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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attn: RIN 1210-AC38

Submitted online via <http://www.regulations.gov>

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

BlackRock, Inc. (together with its affiliates, “**BlackRock**”) ¹ respectfully submits its comments to the Department of Labor (“**DOL**”) in response to the DOL’s proposed rule, *Fiduciary Duties in Selecting Designated Investment Alternatives* (the “**Proposal**”). ² The Proposal would clarify, and provide a safe harbor for, a fiduciary’s duty of prudence under the Employee Retirement Income Security Act of 1974 (“**ERISA**”) in connection with selecting designated investment alternatives for a participant-directed individual account plan, including asset allocation funds that include alternative assets. It implements section 3(c) of President Trump’s Executive Order 14330, *Democratizing Access to Alternative Assets for 401(k) Investors* (the “**Executive Order**”). ³

As a manager of retirement funds on behalf of millions of Americans, BlackRock shares the DOL’s goal of helping American workers secure a dignified and comfortable retirement. We support the Proposal, which represents an important step to modernize retirement plans and expand access to investments that can improve diversification and long-term retirement outcomes.

The Proposal would establish a process-based safe harbor for plan fiduciaries when they select designated investment alternatives for a plan’s investment menu. The Proposal’s framework is asset-neutral, such that it applies to the selection of any type of investment. It identifies six non-exhaustive factors for a plan fiduciary to objectively, thoroughly, and analytically consider and make determinations on, when making such a selection: (1) performance; (2) fees; (3) liquidity; (4) valuation; (5) performance benchmarks; and (6)

¹ BlackRock is one of the world’s leading asset management firms. We manage assets on behalf of individual and institutional clients across equity, fixed income, liquidity, real estate, alternatives and multi-asset strategies. We manage retirement funds on behalf of millions of Americans.

² *Fiduciary Duties in Selecting Designated Investment Alternatives*, U.S. Dep’t of Labor, 91 Fed. Reg. 16088 (Mar. 31, 2026), available at <https://www.govinfo.gov/content/pkg/FR-2026-03-31/pdf/2026-06178.pdf>.

³ *Democratizing Access to Alternative Assets for 401(k) Investors*, E.O. 14330 (Aug. 7, 2025), reprinted in 90 Fed. Reg. 38921 (Aug. 12, 2025), available at <https://www.govinfo.gov/content/pkg/FR-2025-08-12/pdf/2025-15340.pdf>.

complexity. When a plan fiduciary does so following the process described in the Proposal for any of the factors, their judgment regarding the factor(s) is presumed to have met their ERISA duty of prudence.⁴

If refined and implemented effectively, the Proposal could promote retirement security by increasing the opportunity set and protections for retirement investors, while supporting innovation and prudent decision-making among plan sponsors. A refined framework's clarity and administrability would give plan fiduciaries and participants confidence that investments are selected through a prudent process. This would lay the foundation for greater choice and modernization in investment options, which can improve retirement outcomes through increased diversification and the potential for higher risk-adjusted returns.

Our letter proceeds in two parts. Part I provides comments on the structure and scope of the safe harbor, to reinforce plan fiduciaries' significant discretion and the deference afforded to those who comply with it. Part II provides our comments on the six-factor framework, including each factor's standard and examples. Our comments are informed by our experience as a service provider to a range of US defined contribution plans and our long history of deep engagement with our clients.

I. Strengthening the Presumption of Prudence

As described above, the Proposal establishes processes that plan fiduciaries can use to show that they have satisfied their duty of prudence when selecting an investment option. Applying this framework can increase plan fiduciaries' and participants' confidence in investment selections and entitle plan fiduciaries to significant legal deference.

In our view, the safe harbor will be most effective if its scope and conditions are clear, and if it reflects the high level of discretion that ERISA affords plan fiduciaries. Part I provides recommendations to this end, focusing on the Proposal's examples, references to professional fiduciaries and advisors, and application to the duty to monitor.

A. Illustrative, Adaptable Examples Will Support Plan Fiduciaries' Prudent Processes

The Proposal sets forth the safe harbor process for each of the six factors in a provision that first describes the process and then provides examples applying the process to different fact patterns. These detailed examples present specific facts involving different types of investments and explain whether or not the plan fiduciary in the example satisfies the safe harbor. They are incorporated directly into the regulatory text, to demonstrate what it means for a fiduciary to be prudent in the circumstances that they address.⁵

Although the examples constitute much of the proposed regulation, the Proposal provides limited context to guide how they should be interpreted or applied. The proposed regulatory text does not explain how the examples relate to the description of each factor's process, and the Proposal's preamble only modestly supplements the regulatory text. The preamble indicates that certain examples are intended to illustrate principles that apply to

⁴ 91 Fed. Reg. 16095; Proposed § 2550.404a-6(f).

⁵ See 91 Fed. Reg. 16089.

a fiduciary's prudent process; it also describes the examples as "illustrative" in one instance.⁶

Importantly, the Proposal does not clarify whether the examples are intended to establish additional safe harbor requirements in certain circumstances. For instance, if a safe harbor example contemplates the use of a particular measure for risk-adjusted performance, valuation standard, or liquidity risk management framework, the extent to which this framework must be used to comply with the safe harbor is unclear. As a result, some may interpret the example to require use of the stated framework to invoke the safe harbor.

Ambiguity regarding the application of the examples could make the safe harbor framework less effective. Most fundamentally, it undercuts the high level of discretion that ERISA and the Proposal otherwise afford plan fiduciaries when selecting plan investments. If plan fiduciaries are uncertain how the examples apply, they may feel constrained to rigidly conform with the examples' fact patterns. This could discourage fiduciaries from selecting types of investments for which an example is not provided or steer them to use specific methodologies and processes that do not necessarily further the interests of the plan. Such an outcome would run counter to the design of the safe harbor and could undermine the goals of ERISA, the Proposal, and the Executive Order.

To clarify the purpose of the examples and strengthen the safe harbor framework, the regulatory text of the final rule should state that the examples are illustrative only, and do not impose operative safe harbor requirements. This change will empower plan fiduciaries to apply the robust safe harbor processes when considering a broad range of investment options, while maximizing their discretion and flexibility.

B. References to Professional Advisors Should Reflect Plan Fiduciaries' Maximum Discretion in Selecting Investments

The Proposal makes numerous, favorable references to the potential role of professional fiduciaries and other advisors in supporting a plan fiduciary's prudent process. For example, the clause that establishes the core requirements of the safe harbor contemplates that a satisfactory process "may include relying on recommendations of a prudently selected investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA... or prudently delegating compliance with respect to a particular factor or factors to an investment manager within the meaning of section 3(38) of ERISA."⁷ A separate clause provides that prudence requires consideration of all relevant factors, "including, where appropriate, with the benefit of analysis of professional advisors like third-party

⁶ See, e.g., 91 Fed. Reg. 16096, 16099, 16102. See also 91 Fed. Reg. 16094. "The Department generally is of the view that 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."

⁷ Proposed § 2550.404a-6(f).

investment advice fiduciaries....”⁸ The examples demonstrating a prudent process for each safe harbor factor often involve the use of a third-party professional advisor as well.⁹

Third-party investment advice fiduciaries and other professional advisors support many plan fiduciaries in fulfilling their duties to plan participants and beneficiaries. The Proposal appropriately highlights how their expertise and services can contribute to a prudent process. However, a prudent process need not always involve a third-party advisor, and hiring an advisor does not *per se* satisfy the duty of prudence.

As presently drafted, the Proposal could be read to suggest that hiring a professional advisor is necessary to comply with the safe harbor in a broad set of circumstances, without regard to the plan fiduciary’s skills, knowledge, experience, and capacity to carry out its duties. This implication is particularly acute in the examples embedded in the regulatory text, which frequently involve the use of a 3(21) fiduciary or other advisor. Where examples of a prudent process almost always incorporate consultation with a professional advisor, retaining such an advisor could be seen as integral to a prudent process.

While plan sponsors may choose to enlist advisors to support their prudent decision-making, they should retain the discretion to make investment selections independently where they have the skills, knowledge, experience and capacity to do so. For example, plan fiduciaries increasingly have access to data, analytics, and other tools that could enable them to prudently select investments using the safe harbor’s processes. The safe harbor framework should accommodate and foster the use of these analytical tools, which can support a rigorous and effective investment selection process.

We recommend that the DOL revise references to professional advisors in the final rule, to better clarify the maximum discretion that the Proposal provides to plan fiduciaries. Paragraphs (e) and (f), which describe elements of a prudent process that apply to any use of the safe harbor, specify that such a process may include use of a professional advisor. Paragraph (l) also addresses the potential use of a professional advisor in connection with the complexity factor. These paragraphs suffice to confirm that plan fiduciaries may prudently engage such advisors, where appropriate, when selecting investments. Incorporating references to advisors in the safe harbor examples is therefore unnecessary; it could also create uncertainty as to whether retaining advisors is required in certain circumstances, as explained in Part I.A. We therefore recommend omitting references to the use of professional advisors from the safe harbor examples, and retaining the references in paragraphs (e), (f), and (l). In addition, we recommend including a clarifying statement that a plan fiduciary’s decision not to use a professional advisor should not create any inference or presumption that the plan fiduciary failed to follow a prudent process.

⁸ Proposed § 2550.404a–6(e). The proposed complexity factor also provides “The plan fiduciary must appropriately consider the complexity of the designated investment alternative and determine that it has the skills, knowledge, experience, and capacity to comprehend it 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.” Proposed § 2550.404a–6(l).

⁹ See, e.g., Proposed § 2550.404a–6(g)(1), (2); Proposed § 2550.404a–6(h)(1), (3), (4), (5).

C. The Safe Harbor Should Extend to the Duty to Monitor

The Proposal clarifies a plan fiduciary's duty of prudence when selecting plan investment options, but the preamble states that the Proposal does not address plan fiduciaries' duty to monitor investment options after they have been selected.¹⁰ According to the Proposal, the DOL anticipates issuing interpretive guidance in the near term regarding this duty to monitor.¹¹ In addition, the preamble briefly discusses the Proposal's potential application to the duty to monitor:

The Department generally is of the view that 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 [to monitor]. Put differently, a plan fiduciary that tracks the process in the proposed regulation during appropriately established monitoring cycles will meet ERISA's monitoring requirements.¹²

The text of the proposed regulation does not refer to the duty to monitor or describe how the safe harbor processes and factors could apply to this duty.

We agree with the DOL that complying with the safe harbor's processes during appropriate monitoring cycles satisfies ERISA's duty to monitor. We believe the safe harbor processes are robust, prudent, and readily applicable in the monitoring context. Moreover, a plan fiduciary that satisfies the safe harbor processes when monitoring investments should benefit from the same deference and presumption of prudence that the safe harbor provides regarding the selection of investments.

To promote adoption of the safe harbor's processes and to support plan fiduciaries in carrying out their duty to monitor, the final rule should expressly provide that the judgment of a fiduciary that follows the safe harbor's processes during appropriate monitoring cycles is presumed to meet ERISA's monitoring requirements and is entitled to significant deference. This clarification will appropriately affirm that plan fiduciaries applying the safe harbor processes to monitor are entitled to a high level of deference, as when they apply these processes to investment selection. The provision should carry persuasive weight with courts, such that the relevant judgment of a plan fiduciary is respected. Following the final rule's adoption, the DOL could evaluate its impact on fiduciary monitoring practices and assess whether issuing interpretive guidance on the duty to monitor would be valuable.

II. Enhancing the Six-Factor Framework

As described above, the Proposal establishes the substantive processes that satisfy the safe harbor through a six-factor framework that focuses on: (1) performance; (2) fees; (3) liquidity; (4) valuation; (5) performance benchmarks; and (6) complexity. For each factor, the Proposal first describes the applicable standard and then presents examples that

¹⁰ 91 Fed. Reg. 16093.

¹¹ 91 Fed. Reg. 16094; 91 Fed. Reg. 16128.

¹² 91 Fed. Reg. 16094.

apply the standard to different fact patterns, to illustrate a prudent process in those circumstances.

We support the six-factor framework and agree that a plan fiduciary should appropriately consider and make determinations about each applicable factor when prudently selecting investment options. We believe the six factors appropriately reflect existing legal, regulatory, and subregulatory frameworks, as well as prudent market practices. While a plan fiduciary may also prudently consider additional factors, we believe that the current six represent a comprehensive list for purposes of satisfying the safe harbor. We do not recommend that the DOL incorporate additional factors into the formal safe harbor framework. To that end, we recommend revising paragraph (f) of the final rule to omit “non-exhaustive” from the first sentence, to expressly confirm that plan fiduciaries that follow the applicable processes set forth in paragraphs (g) through (l) may rely on the safe harbor.

Part II reviews the six-factor framework in further detail and sets forth our principal comments on each factor. For each factor, we provide comments on both the proposed standard and the illustrative examples.

A. Performance

i. The Performance Standard

The Proposal’s performance factor in paragraph (g) provides that a fiduciary must appropriately consider a reasonable number of similar alternatives and determine that the risk-adjusted expected returns of the designated investment alternative, over an appropriate time horizon and net of anticipated fees and expenses, further the purposes of the plan by enabling participants and beneficiaries to maximize risk-adjusted returns on investment net of fees and expenses.¹³

We support the inclusion of performance as a safe harbor factor, and we agree with the core principles that inform the standard. For example, it is appropriate that fiduciaries take into account certain risks associated with a designated investment alternative, as well as participants’ time horizons. To establish a meaningful performance framework, the language of paragraph (g) should state clear and practicable process expectations. To this end, we recommend clarifying in the regulatory text how “risk-adjusted expected returns” may be determined, including for newly established funds. We suggest conforming this language with the text of paragraph (k) that provides “[t]he ‘risk-adjusted expected returns’ of the designated investment alternative may be determined based on its historical performance unless it has none, in which case it may be determined based on the historical performance of a different investment with similar mandates, strategies, objectives, and risks and that is not the meaningful benchmark [as described in paragraph (k)].”¹⁴

¹³ Proposed § 2550.404a-6(g).

¹⁴ See Proposed § 2550.404a-6(k).

We also recommend adding language in the final rule (or accompanying preamble) confirming that a plan fiduciary’s reasonable judgment in identifying and considering “a reasonable number of similar alternatives” is entitled to significant deference.

ii. Performance Examples

The Proposal includes two examples to demonstrate prudent processes regarding the performance factor. We believe the processes illustrated in the examples are sound, and we offer minor suggested revisions to ensure that the examples are generalizable to a range of plans, investments, and participants.

In Example (1), the named fiduciary selects a target date series with lower expected returns but lower expected risk (as measured by volatility), after considering various risk measures, including the Sharpe Ratio.¹⁵ The example notes that it is “often prudent to select a lower-risk investment strategy with a lower expected return.”¹⁶ While the analysis appears appropriate for the facts in the example, stating that a lower-risk, lower-return strategy is “often prudent” could be read as an *a priori* endorsement of such a strategy in a broader set of circumstances. Revising the text to state that it “may be” prudent would improve the example’s objectivity. Similarly, we suggest omitting the specific reference to the Sharpe Ratio, to avoid implying that this specific risk measure is broadly applicable to any fiduciary assessment of performance.

In Example (2), the named fiduciary analyzes the historical performance of three target date series over 1-, 3-, 5-, and 10-year periods, and relies most heavily on the 10-year historical performance data as most probative for purposes of selecting a designated investment alternative for a plan with a predominantly younger workforce.¹⁷ The example states that “[g]iven the long-term nature of retirement savings, it is often prudent to give greater weight to the long-term historical performance...over short-term performance.”¹⁸ As in Example (1), this language could be construed to favor the use of 10-year performance data in a broader set of circumstances than is intended. We therefore recommend revising “it is often prudent” to “it may be prudent,” and incorporating a similar example demonstrating the prudent use of historical performance data over a shorter time horizon.

We also recommend clarifying in the examples that plan fiduciaries may use other methods of analyzing performance in addition to actual historical performance data to supplement their performance analysis. This is particularly relevant for the consideration of an investment alternative with a new or innovative strategy or product design. In addition, we recommend incorporating an example to illustrate an instance where paragraph (g) is satisfied through the plan fiduciary’s use of a data and research platform to evaluate investment options. We believe this additional clarity would support the Proposal’s stated aim of maximizing plan fiduciaries’ discretion in making investment selections, by demonstrating how data and analytical resources can support plan fiduciaries’ evaluation of performance and underpin prudent processes.

¹⁵ Proposed § 2550.404a-6(g)(1).

¹⁶ *Id.*

¹⁷ Proposed § 2550.404a-6(g)(2).

¹⁸ *Id.*

B. Fees

i. The Fees Standard

The Proposal's fees factor in paragraph (h) provides that a plan fiduciary must consider a reasonable number of similar alternatives and determine that the fees and expenses of the designated investment alternative are appropriate, taking into account its risk-adjusted expected returns and any other value the designated investment alternative brings to furthering the purposes of the plan. For this purpose, "value" includes any benefits, features, or services other than risk-adjusted returns. The fiduciary does not necessarily need to select the alternative with the lowest fees and expenses from among the alternatives it considers—for example, they could choose to pay more in exchange for greater services.¹⁹

We support the proposed standard on fees as currently drafted. It appropriately contemplates a data-driven assessment of investment alternatives' fees, expenses, expected risk-adjusted returns, and other value when selecting an investment option. Importantly, the provision underscores the fiduciary's discretion when considering fees—they must determine that fees "are appropriate" based on an evaluation that accounts for, *inter alia*, any benefits, features, or services associated with the investment option. The proposed language establishes a meaningful and practicable standard for safe harbor compliance, which accurately reflects the range of factors that may inform a prudent assessment of fees. As with the performance factor, we recommend that the final rule or preamble also state that a plan fiduciary's reasonable judgment in identifying and considering "a reasonable number of similar alternatives" is entitled to significant deference.

ii. Fees Examples

The Proposal presents five examples of processes applying the fees factor, four of which demonstrate prudent processes and one which fails to satisfy the safe harbor. They provide illustrative context that can aid fiduciaries in applying the fees factor in different circumstances, such as the selection of a lifetime income product, fund with alternative asset exposures, and other actively-managed funds. In our view, however, targeted revisions to certain examples would make them clearer and align them more closely with the proposed standard.

First, we recommend revising Example (2) to better clarify the safe harbor standard. It describes a selection process that is flawed because the plan fiduciary fails to consider the differences in fee structures among a fund's different share classes. The fiduciary in the example selects fund shares in a class that is identical to another class, but has higher fees. The fiduciary makes this selection after reviewing fund ratings provided by an independent ratings firm that do not account for differences between a fund's share classes. The fiduciary does not engage a professional fiduciary or consultant.²⁰

¹⁹ Proposed § 2550.404a-6(h).

²⁰ Proposed § 2550.404a-6(h)(2).

We agree that the process in the example appears to be flawed, because the fiduciary “failed to give any consideration to the differences in fees between the various share classes of the fund.”²¹ However, we are concerned that the additional details in the example could lead some to misunderstand the reasons that the stated process is flawed. In particular, the fiduciary’s use of an independent research tool in evaluating investment options may be consistent with a prudent process in many circumstances. We recommend revising Example (2) to clarify this point. We also recommend incorporating an additional example in the final rule to illustrate an instance where paragraph (h) is satisfied through the plan fiduciary’s use of a data and research platform to evaluate investment options.

We similarly recommend revising Example (3) to make clearer that certain details in the fact pattern are not necessary for safe harbor compliance. The example describes the prudent selection of an investment alternative with a lifetime income benefit with a higher fee than a similar designated investment alternative that does not have a lifetime income benefit. The analysis appropriately notes “[t]he lifetime income feature has added value to the plan and therefore justifies higher total fees than the designated investment alternative without this feature.”²²

However, the example’s facts provide additional details about the lifetime income product’s fees that are not necessary to the prudence analysis, but which some may interpret to be. For example, some may interpret the sentence “The additional fee typically secures more favorable annuity conversion rates throughout the life of the contract than would otherwise be available outside of the contract” to suggest that the higher total fees for the designated investment alternative with a lifetime income benefit are only appropriate because, in this case, the additional fee secures more favorable annuity conversion rates throughout the life of the contract than would otherwise be available.²³ We do not believe that this is the only context in which fees that are higher for a designated investment alternative with a lifetime income benefit than for a similar investment alternative without a lifetime income benefit would be appropriate. For example, other costs associated with a lifetime income product may contribute to higher total fees that may be justified in light of the added value that the lifetime income feature provides to the plan. We therefore recommend deleting “The additional fee typically secures more favorable annuity conversion rates throughout the life of the contract than would otherwise be available outside of the contract” from the final rule.

C. Liquidity

i. The Liquidity Standard

The Proposal’s liquidity factor in paragraph (i) provides that a plan fiduciary must consider and determine that the designated investment alternative will have sufficient liquidity to meet the anticipated needs of the plan at both the plan and individual levels.²⁴ The operative text notes there is no requirement that a fiduciary select only fully liquid products, and that a prudent process may regularly lead to a decision to sacrifice some

²¹ *Id.*

²² Proposed § 2550.404a–6(h)(3).

²³ *Id.*

²⁴ Proposed § 2550.404a–6(i).

plan- or individual-level liquidity, or both, in pursuit of additional risk-adjusted return.²⁵ The preamble explains that this text is intended to clarify that “ERISA gives fiduciaries the discretion to offer designated investment alternatives that contain illiquid investments.”²⁶

We agree that the consideration and determination of both plan- and participant-level liquidity is integral to a prudent process when selecting designated investment alternatives. We support the inclusion of a liquidity factor in the safe harbor framework and we believe the standard’s formulation is sound. The Proposal’s recognition that the potential for additional risk-adjusted return from an investment alternative that is comparatively less liquid may appropriately factor into a plan fiduciary’s evaluation of investment options is an important element of this framework, which aligns with the goals of the Executive Order.

ii. Liquidity Examples

To supplement the operative language, the Proposal presents four examples to demonstrate prudent processes with respect to plan- and participant-level liquidity. The examples include certain sound, illustrative principles to inform compliance with the safe harbor—for instance, Example (2) demonstrates how considerations such as the value of guaranteed payments and certainty of an insurer’s guarantee may justify restrictions on liquidity with respect to selection of a deferred annuity contract.²⁷ However, three of the examples expressly contemplate compliance with the safe harbor if the plan fiduciary selects an investment alternative that is subject to the liquidity risk management requirements under the Investment Company Act of 1940 (the “**1940 Act**”), or has established a program that is “substantially similar” to one that meets those requirements.²⁸ As explained below, we believe this disproportionate focus on funds that are subject to, or that operate consistent with, a specific body of law does not adequately account for the robust regulatory and risk management frameworks that are designed for other types of investment vehicles and undermines the goals of the Proposal and Executive Order.

Rule 22e-4 under the 1940 Act establishes liquidity risk management program requirements that are well suited to open-end mutual funds but inapposite for certain other vehicles, including many funds that invest in alternative assets. Notably, the rule provides that no covered fund may invest more than 15% of its net assets in illiquid investments.²⁹ An “illiquid investment” (as that term is defined under the rule) is one that the fund reasonably expects cannot be sold or disposed of in current market conditions in seven calendar days or less without the sale significantly changing the market value of the investment.³⁰ Many alternative assets would fall under that definition.

Imposing a hard cap on illiquid investments would undercut the substantial discretion and flexibility that ERISA and the Proposal otherwise afford fiduciaries. The safe harbor

²⁵ *Id.*

²⁶ 91 Fed. Reg. 16098.

²⁷ Proposed § 2550.404a-6(i)(2).

²⁸ See, e.g., Proposed § 2550.404a-6(i) (1), (3) and (4).

²⁹ 17 CFR §270.22e-4(b)(iv).

³⁰ 17 CFR §270.22e-4(a)(8).

framework is designed to support investors' access to a range of investment options as markets and investment practices evolve. A percentage cap may be arbitrary or inappropriately prescriptive for certain plans and investment options, which could raise questions about the prudence of a process oriented to ensure such a restriction. A cap may also be seen to "disfavor" the type of investment it limits, undercutting the Proposal's asset-neutral approach.³¹ It also appears to be in tension with other technical elements of the Proposal. Example (2), for instance, expressly states "the fact that a designated investment alternative is fully allocated to an illiquid product, like an annuity, does not foreclose its selection..."³² Such a product might not satisfy the requirements of a Rule 22e-4 framework, or one substantially similar thereto.

The Proposal's focus on mutual fund liquidity risk management programs (i.e., programs that comply with the 1940 Act requirements) discounts the robust regulatory and risk management frameworks that are designed for other types of investment vehicles. Bank-maintained collective trust funds (commonly referred to as "collective investment trusts" or "**CITs**"), for example, are highly regulated, pooled investment vehicles available to certain retirement plans, which implement liquidity risk management programs tailored to their investment objectives, investor base, redemption features, and underlying assets.

A CIT that is maintained by a nationally chartered bank is subject to regulation by the Office of the Comptroller of the Currency ("**OCC**") and a CIT that is maintained by a state chartered bank is subject to regulation by the applicable state's banking regulator. Unlike a mutual fund, a CIT is also subject to ERISA (and DOL oversight) if any ERISA plan assets are invested in the CIT. This robust regulatory structure informs the liquidity practices that a CIT deploys. For example, the Comptroller's Handbook on Collective Investment Funds highlights the importance of a bank's ensuring adequate liquidity to meet customer redemption needs, and sets forth related considerations for OCC-regulated banks that maintain CITs.³³ These considerations include "the structure and duration of the assets owned by the [CIT], redemption patterns, cash flow projections, and underlying assumptions."³⁴ The Handbook also states that the CIT "should be stress tested, looking at changes in [CIT] flows and the availability of liquidity, under various scenarios. Regular testing of any contingency financing sources is expected."³⁵ These supervisory standards, reinforced by applicable statutes, regulations, and fiduciary obligations, lay the foundation for robust CIT liquidity risk management programs that are tailored at the vehicle- and platform-level.

³¹ See, e.g., 91 Fed. Reg. 16093. "While the proposed regulation does provide the exact guidance contemplated by E.O. 14330, providing guidance only with respect to those asset allocation funds that invest in alternative assets could create the impression that those asset allocation funds are either favored or disfavored. They are not. They are subject to the same requirements as any other investment. This is consistent with the Department's historical practice of providing neutral guidance that does not favor or disfavor any particular type of investment or investment strategy."

³² Proposed § 2550.404a-6(i)(2).

³³ Office of the Comptroller of the Currency, Comptroller's Handbook, Asset Management, Collective Investment Funds, Version , May 2014, available at: <https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/collective-investment-funds/index-collective-investment-funds.html>.

³⁴ *Id.* at 7.

³⁵ *Id.*

To more accurately reflect liquidity risk management practices of the range of investment options that the Proposal enables plan fiduciaries to consider, we recommend revising Examples (1), (3) and (4) as set forth below.

We recommend two key changes to Example (1). First, clause (iii) should reflect that a plan fiduciary is deemed to have satisfied paragraph (i)'s participant-level liquidity requirements if the designated investment alternative is a bank-maintained collective trust fund and the plan fiduciary determines that the fund has a liquidity risk management framework that has been reasonably designed in accordance with the law, regulation and supervisory expectations to which the fund is subject. Second, the three-pronged framework currently set forth for non-mutual funds should be replaced with language clarifying that, for any investment vehicle type, a plan fiduciary will be deemed to have met the consideration and determination requirements of paragraph (i) of this section and section 404(a)(1)(B) of ERISA if the fiduciary performs appropriate due diligence to confirm that the designated investment alternative will have sufficient liquidity to meet the anticipated needs of the plan at both the plan and individual levels.

We recommend making conforming changes to Examples (3) and (4). In Example (3), clause (B) should be revised to reflect that the plan fiduciary may also rely on the fact that the designated investment alternative is a bank-maintained collective trust fund, which is required under applicable law and regulation to manage liquidity risk. Example (3)'s three-pronged framework for non-mutual funds should also be replaced with language stating that, for any investment vehicle type, a plan fiduciary must perform appropriate due diligence to confirm that the designated investment alternative will have sufficient liquidity to meet the anticipated plan-level liquidity needs of the plan. We similarly recommend revising Example (4) to omit references to a liquidity risk management program that is substantially similar to the 1940 Act requirements that apply to mutual funds.

D. Valuation

i. The Valuation Standard

The Proposal's valuation factor in paragraph (j) requires the fiduciary to appropriately consider and determine that the designated investment alternative has adopted adequate measures to ensure that the designated investment alternative is capable of being timely and accurately valued in accordance with the needs of the plan.³⁶ We share the DOL's view that valuation is a fundamental consideration in a fiduciary's selection of designated investment alternatives and we support its incorporation into the six-factor framework. We also generally support the principles that inform the proposed standard.

We note, however, that there is limited precedent to inform the adoption of "adequate measures to ensure" that an investment is "capable of being timely and accurately valued," and we recommend revising this language to better align with established valuation requirements and practices. We suggest replacing this text with language requiring a fiduciary to appropriately consider and determine that the designated investment alternative "is subject to reasonably designed valuation policies and procedures in

³⁶ Proposed § 2550.404a-6(j).

accordance with the needs of the plan.” This language would establish a meaningful standard for a prudent process with respect to valuation, while maximizing fiduciary discretion and the standard’s administrability.

ii. Valuation Examples

The Proposal includes four examples to demonstrate processes regarding valuation that either satisfy or fail to comply with the safe harbor. Certain of these examples include helpful demonstrative context on prudent processes. Example (1), for instance, confirms that plan fiduciaries may generally rely on asset valuations derived from a national securities exchange or similar public exchange.³⁷ However, other examples introduce novel or unclear valuation constructs that could create uncertainty and practical challenges for plan fiduciaries seeking to use the safe harbor.

Example (2) presents several such challenges. It describes a process in which the manager of a designated investment alternative “represents in writing that...securities for which there is not a generally recognized market are valued through a conflict-free, independent process no less frequently than quarterly, according to procedures that satisfy the Financial Accounting Standards Board Accounting Standards Codification 820...”³⁸ The example’s analysis confirms that a “conflict-free, independent process” is integral to plan fiduciaries’ ability to rely on asset valuations that use fair value measurement.³⁹ Example (4) incorporates this construct in a fact pattern involving the selection of a continuation fund as a designated investment alternative, stating “[t]he named fiduciary must assess whether the assets have been or will be valued through a conflict-free and independent process.”⁴⁰ Neither example defines “conflict-free” or “independent process.”

As currently drafted, the processes contemplated under Examples (2) and (4) diverge from those employed under existing regulatory frameworks, such as SEC Rule 2a-5.⁴¹ We do not believe this is the DOL’s intent—indeed, Example (3) separately provides that plan fiduciaries may rely on asset valuations that result from the application of reasonable valuation procedures adopted to comply with the 1940 Act and rules thereunder.⁴² We recommend revising references to a “conflict-free” and “independent process” to better align with those existing frameworks. First, references to a “conflict-free” process should be replaced with references to a process whereby conflicts are appropriately mitigated. Second, the text should clarify that valuation processes that include governance and oversight consistent with applicable law and regulation, such as oversight by a fund’s board, will constitute an independent process for purposes of the valuation factor.

Finally, we recommend adding language (potentially in a new example) to clarify the treatment of a designated investment alternative that is managed by an investment manager that is subject to ERISA’s fiduciary requirements, for purposes of paragraph (j). Specifically, we recommend clarifying that such a designated investment alternative may

³⁷ Proposed § 2550.404a-6(j)(1).

³⁸ Proposed § 2550.404a-6(j)(2).

³⁹ *Id.*

⁴⁰ Proposed § 2550.404a-6(j)(4).

⁴¹ 17 CFR § 270.2a-5.

⁴² Proposed § 2550.404a-6(j)(3).

be presumed by a plan fiduciary to have adopted adequate measures to ensure that the designated investment alternative is capable of being timely and accurately valued in accordance with the needs of the plan (or, if paragraph (j) is revised as recommended, to be subject to reasonably designed valuation policies and procedures in accordance with the needs of the plan).

E. Performance Benchmark

i. The Performance Benchmark Standard

The Proposal's performance benchmark factor in paragraph (k) provides that a plan fiduciary must appropriately consider and determine that each designated investment alternative has a meaningful benchmark, and compare the risk-adjusted expected returns of the designated investment alternative to the meaningful benchmark.⁴³

A "meaningful benchmark" is defined as an investment, strategy, index, or other comparator that has similar mandates, strategies, objectives, and risks to the designated investment alternative, and paragraph (k) makes clear that there may be more than one meaningful benchmark for a designated investment alternative. The "risk-adjusted expected returns" of the designated investment alternative may be determined based on its historical performance unless it has none, in which case it may be determined based on the historical performance of a different investment with similar mandates, strategies, objectives, and risks (that is not the meaningful benchmark).⁴⁴

The text also provides that, while a plan fiduciary should identify benchmarks that are as meaningful as possible, there is no presumption or preference against new or innovative designated investment alternative designs. Instead, when considering a new or innovative product design, a fiduciary should seek to identify the best possible comparators to it while also scrutinizing the potential value proposition presented by the new or innovative design.⁴⁵

We support the inclusion of a standalone factor focused on performance benchmarks in the safe harbor framework. A regulatory provision that clarifies the definition and use of a "meaningful benchmark" is an important element of an effective safe harbor that entitles a plan fiduciary's judgments to significant deference. We also generally agree with the language of the proposed standard, which underscores the importance of determining and comparing to a meaningful benchmark, while preserving fiduciaries' discretion in performing this comparison as part of their prudent process in selecting an investment alternative.

We appreciate that the Proposal provides for the consideration of new and innovative product designs. To better clarify that there is no bias against new and innovative products, we recommend two key revisions to the text. First, we recommend omitting the language "while a plan fiduciary should identify benchmarks that are as meaningful as possible," which could be read to establish a higher standard than would apply in the case

⁴³ Proposed § 2550.404a-6(k).

⁴⁴ *Id.*

⁴⁵ *Id.*

of a standard investment alternative design. We recommend revising “the best possible comparators” to “appropriate comparators” for the same reason.

ii. Performance Benchmark Examples

The performance benchmark factor includes three examples, two of which demonstrate prudent processes and one that fails to satisfy the safe harbor. We focus our comments on Example (2), which we recommend revising to inform plan fiduciaries’ prudent use of custom composite benchmarks.

In Example (2), a plan fiduciary satisfies the safe harbor’s performance benchmark factor by comparing the risk-adjusted expected returns of a designated investment alternative, which invests in publicly traded securities and private equity, with a custom composite benchmark. The custom composite benchmark is created by an investment advice fiduciary that the plan fiduciary hires, “who has no affiliation with the asset allocation fund.” The example analysis further states “In determining whether a particular benchmark is a meaningful benchmark, a plan fiduciary may rely on a benchmark created by a prudently selected investment advice fiduciary that is independent of the manager of the designated investment alternative.”⁴⁶

We recommend revising the example to clarify that a plan fiduciary may comply with the performance benchmark factor by utilizing a custom composite benchmark created by the manager of the designated investment alternative (or the manager’s affiliate), the plan fiduciary or anyone else with the appropriate expertise and informed insight into the proposed strategy, including for a fund with private asset allocations. The plan fiduciary can then make the determination as to whether the custom composite benchmark can appropriately serve as a meaningful benchmark for the designated investment alternative. A plan fiduciary can evaluate the manager’s potential conflicts of interest and whether those conflicts could affect the custom composite benchmark’s reliability as a comparator in determining whether it is appropriate for use as a meaningful benchmark (or consult with an independent advice fiduciary to help with that evaluation).

F. Complexity

i. The Complexity Standard

The Proposal’s complexity factor in paragraph (l) provides that a plan fiduciary must appropriately consider the complexity of the designated investment alternative and determine that it has the skills, knowledge, experience, and capacity to comprehend it 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.⁴⁷

We agree that an investment’s complexity is relevant to the prudent selection of that investment, and we support the incorporation of this factor into the safe harbor framework. We believe the language of the proposed standard is consistent with existing

⁴⁶ Proposed § 2550.404a-6(k)(2).

⁴⁷ Proposed § 2550.404a-6(l).

law and DOL guidance. Importantly, the standard does not require a plan fiduciary to hire a professional—the standard is whether the fiduciary has the skills, knowledge, experience, and capacity to understand the investment alternative sufficiently to carry out its obligations.⁴⁸ Plan fiduciaries that satisfy this standard are well-positioned to leverage databases and analytical tools in prudently selecting investments, with or without the help of a professional advisor.

ii. Complexity Examples

The Proposal presents two examples to illustrate how the complexity factor may apply to certain fact patterns. The first example illustrates two ways that a plan fiduciary may demonstrate that it sufficiently comprehends the complexity of an investment’s fee structure. The second example illustrates a selection process that is flawed because the plan fiduciary does not comprehend the investment alternative’s features, values, and fees. We provide comments on each example in turn.

In Example (1), a plan fiduciary considers a designated investment alternative that is a pooled investment vehicle with target positions in private assets and other assets. Certain of the private assets use “sophisticated and variable fee-based incentive structures to drive performance, including management fees and performance fees which include carried interest rights.” As noted above, the example describes two scenarios in which a plan fiduciary is deemed to have met the comprehension requirements for purposes of the complexity factor with respect to the investment alternative’s fee structure.⁴⁹

In the first scenario, the plan fiduciary must conduct relevant due diligence and determine the average total expected rate of the investment alternative’s fees, when fees will be paid, and how they will be determined. The plan fiduciary must then determine that the fee structure will deliver increased value by incentivizing performance which will, in turn, increase expected risk-adjusted return on investment and that this increase outweighs the variability or potential unpredictability of the amount and timing of the fees.⁵⁰

In the second scenario, the plan fiduciary must, among other things, obtain a written representation from the manager of the investment alternative, or otherwise perform adequate due diligence to confirm that none of the underlying fees will be passed through to the plan, and that, instead, the plan will pay an appropriate, flat, AUM-based fee to the manager, who will internalize the underlying fees.⁵¹

While we believe the processes described in each scenario are prudent, we are concerned that they contemplate specific analyses and procedures that may not be applicable in every evaluation of an investment alternative’s fees. In particular, the determinations in the first scenario relating to the fee structure’s incentivizing performance may not apply to many investment alternatives. We therefore recommend clarifying in the text the types of fee structures that merit such an analysis, and confirming that the analysis is not required for other fee structures.

⁴⁸ 91 Fed. Reg. 16103.

⁴⁹ Proposed § 2550.404a–6(l)(1).

⁵⁰ *Id.*

⁵¹ *Id.*

In Example (2), a plan fiduciary adds a managed account service to create a customized portfolio for each participant as the plan’s qualified default investment alternative. The fiduciary provides incomplete information to the managed account service because he does not understand the design of the service, and, as a result, the custom portfolios are materially similar to the plan’s target date fund (another designated investment alternative in the plan) but subject to substantially higher fees than those of the target date fund. The example states that the process “appears to be flawed because the named fiduciary failed to comprehend the features, values, and fees” of the managed account investment alternative.⁵²

We agree that the process described in Example (2) appears to be flawed, because the named fiduciary did not understand the managed account investment alternative’s design, features, values, and fees. As such, he did not comply with the complexity factor’s requirement that he “comprehend it sufficiently.” However, we are concerned that additional details in the example could be misinterpreted as contributing to the flawed process. For instance, Example (2) is the only example in the Proposal that addresses the use of a managed account service—the Proposal contains no illustrations of the prudent selection of such a service. The Proposal could therefore be seen to disfavor managed accounts and discourage their selection.

To better clarify the application of the complexity factor, we recommend deleting Example (2). In our view, the example is unlikely to supplement plan fiduciaries’ understanding of the factor—a process in which a fiduciary explicitly fails to understand basic elements of an investment is demonstrably non-compliant. Alternatively, the DOL could revise the example to demonstrate a prudent process for the selection of a similar investment alternative, which may be more instructive for those implementing the framework.

We thank the DOL for providing BlackRock the opportunity to comment on the Proposal. Please contact the undersigned if you have any questions or comments regarding BlackRock’s views.

Sincerely,

Nick Nefouse

Global Head of Retirement Solutions and Head of LifePath
Managing Director, BlackRock

Benjamin A. Tecmire

Head of U.S. Regulatory Affairs
Managing Director, BlackRock

⁵² Proposed § 2550.404a-6(l)(2).