment alternative (such as a pooled investment vehicle) with a strategy involving a target position in certain private assets along with public assets (*e.g.*, publicly traded securities). With such designated investment alternatives, a specific plan's (or, in a pooled investment product, other plan's or non-plan investors') need for relatively short-term liquidity (*e.g.*, when the investor wants to exit the investment) may present significant liquidity risk to the designated investment alternative as a whole such that it cannot maintain its asset allocation targets. Thus, in such circumstances, designated investment alternatives may or must impose temporal restrictions on redemptions (*e.g.*, they might require advance notice and permit only incremental redemptions over a period of time). When fulfilling withdrawals, particularly large withdrawals, diversified designated investment alternatives may temporarily deviate from their target asset allocations. For example, a designated investment alternative that is designed to have a 90 percent allocation to fully liquid instruments may have to temporarily accept a lower allocation to fully liquid instruments to satisfy a large withdrawal.

(ii) *Analysis*. Plan fiduciaries must give consideration to, and determine, that the scope and duration of redemption restrictions at the plan level meet the anticipated needs of the plan. This includes whether the designated investment alternative has a sufficient process in place to balance the plan's potential need for withdrawal against the plan's desire for the designated investment alternative to maintain smooth and consistent target positions, including following a significant withdrawal of investors other than the plan.

(iii) *Conclusion*. A plan fiduciary is deemed to have met the consideration and determination requirements of paragraph (i) of this section, and section 404(a)(1)(B) of ERISA, with respect to the plan-level liquidity needs of a given plan in connection with a given designated investment alternative (including one that holds a percentage of assets that are not

securities, non-publicly traded securities, or securities acquired in exempt offerings) in either of the two following scenarios.

(A) In the first scenario, the plan fiduciary evaluates, including, if appropriate, with the advice of a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, in concert, the maximum that the designated investment alternative will allocate to illiquid investments, the time until such investments could likely be sold without reducing their value, the time until such investments will return capital to their investors, and the required advance notice plans must give before exiting the designated investment alternative. After this evaluation, the plan fiduciary concludes that the designated investment alternative will appropriately balance the future liquidity needs of the plan, the ability of the designated investment alternative to achieve increased risk-adjusted return on investment, and the ability to maintain its asset allocation targets even if there were redemptions from multiple plans or non-plan investors.

(B) In the second scenario, the plan fiduciary relies on the fact that the designated investment alternative is a mutual fund registered as an open-end management investment company with the SEC under the Investment Company Act of 1940, which is required by rules under such Act to adopt and implement a written liquidity risk management program that is designed to assess and manage their liquidity risk. If the designated investment alternative is not such a fund, the fiduciary must meet three conditions. First, the fiduciary obtains a written representation from the person responsible for managing the designated investment alternative, or otherwise performs appropriate due diligence, that the designated investment alternative has adopted and implemented a liquidity risk management program that is substantially similar to a program that meets the liquidity risk management requirements under such Act. Second, the fiduciary reads, critically reviews, and understands any written representation and consults a qualified professional where appropriate. Third, the fiduciary does not know, or have reason to know, other information which would cause the fiduciary to question any written representation.

(4) *Example. Participant and plan-level liquidity*--(i) *Facts*. A participant-directed individual account plan offers a designated investment alternative that is a pooled investment vehicle with an investment strategy involving target positions in particular types of assets, including holdings in private assets. According to written representations from the person responsible for managing the product, it is structured so that the timing of the product's ability to liquidate private-asset investments aligns generally with the redemption rights of plans investing in the product. Representations also are made that the product permits quarterly redemptions by investors and does not otherwise impose any specific limits or restrictions on timing or payment of redemptions. For individual participants, representations are made to the plan fiduciary that the designated investment alternative has adopted and implemented a liquidity risk-management program that imposes requirements substantially similar to the requirements related to liquidity risk management programs for mutual funds registered as open-end management investment companies with the SEC under the Investment Company Act of 1940. The fiduciary reads, critically reviews, and understands the written representations and consults a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA. The fiduciary does not know, or have reason to know, other information which would cause the fiduciary to question the written representations.

(ii) *Analysis*. The example in paragraph (i)(1) of this section clarifies that plan fiduciaries must appropriately consider the potential participant-level events that may trigger a plan's need for immediate liquidity, and must determine that the designated investment alternative, at the time of selection, will have sufficient liquidity to meet the anticipated liquidity needs of the plan. Similarly, the example in paragraph (i)(3) of this section clarifies that plan fiduciaries must appropriately consider, and determine, that the scope and duration of redemption restrictions at the plan level meet the anticipated needs of the plan.

(iii) *Conclusion*. A plan fiduciary is deemed to have met the consideration and determination requirements of paragraph (i) of this section, and section 404(a)(1)(B) of ERISA,

with respect to the participant-level and plan-level liquidity needs of a given plan in connection with a given designated investment alternative when the fiduciary determines within its discretion that the redemption structures under the product are appropriate to the needs of the plan after giving due consideration, including, where applicable, with the benefit of analysis of professional advisors, to the specific needs of the plan, including its need to maximize risk-adjusted return on investment.

(j) *Valuation*. 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.

(1) *Example. Valuation; Public exchanges*--(i) *Facts*. A participant-directed individual account plan offers a designated investment alternative that allows participants to acquire shares of a mutual fund registered as an open-end management investment company with the SEC under the Investment Company Act. Except for necessary cash reserves for operating expenses, all the underlying investments of the designated investment alternative trade daily on a public exchange. The exchange is a national securities exchange which is regulated under section 6 of the Securities Exchange Act of 1934.

(ii) *Analysis*. For purposes of determining the prudence of an investment, plan fiduciaries may rely on asset valuations derived from a national securities exchange or another similar, public exchange to the extent the exchange constitutes a generally recognized market through which the value of the investment is readily and accurately determinable in a timely manner.

(iii) *Conclusion*. The plan fiduciary is deemed to have met the consideration and determination requirements of paragraph (j) of this section, and section 404(a)(1)(B) of ERISA, with respect to this designated investment alternative, provided that the alternative's organizational documents or prospectus indicate that its value is determined in all material

respects by reference to the price of the security as reflected on the exchange at the time of the valuation.

(2*) Example. Valuation; FASB 820*--(i) *Facts*. A participant-directed individual account plan offers a designated investment alternative that invests in some securities that trade daily on a public exchange and some securities for which there is not a generally recognized market. The manager of the designated investment alternative represents in writing that the securities for which there is not a generally recognized market are valued through a conflict-free, independent process no less frequently than quarterly, according to procedures that satisfy the Financial Accounting Standards Board Accounting Standards Codification 820, titled Fair Value Measurements (or any successor standard). The current value of each share of the designated investment alternative is then communicated in writing to the named fiduciary of the plan.

(ii) *Analysis*. For purposes of determining the prudence of an investment, 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 with respect to acquisition, disposition, or management of the assets.

(iii) *Conclusion*. The named fiduciary of this plan is deemed to have met the consideration and determination requirements of paragraph (j) of this section, and section 404(a)(1)(B) of ERISA, with respect to this designated investment alternative under the following scenario. First, the named fiduciary reads, critically reviews, and understands the written representation, or otherwise performs appropriate due diligence on the valuation process, and consults a qualified professional where appropriate. Second, the named fiduciary does not know, or have reason to know, other information which would cause the named fiduciary to question any written representation. This conclusion would not change solely because the designated investment alternative permits its manager, acting in good faith, to adopt alternative valuation procedures if the manager determines and documents a temporary emergency that

could result in a negative impact on investors if the generally applicable valuation procedures are followed (*e.g.*, if investors would be able to redeem their interests based on a valuation that the manager believes is inflated and that would result in a significant harm to remaining investors).

(3) *Example. Valuation; SEC rules*--(i) *Facts*. A participant-directed individual account plan offers a designated investment alternative that is a mutual fund registered as an open-end management investment company with the SEC under the Investment Company Act of 1940 and that contains some securities that trade daily on a public exchange and some securities for which there is not a generally recognized market. Under the Investment Company Act and rules thereunder, among other things, mutual funds are required to have audited financial statements prepared in accordance with generally accepted accounting principles. These audited financial statements include an auditor's report. The fiduciary reviews the fund's publicly-available financial statements and valuation-related disclosures to confirm compliance with all applicable requirements under the Investment Company Act related to pricing and valuation of its shares, or otherwise performs appropriate due diligence. The fiduciary also reviews the fund's Form N-1A prospectus disclosures to confirm that a majority of the fund's board is independent.

(ii) *Analysis*. For purposes of determining the prudence of an investment that is governed by the Investment Company Act, plan fiduciaries may rely on asset valuations that result from the application of reasonable valuation procedures adopted to comply with the Investment Company Act and rules thereunder.

(iii) *Conclusion*. The plan fiduciary of this plan is deemed to have met the consideration and determination requirements of paragraph (j) of this section, and section 404(a)(1)(B) of ERISA, with respect to this designated investment alternative under the following scenario. First, the fiduciary reads the fund's publicly available audited financial statements and valuation-related disclosures, or otherwise performs appropriate due diligence on the valuation process, and consults a qualified professional as appropriate. Second, the fiduciary does not know, or

have reason to know, other information which would cause the fiduciary to question the veracity of the audited financial statements.

(4) *Example. Valuation; Conflicts of interest*--(i) *Facts*. The plan document for a participant-directed individual account plan specifies that the plan sponsor's chief financial officer is the named fiduciary of the plan and responsible for the establishment of the plan investment menu and selection and monitoring of designated investment alternatives. The named fiduciary selects as a designated investment alternative (or part of a broader investment alternative) a continuation fund (Fund) managed or controlled by an entity (Manager) that has recently acquired or contemplates an imminent acquisition of assets from an investment vehicle, such as another fund or vehicle with alternative assets, that is managed or controlled by the Manager or an affiliate of the Manager. The assets that were or will be purchased for the Fund from the investment vehicle do not trade on a public exchange and lack readily observable market prices, and the Manager was or will be able to control or influence—directly or indirectly—the price or other material terms on which the assets are transferred to the Fund. The Manager represents to the named fiduciary that valuation of the purchased assets is based on application of its proprietary valuation methods that rely on inputs provided by the Manager or its affiliates.

(ii) *Analysis*. The named fiduciary must assess whether the assets have been or will be valued through a conflict-free and independent process. When a designated investment alternative is a continuation fund that has recently acquired or contemplates an imminent acquisition of assets in a transaction that may be materially and adversely affected by a significant conflict of interest, the fiduciary must determine that the conflict of interest has not and will not render the designated investment alternative's valuation inaccurate. The facts do not demonstrate that the fiduciary can make this determination.

(iii) *Conclusion*. The facts in this example do not establish that the named fiduciary satisfied section 404(a)(1)(B) of ERISA and paragraph (j) of this section when selecting the designated investment alternative.

(k) *Performance benchmark*. 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 it 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.

(1) *Example. Benchmark; Misalignment of strategies*--(i) *Facts*. A participant-directed individual account plan offers a designated investment alternative that is a target date fund with an investment strategy and long-term objective of investing in different asset classes with varying degrees of risk, and which gradually becomes more conservative over time by adjusting the mix of asset classes. To compare the risk-adjusted expected returns of the target date fund to a meaningful benchmark, the named fiduciary compares the returns to a benchmark that is an index that only tracks the returns of large capitalization U.S. equities even though other

benchmarks with more similarities to the designated investment alternative were readily available.

(ii) *Analysis*. Paragraph (k) of this section provides that a "meaningful benchmark" is an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative.

(iii) *Conclusion*. The facts in this example do not establish that the named fiduciary satisfied section 404(a)(1)(B) of ERISA and paragraph (k) of this section when selecting the designated investment alternative because the strategies of the benchmark are not similar to the investment strategy of the target-date fund and other benchmarks with more similarities were readily available.

(2) *Example. Custom composite benchmark; Private equity sleeve*--(i) *Facts*. The named fiduciary of a participant-directed individual account plan selects as a designated investment alternative an asset allocation fund, which is registered under the Investment Company Act of 1940, that contains a private equity sleeve in addition to publicly traded stocks and bonds. In making this selection, the named fiduciary prudently enlists the assistance of an investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA. The investment advice fiduciary, who has no affiliation with the asset allocation fund, recommends the designated investment after creating a composite benchmark against which to measure risk-adjusted expected returns of the sleeves of the designated investment alternative. For the publicly traded stock and bond sleeves, the composite benchmark blends the performance of broad-based securities market indices reflective of and in proportion to the stock and bond holdings of the designated investment alternative. For the private equity sleeve, the investment advice fiduciary uses a combination of methodologies commonly used by investment professionals, including the internal rate of return method and a public market equivalent method, and presents these measures with explanations of how to interpret them to monitor the designated investment alternative's performance over time. The investment advice fiduciary also provides the named

fiduciary with a written explanation of the composite benchmark. The named fiduciary reads, critically reviews, and understands the written explanation, and does not know, or have reason to know, other information which would cause the named fiduciary to question the written explanation.

(ii) *Analysis*. The named fiduciary must ensure that its decision is based on a meaningful benchmark. In determining whether a particular benchmark is a meaningful benchmark, a named fiduciary may rely on a benchmark created by a prudently selected investment advice fiduciary that is independent of the manager of the designated investment alternative. A named fiduciary need not be more expert in benchmark construction and analytics than the investment advice expert hired by the named fiduciary to assist in the selection process.

(iii) *Conclusion*. The named fiduciary in this example satisfies this paragraph (k) and ERISA section 404(a)(1)(B) by considering and determining that the designated investment alternative has a meaningful benchmark and comparing the risk-adjusted expected returns of the designated investment alternative to the meaningful benchmark. The composite benchmark reflects the strategies and proportions of the underlying assets of the designated investment alternative. The named fiduciary read, critically reviewed, and understood the investment advice fiduciary's explanation of the composite benchmark.

(3) *Example. Custom composite benchmark; Public securities*--(i) *Facts*. The named fiduciary for a participant-directed individual account plan selects a target date fund as a designated investment alternative. The target date fund holds only publicly traded stocks and bonds. As part of the selection process, the fiduciary appropriately considers whether a particular custom composite benchmark is a meaningful benchmark. The custom composite benchmark is a blend of broad-based securities market indices. The blend represents the asset allocation used to implement the target date fund's strategy. The named fiduciary reads, critically reviews and understands the benchmark description and determines that the custom composite benchmark is a meaningful benchmark. The named fiduciary compares the historical performance of the target

date fund to the historical returns of the custom composite benchmark as a means of evaluating the risk-adjusted expected returns of the target date fund.

(ii) *Analysis*. In determining whether a particular benchmark is a meaningful benchmark with respect to a designated investment alternative, plan fiduciaries may rely on benchmarks that blend multiple broad-based securities market indices to represent the asset allocation used to implement the target date fund's strategy. Plan fiduciaries should review and understand the benchmark description or consult with an investment professional, as appropriate. The custom composite benchmark described in this example is meaningful because it reflects a similar strategy as the designated investment alternative. The custom composite benchmark can reveal whether the fund has outperformed or underperformed the benchmark in each asset class, providing valuable information to the plan fiduciary about the fund's investment selection decisions.

(iii) *Conclusion*. The plan fiduciary in this example satisfies this paragraph (k) and ERISA section 404(a)(1)(B) by considering and determining within its discretion that the designated investment alternative has a meaningful benchmark and comparing the risk-adjusted expected returns of the designated investment alternative to the meaningful benchmark.

(l) *Complexity*. 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.

(1) *Example. Complexity; Fees*--(i) *Facts*. A participant-directed individual account plan offers a designated investment alternative that is a pooled investment vehicle with an investment strategy involving target positions in particular types of assets, which includes holdings of private assets. The private assets in the designated investment alternative are varied and use

sophisticated and variable fee-based incentive structures to drive performance, including management fees and performance fees which include carried interest rights.

(ii) *Analysis*. As described in more detail in paragraph (h), the fiduciary must determine that the fees and expenses of the designated investment alternative are appropriate, taking into account the designated investment alternative's risk-adjusted expected returns and any other value the designated investment alternative brings to furthering the purposes of the plan. In order to make this determination, the plan fiduciary must comprehend the fees that will be charged to the plan and determine, within its discretion, that such fees are appropriate given the value proposition offered by the designated investment alternative.

(iii) *Conclusion*. A plan fiduciary is deemed to have met the comprehension requirements of paragraph (l) of this section, and section 404(a)(1)(B) of ERISA, with respect to the complexity of a designated investment alternative's fee structure in either of the two following scenarios.

(A) In the first scenario, the plan fiduciary conducts relevant due diligence to understand each fee that the plan may pay, and, in so doing, critically evaluates and determines, including, if appropriate, with the advice of a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, the average total expected rate of the designated investment alternative's fees, when fees will be paid, and how they will be determined. After this evaluation, the plan fiduciary determines (1) that the fee structure will deliver increased value by incentivizing performance which will, in turn, increase expected risk-adjusted return on investment and (2) that this increase outweighs the variability or potential unpredictability of the amount and timing of the fees.

(B) In the second scenario, three conditions are met. First, the fiduciary obtains a written representation from the person responsible for managing the designated investment alternative, or otherwise performs adequate due diligence to confirm, that none of the underlying fees will be passed through to the plan, and that, instead, the plan will pay an appropriate, flat, AUM-based

fee, to the person responsible for managing the designated investment alternative, who will then internalize the underlying fees. Second, the fiduciary reads, critically reviews, and understands any written representation and consults a qualified professional where appropriate. Third, the fiduciary does not know, or have reason to know, other information which would cause the fiduciary to question any written representation.

(2) *Example. Complexity; Participant needs*--(i) *Facts*. The plan document for a participant-directed individual account plan specifies that the plan sponsor's chief financial officer is the named fiduciary of the plan and responsible for the establishment of the plan investment menu and selection and monitoring of designated investment alternatives. The named fiduciary does not enlist the services of an investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, an investment manager within the meaning of section 3(38) of ERISA, or any other type of professional consultant. The named fiduciary adds a managed account service to create a customized portfolio tailored to each participant's unique financial circumstances as the plan's qualified default investment alternative. But, because the named fiduciary does not understand the design of the managed account service, the named fiduciary provides only the age of each participant to the managed account service, instead of providing, or allowing the participants to provide, information about the participants' unique financial circumstances. Based on each participant's age, the managed account service creates a portfolio for each participant that is materially similar in terms of strategies, historical performance, and liquidity to the portfolio that each participant would have been exposed to in the plan's target date fund – another designated investment alternative in the plan. The target date fund has substantially lower fees than the managed account service.

(ii) *Analysis*. A plan fiduciary must, including with the help of professional investment advisers like third-party investment advice fiduciaries within the meaning of section 3(21)(A)(ii) of ERISA, when appropriate, determine that it has the skills, knowledge, experience, and

capacity to understand each designated investment alternative sufficiently to discharge its obligations under ERISA and the governing plan documents.

(iii) *Conclusion*. The facts in this example do not establish that the named fiduciary satisfied section 404(a)(1)(B) of ERISA and paragraph (l) of this section in selecting the management account service as a designated investment alternative. The selection and implementation process appears to be flawed because the named fiduciary failed to comprehend the features, values, and fees of the designated investment alternative. After an appropriate due diligence process, a plan fiduciary would ordinarily be expected to understand how a designated investment alternative functions and delivers value to plan participants and operationalize it accordingly.

(m) *Designated investment alternative*. (1) The term "designated investment alternative" means any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, including a qualified default investment alternative within the meaning of 29 CFR 2550.404c-5.

(2) The term "designated investment alternative" shall not include "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan and shall not include investments acquired or available to be acquired through any such arrangements.

(3) The term "designated investment alternative" shall not include plan design features chosen by plan settlors, including features that establish the payment method of benefits under the plan. For example, a design feature in a participant-directed individual account plan that permits participants to electively join an open-end, actuarily fair, longevity risk-sharing solution with mortality pooling but no insurance contract or additional investment product, in which participants are allowed to select from the plan's existing designated investment alternatives and

to choose from a variety of payout methods, with each participant's results being unaffected by the investment and payout choices of others, is not a "designated investment alternative."

Signed at Washington, DC, on this 24th day of March 2026.

Daniel Aronowitz,

Assistant Secretary,

Employee Benefits Security Administration,

U.S. Department of Labor.