



May 26, 2026

The Honorable Daniel Aronowitz
Assistant Secretary for Employee Benefits Security
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Public Comment on Proposed Rule, "Fiduciary Duties in Selecting Designated Investment Alternatives" (RIN 1210-AC38)

Dear Assistant Secretary Aronowitz:

The Pinpoint Policy Institute ("Pinpoint") is a nonpartisan, nonprofit organization dedicated to promoting and defending the essential pillars of America's economic growth and prosperity. We appreciate the opportunity to submit these comments in strong support of the Department of Labor's ("DOL") proposed rule implementing Executive Order 14330, "Democratizing Access to Alternative Assets for 401(k) Investors," issued by President Trump on August 7, 2025.

Pinpoint fully supports the proposed rule's objectives. Alternative assets, including private equity, real estate, infrastructure, and lifetime income strategies, have delivered strong net risk-adjusted returns, meaningful diversification, and resilience across market cycles. Expanding access to these assets for everyday Americans saving through defined contribution plans is a matter of basic economic fairness. By providing clear fiduciary guidance and an actionable safe harbor, this rule empowers plan sponsors to act in the best interests of their participants without fear that good-faith decisions will be weaponized against them in litigation.

I. The Fairness Case for Expanding Access

The retirement savings gap in America is not simply a product of income; it is a product of access. Public pension funds, university endowments, and high-net-worth individuals have long allocated meaningfully to alternative assets, which have historically outperformed the S&P 500 by more than 3 percent annually for private equity¹. The average 401(k) participant, by contrast, has been largely confined to traditional stocks and bonds, not because alternatives are inappropriate, but because regulatory uncertainty and litigation risk have made plan fiduciaries reluctant to offer them.

EO 14330 correctly identified this problem. As the order states, it is the policy of the United States that "every American preparing for retirement should have access to funds that include investments in alternative assets when the relevant plan fiduciary determines that such access

¹ *Council of Economic Advisers, Economic Report of the President, ch. 12, at 231 (2026)*, <https://www.whitehouse.gov/wp-content/uploads/2026/04/2026-Economic-Report-of-the-President.pdf>

provides an appropriate opportunity for plan participants and beneficiaries to enhance the net risk-adjusted returns on their retirement assets."² This rule gives that policy teeth.

Public support for this direction is strong and bipartisan. Pinpoint's national polling³, conducted by Fabrizio Ward, found that 57% of voters support reforming regulations to allow workers greater choice in investing in private equity through their 401(k) plans, compared to just 13% opposed. Support is even higher among those with 401(k) plans (63%–14%). This reflects broad public consensus that everyday workers deserve the same investment opportunities currently available to the wealthy and well-connected.

II. Endorsement of the Six-Factor Safe Harbor Framework

Pinpoint explicitly endorses the proposed rule's process-based safe harbor and its six-factor framework as written. The six factors, Performance, Fees, Liquidity, Valuation, Performance Benchmarks, and Complexity, reflect a thorough synthesis of the Department's experience, applicable case law, and stakeholder input. The framework is process-based rather than outcome-based, meaning fiduciary prudence is evaluated on the rigor of the decision-making process rather than the ultimate performance of any given investment. This correctly places maximum discretion and flexibility with plan fiduciaries, who are best positioned to evaluate the specific circumstances of their plans and participants. We believe the framework is well-constructed, appropriately calibrated, and faithfully implements EO 14330's directive to "prioritize approaches designed to curb litigation risk that may constrain fiduciaries from applying their best judgment." We offer four targeted recommendations, addressed in Sections IV, V, and VII below.

The six-factor framework is also appropriately flexible in its application. The depth of inquiry required under each factor will naturally vary based on the facts and circumstances of the specific investment alternative under consideration. A straightforward fee structure requires less analysis than a complex incentive arrangement; a highly liquid investment requires less scrutiny under the Liquidity factor than one with a long-term lock-up. The Department should make explicit in the final rule that this variation is expected and appropriate, and that a fiduciary that satisfies each of the six enumerated factors may avail itself of the safe harbor regardless of the relative depth of analysis applied to any individual factor. Stating this clearly in the rule text will help foreclose frivolous litigation premised on differences in the level of review applied across different investment types.

III. The Safe Harbor and Litigation Risk

EO 14330 explicitly directed the Department to "prioritize approaches designed to curb litigation risk." Pinpoint's own research has examined this problem in depth. The ERISA plaintiff's bar

² Exec. Order No. 14330, "Democratizing Access to Alternative Assets for 401(k) Investors," [90 Fed. Reg. 38921](#) (Aug. 12, 2025).

³

<https://pinpointpolicyinstitute.org/the-point/new-pinpoint-poll-americans-overwhelmingly-support-expanding-investment-options-in-401k-plans/>

has, over the past two decades, built a lucrative industry out of challenging retirement plan decisions – not because those decisions harmed participants, but because fee-based class action litigation has become extraordinarily profitable for plaintiffs' attorneys. In fact, they've delivered median average per-participant awards of just \$67.79 while attorneys collect average fees of \$1.59 million⁴.

This litigation environment has been a primary driver of fiduciary reluctance to offer alternative investments. Plan sponsors have rationally avoided anything that could attract litigation attention, even when the underlying investment decision would clearly benefit participants.

The proposed rule's process-based safe harbor directly addresses this dynamic. By establishing clear, documented criteria under which a fiduciary's judgment is "presumed to have met" its duty of prudence, the rule provides meaningful shelter from speculative fee and selection challenges that have historically deterred innovation in plan menus.

IV. Remove the 15% Liquidity Cap for Collective Investment Trusts

Pinpoint supports the proposed rule's six-factor framework as written. The Liquidity factor as currently drafted would import the 15% cap on illiquid assets from SEC Rule 22e-4⁵ into the fiduciary evaluation framework for open-end funds. For funds structured as mutual funds and regulated by the SEC, this is an appropriate reference point. However, for collective investment trusts (CITs), it is not.

CITs are regulated by the Office of the Comptroller of the Currency (OCC), not the SEC. They are not subject to SEC Rule 22e-4, and they currently operate without a 15% illiquid asset cap. Applying that cap to CITs through this rule would constitute a net increase in regulation for OCC-regulated vehicles, and would do so by importing a standard designed for a different regulatory regime. This is precisely the kind of unnecessary red tape that EO 14330 directed the Department to avoid.

This matters practically because retirement products incorporating private assets into 401(k) plans will predominantly be structured as CITs, not mutual funds. Imposing a 15% illiquid asset cap on those vehicles would directly limit participant exposure to the private market assets this rule is designed to expand access to. The White House Council of Economic Advisers has found that young workers could benefit from private equity exposure of up to 30%⁶ of assets. A 15% cap imposed through this rule would cut that potential in half and disproportionately harm younger participants with longer investment horizons.

⁴ Kent A. Mason, Adam R. McMahon, and Taylor M. Howard, "Davis & Harman Survey Highlights Massive Gap Between Participant and Attorney Recoveries in ERISA Lawsuits," Davis & Harman LLP, January 14, 2026, <https://www.davis-harman.com/dh-survey-highlights-gap-attorney-fee-participant-recovery-insight/>.

⁵ [17 CFR 270.22e-4](https://www.ecfr.gov/current/title-17/chapter-II/subchapter-D/part-270/subpart-270.22)

⁶

<https://www.whitehouse.gov/wp-content/uploads/2026/04/ERP-2026-12.-Unlocking-Retail-Access-to-Private-Equity-Investments-through-Defined-Contribution-Plans.pdf>

Pinpoint urges the Department to remove the 15% illiquid asset cap from the final rule's Liquidity factor as it applies to CITs, preserving the asset-neutral stance the rule correctly establishes elsewhere.

V. Clarify the "Conflict-Free, Independent" Valuation Standard

Pinpoint recommends that the Department provide additional guidance on the meaning of "conflict-free, independent"⁷ valuation as used in the Valuation factor. Because private asset valuations are inherently dependent on non-public data provided by the manager, no third-party valuation can be fully insulated from the underlying information source.

We do not suggest removing this standard, rather, we urge the Department to clarify what "conflict-free, independent" means in practice, including whether engagement of a qualified third-party valuation firm satisfies this requirement regardless of the firm's reliance on manager-provided data. Clear guidance here will reduce compliance uncertainty and help fiduciaries apply this factor with confidence.

VI. Guarding Against Non-Economic Influences on Fiduciary Decision-Making

While Pinpoint does not oppose legitimate stakeholder participation in the rulemaking process, we flag a concern that has emerged from our own investigations of the pensions and investments policy space: certain organized advocacy groups have, in documented instances, used sophisticated pressure campaigns directed at state pension officials and plan fiduciaries to inject ideological priorities into investment decisions, at the expense of participants' economic interests.

Pinpoint's Freedom of Information Act (FOIA) research⁸ has produced evidence of non-public communications in which advocacy organizations sought to steer pension officials toward investment decisions based on ideological considerations rather than rigorous fiduciary analysis. This proposed rule, by centering the six-factor framework and its process-based safe harbor on purely economic criteria, is well-positioned to guard against exactly this kind of outside pressure.

VII. Additional Recommendations for Safe Harbor Implementation

Pinpoint offers two additional recommendations to ensure the safe harbor functions as intended in practice.

First, the final rule should include clear guidance on how the safe harbor applies to the ongoing monitoring of investment choices after initial selection. Fiduciaries considering new alternative investment options will reasonably want to understand their continuing obligations before committing to offer those investments to participants. Without that clarity in the rule itself, plan

⁷ See Proposed Rule § 2550.404a-6(j)(2), 91 Fed. Reg. 16088, 16100 (Mar. 31, 2026)

⁸

<https://pinpointpolicyinstitute.org/the-point/foia-files-pesps-influence-campaign-into-americas-retirement-system/>

sponsors may delay or forego adopting investment alternatives they would otherwise deem beneficial, effectively negating the rule's purpose. The Department's recent history of materially altering its guidance on alternative assets without notice-and-comment only heightens this concern. Pinpoint recommends that the final rule include process-based monitoring parameters, providing a presumption of proper ongoing monitoring where a fiduciary's internal controls are structured to identify, on a regular basis, any issues that would prevent continued satisfaction of the six safe harbor factors.

Second, the final rule should explicitly state that obtaining the advice of an investment advisory fiduciary under ERISA Section 3(21) is not required to access the safe harbor. As currently drafted, the rule's examples appear to place significant weight on fiduciaries receiving such advice, which creates a perverse outcome: a fiduciary that determines such advice is unnecessary to its evaluation may face greater litigation exposure under the safe harbor than it would have faced without it. The rule should make clear that a fiduciary's well-documented, independent judgment regarding the need for outside advisory assistance is entitled to deference, and that a fiduciary may satisfy the safe harbor based on its own expertise, the complexity of the investment, and the availability of reliable third-party data, without a mandatory Section 3(21) engagement.

VIII. Conclusion

Pinpoint Policy Institute urges the Department to finalize this rule substantially as proposed. This rulemaking represents a meaningful and long-overdue step toward closing the investment opportunity gap between everyday retirement savers and institutional investors. The six-factor safe harbor framework is sound, the process-based approach correctly prioritizes fiduciary judgment over rigid outcome mandates, and the rule faithfully executes EO 14330's directive to expand access while curbing unnecessary litigation risk.

We offer four targeted recommendations:

- First, remove the 15% illiquid asset cap from the Liquidity factor as it applies to collective investment trusts, which are regulated by the OCC and not subject to SEC Rule 22e-4.
- Second, provide additional guidance clarifying the meaning of “conflict-free, independent” valuation under the Valuation factor.
- Third, include explicit process-based monitoring parameters in the final rule so fiduciaries understand their ongoing obligations and are not deterred from adopting new investment alternatives.
- Fourth, state explicitly that obtaining advice from a Section 3(21) investment advisory fiduciary is not required to access the safe harbor, and that a fiduciary's well-documented independent judgment on that question is entitled to deference.

These modifications would preserve the asset-neutral stance the rule correctly establishes throughout and ensure that the framework does not inadvertently limit the very access it is designed to expand.

America's workers deserve the same opportunities to build wealth that have long been available to pension funds, endowments, and high-net-worth investors. This rule moves us closer to that goal. We appreciate the Department's attention to this matter and look forward to the final rule.

Sincerely,

Eric Ventimiglia

Eric Ventimiglia
Executive Director
Pinpoint Policy Institute
eric@pinpointpolicyinstitute.org