

May 22, 2026

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

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

Dear Assistant Secretary Aronowitz:

We appreciate the opportunity to comment on the Department of Labor's proposed rule on designated investment alternatives. The proposal is a positive step in clarifying how plan fiduciaries can evaluate investments for their retirement plans.

By their own assessment, many Americans are unprepared for retirement. Nearly 40 percent of future retirees have little or no savings, and among those who do, three in five doubt their nest eggs will be enough.¹ About 70 percent of nonretirees are moderately or very concerned that they will not have enough money to retire comfortably.²

Private pension plans – once the backbone of retirement security – have become increasingly rare. Today, roughly 70 million Americans, or about 42% of the working population, rely on a 401(k) as their primary retirement vehicle.

Yet these plans are hampered by limitations. They largely do not offer access to private market investments. Historically, private equity, real estate, and other alternative assets have outperformed public stocks by more than 4% annually from 2003 to 2023, even after fees³. Despite this, outdated regulations make it unnecessarily difficult for 401(k) plans to include these high-performing assets.

The Department's proposed rule rightly seeks to provide employers with a framework to include these investments while meeting their fiduciary obligations under the Employee Retirement Income Security Act of 1974 (ERISA). This is a welcome step. However, as written, the rule does not go far enough to give plan sponsors the confidence they need to act. For too long, the threat of litigation has discouraged employers from offering private market options, limiting access to investments that have long benefited institutional investors and the wealthy.

¹ <https://www.pewresearch.org/social-trends/2025/11/06/how-americans-are-feeling-about-their-finances-as-they-age/>

² <https://news.gallup.com/poll/709319/nonretirees-worry-remains-high.aspx>.

³ <https://cliffwater.com/ResourceArticle/longterm-private-equity-performance-20002024?docId=26043#:~:text=The%20Cliffwater%20Private%20Equity%20Index,by%20investing%20in%20public%20stocks>

The final rule must go further by providing a clear roadmap so employers and plan sponsors can offer private assets in 401(k) plans without fear of frivolous litigation. Without that clarity and protection, many sponsors will remain on the sidelines, and the rule’s promise will go unrealized. A meaningful safe harbor is essential to ensure that fiduciaries can prudently include private market exposure without facing undue legal risk.

For example, the Department should remove the requirement to comply with SEC Rule 22e-4, or a “substantially similar” program. Rule 22e-4 imposes a 15 percent cap on illiquid assets. As written, the proposed rule would impose unnecessary, onerous SEC requirements on investment structures that do not fall under the SEC’s purview (e.g., collective investment trusts)—introducing unnecessary complexity and red tape for American retirement savers. This limitation is not grounded in how portfolios are actually constructed for long-term investors. The White House Council of Economic Advisers has noted that younger workers, in particular, could benefit from allocations of up to 30 percent in private equity.⁴ Maintaining an arbitrary 15 percent cap risks constraining diversification and limiting long-term returns for the very workers the system is meant to serve.

As you know, private markets make up the vast majority of the U.S. economy and are increasingly the primary driver of economic growth. Today, 87 percent of companies with revenue greater than \$100 million are private. Their assets are projected to surpass \$18 trillion by 2027, with forecasters expecting that figure to reach \$62 trillion by 2034.^{5 6} Public pension funds already benefit from private market investments – about one-third of their \$12 trillion in assets are in private investments.

So why should the 70 million Americans who rely on 401(k)s be denied access to the same opportunities? Expanding access to private markets is ultimately about fairness, but it is also about ensuring that workers have the tools they need to build secure retirements in a changing economy.

The path forward is clear. Workers saving through a 401(k) deserve the same opportunities for growth and diversification that pension beneficiaries already enjoy. The Department should move expeditiously to finalize a rule that not only permits access to private markets but also makes it practical by establishing a clear roadmap, strengthening safe-harbor protections, and removing unnecessary constraints.

Financial insecurity is no picnic at any age, and a lack of resources in retirement can be devastating. We have an opportunity to modernize the system so that all workers, not just a select few, have a real shot at retirement security.

To that end, the Department should make a few other improvements as it develops its final rule.

Recommended Improvements to the Final Rule

- The Department should avoid imposing overly burdensome liquidity requirements that would unnecessarily expand the SEC’s authority over collective investment trusts.

⁴ <https://www.whitehouse.gov/wp-content/uploads/2026/04/ERP-2026-12.-Unlocking-Retail-Access-to-Private-Equity-Investments-through-Defined-Contribution-Plans.pdf>.

⁵ <https://www.spglobal.com/en/research-insights/market-insights/private-markets>

⁶ <https://www.bain.com/insights/avoiding-wipeout-how-to-ride-the-wave-of-private-markets/>

- The final rule should recognize that a fully “conflict-free and independent” valuation process, as contemplated in the proposal, is not feasible for certain investments.
- The final rule should clarify that fiduciaries need only satisfy the listed factors when applicable, and that those factors should not be treated as non-exhaustive in a way that creates additional uncertainty.
- The Department should not rigidly require fiduciaries to consult investment advice fiduciaries in all cases to satisfy ERISA; instead, fiduciaries should retain case-by-case flexibility to determine when such consultation is appropriate.
- The final rule should make clear that the examples provided for each factor are illustrative only and do not foreclose otherwise prudent investment options or structures.
- The Department should also initiate a subsequent notice-and-comment rulemaking to amend Prohibited Transaction Exemption (PTE) 77-4 so that fiduciaries may offer affiliated investments in closed-end funds and private funds in employer-sponsored plans. This would remove red tape that currently exists. As PTE 77-4 currently stands, it permits investment only in the affiliated assets of open-end mutual funds and ETFs.

We appreciate the opportunity to comment on this proposed rule. Please don't hesitate to reach out if you have questions or need any additional information.

Sincerely,

Gerard Scimeca
Chairman and General Counsel
Consumer Action for a Strong Economy