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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

Re: Request for Comments on Proposed Rule — "Fiduciary Duties in Selecting Designated Investment Alternatives" (RIN 1210-AC38)

Dear Assistant Secretary,

Employee Fiduciary, LLC is a low-cost 401(k) plan provider serving more than 5,000 small businesses across the United States. Our mission has been to act as a genuine fiduciary to plan participants as well as plan sponsors. We submit these comments in that spirit, in response to the Department of Labor's proposed rule, "Fiduciary Duties in Selecting Designated Investment Alternatives" (RIN 1210-AC38), published March 30, 2026.

We support the rule's core objective: giving plan fiduciaries a clear, documented framework for prudent investment selection. The six-factor test removes the ambiguity long surrounding ERISA's "prudent expert" standard. The process-based safe harbor encourages investment decisions based on financial merit rather than litigation avoidance. But these improvements to the fiduciary framework must be accompanied by stronger access, disclosure, and transparency standards to meaningfully protect employees.

We urge the Department to strengthen three aspects of the proposed rule before finalization. In its current form, the rule's safe harbor rests on a broken fee disclosure framework for collective investment trusts holding private market assets, extends asset-neutral treatment to cryptocurrency without any participant protections, and creates robust legal protections for fiduciaries without corresponding transparency for participants. Each of these gaps undermines the rule's participant-protection potential and should be addressed in the final rule.

I. The Six-Factor Framework and Safe Harbor Are Sound — and Should Be Preserved

The six-factor test — performance, fees, liquidity, valuation, benchmarking, and complexity — provides plan fiduciaries with a structured, financially-grounded checklist that can be applied consistently across all investment decisions. We particularly support:

The fee scrutiny standard. The rule's explicit identification of selecting a higher-cost share class when a cheaper, identical class is available as a process flaw directly addresses one of the most common and participant-damaging patterns in plan administration. Excessive fee lawsuits have surged in recent years and clear process standards of the kind the rule establishes are the most effective deterrent.

The asset-neutral stance — and an underappreciated outcome the Department may not have anticipated. No investment type should be categorically permitted or prohibited, and we support that principle. We also want to highlight an outcome of the rule that may not have been its primary intention but that we consider genuinely valuable: the six-factor framework, rigorously applied, makes an exceptionally strong case for well-constructed passive investment menus. Research from Morningstar's Active/Passive Barometer[1] and S&P's SPIVA Scorecard[2] consistently demonstrates that low-cost index funds outperform the majority of actively managed peers on a net-of-fees basis over the long term. A plan sponsor who documents that analysis under the six-factor framework will find the passive case easier to make than ever — not harder. In a regulatory environment often criticized for favoring complexity, this is a welcome and participant-friendly result.

The safe harbor structure — with an important caveat. The process-based safe harbor is designed to reward genuine, documented investment analysis. Prior to this rule, many plan sponsors responded to the surge in excessive fee litigation by defaulting to the narrowest, most conventional investment menus they could defend — not because those menus were necessarily optimal for participants, but because any deviation from convention invited legal exposure. The safe harbor, in principle, should allow sponsors to make more thoughtful investment decisions by giving them documented legal protection when they do.

We support this intent. However, we are concerned that in practice, the safe harbor's factor-specific protection will generate a market for canned compliance checklists — pre-packaged documentation templates that satisfy the letter of each factor without requiring genuine analysis. If investment advisers and recordkeepers market the safe harbor as a compliance exercise rather than a fiduciary one, the result will be checkbox compliance that protects sponsors legally while delivering little improvement in participant outcomes. We urge the Department to include in the final rule explicit guidance that boilerplate or templated documentation does not satisfy the safe harbor's requirement for objective, thorough, and analytical evaluation — and the quality and specificity of documentation, not merely its existence, will determine whether protection attaches.

II. Fee Transparency for CITs Holding Private Market Assets Must Be Resolved Before Finalization

Our most significant concern with the proposed rule is that its fee comparison requirements cannot be meaningfully satisfied under current collective investment trust (CIT) disclosure standards.

The rule's six-factor test explicitly covers CITs as designated investment alternatives — and given their rapidly growing use as wrappers for private market and alternative investments in 401(k) plans, that's significant. Unlike mutual funds, CITs are exempt from SEC registration under the Investment Company Act of 1940, which makes them cheaper to administer — but also means they are not subject to the same fee disclosure standards as registered mutual funds. That cost advantage has made CITs increasingly attractive to plan sponsors, but the fee disclosure gap it creates is a problem the proposed rule does nothing to resolve.

The rule requires fiduciaries to evaluate fees across "a reasonable number of similar alternatives" and determine that fees are appropriate relative to risk-adjusted expected returns and other value delivered. This is the right standard. But as Morningstar's Jack Shannon has documented,[3] consistent fee disclosure remains a serious problem for semi-liquid funds holding private market investments — and the growing use of CITs in 401(k) plans makes it worse. Because their sponsoring trustees are regulated by state or federal banking authorities rather than the SEC, and their use in retirement plans is governed by ERISA, neither framework imposes the same fee disclosure standards as registered mutual funds. Three specific gaps require resolution:

- **Carried interest.** It is currently unclear whether CITs holding private market funds that charge performance fees must include those costs in the total net expense ratio shown to participants and plan sponsors. Without this requirement, the true cost of private market exposure in a CIT wrapper is systematically understated.
- **Cost of leverage.** Mutual funds and ETFs are required to include the cost of leverage in their prospectus and annual report expense ratios — a material expense for private credit, real estate, and infrastructure funds. There is no equivalent requirement for CITs. The proposed rule does not address this gap.
- **Acquired fund fees.** How either of the above costs flows through as acquired fund fees in CIT structures remains an open question. Until it is resolved, plan sponsors conducting fee comparisons between registered funds and CIT vehicles will be comparing apples to oranges, potentially in good faith, without knowing it.

We urge the Department to include in the final rule explicit fee disclosure requirements for CITs holding private market assets, including carried interest, leverage costs, and acquired fund fees, expressed in both percentage and dollar terms. Without these requirements, the safe harbor's fee factor cannot be meaningfully satisfied for private market CIT investments, and plan sponsors will lack the information they need to make the comparisons the rule requires.

III. The Rule's Asset-Neutral Treatment of Cryptocurrency Requires Meaningful Participant Protections — Not Just Disclosure

The proposed rule's asset-neutral stance reverses prior Department guidance that specifically warned plan sponsors against cryptocurrency exposure in retirement plans. We respectfully submit the prior caution was warranted and the proposed rule, as written, does not adequately protect participants from the risks of digital asset exposure in their retirement accounts.

Cryptocurrency is extraordinarily volatile, has no cash flows to justify valuation, has a demonstrated history of fraud and market manipulation, and has no meaningful track record in retirement plan contexts. The rule's valuation and benchmarking factors, applied rigorously, should screen out the worst options — but we have little confidence that rigor will prevail in practice. Independence requirements are easily satisfied on paper by sophisticated financial industry participants. Custom benchmarks can be constructed to favor almost any asset class. Disclosure requirements, while necessary, are insufficient on their own: a participant who receives a disclosure they don't fully understand has not been protected.

We urge the Department to move beyond disclosure and adopt the following substantive protections in the final rule for any plan that includes digital assets:

- **A participant opt-in requirement.** No participant should be defaulted into or passively exposed to digital asset investments. Crypto exposure should require an affirmative, informed election by each participant, separate from their general investment elections.
- **A suitability standard modeled on existing blue sky law qualifications.** The Department should consider whether participants who wish to invest in digital assets through their 401(k) plan should be required to meet suitability criteria analogous to accredited investor standards — recognizing that retirement savings represent many participants' primary or sole source of financial security, and that crypto's risk profile is categorically different from conventional retirement plan investments.
- **Enhanced valuation requirements** specifying that digital asset valuations must be conducted by independent third parties with no financial relationship to the digital asset manager, at a frequency no less than daily.
- **A meaningful benchmark standard** clarifying that a custom composite benchmark constructed by an adviser with a financial relationship to the digital asset manager does not satisfy the rule's benchmarking requirement.

These protections are consistent with the rule's asset-neutral framework — they do not categorically prohibit digital assets — but they ensure the safe harbor cannot be used to expose participants to highly speculative investments without their knowledge, informed consent, and a meaningful determination that such investments are appropriate for them.

IV. The Rule Should Create Corresponding Transparency Obligations for Participants

The proposed rule creates meaningful new protections for plan fiduciaries who follow the six-factor process. It creates no corresponding new rights or information for participants. We believe this asymmetry is the rule's most significant structural limitation.

Under the rule as proposed, a participant has no way to know whether their plan's fiduciary applied the six-factor test rigorously or superficially, whether the benchmarks used were meaningful or constructed to favor a preferred investment, or whether fee comparisons reflected the true all-in cost of CIT vehicles. Participants remain entirely dependent on their fiduciaries' good faith or plaintiffs' attorneys' willingness to take cases — and the safe harbor makes the latter less likely.

We urge the Department to include in the final rule the following participant-facing transparency requirements:

- **A plain-language annual summary**, provided to each participant, identifying each investment option on the plan menu, the benchmark used to evaluate it, its net-of-fees performance relative to that benchmark over one, three, and five years, and the total fees paid by the participant in dollar terms.
- **For plans that include private market or alternative investments**, a plain-language disclosure of the liquidity limitations that apply and the circumstances under which a participant may be unable to access their funds on a standard timeline.
- **Access to six-factor documentation upon request** — including both a plain-language summary of the fiduciary's analysis for each investment and the full underlying documentation. A plain-language summary is essential: without it, the right to request documentation replicates the existing problem of technically-available-but-practically-impenetrable fee disclosures that participants cannot meaningfully use. The summary requirement ensures the right of access translates into genuine participant understanding.

These requirements are consistent with the Department's longstanding commitment to fee transparency as a driver of better participant outcomes and would ensure the rule's safe harbor serves retirement savers — not only the fiduciaries and service providers who manage their assets.

V. Conclusion

For over 22 years, Employee Fiduciary has operated on a simple premise: that a 401(k) provider's first obligation is to advocate for plan participants, and work with plan sponsors — especially small business owners — and financial advisers to achieve the best outcomes for all working people seeking a comfortable retirement. That commitment informs every aspect of these comments.

We support the proposed rule's six-factor framework and process-based safe harbor as meaningful improvements to the regulatory landscape for 401(k) investment selection. We urge

the Department to strengthen the final rule in three ways: by closing the fee transparency gaps preventing meaningful cost comparisons for private market CIT investments, by adopting substantive participant protections — not merely disclosure requirements — for plans including digital assets, and by creating transparency obligations for participants matching the new protections created for fiduciaries.

A rule creating robust protections for plan sponsors without corresponding transparency for retirement savers is, at its core, a rule written for plan sponsors — not the participants it nominally serves. We believe the Department can achieve both objectives in the final rule, and we respectfully urge it to do so.

We appreciate the opportunity to comment and welcome any questions.

Respectfully submitted,

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Footnotes

[1] Morningstar U.S. Active/Passive Barometer, Year-End 2025: https://www.morningstar.com/business/insights/research/active-passive-barometer

[2] S&P SPIVA U.S. Scorecard, Year-End 2025: https://www.spglobal.com/spdji/en/spiva/article/spiva-us/

[3] Jack Shannon, Morningstar, "Private Investments in 401(k)s: We Still Have Questions," April 1, 2026: https://www.morningstar.com/alternative-investments/private-investments-401ks-we-still-have-questions