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

May 30, 2026

**Re: RIN 1210-AC38, Fiduciary Duties in Selecting Designated Investment Alternatives**

We appreciate the opportunity to comment on the DOL’s proposed rule, “Fiduciary Duties in Selecting Designated Investment Alternatives.” We are academics and former division directors at the U.S. Securities and Exchange Commission, specializing in securities law and finance, respectively. As proposed, this rule would, among other things, establish a safe harbor for a fiduciary’s duty of prudence under ERISA in connection with selecting designated investment alternatives, including asset allocation funds that include alternative assets.

Alternative assets include venture capital (VC), private equity (PE), hedge funds, real estate, and others. As of 2025 Q3, their aggregate gross asset value exceeded \$26 trillion.<sup>1</sup> Unlike the public markets for stocks and bonds, markets for alternative assets are opaque and illiquid. Reported valuations can be stale or potentially biased, and risks are difficult to measure. Additionally, private funds and private companies are exempt from disclosure requirements under the securities laws, based, in part, on the assumption that their investors are sophisticated enough to bargain for necessary protections and wealthy enough to absorb the losses of investments gone wrong.<sup>2</sup> These assumptions do not hold for the typical retirement saver in the United States.<sup>3</sup>

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<sup>1</sup> <https://www.sec.gov/files/investment/private-funds-statistics-2025-q3.pdf>.

<sup>2</sup> SEC, “Review of the ‘Accredited Investor’ Definition Under the Dodd-Frank Act, 13 (December 14, 2023), <https://www.sec.gov/files/review-definition-accredited-investor-2023.pdf>; SEC, Regulation D Revisions; Exemption for Certain Employee Benefit Plans, Release No. 33-6683 (Jan. 16, 1987) [52 FR 3015 (Jan. 30, 1987)] at 3017.

<sup>3</sup> Fidelity reports that as of March 31, 2026, the average 401(k) account balance was \$141,000. <https://about.fidelity.com/data-and-insights/q1-2026-retirement-analysis>.

Opening retirement savings to more alternative assets while providing a liability shield for fund fiduciaries, as proposed, would expose millions of working families to significant risks. We highlight three of these risks below:

The first risk is that alternative assets have not demonstrated consistently superior returns on a risk-adjusted basis, compared to the more transparent and liquid public market, according to research from academia and industry.<sup>4</sup> The after-fee, risk adjusted-returns of venture capital funds are comparable to or worse than those of the public stock market. Buyout funds had more consistent returns that resemble value investment, but they have been struggling in the last five years, a challenge shared by the alternative asset industry broadly. Real estate funds have not provided meaningful excess returns relative to the public markets. Given the lack of clear evidence for consistently superior risk-adjusted returns over a long horizon, alternative assets are not appropriate investments for most retirement savers and should remain in the domain of expert institutional investors who are equipped to take calculated risks. The relatively weak performance of the most recent vintages of this asset class makes it particularly treacherous for 401(k) holders to wade into alternative assets at this moment.

The second significant risk the proposed rule would pose to retirement savers is adverse selection. There is a wide dispersion of performance among alternative assets. If the average performance of this asset class can barely match the public stock market, below-average funds and deals more clearly underperform public markets. It is precisely those underperforming deals—failing startups, nonperforming private loans, and struggling buyouts—that are most likely to be re-packaged and sold to retirement savers. Because alternative assets are opaque, retirement savers and their advisors will not likely have the requisite information to distinguish gems from lemons. In the public market, this lemons problem can be mitigated by purchasing shares in a broad stock index fund, thereby gaining exposure to all companies in the index. In the alternative asset space, however, individual 401(k) investors may end up holding the bag for lackluster or failing deals.

The third risk retirement savers will face if the proposed rule is adopted is the illiquidity of alternative assets. The long investment horizon of 401(k) investors does not negate

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<sup>4</sup> See, for example, Arthur Korteweg, 2019, Risk Adjustment in Private Equity Returns, Annual Review of Financial Economics, <https://www.annualreviews.org/content/journals/10.1146/annurev-financial-110118-123057>; Gregory Brown, Christian Lundblad, and William Volckmann, 2025, Risk-Adjusted Performance of Private Funds: What Do We Know? <https://uncipc.org/wp-content/uploads/2025/03/Private-Risk-Adjusted-Returns-1.pdf>; Michael Cembalest, 2025, JP Morgan Biennial Alternative Investments Review, <https://assets.jpmprivatebank.com/content/dam/jpm-pb-aem/global/en/documents/eotm/the-deep-end.pdf>; Caryn Slotsky, Drew Carneal, and Wyatt Yasinski, 2026, Cambridge Associates US PE/VC Benchmark Commentary: First Half 2025, <https://www.cambridgeassociates.com/insight/us-pe-vc-benchmark-commentary-first-half-2025/>.

their need for liquidity and ready access to their funds. Workers change their investment options, rollover investments to new employers or IRAs, and sometimes make withdrawals in cases of economic hardship, such as a job loss, medical bills, or other economic challenges.<sup>5</sup> In particular, early withdrawals of 401(k) money are more likely during economic downturns, a time when illiquid assets are difficult to sell without a material discount.<sup>6</sup> In other words, 401(k) investors could suffer from a material “fire sale” loss when they need their money the most.

In sum, while alternative assets have grown significantly in the last 20 years, the market remains too opaque and illiquid to serve as an appropriate investment option for most individual investors and retirement savers. This asset class has not consistently outperformed the public stock market over a long horizon, and the most recent vintages have demonstrably underperformed. Aggressive marketing of alternative assets to retirement savers, with the express or tacit endorsement of the DOL safe harbor, would likely result in a material wealth transfer from retirement savers to institutional investors who wish to exit.

Sincerely,

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<sup>5</sup> Board of Governors of the Federal Reserve System, 2024, Economic Well-Being of US Households in 2023, <https://www.federalreserve.gov/publications/files/2023-report-economic-well-being-us-households-202405.pdf> (reporting that 10% of retirement savers surveyed had made withdrawals from their tax deferred retirement savings in the past 12 months).

<sup>6</sup> Anne Tergesen, Record Number of Workers are Raiding Their 401(k)s, Wall Street Journal, March 4 2026, <https://www.wsj.com/personal-finance/retirement/record-numbers-of-workers-are-raiding-their-401-k-savings-bc89d5c3>; Jessica Dickler, More Workers are Raiding their 401(k)s as average balances fall, Fidelity Says. CNBC, May 28, 2026, <https://www.cnbc.com/2026/05/28/fidelity-average-401k-balances-g1-2026.html> (quoting Fidelity report showing an increase in withdrawals related to economic and market stress associated with the Iran war).