May 19, 2026

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

Re: Comments on Proposed Rule — Fiduciary Duties in Selecting Designated Investment Alternatives (RIN 1210–AC25; Docket No. EBSA–2026–0166)

On behalf of the Consumer Choice Center, a nonpartisan consumer advocacy organization representing consumers across all 50 states, I submit these comments in support of the Department of Labor's proposed rule establishing a process-based safe harbor for plan fiduciaries selecting designated investment alternatives in participant-directed defined contribution plans.

The Consumer Choice Center has long argued that the most powerful tool ordinary Americans have to fund their retirement, whether Social Security is there for them or not, is the suite of tax-advantaged accounts at their disposal: 401(k)s, IRAs, HSAs, 403(b)s, and the like.

But the consumer experience inside those accounts is stuck in a 20th-century mold. Workers can deposit their paychecks, but the assets they're allowed to hold, the platforms they can use, and the strategies they can pursue are boxed in by a mix of plan-sponsor anxiety, regulatory fog, and the ever-present threat of frivolous ERISA litigation.

This proposed rule is a serious step toward fixing that, and we urge the Department to finalize it, with the targeted improvements laid out below.

The Case for Choice in Retirement Investing

Younger Americans, especially millennials and Gen Z, are the workers whose contributions will compound over the longest horizons and who therefore have the most to lose from a stunted opportunity set. They aren't asking for less from their retirement plans. They're asking for considerably more.

They want access to new IPO listings on the day they price, not months later through the rear-view mirror of a target-date fund. They want platforms like Robinhood and SoFi Bank that have democratized participation in markets once gated by white-shoe brokerages. They want exposure to private equity, infrastructure, real estate, and secondaries, asset classes their parents could never touch through an employer plan. They want fintech advisory tools like Pontera, Yodlee, and AI-driven robo-advisors to manage held-away accounts with a level of granularity prior generations never had.

The White House Council of Economic Advisers has acknowledged that younger workers, given their long time horizons, could benefit from private-equity exposure of up to 30% of plan assets. Yet today, the average 401(k) menu offers a handful of plain-vanilla mutual funds, an employer-stock option, and a target-date glide-path that liquidates into bonds well before most participants will actually need the money. That isn't retirement security. That's a one-size-fits-none captive menu, and workers are right to be frustrated with it.

The Department's proposed safe harbor wouldn't force any plan fiduciary to offer alternative assets, nor would it pressure any participant to invest in them. What it would do is lift the cloud of litigation risk that has pushed fiduciaries toward the narrowest possible universe of options.

As the Department itself documents, ERISA class-action filings hit "all-time highs" in 2024, and more than half of plans with $1 billion or more in assets have been targeted by at least one such suit since 2016. That's a chilling effect on innovation, and the result is a regime in which the plaintiff bar, not the participant, ends up driving plan design. The workers who pay for it are the ones whose menus were quietly narrowed in anticipation of the lawsuit, not after it.

Strong Support for the Asset-Neutral Framework

The Consumer Choice Center commends the Department for grounding the safe harbor in an asset-neutral process. The six-factor framework (fees, performance, liquidity, valuation, performance benchmark, and complexity) gives fiduciaries a clear, objective methodology to discharge their duty of prudence under ERISA without picking winners and losers among asset

classes. That's consistent with the statutory text and with decades of case law holding that ERISA prescribes a process, not a particular outcome.

We're glad to see the rule define "designated investment alternatives" broadly enough to cover virtually any vehicle a plan might wish to offer, including target-date funds, collective investment trusts (CITs), and funds that hold private-market exposure. Drawing the line anywhere else would just reproduce the current problem in a new spot.

Where the Rule Can Be Improved

While we strongly support the proposal's overall direction, three provisions would benefit from refinement before the rule is finalized:

- The 15% liquidity cap is the wrong tool for CITs. The proposed Liquidity factor would, in effect, import the cap on illiquid investments from SEC Rule 22e-4 (15% of net assets) into the universe of collective investment trusts. CITs are not mutual funds. They're regulated by the Office of the Comptroller of the Currency (OCC), not the Securities and Exchange Commission (SEC), and they have no equivalent statutory cap precisely because their participant base and operational structure are different. Importing an SEC liquidity rule into OCC-regulated vehicles is a net increase in regulation that directly undermines the rule's stated asset-neutrality.
    - Given that the most likely vehicle for delivering private-market exposure to 401(k) participants is a CIT-based target-date fund, not a mutual fund, this provision risks hamstringing the very innovation the rule is meant to enable. We urge the Department to strike the 15% cap from the final rule.

- The "substantially similar" standard is undefined and invites the litigation it's meant to prevent. The proposed rule requires fiduciaries to either replicate an SEC Rule 22e-4 liquidity-risk-management program exactly or implement one that is "substantially similar." That term is nowhere defined. Plan fiduciaries looking for the legal certainty the safe harbor promises will have no way to know in advance whether their program qualifies. The likely outcome is either over-compliance, with

fiduciaries copying the SEC framework verbatim and inheriting all of its costs, or under-compliance and a fresh round of class-action filings.
    - Either way, plan participants lose. The Department should spell out concretely what "substantially similar" means, or strike the standard altogether and deliver the legal clarity the safe harbor was designed to provide.

- The "conflict-free, independent" valuation standard is too prescriptive. We support the use of FASB Accounting Standards Codification 820 as the valuation framework for private assets. ASC 820 is widely understood, broadly adopted, and produces auditable results. But the additional requirement that valuations be conducted through a "conflict-free, independent process" is impossible to satisfy in any literal sense.
    - Any credible valuation of a private asset relies, at some point, on non-public information from the underlying asset manager. There's no truly independent shadow-valuation universe for most private investments. As written, this language risks becoming a back-door mechanism for excluding entire categories of alternative assets from 401(k) menus, exactly the kind of asset-class discrimination the Department has rightly disclaimed. We urge the Department to rely on ASC 820 and standard auditor-attestation practice rather than impose a novel and undefined "conflict-free" overlay.

Conclusion

For decades, Americans have been told their 401(k) is "their" retirement. The reality has been a lot more constrained than that. This rule, properly refined, can begin to close that gap. It would give plan fiduciaries the legal clarity they need to offer broader menus, and it would give participants, especially younger workers, the genuine ownership of their retirement the system was always supposed to provide.

The Consumer Choice Center thanks the Department for advancing this proposal and stands ready to assist as the rule is finalized.

Thank you for your time and consideration on this matter.

Respectfully submitted,

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