June 1, 2026

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N–5655
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

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

Dear Assistant Secretary Aronowitz:

The Institute for Portfolio Alternatives (the "IPA") appreciates the opportunity to comment on the Department of Labor's (the "Department") proposed rule, "Fiduciary Duties in Selecting Designated Investment Alternatives" (the "Proposed Regulation"), published on March 31, 2026.[1] For the reasons stated below, the IPA strongly supports the Proposed Regulation.

The IPA also respectfully recommends that the Department include additional illustrative examples relating to performance, fees, liquidity, and valuation in the final regulation and clarify that the safe harbor does not shift the burden of proof to plan fiduciaries at the motion to dismiss stage.

I. About the IPA

For more than 40 years, the IPA has advocated for policies that expand access to portfolio diversifying investments for all investors, including participants in defined contribution plans.[2]

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[1] *Fiduciary Duties in Selecting Designated Investment Alternatives*, 91 Fed. Reg. 16,088 (Mar. 31, 2026) (to be codified at 29 C.F.R. pt. 2550).

[2] *See* Institute for Portfolio Alternatives May 12, 2022 joint letter with the Defined Contribution Alternative Association (advocating its support for the *Retirement Savings Modernization Act* that would expand defined contribution plan access to professionally managed alternative investments to improve diversification, performance and retirement security); *See also* Institute for Portfolio Alternatives May 21, 2020 joint letter with the Defined Contribution Alternative Association (encouraging the Department to issue guidance to help defined contribution plan fiduciaries consider adding portfolio diversifying investments to their plans) ("May 2020 Joint Letter"); *See also* The Institute for Portfolio Alternatives July 22, 2019 joint letter with the Defined Contribution Alternative Association (encouraging the Department to issue guidance that would help facilitate the inclusion of alternative asset classes as part of the professionally managed investment options offered in connection with a defined contribution plan).

The IPA's membership consists of product sponsors of private equity, private real estate, private credit, infrastructure and other real assets, financial intermediaries such as registered investment advisers and broker-dealers, and industry service providers including major law firms, accounting firms, technology providers, and consultants. With nearly $1 trillion in invested capital, the IPA's members service financial and direct investment assets structured through investment vehicles such as non-listed real estate investment trusts, non-listed business development companies, unlisted closed-end funds including interval and tender offer funds, and private placements.

II. Summary

The IPA strongly supports the Department's objectives in the Proposed Regulation to establish an asset-class neutral framework that expands access to designated investment alternatives capable of improving long-term, risk-adjusted outcomes for retirement savers. We appreciate that the Proposed Regulation appropriately reinforces ERISA's principles-based prudence standard, preserves fiduciary discretion, and provides a workable safe harbor that will meaningfully reduce unnecessary litigation risk.[3]

Each recommendation described in this letter is intended to advance that objective by clarifying common fact patterns and methodologies that have, in the absence of clear guidance, contributed to costly and unproductive litigation. Together, these refinements would provide plan fiduciaries with the practical certainty they need to consider portfolio-diversifying investments on their merits and would reduce the litigation-driven uncertainty that the Department has identified as a barrier to participant access.

The IPA believes there are further opportunities for the Department to enhance the Proposed Regulation.

We focus on five areas:

- The Department should add an illustrative example confirming that fiduciaries acting on substantially similar facts may prudently reach different reasoned conclusions on the appropriate time horizon for evaluating historical performance, complementing Example (g)(2) of the Proposed Regulation. In this example, the IPA proposes an assessment of what qualifies as a prudent fiduciary process that would satisfy the requirements of paragraph (g) of the Proposed Regulation and section 404(a)(1)(B) of ERISA.

[3] The IPA supports the work the Department is doing more broadly to enhance retirement security. A strong framework for plan fiduciaries is a key component towards helping more Americans achieve a secure retirement. As important is ensuring that participants have access to retirement plans. For Americans without access to 401(k) plans, we look forward to partnering with the Department to implement the President's recent executive order, *Promoting Retirement-Savings Access for American Workers by Establishing Trumpira.gov* and identifying other ways to increase access to tax preferred retirement savings vehicles.

- The Department should add an illustrative example addressing a fiduciary's consideration of the net-cost effect of a share class's revenue-sharing payments in offsetting plan-level recordkeeping and administrative fees, complementing Example (h)(2) of the Proposed Regulation. In this example, the IPA proposes an assessment of what qualifies as a prudent fiduciary process that would satisfy the requirements of paragraph (h) of the Proposed Regulation and section 404(a)(1)(B) of ERISA.

- The Department should add illustrative examples confirming that the prudent fiduciary process for evaluating CITs that combine daily participant-level liquidity with fund-level liquidity management features—including allocations to private markets vehicles with periodic liquidity caps, and participant-level withdrawal limits designed to protect all investors during periods of extraordinary withdrawal activity—would satisfy the requirements of paragraph (i) of the Proposed Regulation and section 404(a)(1)(B) of ERISA.

- The Department should add four additional illustrative examples confirming that the prudent fiduciary process for evaluating designated investment alternatives using valuation methodologies common in practice—including (1) quarterly third-party valuation based on manager-supplied inputs, (2) rotating independent valuation of one-third of non-publicly traded assets each quarter, (3) hybrid direct and independent valuation of diversified portfolios holding both public and non-publicly traded assets, and (4) manager-determined valuation with quarterly positive assurance from an independent third-party valuation agent—would satisfy the requirements of paragraph (j) of the Proposed Regulation and section 404(a)(1)(B) of ERISA.

- The Department should clarify in the final regulation and preamble that the process-based safe harbor does not shift the burden of proof to plan fiduciaries. That is, a plaintiff has not stated a claim that a fiduciary has breached their duty of prudence by simply asserting that the fiduciary did not satisfy the safe harbor. **Without this clarification, plaintiffs may attempt to argue that fiduciaries must affirmatively prove compliance with the safe harbor at the outset of litigation, contrary to established ERISA jurisprudence and the Proposed Regulation's intent to reduce litigation risk**.

III. The IPA Supports the Proposed Regulation

The IPA has long advocated for regulatory clarity that would reduce litigation risk and enable plan fiduciaries to consider a broader range of investment options for defined contribution plan participants. The Proposed Regulation directly addresses these concerns, which the IPA appreciates and supports.

First, we support the Proposed Regulation's unequivocal confirmation in paragraph (c) that ERISA section 404(a)(1)(B) does not require or restrict any specific type of designated investment alternative.[4] This principle is consistent with the Department's historical guidance, including the June 3, 2020 Information Letter to Jon W. Breyfogle, Esq. and the Department's August 2025 decision to rescind the 2021 supplemental statement on private equity investments.

The IPA has consistently encouraged the Department to confirm that defined contribution plan fiduciaries have the same flexibility to consider alternative asset classes that defined benefit plan fiduciaries have exercised for decades.[5]

Second, we strongly endorse the safe harbor framework in paragraph (f) and the six enumerated factors in paragraphs (g) through (l).[6] The illustrative examples accompanying each factor provide fiduciaries with concrete, actionable guidance that should meaningfully reduce the litigation-driven uncertainty that has chilled innovation in plan investment design. We agree with the Department that the prevailing climate of litigation has deterred plan sponsors from considering portfolio diversifying options, even where those options are selected through a prudent fiduciary process and may lead to improved participant outcomes.[7]

Third, we support the Proposed Regulation's recognition that plan fiduciaries may rely on written representations from investment managers and on the expertise of third-party investment advice fiduciaries in evaluating designated investment alternatives. This recognition is particularly important for the products that IPA members offer, which may involve features—such as limited liquidity or asset-level valuations—that require specialized expertise to evaluate. By permitting reliance on professional advisors and representations, the Proposed Regulation appropriately acknowledges the practical realities of selecting designated investment alternatives that include alternative assets. The IPA notes that information provided by an investment manager need not take the form of a formal "written representation" to support a fiduciary's prudent process; reliable information furnished by a manager, whether or not styled as a written representation, may appropriately be considered and relied upon. Accordingly, the references in the examples below to a manager's or trustee's representations should be understood to include such information, however conveyed.

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[4] 91 Fed. Reg. at 16,136.

[5] *See* May 2020 Joint Letter at 2 (noting that defined benefit plans have nearly $800 billion invested in real estate and that the Department should encourage defined contribution fiduciaries to expand investment choices beyond mutual funds).

[6] 91 Fed. Reg. at 16,136–44.

[7] *See, e.g.*, *The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors*, Deloitte (Aug. 9, 2017) (finding that 95% of surveyed financial institutions limited or made changes to the products available to retirement savers under the 2016 fiduciary rule).

Finally, we agree with the Department's articulation that fiduciary decisions based on a prudent process are entitled to significant deference.
The Proposed Regulation's grounding of this principle in extensive case law cited throughout the preamble should provide comfort to plan fiduciaries considering the inclusion of alternative investments in their plan menus.

Building on the framework we strongly support, the IPA respectfully offers below additional illustrative examples addressing performance, fees, liquidity, and valuation, together with a clarification regarding the burden of proof at the motion to dismiss stage, each designed to enhance the practical utility of the Proposed Regulation for plan fiduciaries and to address common fact patterns that IPA members encounter in evaluating designated investment alternatives for defined contribution plans.

The Department Should Include an Additional Performance Example in the Final Regulation

The IPA strongly supports the Department's treatment of performance in paragraph (g) of the Proposed Regulation, including Example (g)(2), which illustrates a fiduciary's prudent consideration of an appropriate time horizon by analyzing the 1-, 3-, 5-, and 10-year historical performance of three target date fund series and, with the assistance of a third-party investment advice fiduciary, placing the greatest weight on the 10-year performance data. We agree with the Department's recognition that an appropriate time horizon for retirement savings may be a long-term horizon, and we appreciate the Department's confirmation that a fiduciary need not select an investment based on the highest returns during a short or recent period.

The IPA respectfully recommends that the Department include a complementary example confirming that, on substantially the same facts, a fiduciary who—through an objective, thorough, and analytical process—places greater weight on a shorter performance period for documented, fact-specific reasons may also satisfy the consideration and determination requirements of paragraph (g). A complementary example would further reinforce the Proposed Regulation's principles-based approach and the deference appropriately accorded to a fiduciary's reasoned judgment.

Performance Scenario: Fiduciary Reasonably Places Greater Weight on a Shorter Performance Period

The IPA recommends that the Department include an example involving the same fact pattern as Example (g)(2)—a plan fiduciary, with the assistance of a qualified investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii), evaluating three similar target date fund series across 1-, 3-, 5-, and 10-year performance periods—but in which the investment advice fiduciary recommends, and the plan fiduciary concurs, that the greatest weight should be placed on the 3-year performance data.

Under this fact pattern, the investment advice fiduciary documents that two of the three target date managers have, within the past five years, materially changed their portfolio management teams, glide path methodologies, or strategic asset allocations, such that the longer-term performance record is, in the investment advice fiduciary's professional judgment, less reflective of the strategy participants will receive on a going-forward basis. The investment advice fiduciary further documents that the 3-year period provides sufficient insight into how the managers are likely to perform over a market cycle. The plan fiduciary reviews this analysis, considers the underlying performance figures across all four time periods, and concurs with the investment advice fiduciary's recommendation.

The IPA recommends that the example conclude that a plan fiduciary who receives and reviews the investment advice fiduciary's written analysis, independently or with the assistance of a qualified investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii), and determines—after an objective, thorough, and analytical evaluation, that the risk-adjusted expected returns, net of fees and expenses, of the selected designated investment alternative further the purposes of the plan—would satisfy the consideration and determination requirements of paragraph (g) of the Proposed Regulation and section 404(a)(1)(B) of ERISA.

In reaching this conclusion, the plan fiduciary would appropriately weigh: (i) the appropriate time horizon of the designated investment alternative in light of the strategy participants will receive on a going-forward basis; (ii) qualitative considerations bearing on which historical period is most informative as to expected risk-adjusted returns, including changes in portfolio management teams, glide paths, or strategic asset allocations; (iii) the documented analysis and recommendation of the investment advice fiduciary; and (iv) the consistency of this analysis with the Department's principle that the prudence inquiry is forward-looking and assessed at the time of the decision.

Read together with Example (g)(2), this complementary example would helpfully illustrate that fiduciaries acting in good faith on substantially similar facts may, consistent with the principles-based prudence standard of section 404(a)(1)(B), reasonably emphasize different considerations and reach different conclusions, each of which can satisfy the safe harbor.

The Department Should Include an Additional Fee Example in the Final Regulation

The IPA appreciates the Department's treatment of fees in paragraph (h) of the Proposed Regulation. We support Example (h)(1), which confirms that a fiduciary may prudently select a designated investment alternative with higher fees than other alternatives with comparable risk-adjusted returns where the higher-fee option offers a meaningful value proposition.

We also support the principle underlying Example (h)(2), which appropriately illustrates that a fiduciary who selects a more expensive share class without considering the differences among available share classes—and without enlisting the assistance of a professional advisor, manager, or consultant—has not engaged in a prudent process.

Building on Example (h)(2), the IPA respectfully recommends that the Department include a complementary example confirming that a fiduciary who does engage with the differences among available share classes—and who in particular evaluates the effect of a share class's revenue-sharing arrangements on the net total cost borne by participants—may prudently select the share class with the higher headline expense ratio. Revenue-sharing arrangements that offset recordkeeping and other administrative fees are a common feature of defined contribution plan administration, and a complementary example would provide helpful guidance to fiduciaries who routinely evaluate share classes whose revenue-sharing payments offset administrative fees that participants would otherwise pay directly.

Fee Scenario: Revenue-Sharing Payments Offset Plan-Level Recordkeeping and Administrative Fees

The IPA recommends that the Department include an example involving a plan fiduciary considering two share classes of an otherwise substantially similar designated investment alternative. Share Class A carries a total expense ratio of 35 basis points and generates no revenue-sharing payments. Share Class B carries a total expense ratio of 60 basis points but, pursuant to a written arrangement between the fund and the plan's recordkeeper, pays 30 basis points per year to the recordkeeper, which the recordkeeper has represented in writing will be applied on a dollar-for-dollar basis to offset the recordkeeping and other administrative fees that would otherwise be charged to participant accounts under the plan's services agreement.

Under this fact pattern, the plan fiduciary—independently or with the assistance of a qualified investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii)—prepares and reviews a written net-cost analysis demonstrating that, after taking account of the revenue-sharing offset, participants invested in Share Class B will bear lower total fees in connection with their participation in the plan than participants invested in Share Class A. The plan fiduciary further obtains and reviews a written representation from the recordkeeper confirming the mechanics of the revenue-sharing offset, including that any revenue-sharing payments in excess of the contracted recordkeeping and administrative fees will be applied for the exclusive benefit of participants.

The IPA recommends that the example conclude that a plan fiduciary who receives and reviews the net-cost analysis and the recordkeeper's written representation regarding the application of revenue-sharing payments, independently or with the assistance of a qualified investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii), and determines—after an objective, thorough, and analytical evaluation, that the fees and expenses of the selected designated investment alternative are appropriate in light of the alternative's risk-adjusted expected returns and the additional value delivered to participants through the reduction in administrative fees borne by participant accounts—would satisfy the consideration and determination requirements of paragraph (h) of the Proposed Regulation and section 404(a)(1)(B) of ERISA.

In reaching this conclusion, the plan fiduciary would appropriately weigh: (i) the headline expense ratios of the two share classes; (ii) the terms of the revenue-sharing arrangement applicable to each share class and the recordkeeper's written representation regarding the application of those payments to offset participant-borne administrative fees; (iii) the net total cost borne by participants in each share class; and (iv) the principle, confirmed in paragraph (h) and Example (h)(1), that the duty of prudence does not require the selection of the alternative with the lowest fees and expenses where a prudent process establishes that another alternative is appropriate in light of its risk-adjusted expected returns and other value to participants.

Read together with Example (h)(2), this complementary example would helpfully illustrate that the line between a prudent and an imprudent selection among share classes turns on the fiduciary's engagement with the actual differences among the share classes—including the operation of any revenue-sharing arrangements—rather than on the relative magnitude of the headline expense ratios.

IV. The Department Should Include Additional Liquidity Examples in the Final Regulation

The IPA appreciates the Department's thoughtful treatment of liquidity in paragraph (i) of the Proposed Regulation, and in particular, the Department's recognition that plans do not need to offer fully liquid investment options and that many retirement savers have long investment time horizons that make them well-suited to benefit from an illiquidity premium.

The existing liquidity examples in paragraphs (i)(1) through (i)(4) provide helpful guidance across a range of scenarios.[8] The IPA, however, respectfully recommends that the Department include additional examples addressing specific liquidity structures that are common among the pooled investment vehicles.

[8] 91 Fed. Reg. at 16,139–41.

The examples illustrated below assume that the plan sponsor did not identify any material concerns with the written representations made by either a qualified investment advice fiduciary (as that term is defined in Section 3(21)(A)(ii) of ERISA) or the investment manager of the pooled investment vehicle, as applicable.

a. Liquidity Scenario 1: Multi-Asset CIT with a Liquid Sleeve and a Private Markets Allocation

The IPA recommends that the Department include an example involving a multi-asset CIT that provides daily liquidity to individual plan participants. The CIT holds approximately 70% of its assets in a liquid sleeve of publicly traded securities (the "Liquid Sleeve") and approximately 30% of its assets in a private markets vehicle (the "PM Vehicle"). The PM Vehicle, consistent with terms common in the industry, offers redemptions on a quarterly basis subject to a cap of 5% of the PM Vehicle's net asset value per quarter, and the CIT's investment guidelines establish a tolerance band of 25% to 35% around the target 30% allocation to the PM Vehicle.

Under this fact pattern, the CIT trustee provides a representation to the plan fiduciary that the CIT (i) is expected to be able to meet participant-level daily liquidity needs, which the CIT meets through its Liquid Sleeve, and (ii) will generally accommodate plan-level terminations as of a quarter-end with 90 days' notice, subject to an extended notice period for large plans or custom vehicles.

The CIT's manager separately provides a representation acknowledging that, as the Liquid Sleeve is used to meet redemptions, the CIT's allocation to the PM Vehicle may temporarily drift outside the 25% to 35% tolerance band and describing the manager's policies for rebalancing back to the target allocation as redemptions are received from the PM Vehicle. The manager further represents that, based on stochastic modeling using historical data and reasonable forward-looking assumptions, the probability that the CIT will be unable to satisfy a participant's redemption request at any point over a 20-year modeling horizon—reflecting the long-term nature of retirement savings—is less than 5% across all modeled scenarios.

The IPA recommends that the example conclude that a plan fiduciary who receives and reviews the CIT trustee's representation regarding the liquidity terms of the CIT and the CIT manager's representation regarding portfolio rebalancing and stochastic modeling, independently or with the assistance of a qualified investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii), and determines—after an objective, thorough, and analytical evaluation, that the liquidity structure is sufficient to satisfy the terms of the plan and the anticipated needs of the plan's participants and beneficiaries—would satisfy the consideration and determination requirements of paragraph (i) of the Proposed Regulation and section 404(a)(1)(B) of ERISA.

In reaching this conclusion, the plan fiduciary would appropriately weigh: (i) the very low probability, as supported by the manager's stochastic modeling, that the CIT will be unable to satisfy a participant's redemption request over a horizon appropriate to retirement savings; (ii) the role of the CIT's Liquid Sleeve in providing sufficient liquidity at the CIT level to meet daily participant redemptions while the PM Vehicle's quarterly liquidity cap operates; (iii) the quarterly liquidity cap on the PM Vehicle, which is designed to protect all investors in the PM Vehicle from the adverse effects of forced liquidation of illiquid assets during periods of stress; and (iv) the potential for the designated investment alternative to deliver an illiquidity premium and enhanced risk-adjusted returns net of fees that would benefit participants over their investment horizons.

b. Liquidity Scenario 2: Extraordinary Withdrawal Limits

The IPA recommends that the Department include an example involving a CIT that provides daily liquidity to individual plan participants under normal conditions, but that includes a fund-level redemption limit designed to protect all investors in the event of extraordinary aggregate withdrawal activity. The CIT is not a fully private vehicle; rather, it holds a blended allocation across publicly traded and private market assets, with approximately 50% of its assets allocated to private market investments.

Under this fact pattern, the CIT trustee provides a written disclosure to the plan fiduciary that participants will have daily liquidity under normal conditions. If, however, the aggregate of participant redemption requests in any calendar quarter reaches 10% of the CIT's assets under management (measured as of the first day of that quarter), the fund-level redemption limit will activate. Once activated, the CIT will, in each calendar quarter, satisfy redemption requests on a pro rata basis up to 5% of the CIT's assets under management as of the date of activation. The investment limit would cease to apply the quarter after the CIT's private market investments are reduced below 50% of Fund AUM. The CIT trustee further discloses that based on stochastic modeling described below, in 97% of historical situations all redemption requests received as of activation would be satisfied in full no later than the fourth calendar quarter following the request.

Under this structure, the CIT's manager has acknowledged that during the four calendar quarters following activation of the fund-level redemption limit, the fund's investment guidelines may drift out of the fund's target allocation ranges as the manager sells liquid assets to meet redemptions while retaining illiquid positions. The CIT's manager has modeled this scenario using stochastic analysis and has represented to the plan fiduciary that — based on proposed allocations, historical data, and reasonable forward-looking assumptions — the probability of the fund-level redemption limit being triggered at any point within the next 20 years is less than 5% across all modeled scenarios.

These modeled scenarios incorporate periods of acute market stress comparable to historical financial crises, such that the manager's modeling indicates that activation of the redemption limit is very unlikely even under financial-crisis conditions.

The IPA recommends that the example conclude that a plan fiduciary that receives and reviews the CIT trustee's disclosures regarding the fund-level redemption limit and the manager's stochastic modeling analysis — independently or with the assistance of a qualified investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) — and determines, after an objective, thorough, and analytical evaluation, that the liquidity structure is sufficient to satisfy the terms of the plan and the anticipated needs of the plan's participants and beneficiaries, would satisfy the consideration and determination requirements of paragraph (i) of the Proposed Regulation and section 404(a)(1)(B) of ERISA.

In reaching this conclusion, the plan fiduciary would appropriately weigh: (i) the low probability of the fund-level redemption limit being triggered; (ii) the phased and orderly nature of the redemption process, which ensures that even in the unlikely event that the redemption limit is activated, participants will receive full liquidity over a defined and reasonable time period not exceeding ten calendar quarters; (iii) the potential for the designated investment alternative to deliver an illiquidity premium and enhanced risk-adjusted returns net of fees that would benefit participants over their investment horizons; and (iv) the fact that the redemption limit is designed to protect all investors in the CIT from the adverse effects of forced liquidation of illiquid assets during periods of stress.

These examples would provide valuable guidance to plan fiduciaries evaluating CITs and similar pooled investment vehicles that use withdrawal limits to manage liquidity risk while holding sleeves of illiquid, portfolio-diversifying assets. Such structures are common among the products that IPA members offer and are well-suited to the long time horizons of retirement savers.

V. The Department Should Include Additional Valuation Examples in the Final Regulation

The IPA also appreciates the Department's treatment of valuation in paragraph (j) of the Proposed Regulation, and we support the principle that plan fiduciaries must appropriately consider and determine that a designated investment alternative has adopted adequate measures to ensure that it is capable of being timely and accurately valued. The existing examples in paragraphs (j)(1) through (j)(4) provide helpful guidance, particularly the Department's recognition in paragraph (j)(2) that fiduciaries may rely on valuations that satisfy FASB Accounting Standards Codification 820 ("ASC 820") on Fair Value Measurement.[9]

[9] *Id.* at 16,141–42.

We strongly support the Department's endorsement of ASC 820 and request clarity on one point and propose four additional examples. We note, however, that alternative investment funds do not always follow ASC 820 in every respect, and the final regulation should accommodate reasonable, well-disclosed valuation practices that may depart from ASC 820 in part where appropriate for the asset class.

It is vital that the Department clarify that valuation satisfying ASC 820 will be considered "independent and conflict free" for purposes of the Proposed Regulation. Under ASC 820, managers are expected to exercise discretion when providing inputs for the valuation of Level 3 assets. In addition to providing inputs where a third-party valuation firm is used, it is often the manager who selects the third-party valuation firm. For purposes of ASC 820, manager participation is encouraged, as it leads to a more accurate valuation. As a result, the Proposed Regulation's valuation language requires clarification because it both suggests that ASC 820 is an appropriate valuation standard while elsewhere the examples could be read to suggest a standard that is inconsistent with ASC 820.

Another way to address this concern, in the context of a designated investment alternative that is a fund of funds, would be to clarify that the valuation analysis applies only at the designated investment alternative level and not at the component level. In the Proposed Regulation, it appeared as though a fiduciary is required to evaluate the designated investment alternative and not each component of a designated investment alternative in all of the examples except for the continuation fund example. Because that example appeared to look through not just the designated investment alternative but into the operation of a component that was itself not a "plan asset vehicle," the example could be read to undermine the regulatory boundaries between the Securities and Exchange Commission and the Department by weighing in on how non-ERISA-governed vehicles should operate.

Consistent with this request, the IPA respectfully recommends that the Department include four additional valuation examples in the final regulation to address methodologies that are common in practice. In all four scenarios described below, the designated investment alternative complies with ASC 820, and, at the end of each fiscal year, the fund's financial statements are reviewed by an independent auditor consistent with applicable law and standard industry practices.

a. Scenario 1: Manager Provides Inputs to an Independent Third-Party Valuation Firm

In this scenario, the designated investment alternative holds non-publicly traded assets, and the manager of the designated investment alternative engages an independent third-party valuation firm to value those assets on a quarterly basis.

The manager provides the independent third-party valuation firm with certain inputs used in the valuation process, including property-level financial data, cash flow projections, comparable transaction data, and other information relevant to the application of ASC 820. The independent third-party valuation firm applies valuation methodologies consistent with ASC 820 using these inputs and produces an independent valuation report. At the end of each fiscal year, the fund's financial statements are reviewed by an independent auditor consistent with applicable law and standard industry practices.

The IPA recommends this example conclude that a plan fiduciary who receives and reviews a representation from the fund or its trustee describing this valuation process—including the role of the third-party valuation firm, the nature of the inputs provided by the manager (i.e., the investment manager of the designated investment alternative), the application of ASC 820, and the annual independent audit—and determines, after an objective, thorough, and analytical evaluation (independently or with the assistance of a qualified investment professional), that the valuation methodology is adequate to ensure that the designated investment alternative is capable of being timely and accurately valued, would satisfy the consideration and determination requirements of paragraph (j) of the Proposed Regulation and section 404(a)(1)(B) of ERISA.[10]

b. Scenario 2: Rotating Independent Valuation of One-Third of Assets Each Quarter

In this scenario, the designated investment alternative holds non-publicly traded assets, and the manager of the designated investment alternative has engaged an independent third-party valuation firm to value one-third of the fund's non-publicly traded assets each quarter, such that all non-publicly traded assets are independently valued at least once during each twelve-month period.

For the remaining two-thirds of the non-publicly traded assets in any given quarter, the manager applies internal valuation procedures consistent with ASC 820, taking into account any material changes in conditions or circumstances since the last independent valuation. At the end of each fiscal year, the fund's financial statements are reviewed by an independent auditor consistent with applicable law and standard industry practices.

[10] This conclusion is consistent with the existing example in paragraph (j)(2) of the Proposed Regulation, which addresses a written representation that non-public securities are valued through a conflict-free, independent process according to ASC 820. The additional scenarios recommended by the IPA address variations in the valuation process that are common in practice but that involve the manager's participation in the valuation process to varying degrees, with the annual independent audit serving as an important additional safeguard in each scenario.

The IPA recommends that this example conclude that a plan fiduciary that receives and reviews a representation describing this rotating valuation process, and determines, after an objective, thorough, and analytical evaluation (independently or with the assistance of a qualified investment professional), that the methodology is adequate to ensure timely and accurate valuation, would satisfy the requirements of paragraph (j) and section 404(a)(1)(B) of ERISA. The rotating approach appropriately balances the cost of obtaining independent valuations with the need for timely and accurate pricing, and the annual audit provides a further layer of assurance.

c. Scenario 3: Manager Directly Values a Portion of the Portfolio

In this scenario, the designated investment alternative holds a diversified portfolio that includes both publicly traded securities and private market assets. The manager directly values a portion of the non-publicly traded assets using internal valuation procedures consistent with ASC 820, while the remaining non-publicly traded assets are valued by an independent third-party valuation firm on a quarterly basis. The division between internally and externally valued assets is based on the complexity and materiality of the holdings, with the most complex or material positions subject to independent valuation. At the end of each fiscal year, the fund's financial statements are reviewed by an independent auditor consistent with applicable law and standard industry practices.

The IPA recommends that this example conclude that a plan fiduciary who receives and reviews a representation describing this valuation approach, and determines, after an objective, thorough, and analytical evaluation (independently or with the assistance of a qualified investment professional), that the approach is adequate to ensure timely and accurate valuation, would satisfy the requirements of paragraph (j) and section 404(a)(1)(B) of ERISA. This conclusion reflects the principle that the duty of prudence does not require that every non-publicly traded asset be independently valued every quarter, so long as the overall valuation process is reasonable, consistent with ASC 820, and subject to annual independent audit.

d. Scenario 4: Independent Valuation Agent Provides Positive Assurance on Manager-Determined Valuations

In this scenario, the designated investment alternative holds non-publicly traded assets, and the manager of the designated investment alternative directly values those assets on a quarterly basis pursuant to written valuation policies and procedures consistent with ASC 820. The manager's valuations are determined by, or under the supervision of, a valuation committee that includes members independent of the portfolio management function, and the manager's valuation process is subject to documented methodologies, escalation protocols, and override controls.

The manager engages an independent third-party valuation agent to perform a quarterly review of the manager's valuations and to deliver a written opinion providing "positive assurance"—that is, an affirmative assertion that the manager's reported valuations are fairly stated or fall within a reasonable range, based on the agent's review procedures, access to underlying transaction documentation and asset-level data, and application of valuation methodologies consistent with ASC 820. The independent valuation agent is not affiliated with the manager and has no economic interest in the valuation outcome. At the end of each fiscal year, the fund's financial statements are reviewed by an independent auditor consistent with applicable law and standard industry practices.

The IPA recommends that this example conclude that a plan fiduciary who receives and reviews a representation from the fund or its trustee describing this valuation process—including the manager's valuation methodologies and committee oversight, the engagement and procedures of the independent valuation agent providing positive assurance, and the annual independent audit—and determines, after an objective, thorough, and analytical evaluation (independently or with the assistance of a qualified investment professional), that the valuation methodology is adequate to ensure that the designated investment alternative is capable of being timely and accurately valued, would satisfy the consideration and determination requirements of paragraph (j) of the Proposed Regulation and section 404(a)(1)(B) of ERISA.

This conclusion reflects the principle that the use of positive assurance from an independent valuation agent is an efficient and well-established form of independent verification that is increasingly used among institutional-quality alternative investment funds. The positive assurance approach enhances the integrity of the valuation process by subjecting manager-determined valuations to independent scrutiny without requiring the valuation agent to duplicate the manager's work or to reconstruct each valuation from underlying inputs. The approach is also consistent with the Securities and Exchange Commission's framework under Rule 2a-5 of the Investment Company Act of 1940, which permits a registered fund's investment adviser to serve as the fund's "valuation designee" responsible for fair value determinations, subject to appropriate board oversight and conflict-mitigation measures. Recognizing positive assurance as a valid valuation approach under paragraph (j) would also be consistent with the Department's general design of permitting fiduciaries to rely on representations from qualified intermediaries and would replace an unattainable zero-conflict standard with a workable framework that reflects actual industry best practice.

These four scenarios, taken together, would provide important additional guidance to plan fiduciaries evaluating the valuation methodologies of designated investment alternatives that hold private market assets. The scenarios address common industry practices that are consistent with both ASC 820 and the principles articulated in the Proposed Regulation, and they would reduce uncertainty for fiduciaries and investment managers alike.

The IPA also notes that ASC 820 compliance, while widely used in registered fund and many alternative fund contexts, is not the only valuation framework consistent with prudent fiduciary practice. Outside the Investment Company Act context, it is common for funds to publish non-GAAP trading NAVs that make appropriate adjustments for organizational and offering expenses, certain tax liabilities, accrued performance fees, or other items that, if reflected on a strict GAAP basis, would produce a NAV that does not fairly reflect the economic interests of subscribing and redeeming investors. These adjustments are well-established, transparent, and disclosed to investors in the fund's offering documents. As new asset classes and investment structures continue to evolve, additional valuation approaches may emerge that are not yet standard but that may be appropriate for the strategies they support. The IPA respectfully requests that the final regulation confirm that the valuation factor is satisfied where the fund's valuation methodology is reasonable, understood, applied consistently, and subject to appropriate oversight and independent audit or review.

VI. The Department Should Clarify That the Safe Harbor Does Not Shift the Burden of Proof to Plan Fiduciaries

The IPA strongly supports the Proposed Regulation's goal of reducing litigation risk that constrains fiduciaries from applying their best judgment in offering investment opportunities to plan participants and beneficiaries. However, we are concerned that, absent clarification, the safe harbor framework could inadvertently increase litigation rather than reduce it. **Specifically, the IPA urges the Department to clarify in the final regulation and the accompanying preamble that the safe harbor does not shift the burden at the motion to dismiss stage from the plaintiff to the defendant fiduciary**.

As the Department correctly recognizes in the Proposed Regulation, the Supreme Court's default rules apply in actions alleging a breach of fiduciary duty: plaintiffs bear the burden of proof and persuasion on the elements of their claim.[11] This includes the burden of pleading facts sufficient to state a plausible claim that the fiduciary failed to follow a prudent process. **The Department has also correctly observed that the meaningful benchmark standard, as endorsed by the Ninth Circuit in Anderson v. Intel Corp., requires a plaintiff asserting fiduciary imprudence based on an investment's relative underperformance to identify a meaningful comparator—not merely allege that the challenged investment underperformed an inapposite benchmark**.[12]

[11] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 58 (2005); *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 137 F.4th 1015, 1022 (9th Cir. 2025), *cert. granted*, No. 25-498 (U.S. Jan. 16, 2026); 91 Fed. Reg. at 16,092.
[12] *Anderson v. Intel Corp. Inv. Pol'y Comm.*, 137 F.4th at 1022.

That said, the IPA is concerned that absent clarification, the safe harbor could be used offensively at the pleading stage. A plaintiff who alleges only that the defendant fiduciary failed to satisfy one or more safe harbor elements—without pleading specific facts demonstrating a breach—could attempt to survive a motion to dismiss on the strength of the safe harbor itself, effectively shifting the burden to the fiduciary to prove compliance at the outset of litigation. The benchmarking element illustrates the risk: a complaint that alleges only noncompliance with the safe harbor's benchmarking factor would evade the meaningful benchmark standard at the pleading stage, lowering the threshold the Department has endorsed and undermining the very litigation-reducing objective the Proposed Regulation is designed to advance.

The same concern applies to each of the six enumerated factors. If the safe harbor becomes a plaintiff's checklist—allowing a complaint to survive a motion to dismiss solely by alleging that the fiduciary did not adequately consider one or more safe harbor elements—the framework the Department designed to protect prudent fiduciaries will instead become a roadmap for plaintiffs' counsel, chilling the very consideration of portfolio-diversifying investments that Executive Order 14330 seeks to encourage.

Accordingly, the IPA respectfully requests that the Department include clear language in the final regulation and preamble explaining the Department's intent and understanding that: (i) the safe harbor is intended as a shield for fiduciaries, not a sword for plaintiffs; (ii) a fiduciary may demonstrate it has satisfied its duty of prudence under ERISA by other means, (iii) a plaintiff alleging a breach of the duty of prudence bears the burden of pleading specific facts sufficient to state a plausible claim, and does not satisfy that burden by merely asserting noncompliance with one or more elements of the safe harbor; and (iv) a fiduciary's demonstrated compliance with the safe harbor supports dismissal at the motion to dismiss stage.

VII. Conclusion

The IPA strongly supports the Proposed Regulation and commends the Department for its thoughtful, principles-based approach to clarifying the fiduciary duty of prudence in the context of selecting designated investment alternatives. The Proposed Regulation's confirmation that no asset class is per se imprudent, its process-based safe harbor framework, and its illustrative examples represent a meaningful step toward reducing the litigation-driven uncertainty that has discouraged plan fiduciaries from offering portfolio diversifying investments to defined contribution plan participants.

We respectfully urge the Department to include the additional performance, fee, liquidity, and valuation examples described in this letter in the final regulation and to clarify that the safe harbor does not shift the burden of proof to plan fiduciaries at the motion to dismiss stage.

These recommendations address common structures and practices in the alternative investment industry, and their adoption would enhance the utility of the safe harbor framework for plan fiduciaries evaluating the types of designated investment alternatives contemplated by Executive Order 14330.

Adopting these refinements would further the objectives of Executive Order 14330 and the Department's longstanding effort to provide plan fiduciaries with the clarity they need to consider the full opportunity set on the merits. Ultimately, the recommendations described in this letter are directed to a single end: enabling the millions of American workers whose retirement security depends on defined contribution plans to share in the diversification, downside mitigation, and long-term return potential that institutional investors and participants in defined benefit plans have long enjoyed.

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The IPA appreciates the opportunity to comment on the Proposed Regulation. Should you have any questions about our comments, please feel free to contact me or Jeff Evans, IPA's director of government affairs and policy, at jevans@ipa.com.

Sincerely,

Anya Coverman
President and CEO