May 23, 2026

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

Re: Regulatory Comment in Response to Proposed Rule "Fiduciary Duties in Selecting Designated Investment Alternatives" (RIN 1210-AC38)

Dear Assistant Secretary:

I respectfully submit this comment in response to the Department of Labor's (the "Department" or "DOL") proposed rule titled "Fiduciary Duties in Selecting Designated Investment Alternatives" (RIN 1210-AC38) (the "Proposed Rule"). I commend the Department for undertaking this rulemaking, which reflects a thoughtful and timely effort to provide ERISA plan fiduciaries with meaningful guidance on their obligations when selecting designated investment alternatives ("DIAs") for participant-directed defined contribution plans.

For the reasons set forth below, I strongly support the Proposed Rule. I write separately, however, to respectfully suggest five targeted enhancements that I believe will strengthen the final rule, reduce litigation risk for fiduciaries acting in good faith, and promote the ultimate goal of maximizing risk-adjusted, net-of-expenses returns for retirement savers. Additionally, I write to respectfully urge a separate notice-and-comment rulemaking period to amend a specific Prohibited Transaction Exemption in order to fully achieve the Department's stated policy objectives.

I. General Support for the Proposed Rule

The Proposed Rule represents a significant and welcome development in ERISA fiduciary guidance. By articulating a principled, process-oriented safe harbor framework for the selection of DIAs, the Department has provided plan sponsors, investment committees, and other fiduciaries with a structured pathway to demonstrate compliance with their duties of prudence and loyalty under ERISA Sections 403 and 404. I am particularly supportive of the following aspects of the Proposed Rule:

First, the Proposed Rule rightly affirms that ERISA imposes no inherent categorical limitations on the types or classes of assets that may be offered as DIAs in participant-directed plans. This asset-neutral stance is consistent with the broad fiduciary discretion that ERISA grants to plan fiduciaries and with the historical practice of defined benefit plans, which have long allocated substantial portions of plan assets to alternative and illiquid investments.

Second, the Proposed Rule's six-factor safe harbor framework—addressing liquidity, valuation, complexity, fees, performance, and benchmarking—provides a practical and comprehensive analytical structure. By centering compliance on process rather than outcome, the Department correctly recognizes that fiduciary prudence is assessed as of the time of the decision, not in hindsight.

Third, the Proposed Rule's acknowledgment that alternative investments—including private equity, private credit, real assets, and other non-public market strategies—may offer superior risk-adjusted returns for long-term retirement savers reflects sound financial economics and is consistent with the investment practices of the most sophisticated institutional investors.

Fourth, the Proposed Rule reflects an important and timely recognition of the significant performance gap between defined benefit ("DB") plans, which have historically invested in private equity and other alternative assets, and defined contribution ("DC") plans, which have not. A 2025 letter to shareholders by BlackRock's Chief Executive Officer observed that DB plans outperform 401(k) plans by approximately 50 basis points annually, attributing this disparity in part to DB plans' access to private market investments that remain largely unavailable to 401(k) and 403(b) participants. The Proposed Rule's facilitation of broader private equity access for DC plan participants is a meaningful step toward closing this gap.

The empirical evidence supporting the long-term return advantage of private equity over public equities is substantial. According to the Cambridge Associates U.S. Private Equity Index, U.S. private equity delivered an annualized net return of approximately 10.48% over the twenty-year period ending June 30, 2020, compared to 5.91% annualized for the S&P 500 over the same period. In a separate analysis, the Cambridge Associates U.S. Private Equity Index demonstrated a twenty-year average annual return of 13.92%, compared to approximately 10.13% for a broad total stock market index fund. Cambridge Associates has further reported that private equity outperformed its public market equivalent by 2.4 percentage points over a ten-year horizon and 5.3 percentage points over a twenty-year horizon. Academic research published through the University of Chicago's Booth School of Business, drawing on cash flows from nearly 600 buyout funds over a span from 1984 to 2008, found that the average U.S. buyout fund outperformed the S&P 500 by at least 20 percent over the life of the fund, or by approximately 3 percentage points per year on an annualized basis.

Over a ten-year horizon through 2024, Hamilton Lane estimates that one dollar invested in private equity in 2015 would have grown to approximately $3.96—a result that reflects a meaningful premium relative to comparable public market investments over the same period. Cambridge Associates data similarly shows that over rolling ten-year periods, private equity has outperformed its public market equivalent by 219 basis points relative to the Russell 3000 and by 480 basis points relative to the MSCI World Index. These findings are consistent with the investment practices of leading institutional allocators: the Canada Pension Plan Investment Board has committed approximately 24.6% of its total assets—representing over $143 billion—to private equity, and major U.S. public pension funds including the California Public Employees' Retirement System and the California State Teachers' Retirement System maintain comparable multi-billion dollar private equity allocations.

Beyond return performance, private equity offers DC plan participants a critical source of diversification that is increasingly unavailable in public equity markets. According to the American Investment Council, the number of publicly traded U.S. companies declined from approximately 8,800 in 1997 to fewer than 3,952 in 2024, while private firms now represent approximately 87% of all U.S. companies, up from 62% in 2002. The S&P 500's gains in 2024 were driven in substantial part by just seven large-capitalization technology companies, underscoring the growing concentration risk inherent in public equity index strategies. By permitting DC plan fiduciaries to select DIAs with meaningful private equity allocations, the Proposed Rule would allow plan participants to gain diversified exposure to a vast and growing segment of the U.S. economy that is simply not accessible through publicly traded securities.

The quantitative benefits of incorporating private equity into DC plan portfolios have been documented by rigorous independent research. A 2023 study by Georgetown University's Center for Retirement Initiatives, conducted in conjunction with CEM Benchmarking, found that allocating up to 10% of DC plan target-date fund assets to illiquid investments (split between private equity and private real estate) would have produced better financial outcomes approximately 82% of the time relative to a comparable all-public-market portfolio, with reduced volatility and an annual return improvement of 15 basis points. Applied to the entire U.S. target-date fund universe, such an allocation would currently generate approximately $5 billion in additional net returns annually. At the individual level, that improvement translates to an estimated $2,400 in additional annual spending power for a retiree drawing $48,000 per year in retirement income. Separately, simulations conducted by the Urban Institute found that a retirement account incorporating private equity investments would outperform a comparable account holding only publicly traded stocks and bonds in fourteen of sixteen modeled scenarios over a full savings lifetime, with an estimated long-term return premium of approximately 6.6%.

Notwithstanding this evidence of long-term outperformance, I acknowledge that private equity returns are not uniform across managers, strategies, or vintage years. Return dispersion between top-quartile and lower-quartile managers is wide, and academic research has confirmed that performance persistence (the tendency of top-performing managers to continue outperforming) is a distinguishing characteristic of private equity relative to public equity strategies. This characteristic further underscores the importance of the Proposed Rule's process-oriented framework: it is precisely because manager selection matters that the Department has correctly focused its safe harbor on fiduciary process, including the rigorous evaluation of DIA managers' track records, fee structures, and investment methodologies.

II. Suggested Enhancements to the Final Rule

While I strongly support the Proposed Rule, I respectfully submit the following five suggested enhancements for the Department's consideration in developing the final rule.

Enhancement 1: The Final Rule Should Promote Asset-Neutrality with Respect to an Appropriate Liquidity Risk Management Plan

As currently written, the Proposed Rule could be read to encourage investment alternatives that are not structured as mutual funds subject to the requirements of the Investment Company Act of 1940 (the "40 Act") to adhere to investment restrictions imposed on 40 Act entities. Most critically, substantial compliance with the SEC's 40 Act regulations would require investment alternatives to limit their illiquid asset allocations to no more than 15%. That suggestion by the Department is internally inconsistent with the Proposed Rule's fundamental proposition that ERISA imposes no inherent limitations or restrictions on the type and class of assets that may be offered for selection under an ERISA-subject plan.

Under ERISA, fiduciaries of the plan are afforded significant discretion, subject to their compliance with their substantial fiduciary obligations, in selecting investments for the plan.

Indeed, defined benefit plans regularly allocate between 25% and 30% of plan assets to illiquid investments. Applying a 15% illiquid asset cap to non-40 Act vehicles would artificially constrain the menu of investment alternatives available to defined contribution plan participants and deny them the potential for superior risk-adjusted returns that such investments may offer.

The final rule should clarify that a fiduciary selecting any investment alternative will satisfy the prudence requirements if the fiduciary determines, in its reasonable judgment, that the investment alternative will be able to respond appropriately to expected plan participant and otherwise general plan liquidity requirements. The final rule should not artificially limit or influence the exercise of the fiduciary's best judgment by effectively mandating standards adopted for other circumstances, such as the 40 Act's 15% illiquid asset cap, that could reduce the availability of superior risk-adjusted, net-of-expenses returns for plan participants.

Accordingly, the Department should demonstrate through one or more examples that plan fiduciaries may engage in a prudent process that results in the selection of a collective investment trust ("CIT") or similar vehicle that allocates more than 15% of its capital to illiquid assets, consistent with a sound liquidity risk management plan tailored to the specific facts and circumstances of the plan.

Enhancement 2: The Final Rule Should Emphasize That Conflicts in Valuation Processes Should Be Appropriately Addressed, But Not Require a "Conflict-Free, Independent" Valuation Process

The Proposed Rule suggests in multiple examples that, with respect to assets for which a generally recognized market-based measure of valuation is not readily available, a fiduciary may rely on written representations that such assets are valued at least quarterly using a "conflict-free, independent process" that complies with generally accepted accounting principles. This standard is impracticable, if not impossible, to satisfy in real-world investment contexts.

The parties involved in any valuation process will almost invariably possess superior information, hold some degree of financial interest in the outcome, and bear responsibility for making judgments that affect the resulting valuations. This is not an aberration — it is the inherent nature of private-market investment management. Indeed, the valuation processes relied upon by the most sophisticated institutional investors in the world—including major public pension funds, endowments, and sovereign wealth funds—could not meet the standard for freedom from conflicts contemplated by the Proposed Rule.

Rather than mandating an entirely conflict-free process that is neither attainable nor consistent with market practice, the Department should emphasize the importance of safeguards designed to identify, disclose, and appropriately address valuation conflicts. For example, private-market funds often employ independent audits, third-party valuation reviews, and valuation committees, all subject to written valuation policies and industry-accepted accounting standards.

Moreover, DIAs are governed by ERISA, the 40 Act, or other regulatory frameworks that require managers to identify and address conflicts of interest, such as through the use of a prohibited transaction exemption or other conflict-mitigation procedures. A new or modified example involving a DIA with alternative asset allocation should explain that the responsible fiduciary has taken steps to evaluate the efficacy of the DIA's policies and procedures for valuation, including the identification and mitigation of potential conflicts, with appropriate regard for the regulatory framework governing the DIA and the underlying funds.

In other words, the Department should avoid creating the implication that it is per se imprudent to rely on information from interested parties in valuing assets that are not publicly traded. Such a standard would be unworkable in practice and inconsistent with how the industry's most sophisticated fiduciaries operate.

Enhancement 3: The Final Rule Should Clarify That Fiduciaries Need Only Satisfy Each Factor "When Applicable" and That the Factors Should Not Be Deemed "Non-Exhaustive"

The scope of a fiduciary's evaluation with respect to each of the six safe harbor factors outlined in the Proposed Rule could vary significantly depending on the relevant facts and circumstances. For example, the review required for a flat fee structure would differ materially from that required for a structure involving an incentive fee arrangement. Similarly, the liquidity analysis applicable to a daily-valued stable value fund is fundamentally different from that applicable to a closed-end interval fund with quarterly redemption windows. The applicability and depth of each factor will differ for every plan fiduciary based on the specific investment option being evaluated.

The final rule should expressly state that the application of each component of the safe harbor will vary based on the facts and circumstances of the particular investment alternative under consideration. The Department should make clear that it is expected—not merely permitted—that a prudent evaluation of a DIA could vary significantly across different types of investment options.

To avoid the proliferation of frivolous lawsuits premised on differences in the depth of analysis applied to different investment options, the final rule should explicitly state that in meeting each, or some, of the applicable safe harbor factors, a fiduciary is presumed to have satisfied its duty of prudence under ERISA. This could be accomplished by stating that each factor is to be evaluated and addressed "when applicable."

Additionally, the Department should remove the term "non-exhaustive" from its description of the safe harbor factors. As written, that term creates an open-ended invitation for plaintiffs' counsel to argue that the fiduciary failed to consider some unenumerated factor that should, in hindsight, have been part of its evaluation. The safe harbor should provide genuine protection to fiduciaries who engage in a thorough, well-documented, and principled review of the specified factors—not serve as a floor that can always be lowered by creative litigation arguments.

Enhancement 4: The Final Rule Should Remain Flexible in Allowing Fiduciaries to Meet the Safe Harbor Without Requiring the Advice of an Investment Advisory Fiduciary Under ERISA Section 3(21)

The examples in the Proposed Rule appear to place significant emphasis on the fiduciary's receipt of advice from an investment advisory fiduciary under ERISA Section 3(21). This approach, while appropriate in certain circumstances, could unintentionally subject sophisticated fiduciaries who do not need investment advice—or whose circumstances render such advice redundant—to greater litigation exposure than they faced before the rule was published. A plan fiduciary that reasonably proceeds without engaging an investment advisory fiduciary should not, by virtue of that choice alone, be deemed to have acted imprudently.

The final rule should state explicitly that reliance on the advice of an investment advisory fiduciary is not required to receive the benefit of the safe harbor, and that appropriate deference should be given to the judgment of a fiduciary whose process considered the relevant considerations and is well-documented.

The final rule should also recognize that, in determining whether to engage an investment advisory fiduciary, the responsible fiduciary may take into account not only its own level of knowledge and experience with investments of the type under consideration, but also whether the manager of the DIA is itself an ERISA fiduciary with respect to the DIA, as well as the complexity of the factors associated with evaluating the DIA. This flexible, facts-and-circumstances approach is more consistent with ERISA's prudent expert standard than a rule that effectively presumes the need for outside advisory services.

Enhancement 5: The Final Rule Should Make Clear That the Examples for Each Factor Are Illustrative and Do Not Preclude Certain Investment Options and Structures

The Proposed Rule offers a series of examples illustrating how plan fiduciaries may evaluate each of the six investment evaluation factors across a range of DIA structures. However, the rule addresses only a finite set of examples and cannot anticipate every possible scenario or investment type. By providing only a limited number of examples without explicitly stating that those examples are non-exclusive, the Proposed Rule risks dissuading plan sponsors from selecting investment options not described therein—not because such options are inherently inferior, but simply because they fall outside the scope of the enumerated examples.

The final rule should explicitly state that the investment evaluation examples provided for each factor are illustrative only and are not intended to restrict plan fiduciaries from considering investment options, structures, or approaches that are not expressly described within the rule. The Department might consider including prefatory language in each section of examples to the effect that the following examples "are illustrative only and do not represent a complete or exclusive description of prudent fiduciary practice." This clarification will ultimately expand the menu of investment choices available to retirement savers, reduce the potential for litigation premised solely on the fiduciary's selection of an investment type not explicitly mentioned in the rule, and better reflect the broad, facts-and-circumstances nature of ERISA's prudence standard.

III. Request for a Subsequent Rulemaking to Amend Prohibited Transaction Exemption 77-4

In addition to the foregoing comments on the Proposed Rule, I respectfully urge the Department to initiate a separate notice-and-comment rulemaking proceeding to amend Prohibited Transaction Exemption 77-4 ("PTE 77-4") to extend its relief to affiliated closed-end funds and private funds. As described below, the current limitations of PTE 77-4 are in fundamental tension with the asset-neutral principles that animate the Proposed Rule and updating that exemption is a necessary and complementary step to fully achieve the Department's stated policy objectives.

A. Background: The Structure and Current Scope of PTE 77-4

Under ERISA Section 406, a plan fiduciary is broadly prohibited from causing a plan to engage in transactions that present potential conflicts of interest with parties in interest, including the fiduciary itself and its affiliates. As a general matter, when an investment manager serving as a plan fiduciary causes the plan to invest in a fund that the manager or an affiliate also manages, ERISA treats that arrangement as a prohibited transaction, a self-dealing transaction in which the fiduciary uses plan assets to generate additional fees for itself or an affiliated entity.

PTE 77-4 was granted on April 8, 1977, and provides class exemption relief from this prohibition for a specific, narrowly defined category of transactions: the purchase or sale by an employee benefit plan of shares of a registered, open-end investment company (i.e., a mutual fund) when the investment adviser for that mutual fund is also a fiduciary with respect to the plan, or is affiliated with a plan fiduciary. Critically, this exemption applies only to open-end investment companies registered under the Investment Company Act of 1940. It does not extend to closed-end funds, interval funds, business development companies ("BDCs"), private funds, or any other investment vehicle that does not meet that narrow structural definition.

As originally designed, PTE 77-4 reflected the investment landscape of the late 1970s, when traditional open-end mutual funds were effectively the only professionally managed investment vehicle through which most ERISA plan participants could access diversified portfolios. That landscape has changed fundamentally. Closed-end funds, interval funds, BDCs, and private funds—including private equity funds, private credit funds, and real asset funds—now represent a large and growing share of the professionally managed investment universe. As of year-end 2025, the closed-end fund industry alone encompassed 816 registered funds with approximately $791 billion in total assets, including 148 interval funds ($131 billion), 130 tender offer funds ($116 billion), and 174 BDCs ($286 billion). These vehicles collectively provide access to investment strategies and asset classes including private credit, infrastructure, real estate, and private equity that are not available through conventional open-end mutual funds.

B. The Current Limitation of PTE 77-4 Is Structurally Inconsistent with ERISA's Asset-Neutral Principles and the Policy Goals of the Proposed Rule

The Proposed Rule rightly proceeds from the premise that ERISA imposes no inherent categorical restrictions on the types or classes of assets that may be offered as DIAs in participant-directed plans. The Department has taken seriously its obligation to be asset-neutral — that is, to avoid regulatory frameworks that favor certain investment vehicles over others without a principled basis for doing so grounded in participant protection.

PTE 77-4, as currently written, directly contradicts this principle. By granting prohibited transaction relief exclusively for transactions involving affiliated open-end mutual funds, while providing no analogous relief for structurally comparable transactions involving affiliated closed-end funds or private funds, the exemption effectively picks winners and losers among investment vehicle types. An investment manager that serves as a plan fiduciary and also manages affiliated open-end mutual funds can include those funds in the plan's lineup in compliance with ERISA, subject to the protective conditions of PTE 77-4. An investment manager that serves as a plan fiduciary and also manages a suite of affiliated alternative investment vehicles—such as interval funds, BDCs, or private equity funds—currently has no analogous class exemption available to it. The practical effect is to create a structural regulatory preference for open-end mutual fund structures over alternative investment vehicles, regardless of the investment merits of those alternatives for plan participants.

This regulatory asymmetry has significant practical consequences. As the Investment Company Institute has observed, PTE 77-4 continues to operate largely as if traditional mutual funds remain the dominant retirement investment option—a premise that no longer reflects the reality of the modern investment management industry. The result is that investment managers offering a range of professionally managed fund types to ERISA plans—including the alternative investment vehicles whose potential benefits the Department itself has recognized in the Proposed Rule—face a patchwork of individually negotiated exemptions or are required to forgo the use of affiliated vehicles altogether, even where those vehicles may offer the most appropriate risk-adjusted returns for plan participants.

The incongruity between the Department's stated policy of asset-neutrality in the Proposed Rule and the vehicle-specific limitations of PTE 77-4 is particularly acute given the current regulatory environment. The Proposed Rule expressly contemplates that plan fiduciaries may prudently select DIAs structured as closed-end funds, interval funds, and other vehicles providing exposure to private markets. Yet if a plan fiduciary that manages such a fund were to recommend it for inclusion as a DIA, no class exemption would be available to shield that recommendation from prohibited transaction liability. The result is a regulatory system that, in effect, penalizes plan participants by discouraging the selection of investment vehicles that the Department's own Proposed Rule acknowledges may offer superior risk-adjusted returns.

C. Recommended Approach: A Notice-and-Comment Rulemaking to Expand PTE 77-4

I respectfully urge the Department to initiate a notice-and-comment rulemaking to amend PTE 77-4 to extend its relief to affiliated closed-end funds and private funds. Such a rulemaking would align the exemption framework with the asset-neutral principles of the Proposed Rule, reduce unnecessary regulatory friction for investment managers seeking to offer their best strategies in ERISA plan contexts, and ultimately expand the menu of high-quality investment alternatives available to American retirement savers.

I recognize that extending PTE 77-4 to alternative fund structures requires careful calibration of appropriate investor-protective conditions. I do not suggest that the Department simply extend the existing exemption's terms without modification. Rather, I suggest that the amended exemption retain and build upon the core protective conditions that have made PTE 77-4 effective since 1977, including: (1) detailed written disclosure of fees and potential conflicts of interest, including both direct plan-level fees and any fees paid indirectly through the affiliated fund; (2) a prohibition on duplicative fees, ensuring that plan participants are not charged twice for services rendered at both the plan level and the fund level; (3) a requirement that the plan's investment in the affiliated fund be approved by an independent fiduciary that is not an affiliate of the investment manager; and (4) a requirement that the investment be consistent with the plan's established investment guidelines and the fiduciary's duties of prudence and loyalty under ERISA Sections 403 and 404.

In addition to these foundational conditions, an amended PTE 77-4 applicable to closed-end funds and private funds should incorporate conditions tailored to the particular characteristics of those vehicles. For example, with respect to valuation, the amended exemption might require that the affiliated fund's assets be valued in accordance with policies and procedures designed to identify and mitigate conflicts, consistent with the approach I have recommended in Enhancement 2 above. With respect to liquidity, the amended exemption might require affirmative disclosure to the independent plan fiduciary of the fund's redemption or repurchase terms and any applicable lock-up periods, enabling the independent fiduciary to assess whether the fund's liquidity profile is appropriate for the plan's anticipated needs.

I note that the framework I have recommended is consistent with the approach the Department has taken in granting individual prohibited transaction exemptions for specific alternative fund structures. The existence of a class exemption—one applicable to the broad category of affiliated closed-end and private fund transactions, rather than requiring individual applications—would provide a more efficient, predictable, and scalable pathway for investment managers to include their full range of affiliated vehicles in ERISA plan lineups. This, in turn, would reduce administrative burden, promote consistency in the application of exemption conditions, and expand retirement savers' access to the full range of investment strategies that ERISA's fiduciary framework is designed to enable.

In sum, amending PTE 77-4 to cover affiliated closed-end funds and private funds is a logical and necessary complement to the Proposed Rule. The Proposed Rule addresses how fiduciaries should evaluate and select DIAs, including DIAs providing exposure to alternative assets. An amended PTE 77-4 would address the prohibited transaction barrier that currently prevents many of the most capable investment managers from offering their affiliated alternative vehicles as DIAs in the first instance. Together, these two regulatory initiatives would form a coherent, comprehensive framework for expanding ERISA plan participants' access to the full range of prudent investment alternatives.

IV. Conclusion

I strongly support the Department's effort to provide ERISA plan fiduciaries with a meaningful, process-based framework for evaluating and selecting designated investment alternatives. The Proposed Rule represents sound policy and reflects a sophisticated understanding of the evolving investment landscape that plan fiduciaries navigate.

I respectfully urge the Department to consider the five suggested enhancements described above. I believe these modifications would: (1) reinforce the asset-neutral principles underlying the Proposed Rule; (2) align the final rule with market practice on valuation governance; (3) provide fiduciaries with clearer and more durable safe harbor protection; (4) preserve appropriate deference to sophisticated fiduciary judgment; and (5) prevent the finite set of examples from inadvertently narrowing the investment universe available to plan participants.

I also urge the Department to initiate a separate notice-and-comment rulemaking to amend PTE 77-4, so that the prohibited transaction relief available to fiduciaries managing ERISA plan assets keeps pace with the full range of investment vehicles that the Proposed Rule contemplates may be offered as designated investment alternatives. Until PTE 77-4 is updated to reflect the modern investment landscape, the asset-neutral goals of the Proposed Rule will remain partially unrealized.

Taken together, the five suggested enhancements and the proposed PTE 77-4 rulemaking would make this regulatory initiative a more powerful instrument for achieving its ultimate objective: enabling ERISA plan fiduciaries to select the full range of prudent investment alternatives, thereby improving long-term retirement outcomes for American workers and their beneficiaries.

I appreciate the opportunity to comment on this important rulemaking and welcome the opportunity to discuss any of the foregoing further at the Department's convenience.

Respectfully submitted,

E.J. Antoni, Ph.D.

Chief Economist