NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street, NE, Suite 990
Washington, DC 20002
202-737-0900
www.nasaa.org

June 1, 2026

Submitted Online Through https://www.regulations.gov/

Daniel Aronowitz
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Dear Assistant Secretary Aronowitz:

On behalf of the North American Securities Administrators Association, Inc. ("NASAA"),[1] I am writing in response to the Department of Labor Employee Benefits Security Administration's (the "Department") proposed rulemaking to clarify the fiduciary duty of prudence under the Employee Retirement Income Security Act of 1974 ("ERISA") and establish a process-based safe harbor in connection with the selection of designated investment alternatives ("DIAs") for participant-directed defined contribution plans (the "Proposal").[2]

Millions of everyday Americans rely on defined contribution plans to invest and save for retirement. It is therefore critical that the regulatory framework governing those plans be calibrated to properly balance access to the markets and investment opportunities with investor protection and transparency, including a robust fiduciary standard of care for those responsible for making decisions for ERISA plans. NASAA agrees that plan fiduciaries should follow a rigorous, objective, asset-neutral process when selecting DIAs. However, the concept of asset-neutrality must not become a mechanism to lower the fiduciary standard of care for plan fiduciaries considering complex, costly, or illiquid investments. Given such things as recent restrictions on redemption efforts in private credit offerings and the outsized number of investor complaints and arbitrations involving the types of alternatives included in this proposal,[3] NASAA remains

[1] Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, México, Puerto Rico, the U.S. Virgin Islands, and Guam. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

[2] The Proposal has been published in the Federal Register at 91 Fed. Reg. 16088 (Mar. 31, 2026).

[3] *See*, *e.g.*, Leslie Picker, CNBC, *Blue Owl caps private credit funds redemptions at 5% after steep request levels* (Apr. 2, 2026); The Real Deal, *Starwood freezes SREIT redemptions as liquidity crunch deepens* (May 1,

concerned with efforts to loosen guardrails around retail access to these highly risky and illiquid products. In that light, we offer the following suggestions to encourage the Department to further clarify the nature, scope, and operation of the proposed safe harbor.

I. Plan fiduciaries should follow a rigorous, objective, asset-neutral process when selecting DIAs.

NASAA supports the core proposition that ERISA fiduciaries should be guided by a rigorous, objective process, rather than by rigid, per se mandates or prohibitions of certain asset classes. An asset-neutral framework aligns with modern portfolio theory and would help to ensure that plans have the flexibility to adapt to evolving financial markets for the benefit of plan participants. While NASAA continues to have significant concerns about the inclusion of alternative assets in ERISA plans, we agree that the duty of prudence does not and should not categorically bar the inclusion of lawful asset classes in ERISA plans.

To reinforce the principle that no asset class is inherently prudent or imprudent on its face, the Proposal identifies a non-exhaustive list of six factors that fiduciaries must consider when evaluating investment alternatives. The factors in the Proposal are consistent with the considerations that NASAA has long maintained are critical in the consideration and recommendation of complex alternative investments.[4] Accordingly, we agree that those factors constitute an appropriate regulatory floor for ERISA fiduciaries' consideration and selection of DIAs. However, we encourage the Department to remove the phrase, "when applicable," from paragraph (f) in the proposed regulation. The factors identified should be at the core of every investment determination by a plan fiduciary. Although there may be circumstances in which certain factors are simple to evaluate, it is difficult to imagine any circumstance in which one or more of the identified factors is not applicable at all.

The Proposal asks "whether participant profiles or characteristics should be included in the final rule as a stand-alone factor, and if it should be applied to all designated investment alternatives or just with respect to target date funds and managed accounts."[5] We encourage the

---

2026); FINRA, *Dispute Resolution Services Statistics*, Table: Top 15 Security Types in Customer Arbitrations (last viewed June 1, 2026) (listing REITs, options, private equities, annuities, and structured products consistently among the most common security types involved in customer arbitration claims).

[4] *See*, *e.g.*, Letter from Joseph Brady, Executive Director, NASAA, to Lisa M. Gomez, Assistant Secretary, U.S. Dept. of Labor, Re: RIN 1210-AC02: *Retirement Security Rule: Definition of an Investment Advice Fiduciary* (Jan. 2, 2024); Letter from Melanie Senter Lubin, NASAA President and Maryland Securities Commissioner, to Jennifer Piorko Mitchell, Office of the Corporate Secretary, FINRA, Re: Regulatory Notice 22-08: *Complex Products and Options* (May 9, 2022); Letter from Michael Pieciak, NASAA President and Commissioner, Vermont Dept. of Fin. Reg., to Brent J. Fields, Secretary, SEC, Re: Supplemental Comment Letter to NASAA's 2018 Consolidated Comments to SEC Proposed Rulemakings: *Regulation Best Interest* (File No. S7-07-18), *Form CRS Relationship Summary, Amendments to Form ADV, Required Disclosures, and Restrictions on the Use of Certain Names or Titles* (File No. S7-08-18), and *Standards of Conduct for Investment Advisers* (File No. S7-09-18) (Feb. 19, 2019).

[5] Proposal, 91 Fed. Reg. at 16096.

Department to specify in the rule text that a fiduciary must consider participant profiles or characteristics as part of the performance, liquidity, and complexity factors because the nature of the participants being served is a material component of those factors in the appropriate selection of DIAs. Regarding performance, information about the plan participants is critical to determine the appropriate level of risk and the appropriate time horizon for the plan. Regarding liquidity, this kind of information is essential to determine the anticipated needs of the plan, particularly at the participant level. Regarding complexity, we recommend that the Department amend the proposed regulation to require consideration not only of whether the plan fiduciary fully understands the investment (or requires the assistance of an investment advice fiduciary or investment manager), but also whether the DIA is so complex or opaque that a typical participant in the plan would not comprehend the product or the relevant disclosures sufficiently to make an informed investment decision. It should never be deemed prudent for a plan fiduciary to make a DIA available if plan participants cannot make informed decisions about whether and how to incorporate the investment into their portfolios.[6] We also recommend that the Department revise the proposed regulation to expressly clarify that compliance with the proposed regulation, including under the proposed safe harbor, does not alter a plan fiduciary's obligation to provide participants with the information they need to make informed investment decisions.[7] The Department has already stated as much in the Proposal,[8] but we urge the Department to clarify this principle in the rule text to avoid any doubt.[9]

While we generally support the principle of asset-neutrality and the relevant factors identified in the Proposal, the proposed approach must not become a mechanism to reduce or soften the fiduciary standard of care for plan fiduciaries considering complex, costly, or illiquid investments. This is especially true for plans that have participants nearing retirement, who tend to have lower risk tolerances and greater liquidity needs. Neutrality should not mean that a "prudent process" necessarily accommodates the unique operational and informational

---

[6] *See cf.*, 29 C.F.R. § 2550.404a-5(e)(5) (requiring mandatory disclosures to be "written in a manner calculated to be understood by the average plan participant"); 29 C.F.R. § 2550.404c-1(b)(2)(i)(B) ("A plan provides a participant or beneficiary an opportunity to exercise control over assets in his account only if . . . [t]he participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed investment decisions with regard to investment alternatives available under the plan . . . ."); U.S. Dept. of Labor, Field Assistance Bulletin No. 2012-02R (1), *Fee Disclosure Guidance*, at A13 (July 30, 2012) (explaining that "a plan administrator must provide a general description of any [brokerage windows, self-directed brokerage accounts, and other similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan]" and that "[a]t a minimum . . . this description must provide sufficient information to enable participants and beneficiaries to understand how the window, account, or arrangement works (*e.g.*, how and to whom to give investment instructions; account balance requirements, if any; restrictions or limitations on trading, if any; how the window, account, or arrangement differs from the plan's designated investment alternatives)").

[7] *See* 29 C.F.R. §§ 2550.404a-5(d), (e).

[8] Proposal, 91 Fed. Reg. at 16135 ("The requirements implemented in the final rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans . . . .").

[9] At minimum, the proposed regulation should be revised to clarify that a plan fiduciary is not entitled to a presumption of prudence for its determination that any of the identified factors is not applicable, and its resulting failure to appropriately consider that factor.

deficiencies of some alternative investments, such as infrequent valuations and performance reporting, lack of liquidity, or complex multi-layered fee structures.[10] All DIAs selected for a plan menu should be able to withstand the same rigorous and critical evaluation, regardless of whether the plan fiduciary is considering a traditional S&P 500 mutual fund or a complex, illiquid private credit vehicle. Plan fiduciaries considering alternative investments should prioritize those that are functionally equivalent to traditional investments in terms of transparency and investor protection, including the six factors identified in the Proposal. Those factors provide an appropriate framework to guide plan fiduciaries in making such determinations.

II. The Department should further clarify the proposed safe harbor.

With the stated goal of curbing litigation against plan fiduciaries regarding the prudence of their selection of DIAs, the Proposal would establish a safe harbor for fiduciaries who give appropriate consideration to the factors identified in the Proposal. Specifically, a fiduciary's judgment would be presumed to meet the duty of prudence if the fiduciary's determination about any or all of the identified factor(s) followed its "objective[], thorough[], and analytical[]" consideration of those factor(s). Though we do not support the concept of a presumption for fiduciary obligations and question whether it is consistent with the statute,[11] we offer the following suggestions to better clarify the parameters of the proposed safe harbor.

While plan fiduciaries should have discretion to select DIAs, it does not follow that every decision a plan fiduciary might make after considering the relevant factors will necessarily be a prudent one. Given the Department's goal to facilitate retail investment in alternative assets through ERISA retirement plans, it is especially important to ensure that the proposed process is appropriately tailored to identify operational and informational deficiencies in alternative investments that might cause a plan fiduciary to conclude that those investments are not appropriate for a particular plan or its participants. The revisions proposed below would more appropriately balance the interests of plan fiduciaries to avoid litigation risks with the need for plan participants to have a viable avenue to relief when a plan fiduciary exercises its discretion imprudently.

---

[10] *See* Proposal, 91 Fed. Reg. at 16093 ("Alternative assets sometimes are less liquid and harder to value than traditional asset classes, and the fee structures for alternative investments are often more sophisticated and performance-driven than for traditional investments"), 16117 (discussing "Challenges to Comparing Alternative Asset Performance").

[11] *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 399-401 (2024) (explaining that courts are to use their "independent judgment" to "determine the best reading of the statute"); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 418-19 (2014) (rejecting petitioners' asserted presumption of prudence favoring ESOP fiduciaries).

a. The Department should clarify the showing required to receive the presumption.

We recommend three revisions to clarify the showing required to receive the presumption. These revisions would provide valuable guidance to both plan fiduciaries seeking to rely on the proposed safe harbor and to courts applying the proposed regulation.

First, the Department should clarify that a fiduciary must "objectively, thoroughly, and analytically" consider each factor. While paragraph (f) of the proposed regulation includes that language, paragraphs (g) through (*l*) state that the fiduciary must "appropriately consider" the relevant factors.[12] While it appears that these terms are used interchangeably in the proposed regulation,[13] we recommend that the Department use the same terminology throughout the proposed regulation to avoid unnecessary confusion for plan fiduciaries and courts, and clarify that paragraphs (f) through (*l*) are subject to the same standard. This can be achieved by defining "appropriate consideration" in paragraph (e) to mean "objective, thorough, and analytical consideration." Doing so would then apply the standard consistently across all six factors. Although the Proposal does not define "objective, thorough, and analytical," the standard should require, at minimum, that the fiduciary's evaluation of each factor be independent and free of conflicts; include a reasonable number of similar alternatives, where required, or otherwise consider the relevant interrelationship between the different factors; and reflect either the plan fiduciary's understanding of the investment under consideration or the fiduciary's reliance on a prudently selected investment advice fiduciary or investment manager. The Department should also clarify that "objective, thorough, and analytical" consideration of certain factors requires that they be considered in conjunction with other factors. For example, the determination of risk-adjusted expected returns should include consideration of risks related to liquidity, valuation, benchmarking, and the complexity of each investment. Similarly, a plan fiduciary should be required to consider whether and how the complexity of a given investment might impact valuation or liquidity. In sum, the proposed regulation should clarify that a plan fiduciary may not be able to appropriately consider the relevant factors without considering the interrelationships between them. This approach is consistent with the Proposal's premise that plan fiduciaries need to engage in an objective and thorough process to enjoy a presumption of prudent choice.

Second, the Department should clarify in the rule text that the presumption is unavailable without a contemporaneous written record demonstrating that the plan fiduciary made a reasoned determination based on its consideration of the relevant factor(s), including its critical review and understanding of advice received from an investment advice fiduciary. Requiring a plan fiduciary to demonstrate how it weighed the relevant information and data to reach its conclusion would help to ensure that the safe harbor does not inadvertently immunize plan fiduciaries who merely engage in a "check-the-box" exercise, or whose considerations are facially unreasonable.

---

[12] *See* Proposal, 91 Fed. Reg. at 16136-16143.

[13] *See cf.*, 29 C.F.R. § 2509.95-1 ("[T]the fiduciary obligation of prudence, described at section 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B), requires, at a minimum, that plan fiduciaries conduct an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities.").

Requiring the creation and potential production of contemporaneous documentation to a reviewing court would not be a material burden on plan fiduciaries, especially when compared to the protection afforded by the safe harbor.

Third, the Department should clarify that there is no presumption of prudence for a plan fiduciary's selection of an investment advice fiduciary or delegation of compliance to an investment manager when the plan fiduciary relies on those service providers in its consideration of any of the relevant factors.[14] While we agree that it can be prudent for a plan fiduciary to rely on third-party investment managers or investment advisers to help them analyze complex investments, plan fiduciaries should be required to demonstrate that they prudently selected those service providers, appropriately reviewed and considered the advice received, and are appropriately monitoring their performance. Without this clarification, the rule could inadvertently encourage fiduciaries to blindly trust outside service providers or lower their diligence standards for hiring those service providers, which would undermine the longstanding requirement for plan sponsors to independently vet and continuously monitor their service providers. In short, plan fiduciaries must remain ultimately responsible for their choices of DIAs.

b. The Department should clarify that the presumption is rebuttable.

The Proposal does not specify whether the presumption would be rebuttable or conclusive. However, some public commentary has interpreted the Proposal to create a rebuttable presumption.[15] We recommend that the Department revise the Proposal to specify that the presumption is rebuttable and define the parameters for rebuttal. This would help to ensure that the proposed safe harbor does not unintentionally immunize plan fiduciaries from facially negligent decisions or egregious misconduct. It would also provide valuable guidance to plan fiduciaries and courts. At minimum, the presumption should be rebuttable upon a showing that the plan fiduciary's determination is inconsistent or incompatible with the facts and information considered, relies on a false or erroneous factual premise, or omitted consideration of a fact or circumstance that the plan fiduciary knew or should have known was relevant to the particular investment under consideration. Such an approach would help to curb the kinds of suits that the Department is most concerned about in the Proposal, while preserving the ability of plaintiffs to hold plan fiduciaries accountable for facially negligent decisions and egregious misconduct.

c. The Department should clarify the examples provided in the proposed regulation.

For each relevant factor identified in the Proposal, the proposed regulation includes one or more examples to illustrate how a plan fiduciary might comply (or fail to comply) with respect to its consideration of that factor. In general, we recommend that the Department revise the proposed

---

[14] *See*, *e.g.*, Proposal, 91 Fed. Reg. at 16136.

[15] *See*, *e.g.*, Cleary Gottlieb Steen & Hamilton LLP, *Dear Prudence: Does the DOL's Proposed Rule Signal a Brand-New Day for 401(k)s and Alternative Assets?* (Apr. 2, 2026); Fred Reish, *Alternative Assets (5)—DOL Proposal and the Fiduciary Safe Harbor* (May 20, 2026)

regulation to focus on the applicable rules and principles for each factor, and address the examples in guidance rather than rule text. While the examples generally demonstrate reasonable analyses based on the articulated facts and circumstances, some of them omit valuable context that would help to clarify the intended takeaways for plan fiduciaries. If the examples remain in the proposed regulation itself, we recommend that the Department ensure that individual examples do not unintentionally nullify the applicable rule or principle. For instance, Examples (h)(1) and (h)(3) could be read to establish the rule that benefits such as better customer service or lifetime income benefits justify higher fees, without the need to quantify and compare the value of those benefits with the additional cost. Such an interpretation would be contrary to the principles underlying the Proposal. Example (i)(2) could be read to establish a similar rule with respect to liquidity restrictions. We recommend that the Department review the examples to ensure that they do not undermine the primary rules and principles applicable to each factor.

III. Conclusion

NASAA appreciates the opportunity to comment on the Proposal. Thank you for considering these views. Should you have any questions about this letter, please contact either the undersigned or NASAA's General Counsel, Vince Martinez, at (202) 737-0900.

Sincerely,

Marni Rock Gibson

Marni Rock Gibson
NASAA President and
Commissioner, Kentucky Department of
Financial Institutions