June 1, 2026

Via Electronic Submission: **https://www.regulations.gov**

The Honorable Daniel Aronowitz
Assistant Secretary
Employee Benefits Administration
United States Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Re: RIN 1210-AC38; Fiduciary Duties in Selecting Designated Investment Alternatives under the Employee Retirement Income Security Act of 1974

Dear Assistant Secretary Aronowitz:

The International Franchise Association ("IFA") respectfully submits the following comments in response to the U.S. Department of Labor's ("DOL") Notice of Proposed Rulemaking concerning the standard and safe harbor for a fiduciary's duty of prudence in selecting designated investment alternatives for a participant-directed individual account plan, including asset allocation funds that include alternative assets, under the Employee Retirement Income Security Act of 1974 ("ERISA"), published in the Federal Register at 91 Fed. Reg. 16088, RIN 1210-AC38 (March 31, 2026) (the "Proposed Rule").

IFA has a strong interest in promoting clear, consistent, and legally sound fiduciary standards in selecting designated investment alternatives for participant-directed individual account plan under ERISA that:

(1) align with longstanding statutory and judicial precedent;

(2) provide a safe harbor for alternative investments; and

(3) encourage employees to plan for retirement and defer income into defined contribution plans through more diverse investment options.

IFA therefore supports DOL's Proposed Rule on an ERISA fiduciary's duty of prudence in selecting designated investment alternatives for a participant-directed individual plan and urges adoption through a final rule. All interested parties – including the regulated franchise businesses and employer community, those who work for them, and other stakeholders – seek clarity and predictability. The Proposed Rule provides both. The Proposed Rule is balanced and reasonable, it aligns with established caselaw, it complies with the Administrative Procedure Act, and it would clarify the Department's regulations on this important issue.

I. About IFA

IFA is the world's oldest and largest organization representing franchising worldwide. Celebrating over 65 years of excellence, education and advocacy, IFA works through its government relations and public policy, media relations and educational programs to protect, enhance and promote franchising.

IFA's members include franchise companies in over 300 different industries, individual franchisees, and companies that support those franchise companies in marketing, law, technology, human resources, business development, and operations. Franchising serves as an engine for economic growth, contributing an estimated $907.3 billion in economic output and providing an estimated 8.8 million direct jobs in 2025 across the more than 830,000 franchised establishments operating in the United States.[1] Franchising reflects 3% of the gross domestic product of the United States, with growth expected to outpace the rest of the nation's economy. As a cornerstone of small business success, franchising drives innovation, job creation, and prosperity in every corner of the country.

Franchising business is small business. Franchised businesses are projected to exceed 832,000 franchised establishments operating in the United States, with 64% of franchisees being first-time business owners, 85% of franchisees living where they operate their business.[2] Franchising offers a path to entrepreneurship to a diverse group of Americans, and the businesses these franchisees build tend to have higher sales and more employees than non-franchised ventures. Franchised businesses are locally owned, which keeps resources in the local community through supply chains and charitable giving. In a survey of 2,900 franchisees commissioned by IFA and conducted by Oxford Economics, it was discovered that 82% of franchisees own and operate only 1 location, 94% of establishments surveyed employ less than 50 employees, 47% of franchised brands operate 25 units or less, and fast food represents less than 1/4 of franchise establishments.[3] Pay progression, job retention, and part-time to full-time transitions are better among workers at franchised businesses compared with non-franchised businesses, with franchisees also offering benefits at greater rates than, and pay on par with, comparable non-franchise businesses.[4]

IFA's members have shared their lived experiences with employer-sponsored retirement plans. Many IFA members offer their employees retirement benefits through defined contribution plans. Others would like to offer such benefits. Defined contribution plans are uniquely suited for the needs of small businesses, as most franchises are. These plans put workers in the driver's seat and encourage long-term planning and goals.

Building a sustainable workforce is critical to franchise operations. Indeed, the availability, quality, and cost of labor is widely considered the most important business challenge facing the franchise

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[1] Alka Sinha, Khadija Cochinwala & Jin Wang, 2026 FRANCHISING ECONOMIC OUTLOOK 4, (INT'L FRANCHISE ASS'N 2026), https://www.franchise.org/franchising-economic-outlook/.

[2] Oxford Economics, The Value of Franchising (Int'l Franchise Ass'n January 2026), https://www.franchise.org/wp-content/uploads/2026/01/IFA_ValueOfFranchisingFINAL.pdf.

[3] *Id*.

[4] *Id*.

industry.[5] Many IFA members view defined contribution plans as a crucial tool for sustaining a dedicated workforce and shoring up the communities that franchises serve. The more workers with retirement savings, the less employee turnover franchised small businesses experience, creating stable contributions to the local economies in the communities those businesses serve.

For most workers in the franchise industry, making informed decisions regarding a range of investment options is critical to long-term retirement planning. Designated investment alternatives create greater opportunities to diversify investments. But with ERISA fiduciary claims among the fastest growing areas of litigation, many franchises are discouraged from offering retirement plans or are constrained to provide a sanitized list of established investment options that many workers find insufficient or unappealing. IFA is therefore uniquely informed about and able to share the experiences of its members.

II. Statutory Background

A. ERISA Retirement Plans

Congress enacted ERISA in 1974 "to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). But "Congress did not require employers to establish benefit plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). Rather, "ERISA represents a 'careful balancing'": although Congress sought "to ensure that employees would receive the benefits they had earned," Congress also sought to create a system that is not "so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Id.* (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).

Before ERISA was enacted, most employers either did not provide for their employees' retirement or offered traditional defined benefit pension plans. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008). Upon an employee's retirement, such plans provide a "fixed periodic payment" from a "general pool of assets" maintained in investments selected by the employer. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). Although the asset pool may be funded by both employer and employee contributions, the employer "bears the entire investment risk" of such plans, because the payments are fixed. *Id.*

By contrast, in a defined contribution plan, the employer offers "an individual account for each participant," to which both employers and employees contribute. 29 U.S.C. § 1002(34). Unlike defined benefit plans, defined contribution plans do not guarantee a fixed benefit at retirement. Instead, each participant "is entitled to whatever assets are dedicated to his individual account." *Hughes*, 525 U.S. at 439. In a defined contribution plan, the value of an individual account at retirement is "a function of the amounts contributed to that account and the investment performance of those contributions." *LaRue*, 552 U.S. at 250 n.1. Most defined contribution plans

[5] FRANdata, 2025 Annual Franchisor Survey (Int'l Franchise Ass'n 2025), https://www.franchise.org/wp-content/uploads/2025/02/2025-Franchisor-Survey_For-IFA-review-FINAL.pdf. The survey included responses from 171 senior executives representing franchisors and franchise portfolio companies that own 229 franchise brands from 24 different industries with franchise units ranging from less than 10 to 9,500. Together, the respondents represented nearly 20% of all domestic franchised businesses.

are participant-directed, allowing plan participants to select investments for their individual accounts. *See* U.S. Gen. Accounting Office, GAO/HEHS-98-28, *401(k) Pension Plans: Extent of Plans' Investments in Employer Securities & Real Property*8-9 (1997).

B. ERISA Fiduciary Duty of Prudence

Congress designed ERISA to provide plan sponsors and fiduciaries with wide discretion and flexibility. That way, plans could be designed based on the unique circumstances of each plan and the unique needs and preferences of each plan's participants. Because offering employees retirement benefits is voluntary, a flexible system helped to ensure that ERISA would not be so complex that administrative costs, or litigation expenses would discourage employers from maintaining plans in the first place.

Against that backdrop, Congress conceived ERISA's duty of prudence. ERISA imposes fiduciary duties on plan administrators and subjects them to personal liability for breaching those duties. *See* 29 U.S.C. §§ 1104(a), 1109(a), 1132(a)(2). Under ERISA, a fiduciary must "discharge his duties . . . with the care, skill, and prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

This duty serves as an important procedural safeguard of participants' retirement benefits, but it is not a substitute for the judgment of plan fiduciaries. Rather, fiduciaries have significant discretion and flexibility in deciding how to prudently administer an ERISA plan. *See Caterino v. Barry*, 8 F.3d 878, 883 (1st Cir. 1993) (Breyer, J.) ("[W]here, as here, there is no claim of trustee self-dealing or the like, we do not simply substitute our judgment for that of the trustees. We review the trustees' decision at a distance.").

As the text of ERISA makes clear, "the content of the duty of prudence" in any given case is necessarily "context specific." *Fifth Third Bancorp. v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). ERISA expressly pairs the duty of prudence to the role of the fiduciary—"a prudent man acting in a like capacity"—and the nature of the plan—"an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). In other words, the plan itself, whether a defined benefit plan or a defined contribution plan, is crucial to outlining the contours of ERISA's fiduciary duty.

ERISA's fiduciary duty provisions anticipate defined contribution plans that "permit[ ] a participant or beneficiary to exercise control over the assets in his account." 29 U.S.C. § 1104(c)(1)(A). Those provisions also require that such plans have a "mix of asset classes" available to plan participants or beneficiaries. *Id.* § 1104(c)(5)(A). In drafting these provisions, it was top of mind for Congress that if a plan offers "a broad range of investments" and a "participant instructs the plan trustee to invest the full balance of his account in, *e.g.*, a single stock, the trustee is not to be liable for any loss . . . because the investment does not meet the prudent man standards." H.R. Rep. No. 93-1280, at 305-06 (1974) (Conf. Rep.).

C. Participant-Directed Plans

Participant-directed defined contribution plans increasingly dominate the landscape of retirement plans. *See, e.g.*, D. Rajnes, *An Evolving Pension System: Trends in Defined Benefit and Defined Contribution Plans*, Employee Benefit Research Institute (EBRI) Issue Brief No. 249 (Sept. 2002).

These types of plans were offered even before ERISA, but typically only supplemented defined benefit pensions until more recently. *See* Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451, 471 (2004). Participant-directed defined contribution plans have since replaced defined benefit pensions in many workplaces. *See id.*

Perhaps the most well-known type of participant-directed plan is the 401(k) plan, named for the provision in the federal tax code enacted shortly after ERISA. *See* 26 U.S.C. § 401(k). Section 401(k) permits elective cash-or-deferred compensation arrangements in profit-sharing plans if the higher-paid portion of the employer's workforce participates in the arrangement at levels roughly proportional to the participation rates of rank-and-file employees. If the average actual deferral percentage of highly compensated employees did not exceed the actual deferral percentage of the remaining employees by more than the statutorily permitted limits, compensation may be deferred for tax purposes.

Among nonprofit employers, the typical retirement savings vehicle is a 403(b) plan, usually consisting of individual accounts funded by employee contributions and often matched by the employer's contributions. Section 403(b), entitled "Taxation of employee annuities," was enacted before ERISA and provides special tax treatment for retirement plans sponsored by educational institutions and other not-for-profit organizations. 26 U.S.C. § 403(b). These plans are usually heavily invested in annuities. An annuity is an individual contract between a participant and an issuer in which the issuer receives payments immediately in exchange for a stream of payments upon retirement. *See NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1994). ERISA amended section 403(b) to permit certain additional types of investments in 403(b) plans.

ERISA also created the IRA, or the individual retirement account. The IRA was originally intended to provide retirement savings for workers not covered by pensions at their jobs. *See* I.R.C. § 219(b) (2000), *as amended by* Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001 § 601(a), Pub. L. No. 107-16, 2001 U.S.C.C.A.N. (115 Stat.) 38, 94 (2001). It would function as a mini-pension plan that gave workers without employer-provided pension benefits the option to make tax-deductible contributions from their own earnings for their own retirements. *Id*. The availability of the IRA catered to the increasing mobility of the national workforce. It allowed plans to avoid annuity-style payouts and instead transfer lump sums tax free to departing employee-participants' IRAs. *See* Zelinsky, *supra*, at 474.

These different types of defined contribution plans have a common feature: they allow participants to direct their own investments. They mold to the expectations of participants, rather than employer sponsored pension plans. All such plans are "designed to offer participants meaningful choices about how to invest their retirement savings." *Renfro v. Unisys Corp.*, 671 F.3d 314, 327 (3d Cir. 2011). In these plans, participants are the decisionmakers.

The fiduciary's primary responsibility is ensuring participants have a process "to make their own choices." *Loomis v. Exelon Corp.*, 658 F.3d 667, 673 (7th Cir. 2011). That process involves giving plan participants a "variety of investment options" that carry diverse "risk profiles, investment strategies, and associated fees." *Renfro*, 671 F.3d at 327. It also includes providing plan participants with the information necessary to understand and choose among investment options. *Loomis*, 658 F.3d at 671. The fiduciary also monitors the plan to ensure an array of options with

different costs remain available to plan participants. *See Tibble v. Edison Int'l*, 575 U.S. 523, 530-31 (2015).

III. The Proposed Rule Faithfully Implements Court Precedent and the Statutory Text

A. ERISA Treats Participant-Directed Plans Differently from Other Plans

ERISA uniquely treats participant-directed plans. Section 1104(c) of ERISA expressly modifies the ordinary role of plan fiduciaries when the plans "provide for individual accounts and allow a participant or beneficiary 'to exercise control over the assets in his account.'" *Hecker v. Deere & Co.*, 556 F.3d 575, 587 (7th Cir. 2009). For such plans, the participant, not the fiduciary, is responsible for the "results" of the "participant's or beneficiary's exercise or control." 29 U.S.C. § 1104(c)(1)(A)(ii).

In a participant-directed plan, the fiduciary's responsibility is not "paternalistic." *Loomis*, 658 F.3d at 670, 673. It is simply to provide participants with a "wide range of options" from which participants may "make their own choices." *Id.* Where a fiduciary offers a "sufficient mix of investments for their participants," including alternative investments, the "fact that it is possible that some funds" might perform differently or have lower expense rations "is beside the point." *Hecker*, 556 F.3d at 586.

Thus, fiduciaries have broad discretion to make decisions tailored to their specific participants, including which investment options to offer from among the many thousands available in the market. Congress chose the flexible "prudent man" standard, requiring only that fiduciaries make decisions using "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity . . . would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a).

Under this standard, fiduciaries are judged not for the "results" of their decisions, but by the "methods" they use to provide participants a menu of investment options. *PBGC ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013). And for good reason: in participant-directed plans, the participant takes control of the results of their decisions, not the fiduciary. The critical question is whether the participant has adequate information to make decisions among a sufficiently diverse number of investment options. For that reason, ERISA creates extensive disclosure requirements permitting participants to obtain all kinds of information about their plan, other plans, and their plan's service providers. *See, e.g.*, 29 U.S.C. § 1024; *see, e.g.*, *also* 29 C.F.R. § 2550.404a-5.

ERISA does not prohibit or mandate specific investments in participant-directed plans. In fact, when Congress considered required plans to offer at least one index fund, the proposed legislation failed. *See* H.R. 3185, 110th Cong. (2007). The Department was concerned that "[r]equiring specific investment options would limit the ability of employers and workers together to design plans that best serve their mutual needs in a changing marketplace." *Helping Workers Save For*

Retirement: Hearing Before the S. Comm. On Health, Education, Labor, and Pensions, 110th Cong. 15 (2008) (statement of Bradford P. Campbell, Assistant Sec'y of Labor).

B. A Paternalistic Duty of Prudence Undercuts the Proper Workings of Participant-Directed Plans under ERISA

The Proposed Rule rightfully avoids a paternalistic view of ERISA's duty of prudence. A paternalistic fiduciary duty would not promote ERISA's emphasis on participant choice.

Although ERISA's duty of prudence generally derives from the common law of trusts, ERISA does not robotically cut and paste trust law principles. *See Tibble*, 575 U.S. at 528; *see* Restatement (Second) of Trusts § 174 (1959). Trust law merely "informs but does not control the interpretation of ERISA," especially when, as with participant-directed plans, plan participants are "not similarly situated to the beneficiaries of a private trust." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1619 (2020). In private trusts, the trustee has the power to make investment decisions and "is not subject to the control of . . . the beneficiaries." Restatement (Third) of Trusts § 5 cmt. E, at 52 (2003). But defined contribution plans that give participants responsibility for selecting their own investments from a menu of options do not fit the trust-law analogy. *See In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 446 n.24 (3d Cir. 1996) (holding no "common law trust principle" is analogous to participant-directed investment decisions in defined contribution plans).

The better analogy would be a beneficiary who in advance approves an investment, retaining an investment, or changing an investment. In that circumstance, the beneficiary cannot "complain of the trustee's action," even if the investment does not meet the beneficiary's performance expectations. Amy M. Hess, George G. Bogert & George T. Bogert, *The Law of Trusts & Trustees* § 941 (3d ed. 2019).

The Supreme Court's decisions in *Tibble* and *Hughes v. Northwestern University*, 595 U.S. 170 (2022) did not hold otherwise. *Tibble* simply asked whether a fiduciary's "retention of an investment" can be "an 'action' or 'omission' that triggers" ERISA's six-year limitations period. 575 U.S. at 525, 530. The Court answered affirmatively, explaining that trust law imposes a "continuing duty of some kind to monitor investments and remove imprudent ones." *Id.* at 529-30. If the "alleged breach of a continuing duty occurred within six years of suit, the claim is timely." *Id.* at 530. That was the full scope of *Tibble*'s limited holding.

Tibble did not determine the contours of ERISA's fiduciary duty to offer, select, or monitor investments in defined contribution plans. The Court said the opposite: "We express no view on the scope of respondents' fiduciary duty in this case." *Tibble*, 575 U.S. at 531. The parties even disclaimed any dispute over the substance of ERISA's fiduciary duty, focusing instead on whether a claim for ongoing monitoring of plan investments could ever be subject to ERISA's statute of limitations.

Hughes was similarly limited. The Court in *Hughes* certified the narrow question whether the availability of low-cost investment options insulates plan fiduciaries from claims for breach of the duty of prudence. The Court answered no. But the Court was emphatic that the substance of ERISA's fiduciary duty is context-specific and process-oriented. The Court did not remove the deference traditionally afforded plan fiduciaries, much less impose formulaic constraints on the

investment options that defined contribution plans may offer participants. To the contrary, the Court acknowledged that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs." *Hughes*, 595 U.S. at 177. For that reason, the Court instructed lower courts to "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.*

Other courts applying *Tibble* and *Hughes* have deferred to the judgments of plan fiduciaries in challenges to plan investment options. In *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022), the Sixth Circuit held that an ERISA plaintiff failed to state a duty of prudence claim where the complaint "failed to allege that the [recordkeeping] fees were excessive relative to the services rendered." *Id*. at 1169. The *Smith* court explained that a fiduciary must act based on "the circumstances as they reasonably appear to [the fiduciary] at the time when he does act and not at some subsequent time when his conduct is called into question." *Id.* at 1164. The court did not consider Hughes to have any bearing on the analysis of such claims.

Nor did the Sixth Circuit in *Forman v. TriHealth, Inc.*, 40 F.4th 443 (6th Cir. 2022), which similarly concluded ERISA plaintiffs failed to state a claim as to "overall plan fees" where "the employees never alleged that these fees were high in relation to the services that the plan provided."

Likewise, the Seventh Circuit rejected breach of fiduciary claims premised on investment management and recordkeeping fees where the ERISA plaintiff simply alleged that the plan fiduciary failed to consider less expensive alternatives to the plan's investment options. *See Albert v. Oshkosh Corp.*, 47 F.4th 570, 581-82 (7th Cir. 2022). According to the Seventh Circuit, what mattered was whether the plan fiduciary "discharged its duties 'solely in the interest of the Plan's participants and beneficiaries.'" *Id.* at 583 (quoting 29 U.S.C. § 1104(a)(1)(A)). Because there was no reason to believe the fiduciary in that case selected the investment options in the plan "to enrich itself at participants' expense," the fiduciary did not breach his duty. *Id.*

These cases are consistent with the Supreme Court's already established rule that where a plan fiduciary has "the power to construe disputed or doubtful trust terms," the fiduciary's "interpretation, if reasonable, will not be disturbed." *Firestone Tire & Rubber Co., et al. v. Bruch et al.*, 489 U.S. 101, 113 (1989). Rather, courts apply a deferential standard of judicial review when a fiduciary exercises discretionary powers. *Id.* While this deferential standard of review arose from claims for benefits, some courts have suggested extending deference to a fiduciary's investment determinations.

In *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014), the Eighth Circuit held there is "no compelling reason to limit" *Firestone* deference to benefit claims. *Id.* at 335. The *Tussey* court thus applied a "deferential standard of review in evaluating whether the [plan] fiduciaries, at the time they made their investment decisions, breached fiduciary duties" in selecting investment options in accordance with the plan terms. *Id.* at 338.

The Sixth and Seventh Circuits have similarly deferred to the judgment of plan fiduciaries in selecting investment options consistent with the plan terms. *See Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006) (holding investment decision "that involves a balancing of competing interests under conditions of uncertainty requires an exercise of discretion, and the standard of judicial review of discretionary judgments is abuse of discretion"); *Caliber Sys., Inc.*,

220 F.3d 702, 711 (6th Cir. 2000) (applying *Firestone* deference to fiduciary's decisions regarding diversification of plan assets).

C. The Proposed Rule Implements ERISA's Unique Treatment of Participant-Directed Plans

The Proposed Rule properly focuses on a plan fiduciary's prudent process in selecting particular designated investment alternatives, rather than the substance of those investments. For franchise employers who sponsor and administer participant-directed defined contribution plans, the Proposed Rule's six non-exclusive factors are especially helpful because they provide scalable, repeatable criteria that can be applied across multiple plan designs while still allowing for flexibility based on plan size, workforce demographics, and available resources. Critically, the Proposed Rule emphasizes that these six factors are non-exclusive and must be applied holistically, with no single factor being determinative. This is essential for franchise employers, who must balance multiple considerations across varied plan populations and operational constraints.

1. Performance

The Proposed Rule appropriately identifies historical and expected investment performance as a consideration, while recognizing that performance must be evaluated in context. Consistent with long-established ERISA fiduciary duty precedents, plan fiduciaries should not be judged on hindsight or short-term underperformance. Instead, prudent evaluation entails reviewing performance relative to appropriate benchmarks over multiple time horizons, understanding whether performance outcomes are consistent with the investment's stated objectives and strategy, and evaluating performance in relation to risk characteristics, not in isolation. Most importantly, evaluating performance must be focused on the method, not the results of a particular investment.

For small franchise employers, this is especially important where plan fiduciaries often rely on professionally managed, diversified investment options (e.g., target-date funds). These options are designed to perform across full market cycles, and short-term comparisons can be misleading. The proposed framework appropriately encourages contextual and forward-looking analysis, rather than outcome-based second-guessing.

A contrary view would not track the realities of plan administration. The notion that plan fiduciaries act imprudently by not chasing performance is a misguided investment approach. It rests on the mistaken idea that future performance can be predicted from past performance—something that only soothsayers, not plan fiduciaries, could accomplish with any accuracy. Fiduciaries are expected to act with "prudence, not prescience." *PBGC*, 712 F.3d at 716 (citation omitted).

2. Fees and Expenses

The inclusion of fees and expenses as a factor aligns with post-*Tibble* litigation, particularly in excessive fee cases. However, the Proposed Rule improves on current ambiguity by making clear that fees must be evaluated as part of a broader, comparative analysis, rather than in isolation.

A prudent process should include (i) comparing fees across similar asset classes and strategies (e.g., active versus passive); (ii) assessing whether fees are reasonable in light of services provided,

complexity, and expected value; and (iii) evaluating total plan costs, including investment management and recordkeeping.

For franchise employers—many of whom sponsor and administer small plans or rely on bundled service arrangements—this clarification is critical. It recognizes that institutional pricing may not always be available. It also acknowledges that plan fiduciaries often must balance cost with access, service quality, and administrative efficiency. It further accepts that lower fees alone do not determine prudence. This approach appropriately tempers the litigation trend of equating prudence with selecting the lowest-cost option, instead reinforcing a holistic evaluation.

A contrary view would only encourage meritless litigation. Most ERISA plaintiffs complain about fiduciaries' failure to obtain services at the same fee level as one or more of the other thousands of retirement plans in the United States. But inferring imprudence from these types of allegations requires courts to ignore the realities of plan administration and ERISA's statutory structure. Different types of investment vehicles might also cost more to manage or maintain records than others, and not every manager or recordkeeper is willing to manage or keep records for every type of investment.

3. Liquidity

The Proposed Rule appropriately addresses liquidity so that participants may be able to access funds for transfers, withdrawals, and distributions. However, the Proposed Rule sensibly allows fiduciaries to include investments with structured liquidity features, where appropriate, provided those features are understood, disclosed, and integrated within diversified options (e.g., within a target-date or multi-asset fund). The availability of investment options at multiple levels of liquidity is particularly important for franchise employers and their employees. Many such employees have varying levels of financial resilience, but limited opportunities to invest in assets with varying levels of liquidity.

4. Valuation

The Proposed Rule's treatment of valuation is particularly important for investments that are less frequently priced or involve more complex methodologies. The Proposed Rule properly directs fiduciaries to evaluate the reliability and transparency of valuation methodologies, the frequency and independence of pricing, and risks associated with stale or model-based valuations. Importantly, the Proposed Rule does not prohibit investments with more complex valuation structures; rather, it requires fiduciaries to understand and assess those structures. This avoids imposing impractical restrictions on plan design. For franchise systems, which often rely on external managers and pooled investment vehicles, the Proposed Rule's focus on valuation method, rather than unascertainable appraisals is critical.

5. Benchmarking

IFA also supports the Proposed Rule's treatment of benchmarking. IFA agrees that a prudent benchmarking process should involve comparing investments against appropriate market indices

or peer groups, evaluating whether benchmarks are aligned with the investment's strategy and risk profile, and using benchmarking as a tool for ongoing monitoring, not just initial selection.

For franchise employers, benchmarking is particularly valuable in supporting defensible, standardized decision-making across multiple plans or locations. It enables fiduciaries to demonstrate that investment options were selected and retained based on objective criteria, rather than arbitrary or subjective judgments. At the same time, the Proposed Rule appropriately avoids mandating rigid benchmarking requirements, recognizing that not all investments—particularly diversified or custom solutions—lend themselves to simple comparisons.[6]

6. <u>Complexity</u>

Finally, the Proposed Rule's treatment of complexity reflects a sophisticated understanding of modern investment products and participant behavior. The Proposed Rule encourages fiduciaries to consider (i) whether an investment's structure or strategy is reasonably understandable; (ii) the extent to which complexity may affect participant decision-making; and (iii) whether additional complexity is justified by expected benefits, such as diversification or improved risk-adjusted returns.

This framework appropriately avoids a blanket aversion to complexity. Instead, it recognizes that some complexity is inherent in professionally managed, diversified investments. It also acknowledges that complexity may be appropriate when embedded within managed solutions (e.g., target-date funds). The Proposed Rule thus properly asks whether complexity is understood, justified, and appropriately communicated—not whether a designated investment alternative is too complex. For franchise employers, that distinction is critical. Small, often family-owned franchises often compete with larger, better-resourced employers for the same workers. Being able to offer a range of investment options in retirement plans, including complex designated investment alternatives, enhances the attractiveness of franchise employers in the labor market.

IV. DOL Guidance Is Needed to Clarify the Scope of ERISA's Fiduciary Duty in Selecting Designated Investment Alternatives.

A. The Proposed Rule's Safe Harbor Provides Clarity for Participant-Directed Defined Contribution Plans

The Proposed Rule's safe harbor provides needed clarity to all regulated parties. It not only ensures compliance with ERISA's fiduciary duty provisions but also deters needless litigation that undermines the availability of retirement savings opportunities for the nation's workforce. The Proposed Rule's safe harbor fills a void that might otherwise be occupied by flawed lawsuits seeking to subject ERISA fiduciaries to an outflow of damages. Such lawsuits would both discourage employers from offering ERISA plans and harm plan participants by discouraging innovations and dramatically reducing investment options.

Allegations that a plan fiduciary breached its duty simply by selecting investment options are easy to make and costly to litigate. Hundreds of lawsuits challenging investment selections and

[6] IFA respectfully requests the DOL reconsider use of the phrases "as meaningful as possible" and "best possible" with respect to fiduciary obligations so as not to inadvertently create unintended benchmarking standards.

marginal cost differences in investments have been filed against many of the largest retirement plans in the nation, many of them duplicating the same brittle allegations. Indeed, there were a near-record high 155 ERISA fiduciary class action lawsuits filed in 2025, with 401(k) plans remaining the dominant target. *See* The Fid Guru Blog, *ERISA Fiduciary Litigation in 2025: Plaintiff Law Firms Continue Frenetic Pace, With Broader Allegations Against Both Retirement Plans and Health Plans*, Encore Fiduciary (February 9, 2026).[7] And generally, ERISA class actions are one of the fastest-growing areas of litigation. *See* AIG, Understanding the Rapid Rise in Excessive Fee Claims (2021).[8]

These lawsuits have wreaked havoc on the market for fiduciary liability insurance. In the case of franchises, most of which are small businesses, the costs of ascending insurance prices are often borne by the sole proprietors or families who own and operate the business. And these costs become a necessary loss to the business, given the stakes of even meritless litigation.

Even when the plan's menu of investment options meets or exceeds overall market performance, claims premised on a single underperforming investment could derail the plan. The alleged plan-wide damages are often sky-high, sometimes in the "tens of millions of dollars." *Sweda v. University of Pennsylvania*, 923 F.3d 320, 341 (3d Cir. 2019). As a result, when these claims are permitted to proceed beyond a motion to dismiss, their merits become irrelevant. The prospect of "expensive discovery" and "interest-inflated liability totals" create ruinous "pressure to settle." *Id.* at 340-41. Without settlement, the federal courts become plan auditors, examining every investment offering to determine whether its long-term performance, downstream from its initial selection, could have been foreseeable.

These claims, which the Proposed Rule's safe harbor seeks to avoid, run roughshod over ERISA's design. Far from "assuring a predictable set of liabilities, under uniform standards of primary conduct," these allegations will drive protracted litigation, leaving employers and ERISA fiduciaries at the mercy of whatever revolutionary theory of liability a plaintiff can conjure. *Conkright*, 559 U.S. at 517. So many of the largest employers could be so easily dragged into litigation based on common plan management practices. Absent a safe harbor discouraging such claims, small franchise businesses would have little hope to avoid potentially ruinous litigation.

These concerns have broader social implications, given the basic operation of ERISA plans. Employers have no obligation to offer retirement plans. A litigation environment that imposes excessive costs on ERISA plans, and, by extension the employers who sponsor those plans, harms the people ERISA seeks to help: the plan participants.

Absent the clear and deferential guideposts that the Proposed Rule provides, plaintiffs can routinely quarrel with plan fiduciaries over isolated investment options. Plan fiduciaries will inevitably draw from stolid lists of established investment alternatives. A participant's ability to chart the direction of their retirement savings, and to break away from common investment decisions, will diminish and perhaps even disappear. Such a regime would convert federal courts into investment pickers—a task "courts are not well suited" to undertake. *Jones v. Harris Assocs.*

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[7] *See* https://news.bloomberglaw.com/securities_law/spike-in-401k-lawsuits-scrambles_fiduciary-insurance-market (last visited May 20, 2026).
[8] *See* https://www.aig.com/content/dam/aig/america-canada/us/ documents/business/management-liability/pension-trustee-excess-fees-fiduciary-whitepaper.pdf (last visited May 20, 2026).

L.P., 559 U.S. 335, 352-53 (2010). Rather than provide participants the ability to choose which investments are best for them after adequate disclosures, courts would be forced to make those decisions for participants.

Congress sought to avoid such a system. It favored individual decision-making in participant-directed defined contribution plans. In doing so, Congress sought a system in which exposure to litigation would discourage individuals from serving as fiduciaries or, even worse, "discourage employers from offering [ERISA] plans" at all. *Conkright*, 559 U.S. at 517.

The Proposed Rule's safe harbor offers a solution to this problem. It adheres to the context-specific fiduciary duty established by ERISA. Any different conclusion could unleash damages litigation that would cripple ERISA plans and the small businesses that sponsor them. That is particularly true for franchises that often only employ a small number of workers but are also among the most visible businesses in their communities.

B. Expanded Access to Designated Investment Alternatives in Participant-Directed Plans Will Promote Retirement Savings

The Proposed Rule, including its process-based safe harbor, will have important positive effects on retirement savings behavior, plan participation, and plan formation, especially for franchise employers.

1. <u>The Proposed Rule's Safe Harbor Will Encourage Inclusion of Alternative Investments</u>

The proposed safe harbor is likely to materially increase the willingness of plan fiduciaries to include investment options that incorporate alternative assets within participant-directed investment menus. Under current conditions, where even the selection of traditional investment options are under constant attack, most plan fiduciaries are reluctant to even consider alternative investment options—not due to their potential merits, but due to perceived litigation risk, valuation complexity, and uncertainty regarding fiduciary standards. By establishing a clear framework under which plan fiduciaries can demonstrate prudence through a documented, analytical process, the rule reduces these barriers.

As a result, plan fiduciaries will be more likely to evaluate and, where appropriate, include diversified investment options. Employers will have greater confidence that such decisions can be defended if challenged. And investment options in participant-directed plans will better reflect the full range of opportunities available in the modern investment landscape. Increased clarity in ERISA fiduciaries' duty of prudence is a necessary precondition to expanding participant access in a responsible manner.

2. <u>Broader Investment Options Will Increase Employee Engagement and Deferral Rates</u>

Expanding the range of available investment options—particularly those offering differentiated return profiles, diversification benefits, or professionally managed strategies—can play an important role in increasing participant engagement with defined contribution plans.

In the franchise sector, where employees often have diverse financial circumstances and varying levels of investment sophistication, offering more robust and modern investment options enhances the perceived value of the retirement plan as part of total compensation. It also increases employee interest in participating in and actively engaging with plan offerings. That is particularly true for young employees and investors who are more likely to find alternative assets appealing and can experience the most long-term gains through early retirement saving. *See* Bloomberg, *Young Investor Demand for Alternative Assets Is Reshaping Wall Street's Playbook* (June 23, 2025).[9]

That interest, in turn, encourages higher deferral rates as employees gain confidence that their contributions are being invested in a broader opportunity set. After all, participants are more likely to contribute to retirement plans that they view as competitive, relevant, and capable of supporting long-term financial goals, including development of small businesses through franchising. By enabling plan fiduciaries to include a wider array of prudent investment options, the Proposed Rule supports these outcomes.

3. Enhanced Investment Options Will Increase Participation in Existing Plans

For employers that already sponsor defined contribution plans, the ability to expand and modernize investment menus is likely to have a direct positive effect on participant enrollment and retention. In particular, employees who may have previously opted not to participate due to limited or unappealing investment options may be more inclined to enroll. Existing participants may increase contributions when presented with more diversified and professionally managed alternatives. This effect is particularly relevant in the franchise industry, where a dynamic labor market often makes sustained participation a continuing challenge. Improving the attractiveness and perceived quality of plan investment options is a key lever for strengthening participation.

4. The Proposed Rule Would Encourage New Plan Formation Among Employers

The Proposed Rule, particularly its safe harbor, is also likely to encourage plan adoption among employers who do not currently sponsor defined contribution plans. For many franchise employers, the decision not to offer a plan is often driven by concerns about litigation, administrative complexity, and compliance costs. By reducing ambiguity and providing a clear, defensible pathway for selecting and monitoring investments—including those that may incorporate alternative assets—the Proposed Rule lowers perceived barriers to entry. Importantly, the availability of more robust investment options—paired with safe harbor protection—enables small franchise businesses to respond to employee demand for retirement savings vehicles with diverse investment options with greater confidence.

5. Competitive Labor Market Pressures Will Encourage Adoption and Enhancement of Plans

Finally, the Proposed Rule will likely improve overall compensation packages in the labor market. Employers increasingly compete on the basis of total compensation, including retirement benefits.

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[9] *See* https://www.bloomberg.com/news/articles/2025-06-23/the-60-40-playbook-is-dead-to-the-young-risk-loving-wealth-class (last visited May 22, 2026).

As some employers adopt defined contribution plans with enhanced investment menus—including options that incorporate alternative assets—others may need to follow suit in order to remain competitive. This competitive dynamic will reinforce a broader policy objective of increasing access to retirement savings opportunities.

VII. The Proposed Rule Should Clarify Fiduciary Duties in Shared and Delegated Structures and Small to Mid-Sized Plans

Franchise employers would benefit from clarification of the fiduciary duties in shared and delegated structures. Franchises frequently involve layered fiduciary arrangements, including franchisor-sponsored or facilitated plans, pooled employer plans, or delegation to investment managers and recordkeepers. The Department should adopt a final rule that clarifies how the safe harbor applies where fiduciary responsibility is allocated across multiple entities or delegated but still subject to oversight obligations. Specifically, the final rule should confirm that a franchisor or centralized committee may establish a compliant process on behalf of multiple franchisees and franchisee plan fiduciaries may reasonably rely on that process.

In addition, the final rule should clarify the fiduciary duties in small to mid-sized plans. Many franchisees operate small plans with limited administrative capacity. While the Proposed Rule appropriately emphasizes process, additional guidance would help ensure that compliance is proportionate to plan size and resources. The final rule should confirm that the depth and complexity of analysis under the six factors may vary based on plan size and sophistication. The final rule should also clarify that plan fiduciaries are not required to perform institutional-level due diligence where such resources are not reasonably available.

VIII. Conclusion

For the reasons set forth above, IFA supports the Department's Proposed Rule and urges the Department to finalize the NPRM. Prompt action will help clarify ERISA's duty of prudence governing the selection of designated investment alternatives in participant-directed plans. Its safe harbor will encourage employers to offer retirement plans with a range of investment options that are attractive to workers. With greater informed choices, more workers will be encouraged to save for retirement. A final rule is important to franchising – a business model that promotes visible small businesses in almost every community in the United States. These businesses are often the most vulnerable to litigation due to lack of clarity. They also provide the first jobs many workers have, and so, the first opportunity to plan for retirement.

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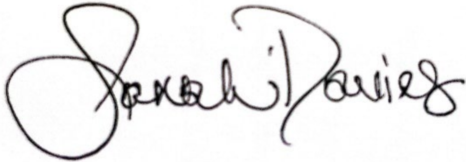
IFA appreciates the Department's engagement on this important issue, thanks the Department for considering the experiences of IFA's members and welcomes the opportunity to provide the Department with any additional information it may deem useful.

Respectfully Submitted,



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