american securities association
America's Voice for Main Street's Investors

June 1, 2026

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

Re: Comments on Proposed Rule, Fiduciary Duties in Selecting Designated Investment Alternatives, 91 FR 16088 (March 31, 2026) (RIN 1210-AC38)

Dear Assistant Secretary Aronowitz:

The American Securities Association[1] (ASA) submits these comments on the Department of Labor's proposed regulation, *Fiduciary Duties in Selecting Designated Investment Alternatives*, 91 FR 16088 (March 31, 2026) (the "Proposed Rule"). The Proposed Rule would clarify a fiduciary's duty of prudence under the Employee Retirement Income Security Act of 1974 ("ERISA") in connection with the selection of designated investment alternatives for participant-directed defined contribution plans, including asset allocation funds incorporating exposure to alternative assets. It establishes a six-factor, process-based safe harbor that creates a rebuttable presumption of prudence under ERISA section 404(a)(1)(B).

ASA member firms include broker-dealers, registered investment advisers, and dually registered firms that collectively serve millions of American retail and institutional investors, including participants in employer-sponsored defined contribution plans. ASA members routinely function as investment advisers and service providers to retirement plans of all sizes, recommending and distributing investment products — including an expanding range of alternatives through plan platforms and individual retirement accounts. The Proposed Rule directly implicates those activities.

ASA supports the Proposed Rule. Prudence under ERISA has always turned on the quality of the fiduciary decision-making process, not on whether a particular investment involves traditional or nontraditional assets.[2] The Proposal appropriately codifies that principle in a workable safe harbor. Our comments are directed at strengthening that framework, clarifying the fee and

[1] ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.
[2] ERISA Fiduciary Advisor https://webapps.dol.gov/elaws/ebsa/fiduciary/q4b.htm

American Securities Association
1455 Pennsylvania Ave. NW, Suite 400
Washington, D.C. 20004
AmericanSecurities.org
@amersecurities
202.621.1784

liquidity standards in the broker-dealer and advisory context, and addressing several issues requiring additional guidance.

I. <u>Asset-Neutral, Process-Based Framework</u>.

ASA supports the Department's three foundational principles: ERISA is a process-based law; plan fiduciaries have maximum discretion in selecting designated investment alternatives; and when a fiduciary follows a prudent process, courts should defer to the fiduciary's judgment under a presumption of prudence.[2] These principles are rooted in decades of ERISA jurisprudence and sound retirement policy.

The proposed six-factor safe harbor — requiring objective, thorough, and analytical consideration of performance, fees, liquidity, valuation, benchmarks, and complexity before selecting an investment option — accurately capture the relevant dimensions of fiduciary analysis across asset classes. ASA agrees that this framework provides practical guidance for plan sponsors, investment committees, and the financial professionals who advise them.

The Proposal's explicit statement that ERISA neither requires, nor restricts any type of designated investment alternative reflects the only approach consistent with ERISA's statutory text and decades of departmental guidance. The final rule should make clear that a fiduciary who prudently selects a plain vanilla index fund is entitled to the same presumption of prudence as a fiduciary who prudently selects a more complex alternative investment. The standard is process and participant benefit — not the outcome.

ASA understands the Department intends to issue separate guidance on ongoing monitoring obligations. We encourage that guidance to be issued promptly so that fiduciaries and their advisers have a complete picture of the process standard.

II. <u>Strengthening the Presumption of Prudence: Pleading-Stage Effect and the Skidmore Framework</u>.

The Proposed Rule states that safe harbor compliance creates a "rebuttable presumption" of prudence. ASA supports this approach but urges the Department to use the preamble to address, with specificity, how safe harbor compliance interacts with fiduciary breach litigation — an area of ongoing uncertainty that directly affects whether plan sponsors and advisers feel confident expanding investment menus to include alternatives.

Specifically, the preamble should state *unambiguously* that a plaintiff challenging a fiduciary decision made in compliance with the safe harbor bears a heightened burden to overcome the presumption of prudence, and that a complaint failing to plead specific facts sufficient to rebut that presumption should be dismissed at the motion to dismiss stage of litigation.

A presumption that attaches only at summary judgment or trial provides little deterrence against meritless litigation. Plan sponsors and advisers will continue to treat alternative investment menus as litigation exposure regardless of safe harbor compliance if the pleading burden is not addressed.

The appropriate vehicle for this guidance is a well-reasoned detailed preamble statement that federal courts apply under the *Skidmore* framework.[3] Under *Skidmore*, an agency's interpretive guidance carries persuasive authority proportional to its thoroughness, consistency, and reasoning — not the agency's mere assertion of a conclusion.[4] Following the Supreme Court's elimination of *Chevron*[5] deference in *Loper Bright Enterprises v. Raimondo*,[6] *Skidmore* is now the operative framework governing the weight courts give to agency interpretive guidance.

Its reach in ERISA litigation is real as courts have consistently deferred to thorough, deliberate, and well-supported DOL interpretive statements on questions of fiduciary duty. A preamble that merely announces a presumption will not carry that weight. The preamble must explain the standard's purpose, identify the facts a plaintiff must plead to overcome it, and articulate the policy rationale for pleading-stage dismissal.

To maximize persuasive authority under Skidmore, ASA recommends that the preamble: (1) expressly state that the rebuttable presumption is intended to operate at the pleading stage; (2) identify what a plaintiff must plead to overcome it — for example, that the fiduciary failed in a material respect to conduct the six-factor analysis, acted in bad faith, or selected an investment no reasonable fiduciary applying the required process would have chosen; and (3) explain the policy rationale, including the deterrent effect of early dismissal on plan sponsor and adviser willingness to expand participant investment options.

For ASA member firms that recommend, distribute, or serve as service providers to plans incorporating alternatives, litigation risk directly affects product development, platform availability, and plan sponsor decision-making. A clearly articulated safe harbor, supported by robust preamble commentary calibrated to satisfy *Skidmore*'s requirements, can meaningfully reduce that uncertainty.

III. <u>The Fee Factor: Total-Cost Basis and Market Context</u>.

The Proposed Rule requires that a fiduciary "determine that the fees and expenses of the designated investment alternative will maximize risk-adjusted returns net of fees and expenses."

ASA supports evaluating fees as one component of a holistic net-return analysis. However, we note that "maximize" is an unusually strong standard. A fiduciary selecting a higher-fee alternative that delivers superior risk-adjusted returns may not be "maximizing" returns in the literal sense. The Department should clarify in the final rule whether "maximize" means "optimize" — i.e., achieve the best risk-adjusted outcome net of cost — rather than "minimize

[3] *Skidmore v. Swift & Co*., 323 U.S. 134 (1944)

[4] *Id*. "We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

[5] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

[6] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

fees." This distinction matters for both fiduciaries and the reviewing courts interpreting the safe harbor. In other words, the "maximize return" standard cannot only rely on reducing the fees associated with the financial products a fiduciary recommends.

ASA recommends two additional fee-related clarifications:

A. Total Cost. the final rule should confirm that the fee factor requires evaluation on a total-cost basis, encompassing all direct and indirect costs attributable to an investment option — including management fees, carried interest, fund-of-fund expenses, performance allocations, and distribution-related costs such as 12b-1 fees and revenue sharing payments. The Department should confirm in the preamble that distribution compensation arrangements common in the broker-dealer channel are encompassed within this total-cost analysis, and evaluated in the context of the value delivered to participants.

B. Best Efforts. The Department should acknowledge that the private investment market has evolved materially. Competition and product innovation have driven meaningful fee compression across strategies and structures as access to alternatives has broadened.[7] Fiduciaries and advisers should use their best efforts to assess current market pricing rather than relying on outdated assumptions about the cost of alternative investment vehicles.

IV. Liquidity and Valuation: Vehicle-Specific, Context-Sensitive Standards.

ASA supports the Department's treatment of both liquidity and valuation as contextual factors rather than categorical barriers.

On liquidity, the Proposal correctly focuses on whether a designated investment alternative "will have sufficient liquidity to meet the plan's anticipated needs at both the plan level and participant level". This correctly choses a plan-specific standard rather than a categorical daily-liquidity requirement.

On valuation, the Proposal correctly requires that a fiduciary determine the alternative "has adopted adequate measures to ensure that it is being timely and accurately valued through an independent and conflict-free process."

For broker-dealers and investment advisers distributing these products, both standards carry direct practical implications: firms must assess and communicate liquidity and valuation in a manner consistent with their obligations under ERISA and applicable securities law.

ASA recommends two clarifications applicable to both factors:

A. Assessment. When private asset exposure is delivered through diversified vehicles — including target date structures, collective investment trusts, or multi-asset funds with

[7] Expanding Opportunities for U.S. Investors and Retirees: Private Markets. Committee on Capital Markets Regulation (August 2025) https://capmktsreg.org/wp-content/uploads/2025/08/CCMR-Expanding-Access-to-Private-Markets-08.07.25-Final.pdf

integrated liquidity management features — the fiduciary's analysis should assess the vehicle as a whole, and not be required to focus on the liquidity or valuation characteristics of underlying holdings in isolation. The final rule should make this explicit.

B. Valuation. The Department should confirm in the preamble that rigorous, independent valuation processes — such as review by independent auditors — can satisfy the valuation standard in a long-term retirement context. The key inquiry should focus on whether the valuation process is independent, systematic, and transparent — not on whether values are calculated daily.

V. Additional Recommendations.

A. Regulatory Coordination. The Proposed Rule does not address the securities law requirements applicable to offering alternative investments in defined contribution plans. ASA strongly encourages the Department to coordinate with the SEC and FINRA to ensure a workable regulatory pathway across ERISA, Regulation Best Interest,[8] and applicable FINRA rules.[9] Member firms operating under those frameworks need a harmonized approach that avoids conflicting or duplicative obligations.

B. Monitoring. The safe harbor addresses initial selection. ASA urges the Department to issue guidance confirming that the same six factors govern ongoing monitoring, and that fiduciaries are not required to evaluate alternative investments more frequently than is appropriate given the nature, structure, and profile of the investment.

C. Participant Disclosure. As plan menus grow more complex, disclosure becomes increasingly important. ASA recommends that the Department develop disclosure standards for alternative investment options that are (i) clear and accessible to the participant population being served, (ii) consistent with existing FINRA and SEC disclosure frameworks, and (iii) proportionate — i.e. disclosures should not become so extensive they become unreadable or so abbreviated that they fail to convey material risk and liquidity characteristics.

D. Participant Characteristics as Embedded, Not Standalone. The Department has solicited comment on whether participant characteristics should be added as a standalone safe harbor factor. ASA recommends against this approach. Participant characteristics are relevant to fiduciary analysis, but they are most appropriately considered within the existing six-factor framework — not as a separate, freestanding requirement that could be read to impose an additional obligation before the presumption of prudence attaches.

E. Third-Party Professionals. The final rule should clarify that engaging a qualified investment professional is not itself a prerequisite to satisfying the safe harbor. A sophisticated plan fiduciary with significant investment experience may conduct the required

[8] Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 34-86031, 84 Fed. Reg. 33318 (July 12, 2019), codified at 17 C.F.R. § 240.15l-1 (compliance date June 30, 2020).
[9] FINRA Rules 2111, 2310, 2320, 2341, 5110 https://www.finra.org/sites/default/files/2020-06/Regulatory-Notice-20-18.pdf

analysis without retaining outside assistance. The safe harbor should be evaluated based on the quality and rigor of the fiduciary's actual process.

VI. Conclusion.

The Proposed Rule is a meaningful step toward a rational, process-centered ERISA fiduciary framework. By confirming ERISA's asset-neutral posture, establishing a clear six-factor safe harbor, and tying fiduciary protection to prudent process rather than investment outcomes, it can reduce the litigation-driven deterrence that has historically constrained participant investment choices — without sacrificing the core protections ERISA was enacted to provide.

For ASA's member firms, a clear, workable, and harmonized regulatory framework is essential to delivering meaningful choice and sound advice. We look forward to continued engagement with the Department and stand ready to provide any additional information that would be helpful as the Department works toward a final rule.

Respectfully submitted,

Christopher A. Iacovella

Christopher A. Iacovella
President and CEO
American Securities Association