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

**Re: Comments on “Fiduciary Duties in Selecting Designated Investment Alternatives”
(RIN 1210-AC38)**

Dear Assistant Secretary Aronowitz:

The law firms set forth on [Appendix A](#) appreciate the opportunity to submit our comments to the Department of Labor (the “Department”) in response to the Department’s recently proposed rule (the “Proposed Rule”) that provides a safe harbor for a fiduciary’s duty of prudence under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) in connection with selecting designated investment alternatives (“DIAs”) for participant-directed individual account plans. We are a group of attorneys who routinely advise plan sponsors, investment fiduciaries, fund sponsors, financial institutions, and financial intermediaries with respect to the application of ERISA, including with respect to the application of fiduciary duties in connection with investment selection. We write from the perspective of decades of experience advising managers of underlying vehicles with alternative asset investment strategies, and other significant market participants in the defined contribution space, including plan sponsors, and managers of plan menu options.

We support and commend the Department’s tremendous efforts to develop and formulate the Proposed Rule. Our comments expressed herein do not seek to take sides on policy matters. Rather, we intend to recommend ways in which the Department could clarify certain elements of the Proposed Rule and bolster the safe harbor’s asset-neutral utility to retirement plans operated under Section 401(k) of the Internal Revenue Code of 1986, as amended (“401(k) plan” or “plan”), including plan sponsors, plan participants and the broader market participants in the 401(k) industry. Our comments endeavor to highlight potential changes and clarifications the Department should adopt in its final rule (“Final Rule”) that would provide plan fiduciaries with additional direction, largely through additional examples, as to how the safe harbor will work in practice.

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I. Key Issues

We summarize the key issues of this letter below. The order of such issues does not necessarily follow the order in which they are discussed in the body of this letter.

We urge the Department to confirm in the Final Rule the process by which fiduciaries may satisfy their ongoing obligation of prudence to monitor DIAs under the safe harbor.

- Guidance related to ongoing monitoring should be process-oriented and explain that the fiduciary may satisfy its ongoing prudence obligations by maintaining a regular internal control reporting process to identify, assess and address any material changes to a DIA's investments or plan needs that might cause the DIA to no longer meet one or more of the safe harbor factors. Such guidance should be contained in the preamble of the Final Rule, including the examples proposed herein, to facilitate plan sponsor reliance on the Final Rule upon its effective date.
- The Department should separately consider issuing a notice of Proposed Rulemaking with respect to monitoring, which would allow the Department to incorporate guidance in a subsequent rulemaking that follows the issuance of any sub-regulatory guidance.

We support additional clarifications related to the application of the proposed safe harbor for fiduciaries that will provide fiduciaries with greater certainty and predictability.

- We urge the Department to further strengthen the safe harbor consistent with trust-law principles and ERISA precedent by expressly stating that (1) based on its experience and expertise, the Department expects that satisfying the enumerated factors of the safe harbor will ordinarily establish that a fiduciary has satisfied the presumption of prudence in substantially all cases, and (2) the presumption will be rebuttable only in cases presenting rare circumstances. We also believe that guidance regarding how fiduciaries may effectively document satisfaction of the enumerated factors will prove administratively helpful, both to fiduciaries and to the judiciary, in evaluating whether a fiduciary has taken sufficient steps to avail itself of the safe harbor. We believe these clarifications will be given significant weight under the *Skidmore* doctrine.

We ask the Department to make clarifying updates that confirm that the scope of the safe harbor is limited to a fiduciary's direct diligence of the plan-level vehicle's considerations and internal processes and procedures and not any direct diligence of the underlying assets.

- The Proposed Rule sets forth an asset neutral approach to the evaluation of investment alternatives. If the demands on fiduciaries with respect to evaluating DIAs with exposure to alternative assets prove too administratively burdensome and differ from the demands with respect to traditional DIAs, or if a manager of a DIA must conduct a significant level of additional diligence on its underlying investments that it otherwise would not conduct, we believe fiduciaries will naturally favor investing in DIAs with limited or no exposure to alternative assets. This should not, however, excuse the fiduciary from understanding the principal strategies and risks of the components of the DIA and their overall impact on the investment based on the information provided to it by the DIA manager.

The “Liquidity” factor should be sufficiently flexible to allow selection of structures not subject to the Investment Company Act of 1940 (“1940 Act”) to comply with the safe harbor and the Department should clarify when a liquidity program is and is not “substantially similar” to the requirements of Rule 22e-4 under the 1940 Act.

- The examples provided that demonstrate a fiduciary has considered the liquidity needs of the plan and the characteristics of the DIA could be viewed as favoring DIA structures registered under the 1940 Act or establishing unrealistic demands on structures that are not so registered. Additionally, the Department’s alternative liquidity evaluation approaches may be viewed as too vague to provide fiduciaries the necessary concrete direction they need to rely on the safe harbor. The Department should, at a minimum, clarify that a DIA investing through a structure not registered under the 1940 Act, such as a collective investment trust (“CIT”), may implement a liquidity risk management plan that does not impose a 15% cap on illiquid assets (as required by Rule 22e-4) and still be eligible for consideration and selection as a DIA under the safe harbor.

The Department should clarify that a valuation process involving illiquid assets may meet the safe harbor “Valuation” factor even if conflicts of interest may be present, provided that such conflicts are effectively managed.

- The safe harbor should recognize, consistent with traditional guidance on conflicts of interest under ERISA, that inherent conflicts of interest will almost always exist at and below the plan level and that a fiduciary may satisfy this safe harbor factor not just by avoiding products that may have conflicts in valuing illiquid assets, but alternatively by considering mitigating factors and reasonably determining that such mitigation is sufficient to otherwise protect the interests of plan participants in maximizing their targeted risk-adjusted returns, net of fees.

The Department should clarify that a fiduciary should consider a DIA manager’s experience, expertise, and historical performance in managing retirement products as well as the DIA manager’s consideration of the experience, historical performance, and scale of the underlying asset managers whose products the DIA manager selects.

- While we agree that volatility and correlation as well as investment horizon are key ingredients in a fiduciary’s assessment (including an investment advice fiduciary) of a potential DIA, we also believe, in line with prior ERISA guidance, that a fiduciary should consider a DIA manager’s capabilities to manage a fund with exposure to alternative assets. That assessment by a fiduciary should include reviewing the materials related to a DIA manager’s evaluation of the experience, historical performance, and scale of the manager of any underlying funds in light of the nature, size and complexity of the asset class(es) being managed.

The Department should clarify that its “meaningful benchmark” requirement satisfies the “Performance Benchmark” factor by use of a “reasonable” benchmark which depends on whether a fiduciary’s benchmark selection process was reasonable.

- Imposing a definitive, open-ended standard will further expose fiduciaries to spurious litigation about whether the benchmark is, in fact, as meaningful as possible or is a best possible comparator—particularly in placing the burden on the fiduciary to show a “meaningful benchmark” rather than traditionally on the plaintiff.

The safe harbor factors should avoid implicit bias against DIAs with exposure to alternative assets by adding flexibility to the “Performance Benchmark” analysis and clarifying the “Complexity” factor.

- The proposed “Performance Benchmark” factor uses standards that are subject to second-guessing and, therefore, do not further the intended goal of the Proposed Rule. Specifically, the preamble of the Proposed Rule (the “Proposing Release”) states the benchmark must be “as meaningful as possible” and that an appropriate benchmark is one that is among the “best possible comparators.”¹ Choosing a benchmark inherently requires some level of judgment. This is all the more true for alternative assets, due to their innovative and bespoke design and/or strategies.
- The “Complexity” factor should focus on an assessment of the fiduciary’s knowledge with respect to evaluating a DIA opportunity and the factor should be renamed to “Comprehension” to avoid any suggestion that the nature of a product’s structure, including its fee architecture, on its own, could reduce a fiduciary’s ability to meet the safe harbor.

The Department should provide examples in which fiduciaries select DIAs allocating to alternative assets that meet each element of the safe harbor through the fiduciaries’ diligence of information provided to them by the DIA manager rather than relying on written representations of such DIA manager.

- Establishing a baseline of reliance on certifications may undercut the rigor of fiduciary evaluation and decision making expected of fiduciaries under ERISA. Requiring certifications from DIA managers to fiduciaries is likely to diminish the incentive for fiduciaries to produce strong records in their diligence. It will also likely make the fiduciary diligence process more difficult in comparing potential DIAs across managers given approaches to DIA manager written representations would vary. We believe many fiduciaries will choose to diligence the DIA based on extensive, well-documented information requests to the manager of the DIA. However, the Proposed Rule is not clear on the exact steps required for a diligence process to be deemed “appropriate” and therefore presumed to be prudent under the safe harbor. As a result, many fiduciaries may have challenges relying on the safe harbor. We recommend that the Department provide additional guidance through additional examples while noting that such examples are non-exhaustive.

II. Specific Comments on the Proposed Rule

§ 2550.404a-6(b) – Selecting designated investment alternatives is a fiduciary act.

A. The Department should consider the potential impact of forthcoming monitoring guidance on the effectiveness of the safe harbor.

The Department should consider how best to address the monitoring guidance (referenced in the Proposing Release) in a manner that resolves uncertainties without delaying the Final Rule. Per the Proposing Release, the Department “anticipates issuing interpretive guidance in the near term concerning fiduciary obligations under ERISA to monitor DIAs following their inclusion on

¹ 91 Fed. Reg. 16,088, 16,142 (March 31, 2026).

a plan's investment menu.”² Until such guidance is released, “the factors and processes (or substantially similar factors and processes) outlined in the proposed regulation—including the illustrative safe harbor examples—apply to this ongoing duty.”³

There are some inherent uncertainties regarding how the principles set forth in the Proposed Rule will apply with respect to ongoing monitoring. For example, the Proposed Rule relates to a one-time decision (i.e., selection) and does not address litigation risks regarding the timing and cadence of the ongoing duty to monitor. The uncertainty around how (and how often) to apply these and/or “substantially similar” processes to monitoring activities could diminish the effectiveness of the safe harbor. In addition, while the Proposed Rule emphasizes the role that an investment advisor/manager (under Sections 3(21) and 3(38) of ERISA) plays in connection with a selection decision, the Department's view relating to the role of the investment advisor/manager in connection with monitoring is less clear. One can imagine a situation where a fiduciary prudently selects an investment option in compliance with the safe harbor and engages in prudent monitoring (with or without the assistance of an investment advisor/manager), but is nonetheless subject to litigation risks because of uncertainty regarding yet-to-be-issued monitoring guidance. These risks could be viewed as heightened for investment options with allocations to alternative assets as compared to public-market investments. Investment options with exposure to alternative assets may not have directly comparable benchmarks and may also have structures, valuation considerations and liquidity programs that differ from traditional public-market investments.

Second, it would be helpful to understand whether the Department intends to address the duty to monitor through guidance in the Final Rule and/or through a separate companion regulation. The Department should include guidance on monitoring in the preamble of the Final Rule, including providing examples on how a fiduciary could satisfy the safe harbor in its monitoring obligations, and separately issue a notice of Proposed Rulemaking specific to monitoring. If the Department addresses monitoring only through other guidance, fiduciaries may face increased ongoing risks due to uncertainty around whether the guidance may be repealed in future administrations. Accordingly, we urge the Department to clarify that the safe harbor applies to a prudent monitoring process. In the Proposing Release, the Department stated that “it is the plaintiff that bears the burden of proof and persuasion” and that “a fiduciary that can actively demonstrate [] compliance with the safe harbor should be able to confidently rely on the safe harbor to defend its actions.”⁴ The benefit of the burden-of-proof provided by the safe harbor may be impacted without clear guidance regarding the process for demonstrating a prudent monitoring process.

B. A regular review of chosen investment options, using the safe harbor factors, should ordinarily satisfy the ongoing duty of monitoring.

When the Department provides guidance on the duty of monitoring, it should provide clear guidelines to fiduciaries as to how frequently the fiduciaries should review the investment options on their plan menus and what factors should be considered.

² *Id.* at 16,094.

³ *Id.*

⁴ *Id.* at 16,092.

We encourage the Department to clarify in the preamble of the Final Rule, and codify further in a subsequent rulemaking, that a fiduciary will have satisfied its duty of monitoring alternative investment options and maintaining those options on its plan menu if it considers and makes determinations on each investment with respect to each of the safe harbor factors on a regular basis as appropriate in the fiduciary's good faith judgment.

We believe that providing clarity around the review cadence and related oversight, and, specifically, clarifying that a process-based review that meets the requirements of the safe harbor will benefit plan sponsors and, ultimately plan participants and is consistent with the objective of freeing fiduciaries to utilize a wide range of DIAs. Of course, this ongoing duty to monitor goes hand-in-hand with monitoring (and subsequent actions relating to) material adverse developments.

To address the foregoing considerations, we encourage the Department to include examples similar to the following to address the uncertainties discussed above:

Example. Monitoring—

Facts: The fiduciary of a 401(k) plan prudently selected a target date fund series as a designated investment option after objectively, thoroughly, and analytically considering (and making determinations with respect to) each of the factors listed in Paragraphs (g) through (l) of this rule. This investment option includes allocations to private equity and/or other alternative assets. The fiduciary works with a third-party investment advice fiduciary (within the meaning of Section 3(21)(A)(ii) of ERISA) to consider the investment option.

The fiduciary investment committee meets quarterly (or more frequently) to discuss various matters relating to the plan's investment options (e.g., any changes to the terms of the investment option or regulatory developments relating thereto). On an annual basis, the fiduciary: (i) reviews the risk-adjusted returns of each investment option (benchmarked against reasonable comparators, which may be updated from time to time); (ii) reviews the fees/expenses of each investment option across all available classes and confirms that there have been no material changes to the fee structure utilized by each underlying investment option; (iii) confirms that there have been no material changes with respect to the liquidity needs of the plan as compared to the liquidity management of each underlying investment option; and (iv) confirms that there have been no material changes to the valuation methodology utilized by each investment option. The fiduciary does not make a renewed determination as to the "Complexity" safe harbor factor. The fiduciary documents and maintains files which include its determinations and actions taken as a result of the foregoing review.

Analysis: The fiduciary considered and made determinations with respect to the safe harbor factors set forth in this rule. Because the fiduciary already made a determination regarding its comprehension of the DIA in connection with its selection, and has confirmed there have been no material changes to fee structures or valuation methodology utilized by each underlying investment option, as well as confirmed there have been no material changes with respect to the liquidity needs of the plan as compared to the liquidity management of each underlying investment option, there is no requirement that the fiduciary reassess its ability to meet the "Complexity" factor in connection with its ongoing monitoring barring

any material changes to its internal controls established that ensure ongoing compliance with the safe harbor factors. Moreover, any changes to the fiduciary's regular review cadence should document the reasons for such variation.

Conclusion: While the facts included herein are not limiting, the fiduciary is entitled to the regulatory presumption of prudence as it relates to its ongoing monitoring of the plan's investment line-up because it has established an internal process that allows the fiduciary to identify and address any material changes to the nature of the DIA or any related factors that would otherwise prevent the fiduciary from continuing to meet the safe harbor requirements.

Example. Monitoring –

Facts. Assume the same facts as the example above, except the fiduciary does not utilize a third-party investment advice fiduciary (within the meaning of Section 3(21)(A)(ii) of ERISA) in connection with its initial investment decision. In addition to the 401(k) plan, the fiduciary is also responsible for the investment of a defined benefit plan (with the same plan sponsor) that invests in alternative assets (including, without limitation, private equity funds, funds of funds, real estate funds, opportunity funds, infrastructure funds, hedge funds, collective investment trusts and various insurance company accounts). The fiduciary determines that it has the requisite knowledge and skills to objectively, thoroughly, and analytically consider (and make determinations with respect to) each of the factors listed in paragraphs (g) through (k) of this section both initially and on an ongoing basis.

Analysis: Same as in the example above.

Conclusion: Same as in the example above.

§ 2550.404a-6(d) – Duty to act prudently when establishing a plan investment menu to maximize risk-adjusted returns.

A. The Proposed Rule should clarify fiduciaries have no duty to maximize risk-adjusted returns under ERISA.

We recommend that the Department revise Section 6(d) of the Proposed Rule to avoid confusion that fiduciaries must maximize risk-adjusted returns to act prudently under ERISA. The Proposing Release also states “Fiduciaries Have a Duty To Act Prudently When Establishing a Plan Investment Menu to Maximize Risk-Adjusted Returns.” We believe this is an inaccurate phrasing of the duty of prudence, which requires fiduciaries to evaluate investments to consider *expected* or *targeted* risk-adjusted returns, net of fees. To tie prudence to maximizing such returns could be interpreted as creating a new standard that would be inconsistent with established law and would be near impossible to meet without the benefit of hindsight. As the Proposed Rule

enunciates elsewhere, the prudence assessment of a fiduciary’s selection of a DIA is process rather than outcome oriented.⁵

§ 2550.404a-6(e) – Prudence requires appropriate consideration of all relevant factors.

A. The Proposed Rule correctly interprets ERISA’s duty of prudence.

We believe that the Proposed Rule’s establishment of the safe harbor factors—compliance with which affords the fiduciary “significant deference”—is consistent with the best interpretation of the duty of prudence under section 404(a)(1)(B) as well as with the case law interpreting ERISA and the common law of trusts. We recommend the related analysis of a number of other commenters on this point, including in Section I of the comment letter submitted by the Defined Contribution Alternatives Association.

§ 2550.404a-6(f) – Safe Harbor

A. The Department should clarify what it means for courts to afford “significant deference” to a fiduciary’s determination.

The Proposed Rule creates a presumption of reasonableness flowing from a fiduciary’s compliance with the process-based safe harbor, but it does not explicitly define “significant deference” in this context. We recommend that the Department clarify the meaning of “significant deference” in a number of ways.

- i. We agree with the Department that a fiduciary’s judgment with regard to the application of the safe harbor factors should be entitled to “significant deference.” To further promote the Proposed Rule’s stated purpose of reducing burdensome litigation, we encourage the Department to more explicitly emphasize the following points—which are already implicit in the Department’s existing analysis: (1) based on its experience and expertise, the Department believes satisfying the specified process will conclusively establish compliance with ERISA’s duty of prudence in substantially all cases and (2) the presumption of compliance can be rebutted only in cases presenting rare circumstances, such as when a fiduciary acts arbitrarily or capriciously. We believe these points should be clarified in the text of the Final Rule.
- ii. The Proposed Rule ties “significant deference” to the abuse of discretion standard from *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). The *Firestone* standard applies to a fiduciary’s interpretation of the terms of the plan, and holds that a court will not disturb that interpretation if it is “reasonable”—*i.e.*, “if a reasonable person could have reached a similar decision, given the evidence before him.”⁶ Here, the “significant deference” standard applies not to the interpretation of a plan term, but to the related decision to include or not include certain kinds of

⁵ See, e.g., *id.* at 16,092 (“In other words, subjecting a fiduciary to constant Monday morning quarterbacking over its decisions, with the benefit of 20/20 hindsight, would eviscerate the discretion that is at the core of the statutory framework.”).

⁶ *Tussey v. ABB, Inc.*, 746 F.3d 327, 334 (8th Cir. 2014) (citation omitted).

investments based on a prudent process. We recommend that the Department clarify that deference in interpreting plan terms (e.g., whether a corporate sale qualifies as a “reduction in the work force”) justifies similar deference to a fiduciary’s inclusion of alternative assets, insofar as both involve the exercise of discretion and reasoned judgment.

- iii. The Proposed Rule states that a determination is entitled to deference so long as the fiduciary “objectively, thoroughly, and analytically considers” the safe harbor factors. In such circumstances, its “judgment regarding the factor ... is presumed to be reasonable and is entitled to significant deference.”⁷ We recommend that the Department further clarify that the fiduciary’s methods in analyzing each factor are also entitled to deference, as well as its conclusion following the application of those methods. We believe the foregoing is implicit in (and consistent with) the Department’s existing analysis.

In addition, we urge the Department to add a litigation-focused example under proposed § 2550.404a-6(f). The stated purposes of the Proposing Release include reducing litigation risk, reinforcing a process-based approach to prudence assessed at the time of the decision rather than in hindsight, and ensuring that fiduciaries who follow an objective, thorough, and analytical process receive the significant deference contemplated by paragraph (f).⁸ As recognized by the Department, claims that attempt to establish an imprudent process based on circumstantial, outcome-focused allegations are not based in the text or law of ERISA and must be subjected to careful, context-sensitive scrutiny. A specific example showing that a court may limit initial discovery to whether the fiduciary actually satisfied paragraphs (g) through (l) would help courts implement the rule as intended and would make clear that the safe harbor has practical force in litigation. That approach is consistent with *Cunningham v. Cornell University*, 604 U.S. 693, 709 (2025), where the Supreme Court explained that district courts may “expedite or limit discovery as necessary to mitigate unnecessary costs,” and with the principle that a defendant fiduciary that complies with the proposed regulation’s safe harbor factors should be confident that it has fulfilled its fiduciary duty of prudence, given that plaintiffs bear the burden of proof and persuasion on the elements of their claim. Relatedly, the Department should clarify that the safe harbor is not the only means by which a fiduciary may demonstrate prudence.

To address the foregoing considerations, we encourage the Department to consider including examples similar to the following under § 2550.404a-6(f):

Example. Safe harbor; litigation—

Facts. The named fiduciary of a participant-directed individual account plan (e.g., the plan sponsor or plan investment committee), working with a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, considers whether to select a target date fund series as the plan’s qualified default investment alternative. The series invests in publicly traded stocks and bonds and includes an allocation to a fixed percentage of the DIA’s net assets that exceeds 20% of its assets directly or indirectly to private market

⁷ 91 Fed. Reg. at 16,095.

⁸ See *id.* at 16,091-92.

investments. Before making the selection, the named fiduciary objectively, thoroughly, and analytically considers, and makes determinations on, each applicable factor in paragraphs (g) through (l) of this section. The named fiduciary contemporaneously documents that process in committee minutes, consultant reports, due diligence materials, benchmark analyses, written representations, and memoranda.

After the selection, a participant brings an action under section 404(a)(1)(B) of ERISA alleging that the selection was imprudent because the series had higher fees than certain other target date fund series and underperformed one comparator during the first three years after selection. The named fiduciary answers and asserts compliance with paragraph (f) of this section. Before permitting broader merits discovery, the court orders targeted discovery limited to whether the named fiduciary followed the process described in paragraphs (g) through (l) of this section and whether the contemporaneous record establishes compliance with paragraph (f), in order to “expedite or limit discovery as necessary to mitigate unnecessary costs.” The targeted discovery is confined to committee minutes, consultant analyses, due diligence materials, benchmark materials, written representations, and similar documents bearing on safe harbor compliance.

Analysis. Paragraph (f) provides that, when a fiduciary follows the process described in paragraphs (g) through (l), the fiduciary’s judgment with respect to the relevant factors is presumed to have satisfied section 404(a)(1)(B) of ERISA and is entitled to significant deference. In this example, the court appropriately limits discovery to the threshold issue of safe harbor compliance, consistent with the principle that prudence is assessed based on a fiduciary’s investigation at the time of the investment decision, and not in hindsight based on the investment results. The targeted discovery demonstrates that the named fiduciary satisfied each applicable factor and contemporaneously documented its determinations. Allegations of higher fees or short-term underperformance, standing alone, do not defeat the paragraph (f) presumption arising from that showing because such allegations constitute the type of outcome-focused, inferential claims that the Department has recognized are not grounded in ERISA’s process-based framework.

Conclusion. The named fiduciary in this example satisfies paragraph (f) of this section. Because the named fiduciary demonstrates safe harbor compliance through targeted discovery, it is entitled to the presumption of prudence described in the Proposed Rule: its judgment with respect to the relevant factors is presumed to have satisfied section 404(a)(1)(B) of ERISA and is entitled to significant deference. The court’s ruling to limit discovery to the threshold issue of safe harbor compliance is also consistent with how the safe harbor should be applied in a litigation setting.

B. The Proposed Rule should be entitled to *Skidmore* deference.

We believe the Proposed Rule is entitled to meaningful deference from judges under *Skidmore*. Although courts have interpreted section 404(a)(1)(B)’s requirement of “the care, skill, prudence, and diligence” relying on common law trust principles, the substance of the duty of prudence also implicates the Department’s expertise and informed judgment, especially as to the complex and technical process for designating investment alternatives. The Department has considerable experience administering ERISA’s fiduciary provisions, including through prior safe

harbor regulations, information letters, and advisory opinions addressing a wide range of investment types. The factors identified in the Proposed Rule were derived from a “thorough consideration of [the Department’s] experience, a comprehensive review of pertinent case law, existing regulations, previous sub-regulatory guidance, E.O. 14330, and valuable stakeholder input.”⁹ Moreover, the thorough and well-reasoned Proposing Release is likely to be regarded by courts as persuasive analysis of “factual premises within [the agency’s] expertise.”¹⁰ We therefore think that courts should give significant weight to the Department’s explication of what constitutes a “prudent process” in the context of selecting DIAs, including those which hold alternative assets.

C. The Department should clarify that a fiduciary must satisfy the safe harbor solely at the level of the DIA.

The Department should clarify the scope of the safe harbor as it applies to the products in which a DIA invests and confirm that a fiduciary need only demonstrate compliance with the safe harbor factors as they relate to the investment product included in the plan menu (i.e., the DIA). For example, a target date fund series includes multiple tiers of underlying investment vehicles which provide exposure to different asset classes and strategies. A target date fund series may in turn invest into a collective investment trust, which in turn invests in publicly traded or liquid securities in one sleeve and less liquid, non-publicly traded securities in another. The less liquid sleeve may be structured as a fund of funds, which means those vehicles would each hold dozens of underlying private fund interests that then directly hold interests in alternative assets, adding another level in the target date fund series structure.

Requiring a fiduciary to meet the safe harbor at each tier of the target date fund series (i.e., having to evaluate each underlying investment vehicle in one or more tiers below the target date fund) would impose an impractical, undue burden on the fiduciary and could give rise to uncertainty regarding how a fiduciary should demonstrate compliance with the safe harbor when evaluating a DIA that is a target date fund series. Consistent with existing law and Department guidance,¹¹ fiduciaries should be equipped to understand the risks and reward potential of an investment and how allocating to that investment will impact a DIA’s strategy and cost profile. The Proposed Rule as drafted, could create uncertainty regarding the lengths to which such fiduciary must go to prudently evaluate the various features of a DIA and, in particular, with respect to investments held by the DIA.

It is our strong view that a fiduciary should be able to rely on the written representation of the manager of the DIA, to the extent provided, and should be able to assume that the DIA manager understands the components of all underlying vehicles and assets and their impact on the overall investment option offered to the fiduciary. Alternatively but similarly, if a fiduciary does not rely on a written representation of the manager of the DIA and instead conducts its own diligence on the DIA, we ask that the Department confirm that, consistent with existing guidance and the asset neutral principles of the Proposed Rule, a fiduciary should understand the principal strategies and

⁹ *Id.* at 16,095-96.

¹⁰ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024).

¹¹ See Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries, U.S. Department of Labor, Employee Benefits Security Administration (February 2013), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/target-date-retirement-funds-erisa-plan-fiduciaries-tips.pdf> [hereinafter “2013 Guidance”].

risks of the components of the DIA and their overall impact on the investment, and that no further diligence into the underlying sub-adviser or sub-fund, including any of their investments, is required beyond the information the fiduciary obtains from the DIA manager. This approach would recognize the reality that the fiduciary is selecting the DIA and the DIA manager selects and monitors the underlying investments of the DIA. In the case of a DIA structured as a CIT, the manager of the DIA will be a fiduciary to all of the “plan assets” invested in the CIT and, as such, will have its own duty to comply with the requirements of Section 404 of ERISA with respect to the management and operation of the CIT, including, but not limited to, prudence.

The Department should acknowledge that in evaluating DIAs with different levels of complexity, a fiduciary’s primary responsibility is to understand the terms of the DIA, and how it will operate at the DIA level accounting for the various liquidity and other terms of the components. But rather than having to assess the safe harbor factors specifically with respect to the underlying assets held within an alternative asset sleeve of a DIA, a fiduciary should understand the principal strategies and risks of all components including the alternative asset components, consistent with the Department’s established guidance on Target Date Funds. As described further in this letter, such inquiry would examine factors such as the liquidity risk management and valuation procedures through the lens of impact on the DIA, not as standalone inquiries.

D. The Department should clarify that a fiduciary will satisfy the safe harbor in almost all cases by considering the identified factors in the manner set forth in the Proposed Rule.

The Department indicated that it made the list of safe harbor factors non-exhaustive so as to be consistent with the goal of creating an asset-neutral rule that applies to different types of investments that may be subject to other rules under ERISA (e.g., qualified default investment alternatives; investment vehicles, such as CITs, which are deemed to hold “plan assets”). We nonetheless have some concerns that the non-exhaustive nature of the factors may unintentionally weaken the strength of the safe harbor and the intended protections for fiduciaries. As noted elsewhere in our comment, we encourage the Department to more explicitly emphasize that compliance with the specified process will conclusively establish prudence in nearly all cases, and that the presumption of prudence can be rebutted only in truly rare circumstances, such as when a fiduciary acts arbitrarily or capriciously.

We also recommend including additional examples to provide clarifying guidance to plan fiduciaries with respect to satisfying, and documenting satisfaction of, the safe harbor factors.

i. Examples evidencing successful use of the safe harbor across all safe harbor factors.

To address the foregoing considerations, we encourage the Department to consider including an additional example (or examples) similar to the below. In addition to the following examples, we also recommend the examples prepared in the comment letters by the American Investment Council and the Securities Industry and Financial Markets Association addressing the process by which a fiduciary would evaluate a DIA structured as a target date fund or collective investment trust.

Example. Safe harbor satisfied; 3(21) investment advisor—

Facts. In connection with selecting a new target date fund series to be added as a DIA on a 401(k) plan's investment menu, the named fiduciary of the plan, with the assistance of a third-party investment advice fiduciary (within the meaning of Section 3(21)(A)(ii) of ERISA), considers three competing DIA options that equally serve the financial interests of the plan over the appropriate time horizon. Each DIA indirectly holds interests in alternative assets (e.g., through investments in CITs that subscribe to private equity, private credit and real estate funds) and limits its exposure to such alternative assets to a fixed percentage of the DIA's net assets that exceeds 20%. The remainder of each DIA's portfolio is invested in publicly-traded securities or other liquid investments with readily ascertainable market values.

The fiduciary selects a DIA after objectively, thoroughly, and analytically considering (and making determinations with respect to) each of the factors listed in Paragraphs (g) through (l) of this section, including with the assistance of the 3(21) investment advisor.

Analysis: Section 404(a)(1)(B) of ERISA does not require or restrict any specific type of DIA. There is no *per se* rule respecting investment in alternative assets generally or the inclusion of private market investments. Accordingly, a fiduciary may consider and select a DIA with exposure to such assets and be entitled to a presumption of prudence under the safe harbor as long as it objectively, thoroughly, and analytically considers and makes determinations on the applicable factors.

Conclusion: Because the fiduciary (including with the assistance of the 3(21) investment advisor) followed an objective, thorough, and analytical process and considered and made determinations on each applicable factor in paragraphs (g) through (l) of this section, the fiduciary's judgment with respect to the particular factors is presumed to have met the duties under section 404(a)(1)(B) of ERISA and is entitled to significant deference under the proposed safe harbor.

Example. Safe harbor satisfied; 3(38) investment manager—

Facts. Assume the same facts as the example above, except the fiduciary has appointed an investment manager (as defined in Section 3(38) of ERISA), instead of a 3(21) investment advisor. The 3(38) investment manager objectively, thoroughly, and analytically considered, and made determinations with respect to, each of the factors listed in Paragraphs (g) through (l) of this section.

Analysis: The 3(38) investment manager may consider and select a DIA that holds interests in alternative assets and be entitled to a presumption of prudence under the safe harbor as long as it objectively, thoroughly, and analytically considers and makes determinations on the applicable factors.

Conclusion: Because the 3(38) investment manager followed an objective, thorough and analytical process and considered and made determinations on each applicable factor in paragraphs (g) through (l) of this section, the 3(38) investment manager's judgment with respect to the particular factors is presumed to have met the duties under section

404(a)(1)(B) of ERISA and is entitled to significant deference under the proposed safe harbor.

Example. Safe harbor satisfied—

Facts. Assume the same facts as the example above except the fiduciary does not utilize a 3(21) investment advisor or a 3(38) investment manager. In addition to the 401(k) plan, the fiduciary is responsible for the investment of a defined benefit plan (with the same plan sponsor) that invests in alternative assets (including, without limitation, private equity funds, private credit funds, funds of funds, real estate funds, opportunity funds, infrastructure funds, hedge funds, CITs and various insurance company accounts). The fiduciary determines, based on its experience with the defined benefit plan and otherwise, that it has the requisite knowledge and skills to objectively, thoroughly, and analytically consider (and make determinations with respect to) each of the factors listed in Paragraphs (g) through (l) of this section.

Analysis: The fiduciary may consider and select a DIA that holds interests in alternative assets and will be entitled to a presumption of prudence under the safe harbor as long as it objectively, thoroughly, and analytically considers and makes determinations on the applicable factors.

Conclusion: While the facts included herein are not limiting, because the fiduciary followed an objective, thorough, and analytical process and considered and made determinations on each applicable factor in paragraphs (g) through (l) of this section, the fiduciary's judgment with respect to the particular factors is presumed to have met the duties under section 404(a)(1)(B) of ERISA and is entitled to significant deference under the proposed safe harbor.

ii. *Examples of documentation used to evidence a fiduciary's satisfaction of the safe harbor.*

The following examples are intended to clarify one method by which a fiduciary could document satisfaction of the safe harbor factors in a manner that would entitle the plan fiduciary to a presumption of prudence.

Example. Safe harbor satisfied; summary—

Facts. In connection with selecting a new target date fund series to be added as a DIA on a 401(k) plan's investment menu, the named fiduciary of the plan works with a third-party investment advice fiduciary (within the meaning of Section 3(21)(A)(ii) of ERISA) to consider three competing investment options that equally serve the financial interests of the plan over the appropriate time horizon. Each investment option indirectly holds interests in alternative assets (through investments in CITs that subscribe to private equity, private credit and real estate funds) and limits its exposure to such alternative assets to a fixed percentage of the DIA's net assets. The remainder of each investment option's portfolio is invested in publicly-traded securities or other liquid investments with readily ascertainable market values.

The fiduciary objectively, thoroughly, and analytically considered (and made determinations with respect to) each of the factors listed in paragraphs (g) through (l) of this section, including with the benefit of the 3(21) investment advisor’s analysis. In order to document its consideration of these factors, the fiduciary prepared a summary similar to the following:

Date: April 30, 2026

Name of Plan: ABC 401(k) Plan (the “plan”)

Investment Alternatives Considered: XYZ Target Date Fund 1 Series (“Fund 1”), XYZ Target Date Fund 2 Series (“Fund 2”), and XYZ Target Date Fund 3 Series (“Fund 3,” and the manager of the foregoing referred to herein as the “DIA Manager”)

Investment Alternative Selected: Fund 2

Named Fiduciary of Plan: ABC 401(k) Plan Investment Committee (the “named fiduciary” or “fiduciary”)

Name of ERISA 3(21) Advisor (if applicable): Fiduciary Advisors ABC (the “3(21) investment advisor”)

For each factor listed below,

- check the box for “Considered” under each of Fund 1, Fund 2, and Fund 3 once the named fiduciary in consultation with the 3(21) investment advisor, as applicable, has objectively, thoroughly, and analytically considered such factor, and
- check the box for “Determination” if the fiduciary has made a determination that consideration of the factor supports the prudent selection of such fund.
 - An unchecked box under “Determination” indicates that the fiduciary did not make a determination that the relevant prudence factor was clearly met.

Documentation and reports reviewed by the fiduciary (including with the benefit of the 3(21) investment advisor’s analysis) in connection with this analysis (including the relevant determinations) are maintained in a subfolder on the plan’s document management site for the plan entitled: “ABC 401(k) plan – Selection of Target Date Fund Series (April 2026).”

Documentation and reports considered by the fiduciary may include, without limitation, the following: (i) performance reports and risk-adjusted return analyses; (ii) details regarding the fee structure and value proposition; (iii) relevant benchmark comparisons (including, where applicable, a custom composite benchmark methodology); (iv) written

representations or information provided to the fiduciary from the DIA Manager regarding liquidity risk management and valuation processes or such information regarding these topics that the fiduciary determines is appropriate for its decision-making process; (v) meeting minutes of the fiduciary documenting deliberations, considerations, and determinations relating to the factors described below; and (vi) analysis from the 3(21) investment advisor.

<u>Factor 1 — Performance</u>	<u>Fund 1</u>	<u>Fund 2</u>	<u>Fund 3</u>
Whether the risk-adjusted expected or targeted returns, over an appropriate time horizon, of the DIA, net of anticipated fees and expenses, further the purposes of the plan by enabling participants and beneficiaries to maximize expected or targeted risk-adjusted returns on investment net of fees and expenses?	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>
Whether the fiduciary has (a) considered the DIA manager’s experience, expertise, and historical performance in managing retirement products, (b) been made aware of the identities of the manager(s) of the underlying assets in the asset allocation fund and (c) reviewed materials provided by the DIA manager evidencing its basis for the selection of each underlying asset manager, including the DIA manager’s evaluation of the experience, historical performance and scale of the manager(s) of the underlying assets in the asset allocation fund?	Considered <input checked="" type="checkbox"/> Determination	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>
Documents Referenced Include: Performance report; the 3(21) investment advisor’s analysis; time-horizon weighting; participant risk capacity information.			

<u>Factor 2 — Fees</u>	<u>Fund 1</u>	<u>Fund 2</u>	<u>Fund 3</u>
Whether the fees and expenses of the DIA are appropriate, taking into account (i) its expected or target risk-adjusted returns, net of fees and expenses, and (ii) any other value* the DIA brings to furthering the purposes of the plan, including any fees charged at the underlying asset level?	Considered <input checked="" type="checkbox"/> Determination <input type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>

<u>Factor 2 — Fees</u>	<u>Fund 1</u>	<u>Fund 2</u>	<u>Fund 3</u>
*For this purpose, “value” includes any benefits, features, or services (other than risk-adjusted returns).			
If the investment option offers multiple share classes, all eligible share classes available to the plan have been reviewed?	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>
Documents Referenced Include: Comparator information; the 3(21) investment advisor’s analysis; share class review; details regarding any “other value,” if applicable (e.g., enhanced services, lifetime income, diversification)			

<u>Factor 3 — Liquidity</u>	<u>Fund 1</u>	<u>Fund 2</u>	<u>Fund 3</u>
Whether the DIA will have sufficient liquidity to meet the anticipated needs of the plan at both the plan and individual levels?	Considered <input checked="" type="checkbox"/> Determination <input type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>
Has the DIA Manager of the DIA confirmed (via written representation), or provided sufficient information to assess, liquidity, including the basis upon which it deems the liquidity of the underlying assets to be suitable for the DIA?	Considered <input checked="" type="checkbox"/> Determination <input type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input type="checkbox"/>
Documents Referenced Include: Plan feature analysis; turnover patterns; the 3(21) investment advisor’s analysis; information regarding gates/notice periods.			

<u>Factor 4 — Valuation</u>	<u>Fund 1</u>	<u>Fund 2</u>	<u>Fund 3</u>
Whether the DIA has adopted adequate measures to ensure that it is capable of being timely and accurately valued in accordance with the needs of the plan?	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>
If the DIA holds underlying investments that trade on a generally recognized public exchange, will the DIA Manager of the	Considered <input checked="" type="checkbox"/> Determination	Considered <input checked="" type="checkbox"/> Determination	Considered <input checked="" type="checkbox"/> Determination

<u>Factor 4 — Valuation</u>	<u>Fund 1</u>	<u>Fund 2</u>	<u>Fund 3</u>
investment option confirm (in writing) or otherwise provide the fiduciary with sufficient information to confirm that valuations can reasonably be derived from that exchange?	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
If the DIA includes allocations to private equity and/or other alternative assets, review the valuation methodology used by the DIA with respect to such assets and the frequency of valuation?	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>
If the DIA includes allocations to private equity and/or other alternative assets, has the DIA Manager of the investment option confirmed (in writing), or otherwise provided the fiduciary with sufficient information to assess, the valuation methodology it uses for such assets (e.g., FASB ASC 820) and any other basis upon which the DIA Manager is satisfied with the underlying asset manager(s) valuation procedures?	Considered <input checked="" type="checkbox"/> Determination <input type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input type="checkbox"/>
Documents Referenced Include: Valuation policies; ASC 820 confirmation; the 3(21) investment advisor’s analysis.			

<u>Factor 5 — Performance Benchmark</u>	<u>Fund 1</u>	<u>Fund 2</u>	<u>Fund 3</u>
Determine that the DIA has a “meaningful benchmark” and compare the expected or target risk-adjusted returns, net of fees, of the DIA to the meaningful benchmark. If there was no readily available benchmark, was a custom composite benchmark applied to the public and private asset sleeves?	Considered <input checked="" type="checkbox"/> Determination <input type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>
Documents Referenced Include: Benchmarking information/documentation; information regarding composite construction; the 3(21) investment advisor’s analysis.			

<u>Factor 6 — Complexity</u>	<u>Fund 1</u>	<u>Fund 2</u>	<u>Fund 3</u>
Has the fiduciary considered its skills, knowledge, experience, or capacity to	Considered	Considered	Considered

<u>Factor 6 — Complexity</u>	<u>Fund 1</u>	<u>Fund 2</u>	<u>Fund 3</u>
understand the investment sufficiently to discharge its obligations under ERISA and the governing plan documents, including accounting for the features and complexity of the DIA in conjunction with the needs of the plan participants?	<input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>
Documents Referenced include: Analysis provided by the 3(21) investment advisor.			

<u>Any other Factors/Principles/Documents Considered Relevant by the Named Fiduciary/Advisor</u>	<u>Fund 1</u>	<u>Fund 2</u>	<u>Fund 3</u>
Consider whether any other factors are relevant in connection with the review of the investment options. If so, describe such factor and whether a determination was met with respect to such factor.	Considered <input checked="" type="checkbox"/> Determination <input type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input checked="" type="checkbox"/>	Considered <input checked="" type="checkbox"/> Determination <input type="checkbox"/>
Description of other factors if applicable, including the basis upon which the Manager of the DIA is satisfied with the impact of the underlying assets on the DIA's performance, fees, liquidity and valuation.	N/A – no additional relevant factors	N/A – no additional relevant factors	N/A – no additional relevant factors
Documents Referenced Include: Analysis provided by the 3(21) investment advisor			

Analysis: Section 404(a)(1)(B) of ERISA does not require or restrict any specific type of DIA. Further, there is no *per se* rule respecting the inclusion or selection of a target date fund series that indirectly holds investments in alternative assets. Accordingly, a fiduciary may consider and select such a target date fund series and be entitled to the presumption of prudence under the safe harbor as long as it objectively, thoroughly, and analytically considers and makes determinations with respect to the applicable factors.

Conclusion: Because the fiduciary followed an objective, thorough, and analytical process and made determinations on each applicable factor in paragraphs (g) through (l) of this section, the fiduciary's judgment with respect to the particular factors, including the relationship between the factors, is presumed to have met the duties under section 404(a)(1)(B) of ERISA and is entitled to significant deference under paragraph (f) of the rule. Further, the fiduciary's summary provides a helpful record of its consideration and

determination relating to each safe harbor factor for the three investment options being considered. To the extent that the fiduciary's selection of "Fund 2" becomes the subject of litigation, the fiduciary may provide the court with a copy of its summary as evidence that it followed the process described in paragraphs (g) through (l).

Example. Safe harbor satisfied; summary—

Facts. Assume the same facts as the example above except the fiduciary does not utilize a 3(21) investment advisor. In addition to the 401(k) plan, the fiduciary is responsible for the investment of a defined benefit plan (with the same plan sponsor) that invests in alternative assets (including, without limitation, private equity funds, funds of funds, real estate funds, opportunity funds, infrastructure funds, hedge funds, collective investment trusts and various insurance company accounts). The fiduciary determines that it has the requisite knowledge and skills to objectively, thoroughly, and analytically consider (and make determinations with respect to) each of the factors listed in Paragraphs (g) through (l) of this section.

Analysis: Same as in the example above.

Conclusion: Same as in the example above.

E. The Department should clarify there is no requirement to engage a third-party investment advice fiduciary or investment manager.

The Department should clarify whether engaging a third-party investment advice fiduciary (under Section 3(21) of ERISA) or investment manager (under 3(38) of ERISA) is required in order to meet all safe harbor factors. In the Proposing Release and the Proposed Rule, the Department rightfully clarified that a fiduciary's reliance on the investment advice of a fiduciary advisor is "indicative of a prudent process."¹² Further, the examples concluding that a fiduciary engaged in a prudent process do not provide fiduciaries, who themselves may possess the requisite knowledge to prudently select a DIA, guidance regarding how to otherwise satisfy the safe harbor factors if they do not engage a third-party fiduciary advisor or manager. To provide fiduciaries maximum guidance and flexibility in establishing a prudent process, we request that the Department build out its examples to describe processes that would satisfy the safe harbor without a third-party investment advisor or manager. Please see, for example, our proposed example relating to the "Complexity" safe harbor factor further below.

§ 2550.404a-6(g) – Performance

We welcome the Department's decision to remain consistent with its prior guidance that requires a fiduciary to provide investment options which enable the participant to achieve a portfolio with aggregate risk and return characteristics within the range normally appropriate for the participant in considering a fiduciary's prudent selection of a DIA.

¹² 91 Fed. Reg. at 16,103, 16,143.

- A. The Department should clarify that a fiduciary should consider a DIA manager’s experience, expertise and historical performance in managing retirement products as well as the DIA manager’s consideration of the experience, historical performance, and scale of underlying asset managers whose products the DIA manager selects.**

We agree with the Department that volatility and correlation as well as investment horizon are key ingredients in a fiduciary’s assessment, in particular with respect to the evaluation of a DIA with exposure to alternative assets. For example, a fiduciary’s assessment should include a review of the identity(ies) of the manager(s) of the DIA’s underlying holdings, the basis for such selections and the DIA manager’s evaluation of such manager(s)’ experience, historical performance, and scale in light of the nature, size and complexity of the asset class(es) being managed. The Department recognized that an underlying manager’s characteristics may be considered by a fiduciary in the Department’s 2020 information letter and we believe it should continue to emphasize this factor in its Final Rule, including with respect to the underlying manager(s) of alternative assets.¹³ Similarly, the Department noted the importance of a fiduciary’s awareness of features of the underlying asset class when it confirmed in guidance that a fiduciary should “understand the principal strategies and risks of the [target date] fund, or of any underlying asset classes or investments that may be held by the TDF.”¹⁴ We think that the examples should clarify the overall considerations that should be considered in a fiduciary’s assessment of expected or target performance of a DIA. These considerations may prove more important in the context of DIAs with longer time horizons (e.g. longer-term target date funds).

We think an existing example should be modified, or a new example should be included, that highlights these considerations in determining a fiduciary’s investment decision was prudent. Ultimately, we view including these considerations as a logical extension of the Department’s “Complexity” factor on the basis that certain asset classes made available to plan participants ought to require additional safeguards to ensure plan participants are best positioned to benefit from the value propositions of a particular asset class.

- B. The Department should clarify that there is no presumption against innovative investment structures in the “Performance” or “Performance Benchmark” factors of the Final Rule.**

We request that the Department clarify that the Proposed Rule (and Final Rule when issued) is not intended to create a presumption against innovative investment designs and/or

¹³ See Information Letter 06-03-2020, U.S. Department of Labor, <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020> [hereinafter “2020 Information Letter”] (“In evaluating whether to include a particular investment vehicle with an allocation of private equity as a designated investment alternative, the responsible plan fiduciary must evaluate the risks and benefits associated with the investment alternative. In making this determination, the fiduciary should consider ... (ii) whether the asset allocation fund is overseen by plan fiduciaries (using third-party investment experts as necessary) or managed by investment professionals that have the capabilities, experience, and stability to manage an asset allocation fund that includes private equity investments effectively given the nature, size, and complexity of the private equity activity”).

¹⁴ See 2013 Guidance, *supra* note 11.

composite benchmarks reinforced in paragraph (g) of the Final Rule, so that fiduciaries have consistent guidance across the “Performance” and “Performance Benchmark” factors.

§ 2550.404a-6(h) – Fees

A. The Department should expand the definition of “value” as it relates to an analysis of fees.

The Proposed Rule defines “value” as “any benefits, features, or services other than risk-adjusted returns.” We respectfully request clarification that “value” may include diversification benefits, customer support services, expected ability to meet liquidity needs, education of fiduciaries and ongoing support for explaining DIA profiles. Fiduciaries would benefit from knowing definitively that these categories constitute “value” that may be weighed as part of their analysis relating to fees.

B. The Department should clarify that a fiduciary who selects a DIA that may charge performance fees is not precluded from satisfying the safe harbor.

We recommend that the Department clarify that plan fiduciaries who otherwise satisfy their duties and obligations under ERISA are not precluded from selecting DIAs that charge performance fees. Performance fees can provide exposure to funds with higher estimated risk-adjusted returns, align the interests of managers and plan participants and allow for enhanced investment managerial capabilities. We have proposed an example below to address the foregoing.

Example. Fees; Performance-based fees—

Facts. The named fiduciary of a plan (e.g., the plan sponsor or plan investment committee) considers a number of investment alternatives (for inclusion as a DIA) (each a “fund”) that each follow similar strategies primarily targeting investments in income-producing credit and credit-like assets. The funds under consideration take a variety of forms, including one or more closed-end funds that make periodic repurchase offers pursuant to Rule 23c-3 under the 1940 Act or pursuant to Rule 13e-4 under the Securities Exchange Act of 1934—none of which are deemed to hold “plan assets” under ERISA. The plan fiduciary evaluates the funds with the assistance of a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA and considers the funds’ performance, fees, liquidity, and valuation procedures, as well as the capabilities and resources of the funds’ managers. The plan’s investment advice fiduciary determines that one of the funds (“Fund A”) has access to proprietary investment opportunities due to its manager’s scale and sourcing and structuring capabilities, which allow the fund to pursue investments with higher estimated target risk-adjusted returns, net of fees and expenses, relative to the other funds that are being considered. The funds being considered have comparable management fees, but Fund A is the only fund the fiduciary is considering that charges a performance fee, based on the income generated by the fund. The investment advice fiduciary models the estimated returns and determines that Fund A has estimated risk-adjusted returns that are at least comparable to the other funds under consideration. Fund A has also achieved more attractive risk-adjusted returns on investment, net of fees and expenses, than the other funds being considered. The plan fiduciary selects Fund A, which charges a performance

fee, based on advice from the plan’s third-party investment advice fiduciary that Fund A has higher expected or target risk-adjusted returns net of fees and expenses than the other funds being considered.

Analysis. A plan fiduciary, with the benefit of third-party investment advice, when appropriate, may select a DIA that charges both a performance fee and management fee, even if similar investment alternatives charge only a management fee. Based on the advice of an investment advice fiduciary, after considering a reasonable number of similar alternatives, a fiduciary may recognize that a given investment product that charges a performance fee has a more desirable risk-return profile. For example, agreeing to pay a performance fee may support access to proprietary investment opportunities that are sourced or structured by the DIA manager and that are not generally available to managers of similar funds, which can contribute to higher estimated risk-adjusted returns, or the performance fee may provide better alignment between the plan participants and the asset manager.

Conclusion. The named fiduciary in this example does not fail to satisfy section 404(a)(1)(B) of ERISA and paragraph (h) of this section solely because it selected an investment alternative that charges a performance fee or has higher total fees than other alternatives. The named fiduciary enlisted the services of an investment advice fiduciary that identified the distinctive competencies and advantages of the manager of the investment alternative with performance fees and found such investment alternative to have superior estimated risk-adjusted performance, net of fees and expenses, relative to a reasonable number of similar investment alternatives. Having determined that selecting the investment alternative with the higher expected or target risk-adjusted return furthered the purpose of the plan despite the presence of performance fees, the fiduciary shall be deemed to have satisfied the requirements of paragraph (h) of this section in selecting this investment alternative for the plan menu.

§ 2550.404a-6(i) – Liquidity

We urge the Department to provide more clarity regarding how to appropriately consider liquidity in connection with a plan fiduciary’s evaluation of a DIA with allocations to alternative assets. We believe including further clarification in the examples will help enable a plan fiduciary to “be confident that it has fulfilled its fiduciary duty of prudence.”¹⁵

A. The Department should establish a guide for “appropriate due diligence” conducted by a fiduciary.

The Department’s (i)(1)(iii) example suggests that, in connection with its evaluation of potential DIAs, a plan fiduciary need not obtain a written representation from the DIA manager that a liquidity risk management program is in place that satisfies the safe harbor. At the same time, the example describes the fiduciary as needing to “perform[] appropriate due diligence” to

¹⁵ 91 Fed. Reg. at 16,092.

confirm the DIA “has adopted and implemented a liquidity risk management program that is substantially similar to a program that meets the requirements of the [1940 Act].”¹⁶

The Department should include examples illustrating a path to compliance that does not depend on written representations. Fiduciaries should be able to rely on the oversight and due diligence conducted by the adviser managing the DIA. Establishing a baseline of reliance on certifications may undercut the rigor of fiduciary evaluation and decision making expected of fiduciaries under ERISA. Requiring certifications from DIA managers to fiduciaries is likely to diminish the incentive for fiduciaries to produce strong records in their diligence. It will also likely make the fiduciary diligence process more difficult in comparing potential DIAs across managers given approaches to DIA manager written representations would vary. We believe many fiduciaries will choose to diligence the DIA based on extensive, well-documented information requests to the manager of the DIA. Accordingly, we believe the Department should clarify its example to describe plainly what steps a fiduciary must take to “perform appropriate due diligence” as to both plan- and participant-level liquidity in circumstances where it does not obtain a written representation from the DIA manager. Further, we believe an increased prominence given to due diligence efforts of the fiduciary will help alleviate concerns from the stakeholders that the safest way to comply with the safe harbor is to obtain a written representation.

We urge the Department to provide additional guidance (e.g., in the form of an additional example) discussing the requirements of Rule 22e-4 and, in particular, the evaluation of the liquidity factor for a DIA with a maximum percentage for illiquid investments that is greater than 15%. For example, factors to be considered by the fiduciary may include the historical percentage of plan assets, net of incoming contributions, that have been required to satisfy distribution requirements and intra-fund plan transfers, to determine the anticipated participant needs. With regard to this review, the fiduciary may also evaluate historical and expected withdrawals from the DIA (or from other reasonably comparable funds) to determine the reasonably anticipated demands on the DIA on a participating plan level, which includes accounting for job changes and hardship withdrawals. In conducting its evaluation, the fiduciary might add an incremental cushion to its analysis of each component, to anticipate the possibility of a reasonable increase in liquidity demands outside of historical experience. The fiduciary may determine that the participants’ and the plan’s anticipated liquidity requirements would be expected to be met, consistent with the terms of the DIA, based on the near-term liquidity available under the DIA without any material impact to the investment strategy of the DIA and without limiting access of participants to their accounts. The example could also note that the fiduciary considered the impact of the expected or target superior risk-adjusted net returns from allocating a higher percentage of the DIA to alternative assets versus the potential impact of constrained liquidity in the event of an unlikely extreme demand on liquidity at either the participant or plan level. So long as the fiduciary concludes that the benefit of the superior expected or target risk-adjusted returns outweighs the potential of an adverse impact due to the possibility of an extreme liquidity demand, the fiduciary should be deemed to have satisfied the safe harbor liquidity factor.¹⁷

¹⁶ *Id.* at 16,142.

¹⁷ See Committee on Capital Markets Regulation, Comment Letter (Filed May 29, 2026) (finding that a private asset allocation of 33% in a DIA would allow the plan to satisfy participants’ liquidity demands even in the most extreme historical withdrawal scenarios based on the last 25 years of publicly available plan level withdrawal data).

B. The Department should eliminate any implicit bias or lack of clarity around the liquidity risk management program requirements of non-1940 Act structures.

The Department's liquidity safe harbor examples could be interpreted as favoring DIAs that are structured as mutual funds (i.e. open-end funds registered under the 1940 Act) due to the clear guidance that satisfying Rule 22e-4 meets the liquidity safe harbor. But the Proposed Rule and examples may be argued to create a new restriction never before seen in ERISA regulations requiring assets held through structures other than open-end mutual funds to otherwise have liquidity risk management programs in place that are "substantially similar" to those required under Rule 22e-4.¹⁸ We believe that the definition of "substantially similar" may be too vague, given that Rule 22e-4 is a five factor rule, and more specific guidance would be more helpful to fiduciaries. Better clarity in the Final Rule will likely lead to more consistent products that are more easily comparable for fiduciaries and make legal compliance with the Final Rule more practical. Fiduciaries would also likely benefit from concrete examples of liquidity practices by DIAs structured as CITs or managed accounts that comply with the safe harbor.

For example, there could be confusion as to whether the 15% limit on a fund's investment in illiquid investments should apply to non-1940 Act structured DIAs to be considered "substantially similar" to the requirements of Rule 22e-4. Furthermore, we believe that imposing a new limit on illiquid investments for structures that are not open-end mutual funds contravenes the asset-neutrality invoked by the safe harbor. A fiduciary's decision to allocate to illiquid investments should be a function of its plan participants' characteristics, including time horizon, liquidity needs and risk/return appetite. Indeed, the Department acknowledges this in citing to the Council of Economic Advisers' findings that private equity allocations of 23% for those under age 25 "increased annuitized lifetime income" by 2.5% compared to less than 0.5% for those over age 65 that limited their private equity allocations to 13%.¹⁹ Put simply, the Department should not impose investment restrictions that artificially limit the fiduciary's efforts to make available the highest expected or target risk-adjusted return DIA for a particular plan participant profile. Rather, we encourage the Department to take a position consistent with its 2020 Information Letter, where it did not prescribe a cap. There, the Department noted a fiduciary "could" impose a cap on investments in alternatives, which "could" include the 15% limit on illiquid investments applicable to registered open-end investment companies, but to tailor such cap ultimately "in light of the plan's features and participant profile."²⁰

As previously noted, we believe each safe harbor factor, including the liquidity factor, should be tested by the fiduciary at the level of the DIA (i.e., the investment product on the plan's lineup) and not at any other level below the DIA. Additionally, non-1940 Act products, such as CITs with an allocation to less liquid investments may sit below a target date fund DIA and typically include a liquidity sleeve such that the actual underlying exposure to alternative assets is below the allocation made by the DIA to the non-1940 Act product. For instance, a typical

¹⁸ 91 Fed. Reg. at 16,140-41.

¹⁹ See The Council of Economic Advisers, *Retail Access to Alternative Investments Via Defined Contribution Plans*, at 18, fig. 6 and at 20, fig. 7 (2025), <https://www.whitehouse.gov/wp-content/uploads/2025/08/Retail-Access-to-Alternative-Investments-Via-Defined-Contribution-Plans-2.pdf>.

²⁰ See 2020 Information Letter, *supra* note 13.

alternative asset vehicle will have between 80-90% of its assets in an illiquid portfolio and another 10-20% in a liquid portfolio. If the underlying funds of a CIT are subject to the 15% cap, this will prohibit CITs from gaining any meaningful exposure to alternative assets. And if the CIT itself is capped at 15% exposure, this will effectively limit the exposure to less liquid asset classes at less than 15%, because the CIT also invests in a liquidity sleeve. Finally, the cap will effectively be less than 15% because of the need to provide a cushion for the possibility that the investments in less liquid assets held by the CIT will perform better than other allocations. That allocation restriction ultimately punishes fiduciaries for allocating to higher risk-adjusted returning alternative products, by forcing these products to sell such assets (in order to rebalance to stay below the 15% cap) when they deliver outsized returns and imposing an additional administrative monitoring burden for which fiduciaries are unlikely to risk failure to comply. Applying Rule 22e-4 requirements broadly to DIAs may also disadvantage lower cost DIAs like CITs compared to mutual funds. Other 1940 Act vehicles such as registered closed-end funds are not subject to an allocation cap to illiquid assets. The SEC’s Division of Investment Management’s ADI 2025-16 guidance, for example, provides that such funds no longer need to comply with a 15% limit for non-accredited investor access so long as investors receive robust disclosure on the alternative asset exposure.²¹ Given that the safe harbor applies to all DIAs and not just those with exposure to alternative assets, imposing 1940 Act requirements on non-1940 Act vehicles like CITs, may also cause fiduciaries to question whether their existing CIT-structured DIAs comply with ERISA. For example, Rule 22e-4 contemplates a board construct with a majority of disinterested directors but a CIT has no board, only a trustee. This is to say that imposing any limit on exposure to alternative assets in DIAs contradicts the Proposed Rule’s well-founded assertion that “*prudent fiduciaries have maximum discretion to select investments to further the purposes of the plan*” and that “Section 404(a)(1)(B) of ERISA does not require or restrict any specific type of DIA, except insofar as a DIA might be otherwise illegal.”²² We respectfully request the Department include an example demonstrating how a CIT can meet the liquidity safe harbor.

We believe the assessment, management and periodic review of liquidity risk requirements housed in Rule 22e-4(b)(1)(i) provide sufficient basis for fiduciaries to comply with the safe harbor liquidity requirements. The DIA would be required to implement a liquidity risk plan that could be scaled with the needs of its investment strategy without having to abide by specific limitations on allocations to any particular kind of asset.

i. Applicability of the Proposed Rule to Managed Accounts

The examples in paragraph (i) of the Proposed Rule properly focus on participant- and plan-level liquidity considerations relating to the fiduciary’s selection of individual DIAs. In particular, the examples in paragraph (i) of the Proposed Rule generally focus on DIAs that are open-end funds registered under the 1940 Act (*e.g.*, mutual funds or ETFs), or other vehicles that have implemented a liquidity risk management program “substantially similar” to those applicable to mutual funds.

²¹ See ADI 2025-16, *Registered Closed-End Funds of Private Funds*, SEC Division of Investment Management (Aug. 15, 2025), <https://www.sec.gov/about/divisions-offices/division-investment-management/fund-disclosure-glance/accounting-disclosure-information/adi-2025-16-registered-closed-end-funds-private-funds>.

²² 91 Fed. Reg. at 16,136.

We believe it would be helpful for the Department to further include a positive example illustrating a prudent evaluation of liquidity at both the participant and plan levels for a DIA that holds a portion of illiquid, non-publicly traded securities, where such DIA works in concert with other DIAs that do not hold such securities, such as in the context of a managed account program. We believe that a fiduciary could determine that a managed account program may provide sufficient liquidity at both the participant and plan levels. We further believe it to be appropriate and desirable for the Department to include a managed account example, because managed accounts are a popular avenue for participants to access alternative assets in defined contribution plans with the benefit of individualized investment advice from an investment professional. We have proposed an example below to address the foregoing.

Example. Managed Accounts—

Facts. A fiduciary elects to include a managed account program option (the “Program”) for plan participants. This Program allows a participant to appoint an investment manager (the “Participant Manager”) under Section 3(38) of ERISA to select investments on behalf of the participant for a fee, which is borne by the participant and meets the requirements to be considered “reasonable compensation” under ERISA. The participant also bears its proportionate share of the expenses of the investment options selected by the Manager. The Participant Manager is a SEC-registered investment advisor and not affiliated with the fiduciary. At the time of such appointment, the plan and the participant provide to the Participant Manager relevant information about the participant, which includes one or more of the following: age, risk tolerance, investments outside of the plan, and retirement planning goals. The Participant Manager implements a personalized investment strategy that is tailored to the individual needs of the participant. The Participant Manager is able to invest the participant’s account in any of the funds included in the plan’s broad menu of investment options, as well as investment options that are not able to be directly accessed by the participant as a standalone default investment alternative. The Participant Manager’s options include a diversified set of funds or CITs, some of which invest primarily in illiquid investments, which may include real estate, limited partnership interests in private funds, closed-end funds registered under or regulated by the 1940 Act that invest in alternative assets and other alternative assets. The Participant Manager’s options also include funds or CITs that invest primarily in liquid assets, including cash, cash alternatives, and publicly traded securities. The Participant Manager has considered the valuation and liquidity arrangements with the funds or CITs, including withdrawal rights for plan and participant liquidity events. Taken as a whole, the Participant Manager has the ability and the skill to craft an investment program that provides for sufficient liquidity at both the plan and participant levels. A participant has the ability to withdraw from the Program upon 30 days’ notice, which is consistent with the terms of the plan. Plans withdrawing from the Program due to plan terminations or similar events also must give 30 days’ notice.

Analysis. The fiduciary should review the Program, the Participant Manager, and the broad menu of investment options available to the Participant Manager under the Program. It also should review the valuation and liquidity arrangements and the withdrawal rights, including the ability of the fiduciary to terminate the plan’s participation in the Program

and the ability of participants to withdraw from the Program. Based on that review, the fiduciary may determine to include the Program under the plan.

Conclusion. The named fiduciary is deemed to have satisfied the consideration and determination requirements of paragraph (i) of the Proposed Rule and section 404(a)(1)(B) of ERISA. The named fiduciary objectively, thoroughly, and analytically considered the redemption structure and other liquidity features of the Program (independently or with assistance of a qualified investment professional, if necessary) and documented its determination and related considerations that the Program will have sufficient liquidity to meet the anticipated liquidity needs of the plan and each participant.

C. The Final Rule should consider liquidity in the context of other plan menu options.

We recommend that the Department add two additional examples to further its stated goal of reducing litigation risk and confirming that fiduciaries have appropriate discretion to select DIAs to further the purposes of the plan, by clarifying how the liquidity safe harbor applies in two common plan-design settings. The Proposed Rule already makes clear that participant-directed individual account plans are long-term retirement savings vehicles and that fiduciaries need not select only fully liquid products; that periodic redemption structures can be prudent when appropriately evaluated; that paragraph (f) affords a presumption of prudence and significant deference when the fiduciary objectively, thoroughly, and analytically evaluates the relevant factors for each DIA; and that managed account qualified default investment alternatives (“QDIAs”) are themselves DIAs under the Proposed Rule.

An additional menu-based example would help confirm that including a less-liquid DIA does not become imprudent merely because other menu options are more liquid, so long as each option is independently evaluated under the process described in paragraphs (g) through (l).

A second example would help confirm that, when the DIA is a managed account service, the paragraph (i) liquidity inquiry is performed at the level of that managed account service, *not* at the level of an underlying non-designated investment that participants cannot select on a stand-alone basis.

Those clarifications would be consistent with the Department’s recognition in the preamble that ERISA does not contain categorical restrictions on investments, with *Hughes v. Northwestern University*, and with the Department’s 2020 Information Letter addressing professionally managed multi-asset vehicles whose private-market component is not available to participants on a stand-alone basis.

Proposed new paragraph (i)(5):

Example. Menu of DIAs; differing liquidity terms—

Facts. The named fiduciary of a participant-directed individual account plan, with the assistance of a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, establishes a diversified plan investment menu that includes several

DIA. Before finalizing the menu, the named fiduciary separately follows the process described in paragraphs (g) through (l) with respect to each potential DIA under consideration and determines that each selected option is prudent. The selected options include several DIAs that provide the plan daily liquidity and one pooled investment vehicle with a diversified strategy (both public and private assets) that permits the plan to redeem only on quarterly dealing dates subject to advance notice. With respect to that pooled investment vehicle, the named fiduciary evaluates, in light of the plan's anticipated participant withdrawals, exchanges, loans, distributions, and possible plan-level events, the maximum allocation to less-liquid assets, the time expected for those assets to be monetized or return capital, the scope of the advance-notice and redemption provisions, and the option's expected or target risk-adjusted returns, net of fees. After this evaluation, the named fiduciary determines that the quarterly-liquidity structure is appropriate in accordance with paragraph (i). The named fiduciary likewise determines that each of the other DIAs on the menu satisfies paragraph (i).

Analysis. This example concerns paragraph (i) as applied to each DIA selected for the plan menu and does not alter the named fiduciary's separate obligation under paragraph (d) to prudently establish the menu overall. Paragraph (i) requires the named fiduciary to objectively, thoroughly, and analytically consider the liquidity of each DIA on its own merits. The fact that some DIAs on the plan menu provide greater plan level liquidity than others does not, by itself, render the less-liquid DIA imprudent. Nor may the named fiduciary rely on the presence of more liquid options on the menu to excuse an inadequate review of the less-liquid option. Rather, the named fiduciary must independently determine that the liquidity terms of each DIA are appropriate for the anticipated needs of the plan.

Conclusion. The named fiduciary in this example is deemed to have met the consideration and determination requirements of paragraph (i) of this section, and section 404(a)(1)(B) of ERISA, with respect to the DIA that permits quarterly liquidity. The named fiduciary also would not fail to satisfy paragraph (i) solely because other DIAs on the same menu provide greater liquidity. Accordingly, the named fiduciary's judgment with respect to that DIA is entitled to the presumption and deference described in paragraph (f).

Proposed new paragraph (i)(6):

Example. Managed account DIA; underlying investments available only through the service—

Facts. The named fiduciary of a participant-directed individual account plan selects a managed account service as the plan's qualified default investment alternative. Participants may opt out of the managed account service into other DIAs on the plan's menu. The managed account service constructs participant portfolios using a combination of DIAs already on the plan menu and certain underlying investment vehicles that are not separately designated on the plan menu and are not otherwise available to participants except through the managed account service. One of those underlying investment vehicles has materially more limited liquidity than the plan-menu DIAs used by the managed account service. The named fiduciary, with the assistance of a third-party investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA, approves investment parameters for the

managed account service that (a) limit allocations to the less-liquid underlying investment vehicle, (b) require minimum allocations to more liquid DIAs and liquid exposures, (c) require rebalancing and liquidity-management rules, and (d) are designed so that the managed account service as a whole can meet the anticipated participant-level and plan-level liquidity needs of the plan. The named fiduciary further determines that the less-liquid underlying investment vehicle would not be selected for the plan menu as a separate DIA if it were offered on a stand-alone basis. After objectively, thoroughly, and analytically evaluating the managed account service, including its approved investment parameters and the relationship between the liquid and less-liquid components of participant portfolios, the named fiduciary determines that the managed account service has liquidity that is appropriate in accordance with paragraph (i).

Analysis. For purposes of paragraph (i), the relevant DIA in this example is the managed account service selected by the plan. The fact that an underlying investment vehicle available only through the managed account service would not be appropriate as a separate DIA on a stand-alone basis does not preclude the named fiduciary from satisfying paragraph (i) with respect to the managed account service. Paragraph (i) instead requires the named fiduciary to determine that the managed account service, as structured and subject to the approved investment parameters, has sufficient liquidity to meet the anticipated needs of the plan at the participant and plan levels. This example does not extend the safe harbor to the separate selection of non-designated underlying investment vehicles or service providers outside the scope of the Proposed Rule. It clarifies only that, when the plan has selected a managed account service as the DIA, the paragraph (i) liquidity inquiry is performed at the level of that managed account service.

Conclusion. The named fiduciary in this example is deemed to have met the consideration and determination requirements of paragraph (i) of this section, and section 404(a)(1)(B) of ERISA, with respect to the managed account service as the DIA. Because the DIA selected by the plan is the managed account service, the presumption and deference described in paragraph (f) apply to the named fiduciary's liquidity judgment at that level. The existence within the managed account service of an underlying investment vehicle that is not separately designated on the plan menu and would not be appropriate on a stand-alone basis does not, by itself, prevent application of paragraph (f) to the managed account service.

D. The Department should solicit feedback on potential prohibited transaction exemptions and impacts on liquidity management innovations.

We believe that the Proposed Rule, if adopted with the changes we suggest, has the potential to lead to an era of unprecedented innovation in liquidity management, as managers of illiquid, alternative assets of all stripes seek to allow plan participants to access such assets. The Department has signaled a willingness to issue guidance that eliminates obstacles to plan participants gaining access to alternative assets, and has taken an enormous step in this direction with the Proposed Rule. We recommend that the Department, through separate rulemaking, invite market participants to identify potential prohibited transaction exemptions that would be helpful in the creation and operation of new investment products which offer plan participants exposure to alternative assets, and that the Department commit resources to considering such requests. We

believe that such an initiative would serve to encourage development of new products which would enable plan participants to maximize their risk-adjusted returns, net of fees.

We believe it also would be helpful for the Department to consider expanding certain existing prohibited transaction exemptions in a manner that would improve access to alternative assets for plan participants, including by allowing for the development of new investment products. For example, we believe that the Department should consider amendments to PTE 77-4, and such reasonable additional requirements as the Department deems appropriate, to expand its applicability to any type of affiliated fund, provided that the other requirements of the exemption are met, including, critically, its prohibition on double fees. Not only would such amendments be consistent with the Department's position of asset neutrality, such amendments are also critical to modernizing retirement savers' portfolios by allowing for greater access to diversified, cost-effective investment options without sacrificing investor protections.

§ 2550.404a-6(j) – Valuation

A. The “Valuation” factor should affirm that a “conflict-free” independent valuation process includes investments with reasonable steps to address any potential or actual conflicts of interest.

For DIAs that hold non-publicly traded securities, the Department should amend the rule to avoid the incorrect suggestion that, to come within the safe harbor as it relates to the “Valuation” factor, it is necessary that the DIA manager provide written assurance to the fiduciary that such securities are valued through a “conflict-free, independent” process.²³ The Proposed Rule does not detail what would constitute such a process.

In establishing the “plan asset regulations” codified at 29 C.F.R. 2510.3-101, as modified by Section 3(42) of ERISA, the Department recognized that there are circumstances under which it would be inappropriate to apply ERISA's fiduciary responsibility and prohibited transaction rules to the management of a collective investment vehicle. We believe that the Department should clarify that this remains true with respect to the valuation process of underlying funds that are not deemed to hold “plan assets” under ERISA that may serve as components of a DIA and that the Proposed Rule does not intend to apply an ERISA-like standard to such underlying funds. We believe that this position is bolstered by the fact that many funds, while they may not employ a completely “conflict-free” valuation process for non-publicly traded securities held by the fund, nonetheless have rigorous and thoughtful processes that aim to provide accurate and fair valuation for such securities. 1940 Act-regulated funds in particular are subject to rules regarding their valuation process for these types of investments. Accordingly, they should not be precluded from being considered as DIAs by fiduciaries.

Moreover, ERISA does not insist that every fiduciary engagement or process be “conflict-free”; it recognizes that fiduciaries acting on behalf of a plan may have potentially conflicting obligations. For example, officers of the employer sponsoring the plan frequently will serve as fiduciaries of the plan. Trustees, investment managers and other service providers may provide multiple services to a plan, or may also provide services to other parties that may engage in

²³ *Id.* at 16,141.

transactions with the plan. Rather, ERISA protects a plan's interests and those of the plan participants by expressly prohibiting a fiduciary from using the authority that makes such person a fiduciary to benefit itself or other third parties in transactions in which the plan has an interest.

Consistent with the principles-based nature of the safe harbor, we ask that the Department consider using a principles-based approach for managing conflicts in valuing non-publicly traded securities. Such an approach could look similar to the condition under Prohibited Transaction Class Exemption 2020-02 (which is also a principles-based rule), requiring that financial institutions have policies and procedures in place to address conflicts of interest to the extent that a reasonable person reviewing the policies and procedures as a whole would conclude that they do not create an incentive for a financial institution or investment professional to place their interests ahead of the interest of the retirement investor.

Analogously, the fiduciary could receive a written representation or otherwise obtain sufficient information from the manager to confirm the manager has policies and procedures in place to address conflicts of interest in valuing non-publicly traded securities. These policies and procedures would be deemed appropriate if a reasonable person reviewing them as a whole would conclude that they do not place the manager's own interest ahead of the interest of the plan participant. An approach that focuses on measures that address conflicts (instead of mandating a strict conflict-free process) and employs a "reasonable person" standard would add much-needed practicality to the valuation safe harbor while still protecting the interests of the plan and plan participants. It would also align with the asset-neutral theme of the Proposed Rule, as it would not unfairly disfavor investment options which include non-publicly traded assets.

We would also note that, similar to our recommended approach in the "Liquidity" factor, here compliance with the 1940 Act regime should not be a prerequisite to deeming a valuation process prudent for DIAs with illiquid asset exposure. Instead, the Department should describe an appropriate valuation process under ASC 820 or a similar industry standard to include reasonable steps to mitigate any conflicts and disclose such conflicts to an independent party for consideration, including the use of a third-party valuation expert that provides positive assurance or a range of values determination on any illiquid asset. This is a crucial enhancement of the safe harbor, as even independent fiduciaries can have economic interests in matters related to their investment decisions. For example, a trustee of a CIT, in addition to often being subject to ERISA, is responsible for making trustee determinations, including those required in Section 9.18(b)(4) of the Office of the Comptroller of the Currency (the "OCC") regulations or is otherwise subject to state laws which determine CIT fiduciary activities. Pursuant to those regulations, a trustee of a CIT may and does receive a fee based on the assets under its management. Nonetheless, the OCC, for example, has determined that such fee arrangements may be appropriately managed through "good faith" fair value procedures. And a fiduciary's selection of a lower-cost option offered through a CIT may also act as a mitigant. In other words, the Department should remain deferential to existing regulatory frameworks which direct the valuation procedures and conflicts mitigation processes of fiduciaries of DIAs.

On this point, we believe fiduciaries will be more likely to rely upon the safe harbor if there are examples of a valuation process that contain conflicts but otherwise would be deemed to have

met the safe harbor.²⁴ These should include confirming instances where: (1) a plan sponsor or valuation agent it engages makes independent valuation determinations of an underlying portfolio of assets even if it receives information from an interested party, (2) an underlying manager of assets held by the DIA may utilize its own proprietary valuation determination if it disagrees with a valuation opinion provided by a valuation consultant, (3) the independent valuation agent to the fiduciary or an underlying asset manager is partly or wholly compensated by an interested party such as the underlying manager of assets invested in by the DIA, (4) the DIA manager relies on the valuation estimates produced by the valuation consultant that has been engaged by the underlying asset manager if the DIA manager documents and determines such reliance is appropriate and reasonable and (5) a DIA manager engages a valuation agent who uses inputs and/or models from the manager(s) of the underlying assets held by the DIA. These are important examples for which fiduciaries would like clarification in the Final Rule.

Appropriate conflict mitigants with respect to the valuation of private investments could include, for example, engagement with an independent valuation firm to either provide a fair value range for an investment or evaluate whether a fair value analysis by a fund sponsor is reasonable on at least a quarterly basis, while also requiring each illiquid asset be subject to an annual review by an independent auditor. These types of conflict mitigants reflect current best practices in the private funds space.²⁵

Here too, we reiterate the importance of not requiring the manager of a DIA to certify or otherwise “represent[] in writing that the securities for which there is not a generally recognized market are valued through a conflict-free, independent process[.]”²⁶ For one, this approach is impracticable, if not impossible. Parties involved in valuing illiquid assets will likely possess information advantages and enjoy some modicum of financial interest in the asset marks being determined (e.g. performance fees on unrealized gains which are available to certain non-1940 Act vehicles). We believe the Department is well-positioned to recognize the realities of market practices and work alongside asset managers and fiduciaries to continue to elevate the importance of conducting proper due diligence and avoid giving undue prominence to obtaining certifications from managers of DIAs—particularly with respect to DIAs allocating to alternative assets through non-1940 Act structures like CITs and managed accounts. We believe this can be best achieved by the fiduciary requesting from the DIA manager, and documenting, information related to any potential material conflicts that could impact the valuation process of any underlying assets. This approach would empower fiduciaries to make their own judgments after accounting for any identified potential conflicts. Importantly, the Department should also make clear that a fiduciary need not engage its own valuation consultant in making determinations related to valuations.

²⁴ We note that entities holding “plan assets” and are subject to ERISA will remain subject to ERISA’s existing guidance on valuation.

²⁵ See, e.g., Institutional Limited Partners Association, *Continuation Funds: Considerations for Limited Partners and General Partners*, at 7 (May 2023), <https://ilpa.org/wp-content/uploads/2023/05/Continuation-Funds-Considerations-for-Limited-Partners-and-General-Partners.pdf> (describing the limited partner advisory committee conflict waiver process in the context of continuation vehicle investments and noting that “[a] fairness opinion from an independent financial adviser, a partial disposition to a third-party or an arms-length transaction through a minority stake may be helpful” to “ensure a fair price was obtained in relation to conflicts of interest waivers”).

²⁶ 91 Fed. Reg. at 16,141.

As to scope of the valuation assessment expected of fiduciaries, the Department should avoid the suggestion that fiduciaries must diligence investments on an asset-by-asset level. This would prove too burdensome for fiduciaries if they were to select and then monitor a DIA with exposure to illiquid assets being fair valued through various valuation procedures by the underlying asset managers. In addition, certain vehicles may be subject to restrictions on the reporting of certain data, making it difficult for a fiduciary to adopt a single valuation process for each asset. Instead, we believe that, consistent with the general approach under the Proposed Rule, fiduciaries should be required to either have determined through diligence requests or have otherwise obtained a written representation from the DIA manager that the underlying assets (including direct or indirect exposure to Level 3 assets) have been valued by the DIA manager according to appropriate conflicts mitigation policies. Such information should allow the fiduciary to establish the basis upon which such manager found the valuation processes of the underlying manager(s) reasonable (e.g., the existence of conflict policies, disclosure practices and certain valuation procedures).

To the extent the Department considers an alternative construction of the “conflict-free, independent” process, we would propose that the valuation conflict and independence analysis be limited to assessing the relationship between the DIA manager and the valuation agent engaged by the DIA manager to review the DIA’s asset valuations and processes. A fiduciary’s determination would be limited to the conflicts procedures implemented by the DIA manager to address any such potential or actual conflicts at or below the DIA.

B. The Department should revise its continuation fund example to provide an example of a continuation fund that satisfies the safe harbor with respect to the Valuation factor.

Section (j)(4) of the Proposed Rule introduces an example of a situation where the fiduciary has not satisfied the safe harbor with respect to the “Valuation” factor. This example deals with a continuation fund that is managed or controlled by a manager that has recently acquired or contemplates an imminent acquisition of assets from an investment vehicle, such as another fund, that is managed or controlled by the manager or an affiliate of the manager. The example provides that the assets to be purchased by the continuation fund “do not trade on a public exchange and lack readily observable market prices,” and that “valuation of the purchased assets is based on application of the manager’s proprietary valuation methods that rely on inputs provided by the manager or its affiliates.”²⁷ In the Proposing Release, the Department invited comment on whether, and if so how, this rulemaking should be modified to include additional safeguards, consistent with the Proposed Rule’s asset-neutral, process-based framework and E.O. 14330, to address risks that may arise in connection with the valuation and asset selection process of certain private asset vehicles, such as continuation funds.

We are concerned that, notwithstanding the conflicts in the example in section (j)(4), there are certain elements of the valuation framework in the example—a manager’s proprietary valuation method using inputs provided by the manager or an affiliate—that are commonly used by products that hold illiquid, hard-to-value assets and in which a DIA may invest, including many funds that invest in alternative assets. We therefore think it would be helpful for the Department

²⁷ *Id.* at 16,142.

to provide an example of an investment where there are inherent conflicts of interest that may affect valuation, but reasonable steps specific to the conflicts presented have been taken to address such conflicts. We have proposed an example below to address the foregoing:

Example. Indirect investment in a continuation fund—

Facts. A fund manager (“Underlying Manager”) is forming a continuation fund (“Continuation Fund”) that will acquire assets from another fund managed or controlled by the Underlying Manager or an affiliate of the Underlying Manager, and the Underlying Manager takes steps to mitigate conflicts which may affect the valuation of the Continuation Fund’s investments, which steps include (i) hiring an agent to conduct a comprehensive, competitive process to locate lead investors (large, sophisticated investors who will own a substantial stake in the Continuation Fund and will negotiate many of its key terms), (ii) obtaining a fairness opinion, valuation opinion, appraisal or similar analysis on the underlying assets from a third-party financial advisor or other third-party service provider, or both, and (iii) negotiating the terms of the transaction with certain third party lead investors who will invest in the Continuation Fund. The Underlying Manager also takes reasonable steps to ensure that the investors in the selling fund (“Original Fund”) are treated fairly, such as by obtaining consent for the transaction from the limited partner advisory committee or offering investors in the Original Fund the ability to participate in the Continuation Fund unless otherwise approved by the limited partner advisory committee. The named fiduciary of a plan is selecting investment options for the plan, and is considering a DIA which has disclosed that it will invest directly or indirectly in the Continuation Fund following the DIA manager’s consideration of the conflicts involved in the Continuation Fund and the steps taken by the Underlying Manager to mitigate them. The DIA’s direct or indirect investment in the Continuation Fund may be a new investment, or the DIA (or one of its underlying investments) may be a direct or indirect investor in the Original Fund which must decide whether to retain its interest in the underlying asset held by the Original Fund by investing in the Continuation Fund.

Analysis. If the DIA invests directly or indirectly in a Continuation Fund that has recently acquired or contemplates an acquisition of assets in a transaction that may be affected by a conflict of interest, the named fiduciary of a plan who is considering the DIA must assess and determine (independently or with assistance of a qualified investment professional, if necessary) that the conflict of interest has been appropriately considered by the DIA manager to permit an appropriate valuation of the assets to be held by the DIA.

Conclusion. The facts demonstrate that the named fiduciary can conclude that the DIA manager has appropriately considered whether the Underlying Manager has addressed any conflict of interest affecting valuation. The named fiduciary may then select the DIA, which invests directly or indirectly in the Continuation Fund. The example would conclude that the named fiduciary is deemed to have satisfied section 404(a)(1)(B) of ERISA and paragraph (j) of the Proposed Rule when selecting a DIA with exposure to the Continuation Fund.

In the alternative, the Department may wish to remove the continuation fund example that appeared in the Proposed Rule, confirm it has no binding force, and not include another continuation fund example. We believe continuation funds are unlikely to themselves be DIAs, and it is therefore not critical to include a continuation fund among the examples.

C. The Department should align the Final Rule’s treatment of fiduciary engagements of independent third-party valuation firms with other Department guidance.

We request that the Department add an example addressing the common circumstance in which a fiduciary prudently retains an independent third-party valuation firm to help develop and operate a regular valuation process, while the fiduciary retains the authority and responsibility to make the actual valuation determination for the plan. Adding such an example would further the Department’s goal of providing a workable, process-based safe harbor, consistent with the requirement in proposed paragraph (j) that the DIA be capable of being timely and accurately valued through a conflict-free and independent process. Such an example would give plan sponsors additional comfort in an area where valuation questions can create significant litigation and liability concerns and where the Department has recognized that fiduciaries may appropriately enlist the services of professional advisors to carry out the necessary objective, thorough, and analytical evaluation of investment options.

It is also important that the Final Rule, preamble, and any related guidance, including references to Technical Release 2026-01, be drafted carefully so they do not imply fiduciary status for, or otherwise create uncertainty regarding, non-discretionary service providers that assist plans in connection with the valuation process. The Department’s Information Letter to Eugene Ludwig dated March 21, 1996 regarding derivatives and its 2020 Information Letter both contemplate fiduciary reliance on qualified professionals without those professionals thereby assuming fiduciary status. If the Department’s materials are read to suggest that a valuation firm or other service provider becomes a fiduciary merely because it helps a fiduciary develop a repeatable process and provides reports on an agreed cadence, service providers may be less willing to work with plans, may limit the scope of services they are willing to provide, or may increase pricing to reflect perceived fiduciary and litigation risk—the precise kind of regulatory burden that Executive Order 14330 directed the Department to alleviate. In that circumstance, the safe harbor may not provide plan sponsors the practical comfort it is intended to provide, and smaller plans in particular may be deterred from retaining the professional assistance that the Proposed Rule expressly contemplates. To propose an example:

Example. Valuation; independent third-party valuation services—

Facts. The plan document for a participant-directed individual account plan provides that the plan sponsor’s investment committee is the named fiduciary responsible for the selection and monitoring of DIAs and for determining the value used by the plan for a DIA that holds assets for which there is not a generally recognized market.

To assist in carrying out that responsibility, the named fiduciary engages an independent third-party valuation firm that is not under common control with the manager of the DIA or with any person responsible for the acquisition, disposition, or management of the

underlying assets. Working with the named fiduciary, the valuation firm helps develop a written valuation process that is designed to be applied regularly on an agreed cadence appropriate to the needs of the plan. The written process identifies the valuation methodologies to be used, the information sources to be considered, the assumptions to be documented, and the procedures for handling exceptions or follow-up questions.

Pursuant to that written process, the valuation firm periodically performs the agreed analysis, prepares a written valuation report, and transmits that report to the plan sponsor's investment committee on the agreed cadence. The engagement provides that the valuation firm does not have authority to determine the value used by the plan, to cause the plan to accept any valuation, to approve any purchase, sale, or redemption, or otherwise to exercise discretion over plan assets or plan administration. The valuation firm also does not decide whether the DIA should be selected, retained, or removed from the plan. The named fiduciary reviews the report, may ask questions or request additional analysis, and makes the actual valuation determination for purposes of the plan.

Analysis. A fiduciary may prudently retain an independent third-party valuation firm to assist in developing and carrying out a regular valuation process for assets for which there is not a generally recognized market. The valuation firm's assistance in helping the named fiduciary establish that process, periodically applying the process, and furnishing written valuation reports to the named fiduciary would not, solely by reason of those activities, cause the valuation firm to become a fiduciary with respect to the plan's valuation determination. The valuation firm would not become a fiduciary as long as it does not exercise discretion or authority over the value used by the plan and the named fiduciary retains responsibility for the ultimate determination. The named fiduciary nevertheless must objectively, thoroughly, and analytically review the report and the process and determine that they remain appropriate to the needs of the plan.

Conclusion. The named fiduciary of this plan is deemed to have satisfied the consideration and determination requirements of paragraph (j) of this section, and section 404(a)(1)(B) of ERISA, with respect to valuation under this scenario if: the named fiduciary prudently selects and monitors the independent valuation firm; the named fiduciary understands the written valuation report and the valuation process, or otherwise performs appropriate due diligence on the report and process; the named fiduciary does not know, or have reason to know, information that would cause the named fiduciary to question the reliability of the report or the process; and the named fiduciary, and not the valuation firm, makes the actual valuation determination for purposes of the plan. This conclusion would not change solely because the valuation firm works with the named fiduciary to develop, implement, maintain, or periodically update the written valuation process.

§ 2550.404a-6(k) – Performance Benchmark

A. The Department should clarify how the “meaningful benchmark” standard applies to alternative asset determinations.

Under existing case law and common fiduciary practice, plaintiffs claiming that a prudent fiduciary would have selected a different fund based on cost or performance must provide a “sound

basis for comparison” or “meaningful benchmark.”²⁸ Courts have emphasized that benchmarks should share similar mandates, strategies, objectives, and risk characteristics with the DIA under review. The Department has reasonably adopted this judicially developed “meaningful benchmark” standard to shield against burdensome litigation in paragraph (k) of the Proposed Rule. However, procedurally, the Proposed Rule could be incorrectly interpreted as shifting the burden of proving a “meaningful benchmark” to the defendant from the outset and thereby reducing the pleading standard for plaintiffs. We urge the Department to clarify that a plaintiff’s assertion that a fiduciary did not meet this safe harbor factor (or any other factor for that matter) is not sufficient to state a plausible claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

As to substance, the Proposing Release appropriately provides that “there is no presumption or preference against new or innovative” DIAs and that it is appropriate for a fiduciary, with the assistance of valuation adviser, to build a composite comparator when evaluating investment alternatives that do not have a single, readily available benchmark.²⁹ Yet the Proposing Release also states “the complexity of alternative assets can make comparing performance across different asset classes more challenging.”³⁰ There should not be a bias against alternative assets in satisfying this factor.

To ensure that the regulation serves its stated purpose of reducing burdensome litigation, the Department may wish to clarify that the judicially developed “meaningful benchmark” standard—which requires that a benchmark share broadly similar mandates, strategies, objectives, and risk characteristics with the DIA—is context-dependent, and should be evaluated based on the process by which a fiduciary considers the specific characteristics and objectives of the alternative asset and its role in the overall fund.³¹

Additionally, paragraph (k) provides that fiduciaries “should identify benchmarks that are as meaningful as possible” and “should seek to identify the best possible comparators.”³² Because fiduciaries seeking to comply with the safe harbor will need to identify comparators prospectively, the Department may wish to clarify that this “as possible” and “best possible” standard should be based on information available to the fiduciary at the time the determination was made, and that fiduciaries can reasonably rely on different benchmarks and comparators to satisfy the “meaningful benchmark” standard—there is no single right answer. Indeed, a reasonable analysis of process in selecting available comparators should satisfy this standard in the vast majority of cases. The Department should be clear that, consistent with existing law, a fiduciary is not required to identify the single “best possible” comparator, and fiduciaries are free to reasonably select a benchmark that was appropriate under the circumstances, even if not the “best possible” one.

This concern is not hypothetical. As the Department itself has recognized, the current litigation environment has “tremendous power to harass’ individual fiduciaries,” and meritless lawsuits have deterred employers from establishing, maintaining, or enhancing their retirement

²⁸ *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018).

²⁹ 91 Fed. Reg. at 16,142

³⁰ *Id.* at 16,117.

³¹ See *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1148 (10th Cir. 2023).

³² 91 Fed. Reg. at 16,142.

plans and from adopting innovative plan features that could improve participant outcomes.³³ The safe harbor factors proposed by the Department are intended to provide fiduciaries with the confidence to “rely on [their] determination without undue fear of litigation.”³⁴ Language that could be interpreted as requiring fiduciaries to identify the “best possible” comparator may allow “Monday morning quarterback” arguments that a different comparator would have been more appropriate than the one the fiduciary selected, notwithstanding the fiduciary’s reasonable analysis based on information available at the time the determination was made. We do not believe that is consistent with the Department’s intent.

Accordingly, the Department may wish to clarify that the “meaningful benchmark” framework as applied to fiduciaries seeking safe harbor requires that they reasonably endeavor based on the information available to select a “meaningful benchmark,” understood as one that is reasonable under the circumstances. Under this approach, a fiduciary should be found to have identified a “meaningful benchmark” if it satisfies any of several criteria that demonstrate its appropriateness for evaluating the DIA. For example, a benchmark could satisfy the “meaningful benchmark” requirement because it is widely recognized and commonly used in the investment industry for the relevant asset class; because it is well-diversified and reflects the general risk and return characteristics of the investment category; because it represents a transparent and objective measure of performance; or because it is appropriate under the particular circumstances of the plan and its participants. While a fiduciary may compare a potential DIA (with public and private asset exposure) to a DIA option which may include investments of different styles, vehicles or asset classes to establish that such potential DIA would provide plan participants with a higher expected or target risk-adjusted net of fee profile, this initial benchmarking exercise would be followed by a second step—designating one or more “meaningful benchmarks” specific to each component of the DIA. In the case of a DIA with exposure to alternative assets, a fiduciary may find a composite benchmark to be more meaningful particularly if no other benchmark with similar mandates, strategies, objectives and risks exists in the market. This “meaningful benchmark” standard, evaluated based on what can reasonably be determined by a fiduciary’s reasonable effort, would preserve the Department’s core objective of ensuring that fiduciaries engage in a meaningful evaluation process, while providing the flexibility and legal certainty that the safe harbor is intended to deliver. It would also allow fiduciaries to select benchmarks based on practical considerations—such as availability, transparency, and widespread acceptance—rather than being constrained to identify a single comparator that shares substantially identical mandates and strategies with the DIA.

§ 2550.404a-6(l) – Complexity

- A. The safe harbor should remain consistent with existing ERISA obligations and clarify that there is no additional burden being imposed on fiduciaries simply by virtue of investing in a DIA with exposure to alternative assets.**

We encourage the Department to restate the cardinal principle that a fiduciary’s evaluation of investments must be informed and grounded in the fiduciary’s own competence, and that a fiduciary always has an obligation to understand the plan’s investment options, with or without

³³ *Id.* at 16,095 n.33 (citing *Cunningham v. Cornell Univ.*, 2018 WL 1088019, at 1 (S.D.N.Y. Jan. 19, 2018)).

³⁴ *Id.*

the assistance of a professional. We would also urge the Department to clarify in the Final Rule's text that paragraph (1) is consistent with well-established principles of ERISA's duty of prudence and should not be read to favor less complex investments. The safe harbor should implement a generally applicable test for fiduciaries to comply with this factor irrespective of the nature of the asset classes in which the DIA may invest.

The Department should revise example (1)(1), which describes a pooled investment vehicle that includes allocations to alternative assets and notes the varied and sophisticated fee-based incentive structures including management fees and performance fees. By highlighting the fee structures of alternative assets, the Department inherently ties such asset class to requiring a more exacting assessment by the fiduciary for it to determine it satisfies the "Complexity" safe harbor factor. In doing so, the "Complexity" safe harbor could be misread to impose a functional requirement to include or forbid certain types of products. We view the requirements imposed on fiduciaries in example (1)(1) to unnecessarily discriminate against fiduciaries allocating to alternative assets in one or more DIAs. The burden plays out in both scenarios of the example.

In the first scenario, a fiduciary appears to be required to engage a third-party investment advice fiduciary as a condition precedent to making findings that the fee structure is worth the expected or target risk-adjusted return and such value outweighs the "variability or potential unpredictability of the amount and timing of the fees."³⁵ The first scenario also suggests that the management fee construct is part of a variable fee-based incentive structure. However, most products offering alternative asset exposure have an AUM-based fee at a fixed rate. Additionally, we believe this first scenario should expressly state that the value judgment in respect of fees should account for any potential diversification benefits provided by the asset class.

In the second scenario, the fiduciary must secure a written representation from the manager of the DIA or the party otherwise responsible for conducting due diligence on the alternative assets that none of the underlying fees will be passed onto the plan, consult a qualified professional where appropriate and be unaware of any reason to question the written representation. We believe this scenario is too ambiguous, namely that it is unclear fiduciaries could rely on this scenario without further clarity around what constitutes "an appropriate, flat, AUM-based fee."³⁶ Instead, the Department should expressly state that there is no preference for fixed-fee arrangements at the plan level over investment options with variable performance fee structures. Such arrangements that require a DIA manager to internalize fees at the underlying vehicle level could materially stifle plan participants' access to innovative products and limit the options available to fiduciaries in considering and selecting DIAs with exposure to alternative assets.

B. The Department should include examples specific to the application of the "Complexity" factor to smaller plans.

In the event the Department retains the "Complexity" factor as a standalone factor, we respectfully request that the Department add the following two examples after proposed § 2550.404a-6(1)(2). The Proposing Release explains that additional clarity is especially important in the small-plan universe because smaller plans lag in adopting novel or complex investment

³⁵ *Id.* at 16,144.

³⁶ *Id.*

options and many small plans rely on service providers for administration and investment menu selection. Proposed paragraph (l) asks whether the fiduciary has the skills, knowledge, experience, and capacity to comprehend the DIA or instead must seek qualified assistance, and proposed paragraph (f) expressly contemplates both reliance on a prudently selected section 3(21)(A)(ii) investment advice fiduciary and prudent delegation of compliance with relevant factors to a section 3(38) investment manager. The Department also states that a named fiduciary who appoints a section 3(38) investment manager is responsible for prudent selection of the manager, but not the manager's individual investment decisions, while the Department's fiduciary booklet explains that the named fiduciary still must monitor the manager periodically.

Example. Complexity; prudent reliance on investment advice fiduciary—

Facts. The named fiduciary of a small participant-directed individual account plan is responsible for establishing the plan investment menu and selecting DIAs for the plan menu. The named fiduciary believes that participants may benefit from the diversification and risk-adjusted return potential of a target date fund series with a limited allocation to alternative assets. The named fiduciary determines, however, that the named fiduciary does not have the skills, knowledge, experience, or capacity to evaluate such DIAs without professional assistance.

The named fiduciary therefore interviews candidates eligible to serve as investment advice fiduciaries within the meaning of section 3(21)(A)(ii) of ERISA, considers each candidate's knowledge, skill, experience with participant-directed individual account plans, experience evaluating DIAs that include alternative assets, compensation, fiduciary status and conflicts, and selects an independent investment advice fiduciary with extensive experience evaluating such investments. The selected investment advice fiduciary has no affiliation with the managers of the investment alternatives under consideration.

At the named fiduciary's direction, the investment advice fiduciary evaluates a reasonable number of similar target date fund series, including series with limited allocations to alternative assets and comparable series without such allocations. The investment advice fiduciary provides the named fiduciary with written analyses comparing the alternatives' expected or target risk-adjusted returns over an appropriate time horizon, fees and expenses, participant-level and plan-level liquidity, valuation procedures, participant needs, and meaningful benchmarks. For the series that include alternative assets, the investment advice fiduciary also obtains sufficient information from the persons responsible for managing the DIAs regarding valuation procedures and liquidity risk-management practices. The named fiduciary understands the information provided, asks follow-up questions, and determines that one target date fund series with a limited allocation to alternative assets is appropriate to further the purposes of the plan. The named fiduciary then selects that series as a DIA for the plan.

Analysis. Paragraph (l) requires a fiduciary to determine whether it has the skills, knowledge, experience, and capacity to comprehend a DIA sufficiently to discharge its obligations under ERISA and the governing plan documents or whether it must seek assistance from a qualified investment advice fiduciary, investment manager, or other

individual. In this example, the named fiduciary appropriately determines that professional assistance is required and prudently selects an independent investment advice fiduciary with relevant experience. The named fiduciary does not satisfy paragraph (l) merely by retaining the investment advice fiduciary. Rather, the named fiduciary appropriately relies on the investment advice fiduciary's written analyses only after reading, reviewing, and understanding them. Such analyses and related information will differ across various types of investments made by the manager of a DIA and therefore the level of information a fiduciary must consider will vary. Moreover, the named fiduciary uses the investment advice fiduciary's work to objectively, thoroughly, and analytically consider the relevant factors described in paragraphs (g) through (k) of this section with respect to a reasonable number of similar alternatives.

Conclusion. The named fiduciary in this example satisfies the requirements of paragraph (l) of this section by interviewing and selecting a qualified investment advice fiduciary and reviewing and understanding the advice received. While a fiduciary is not required to seek assistance from an investment advice fiduciary in selecting DIAs, reasonable reliance on recommendations of a thoughtfully selected investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA is generally indicative of a prudent process.

Example. Complexity; prudent delegation to investment manager—

Facts. The named fiduciary of a small participant-directed individual account plan is responsible for establishing the plan investment menu and is authorized under the plan to appoint an investment manager within the meaning of section 3(38) of ERISA (a "3(38) manager") with discretion to select DIAs for all or a portion of the plan menu. The named fiduciary believes that participants may benefit from the diversification and risk-adjusted return potential of a target date fund series with a limited allocation to alternative assets. The named fiduciary determines, however, that the named fiduciary does not have the skills, knowledge, experience, or capacity to conduct the substantive investment analysis necessary to evaluate such DIAs.

The named fiduciary therefore interviews candidates eligible to serve as a 3(38) manager, considers each candidate's knowledge, skill, experience with participant-directed individual account plans, experience evaluating DIAs that include alternative assets, compensation, fiduciary status, and conflicts, and appoints an independent investment manager with extensive experience in such investments. The written appointment delegates to the 3(38) manager the responsibility for analyzing and satisfying paragraphs (g) through (k) of this section with respect to the possible target date fund series and gives the investment manager discretion to select the DIAs covered by the appointment.

The 3(38) manager then evaluates a reasonable number of similar target date fund series, including series with limited allocations to alternative assets and comparable series without such allocations, and determines, consistent with paragraphs (g) through (k) of this section, that one series with a limited allocation to alternative assets should be selected as a DIA. In doing so, the 3(38) manager analyzes the alternatives' expected or target risk-adjusted returns over an appropriate time horizon, fees and expenses, participant-level and plan-

level liquidity, valuation procedures, participant needs, and meaningful benchmarks, and obtains written representations where appropriate. The named fiduciary reviews the 3(38) manager's qualifications, the scope of the delegation, and the reports describing the 3(38) manager's process and conclusions, and periodically reviews the 3(38) manager's continued adherence to the investment management agreement, but does not separately repeat the 3(38) manager's underlying substantive analysis of the DIAs.

Analysis. Paragraph (l) requires a fiduciary to determine whether it has the skills, knowledge, experience, and capacity to comprehend a DIA sufficiently to discharge its obligations under ERISA and the governing plan documents or whether it must seek assistance from a qualified investment advice fiduciary, investment manager, or other individual. In this example, the named fiduciary appropriately determines that such assistance is required and prudently appoints a qualified investment manager. Because paragraph (f) permits a named fiduciary to prudently delegate compliance with the relevant factors to an investment manager within the meaning of section 3(38) of ERISA, the named fiduciary is not required to duplicate the 3(38) manager's substantive analysis of the underlying DIAs after making the prudent appointment and delegation. The named fiduciary's responsibility is to prudently appoint the 3(38) manager and to review the 3(38) manager's continued qualifications and adherence to the terms of the appointment.

Conclusion. The named fiduciary in this example satisfies the requirements of paragraph (l) of this section by prudently appointing a qualified 3(38) manager when the named fiduciary lacks the expertise to conduct the substantive analysis itself. The named fiduciary also is deemed to have satisfied the requirements of paragraphs (g) through (k) of this section, and section 404(a)(1)(B) of ERISA, with respect to the factors delegated to the 3(38) manager, because the 3(38) manager conducted the required substantive analysis and made the selection under a valid delegation. The named fiduciary therefore is entitled to rely on the safe harbor with respect to the delegated factors without separately performing the same substantive investment analysis, although the named fiduciary remains responsible for the prudent selection and monitoring of the 3(38) manager and is not liable for the 3(38) manager's individual investment decisions. While a fiduciary is not required to appoint a 3(38) manager to select DIAs, thoughtful delegation to a 3(38) manager within the meaning of section 3(38) of ERISA is generally indicative of a prudent process.

C. The Department should consider renaming the factor as “Comprehension.”

Additionally, if the factor is kept, we believe the “Complexity” factor should be renamed to “Comprehension” to reflect the focus on the knowledge and understanding of the fiduciary and not the nature of the underlying assets that the fiduciary expects to acquire through a DIA. The Proposing Release describes the fiduciary as having to meet the “comprehension requirements” to satisfy this safe harbor factor.³⁷ We believe renaming the factor will better align with the nature of the inquiry a fiduciary must make to satisfy this factor.

³⁷ *Id.* at 16,103.

§ 2550.404a-6(m) – Defining “Designated Investment Alternative”

A. The Department should confirm the safe harbor factor analysis occurs at the plan level.

The Proposed Rule includes several examples in the safe harbor, including in “Fees,” “Valuation” and “Complexity” which require the plan fiduciary to assess these components at the level of the actual vehicles holding direct exposure to funds or the underlying assets in which such funds invest.

We propose the addition of the following exception to subsection (m):

(4) The term “designated investment alternative” shall refer to the vehicle in which the plan participants directly invest and not to any of the underlying products contained within such vehicle. However, such plan level vehicles may be comprised of a broad range of asset classes, including “alternative assets” as defined by Executive Order 14330.

B. The Department should confirm that the Final Rule applies consistently to the selection of all investment options (including QDIAs).

The Department should confirm the application of the Final Rule with respect to QDIAs. We note that the Proposed Rule does not distinguish between the selection of QDIAs and other DIAs. While we assume that the Department intends the Final Rule to apply consistently with respect to the selection of all investment options (including QDIAs), we are asking the Department to confirm this point. This confirmation could be provided in the form of an example that includes a QDIA:

Example. Qualified Default Investment Alternatives; allocation to alternative assets—

Facts. In connection with selecting a new target date fund series for inclusion on a plan’s investment line-up, the named fiduciary of the plan works with a third-party investment advice fiduciary (within the meaning of Section 3(21)(A)(ii) of ERISA) to consider three target-date fund series, each of which includes an allocation to alternative assets. The fiduciary intends to designate the new target date fund series as the plan’s QDIA and to satisfy the conditions of the safe harbor for QDIAs under Section 404(c) of ERISA. After objectively, thoroughly, and analytically considering (and making a determination with respect to) the factors listed in paragraphs (g) through (l) of this section, the fiduciary selects a target-date fund series from the three options as the plan’s QDIA.

Analysis. This rule does not draw a distinction between the selection of QDIAs and the selection of other DIAs. Instead, the principles set forth herein apply consistently to the selection of all DIAs.

Conclusion. Because the fiduciary objectively, thoroughly, and analytically considered, and made determinations with respect to, the factors listed in paragraphs (g) through (l) of this section, the fiduciary is entitled to the regulatory presumption of prudence set forth

herein with respect to its selection of the QDIA. Whether or not the fiduciary is entitled to safe harbor protection for QDIAs under Section 404(c) of ERISA will depend on whether the fiduciary meets the conditions for relief thereunder.

Appendix A

Cleary Gottlieb Steen & Hamilton LLP

Davis Polk & Wardwell LLP

Debevoise & Plimpton LLP

Kirkland & Ellis LLP

Latham & Watkins LLP

Ropes & Gray LLP

Simpson Thacher & Bartlett LLP