

**Comment on Notice of Proposed Rulemaking Entitled “Fiduciary Duties in Selecting Designated Investment Alternatives”**

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) entitled “Fiduciary Duties in Selecting Designated Investment Alternatives,” 19 Fed. Reg. 16088 (Mar. 31, 2026).

*The Proposal Is Misleading*

Despite the NPRM’s misleading name, this rulemaking is not really about retirement plans offering investments in “alternatives.” The NPRM repeatedly refers to “alternative assets” listed in a recent executive order, such as private equity, private credit, and cryptocurrency. See 19 Fed. Reg. at 16092. The news media’s coverage similarly has also generally indicated that the subject of the proposal is “alternative” investments such as “crypto or private equity.”<sup>1</sup>

Although it is true that the proposal may encourage investments in alternative assets to be offered on the “menu” of investments in covered retirement plans such as 401(k)s (including within target-date funds), the suggestion that this is the main or only consequence of what is being proposed is incorrect. In reality, the proposal reflects an attempt to fundamentally change how retirement plans are expected to choose investment options of all kinds. We are concerned that this change, if successful, would likely result in riskier and costlier investments on the menu of investment options across the board, including but not limited to alternative assets.

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<sup>1</sup> See, e.g., Eric Gardner, [The Trump administration is cracking open the trillions sitting in Americans' retirement savings](#), More Perfect Union (May 25, 2026); Brett Samuels, [Employers to Tread Carefully With DOL 401\(k\) Private Asset Push](#), Bloomberg Law (Apr. 14, 2026); Peter Coy, [Why Employers May Be Wary of Adding Crypto or Private Equity to 401\(k\)s](#), New York Times (April 11, 2026); Courtney Vinopal, [Trump administration gives green light for alternative assets in 401\(k\) plans](#), HR Brew (Apr. 2, 2026); Daniel de Visé, [Trump wants private equity, crypto in 401\(k\)s. Should you invest?](#), USA Today (Mar. 31, 2026); Dan Primack, [Private Equity's Next Step Into 401\(k\)s](#), Axios (Mar. 31, 2026); Kenneth Corbin, [The Labor Department Wants to Expand Access to Alts in 401\(k\)s. Financial Advisors Say Change Will Be Slow to Arrive.](#), Barron's (Mar. 31, 2026); Tara Siegel Bernard, [401\(k\) Plans Could Add Riskier Investments Under a New Rule](#), New York Times (Mar. 30, 2026); Andrew Ackerman, [Employees Could Use 401\(k\)s to Invest in Crypto, Private Equity Under Trump Plan](#), Wash. Post (Mar. 30, 2026); Chris Cumming, [Trump's 401\(k\) Rule Checks All Private Equity's Wish List](#), Wall St. J. (Mar. 30, 2026); Utkarsh Shetti, Suzanne McGee, Arasu Kannagi Basil and Isla Binnie, [US paves way for private assets to be included in 401\(k\) retirement plans](#), Reuters (Mar. 30, 2026).

The NPRM eventually acknowledges that the proposal is not just about alternative assets several pages into the text: “Although E.O. 14330 directed the Department to focus guidance on fiduciary responsibilities in connection with offering an asset allocation fund that includes investments in alternative assets, the Department has decided not to limit the proposed rule to such funds” (91 Fed. Reg. at 16093). Much later, the NPRM also refers to its “more expansive approach” (91 Fed. Reg. at 16127). Even so, the NPRM’s own analysis of the proposed rule’s costs and benefits seems not to appreciate this feature of the proposal, focusing only on investments in alternative assets while failing to address the broader effects of fundamentally changing the standard for how all investment options are chosen by retirement plans.<sup>2</sup>

#### *What the Proposal Attempts to Change*

Under well-established interpretations of the law, covered retirement plans such as 401(k)s must not only consider appropriate factors in selecting options to offer plan participants, but also actually choose acceptable options on their merits.<sup>3</sup> These options are judged by their risk of loss and opportunity for gain as compared to other investments, as well as other factors such as diversification.<sup>4</sup> This standard ensures that retirement plans actually choose investments for the menu of options that are sound on their merits—including in target-date funds that contain a variety of investments—rather than going through the motions of considering appropriate factors and then settling on risky or costly options.

The NPRM proposes to abandon this approach. The proposal “introduces a process-based safe harbor for plan fiduciaries to use when selecting designated investment alternatives” (91 Fed. Reg. at 16095). Under this approach, so long as those fiduciaries can claim to have “objectively, thoroughly, and analytically consider[ed]” appropriate factors, they would be free to select risky or costly options with “significant deference” (91 Fed. Reg. at 16136). For example, the proposed rule would expressly allow retirement plans to select higher-cost products based on considerations of vague asserted “value,” such as “exemplary customer

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<sup>2</sup> See 91 Fed. Reg. at 16104-35.

<sup>3</sup> See 29 C.F.R. § 2550.404a-1(b)(1) (requirements are satisfied if the fiduciary “(i) [h]as given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary’s investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved . . . ; and (ii) [h]as acted accordingly” (emphasis added)); see also, e.g., *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996) (in determining whether a fiduciary has acted prudently, courts focus both “on the merits of the transaction” and “the thoroughness of the investigation into the merits of the transaction”).

<sup>4</sup> See 29 C.F.R. § 2550.404a-1(b)(2).

service” (91 Fed. Reg at 16097). Placing additional burdens on families to weed out excessively costly options represents both an economic cost that the NPRM inappropriately fails to consider,<sup>5</sup> and a transfer from people to the financial services industry. These opaque, inclusive costs are exactly how Wall Street often extracts money from people by charging higher fees for complex financial products with little real added value. (The “customer service” idea is particularly ridiculous in this context, since plan participants typically do not even interact with the customer service of investments in their retirement plan.)

Indeed, one implication of the proposal is that covered retirement plans such as 401(k)s would **not** be able to include alternative assets, such as private equity, private credit, and crypto, on retirement plan menus if those investments were judged on their own merits, as they would be too risky or costly. For example, as the NPRM itself notes, “alternative investments tend to be associated with higher, more complex fee structures” (91 Fed. Reg. at 16116).

#### *The Effects of the Proposal’s Approach*

Even if the Department finalizes this proposal, it remains to be seen whether covered retirement plans such as 401(k)s will adopt its approach or if courts will accept it. As the NPRM notes, the Supreme Court no longer instructs courts to defer to a federal agency’s interpretations of statutory terms, and the obligation for retirement plans to choose investment options prudently comes from a clear statutory provision.<sup>6</sup> Aware that they may be sued for violating their duty even if they follow the Department’s instructions, retirement plans may decline to offer alternative asset investments to plan participants. (Among other things, this calls into question the NPRM’s analysis of benefits, which assumes that retirement plans will actually see less litigation from the rule.)

Nonetheless, if retirement plans do adopt this approach, the results would be extremely troubling. Investments with higher fees and greater risk are likely to displace existing lower-cost investments that appear in the menu of investment options. One consequence

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<sup>5</sup> When the Department issued important regulations in 2010 to ensure that participants in covered retirement plans such as 401(k)s have access to information they need to make informed investment decisions, it estimated that those regulations would save people nearly 54 million hours valued at nearly \$2 billion in 2010 dollars. See Employee Benefits Security Administration, *Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans*, 75 Fed. Reg. 64910, 64911 (Oct. 20, 2010). The NPRM fails to consider the erosion of these benefits.

<sup>6</sup> See 19 Fed. Reg. at 16092.

of this proposal may be the erosion of investment options that retirement plan participants currently rely on. These investments include low-cost, diversified index funds, including target-date funds that are composed entirely of them. It is possible that retirement plans that follow the Department's proposed path will remove these options from the menu of choices in favor of options composed in whole or in part of more riskier or costlier options, such as alternative assets. Again, because the proposal would not just govern alternative assets but rather investment choices generally, the change could have consequences beyond the inclusion of alternative assets. For instance, retirement plans could conceivably replace low-cost passively managed funds with actively managed funds, even if the actively managed funds present no particular benefit. The rule contains no requirement that retirement plans maintain existing options, potentially imposing additional risks and fees on workers who like their retirement plan and want to keep it. So the proposed approach may actually broadly reduce access to low-cost or less risky options.

Notably, the NPRM confirms that the inclusion of riskier or costlier investments could occur within target-date funds that people are "defaulted" into.<sup>7</sup> Millions of people could therefore be exposed to these assets without a meaningful choice, both because they are defaulted into them and because better options are no longer available. Indeed, many of these people may not understand—or even know—that their savings are exposed to higher risk or more expensive investments, including private equity, private credit, crypto-linked assets, or commodities.<sup>8</sup> Notwithstanding that the Department explicitly acknowledges that the rule would primarily operate through the target-date funds meant to provide the lowest burden, it fails to take these higher costs into account in its analysis of costs and benefits.<sup>9</sup>

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<sup>7</sup> See 91 Fed. Reg. at 16112 (stating that "the main channel through which this proposal would lead to greater defined contribution plan investment in alternative assets would be within target date funds").

<sup>8</sup> To the degree that alternative assets such as cryptocurrency are [used for money laundering or violating economic sanctions](#), the proposal also threatens to make American retirees unwitting accomplices in that activity.

<sup>9</sup> When the Department issued regulations in 2007 to allow covered retirement plans to default people into certain investments, it estimated that the regulations would result in billions of dollars in benefits to people from increased retirement income because "[d]efault investments will be directed more toward higher-return portfolios." Employee Benefits Security Administration, *Default Investment Alternatives Under Participant Directed Individual Account Plans*, 72 Fed. Reg. 60452, 60466 (Oct. 24, 2007). Unlike the changes made by the 2007 regulations, the approach under consideration now could make default investment options worse rather than better. The NPRM fails to consider the erosion of these benefits.

To the extent that people even know their retirement savings are invested in more expensive or riskier investments, such as alternative assets, the proposal does little to ensure they can make informed decisions. Although the NPRM contains rhetoric about “offer[ing] the opportunity for participants to maximize risk-adjusted returns on their retirement asset net of fees” (91 Fed. Reg. 16088), there is nothing in the rule purporting to require *anyone* to provide plan participants with information, let alone information commensurate with the risks, costs, and complexity of the investments that they may be offered. As the NPRM itself notes, “[a]lternative assets can be complicated and require particularized analysis to understand their liquidity, valuation, and fees” (91 Fed. Reg. at 16115). Thus, the rule’s approach not only places the burden on plan participants to assess these options, but also fails to provide them with the necessary information to do so. Some “opportunity”!

Indeed, in addition to focusing only on alternative assets, the NPRM’s analysis of the proposal’s costs also focuses entirely on the costs and savings to plans and service providers. This analysis completely neglects the additional time people will obviously need to spend analyzing the complex, opaque investments that could be offered to them under the proposal’s approach. And that is not even to mention the costs to people of being opted into or choosing investments with higher fees and greater risk.

We would also note that the Department is pursuing this approach amid volatility in certain alternative assets, especially [private credit](#). It is one thing for wealthy people, who are typically the investors in assets like private credit, to bear the consequences of that volatility. But if these investments end up in retirement accounts, everyday Americans with only one chance to save for retirement could lose out. And among other consequences, more Americans reaching retirement age with less of their own retirement savings would put more pressure on Social Security.

It is clear who will benefit most if retirement plans adopt the approach of the proposal: Wall Street firms offering high-cost investments and existing investors in certain assets who will see appreciation if funds are channeled into these assets. The financial services industry wants access to the American people’s hard-earned retirement savings—the [nearly \\$50 trillion retirement market](#)—so that they can pad their profits with more fees, even if these investments are not any better or even worse than existing options. And existing investors in assets such as crypto will see the value of their investments rise, at least temporarily, as money from retirement accounts pours into the market.

### *Financialization*

The proposal's approach would exacerbate some of the worst features of the financialization of our society—the shifting of costs and risks onto individual people to benefit the financial services industry.

“Financialization” is a [cluster of concepts](#) relating to the growth of the financial sector and its increased power over our society. As relevant here, financialization includes our society's increased reliance on financial products and services to support the essentials of life, which, in turn, demands that everyone learn how to navigate complex financial systems. These changes have shifted costs and risks that were once shared by society onto individuals, benefiting the financial services industry.

Americans' retirement security has become increasingly financialized over the past several decades, primarily through the replacement of defined-benefit retirement plans with “defined-contribution” plans. Traditionally, American retirement plans were pensions, which provided promised benefits for a retiree's lifetime. Employers largely bore the costs and risks associated with those pensions, including investment costs and risks and longevity risk distributed across the population of retirees, and investment professionals managed complex investment decisions, saving workers time and limiting rent-seeking by the financial industry.

Over the last several decades, the retirement system has transformed into a primarily defined-contribution system. Among workers with employer-sponsored retirement plans, defined-benefit coverage [fell from](#) 59 percent in 1989 to 21 percent in 2022. Today, among private-industry workers, only 14 percent [have access to](#) a defined benefit retirement plan. This change means that most workers must now choose how to invest their precious retirement savings, with the risk of mistakes—or simply retiring at the “wrong” time—falling largely on individuals who have only one chance to get it right. There have been hard-fought efforts in recent years to improve governance of defined-contribution plans, such as 401(k)s, including by addressing the problem of high fees, which were draining retirement accounts without providing sufficient value.<sup>10</sup>

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<sup>10</sup> See, e.g., *Hughes v. Northwestern Univ.*, 595 U.S. 170 (2022); *Tibble v. Edison Int'l*, 575 U. S. 523 (2015); Employee Benefits Security Administration, *Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure*, 77 Fed. Reg. 5632 (Feb. 3, 2012); Employee Benefits Security Administration, *Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans*, 75 Fed. Reg. 64910 (Oct. 20, 2010).

This rule would be a step in the wrong direction, at best pushing more complex decisions onto people and at worst increasing their costs and risks so that the financial services industry and existing investors in certain assets can profit. As noted above, the proposal aims to relieve covered retirement plans such as 401(k)s of the obligation to select sound investments for the menu of options in people's retirement plans. Instead, the proposal envisions a world where retirement plans go through the motions of considering various factors in choosing investments for the menu, but people are ultimately on their own for assessing the actual costs and risks associated with different investments, including exotic alternative assets. And the investments actually available to people in their retirement plans may get riskier and costlier.

One way of thinking about the proposal, then, is that it aims to relieve the burden on retirement plans to make good decisions about plan investment options and place that burden on everyday Americans, who may not have been provided with the information or have the expertise to make those decisions. But the effects of the rule being proposed could be even worse than that, eroding low-cost and safer investment options that people have come to rely on. American workers would bear the increased risk and cost of worse investment options in their retirement plans. Benefits would flow to the financial services industry that offers these products, which would capture even more of Americans' precious retirement dollars, as well as existing investors in certain assets that will see their valuation rise at least temporarily.

In short, the proposal treats workers' nest eggs as a new frontier for people who make money off of risky and costly investments, including alternative assets, rather than as savings that should be protected—at a time when we are already seeing volatility in private markets.

### *Social Security*

Finally, we'd note as well that this proposal stands in sharp contrast to the most successful retirement-security program in the United States: Social Security.

Social Security is not perfect, and it must be strengthened. But its basic structure is the opposite of the approach reflected in this NPRM. Social Security provides a defined, inflation-adjusted retirement benefit; pools risk across workers and generations; and does not require people to assess private credit, evaluate the liquidity terms of private equity products, compare complex fee structures, or guess whether a volatile asset class like crypto will perform well leading up to the precise moment they need to retire. As a social

insurance program, it has served for nearly a century as America's [bedrock public retirement system](#).

Social Security shows that retirement security need not be organized around individualized exposure to increasingly complex financial products. To the extent that policymakers are concerned about retirement insecurity, the answer is not to make defined-contribution retirement plans *more dependent* on alternative assets. It is to strengthen the public anchor of the retirement system. Social Security's solvency challenges are real, but they are a reason to address the [labor-market and tax-base choices](#) that have weakened the program's finances, including rising wage inequality and a growing share of earnings exceeding the payroll tax cap.

The policy lesson is therefore not to further the financialization of private retirement savings. It is to strengthen and expand the parts of the retirement system that actually provide stable retirement income. Social Security should remain that anchor. Beyond Social Security, any complementary retirement savings system should minimize risk to the fruits of a lifetime of work—not expose those savings to increased risks and costs.

### *Conclusion*

In sum, in addition to presenting the proposal in a misleading fashion, the NPRM fundamentally misconstrues the costs and benefits of the rule being proposed and would be a step in the wrong direction for our society. Among other things, the proposal's analysis of cost and benefits neglects to consider the effects of the proposed rule beyond alternative assets, as well as the costs to people of choosing among and being defaulted into riskier, costlier, and more complex investment options. The Department's approach would also exacerbate some of the worst features of the financialization of our society—the shifting of costs and risks onto individuals to benefit the financial services industry. This proposal also stands in stark contrast with our country's preeminent public retirement program, Social Security. For these reasons, the Roosevelt Institute does not support the proposal and recommends that the Department of Labor withdraw it.