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Private Markets, Public Comments: An Overview of the Public Comments Submitted on the DOL's Proposed Rule on Alternative Assets in 401(k) Plans

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The US Department of Labor's (DOL) proposed rule entitled "Fiduciary Duties in Selecting Designated Investment Alternatives" (the Proposed Rule) has drawn an unusually large number of public comments because it seeks to address a fundamental question that has shadowed plan fiduciaries for years: What process should a 401(k) plan fiduciary follow when seeking to add an investment option that may look less familiar than a traditional stock or bond fund? The Proposed Rule, which implements Section 3(c) of President Trump's Executive Order 14330, "Democratizing Access to Alternative Assets for 401(k) Investors" was first published on March 30 earlier this year, and the public comment period closed on June 1. At the close of the comment period, an overwhelming number of public comments (upwards of 47,000) had been submitted, reflecting the keen public interest in the Proposed Rule and its potential to reshape the retirement investment landscape for American workers for decades to come.

Background

At its core, the Proposed Rule seeks to control meritless and costly class action litigation that has plagued the retirement plan industry. The Proposed Rule maps out a process-based, presumptive safe harbor under which a plan fiduciary can be presumed to satisfy its duty of prudence under the Employee Retirement Income Security Act of 1974, as amended (ERISA), when selecting designated investment alternatives (DIAs) for participant-directed individual account plans, including 401(k) plans. The Proposed Rule identifies six non-exclusive considerations, focusing on the performance, fees, liquidity, valuation, performance benchmarks, and complexity of a DIA, that a fiduciary should evaluate when selecting a DIA, accompanied by examples describing processes that are either presumptively prudent or imprudent under the Proposed Rule's safe harbor framework.

Comment Record at a Closer Glance

While the comment record appears voluminous, a closer look reveals that the vast majority of

submissions (nearly 43,000) are template comments that were circulated by various organizations who campaigned either in support of, or in opposition to, the Proposed Rule. Approximately 31,000 of these form comments oppose the rule, while approximately 12,000 are supportive.

Approximately 54 submissions consisted of substantive, individually drafted letters from trade associations, advocacy organizations, members of Congress, academics, and other industry stakeholders. Of these substantive letters, 43 support¹ the Proposed Rule while 11 are opposed.² This article aims to provide a brief summary of this subset of substantive public comments and some of the key recurring themes and considerations that they raise.

Common Ground

Asset Neutrality

Supporters and opponents alike agree that ERISA does not categorically favor or disfavor any particular asset class. Supporters commend the Proposed Rule's asset class neutrality and its confirmation that ERISA does not require or restrict any specific type of DIA, noting that this asset-neutral approach is consistent with Section 404(a)(1)(B) of ERISA and the Uniform Prudent Investor Act.³ Opponents likewise endorse asset neutrality as a guiding principle, even as they dispute whether certain alternative assets are suitable for 401(k) plans. The shared premise is that fiduciary conduct should be evaluated without categorical preference for, or prejudice against, the asset that has been selected.

Process-Based Prudence

There is a broad consensus that ERISA's duty of prudence is fundamentally process-based: fiduciaries are judged by the quality of their decision-making process at the time of the investment decision, not in hindsight. Supporters cite this principle as the foundation of the safe harbor framework, and opponents do not dispute the process-based nature of the inquiry. Both sides, therefore, begin from ERISA's

longstanding focus on process, but diverge sharply regarding how much protection a documented process should provide.

Litigation Risk

There is wide acknowledgment that the ERISA litigation environment influences fiduciary behavior and that litigation cost is a relevant consideration. Supporters emphasize that litigation risk has chilled plan innovation and pushed fiduciaries toward defensive decision making. Opponents counter that ERISA litigation serves an essential deterrent function and protects plan participants. Both sides recognize that meritless litigation is a legitimate concern, while disagreeing over the magnitude of meritless litigation and whether the Proposed Rule is the correct solution.

Supportive Themes

Asset Neutrality and Process-Based Prudence

Most letters supporting the Proposed Rule highlight ERISA's longstanding, process-based standard of prudence. The American Retirement Association (ARA) letter notes that, "fiduciary decisions should be evaluated based on whether the fiduciary engaged in a prudent process at the time of the decision, not based on hindsight or whether a particular investment ultimately outperforms other available options."⁴ The Investment Adviser Association (IAA) letter similarly emphasizes that courts have "consistently interpreted this duty of prudence as a process-based standard, one that is evaluated based on the fiduciary's investigation and decision making at the time an investment is selected, rather than through hindsight based on subsequent investment performance."⁵ The Defined Contribution Alternatives Association (DCALTA) letter frames the point historically, noting that "since 1979, the law has consistently held that prudence demands a sound investigative process, not the selection of any particular investment or class of investments," and

cites the Supreme Court's instruction in *Hughes v. Northwestern University* to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."⁶

Closely linked to that process-based framework is the principle of asset neutrality, the premise that no investment type should be *per se* favored or disfavored. Supporters uniformly endorse the Proposed Rule's statement that ERISA "does not require or restrict any specific type of designated investment alternative." The ARA letter stresses that "ERISA has never favored or disfavored an investment merely because of its asset class, vehicle structure, management style, liquidity profile, or degree of familiarity," and that fiduciaries should be free to consider "any legal investment alternative" so long as they follow a prudent process. The Insured Retirement Institute (IRI) echoes this view, urging that "the final rule should not favor traditional accumulation-only products over products designed to support retirement income, nor should it favor familiar structures over newer or differently structured solutions."⁷ One commenter commends the DOL for proposing a safe harbor that is "principles-based, asset-neutral, and oriented around process, rather than investment results that are inherently uncertain," adding that safe harbors "play a particularly valuable role in the ERISA context, where litigation risk can chill fiduciary decision making and unduly narrow the range of investment options available to participants."⁸

Litigation Relief

Supporters underscore what the ERISA Industry Committee (ERIC) describes as a "tsunami" of ERISA class action litigation that, in their view, has distorted fiduciary decision making. ERIC describes a recurring litigation playbook in which plaintiffs' firms identify allegations that can be applied to many large plans, use discovery costs to create settlement pressure, and collect attorney fees that may dwarf per-participant recoveries—citing one case in which 50,000 plan participants averaged less than \$20 each after a \$1.35 million settlement.⁹ Supporters

also emphasize the financial burden of defending these suits.¹⁰ They also argue that the Proposed Rule would provide courts a practical framework to dispose of meritless claims earlier, narrow the discovery process, and remove artificial pressures to settle meritless claims, thereby enabling fiduciaries to consider innovative investment options without being scrutinized in hindsight.¹¹

Access and Diversification

A central argument from supporters is that the Proposed Rule narrows a longstanding and growing gap between defined benefit (DB) and defined contribution (DC) plans. The American Investment Council (AIC) highlights that 68 percent of Fortune 1000 companies with DB plans invested in alternative assets in 2023, 89 percent of public pension plans allocated to alternatives, and 90 percent of Taft-Hartley plans did the same, yet "only 0.1 percent of all DC plan assets were in alternative investments in 2024."¹² Supporters contend that this disparity does not reflect categorical unsuitability, but rather the chilling effect of litigation risk on fiduciary innovation. The coalition letter from the Small Business & Entrepreneurship Council (SBE Council), the National Taxpayers Union (NTU), and more than 20 other organizations emphasizes that "defined-benefit plans, which have long maintained allocations to private equity and other alternative assets, have consistently outperformed defined-contribution plans," placing DC plan participants "at a structural disadvantage relative to institutional investors."¹³

Supporters also cite significant empirical evidence showing the potential performance benefits provided by diversification to alternatives.¹⁴ Several commenters also stressed that public markets have grown more concentrated, making private-market exposure a potentially more important tool for portfolio diversification.¹⁵

Lifetime Income

A distinct thread in the comment record, driven primarily by the insurance and annuity industry,

focuses on the Proposed Rule's treatment of lifetime income products. The American Council of Life Insurers (ACLI) letter emphasizes that guaranteed lifetime income is "a cornerstone of meaningful retirement security" because it protects against longevity risk, the prospect of outliving one's savings, and stressed that annuities provided by life insurance companies are "the only private sector financial instrument that guarantees monthly retirement income."¹⁶ IRI similarly urges the DOL to "more clearly distinguish annuities and other lifetime income products" from broader references to longevity risk-sharing pools, noting that these products "may provide contractual guarantees, insurance protections, income certainty, longevity-risk transfer, guaranteed minimum withdrawal benefits, fixed or variable payout structures, death benefit features, or other protections designed to help participants convert savings into income that may continue for life."¹⁷

The Teachers Insurance and Annuity Association of America (TIAA) and Nuveen ground the argument in the broader retirement landscape, observing that the decline of traditional DB plans has left many retirees without guaranteed lifetime income and commending the DOL for recognizing that "lifetime income solutions play a central role in advancing" retirement security.¹⁸ The Committee of Annuity Insurers provides an extensive taxonomy of annuity products (immediate annuities, deferred fixed and variable annuities, registered index-linked annuities, and guaranteed lifetime withdrawal benefits) noting that these products pool longevity, investment, inflation, and interest-rate risks that "individual savers are poorly equipped to handle on their own."¹⁹ Several of these commenters also argue that the safe harbor's fee analysis should account for the distinct value of insurance protections, because annuities may cost more than accumulation-only alternatives but provide benefits—such as guaranteed income and downside protection—that traditional investments cannot replicate.

Opposing Themes

The opposition to the Proposed Rule asserts four principal critiques: (1) the Proposed Rule weakens, rather than clarifies, the prudence standard; (2) the investment vehicles most likely to benefit from the Proposed Rule are not suitable for 401(k) plans or their participants; (3) the litigation problem that the Proposed Rule seeks to address has been overstated; and (4) the DOL lacks statutory authority to promulgate the rule.²⁰

Weakening the Prudence Standard

Opponents' most fundamental objection is that (in their view) the Proposed Rule does not clarify the prudence standard but dilutes it, reducing ERISA's central fiduciary obligation to what commenters characterized as "a check-the-box exercise."²¹ They assert that the Proposed Rule dispenses with a longstanding requirement that fiduciaries "act accordingly"²² on the results of their analysis, instead presuming that requirement satisfied whenever a fiduciary has carried out the analysis and considered the relevant factors. Commenters argue that this substitution would shield fiduciaries from liability for imprudent investment decisions so long as they can document that they weighed the required factors, even though, as several letters contend, "the obligation to make a sound investment selection based on the information collected and the analysis conducted" is arguably the most consequential part of the prudent process.²³

The Consumer Policy Center (CPC) grounds this critique in the 1979 Investment Duties Regulation preamble, which makes clear that a fiduciary does not satisfy the prudence standard merely by considering the relevant facts and circumstances, a concern several commenters echoed. The letter argues that the Proposed Rule would immunize fiduciaries in precisely the manner the DOL previously sought to foreclose, because a fiduciary could weigh each enumerated factor and

still make a decision that “falls outside the range of reasonableness” (that is, a facially prudent process that results in imprudent selections does not satisfy ERISA).²⁴ The Public Investors Advocate Bar Association emphasizes this concern from a litigation vantage point, noting that its members have repeatedly observed harmful investment decisions accompanied by “superficially adequate documentation,” which they view as precisely the kind of paper record that could be treated as sufficient under the Proposed Rule.²⁵

Unsuitability

A second line of criticism questions whether the investments most likely to benefit from the Proposed Rule are suitable for ordinary 401(k) plan participants. Several letters argue that the rule would principally benefit private-market managers by opening a channel to the \$10.1 trillion held in 401(k) plans, while exposing workers to products that may be illiquid, opaque, costly, and difficult to evaluate. One commenter described the proposal as “a thinly disguised bailout for struggling Wall Street firms” amid declining performance and mounting risk²⁶ in private markets, while the Roosevelt Institute warned against treating “workers’ nest eggs as a new frontier for people who make money off of risky and costly investments . . . rather than as savings that should be protected—at a time when we are already seeing volatility in private markets.”²⁷

Several comment letters raised more detailed suitability concerns, arguing that private credit and private equity are too illiquid and risky for workers’ retirement plans, and that these products lack the transparency available in traditional public market investments while charging higher fees and, in some cases, underperforming them. A recurring theme is that opponents view the complexity of alternative investments as potentially exceeding what many retail investors, particularly lower-income 401(k) plan participants, can reasonably evaluate: most plan holders lack the information, expertise, or

experience to analyze the prospectuses and financial statements needed to assess whether a given product matches their risk tolerance and investment objectives. Unlike institutional investors such as traditional pension plans, which have historically invested in private and alternative assets with the benefit of dedicated staff, 401(k) plan participants select from a menu chosen by their fiduciary, with no structural guardrail against over-concentration in illiquid or opaque products. The comment letter submitted by a coalition of state attorneys general (State Attorneys General Coalition) warns that this dynamic exposes participants to the risk of catastrophic financial losses.

The Certified Financial Planner Board of Standards, Inc. (CFP Board) similarly argues that fiduciaries have long avoided certain investments for sound reasons because “these products cannot satisfy a genuine merits-based suitability test.”²⁸ The American Association of Retired Persons (AARP) singles out several asset classes as categorically unsuitable. It argues that cryptocurrency can “operate in fragmented or evolving regulatory environments, with inconsistent federal standards and significant gaps in investor protections” and is “highly volatile, subject to manipulation, and opaque for most Americans,” while non-traded real estate investment trusts and other private real estate vehicles are “characterized by limited transparency, high fees, and constrained liquidity” and rely “heavily on sponsor-provided valuations,” creating risks of “pricing inaccuracies” and conflicts of interest.²⁹ This asset-specific skepticism, however, sits uneasily with the guiding principle of asset neutrality that both supporters and opponents otherwise invoke.

Litigation

A third strand of opposition contends that the litigation surge the Proposed Rule seeks to address has been exaggerated and that ERISA litigation continues to serve the protective function that Congress intended. The CPC offers the most detailed critique

on this point, stating flatly that “there has been no epidemic of litigation sufficient to justify the creation of a new legal safe harbor.”³⁰ According to the letter, ERISA fiduciary lawsuits grew during an initial period in the early 2000s but have since leveled off, fluctuating between 50 to 100 cases annually from 2020 to 2024 with no discernible upward trend.³¹ The CPC further observed that recent litigation has disproportionately targeted group health and defined benefit plans rather than the defined contribution plans this rule addresses, and that the number of defined contribution cases was notably lower in 2024 than in 2020. Opponents argue that, taken together with data showing that fewer than 0.1 percent of plans have been sued since 2016 and about 0.01 percent of plans are sued in any given year, the litigation record does not justify a new safe harbor.³² The litigation risk, in this view, is concentrated almost entirely among plans exceeding \$1 billion in assets, while the smaller plans that make up roughly 85 percent of the universe face a risk of litigation that is “all but non-existent.”³³ AARP adds that across more than 800,000 ERISA-covered retirement plans nationwide, fiduciary breach litigation is rare.³⁴

Opponents also dispute the claim that these lawsuits are primarily frivolous.³⁵ The CPC notes that the DOL offered limited evidence of dismissed cases, while the three ERISA fiduciary cases decided by the Supreme Court resulted in unanimous decisions for plaintiffs. Plaintiffs, the CPC argues, already bear a substantial burden in bringing these claims because they must show both a flawed process and that the alleged breach caused actual losses, a standard that “serves as an effective guard against speculative or frivolous litigation.”³⁶ AARP similarly notes that courts routinely dismiss meritless claims at the earliest stages, and that the cases that do proceed represent only a small fraction of plans and of federal litigation generally. The CPC alleges that the DOL “attributes the scarcity of alternative assets in defined contribution plans to an epidemic of litigation in order to justify its proposed regulatory approach.”³⁷

Opponents further argue that the DOL’s cost-benefit analysis is one-sided because it ignores the benefits litigation has produced: \$1.5 billion in recoveries for plan participants and broader fee reductions driven by litigation pressure. Americans for Financial Reform Education Fund credits fiduciary litigation with helping drive down general plan fees and expenses by 25 percent to 35 percent between 2013 and 2023, real savings, it argues, that the DOL’s analysis fails to weigh against the compliance costs it emphasizes.³⁸ Litigation risk, in this view, is not a defect to be engineered away but evidence that ERISA’s accountability mechanism is functioning as intended. The State Attorneys General Coalition acknowledges that frivolous suits are a legitimate concern, but notes that Congress considered that tradeoff when it drafted ERISA to give plan participants “ready access to the Federal courts.”³⁹

Legal Authority

A fourth and more structural objection is that the DOL lacks statutory authority to promulgate the Proposed Rule. The State Attorneys General Coalition argues that the rule contradicts both ERISA’s text and the body of case law interpreting it. ERISA’s purpose provision provides that participants be protected and afforded ready access to federal courts, a mandate the proposed safe harbor allegedly undercuts. The coalition contends that, if enacted, the rule “would violate both the text and the purpose of ERISA” and is “thus contrary to law and entitled to nothing but a swift and successful action for vacatur under the Administrative Procedure Act,” rejecting the DOL’s position that its interpretation merits Skidmore deference.⁴⁰ The letter further argues that the Proposed Rule cannot be reconciled with Supreme Court precedent rejecting the “presumption of prudence” once applied in several circuits, because breaking the prudence inquiry into discrete, safe-harbored steps is inconsistent with case law requiring that prudence be evaluated holistically and contextually.⁴¹ Limiting courts to a deferential

review of process alone, the coalition warns, “contradicts precedent by insulating imprudent conduct from meaningful judicial scrutiny.”⁴²

The CFP Board raises a narrower version of this challenge. It observes that the DOL’s rulemaking authority, derived from 29 U.S.C. § 1135, authorizes regulations necessary to carry out Title I of ERISA and has historically been used to interpret and implement the statute’s existing requirements. In the CFP Board’s view, the Proposed Rule exceeds that authority because, rather than clarifying or implementing existing fiduciary obligations, it would establish a substantively new standard that falls outside the scope of the DOL’s cited source of power.

Requested Refinements

Taken together, the comments identify the following 10 primary areas in which the Proposed Rule should be refined.

1. Extend the Safe Harbor to Monitoring or Promptly Issue Additional Guidance

Selection is only the first point in the investment lifecycle. The Proposed Rule covers only the initial *selection* of DIAs. Many commenters repeatedly note, however, that litigation often challenges both the initial decision to add an investment option and the ongoing decision to retain it. Without a “monitoring” safe harbor, the practical impact of the rule on litigation risk may be significantly diminished. A fiduciary might prudently select a target-date fund with a private-market sleeve, for example, while remaining vulnerable to allegations that it failed to respond to underperformance, valuation concerns, fee changes, liquidity stress, or a change in manager personnel. Plaintiffs could also recast selection disputes as monitoring claims, undermining the rule’s litigation-reduction purpose.

Some commenters suggest extending the safe harbor to cover monitoring of DIAs or issuing additional regulatory guidance to create monitoring-specific protections.⁴³ They also note that any

monitoring safe harbor should preserve fiduciary discretion, avoid rigid review cycles, and clarify that the cadence and depth of review depend on the plan, product, and facts known at the time.⁴⁴

2. Clarify that the Safe Harbor Is Voluntary, with No Negative Inference from Non-Use

The Proposed Rule states that a fiduciary “*must* objectively, thoroughly, and analytically consider” each of the six factors. Some supporters fear that this statement risks being understood by courts as establishing a new minimum standard of prudence rather than one optional path to a litigation-protective presumption. Human Interest Advisors warns that, for small sponsors in particular, the six-factor framework could become “a new six-item checklist,”⁴⁵ increasing litigation exposure for any fiduciary that does not fully document each factor.

Some commenters recommend adding explicit language clarifying that a fiduciary’s decision not to use the safe harbor creates no presumption of imprudence.⁴⁶ That clarification would preserve the safe harbor as an optional, non-exclusive means of demonstrating prudence and avoid converting the rule into a mandatory checklist that could increase litigation risk for plans that demonstrate prudence through other means.

3. Avoid Implying Third-Party Advisers Are a Prerequisite to the Safe Harbor

The rule’s examples lean heavily on scenarios involving third-party “3(21)” or “3(38)” investment fiduciaries, which could be understood to imply that engaging outside expertise is a condition of safe harbor eligibility. That reading would burden smaller sponsors that rely on capable internal investment committees and may not be able to engage outside advisers for every investment decision, potentially undermining the rule’s stated goal of democratizing alternatives access for workers at businesses of all sizes. To address this concern, some commenters suggest adding an example demonstrating that an

internal investment committee with appropriate expertise can satisfy the safe harbor through its own competent analysis, without third-party assistance.⁴⁷

4. Treat Examples as Illustrative, Not Prescriptive

The Proposed Rule embeds multiple examples directly within the regulatory text for each safe harbor factor. Some commenters express concern that this placement risks having the examples treated as prescriptive checklists. The examples cannot cover every reasonable product structure, plan size, committee process, or participant population, yet plaintiffs and courts could treat them as the only approved pathways for satisfying the safe harbor. The Investment Company Institute (ICI) further warns that fiduciaries may feel pressure to select only investments that fit “within the four corners of a particular example.”⁴⁸

A broad swath of commenters suggest that the DOL relocate the examples from the Proposed Rule’s operative text to the preamble, or that it clearly label each example as merely illustrative.⁴⁹ Some commenters also request that the final rule eliminate the negative examples that illustrate conduct falling outside the safe harbor.⁵⁰ These commenters argue that treating the examples as illustrative would preserve their value as guides to prudent behavior while reducing the risk that plaintiffs could allege imprudence based solely on a fiduciary’s failure to prescriptively follow an example verbatim.

5. Clarify That the Factors Are Applied at the DIA/Plan Level

The Proposed Rule requires fiduciaries to consider the six factors but does not clearly specify whether the analysis must occur at the level of the DIA or at the level of the underlying asset or sleeve within each DIA vehicle. The latter reading would be especially burdensome for multi-asset products such as target-date funds, where fiduciaries could be forced to separately re-evaluate all six factors for each underlying component, rather than for the fund as

offered. Given that target-date funds hold the majority of the roughly \$3.8 trillion in defined contribution assets, unresolved ambiguity here could make the safe harbor unworkable for exactly the products the rule is designed to facilitate.⁵¹

Some commenters suggest that the final rule expressly confirm that the six factors apply at the DIA level, not at the asset or sleeve level.⁵² This would allow fiduciaries to evaluate a fund as offered, without a duplicative sleeve-by-sleeve analysis. The letter authored by a coalition of law firms (Law Firm Coalition) further suggests defining a DIA as the vehicle in which participants directly invest, resolving the ambiguity at its source by applying the DIA-level principle consistently throughout the rule.⁵³

6. Replace “Conflict-Free” Valuation with a Conflict-Mitigation Standard

The Proposed Rule requires a “conflict-free, independent” valuation process. Some commenters argue that this standard can be unworkable for assets such as private equity, private credit, private real estate, and private infrastructure, where valuation often involves manager inputs, valuation committees, and parties affiliated with the sponsor. Moreover, requiring conflict-free valuation for DIAs would deviate from the US Securities and Exchange Commission’s (SEC) rules for registered fund valuation, under which advisers may act as valuation designees, making the DOL’s proposed standard comparatively burdensome. Some commenters also warned that this heightened bar could encourage formalistic representations rather than improve participant protection.

Commenters suggest replacing the “conflict-free, independent” standard with language requiring controls and procedures “reasonably designed to identify, manage, and mitigate conflicts.”⁵⁴ They argue that the key fiduciary question should be whether the valuation process has reliable controls, independent review where appropriate, sound methodology, and procedures reasonably designed to

identify, manage, and mitigate conflicts that could affect valuation accuracy.

7. Remove or Clarify the SEC Rule 22e-4 Liquidity Reference

The Proposed Rule's liquidity factor references Rule 22e-4, a rule that prohibits mutual funds from acquiring illiquid investments if more than 15 percent of the fund's net assets would be in illiquid investments, due to their daily redemption obligations. Commenters argued that this reference could be read as importing Rule 22e-4's 15 percent threshold into the liquidity factor, unreasonably limiting the illiquid exposure of collective investment trusts (CITs) and other non-registered vehicles that lack daily redemption obligations.⁵⁵ CITs are expected to be the primary vehicle for delivering alternatives to 401(k) plans through target-date funds, and, as the comment record notes, younger workers in particular could benefit from private equity allocations of up to 30 percent.⁵⁶ If Rule 22e-4 applies to CITs, it could prevent workers from obtaining meaningful private-markets exposure.

Some commenters suggest removing the reference to Rule 22e-4 or clarifying that it is merely illustrative rather than prescriptive. They argue that the final rule's liquidity factor should require fiduciaries to evaluate whether the product has a written liquidity risk management process appropriate for the product's structure, participant flows, redemption terms, and plan-level needs.⁵⁷

8. Increase Benchmark Flexibility

The Proposed Rule's benchmark factor requires a "meaningful" composite benchmark built by an unaffiliated adviser. Multiple commenters expressed concern that this standard is disproportionately costly, especially for smaller plans, and difficult to satisfy for asset classes that lack established indices.⁵⁸

Some commenters argue that the final rule should replace "*meaningful*" with "*reasonable*" to avoid imposing an impossibly high bar for less liquid asset classes and that the final rule expressly

permit composite benchmarks, because a single index is often inadequate for multi-strategy alternative investments.⁵⁹ One commenter went further, recommending that the final rule eliminate benchmarking as a standalone factor because it substantially duplicates the performance factor.⁶⁰

9. Ensure Vehicle Neutrality for CITs

As the comment record notes, CITs are one of the fastest-growing investment vehicles in defined contribution plans, as target-date funds are increasingly built on CIT structures.⁶¹ Despite this growing prevalence, the Proposed Rule's framework and examples appear to have been written with mutual funds in mind. This lack of vehicle neutrality could undermine the rule's goal of asset-neutrality by offering less protection to the investment vehicles that are most prominent in retirement investing and the most likely conduits for alternative assets.

A plurality of commenters request that the final rule ensure CITs are eligible for the safe harbor on the same vehicle-neutral terms as registered funds. Suggestions for accomplishing this include adding CIT-specific examples or an explicit vehicle-neutrality statement.⁶²

10. Modernize Prohibited Transaction Exemption (PTE) 77-4

ERISA Section 406 generally restricts certain transactions involving plans, fiduciaries, parties in interest, and conflicts. Prohibited Transaction Exemption 77-4 (PTE 77-4) provides relief under ERISA Section 406 for plan purchases and sales of shares of mutual funds when a plan fiduciary or affiliate also advises that investment company. PTE 77-4, however, is limited to mutual fund structures, preventing a broader universe of pooled vehicles, including CITs, private funds, and other pooled structures, from availing themselves of this exemption.

Many commenters urge the DOL to modernize PTE 77-4 to cover all pooled investment vehicles, not just mutual funds, which would remove a

structural barrier to constructing retirement products that include alternative investments.⁶³ While support for this change is widespread, any expansion of PTE 77-4 is likely to come from subsequent rulemaking.

What to Expect: The Final Rule and *Anderson*

Whether the DOL's proposed safe harbor will meaningfully accomplish its goals may be influenced in part by the outcome of *Anderson v. Intel*, a fiduciary breach claim pending before the Supreme Court.⁶⁴ At issue in *Anderson* is whether a plaintiff alleging fiduciary breach based on fund underperformance must plead a "meaningful benchmark" in the complaint to survive a motion to dismiss. Because traditional benchmarks often do not exist for private equity, private credit, and other alternative strategies, the outcome of *Anderson* could significantly affect the rule's ability to reduce litigation arising from the inclusion of alternatives in DIA menus.⁶⁵

Plan sponsors, asset managers, and fiduciaries evaluating alternatives-inclusive retirement products should track four developments closely in the months ahead: (1) the extent to which the DOL adopts the refinements summarized above in the final rule; (2) whether the final rule retains the reference to SEC Rule 22e-4; (3) the DOL's anticipated subsequent guidance on monitoring obligations and modernization of PTE 77-4; and (4) the Supreme Court's decision in *Anderson*. These developments can shape whether the rule will deliver on its promise of broadening retirement investors' access to private-market opportunities or if it will merely remain an additive waypoint in the long-running debate over how ERISA should govern access to private-market strategies in participant-directed retirement plans.

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NOTES

- ¹ These include submissions from the ICI, AIC, ARA, the Managed Funds Association (MFA), ERIC, the SPARK Institute (SPARK), the Defined Contribution Alternatives Association, ACLI, the Securities Industry and Financial Markets Association (SIFMA), the IRI, Vanguard, Betterment LLC, Nareit, NTU, SBE Council, and bipartisan groups of members of both the US Senate and the US House of Representatives.
- ² These include submissions from AARP, the State Attorneys General Coalition and state labor agencies (AFL-CIO), Better Markets, Americans for Financial Reform Education Fund, Public Citizen, the Public Investors Advocate Bar Association, the Roosevelt Institute, the CPC, the Center for Economic and Policy Research (CEPR), NYU Stern, and the CFP Board.
- ³ As adopted in 1992 by the American Law Institute's Third Restatement of the Law of Trusts.
- ⁴ See American Retirement Association, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46876>.
- ⁵ See Investment Adviser Association, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46862>.
- ⁶ See Defined Contribution Alternatives Association, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46852>.
- ⁷ See Insured Retirement Institute, Comment Letter on Proposed Rule on Fiduciary Duties in

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Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46877>.

- ⁸ See Betterment LLC, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46921>.
- ⁹ See ERISA Industry Committee, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46854>. Over half of plans with more than \$1 billion in assets have been targeted by at least one excessive-fee or investment-performance lawsuit since 2016 and plans with \$500 million or more face close to a 10 percent chance of being sued in any given year.
- ¹⁰ ICI reports that the average cost to defend an ERISA class action through trial ranges from \$5.5 million to \$14 million, with defense costs through a motion to dismiss alone running \$500,000 to \$1 million. See Investment Company Institute, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46942>. SIFMA notes that since 2016, more than 500 ERISA class actions have been filed, producing average settlements of \$5.6 million each—yet “the typical employee receives just \$198, less than \$5 a year when annuitized.” See Securities Industry and Financial Markets Association, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46869>.
- ¹¹ The AIC letter quotes Justice Alito’s concurrence in *Cunningham v. Cornell University*, in which he observed that “getting by a motion to dismiss is often the whole ball game because of the cost of discovery” and that defendants often “calculate that it is efficient to settle a case even though they are convinced that they would win.” See American Investment Council, Comment Letter on Proposed Rule on

Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46923>.

- ¹² *Id.*
- ¹³ See Americans for Tax Reform, Small Business & Entrepreneurship Council, National Taxpayers Union, et al., Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (May 18, 2026), <https://www.rstreet.org/outreach/coalition-letter-in-support-of-democratizing-alternative-asset-access-for-401k-investors/>.
- ¹⁴ The bipartisan congressional letter written by Rep. Lawler and Rep. Gottheimer notes that state pension private equity portfolios returned 10.7 percent net annually from 2000 to 2024, compared with 6.6 percent for public equities. See Rep. Michael V. Lawler & Rep. Josh Gottheimer, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46930>. The AIC cited research finding that even modest exposure to private assets could improve DC outcomes by 7 percent to 8 percent across a range of participant savings patterns and an estimate that allowing private market allocations would increase annuitized lifetime income by 2.5 percent for younger workers—reaching \$35 billion in aggregate. See American Investment Council, *supra* n.11. ICI’s own simulations of target-date fund glide paths with a 20 percent private market allocation yielded a median account balance 12 percent higher than a public-only baseline, with 94 percent of simulations producing higher balances at retirement age. See Investment Company Institute, *supra* n.10.
- ¹⁵ The number of publicly listed US companies fell from more than 8,000 in 1996 to fewer than 4,000 by 2025. See American Investment Council, *supra* n.11.
- ¹⁶ See American Council of Life Insurers, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46895>.

- ¹⁷ See Insured Retirement Institute, *supra* n.7.
- ¹⁸ Teachers Insurance and Annuity Association of America, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46860>.
- ¹⁹ Committee of Annuity Insurers, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46863>.
- ²⁰ Commenters opposing the Proposed Rule include consumer advocacy organizations (AARP, Public Citizen, Better Markets, and the CPC), the AFL-CIO, policy and academic institutions (the Roosevelt Institute, CEPR, and NYU Stern), and professional and financial-reform associations (the Public Investors Advocate Bar Association, the CFP Board, and Americans for Financial Reform Education Fund).
- ²¹ See CFP Board, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46891>.
- ²² See Consumer Policy Center, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46848>.
- ²³ See *id.*
- ²⁴ See CFP Board, *supra* n.21; see also Public Investors Advocate Bar Association, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46947>.
- ²⁵ See *id.*
- ²⁶ Dr. Eileen Appelbaum, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46861>.
- ²⁷ Roosevelt Institute, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46849>.
- ²⁸ CFP Board, *supra* n.21.
- ²⁹ American Association of Retired Persons, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46836>.
- ³⁰ See Consumer Policy Center, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46848>.
- ³¹ See *id.*
- ³² See Consumer Policy Center, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46848>.
- ³³ *Id.*
- ³⁴ American Association of Retired Persons, *supra* n.29.
- ³⁵ See Consumer Policy Center, *supra* n.30.
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ Americans for Financial Reform Education Fund, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46892>.
- ³⁹ State Labor Agencies and Attorneys General, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (May 29, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-44083>.
- ⁴⁰ *Id.*
- ⁴¹ See *id.*
- ⁴² *Id.*
- ⁴³ Commenters supporting this change included AIC, ARA, ERIC, DCALTA, ICI, SIFMA, and the Law Firm Coalition.
- ⁴⁴ The Committee of Annuity Insurers and IRI took the view that monitoring should be addressed in a separate rulemaking, if at all.

- ⁴⁵ See Human Interest Advisors, LLC, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46918>.
- ⁴⁶ Supportive commenters included ARA, ICI, SIFMA, DCALTA, Human Interest Advisors, and SPARK.
- ⁴⁷ Some commenters request that final rule go further and deem a sponsor's appointment of a Section 3(38) manager sufficient to satisfy the comprehension burden without independently re-evaluating each factor. See Human Interest Advisors, LLC, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46918>.
- ⁴⁸ See Investment Company Institute, *supra* n.10.
- ⁴⁹ Commenters supportive of this suggestion included AIC, ARA, ICI, DCALTA, SIFMA, SPARK, the Committee of Annuity Insurers, and the Law Firm Coalition.
- ⁵⁰ SPARK recommended removing the negative examples, warning that plaintiffs may use them as litigation templates. See SPARK Institute, Inc., Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46886>.
- ⁵¹ See Securities Industry and Financial Markets Association, *supra* n.10.
- ⁵² Support for this change was expressed by AIC, the American Bankers Association, the American Securities Association, DCALTA, MFA, the Law Firm Coalition, and SIFMA.
- ⁵³ See Law Firm Coalition, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46941>.
- ⁵⁴ Support for this change was broad, with AIC, the American Bankers Association, DCALTA, NTU, SBE Council, Americans for Tax Reform, IRI, SIFMA, Kroll, State Street, and the Law Firm Coalition all arguing that the proposed standard was impractical. See American Bankers Association, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46851>.
- ⁵⁵ See Investment Company Institute, *supra* n.10.
- ⁵⁶ See National Association of Investment Companies, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives (May 27, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-40851> (citing White House Council of Economic Advisers, *Unlocking Retail Access to Private Equity Investments through Defined Contribution Plans*, ERP 2026-12 (April 2026), <https://www.whitehouse.gov/wp-content/uploads/2026/04/ERP-2026-12.-Unlocking-Retail-Access-to-Private-Equity-Investments-through-Defined-Contribution-Plans.pdf> (stating younger workers would benefit from a private equity investment allocation of up to 30 percent)).
- ⁵⁷ Commenters supporting this change included AIC, the American Bankers Association, DCALTA, ICI, Capital Group, SIFMA, NTU, SBE Council, Americans for Tax Reform, and the Law Firm Coalition.
- ⁵⁸ See American Bankers Association, *supra* n.55.
- ⁵⁹ This suggestion was supported by the American Bankers Association, AIC, Awaken Group Inc., and MFA.
- ⁶⁰ See SPARK Institute, Inc., *supra* n.50.
- ⁶¹ See Investment Company Institute, *supra* n.10.
- ⁶² Multiple commenters, including the American Bankers Association, DCALTA, the Defined Contribution Institutional Investment Association, State Street, ICI, MFA, AIC, Capital Group, and SPARK, urged the DOL to ensure CITs qualify for the safe harbor on equal terms.
- ⁶³ the American Bankers Association, AIC, ICI, MFA, SIFMA, SPARK, and DCALTA, among others, urged the DOL to expand PTE 77-4 to cover all pooled investment vehicles.

⁶⁴ *Anderson v. Intel Corp. Investment Policy Committee*, 137 F.4th 1015 (9th Cir. 2025), cert. granted, No. 25-498 (U.S. Jan. 16, 2026).

⁶⁵ See Defined Contribution Alternatives Association, Comment Letter on Proposed Rule on Fiduciary Duties in Selecting Designated Investment

Alternatives (June 1, 2026), <https://www.regulations.gov/comment/EBSA-2026-0166-46852> (noting that the outcome of *Anderson* “will have profound implications for every fiduciary considering investments... that do not map neatly onto a widely recognized public market index.”).

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