

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

June 25, 2026

June 25, 2026

The Honorable Keith E. Sonderling
Acting Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

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

Dear Acting Secretary Sonderling:

I write to express my strong opposition to the Department of Labor’s (Department) proposed rule, *Fiduciary Duties in Selecting Designated Investment Alternatives*.¹ The proposal would create a so-called safe harbor that encourages the fiduciaries of 401(k) and other participant-directed retirement plans to place private equity, private credit, real estate, commodities, digital assets, and other illiquid, opaque, and high-cost “alternative” investments on the menus that tens of millions of American workers rely on to build a secure retirement.² In the name of “expanding access,” the proposal would expose the retirement savings of ordinary Americans to assets that sophisticated institutions are now working to accelerate the decline of the public capital markets that have long been an important engine of American wealth-building; and perpetuate significant conflicts of interest by those in the Administration advocating for its adoption, including an Assistant Secretary at the Department with a direct financial interest in the rule’s adoption. I urge the Department to withdraw it. My numerous concerns follow.

I. The proposal would further discourage companies from going public, to the detriment of the workers it claims to help.

The Department’s own justification for this rule is that the American capital markets have undergone a “structural shift” away from public markets and toward private ones. The preamble emphasizes that the number of U.S. public companies has fallen by roughly 55 percent since 1997—from about 8,800 to fewer than 4,000—even as the number of private companies has grown by about 67 percent, to roughly 35 million.³ The Department responds to that decline not by encouraging more companies to go public, but by channeling retirement capital into private markets, reasoning that defined

¹*Fiduciary Duties in Selecting Designated Investment Alternatives*, 91 Fed. Reg. 16088 (proposed Mar. 31, 2026) (to be codified at 29 C.F.R. pt. 2550) (Proposal).

²The Employee Benefits Security Administration administers ERISA protections for private-sector retirement and welfare plans covering over 150 million workers, retirees, and their families. U.S. Dep’t of Labor, EBSA, *About EBSA*.

³Council of Econ. Advisers, *Retail Access to Alternative Investments Via Defined Contribution Plans* (Aug. 2025), cited in Proposal (preamble § 12.2.2 & n.79) (reporting that the number of U.S. public companies fell from about 8,800 in 1997 to fewer than 4,000 in 2024, while private companies grew by about 67 percent to roughly 35 million).

contribution plans have been left “absent from an emerging financial sector” and denied “access to the fastest growing American companies.”⁴

The growth of the private markets is not a market phenomenon to which the Department is responding; it is the direct product of decades of regulatory choices. Beginning with the adoption of Regulation D in 1982, and continuing through the weakening of the ban on general solicitation,⁵ repeated increases in private offering limits, the Securities and Exchange Commission’s (“Commission” or “SEC”) failure to adjust the accredited-investor thresholds for inflation, and the SEC’s loosening reporting triggers, we have seen expansion of the exemptions that let companies raise capital without the disclosure, governance, and accountability obligations of a public offering.⁶ The predictable result is that more than two-thirds of all new capital is now raised through exempt offerings rather than registered, public ones, and that disparity has persisted.⁷ As then-Commissioner Allison Herren Lee of the SEC

⁴Proposal (preamble § 12.2.2).

⁵ The prohibition on general solicitation and general advertising in exempt offerings has long reflected the Commission’s view that public solicitation was incompatible with a non-public offering. This prohibition covers advertisements in newspapers, magazines, television, and radio, seminars whose attendees were invited by general solicitation, and unrestricted websites. Section 201(a) of the Jumpstart Our Business Startups Act directed the Commission to lift that prohibition for offerings under Rule 506, and in parallel Rule 144A, where the securities are sold only to accredited investors (or, under Rule 144A, to qualified institutional buyers), provided the issuer takes “reasonable steps to verify” the purchasers’ status. Pub. L. No. 112-106, § 201(a), 126 Stat. 306, 313 (2012). The Commission implemented that mandate by adopting Rule 506(c), 17 C.F.R. § 230.506(c). See *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, Securities Act Release No. 33-9415, 78 Fed. Reg. 44771 (July 24, 2013) (effective Sept. 23, 2013). Rule 506(c) permits general solicitation provided that all purchasers are accredited investors and the issuer takes reasonable steps to verify their accredited status, an objective, facts-and-circumstances determination for which the rule supplies a non-exclusive list of verification methods and which must be satisfied even where every purchaser is in fact accredited. The practical effect was to reverse the Commission’s longstanding position and to permit, for the first time, the public marketing of unregistered securities to accredited investors under Rule 506, the most heavily used exemption from registration. In March 2025, current Commission staff issued no-action relief providing that an issuer takes “reasonable steps to verify” accredited status simply by requiring a high minimum investment and obtaining the purchaser’s written representations that it is accredited and that the investment is not financed by a third party, with no documentary verification required. See Latham & Watkins LLP, SEC No-Action Letter (Div. of Corp. Fin. Mar. 12, 2025); SEC Div. of Corp. Fin., Compliance & Disclosure Interpretations, Securities Act Rules, Questions 256.35 & 256.36 (Mar. 12, 2025) available at <https://www.sec.gov/files/corpfin/no-action/latham-watkins506c-031225-incoming.pdf>.

⁶See, e.g., *Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales*, 47 Fed. Reg. 11251 (Mar. 16, 1982) (adopting Regulation D); Jumpstart Our Business Startups Act, Pub. L. No. 112-106, §§ 201, 501 (2012) (directing the Commission to permit general solicitation in Rule 506 and Rule 144A offerings, and raising the Securities Exchange Act § 12(g) holder-of-record reporting threshold from 500 to 2,000); *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, Securities Act Release No. 33-10884 (Nov. 2, 2020) (raising the offering limits for Regulation A, Regulation Crowdfunding, and Rule 504). The accredited-investor income and net-worth thresholds have meanwhile remained unchanged in dollar terms since 1982, expanding the pool of eligible households by roughly 550 percent since 1983. See Better Markets, *Expanding Private Markets Undercuts Public Markets, Investor Protections, and Capital Formation* (Apr. 14, 2023).

⁷In 2019, exempt offerings accounted for approximately \$2.7 trillion (69.2 percent) of new capital, against \$1.2 trillion (30.8 percent) raised in registered offerings. *Facilitating Capital Formation ...*, Securities Act Release No. 33-10763 (Mar. 4, 2020). The disparity has persisted: the Commission’s Office of the Advocate for Small Business Capital Formation reports that, in the year ended June 30, 2024, registered initial public offerings raised only \$28 billion, against \$1.2 trillion in other registered offerings and far larger sums raised privately. SEC, Off. of the Advoc. for Small Bus. Cap. Formation, Annual Report (FY 2024). On the decline in the number of public companies, see Proposal (preamble) (citing Council of Economic Advisers data reflecting a roughly 55 percent decline since 1997).

explained, the expansion of these markets “is not the natural result of the evolution of ‘free market’ forces,” but rather “a product of the framework of laws and regulations through which markets operate.”⁸ The private markets the Department now proposes to open to 401(k) participants are, in other words, a regulatory construct, one built specifically to operate beyond the transparency and investor-protection regime that governs the public markets, and one whose continued expansion comes at the public markets’ direct expense.

More fundamentally, the exemptions that produced this growth were justified as relief for small businesses—a way to tailor disclosure requirements to be more small-issuer friendly—yet they have been captured by the largest and most opaque participants in the market.⁹ The Commission still describes Regulation D as a small-business tool, and the median Regulation D offering by an *operating company* remains under \$1 million. Measured in dollars, however, the exempt market is no longer about small issuers at all: it is dominated by pooled investment vehicles. According to the most recent reporting year, private equity, private credit, hedge, and real-estate funds together raised over \$1.7 trillion through Regulation D.¹⁰ Some of these are precisely the high-fee, illiquid, and infrequently valued products the proposed rule would now channel into 401(k) plans (discussed in detail in Section II of this letter). An exemption sold to Congress and the public as a way to help the corner business raise capital has become the principal conduit through which the most complex and least transparent funds in American finance gather assets.

We have also seen the hollowing out of the one statutory backstop meant to force large, widely held companies into the public-reporting system. Section 12(g) of the Securities Exchange Act requires a company to register and begin reporting once a class of its equity is “held of record” by 2,000 investors. But a unicorn size loophole has allowed billion-dollar companies to hide thousands of beneficial owners who actually own the shares behind Wall Street intermediaries, special-purpose vehicles, and nominee or “street name” arrangements.¹¹ SpaceX is the paradigmatic case. It remained private for about two

⁸Commissioner Allison Herren Lee, *Going Dark: The Growth of Private Markets and the Impact on Investors and the Economy*, Remarks at The SEC Speaks in 2021 (Oct. 12, 2021).

⁹The exempt-offering framework has long been defended as relief for small issuers. See Better Markets, *supra* (describing the Securities Act § 3(b) exemption for offerings of a “limited character” or “small amount”); Letter from Tyler Gellasch, Healthy Markets Ass’n, to SEC (Mar. 16, 2020) (File No. S7-05-20) (tracing the modern expansion of the exemptions to late-1970s concerns about regulatory burdens on small business). Yet by dollar volume the exempt market is dominated by pooled investment vehicles, which raised on the order of \$1.7 trillion through Regulation D in the most recent reporting year, even as the median Regulation D offering by a non-financial issuer remained under \$1 million. SEC, Off. of the Advoc. for Small Bus. Cap. Formation, Annual Report (FY 2024); Lee, *supra*.

¹⁰ See *supra* fn 8.

¹¹Section 12(g) requires registration once a class of equity is held of record by 2,000 persons (or 500 persons who are not accredited investors) and the issuer has more than \$10 million in total assets. 15 U.S.C. § 78l(g); 17 C.F.R. § 240.12g5-1. The test reaches only holders of record; investors holding through brokers, funds, special-purpose vehicles, or other nominee (“street name”) arrangements are counted as a single record holder, and, since the JOBS Act, securities held by employees under compensation plans are excluded from the count. See Commissioner Allison Herren Lee, *supra* (observing that an issuer “could have active secondary markets with hundreds perhaps thousands of investors and no obligation to file periodic reports”); Letter from Tyler Gellasch, Healthy Markets Ass’n, *supra* (explaining that the held-of-record test “allows for easy evasion” and that a fund used to access a private company may cause “numerous investors [to be] classified as a single investor”). When Facebook approached its 2012 offering, the older 500-holder trigger helped force it

decades and reached a valuation surpassing \$1.7 trillion, providing liquidity to a base of employees and investors numbering well into the tens of thousands through periodic, company-run tender offers rather than registered offerings—all while those beneficial owners stayed hidden behind a small number of record holders and the Section 12(g) threshold was never tripped.¹² Only its 2026 decision to file for an initial public offering—voluntary, and compelled by no reporting trigger—will produce the company’s first audited public financial statements, after twenty years in the dark.

The Department’s own justification and reasoning for this rule—that the American capital markets have undergone a “structural shift” away from public markets and toward private ones—is backwards, and it would make the underlying problem worse. The decline of the public company is not a condition to be accommodated; it is a development that warrants concern, precisely because the public markets are where most Americans can invest on equal terms. Public markets have offered the protection of mandatory and audited disclosure, Regulation Fair Disclosure, Sarbanes-Oxley internal-control requirements, Section 11 liability for material misstatements, and shareholder voting and governance rights. Private markets extend none of these protections to the shareholders (or working families) whose savings this rule would redirect.

Funneling a vast pool of retirement capital into private markets would only deepen the incentive for companies to remain private longer. Private capital is attractive to issuers precisely because it comes without the disclosure, governance, and accountability obligations of a public listing. If the Department effectively guarantees private funds a new and durable stream of 401(k) contributions, it reduces—at the margin and in the aggregate—the reason any company would submit to the rigors of a public offering. The predictable consequences are fewer initial public offerings, less price discovery, diminished opportunity for ordinary investors to share in the growth of successful companies through transparent registered markets, and a still more deeply bifurcated capital market: one in which sophisticated investors own the companies of the future on favorable terms, while ordinary workers’ retirement savings are routed into those same companies on inferior terms and at valuations the managers set for themselves (more on this in Section II of this letter).

In short, the proposal would entrench the very two-tier market it purports to remedy. A rule marketed as “democratizing” access to private markets would in fact ratify a system in which the public markets—the markets that are actually open to, and protective of, hardworking Americans—continue to wither, while retirement savers are enlisted to backfill the capital that issuers no longer need to raise in public view.

into the public markets; the JOBS Act then raised the threshold and, together with the record-holder loophole, largely removed that backstop. See *id.*

¹²SpaceX was founded in 2002 and remained private for more than two decades, reaching a valuation near \$1 trillion while providing liquidity to employees and investors through periodic company-run tender offers rather than registered offerings. It filed its first Form S-1—and thus its first audited public financial statements—in May 2026, in connection with a voluntary initial public offering. See, e.g., SpaceX, Form S-1 (May 20, 2026). On the investor-protection concerns that offering raised, see Letter from N.Y.C. Comptroller, N.Y. State Comptroller & CalPERS CEO to SpaceX (May 2026).

II. Sophisticated investors are heading for the exits, and this rule would route the assets they are shedding—and the worst of those assets—into the plans least able to evaluate them.

At the moment the Department proposes to open retirement plans to private markets, the most sophisticated investors in those markets are working to get out.¹³ Confronted with historically low distributions, a multi-year slump in fundraising, and mounting doubts about valuations, institutional limited partners are increasingly seeking to exit their aging private equity and private credit positions.¹⁴ The reasons are understandable: distributions to limited partners have now run below 15 percent of net asset value for four consecutive years—an industry record, and a level last seen during the 2008–09 financial crisis—while roughly 32,000 unsold portfolio companies sit in fund portfolios awaiting exits and buyout fundraising fell another 16 percent last year.¹⁵

However, as these sophisticated investors seek to exit these holdings, the proposal would dump those investments onto unsuspecting 401k investors. For example, the proposal expressly contemplates that a “continuation fund”—a vehicle into which a manager moves assets out of an older fund it also manages—may serve as a designated investment alternative, even as the Department concedes that such arrangements present an acute “potential . . . to rely on a conflicted or self-serving valuation.”¹⁶ These manager-led secondary transactions are a principal mechanism by which managers enable institutional investors to exit their poor performing positions. And these transactions are no longer a niche: continuation funds have multiplied from five in 2018 to 130 in 2024, and single-asset continuation vehicles—in which the manager prices a single company that it is selling to itself—now account for the majority of manager-led secondary volume.¹⁷

The rule would thus construct an exit ramp running directly from sophisticated investors to 401(k) participants: the institutions sell, the manager sets the price, and the workers buy what the smart money no longer wants. That ramp’s retail end is already being built. When institutions sell these stakes on the secondary market, a growing share of the buyers are now semi-liquid retail funds: interval funds, tender-offer funds, and non-traded business development companies, registered under the Investment Company Act of 1940, which raise their capital from ordinary investors. The pool of capital these buyers

¹³ Jefferies, 2025 Global Secondary Market Review (Feb. 2026), available at <http://spklr.io/60428f0jg> (reporting record secondary-market volume in 2025, the principal channel through which institutions sell fund stakes before maturity, including twenty-seven limited-partner portfolio sales exceeding \$1 billion and the largest such sale surpassing \$5 billion).

¹⁴ See, e.g., AnnaMaria Andriotis & Peter Rudegeair, *The Wealthy Investors That Powered Private Credit Are Rushing for the Exits*, Wall St. J. (Apr. 2, 2026); *The Private-Credit Industry’s Trouble: Surging Redemptions, Slower Fundraising*, Wall St. J. (Mar. 28, 2026); *Cliffwater \$33B Private Credit Fund to See Redemptions Above 7%*, Bloomberg (Mar. 10, 2026).

¹⁵ Bain & Co., *Global Private Equity Report 2026* (Feb. 2026) (reporting that distributions to limited partners as a share of net asset value remained below 15 percent for a fourth consecutive year—an industry record, at a level last seen in 2008–09—that roughly 32,000 unsold portfolio companies remain in fund portfolios, and that buyout fundraising fell 16 percent in 2025, to \$395 billion).

¹⁶ Proposal (preamble § 8.2 & proposed 29 C.F.R. § 2550.404a-6(j)(4)) (contemplating a “continuation fund” that “has recently acquired or contemplates an imminent acquisition” of assets from another fund managed by the same entity, and acknowledging the “potential for the Manager to rely on a conflicted or self-serving valuation”).

¹⁷ Rustam Abuzov, Will Gornall, Sophie Shive, Ilya A. Strebulaev & Michael S. Weisbach, *Selling to Yourself: Continuation Funds in Private Equity* (NBER Working Paper No. 34471, Nov. 2025) (documenting growth from five continuation funds raised in 2018 to 130 in 2024); CFA Inst. Rsch. & Pol’y Ctr., *Continuation Funds: Ethics in Private Markets, Part I* (2025) (single-asset continuation vehicles rose to approximately 57 percent of manager-led secondary volume in 2024).

have amassed has reached a record, swelled by exactly this influx of retail money.¹⁸ Because these are the very structures the proposal would place on 401(k) menus, the rule would complete the pipeline, channeling workers' retirement savings into the vehicles that increasingly absorb what sophisticated investors are unloading. Their registration is no assurance of safety; it is merely the legal wrapper that lets illiquid private stakes be repackaged and sold to retail. This is one of the reasons I continue opposing legislation that would permit closed-end funds to invest all of their proceeds both directly into private assets or funds which predominately hold private assets.¹⁹

This problem is compounded by how opportunities are allocated in private markets. Access is neither equal nor blind. The most attractive deals are allocated to the largest, most sophisticated, and best-connected investors, who use their leverage to negotiate preferential terms. There is also the practice of offering "side letters" that grant superior redemption rights, fee discounts, and information advantages to a favored subclass of investors (often unbeknownst to the rest of the same fund's investor base).²⁰ What is left for retail-oriented vehicles and small retirement plans is the residual: the capacity that could not be placed with discerning institutional investors.

Sophisticated investors' own behavior reveals what they think of these vehicles. A new National Bureau of Economic Research study of 472 continuation funds—aptly titled *Selling to Yourself*—finds that when limited partners are offered the choice, only about 6 percent roll their stakes into the continuation fund at the manager's price; the rest take the cash and leave.²¹ The share willing to roll has collapsed from as much as 30 percent in 2018 to under 5 percent in 2025, even as the number of these vehicles has soared. And the continuation funds themselves go on to deliver significantly lower net investment multiples than traditional buyout funds. Moreover, the price at which the manager moves these assets into the continuation fund is not one the market accepts: in arm's-length secondary sales in 2025, private fund stakes changed hands at an average of just 87 percent of reported net asset value, and those in funds more than ten years old at just 73 percent, confirming that reported valuations exceed what informed buyers will actually pay.²² Institutional investors' own trade association, the Institutional Limited Partners Association, treats these deals as inherently conflicted. Because the manager sits on both sides, moving assets out of one fund it controls and into a new one it will also control, ILPA's

¹⁸Jefferies, *Global Secondary Market Review* (Jan. 2025) (dedicated available capital at an all-time high of \$288 billion, driven in part by an influx of new evergreen retail capital, including registered '40-Act funds).

¹⁹ See "Increasing Investor Opportunities Act," Committee Print, 119th Congress, pp-45-46. *available at* <https://www.govinfo.gov/content/pkg/CRPT-119hrpt169/pdf/CRPT-119hrpt169.pdf>

²⁰ The SEC found that, "The practice of granting certain preferential treatment (or, in some cases, granting preferential treatment without sufficient disclosure) is contrary to the public interest and the protection of investors because it can harm, mislead, or deceive other investors." See *Release No. IA-6383; File No. S7-03-22*, *available at* <https://www.sec.gov/files/rules/final/2023/ia-6383.pdf>, p.263. The Fifth Circuit later vacated the rule on statutory-authority grounds, *Nat'l Ass'n of Private Fund Managers v. SEC*, 103 F.4th 1097 (5th Cir. 2024), but the Commission's factual findings on the prevalence and effects of preferential treatment stand unrebuted.

²¹Abuzov, Gornall, Shive, Strebulaev & Weisbach, *Selling to Yourself*, *supra* (hand-collected sample of 472 continuation funds; documenting that only about 6 percent of legacy limited partners roll, with the rolling share falling from roughly 14–30 percent in 2018 to under 5 percent in 2025, and that continuation funds deliver a significantly lower net multiple—1.59 versus 2.00—than traditional buyout funds).

²²Jefferies, 2025 *Global Secondary Market Review*, *supra* (average limited-partner portfolio pricing of 87 percent of net asset value in 2025, down 200 basis points from 2024; buyout at 92 percent, venture and growth at 78 percent, real estate at 70 percent; funds more than ten years old at 73 percent).

guidance calls for independent fairness opinions and enhanced disclosure to the fund’s advisory committee before any such transfer proceeds.²³

The proposal’s preamble acknowledges that, where alternatives are offered in defined contribution plans at all, it is “only by the largest defined contribution plans with significant resources to conduct due diligence,” and that smaller plans have “generally avoided” these investments because evaluating their valuation, liquidity, benchmarks, and “complex fee structures has been extremely challenging.”²⁴ That acknowledgement is fatal to the rule. A fiduciary for a small or mid-sized 401(k) plan cannot realistically distinguish a high-quality fund from a vehicle assembled to offload what sophisticated investors have declined, nor can a fiduciary meaningfully monitor opaque holdings that are not reliably valued. The rule would therefore operate to funnel the lowest-quality, highest-fee, and least-liquid products to precisely the workers and plan sponsors least equipped to evaluate or financially withstand them.

Nor is there a performance premium that might justify the gamble: the best available evidence finds that even the largest, best-resourced institutional investors—with negotiated fees, dedicated staff, and full diligence access—have earned net private equity returns that roughly match public equity indexes since at least 2006, while the industry collected an estimated \$230 billion in performance fees.²⁵

III. Digital assets are unsuitable for retirement plans until the SEC completes the investor-protection framework it is now building.

The proposal sweeps digital assets into the categories of “alternative” investments eligible for its safe harbor,²⁶ and it follows the Department’s May 2025 decision to rescind its 2022 guidance, which had advised fiduciaries to exercise “extreme care” before adding a cryptocurrency option to a 401(k) menu.²⁷ Withdrawing that caution now—and affirmatively encouraging digital-asset exposure in retirement plans—is indefensible, because the federal regulator with primary responsibility for the securities markets has itself concluded that the existing rules do not adequately protect investors in this asset class, and is in the midst of writing these rules.

²³Institutional Ltd. Partners Ass’n, *Continuation Funds: Considerations for Limited Partners and General Partners* (May 2023) (premised on the principles that continuation funds should maximize value for existing limited partners and that rolling investors should be no worse off than had the transaction not occurred; recommending independent fairness opinions and advisory-committee review of conflicts).

²⁴Proposal (preamble § 12.2.2) (acknowledging that alternatives are offered in defined contribution plans “only by the largest defined contribution plans with significant resources to conduct due diligence,” and that smaller plans have “generally avoided” them because evaluating valuation, liquidity, benchmarks, and “complex fee structures has been extremely challenging”).

²⁵Ludovic Phalippou, *An Inconvenient Fact: Private Equity Returns and the Billionaire Factory*, 30 J. Investing 11 (2020) (net multiples of roughly 1.5x for large public pension funds since 2006, implying about 11 percent annually and matching public equity indexes, against an estimated \$230 billion in carried interest collected on 2006–2015 vintages); accord Robert S. Harris, Tim Jenkinson & Steven N. Kaplan, *How Do Private Equity Investments Perform Compared to Public Equity?*, 14 J. Inv. Mgmt. 1 (2016) (finding post-2005 vintage buyout returns roughly in line with public markets).

²⁶Proposal (preamble & proposed 29 C.F.R. § 2550.404a-6) (treating holdings in actively managed vehicles investing in digital assets as among the covered asset categories).

²⁷U.S. Dep’t of Labor, EBSA, Compliance Assistance Release No. 2022-01 (Mar. 10, 2022) (advising “extreme care” before adding a cryptocurrency option to a 401(k) menu); rescinded by Compliance Assistance Release No. 2025-01 (May 28, 2025). See Proposal (preamble § 12.3.3).

The SEC has made plain that the current treatment of digital assets is unsettled and inadequate. Chairman Atkins has described the existing landscape as a “securities-law minefield,” and through its “Project Crypto” initiative the Commission is now constructing a tailored framework. The newly released “token taxonomy” to determine which digital assets are securities remains untested. The contemplated “Regulation Crypto”—tailored disclosure, exemption, and safe-harbor rules, along with updated market-structure rules—is still being drafted and is far from being operationalized by market participants.²⁸ The premise of that entire undertaking is that the protections presently available to crypto investors are insufficient and must be purpose-built.

It is incoherent for the Department to bless digital assets as suitable for the retirement savings of everyday Americans while the SEC is still building the investor-protection regime intended to make those same assets safe for ordinary investors. The hazard is not confined to the volatility of individual tokens, severe as that is. It reflects a broader deterioration across the digital-asset ecosystem, where trading activity, developer engagement, and user participation have collapsed. Only a tiny fraction of the millions of issued tokens have meaningful market activity, pushing most venture-backed assets far below their launch values, often at steeply negative returns.²⁹ As developers exit and liquidity dries up, capital has begun concentrating around only a narrow band of projects with demonstrable utility.³⁰ Venture funds, now holding large portfolios of illiquid and sharply impaired positions, face mounting pressure to find exit channels.³¹ The Department’s proposal risks creating precisely such a channel, enabling distressed digital-asset exposures to be offloaded into 401(k)-oriented vehicles marketed to everyday workers and retirees.

The threat is not limited to unstable prices; it extends to the surrounding ecosystem—custodians, trading platforms, lending and staking arrangements, and tokenized products—much of which operates outside any federal framework and has produced staggering investor losses.³² The Federal Bureau of Investigation (“FBI”) reported that cryptocurrency-related complaints accounted for more than \$11

²⁸Paul S. Atkins, Chairman, SEC, *The SEC’s Approach to Digital Assets: Inside “Project Crypto”* (Nov. 12, 2025) (describing the current landscape as a “securities-law minefield” and previewing a token taxonomy and tailored disclosure, exemption, and safe-harbor rules); Off. of Info. & Regulatory Affairs, Unified Agenda (Fall 2025) (anticipating SEC crypto rule proposals in 2026); SEC & CFTC, *Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets*, 91 Fed. Reg. 13714 (Mar. 23, 2026) (joint interpretation adopting the token taxonomy).

²⁹ See Olga Kharif & Vildana Hajric “There Are Millions of Crypto Tokens. Almost None Have Any Value,” Bloomberg (June 6, 2026), available at <https://www.bloomberg.com/news/articles/2026-06-06/there-are-millions-of-crypto-tokens-almost-none-have-any-value>.

³⁰ *Id.*

³¹ *Id.*

³² The Bank for International Settlements (BIS) found that the 2022 failures across the crypto ecosystem—spanning custodians, trading platforms, lending and staking services, and tokenized products—resulted in severe and widespread investor harm. Following the collapse of Terra/Luna in May 2022, more than \$450 billion in crypto market value was erased, with an additional \$200 billion lost after the FTX bankruptcy in November. In total, roughly \$1.8 trillion in market value evaporated over the course of the year. BIS analysis of trading-platform data from 2015–2022 shows that a majority of retail crypto-app users in nearly all countries incurred net losses on their Bitcoin holdings during this period, as larger and more sophisticated investors tended to sell during major price drops while smaller investors bought into them. See, “Crypto shocks and retail losses,” BIS (Feb 2023), available at <https://www.bis.org/publ/bisbull69.pdf>.

billion in losses in 2025 alone, the highest of any category it tracks.³³ Retirement savings—which workers cannot afford to lose and frequently cannot be replaced—are the last assets that should be exposed to this ecosystem during a regulatory interregnum. At a minimum, the Department should decline to treat digital assets as safe-harbor-eligible until the SEC’s tailored rules are final and their protections are operative.

IV. The rulemaking is the product of a disqualifying conflict of interest.

This proposal is also the product of a disqualifying conflict of interest at the level of the rulemaker himself. The proposal was signed by Assistant Secretary Daniel Aronowitz, who founded and led Encore Fiduciary (formerly Euclid Fiduciary), a fiduciary-liability insurance underwriting company that sells coverage to the very plan sponsors whose litigation exposure this rule is designed to reduce.³⁴ The preamble relies on Encore Fiduciary’s work at multiple turns—including for the litigation-cost figures that supply the principal empirical basis for the rule’s “litigation risk” narrative—and it cites Mr. Aronowitz’s own “Fid Guru Blog” and his prior commentary on the fiduciary-insurance market.³⁵

The benefit of this proposal to that industry—and potentially to Mr. Aronowitz himself—is concrete and direct. Fiduciary-liability insurers exist to cover the very litigation this rule is designed to suppress: their policies pay the legal defense costs and settlements when plan fiduciaries are sued for imprudent or disloyal management of plan investments, including the excessive-fee and imprudent-investment suits the proposal repeatedly invokes. A rule that makes such suits harder to bring and to win therefore reduces the claims these insurers must pay in the first place. Fewer and smaller claims mean lower loss ratios and a more profitable fiduciary-liability insurance business. This is the very dynamic Mr. Aronowitz himself (though described in euphemistic “stable insurance market” language) chronicled before entering government, when he warned that excessive-fee litigation was destabilizing the fiduciary-insurance market and driving up its costs.³⁶

His rule would now reverse that pressure to the industry’s benefit. The proposal’s own regulatory-impact analysis confirms the effect, forecasting that the rule will reshape the fiduciary-insurance market—“a stabilization or reduction of premiums” and an “increase in coverage terms.”³⁷ Because Mr. Aronowitz personally signed this rule, its benefits would flow to the business he founded

³³FBI, *Cryptocurrency and AI Scams Bilk Americans of Billions* (Apr. 2026) (reporting that cryptocurrency-related complaints accounted for more than \$11 billion in losses—the highest of any category). See also FBI Internet Crime Complaint Center, 2025 Internet Crime Report (Apr. 6, 2026) (181,565 cryptocurrency-related complaints; \$11.36 billion in reported losses).

³⁴Comm. on Educ. & the Workforce, U.S. House of Reps., *Biography of Daniel Aronowitz* (Apr. 16, 2026) (“the former president and founder of Encore Fiduciary”); Encore Fiduciary (formerly Euclid Fiduciary, founded 2011), a fiduciary-liability insurance underwriting company for employee benefit plans.

³⁵Proposal (preamble nn. 67, 69, 85, 88, 95, 97 & 201) (relying on Encore Fiduciary’s amicus brief in *Parker-Hannifin Corp. v. Johnson* for the rule’s litigation-cost figures, and citing the “Fid Guru Blog” and Mr. Aronowitz’s own commentary on the fiduciary-insurance market); see also *id.* n.98 (citing the same brief).

³⁶Daniel Aronowitz & AMWINS Brokerage, *How Excessive Fee Litigation Is Changing the Fiduciary Insurance Market* (Apr. 2021) (cited at Proposal n. 201).

³⁷Proposal (regulatory impact analysis) (forecasting “a transfer from fiduciary insurance underwriters to plans/plan fiduciaries via a stabilization or reduction of premiums and increase in coverage terms”). The Department frames this premium effect as a benefit flowing to plans; as explained in text, the reduced litigation that produces it is itself a benefit to the underwriters whose claims that litigation drives.

and led and to the narrow industry in which he built his career and to which he may return (and, to the extent he retains any interest in Encore Fiduciary, to Mr. Aronowitz himself).³⁸

The Department has not disclosed whether Mr. Aronowitz has fully divested his interests in Encore Fiduciary, nor whether he sought or received a waiver under 18 U.S.C. § 208(b) or an impartiality determination under 5 C.F.R. § 2635.502 before participating personally and substantially in a rulemaking that relies on his former firm's advocacy and is designed to improve the bottom line of the market that firm serves. At a minimum, this rulemaking warrants review by the Department's Inspector General and its designated agency ethics official, and the Department should publicly disclose the relevant ethics record before finalizing any rule.³⁹ The American people cannot be expected to trust a regulation promulgated by an official whose own former firm and industry stand to benefit from its adoption.

V. The proposal suffers from additional, independent defects.

Beyond the foregoing, the proposal is defective in several further respects, any one of which independently warrants withdrawal:

- **Daily Liquidity.** Participants in 401(k) plans depend on daily liquidity to take hardship withdrawals, plan loans, and roll over their accounts when they change jobs. Private equity, private credit, and real estate cannot reliably provide it. The proposal would permit a fiduciary to satisfy the liquidity factor through a written representation from the product manager, and it provides that diversified alternatives “may temporarily deviate from their target asset allocations” to meet redemptions. This means that when redemptions surge, the liquid, public-market sleeve is sold first and the remaining participants are left disproportionately exposed to the illiquid sleeve at the worst possible time.⁴⁰
- **Fee Opacity.** The proposal would allow managers to “internalize” the layered fees of alternative-asset vehicles and charge a single, flat asset-based fee. This would permit folding carried interest, performance fees, and transaction costs into one number and defeating the very fee transparency that the Department's participant-disclosure regulation has required since 2012. The rule's economic analysis does not account for the resulting fee impact.⁴¹
- **ERISA's Fiduciary Duties.** The proposal's central device—a presumption that fiduciary judgments are reasonable and “entitled to significant deference”—cannot be squared with ERISA's text or with Supreme Court precedent. In *Fifth Third Bancorp v. Dudenhoeffer*, a unanimous Court refused to adopt a presumption of prudence even for ESOP fiduciaries, holding that “the same standard of prudence applies to all ERISA fiduciaries,” and in *Hughes v. Northwestern University*, the Court reaffirmed that the prudence inquiry is “context specific”—not categorically deferential. It also severs the selection of an investment from the duty to monitor it—a duty the Supreme Court has held is “separate and

³⁸Proposal (regulatory impact analysis § 12.4, Table 1) (“A transfer from fiduciary insurance underwriters to plans/plan fiduciaries via a stabilization or reduction of premiums”).

³⁹18 U.S.C. § 208; 5 C.F.R. § 2635.502.

⁴⁰Proposal (preamble & proposed 29 C.F.R. § 2550.404a-6(i)(1), (i)(3)) (permitting reliance on a “written representation” from the product manager and providing that diversified alternatives “may temporarily deviate from their target asset allocations”).

⁴¹Proposal (proposed 29 C.F.R. § 2550.404a-6(l)(1)(B)) (manager “will internalize the underlying fees and the plan will pay only an appropriate, flat fee based on assets under management”); *see* 29 C.F.R. § 2550.404a-5 (participant-level fee-disclosure requirements in effect since 2012).

apart” from selection and just as rigorous—by deferring any monitoring framework to undefined future guidance.⁴²

- **The Administrative Procedure Act Violations.** The Department cites research finding that alternative assets have not improved, and in some periods have harmed, the performance of professionally managed pension funds, and then dismisses that evidence with the conclusory observation that the experience of defined benefit plans “cannot be directly applied” to defined contribution plans. The litigation narrative at the rule’s core fares no better: it rests on advocacy material, including a survey the Department itself concedes “is not based on a representative sample.” Its reliance on the Ninth Circuit’s decision in *Anderson v. Intel Corp. Investment Policy Committee* is likewise misplaced: the Supreme Court granted *certiorari* in that case on January 16, 2026, so the law on which the Department builds is unsettled.^{43,44} If these material weaknesses persist in the final rule, judicial review may find it arbitrary and capricious under the APA.

Conclusion

The Department should withdraw this proposal. It would expose the retirement security of millions of hardworking Americans and retirees to assets that sophisticated investors are working to shed, accelerate the decline of the public markets on which everyday Americans depend, prematurely endorse digital assets that the SEC has not yet brought within an adequate regulatory framework, and accomplish all of this on the basis of a record shaped by a conflicted official.

Sincerely,



Representative Maxine Waters
Ranking Member
Committee on Financial Services

Cc: The Honorable Paul Atkins, Chairman, SEC
The Honorable French Hill, Chairman, Committee on Financial Services, U.S. House

⁴²*Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 418–19 (2014); *Tibble v. Edison Int’l*, 575 U.S. 523, 529 (2015); *Hughes v. Northwestern Univ.*, 595 U.S. 170, 177 (2022); Proposal (preamble §§ 2.4.4, 4.1 & proposed 29 C.F.R. § 2550.404a-6(f)).

⁴³See Jean-Pierre Aubry, Ctr. for Ret. Rsch. at Bos. Coll., *Public Pension Investment Update: Have Alternatives Helped or Hurt?* (2022) (cited in the Proposal); Arthur Korteweg, Stavros Panageas & Anand Systla, *Private Equity for Pension Plans? Evaluating Private Equity Performance from an Investor’s Perspective* (NBER Working Paper No. 33194, Nov. 2024) (forthcoming, J. Fin. Econ.) (also cited in the Proposal); Proposal (preamble § 12.7.3.1.4) (“The experience of defined benefit plans cannot be directly applied to defined contribution plans.”); *id.* § 12.7.1 n.133 (conceding that the American Benefits Council survey “is not based on a representative sample”).

⁴⁴*Anderson v. Intel Corp. Inv. Policy Comm.*, 137 F.4th 1015 (9th Cir. 2025), *cert. granted* (U.S. Jan. 16, 2026).