THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

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

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to comment on the notice of proposed rulemaking issued by the Department of Labor (Department or DOL) on March 31, 2026, entitled "Fiduciary Duties in Selecting Designated Investment Alternatives" (proposal, NPRM, Proposed Regulation, or Proposed Rule).[1] **ERIC strongly supports the goals of the proposal, applauds the proposal's focus on managing litigation risk, and offers targeted suggested recommendations to improve the NPRM to enhance the retirement security of workers and retirees.**

By way of background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state.

The ERIC Legal Center advocates for large employers in the courts on legal matters affecting their ability to provide health, retirement, and other compensation benefits to their nationwide workforces. On behalf of ERIC, the Legal Center engages in litigation against state mandates and other measures that threaten the ability of employers to offer uniform nationwide benefits. The Legal Center also participates in cases that have the potential to significantly affect the design and administration of employee benefit plans under the *Employee Retirement Income Security Act of 1974* (ERISA). For example, in the last few years alone, we have filed dozens of *amicus curiae* briefs addressing important questions relating to, among other topics, ERISA preemption of state laws affecting employee benefit plans, permissible use of 401(k) plan forfeitures,

[1] 91 Fed. Reg. 16088 (Mar. 31, 2026). Citations to the NPRM's preamble will refer to Federal Register pages; citations to the proposed revised 29 CFR §2550.404a-6 will refer to the proposed regulatory text.

calculation of actuarially equivalent benefits under a pension plan, and the allegations that must be included in a lawsuit against a benefit plan fiduciary in order to state a proper claim for relief.

I. Background: Retirement Plans Are Under Assault in the Courts

The bipartisan, decades-long public policy judgment that encouraging benefit plan sponsorship helps strengthen financial security for American workers and retirees is threatened by abusive class action litigation. Yet only modest clarifications of the system's ground rules are needed to discourage such litigation while maintaining the ability of plan participants to vindicate their rights. **As discussed here, the Proposed Regulation is a crucial step in restoring balance, limiting meritless litigation, and reducing uncertainty and improving outcomes for retirement savers.**

The private sector's delivery of employee benefits is a backbone of retirement savings in the United States today. Nearly 100 million private sector workers have access to retirement savings plans such as 401(k) plans.[2] Large employers, including ERIC's members, are at the forefront of delivering high quality, high value, and innovative benefits to tens of millions of Americans.

Employers are not required to establish employee benefit plans, but public policy has taken pains to encourage the practice.[3] Indeed, ERISA reflects a "careful balancing" between ensuring employees receive their promised benefits and encouraging employers to create and maintain benefit plans in the first place.[4] As the Supreme Court has stated, Congress endeavored "not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place."[5]

This balance has served employees and retirees very well.[6] ERISA provides the opportunity for judicial remedies in those cases where plan fiduciaries neglect their legal obligations to workers and retirees, cause losses to plan participants, or unscrupulously use the plan for self-dealing. These are the situations ERISA was designed to address.

ERISA establishes myriad responsibilities for the fiduciaries of these benefit plans, including the twin duties of prudence and loyalty encapsulated in section 404(a) of ERISA.[7] That section states, in part:

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[2] According to the latest available Federal Reserve data, there are about 135.4 million private sector workers, on a seasonally adjusted basis. https://fred.stlouisfed.org/series/USPRIV (updated May 8, 2026). According to Bureau of Labor Statistics Data, approximately 70 percent of private sector workers have access to a defined contribution retirement plan. "Employee Benefits in the United States, March 2025" available at https://www.bls.gov/ebs/publications/employee-benefits-in-the-united-states-march-2025.htm (updated September 2025).

[3] *E.g. Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

[4] *Conkright v. Frommert*, 559 U.S. 506, 517 (2010); see also NPRM at 16091.

[5] *Varity Corp v. Howe*, 516 U. S. 489, 497 (1996).

[6] For example, workers hold $10.1 trillion just in 401(k) plan assets. Investment Company Institute, "2026 Investment Company Fact Book," 93 (available at https://icifactbook.org/pdf/2026-factbook-ch8.pdf).

[7] Codified at 29 U.S.C. §1104. ERISA section numbers will generally be used in lieu of U.S. Code sections throughout.

> *a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—*
> *(A) for the exclusive purpose of:*
> *(i) providing benefits to participants and their beneficiaries; and*
> *(ii) defraying reasonable expenses of administering the plan;*
> *(B) 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 . . . .*

ERISA permits plan participants, beneficiaries, the Labor Department, and other plan fiduciaries to sue for breach of these fiduciary duties.[8] In recent years, there has been a tsunami of litigation, ostensibly brought on behalf of plan participants, attacking all manner of decisions made by plan fiduciaries and plan sponsors. To name a few examples, these lawsuits have challenged decisions such as which recordkeeper was retained, which investment funds were offered, and how plan forfeitures were used.

ERIC has no objection to plan participants pursuing well-founded claims and vindicating their rights in court. However, there has been a surge in frivolous cases not brought to vindicate rights, but instead too often cynically brought by opportunistic lawyers to extract settlements from plan sponsors.

President Trump recognized this in signing Executive Order 14330,[9] where he directed the Labor Department, in taking actions to make alternative assets more available to retirement savers, 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." This litigation epidemic, discussed in the NPRM's regulatory impact analysis,[10] has fundamentally altered the incentives plan sponsors and fiduciaries have in sponsoring and administering plans, to the detriment of workers and retirees. That's because "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."[11]

In recent years, the plaintiffs' bar has exploited ERISA's civil enforcement provisions as a weapon by opportunistically attacking large plan sponsors and fiduciaries in a systematic way. According to a Supreme Court brief filed by Encore Fiduciary, a fiduciary liability insurance underwriter, since 2016, over one half of plans with more than $1 billion in assets have been targeted by at least one excessive fee or investment performance lawsuit.[12] Plans with $500 million or more in assets have close to a 10% chance of being sued in a given year.[13] There are

[8] ERISA §502(a)(2); *see also* ERISA §409.
[9] Executive Order 14330, "Democratizing Access to Alternative Assets for 401(k) Investors," 90 Fed. Reg. 38921 (Aug. 12, 2025).
[10] *See* especially NPRM at 16106-16107.
[11] NPRM at 16092.
[12] Brief of Encore Fiduciary as *Amicus Curiae* in Support of Petitioners, *Parker-Hannifin Corp., et al v. Johnson* (May 21, 2025), *available a*t https://www.supremecourt.gov/DocketPDF/24/24-1030/359296/20250521120726513_250511a%20AC%20Brief%20for%20efiling.pdf.
[13] *Id.*

hundreds of lawsuits conjured by plaintiffs' attorneys, that rely on nearly identical, bare-bones allegations that apply against almost any company or benefit plan, irrespective of the actual underlying facts applicable to the specific defendant.

The playbook followed by plaintiffs' firms in these cases is both enterprising and deeply unfortunate.

- First, identify virtually any set of decisions that many plans must make where there are multiple market actors: for example, plan recordkeeping, investments available on a 401(k) menu, or the selection of an annuity provider in the case of a defined benefit plan pension risk transfer.
- Second, identify any basis where the options available in the market differ, whether by price, risk, or service.
- Third, argue (oftentimes purely in hindsight) that the decision made by the plan fiduciaries was imprudent, without ***any*** particularized evidence that the plan fiduciaries had a flawed process or were cavalier with plan assets, and often without any evidence that plan participants suffered any meaningful, cognizable harm.
- Fourth, identify a set of companies with passably similar plans such that cookie-cutter lawsuit complaints can be drafted with minimal defendant-specific research, and then optimize the target list for potential settlement value to focus on sophisticated companies with deep pockets and reputations to protect.
- Fifth, after filing suit, threaten to impose hundreds of thousands – even millions – in legal fees related to discovery, motion practice, and potential damages, if defendants refuse to accede to unreasonable settlement demands.
- Sixth, collect attorneys' fees as a result of a settlement, often 30 percent or more of any recovery, while relegating individual plan participants (especially in plans with many participants) to receiving only paltry amounts.

That sixth and final point, above, ought to be particularly concerning. There are dozens of major settlements annually, amounting to hundreds of millions of dollars each year.[14] And while some class action settlements are large, many result in incredibly small recoveries for actual plan participants, after attorneys' fees, expenses, and payments to the named plaintiffs. For example, one suit alleging excessive fees against a large employer settled for $1.35 million after four years of hard-fought litigation.[15] After attorneys' fees and expenses, the 50,000 plan participants averaged a recovery of less than $20 each.[16]

These cases do not meaningfully benefit plan participants. Instead, they disrupt the calculus of plan sponsors and fiduciaries. Employers offer benefit plans for a variety of business-related

[14] D. Aronowitz & K. Jozwiak, PlanAdviser, *401(k) Excessive Fee Litigation Spiked to 'Near Record Place' in '24* (Jan. 13, 2025), https://www.planadviser.com/401k-excessive-fee-litigation-spiked-near-record-pace-24.
[15] Alex Ortolani, *Salesforce Settles 401(k) Suits for $1.35 Million*, PLANADVISER, *available at* https://www.planadviser.com/salesforce-settles-401k-suits-1-35m (Sept. 23, 2024).
[16] The settlement deducted $449,955 in attorneys fees from the $1.35 million settlement fund and authorized up to $150,000 more for expenses. More than 50,000 participants shared the remainder. The settlement agreement in *Miguel et al. v. Salesforce*, No. 3:20-cv-01753-MMC (N.D. Cal.) is available here: https://si-interactive.s3.amazonaws.com/prod/planadviser-com/wp-content/uploads/2024/09/03100703/SalesForceSettlement.pdf.

reasons, such as attracting and retaining talent and improving the productivity of workers. The costs of providing these benefits should be predictable and oriented towards delivering value: for example, the actual cost of employer contributions to a 401(k) plan (e.g., the employer match) or the cost of engaging necessary plan service providers.

Frivolous litigation instead introduces inefficiencies and externalities into the benefits ecosystem. For example, higher insurance costs can lead to worse benefits. Fiduciary liability insurance rates are increasing. This is a pure transaction cost to the plan sponsor: workers and retirees realize no benefit from the costs of this coverage. Indeed, litigation risk and inconsistent pleading standards are key factors in rising liability insurance rates.[17] To the extent these costs are factored into the overall cost of providing benefits, the economic impact is simple: the money budgeted for providing benefits is reduced, likely resulting in reduced employer contributions or lower levels of benefits, or both.

Moreover, litigation is disruptive to the work of corporate benefits professionals. Even many large employers do not have vast internal departments to manage their employee benefits operations. Employers already face challenges to do the work of managing complex, valuable benefits programs: engaging and overseeing vendors, monitoring results, and interacting with the workforce to ensure that health and retirement plans are delivering the value to workers that the business demands. Lawsuits are incredibly disruptive to these operations, as key employees are forced to spend time gathering documents, preparing for depositions, and talking to outside counsel that charge many hundreds of dollars an hour. All this in the context of frivolous lawsuits that do not plausibly allege fiduciary breaches or identifiable, material harm.

Most importantly, rampant litigation weakens the retirement system. If a key purpose of ERISA and the myriad tax incentives offered under the Internal Revenue Code is to encourage plan sponsorship, it is counterproductive to have a governing legal regime that introduces litigation risk with virtually any decision. Unfortunately, some employers may decide the costs and risk of offering a defined contribution plan are simply not worth it, which would be a disaster for retirement security. **Certainty and predictability in legal standards are absolutely essential to our retirement system, and the NPRM is an important step.** [18]

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[17] *See e.g.* https://www.wtwco.com/en-us/insights/2025/01/fiduciary-liability-a-look-ahead-to-2025 (predicting higher insurance rates if the plaintiffs prevail in the *Cornell* case, which they subsequently did).

[18] In addition to the Proposed Rule, which attempts to provide regulatory clarity about the duty of prudence, ERIC strongly supports legislative action to address the litigation epidemic in a responsible, balanced fashion. Such legislation should incorporate several modest but very important changes to ensure that meritorious ERISA cases may continue to be brought while weeding out those founded on pro forma cookie-cutter allegations. Congress should also consider requiring a plaintiff, in a case alleging that a contract between a plan and a plan service provider constituted a prohibited transaction under ERISA §406(a)(1)(C), to allege with particularity why that arrangement does not meet the statutory exemption under ERISA §408(b)(2) for necessary and reasonable arrangements with service-providers. It should also provide for a stay of discovery (with appropriate exceptions) while a motion to dismiss is pending. ERIC strongly supports the *ERISA Litigation Reform Act*, which incorporates these recommendations. H.R. 6084 (119th Cong.); *see* "Pension Predators: Stopping Class Action Abuse Against Workers' Retirement: Hearing before the U.S. House of Representatives Committee on Education and Workforce, Subcommittee on Health, Employment, Labor, and Pensions," 119th Cong. (2025) (Testimony of Glenn Butash, Chairman, ERIC Legal Center), *available at* https://edworkforce.house.gov/uploadedfiles/butash_testimony.pdf.

II. Global Comments Regarding the Proposed Regulation

On December 4, 2025, ERIC and a number of other trade associations representing retirement plans and their service providers asked that the Department implement Executive Order 14330 by "speaking clearly about general fiduciary principles and service provider considerations" to help achieve the goals of democratizing access to investment opportunities for 401(k) savers, limiting the "surge in abusive litigation" and reducing the challenges facing employers that provide retirement benefits.[19] We asked the Department to reaffirm "general fiduciary investment principles that apply to all plan investment options" and "clarify that prudence under ERISA is a process-based standard grounded in reasonable judgment and not evaluated with the benefit of hindsight." **We strongly support the NPRM because it generally adopts the framework the retirement community has recommended and because it has the potential to meaningfully improve the ability of tens of millions of Americans to save for retirement.[20]**

Specifically, we strongly support the asset-neutral framework used by the Department in developing the NPRM. This framework – which broadly affirms that the nature of ERISA's fiduciary obligations does not vary based on the type of investment alternative under consideration – is consistent with DOL taking its "thumb off the scale" in promoting or opposing, *per se*, any particular class of investments,[21] so long as they are otherwise permissible.

In this regard, Proposed 29 CFR §2550.404a-6(c) explains that ERISA section 404(a)(1)(B) "does not require or restrict any specific type of designated investment alternative, except insofar as a designated investment alternative might be otherwise illegal," giving the example of an illegal investment in a foreign adversary, "or any other type of investment in violation of applicable federal law" We recommend clarifying this catch-all is not referring to violations of ERISA itself, otherwise this statement would be circular.

Congress could also consider applying reasonable strengthened pleading standards to all cases brought under section 404(a)(1)(B), such as cases alleging that investment funds offered on a 401(k) menu underperformed, or cases alleging defined benefit plan sponsors breached duties when engaging in pension risk transfer transactions, among others. Congress could also address the split in the federal appellate courts about which party has the burden of proving that a loss suffered by a plaintiff was actually caused by an allegedly imprudent act or omission of a plan fiduciary defendant.

[19] Letter from Trade Associations (including ERIC) to the Honorable Lori Chavez-DeRemer, Secretary, U.S. Department of Labor (Dec. 4, 2025) ("Joint Trades Letter").

[20] In this regard, we interpret the Department's explanation of the prudence duty to be a collection of restatements of the law and clarifications, not an articulation of an even more demanding standard of fiduciary conduct.

[21] *See e.g.*, "US Department of Labor rescinds 2021 supplemental statement on alternative assets in 401(k) plans", *available at* https://www.dol.gov/newsroom/releases/ebsa/ebsa20250812 (Aug. 12, 2025); and, "US Department of Labor rescinds 2022 guidance on Cryptocurrency in 401(k) Plans," *available at* https://www.dol.gov/newsroom/releases/ebsa/ebsa20250528 (May 28, 2025). In an analogous context, the Department has issued subregulatory guidance addressing how an investment management service with a lifetime income feature can be a qualified default investment alternative (QDIA). See Adv. Op. 2025-04A. Similarly, DOL should issue subregulatory guidance confirming that an asset allocation fund with an allocation to alternative investments can serve as a QDIA, provided applicable conditions are met.

A. Duty to "maximize" returns

The proposed regulation describes 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 the plan*."[22] In several additional places in the proposal, the Department refers again to a requirement to "maximize risk-adjusted returns, net of fees." We respectfully urge the Department to reconsider this wording. First, it is inconsistent with (and appears to create a higher standard than) the standard that currently applies for menu design under regulations accompanying ERISA section 404(c).[23] Second, there is a "range of reasonable judgments" that fiduciaries may make based on experience and expertise.[24] Use of the word "maximize" could encourage hindsight-based second-guessing that is counterproductive to the process-based approach of the proposed rule.[25] And third, using "maximize" implies an obligation to find the highest (risk-adjusted) return, which is neither the statutory standard nor required to satisfy the various prongs of the safe harbor. We are concerned this could be misread to suggest an exclusive focus on maximizing expected returns in the prudence calculus, which would chill the otherwise appropriate consideration of other factors the Department has specifically blessed. Elsewhere in the proposal, fiduciaries are expressly permitted to consider other factors (including exemplary customer service, for example) when determining the value proposition of a candidate investment. [26]

Therefore, the Department could improve the proposal by describing the duty instead as a duty to enable participants and beneficiaries to achieve a portfolio with aggregate expected risk and return characteristics at any point within the range normally appropriate for participants and beneficiaries. Alternatively, DOL could emphasize in the regulatory text that *ex ante* process, and not *ex post* outcomes, is determinative of whether the duty to act prudently was satisfied.

B. Structure of the safe harbor

Under the proposed regulation, if the conditions are met, *"the plan fiduciary's judgments 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."*[27]

We recommend that the Department clarify that the safe harbor is not the exclusive means nor does it set forth the minimum requirements of satisfying the duty of prudence.[28] In doing so, the Department should emphasize that not using the safe harbor does not create a presumption of

[22] Proposed 29 CFR §2550.404a-6(d).
[23] 29 CFR 2550.§404c-1. The NPRM also does not address the question of how to prudently curate a menu of investments overall, but the Department asked whether additional guidance is necessary. In our view, the 404c-1 regulations continue to be applicable and relevant, and so no additional guidance is necessary at this time.
[24] *E.g. Hughes v. Northwestern Univ*., 595 U.S. 170, 177 (2022).
[25] NPRM at 16091.
[26] *Id.* at 16097; Proposed 29 CFR §2550.404a-6(h)(1).
[27] Proposed 29 CFR §2550.404a-6(f).
[28] The Department could even adopt this language, which is based on the annuity selection safe harbor. 29 CFR §2550.404a-4(a)(2).

imprudence or in any way shift the burden of alleging a violation of 404(a).[29] Additionally, we recommend that the word "deemed" replace "presumed" in this paragraph. The word "presumed" indicates that it is theoretically possible for a decision to be imprudent even if the plan fiduciary satisfied the safe harbor requirements. This should not be the case. A change to "deemed" would also be consistent with the Department's stated intent to provide plan fiduciaries with confidence.[30]

C. Number and exclusivity of factors

Generally, we appreciate and support the factors identified by the Department as being key factors in determining the prudence of the selection of a designated investment alternative (DIA). However, the Department should consider adding a statement that they are not the only factors that a prudent fiduciary may consider while still qualifying for the safe harbor. For example, the Department asked if participant profiles or characteristics should be included in the final rule as a standalone factor.[31] While we do not recommend adding an additional qualification, this is an example of a characteristic that a prudent fiduciary might choose to consider.

On the other hand, the Department indicates that the six factors are "not exhaustive."[32] This statement is problematic because it appears to suggest that a fiduciary decision that properly considers the six stated factors might nevertheless be attacked based on a theory that the fiduciary was required to consider some other not-articulated factor. We do not believe this is the Department's intention, as this would nullify the scope of the relief offered by the safe harbor. Instead, DOL should specify that availability of the safe harbor is predicated on proper consideration of these six factors exclusively, where applicable.[33]

D. Use of examples

ERIC appreciates the Department's inclusion of examples in the regulatory text, which it has done in other contexts.[34] In the preamble, the Department described these examples as "illustrative."[35] However, this feature of the proposed rule has prompted some concern that market participants will feel bound to the very specific fact patterns discussed in these examples. To address any possible confusion, ERIC encourages even stronger statements in the final rule (including in the regulatory text) that each example is merely illustrative, and that the selection of an investment can fit within the safe harbor even if the actual facts do not exactly correspond

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[29] Relatedly, DOL should consider providing transition relief to account for fund managers potentially needing to update written representations or other fund documents to provide to plan fiduciaries immediately after the final rule is issued.
[30] NPRM at 16095 ("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").
[31] *Id.* at 16096.
[32] 29 CFR §2550.404c-1(f)
[33] Providing this assurance in no way implicates the duty of loyalty. We acknowledge that a fiduciary could select an option that meets the test for prudence laid out in this proposed rule, but might fail to meet the duty of loyalty (for example, by considering benefits to the plan sponsor of choosing a fund manager independent of the effect of the selection on the benefit plan). *See* Proposed 29 CFR §2550.404a-6(e).
[34] For example, 29 CFR §2550.404c-1(f).
[35] *E.g.,* NPRM at 16094 and 16100.

to the relevant examples. Some of the examples also appear to include sub-tests, without clarifying whether these are generally applicable to all analysis under the relevant factor. Where an example sets out a test for analyzing compliance with a safe harbor element, it would be more clear to codify these substantive elements inside regulatory text.

E. Use of investment professionals and internal experts

Many of the examples include, in the fact pattern, that the plan relied on recommendations from an investment professional under either ERISA sections (3)(21) or (3)(38). However, the preamble notes that reliance on an investment professional is not necessary to meet the criteria of the safe harbor.[36] We agree that it should be clear that such reliance is not required in all circumstances.[37] To that end, it may be helpful for the Department to add examples where internal expertise is used and sufficient to meet the requirements of the safe harbor; DOL could also consider removing consultation with an investment advice fiduciary from some of the examples where that fact does not add to the analysis.

Moreover, while the use of investment professionals may be helpful, it is also true that a retirement plan investment committee might delegate decision-making to an internal leader with appropriate expertise and internal investment experts.[38] Documentation of those decisions may not necessarily be included in *committee* meeting minutes under current practice. It would be helpful for the preamble to note that documentation of decisions can be maintained at the delegated level.

Additionally, paragraph (f) articulates that the plan fiduciary is responsible for "*establishing and maintaining a plan investment menu of designated investment alternatives."* A plan may have an internal committee that designs the menu, but delegates to a 3(38) investment manager the responsibility to implement that design (i.e. picking the designated investment alternatives to implement the design). Proposed paragraph (f) seems to impose a requirement that the plan or plan fiduciary needs to explicitly delegate compliance with these safe harbor factors to the 3(38) manager.[39] However, a new delegation should not be required in that circumstance, and the manager should be responsible for ensuring that the DIAs selected are prudent, including deciding whether to use the safe harbor.

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[36] *Id.* at 16103 ("However, none of the safe harbors require a plan fiduciary to seek assistance from an investment advice fiduciary or 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").
[37] While not required, in some circumstances professional evaluation of investments and menu construction is a feature of the plan structure (for example, pooled employer plans).
[38] In acknowledging this, the Department should confirm that members of an investment committee are permitted to rely on each other; there is not a requirement that every individual have the expertise to evaluate every relevant piece of information.
[39] We recommend that DOL confirm that nothing prevents an investment professional from relying on these safe harbor factors.

F. Duty to compare

In the standard articulated in both the fee and performance prongs,[40] the Department indicates that a fiduciary should compare a "reasonable number of similar alternatives" when evaluating candidate investment alternatives. Additionally, in the preamble the Department states:

> *"[w]hether "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 marke*t."[41]

We recommend the Department specify that considering at least three similar and readily available alternatives, where available, is presumptively reasonable, and also reassure plan fiduciaries that a decision to include a new or innovative product can still be prudent and eligible for the safe harbor even if there are not similar alternatives against which to compare it. Additionally, while we agree that it is challenging to define "similar" in this context, the Department should affirm that the fiduciary's reasonable, process-based judgment that funds are similar for comparison purposes should be accepted.

G. Duty to monitor

Once a designated investment alternative is selected, plan fiduciaries have a duty to monitor these investments.[42] In describing this duty, DOL specifically invited comments on the following question:

> "*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 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.*"[43]

The proposed regulatory text does not precisely address the interaction of the safe harbor elements with this duty to monitor. We support the duty to periodically and reasonably monitor plan investment alternatives, but clearly, prudent fiduciaries are not, and should not be, required to reconsider every decision *de novo* constantly, which would be costly and grind plan administration to a halt. It would be warranted for the Department promptly to address the duty to monitor, ideally in separate regulations to maximize durability and receive the benefit of public comment.

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[40] Proposed 29 CFR §2550.404a-6(g) and (h).
[41] NPRM at 16097.
[42] *Tibble v. Edison Int'l*, 575 U.S. 523 (2015).
[43] *Id.* at 16094.

III. Comments on Each Factor of the Six-Part Test

A. Performance

Under the Proposal, 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."*[44]

- As discussed previously, the Department should reconsider the use of the word "maximize" in the performance factor, which invites hindsight analysis and as discussed previously, could be read to establish a new and heightened fiduciary standard. Moreover, the examples show how fiduciaries might balance this factor, confirming that the prudence duty does not require maximizing in every circumstance.[45]

- The prong includes a requirement to consider a "reasonable number of similar alternatives"; as discussed previously, we recommend further clarification of this duty to compare, including appropriate flexibility and deference to the determinations of plan fiduciaries regarding the availability of "similar alternatives" without prejudice to new and innovative products.

- The proposed rule appears to require that fiduciaries project out future expected performance and volatility measures, which requires significant forecasting judgment. We recommend the Department clarify that projections of expected future risk-adjusted returns over a stated time horizon may incorporate historic risk-adjusted returns achieved over similar time periods. Fiduciaries should have the flexibility to evaluate modeled risk and performance for newer products or use proxies for projections or assessments. As an example, examining performance of an investment's preexisting share class is acceptable in assessing the validity of a new share class with the same strategy and implementation.

- In the time horizon example,[46] DOL gives an example where the fiduciary analyzes the historical performance of three target date fund series over 1-, 3-, 5-, and 10-year periods, and the investment advice fiduciary recommends to rely most heavily on the 10-year historical performance data. In concluding that the named fiduciary met the safe harbor, DOL states that "*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.*"
    - We generally agree with this statement, although we would recommend removing "often" and replacing with "may be" to emphasize the range of reasonable decisions fiduciaries may make.

[44] Proposed 29 CFR §2550.404a-6(g).
[45] For example, it is unclear how a "maximization" standard would apply in the case of index funds or principle preservation products. If the language remains unchanged, we'd request additional clarification with respect to those products.
[46] Proposed 29 CFR §2550.404a-6(g)(2).

- DOL should also consider tempering this statement to avoid discouraging the selection of new competitors that may not have 10-year performance data. No negative inference should necessarily be drawn if the named fiduciary selects a newer fund that otherwise would meet the requirements of the safe harbor.
- Inclusion of this example also might unfairly lead to the conclusion that consideration of a shorter time period might never be appropriate. For example, a shorter time horizon might be relevant if there is an intention to merge or terminate the plan within a short amount of time, so that the investment funds would need to be liquidated and so any new fund added must consider that shorter timeframe. The Department could consider adding an example or including a general statement where consideration of a shorter time period is appropriate.
- In this and the other "performance" example, the sample investment products are target date funds. The Department could consider including an example with a different type of investment product.

B. Fees

Under the Proposal, *"[t]he 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."*[47]

- We generally support this standard, although we renew our request for more discussion about fiduciary flexibility regarding the definition of "reasonable number." It would also be helpful to have more clarity about the definition of "fees." For example, how should investments with unique structures report fees for this purpose? And how should revenue sharing rebates be considered? Examples could be added to further discuss fee structure.

- It is important that the Department acknowledges that there may be values that are permissible for a plan fiduciary to consider other than purely risk-adjusted returns, net of fees. Language throughout the proposed regulation should be updated to reflect that important judgment. For example, the description of the prudence duty in (d) and the standard for the performance prong in (g) speak of a duty to "maximize" returns net of fees, which is not consistent with the recognition in (h) that additional fees might be permissible (thereby lowering risk-adjusted performance, net of fees and expenses) so long as there is commensurate value created for participants.

- In the first example,[48] a difference between two similar candidate investment options is ratings for customer service and communication, illustrating better service to plan

[47] Proposed 29 CFR §2550.404a-6(h).
[48] Proposed 29 CFR §2550.404a-6(h)(1).

participants, at a cost of an extra one quarter of a basis point. We agree that plan fiduciaries must have the flexibility within the safe harbor structure to consider benefits to the plan that improve participant outcomes. We note that the example has a fee size differential of one quarter of one basis point. In the preamble, DOL should consider confirming that this differential is illustrative only, and that a larger differential is not necessarily presumptively too large a price.

- In the fourth example,[49] a plan's responsible investment fiduciaries decide to add a private equity sleeve to a custom target date fund series. The analysis of the example states "*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."*[50] We'd recommend deleting or significantly modifying this example from this proposal. As drafted, we are concerned that the example might be overread by cautious fiduciaries to mean that any meaningful change in the strategy or operation of a fund automatically must trigger an immediate reevaluation of the prudence of the investment alternative under the safe harbor. This would add significant costs and administrative burdens. It may also be unnecessary, as plans should be routinely monitoring their investment options in any case. Finally, the Department has, in another context, treated a change relating to an existing option as not tantamount to selection of a new fund.[51] This situation could be addressed in forthcoming regulations or guidance regarding the duty to monitor.

C. Liquidity

Under the Proposal,"*[t]he 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."*[52]

- We recommend adding "or other value to the plan and plan participants" as a permissible tradeoff for plan- or individual-level liquidity, consistent with example (2), which includes certainty of an insurer's guarantee as an appropriate consideration justifying a restriction on liquidity. This consideration of other value is also consistent with the analysis under the performance and fee prongs.

[49] Proposed 29 CFR §2550.404a-6(h)(4)
[50] Proposed 29 CFR §2550.404a-6(h)(4)(ii).
[51] In particular, under 29 CFR §2550.404a-5, plans are required to furnish investment-related disclosures to plan participants. While a number of changes do trigger disclosure requirements, changes to an existing investment option are not treated as the selection of a new investment option.
[52] Proposed 29 CFR §2550.404a-6(i).

- Both the participant-level and plan-level liquidity examples include analysis of compliance with this prong in scenarios where the fiduciary received written representations from the investment manager (or otherwise performs due diligence) and that "the fiduciary reads, critically reviews, and understands any written representation and consults a qualified professional where appropriate" while confirming that the fiduciary does not know, or have reason to know, other information that would cause the fiduciary to question any written representation.

  Our comments on these conditions are grounded in the ordinary practicalities of retirement plan fiduciaries, including even at large companies with significant internal resources, where the investment committee may be composed of several members with differing areas of expertise. Division of labor and reliance on expertise is a hallmark of well-functioning organizations, including retirement plan investment committees. DOL should clarify that "the fiduciary" in this example (and similar examples elsewhere in the regulation) does not intend to refer to each individual member of the investment committee or other fiduciary body and can also refer to a plan's consultant or investment professional.

  Moreover, because members of the investment committee should be able to divide labor, it should be clear that not every constituent member of an investment committee or fiduciary body must read, critically review, and understand, each and every representation related to liquidity. Instead, it should be acceptable where there is a process in place to ensure that an appropriate level of review is conducted. An alternative rule would not be administrable and would lead to even more litigation.

  Furthermore, the final regulation should ensure that the safe harbor protects fiduciaries who received a representation that the manager later breaches.

- Additionally, these examples may be challenging for investment vehicles other than mutual funds, such as certain asset classes that do not have daily liquidity or are not regulated by the Securities and Exchange Commission. For example, example (i)(1) incorporates a requirement that a pooled investment product not registered as a mutual fund under the Investment Company Act of 1940 needs to adopt a liquidity risk management program similar to that required under the Act. Similarly, example (i)(3) requires plan fiduciaries to investigate a liquidity risk management program of a candidate investment alternative that is not an open-end mutual fund, including whether the program is substantially similar to that required under the '40 Act. We understand that some of these requirements do not map easily onto vehicles that are not open-end mutual funds, creating challenges for plans that want to use products structured in this way. Instead of incorporating those requirements, the investment manager of the designated investment alternative (and not the manager of any underlying components of an asset allocation fund) should provide information to the plan regarding liquidity, and the fiduciary should make the determination that the investment's liquidity will meet the needs of the plan.

- DOL should also clarify that fund restrictions aimed at preventing frequent trading and "equity wash" restrictions for stable value products do not implicate analysis under the liquidity factor.

D. Valuation

Under the Proposal, "*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.*"[53]

- We agree that a DIA needs to be subject to timely and accurate valuation policies and procedures. However, it would be helpful to clarify that this burden falls on the DIA's investment manager and not the plan fiduciary. In particular, while we understand the plan fiduciary has a duty to read and understand valuation-related disclosures, it would be helpful to confirm that plan fiduciaries do not have a responsibility to independently confirm information contained in financial statements, or to verify their compliance with securities laws, and may rely on representations of the DIA's manager.[54]

- In one example,[55] DOL describes how a plan fiduciary might evaluate a DIA that invests in some securities for which there is not a generally recognized market. The investment manager represents to the fiduciary in writing that the securities are valued "through a conflict-free, independent process no less than quarterly" according to Financial Accounting Standards Board Accounting Standards Codification (FASB) 820.

  We understand this example to be illustrative, and that plan fiduciaries have flexibility in assessing the ability of a DIA to be accurately valued. If, however, the Department intends to set a minimum quarterly valuation interval or if the Department intends to functionally mandate use of FASB 820 in these circumstances, that would need to be clarified. Additionally, similar to the evaluation of representations made regarding liquidity, DOL states that the fiduciary can meet the tenets of the safe harbor if (1) 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; and (2) the named fiduciary does not know, or have reason to know, other information which would cause the named fiduciary to question any written representation. It should be sufficient to document the process a fiduciary committee used to evaluate the representation; it would be counterproductive to allow for costly litigation interrogating which committee members "read," "critically reviewed," or subjectively "understands" the document.

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[53] Proposed 29 CFR §2550.404a-6(j).
[54] The example at Proposed 29 CFR §2550.404a-6(j)(3) posits a scenario where the fiduciary takes these additional steps, which we understand are not necessary for the availability of the safe harbor. Plan fiduciaries should not be subject to an obligation independently to consider and make determination as to the adequacy of the valuation process in most circumstances.
[55] Proposed 29 CFR §2550.404a-6(j)(2).

- Example (4) refers to valuation of a product where the investment manager was able to influence the price, and concludes that a named fiduciary must assess whether the assets have been or will be valued through a "conflict-free and independent process."[56] As we understand it, for private assets purchased outside of a registered mutual fund, many valuations involve some element of manager input. We would recommend clarifying that in such circumstances, the investment need not fail this prong if there is a method of independent review or validation, or other reasonable indicia of reliability.

E. Performance Benchmark

Under the Proposal, "*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… A ''meaningful benchmark'' is an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative... 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.*"[57]

- We agree that, where available, plan fiduciaries should take care to select an appropriate benchmark against which to compare candidate DIAs. Selection of that benchmark should be accorded deference. While there is no single benchmark that is a meaningful benchmark for all designated investment alternatives,[58] there may well be more than one meaningful benchmark for a given fund.

- The preamble collects cases where federal courts have articulated characteristics that make a benchmark "meaningful." These principles have been developed in the context of litigation where plaintiffs have attempted to infer imprudent selection of DIAs by comparison to a cherry-picked benchmark in the pleadings, and defendants have responded by attacking the selected benchmark. Disputes about these benchmarks serves only to delay and ratchet up the cost of litigation where benchmark selection is second-guessed without clear benefit to participants.

  The NPRM is attempting to do something slightly different: to describe the prudent selection of a DIA in the context of the safe harbor. To avoid confusing courts using the phrase "meaningful benchmark" in a different context, we recommend highlighting in the final rule that, in DOL's view, the burden continues to rest on a prospective plaintiff to identify a meaningful benchmark in the context of litigation, and that this regulation does not shift that burden.

[56] Proposed 29 CFR §2550.404a-6(j)(4).
[57] Proposed 29 CFR §2550.404a-6(k). We also note that section 318 of the SECURE 2.0 Act of 2022 directed the Secretary of Labor to update DOL's participant disclosure regulations so that an investment that an asset allocation fund can be compared to blended benchmarks provided certain conditions are met.
[58] NPRM at 16101.

- This factor charges the fiduciary with identifying benchmarks that are "as meaningful as possible." Similarly, the NPRM appears to impose a requirement that the fiduciary "seek to identify the best possible comparators" to the candidate DIA. As the Department notes throughout the NPRM, ERISA is a law of process, not second-guessing or hindsight. We recommend clarifying that this factor requires that the DIA is compared to a meaningful, reasonable, or appropriate benchmark, not that the benchmark selected is perfectly optimal. There may be more than one appropriate benchmark, and so the absolute language in the NPRM should be removed to avoid time-consuming and costly litigation about minor differences in benchmarks. For instance, example (1) concludes that the fiduciary did not meet the criteria of the safe harbor because "other benchmarks with more similarities were readily available." "Readily available" seems to be a different standard than "as meaningful as possible."[59]

- Similarly, example (2) relates to a DIA that is an asset allocation fund containing a private equity sleeve as a component. In the example, the independent investment advice fiduciary creates a custom benchmark for the private equity sleeve, which is used to formulate a composite benchmark for the fund. This is provided to the named plan fiduciary, which reads, critically reviews, and understands the written explanation, and has no reason to question the explanation.[60] In this case, the DOL says that the named fiduciary met its duties under the safe harbor. We agree that named fiduciaries may be reliant on investment advice fiduciaries in creating these benchmarks, as it is unrealistic for many plan fiduciaries to create custom composite benchmarks. However, the comments made previously about reading, reviewing critically, and understanding also apply in this context.[61]

- We appreciate the statement that there is "*no presumption or preference against new or innovative designated investment alternative designs.*" We recommend including an example in this section where the plan fiduciary prudently selects a new or innovative option.

- Finally, the requirement to compare candidate DIAs to an appropriate benchmark is related to the performance prong of the safe harbor. In fact, the Department could consider incorporating this discussion into that prong, if desirable.

F. Complexity

The sixth and final factor listed in the safe harbor is complexity. Under the Proposal, the fiduciary is required to "*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*

[59] Proposed 29 CFR §2550.404a-6(k)(1)(iii).
[60] Proposed 29 CFR §2550.404a-6(k)(2).
[61] We recommend that DOL harmonize the acceptable use of custom composite benchmarking with the disclosure regulations in 29 CFR §2550.404a-5.

documents or whether it must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual."[62]

We agree with the premise of the criterion: obviously, plan fiduciaries should comprehend the DIA and make a prudent determination about whether it must seek assistance from an investment professional. In this way, although described as a separate factor, this comprehension requirement is an implied component for each of the other factors. The Department should further explain that the fiduciary's "determination" for purposes of this factor can be objectively documented. That is, if selection of a DIA is attacked, plan fiduciaries should be able to show compliance with this factor *procedurally* (for example, by documenting the determination contemporaneously with the selection of the DIA). Therefore, extensive, burdensome depositions interrogating the subjective comprehension of the plan fiduciaries would be unnecessary.

IV. Other Considerations

A. Brokerage window clarification

Under the NPRM, the term "designated investment alternative" does not include brokerage windows or investments acquired through such an arrangement.[63] This should be included in the final regulation, and it should be made clear that, while a plan must prudently select the brokerage window provider, it does not have a duty to monitor the investments selected by participants. Additionally, we recommend the Department amend the discussion of "plan design features chosen by plan settlors" in subparagraph (m)(3) to include, as another example, the decision to amend a plan to include a brokerage window or to state the design of the brokerage window, or the decision to enable a brokerage window feature made available through a plan recordkeeper.

B. PTE 77-4

Removing *per se* barriers to the inclusion of certain products in retirement plans is a worthy project, and the proposed regulation is an important step. There are other possibilities to consider as well. For example, Prohibited Transaction Exemption 77-4 permits investment managers to offer certain types of affiliated funds to retirement plans, subject to a number of important participant protections. However, that relief from the prohibited transaction rules is only available for open-end mutual funds. That limits the universe of potential options available to plan fiduciaries merely based on structure of the investment vehicle. DOL should consider modernizing this relief to be agnostic with respect to vehicle structure.

[62] Proposed 29 CFR §2550.404a-6(l).
[63] Proposed 29 CFR §2550.404a-6(m)(2).

V. Conclusion

In conclusion, ERIC strongly supports the proposed regulation, which will help clarify the duty of prudence under ERISA and is an important step toward addressing the epidemic of hindsight-based lawsuits plaguing our voluntary benefits system. We have offered a number of recommendations to improve the proposal and look forward to engaging with the Department as it works to incorporate feedback and finalize the rule. We applaud these efforts.

Sincerely,

Andrew Banducci