

June 1, 2026

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210
Attn: Fiduciary Duties in Selecting Designated Investment Alternatives (RIN 1210-AC38)

RE: Proposed Rule on Fiduciary Duties in Selecting Designated Investment Alternatives

Dear Assistant Secretary Daniel Aronowitz,

The American Retirement Association (ARA) is writing in response to the proposed rule regarding Fiduciary Duties in Selecting Designated Investment Alternatives published in the Federal Register on March 31, 2026 (the "proposed rule"). ARA thanks the Department of Labor (the "Department") for the opportunity to provide input on these matters.

The ARA is a national organization of nearly 40,000 members who provide consulting and administrative services to American workers, savers, and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system: the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). ARA's membership is diverse but united in a common dedication to America's employer-based retirement plan system.

Summary

ARA strongly supports the Department's efforts to provide additional clarity to plan fiduciaries regarding the prudent selection of designated investment alternatives ("DIAs"). The proposed rule appropriately reinforces a fundamental principle of ERISA: fiduciary decisions should be evaluated based on whether the fiduciary engaged in a prudent process at the time of the decision, not based on hindsight or whether a particular investment ultimately outperforms other available options.

We also applaud the Department's decision to propose a rule that is asset-neutral and does not require, prefer, or disfavor any particular asset class, investment structure, investment strategy, or product type. This is an important and constructive framework. ERISA fiduciaries must retain the ability to evaluate a broad range of investment options based on the needs of the plan and its participants. ERISA fiduciaries must also have the flexibility to adapt to innovations in investment options and changes in the markets. The proposed rule's focus on process and fiduciary discretion is therefore both timely and helpful.

Our comments are intended to support the Department's objectives by recommending targeted clarifications that would make the final rule more administrable, reduce litigation risk that constrains fiduciaries' ability to apply their best judgment, and further the Department's efforts to align the regulatory text with the practical realities of investment selection and monitoring in defined contribution plans. In particular, we recommend that the Department:

- Provide additional context to clarify how the proposed rule aligns with the existing prudence regulations;

- Clarify the interaction of a fiduciary’s plan menu strategy decision and a fiduciary’s selection of a DIA;
- Continue to recognize the practical and vital role of ERISA section 3(21) investment advice fiduciaries and section 3(38) investment managers;
- Further mitigate frivolous ERISA litigation by addressing monitoring in the final rule and more explicitly defining certain key concepts, such as “similar alternative,” the lens for choosing comparators for benchmarking, “risk-adjusted returns,” and the “purposes” or “objectives” of the plan; and
- Refine certain provisions relating to the safe harbor, including eligibility for the safe harbor, the role of examples in the factors, and particular concepts related to the safe harbor factors.

Discussion

ARA commends the Department for grounding the proposed rule in ERISA’s longstanding fiduciary framework. The proposed rule appropriately recognizes that ERISA is inherently principles-based and that the Department’s role is not to select preferred investments, strategies, asset classes, or investment structures for retirement plans. Rather, the Department rightly emphasizes and reaffirms that ERISA requires fiduciaries to engage in a prudent process, evaluate the relevant facts and circumstances, and make reasoned decisions based on the needs of the plan and its participants.

That principles-based structure has long been one of ERISA’s greatest strengths. Retirement plans vary widely in size, governance structure, participant demographics, investment menu design, and available resources. The investment markets also continue to evolve—with the most recent evolution being a reduction in the number of publicly traded investments and an increase in the number of private investments. Many of the products, strategies, and tools available to help participants build retirement security today did not exist two decades ago (and even fewer existed more than 50 years ago when ERISA was enacted). However, ERISA has effectively guided fiduciaries and protected participants through these decades of change. By providing a fiduciary standard that is principles-based rather than prescriptive, ERISA has allowed plan fiduciaries to adapt to these differences and changes while remaining accountable to rigorous duties of prudence and loyalty.

Asset-neutrality is equally central to that framework. ERISA has never favored or disfavored an investment merely because of its asset class, vehicle structure, management style, liquidity profile, or degree of familiarity. Fiduciaries should be able to consider any legal investment alternative in evaluating what will prudently serve a role in the plan’s investment menu, including traditional public-market investments, active strategies, passive strategies, managed accounts, lifetime income solutions, private-market exposure, and other professionally managed structures. Regardless of the particular investment chosen, the relevant question under ERISA should remain whether the fiduciary engaged in a prudent process and reasonably determined that the investment alternative is appropriate for the plan.

This asset-neutral approach protects participants. It allows fiduciaries to evaluate investment alternatives based on merit, value, risk, cost, operational fit, participant needs, and the role of the option in the plan menu—not based on government preference or disfavor—and adapt as new alternatives are developed, allowing the innovation of solutions that improve participant outcomes. Even well-intended regulatory signals can distort fiduciary decision-making or chill participant-beneficial innovation if fiduciaries or courts interpret them as indicating that certain products are approved, disapproved, favored, or disfavored. Such signals can contribute to defensive plan governance, overreliance on the most familiar or lowest-litigation-risk products, reduced innovation, less tailored investment menus, and ultimately weaker participant outcomes.

A more rigid, product-specific, or checklist-based approach would not serve participants as well. It could freeze fiduciary decision-making around a particular set of products, metrics, or procedural steps, even as markets evolve and participants’ needs change. ERISA’s flexible fiduciary framework instead permits responsible innovation, tailored plan design, and careful exercise of fiduciary judgment. That flexibility is especially important in participant-directed individual account plans, where fiduciaries must construct menus that give participants meaningful opportunities to diversify and pursue retirement outcomes appropriate to their circumstances.

For that reason, we strongly support the Department’s clear recognition in its development of the proposed rule that the Department can provide meaningful guidance without substituting its judgment for that of plan fiduciaries. The proposed rule would empower fiduciaries to develop strong fiduciary processes and proceed more confidently in making those decisions, rather than nudging them toward any government-preferred investment outcomes.

The Department’s effort to clarify the investment selection process is especially important in light of the current ERISA litigation environment. Plan fiduciaries are under increasing legal pressure. Plaintiffs’ attorneys are attacking investment decisions more aggressively than ever, often relying on mismatched comparisons over cherry-picked short periods of time to allege imprudence. Hundreds of lawsuits have been filed in the last decade, with the rate of suits continuing to increase. Some estimates suggest more than one-third of plans with at least \$1B in assets have been sued and more than half of plans with at least \$5B in assets have been sued.

Clear fiduciary process standards can help courts evaluate fiduciary conduct based on the process followed at the time of the decision, rather than through hindsight or by focusing on the type of product selected. The proposed rule can serve a key role by reinforcing that ERISA fiduciary prudence turns on process and reasoned judgment—not on whether a different investment later appears preferable. That clarification is valuable not only for fiduciaries, but also for participants, because excessive litigation risk can encourage defensive plan design, discourage innovation, and narrow the range of investment solutions fiduciaries are willing to consider.

With that important framework in mind, we reiterate our support for the proposed rule and offer the following recommendations to ensure the final rule fully advances the Department’s objectives, to make the final rule more administrable, and to reduce litigation risk that constrains fiduciaries’ ability to apply their best judgment and consider investment innovations.

I. Clarify Alignment with Existing Fiduciary Standards

ARA supports the Department’s effort to provide fiduciaries with a more concrete framework for selecting DIAs. The final rule would be strengthened by more strongly situating that framework within the Department’s existing prudence regulation at 29 C.F.R. § 2550.404a-1. That regulation provides that a fiduciary satisfies ERISA’s prudence requirements if the fiduciary gives appropriate consideration to the facts and circumstances that the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in the plan’s investment portfolio, and acts accordingly.

While the proposed rule is consistent with that framework, it makes slight deviations from the language used in that regulation, which could create confusion or suggest that the Department intends to create a different standard rather than merely clarifying the existing standard and providing additional detail regarding the facts and circumstances relevant when a fiduciary selects a DIA for a participant-directed individual account plan. To avoid any inference that the proposed rule creates a separate or inconsistent prudence standard, **ARA recommends that (1) the final rule expressly state that the DIA selection framework is intended to supplement and clarify, not replace or narrow, the existing prudence regulation at 29 C.F.R. § 2550.404a-1(b)(1)(i), and (2) the language of subsections (d) and (e) of the final rule mirror the language of § 2550.404a-1 when stating the general standard that applies.**

For example, subsection (d) currently provides that a fiduciary must act prudently when designing a plan’s investment menu “by enabling participants and beneficiaries in such plan to maximize risk-adjusted returns, net of fees, on investment across their entire portfolios in their plan.” This could be interpreted as a new standard because § 2550.404a-1 does not limit the purposes of the plan that may be considered when designing an investment menu to only maximizing risk-adjusted returns. When designing plan menus, fiduciaries take into account many factors that further the purposes of the plan—including the appropriateness of an investment for the plan population, the ability of participants to diversify, the need to reduce market risk for participants approaching retirement, etc. Deviating from the general language of § 2550.404a-1 in stating the general

fiduciary principle could suggest that these reasonable and appropriate processes to design a menu are inappropriate, which does not appear to be the Department's intent.

More closely matching the language in § 2550.404a-1 would be a clarification that would help fiduciaries, advisors, and courts understand that the proposed rule is a process-oriented clarification of existing fiduciary principles, not a new substantive rule.

II. Clarify Interaction of Menu Strategy Decisions and Selection of DIAs

The proposed rule clearly provides that the design and establishment of a plan menu is a fiduciary decision that is separate from the decision to select a particular DIA. We strongly support the acknowledgment of that distinction and recommend the Department enhance the proposed rule by further emphasizing and clarifying the impact of that distinction.

Generally, when a fiduciary selects investments for a defined contribution plan, the fiduciary makes menu-level judgments before selecting a specific product. For example, the fiduciary may first determine that the plan menu should include a target date suite, a capital preservation option, a real asset strategy, a particular lifetime income accumulation strategy, a suite of actively managed options, and a suite of passively managed options.¹ Once that menu-level or strategy decision is made, the fiduciary then evaluates which DIA or DIAs are prudent vehicles to implement each element of that menu-level or strategy decision.

While this fiduciary process of first designing an investment menu that includes particular investment strategies and then selecting one or more DIAs to carry out each strategy is not precluded by the proposed rule, **ARA recommends the Department make it clearer that the evaluation of a DIA is made in light of the DIA's role in the menu designed by the fiduciary.**

For example, in subsection (e), the Department could clarify the introductory sentence by revising it to say, "To satisfy the duty of prudence in section 404(a)(1)(B) of ERISA when selecting a designated investment alternative to carry out a particular strategy for the plan investment menu, the plan fiduciary must follow a prudent process . . .". Similarly, in the safe harbor in subsection (f), the Department could clarify that the safe harbor applies "when selecting each such designated investment alternative to carry out a particular strategy for the plan investment menu." And each factor under the safe harbor would be evaluating whether the DIA is maximizing value and risk-adjusted returns net of fees *for the particular plan investment menu strategy being considered*.

Consistently recognizing throughout the final rule that selection of a DIA occurs in the broader context of a prior decision regarding which strategies should be included in the plan investment menu will preserve fiduciary discretion and avoid turning the proposed rule into a requirement that every fiduciary re-justify the overall design of the investment menu each time it selects or replaces a particular DIA.

III. Continue to Appropriately Recognize the Value of 3(21) and 3(38) Fiduciaries

ARA strongly supports the proposed rule's recognition of the significant role played by ERISA section 3(21) investment advice fiduciaries and section 3(38) investment managers. While a plan sponsor is not required to use industry experts when selecting DIAs, in practice, the overwhelming majority of employers sponsoring retirement plans do not have the internal investment expertise necessary to evaluate complex investment

¹ Similarly, ARA recommends the Department consider clarifying the example involving active management in paragraph (h)(5). As drafted, that example is helpful because it recognizes that tracking error is a legitimate factor to consider and that a prudently designed menu can include both active and passive funds. However, the example could be read to blur the distinction between the fiduciary's decision when designing the plan's investment menu that the plan should permit participants the ability to diversify their portfolios using either actively managed funds or passive funds and the fiduciary's separate selection of a DIA to implement that objective. We recommend revising this example to clarify that the DIA in the example is being selected in the context of a fiduciary's decision that the menu should include one or more small-cap stock fund(s), without restriction related to active and passive management.

products, fee structures, liquidity features, valuation methodologies, and benchmarks without assistance. And, according to the 2025 PSCA Annual Survey of Profit Sharing and 401(k) Plans, the overwhelming majority of plan sponsors responding (84%) do work with a fiduciary investment professional.

The proposed rule appropriately emphasizes the circumstances in which plan sponsors may want to work with a 3(21) advisor for recommendations and analysis or prudently appoint a 3(38) investment manager to assume discretionary responsibility for selecting and monitoring investments. The final rule, including the examples contained therein, should continue to validate and emphasize these arrangements as ways most employers can satisfy their prudence obligation.

At the same time, to avoid any suggestion that using a 3(21) or 3(38) fiduciary is mandatory, **ARA recommends the Department consider including at least one example in the final rule where a plan fiduciary meets ERISA’s high standard without using an investment professional.** Such an example might include facts like the following as part of an example:

A large plan sponsor maintains an internal investment committee that includes individuals with significant institutional investment experience. The committee has access to independent investment research, regularly reviews written materials regarding the DIA’s strategy, fees, liquidity, valuation, and benchmark, documents its analysis, and confirms that committee members understand the material features and risks of the DIA. The committee compares the DIA to a reasonable number of similar alternatives and documents why the DIA is appropriate for the plan’s investment menu. The fiduciary does not engage a 3(21) or 3(38) investment fiduciary, but the facts demonstrate that the fiduciary had the skills, knowledge, experience, and capacity to conduct the review prudently.

This type of example would preserve the important message that outside expertise is often appropriate and frequently necessary, while avoiding any implication that the use of a 3(21) or 3(38) investment fiduciary is a condition of compliance.

IV. Recommendations to Further Mitigate Litigation

ARA applauds the Department’s fervent desire and commitment to help reduce ERISA litigation risk by providing a clearer framework for fiduciary process. Meritless and speculative litigation constrains fiduciaries’ ability to apply their best judgment, chills innovation in investment design and plan offerings, narrows the range of options available to participants, and ultimately undermines participant outcomes. The Department’s goal of reducing frivolous ERISA litigation would be further advanced by certain refinements to the proposed rule, targeted to address certain issues likely to generate claims and pleading disputes.

a. Address Monitoring

ARA strongly believes that expanding the rule to address the monitoring of plan investments is necessary to fully achieve the important goal of mitigating frivolous ERISA litigation.

Much of the ERISA investment litigation focuses not only on the initial selection of investments, but also on whether fiduciaries prudently monitored and retained investments. If the final rule applies only at the moment of initial selection, it may leave unresolved many of the practical questions that fiduciaries and courts face most often and deny fiduciaries the potential protections offered by the safe harbor presumption of prudence. The Department can substantially enhance the usefulness of the rule by ensuring the presumption for factors in the final rule may be used in ongoing monitoring.

We recommend the final rule make clear that fiduciaries may rely on the same general categories of analysis—performance, fees, liquidity, valuation, benchmarking, and any other relevant considerations included in the final rule—when monitoring DIAs. While the process to monitor a DIA is not identical to initial selection, some or all the factors used in initial selection generally will be applicable to monitoring as well and, where a fiduciary prudently applies the rule’s factors in monitoring a DIA, the fiduciary should receive appropriate deference for that process.

While the Department could provide additional sub-regulatory guidance on monitoring, such guidance is unlikely to result in the same level of consideration or persuasiveness in litigation as a final rule. Therefore, **ARA recommends strongly the Department revise the safe harbor in subparagraph (f) to be available “when selecting or monitoring each such designated investment alternative for the plan investment menu.”**

In expanding the safe harbor to provide deference to monitoring decisions, it also would be helpful for the Department to acknowledge a fiduciary may prudently apply the same factor differently in the monitoring context than it does in the initial selection context and provide examples of other factors a fiduciary might prudently consider when monitoring a DIA, such as the cost of making a change and the participant impacts associated with replacing an investment.

This expansion of the safe harbor will make the rule significantly more useful in practice by providing fiduciaries meaningful guidance and deference for the decisions they make most often.

b. More Explicitly Define “Similar Alternative”

The concept of a “similar alternative” is central to the “performance” and “fees” factors in subsections (g) and (h). In addition, this concept is central to many litigation claims involving the selection and monitoring of investments.

While the Department clearly acknowledged the importance of this concept in the proposed rule by addressing it in several examples, this decentralized approach requires a plan fiduciary to consult multiple provisions to construct a comprehensive understanding of what a “similar alternative” means. In addition, distributing the concept across different examples potentially invites litigants to take elements of the proposed rule out of context, thereby creating inadvertent disputes and technical pleading hooks regarding what it means to compare a fund to a similar alternative for purposes of evaluating the factors. Because the concept is so important and central to both the rule and ERISA litigation, **ARA recommends the Department consolidate its discussion of the term “similar alternative” into a cohesive definition that appears in the regulation, which would avoid arguments that certain elements of the definition apply only in certain contexts and would help ensure the term is used consistently throughout the rule and examples.** One formulation of this definition could appear with the DIA definition in subsection (m) and be drafted as follows:

The term “similar alternative” means an investment other than the designated investment alternative being evaluated that shares similar key characteristics with the designated investment alternative and could fulfill the plan investment menu strategy the designated investment alternative is intended to fulfill. For this purpose, key characteristics of the designated investment alternative being evaluated include, but are not limited to, the designated investment alternative’s key objectives and other features that are material to the fulfillment of the plan investment menu strategy. Whether alternatives are similar to the designated investment alternative being evaluated is dependent on the specific facts and circumstances of each case.

This definition could then be reinforced with certain examples to illustrate that a comparison is meaningful only if the alternatives share the material characteristics that are relevant to the fiduciary’s decision, which is made in the context of fulfilling a particular strategy on the menu.

For example, an asset allocation fund with a lifetime income feature should not be treated as interchangeable with an otherwise similar asset allocation fund that does not provide lifetime income if the fiduciary is seeking to implement a plan investment menu strategy of offering lifetime income—in that case, the fund without a lifetime income feature would not satisfy the plan investment menu strategy under consideration and therefore would not be a similar alternative. By contrast, if the fiduciary is implementing a plan investment menu strategy that is agnostic regarding the existence of a lifetime income feature, then the two options could fulfill that strategy and may be similar alternatives.

Similarly, an actively managed fund should not always be treated as a similar alternative that is interchangeable with a passive fund, even within the same asset class. If the fiduciary is evaluating active management as a

distinct plan menu strategy, the passive fund is not a similar alternative (whereas if the plan menu design is agnostic regarding management style, they could be similar alternatives).

Establishing a single cohesive definition of a “similar alternative” will avoid confusion and potential inconsistency regarding how to evaluate similar alternatives—thereby furthering a strong fiduciary process and avoiding inadvertent litigation theories that select only certain elements from different examples.

c. Distinguish Selection Criteria for Benchmarking

The proposed rule also reflects a second comparison that fiduciaries may engage in when considering a DIA—performance benchmarking. While the proposed rule does use different terms in its description of the performance and fee comparisons versus the performance benchmarking comparison, the final rule could benefit from certain clarifications regarding the different objectives of these two comparisons.

Where the performance and fees factors in subsections (g) and (h) direct the fiduciary to compare a DIA to similar alternatives, which is intended to evaluate whether the DIA is best suited to fulfill a certain plan investment menu strategy, the performance benchmark factor in subsection (k) directs the fiduciary to compare a DIA to a meaningful comparator, which is intended to evaluate the DIA’s performance against its own stated strategy.

ARA recommends providing a cohesive definition of “similar alternative” that incorporates the focus on fulfillment of the investment menu strategy. In addition, we recommend the preamble and the text of the final rule further clarify that the set of comparators that are meaningful benchmarks may be different than the set of comparators that would qualify as similar alternatives. This could be done by the inclusion (or modification) of an example involving an asset allocation fund with a risk mitigation strategy. The basis of the example might follow the following construct:

The fiduciary is fulfilling a plan investment menu strategy to provide for a “to-retirement” target date suite (with no direction regarding the features or asset allocation of the suite). The fiduciary is considering a designated investment alternative that is an allocation fund with a stated objective of lower volatility (such as in the example in subsection (h)(4)). In evaluating the performance and fees factors in subsections (g) and (h), the fiduciary compares the designated investment alternative to a reasonable number of similar alternatives, including an allocation fund without a risk mitigation strategy, which is appropriate because the plan investment menu strategy did not include a direction regarding risk mitigation. In evaluating the benchmark factor in subsection (k), the fiduciary may reasonably conclude that those “similar alternatives” are not “meaningful benchmarks” because they do not share the same strategy of risk mitigation as the DIA.

Clarifying that the performance benchmarking factor is a different comparison, focused on evaluation of the designated investment alternative’s performance against its own stated strategy (and not other investments that could fulfill the plan investment menu strategy), will assist fiduciaries in the selection of meaningful benchmarks and clarify the distinction for courts reviewing the fiduciary process.

d. Clarify Use of “Risk-Adjusted Returns”

ARA strongly supports the Department’s emphasis on evaluation of plans based on risk-adjusted returns net of fees. That concept is central to a prudent investment selection process and appropriately reinforces that fiduciaries should not evaluate investment alternatives based on expected return alone. We recommend, however, that the Department clarify the use of “risk-adjusted returns” to reflect the comprehensive view of risk that fiduciaries prudently use in practice.

The proposed rule uses formulations such as “risk-adjusted returns” and “expected risk-adjusted returns.” In investment industry parlance, “risk-adjusted return” can have a specific quantitative meaning, often referring to metrics such as the Sharpe ratio or similar measures that compare return to volatility or another defined risk measure—as the Department noted in its performance example in paragraph (g)(1). Those quantitative metrics can be incredibly useful, and fiduciaries should be able to consider them as part of a prudent process.

At the same time, investment professionals do not evaluate risk solely through quantitative metrics. A prudent assessment of whether an investment is likely to deliver appropriate returns for the risks assumed may also include qualitative and forward-looking considerations that are not fully captured by a Sharpe ratio or similar formula. These may include, among other things, the depth and stability of the investment management team; the manager's expertise in the relevant asset class or strategy, particularly for more complex strategies; the consistency and discipline of the manager's investment process; adherence to the stated investment style or mandate; the extent of deviation from an applicable benchmark; the quality of risk-management practices; and operational capabilities. For example, a DIA with a higher Sharpe Ratio may not offer the same truly risk-adjusted value if it has less reliable management, weaker adherence to its stated strategy, greater tracking error than expected for its role in the plan menu, less robust risk controls, or other characteristics that could affect the likelihood that the investment will deliver its intended value to participants.

Clarifying this point would be consistent with the Department's overall approach. The proposed rule appropriately emphasizes that fiduciaries are not required to select the investment with the highest expected return, nor are they required to select the lowest-cost alternative in all circumstances. The final rule should ensure it is clear that the same principle applies to expected quantitative risk-adjusted return metrics—that a fiduciary is not required to select the investment with the highest projected Sharpe ratio or similar metric if other relevant risk considerations indicate that a different investment is more appropriate for the plan.

Therefore, **ARA recommends the Department clarify in the final rule that “risk-adjusted returns” should be understood as a holistic fiduciary concept, not only as a quantitative investment metric.** This might be accomplished by inclusion of language such as the following:

“For purposes of this section, consideration of expected risk-adjusted returns may include quantitative measures of return relative to risk, as well as qualitative and forward-looking considerations that the fiduciary determines are relevant to evaluating whether the designated investment alternative is expected to provide appropriate returns for the risks assumed and to serve its intended role in the plan's investment menu.”

This language, plus incorporation of the qualitative factors in one or more examples (as suggested below), will ensure the final rule reflects that quantitative measures of risk-adjusted return are important tools, but they should not displace fiduciary judgment or prevent fiduciaries from considering qualitative risk factors that investment professionals commonly consider in evaluating an investment option. This will ensure ERISA fiduciaries can continue to take into account a complete view of a DIA when engaging in a prudent selection or monitoring process.

e. Emphasize Qualitative Values That Further Purposes of the Plan

While the proposed rule appropriately emphasizes the central role of evaluating risk-adjusted returns net of fees and expenses in the selection of a DIA, we commend the Department for also clearly recognizing (in the fees factor) that the purposes of the plan include both risk-adjusted returns as well as other benefits, features, or services (collectively called “value”). We strongly agree that it is important to recognize value beyond risk-adjusted returns and recommend the Department strengthen the final rule by (1) ensuring the final rule avoids language that could be read to reduce fiduciary analysis to a single objective of maximizing returns without consideration of other value and (2) providing additional guidance and references to the concept of value throughout the final rule.

To avoid the suggestion that other value cannot be considered, **ARA recommends the Department ensure each use of the phrase “purposes of the plan” includes a reference to value.** For example, in subsection (g), we recommend the Department include the concept of value as follows:

(g) *Performance.* The plan fiduciary must appropriately consider a reasonable number of similar alternatives and determine that the risk-adjusted expected returns, over an appropriate time-horizon, of the designated investment alternative, net of anticipated fees and expenses, further the purposes of the plan by enabling participants and beneficiaries to maximize risk-adjusted returns

on investment net of fees and expenses and any other value the designated investment alternative brings to furthering the purposes of the plan and the role of the designated investment alternative in the plan's investment menu.

This clarification would make the rule more consistent with ERISA's principles and with the proposed rule's own recognition that fiduciaries are not required to select the lowest-fee or highest-return investment in all circumstances.

Further, **ARA recommends the Department enhance the final rule's recognition of the qualitative "value" features that bear directly on whether an investment option advances the purposes of the plan by providing additional guidance related to the concept of value.** We agree with the Department's broad definition of value (meaning any benefits, features, or services that further the purposes of the plan) and with customer service as one example of value. However, other examples of considerations that provide value to the plan and its participants may be instructive for fiduciaries and litigants. For example, a fiduciary may reasonably consider the transparency and usefulness of participant communications; the operational compatibility of the DIA with the plan's recordkeeping platform; participant service and education resources; etc. Because these qualitative considerations can be highly relevant to participant outcomes and to the fiduciary's overall assessment of prudence, we recommend the Department incorporate these additional examples of value.

Recognizing these qualitative factors also would further reinforce the Department's important conclusion that fiduciaries are not required to select the lowest-cost or highest-return investment in all circumstances. A lower-cost option may not provide the same value if, for example, it has inferior participant support, operational limitations, or features that make it less effective in serving the plan's intended investment menu design. Conversely, a fiduciary may prudently determine that a DIA with higher fees provides commensurate value because it offers more robust participant services, a lifetime income feature, or other characteristics that further the purposes of the plan.

Therefore, in finalizing the proposed rule, we recommend the Department clarify and enhance the discussion of "value" to address these common qualitative considerations as well as ensure the concept of value is recognized as furthering the purposes of the plan throughout the rule. These clarifications would help fiduciaries establish a strong process that considers all relevant considerations, reduce the risk that the rule is misread as requiring a one-dimensional net risk-adjusted return comparison, and better reflect the way prudent investment fiduciaries evaluate DIAs in practice.

V. Safe Harbor Refinements

We strongly support the proposed rule's safe harbor framework. It provides a practical, process-based structure that can help fiduciaries construct a robust, prudent process to guide their decisions and can help courts evaluate fiduciary conduct in a disciplined and less hindsight-driven manner.

The presumption-of-prudence construct is particularly helpful because it gives fiduciaries a clear procedural pathway without converting the Department's guidance into a rigid investment mandate. By tying the presumption to a strong process, rather than to the selection of any particular product, asset class, or fee level, the proposed rule appropriately reinforces that ERISA prudence is grounded in fiduciary judgment and process. This approach should help fiduciaries better understand what information to consider, help advisors and investment committees structure their reviews, and help courts evaluate fiduciary conduct based on the decision-making record rather than hindsight.

We also appreciate that the presumption construct preserves fiduciary discretion. A fiduciary that follows the specified process may receive the benefit of the presumption, but the rule does not suggest that other prudent processes are necessarily deficient. That balance is important. It encourages disciplined documentation and consistent evaluation while maintaining ERISA's facts and circumstances standard. In this respect, the proposed rule provides a constructive roadmap for fiduciaries and a useful litigation-management tool, without lowering ERISA's standard of conduct, dictating outcomes, or narrowing the range of investments that may prudently be offered to participants.

We recommend building on this strong construct by making certain revisions to the safe harbor.

a. Ensure Safe Harbor Is Not Misinterpreted as a Requirement or Minimum Standard

We strongly support the Department's effort to identify factors that fiduciaries may consider as part of a prudent process. However, any list has the potential to be misinterpreted as factors that are mandatory or the only permissible path to compliance. This concern is amplified by the introductory sentence of the safe harbor where the proposed rule provides that the factors are a non-exhaustive list that "must" be analyzed by a fiduciary.

As the Department has long recognized, fiduciaries may prudently evaluate investments using different processes depending on the plan, the investment alternative, the role of the investment in the menu, the fiduciary's governance structure, and other facts and circumstances. In some circumstances, each factor identified in the rule may be relevant. In others, certain factors may be inapplicable, less significant, or appropriately addressed through a different but still prudent analytical framework.

Without an express clarification, the safe harbor could be misinterpreted as establishing the minimum process required in every case. That result would be inconsistent with the Department's stated objective of providing clarity and reducing unnecessary litigation risk. A fiduciary that does not precisely follow the safe harbor should not be presumed to have acted imprudently, just as a fiduciary that follows a different prudent process should not be treated as having failed to satisfy ERISA merely because it did not organize its analysis under each of the enumerated factors.

To avoid any misinterpretation, **ARA recommends the Department expressly clarify that the safe harbor is not intended to be the exclusive means by which a fiduciary may satisfy ERISA's duty of prudence and that a fiduciary may prudently conclude that a factor is not applicable.** This clarification would reinforce ERISA's flexible fiduciary framework, preserve fiduciary discretion, and reduce the risk that a helpful safe harbor is transformed into an unintended litigation trap.

b. Apply Safe Harbor to DIA Selection Even Where the Fiduciary Is Not Setting the Overall Menu Design

Currently, the safe harbor is available only to "a plan fiduciary that is responsible for establishing and maintaining a plan investment menu of designated investment alternatives for a participant-directed individual account plan." We recommend the Department expand availability of the safe harbor to any fiduciary selecting a DIA, even if they are not the fiduciary that is responsible for setting the design of the overall investment menu.

In many plans, a plan sponsor or investment committee may be responsible for the fiduciary decision regarding design of the plan's investment menu (such as by establishing an investment policy statement) and then another fiduciary (such as a 3(38) investment manager) may be responsible for selecting the DIAs to effect the strategy reflected in the investment policy statement (or other document reflecting the decision regarding the investment menu design). The considerations relevant to the selection of DIAs in this structure are the same as when the same party designs the menu and selects the DIAs. The fact that different parties design the investment menu and then select the DIAs should not foreclose access to the Department's valuable safe harbor.

Therefore, **ARA recommends strongly that the final rule extend the safe harbor to the fiduciary that prudently selects the DIA, regardless of whether it also designed the investment menu.** Otherwise, the protection of the safe harbor could be unnecessarily limited and inapplicable in common plan governance structures.

The Department also should consider extending the presumption to the actual selection decision—so that the fiduciary is entitled to appropriate deference with regard to the ultimate selection, not just the evaluation of a factor, where the fiduciary follows a prudent process. As the Department rightly noted, courts should not replace a fiduciary's reasoned judgment with a hindsight determination that another investment might also have been

reasonable or might later have performed better. Extending the presumption to the ultimate selection or retention of the investment will further emphasize this standard.

One possible reformulation of the safe harbor (also incorporating the prior recommendations) could be as follows:

(f) *Safe harbor.* Paragraphs (g) through (l) of this section set forth a non-exhaustive list of factors, when applicable, that a plan fiduciary that is responsible for establishing and maintaining a plan investment menu of designated investment alternatives for a participant-directed individual account plan must may objectively, thoroughly, and analytically consider, and make determinations on, when selecting or monitoring each such designated investment alternative to carry out a particular strategy for the plan investment menu. The factors described in paragraphs (g) through (l) are not intended to be the exclusive means by which a fiduciary may satisfy the duties under section 404(a)(1)(B) of ERISA, and a fiduciary may satisfy such duties through other prudent processes based on the relevant facts and circumstances.

When a plan fiduciary responsible for selecting or monitoring a DIA objectively, thoroughly, and analytically considers, and makes determinations on one or more factors (including a determination that such factor does not apply) does so, following the process described in paragraphs (g) through (l) with respect to such factors, as applicable, which may include relying on recommendations of a prudently selected investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA with respect to a particular factor or factors, or prudently delegating compliance with respect to a particular factor or factors to an investment manager within the meaning of section 3(38) of ERISA, the plan fiduciary's judgment with respect to the particular factor or factors, including the relationship between the factors, is presumed to have met the duties under section 404(a)(1)(B) of ERISA of such fiduciary and is entitled to significant deference. When the plan fiduciary objectively, thoroughly, and analytically considers, and makes determinations on all of the factors described in paragraphs (g) through (l) (including a determination that such factor does not apply), following the process described in such paragraphs, as applicable with respect to the selection or monitoring of a designated alternative, and objectively, thoroughly, and analytically considers and makes determinations on whether or not any other factors are relevant to the decision to select or retain an investment, the fiduciary's decision to select or retain the investment is presumed to have met the duties under section 404(a)(1)(B) of ERISA of such fiduciary and is entitled to significant deference.

Nothing in this paragraph should be construed to imply that a fiduciary who does not follow the process described in paragraphs (g) through (l), or who considers different or additional factors based on the relevant facts and circumstances, has failed to satisfy section 404(a)(1)(B) of ERISA.

c. Refine Examples to Avoid Misinterpretation

We support the Department's significant work to provide more detailed fiduciary guidance, including the Department's inclusion of examples.

As a general matter, the examples appropriately recognize several important principles: fiduciaries are not required to select the lowest-cost alternative; higher fees may be justified by additional value; liquidity must be evaluated in light of plan and participant needs; benchmarking must be meaningful; and fiduciaries may appropriately rely on qualified professionals when they lack specialized expertise. Examples are particularly valuable in this area because fiduciaries, advisors, and courts benefit from concrete illustrations of how ERISA's prudence standard operates in practice.

We recommend the Department refine its use of examples when finalizing the rule in certain respects. First, while use of the "Example" headings seems like it should clearly indicate that the examples are only illustrative and not rules in and of themselves, the proposed rule lacks this explicit statement in the text. For the avoidance of any doubt, **ARA recommends the Department include in the final rule an explicit statement that the examples are only illustrative, potentially in subsection (f)'s discussion of the safe harbor factors.**

In addition, we recommend several targeted refinements to the examples to ensure the examples are not misinterpreted in a way that would increase litigation risk, change existing fiduciary standards, inadvertently favor certain investment products, or narrow fiduciary discretion.

i. Performance

As discussed above, we strongly recommend the final rule reflect the qualitative risks that fiduciaries prudently consider when evaluating DIAs currently. In addition to the language noted above, **ARA recommends the qualitative risks concept be incorporated into the example in paragraph (g)(1)**. The addition to this example could include language such as the following:

Within the Facts:

The investment advice fiduciary also presents qualitative and forward-looking considerations relevant to evaluating whether each target date fund series is likely to deliver appropriate returns for the risks assumed over the anticipated investment horizon. These considerations include, as relevant, the depth and stability of the investment management team; the manager's experience and expertise in the relevant asset classes and strategies; the consistency and discipline of the investment process; adherence to the stated investment style, mandate, and glidepath; the extent and explanation of deviations from applicable benchmarks; the quality of the manager's risk-management practices; and the extent to which each series is expected to serve its intended role in the plan's investment menu.

The investment advice fiduciary explains these quantitative and qualitative considerations and their implications to the named fiduciary.

Within the Conclusion:

In evaluating risk-adjusted returns, plan fiduciaries may consider both quantitative risk metrics and qualitative risk considerations that are relevant to whether the investment is expected to deliver appropriate returns for the risks assumed and to serve its intended role in the plan's investment menu. Stability of the investment team, the manager's expertise, adherence to the stated mandate or glidepath, consistency of investment process, benchmark deviation, tracking error, and quality of risk-management practices may all affect whether an investment is likely to deliver its intended value to participants.

Further, **ARA recommends that this example be refined to avoid statements regarding the frequency with which a fiduciary determination is made**. Currently the *Analysis* paragraph provides that it is "often" prudent to select a lower-risk investment strategy with lower expected return. This type of statement involving frequency is often taken out of context by both industry professionals and litigants as a judgment by the Department that a fiduciary *must* choose the more conservative investment or that a selection of anything other than most conservative strategy should be presumed to be imprudent. To avoid misinterpretation, we recommend the Department refine this example to merely state that it "may" be prudent to select the lower-risk investment strategy with lower expected return.

These revisions will ensure the Department does not unintentionally favor conservative investments or put inappropriate emphasis on quantitative measures of risk (to the exclusion of relevant qualitative factors).

ii. Fees

ARA appreciates the examples in the fees factor, particularly the Department's recognition that fiduciaries are not required to select the investment alternative with the lowest fees in all circumstances. This is an important and practical principle. Fees are a critical component of fiduciary review, but the Department rightly emphasizes that they must be evaluated in relation to the value provided by the investment alternative, its expected risk-adjusted returns, and the role it is intended to play in the plan's investment menu.

We recommend the Department refine several of the examples under the fees factor to ensure this objective is accomplished, better reflect market practice, and reduce the risk that the examples are misinterpreted as establishing rigid comparison requirements.

1. Use a Stronger Market-based Illustration of Value

The example in paragraph (h)(1) involving customer service and communication is helpful because it illustrates that higher fees may be justified by additional value. We agree with that principle. However, the current example involves several index funds tracking the same index, with the fiduciary selecting the highest-fee index fund based on superior customer service and communications. While that example demonstrates the concept in a simple way, it may be a less compelling illustration in the market because index funds tracking the same benchmark are often evaluated primarily on fees, tracking error, securities lending practices, operational quality, and other features closely tied to the fund's implementation of the index strategy.

ARA recommends using a stronger example in paragraph (h)(1) that would involve an investment alternative where participant experience, communications, personalization, and implementation support are more central to the value proposition. For example, the Department could use a managed account service or other professionally managed solution for the example. In that context, fiduciaries commonly evaluate not only fees and investment performance, but also other benefits, services, and features such as: the quality of participant disclosures, the participant experience, the quality and usability of data inputs, the methodology used to personalize portfolios, the extent to which participants are encouraged to provide relevant information, participant engagement, call center or advisory support, cybersecurity and data practices, and the provider's ability to operationalize the service effectively. A concept for the revised example might include the following:

The plan investment menu calls for a managed account strategy. The plan fiduciary evaluates several managed account services to fulfill this strategy in the plan's investment menu. The fiduciary, with assistance from a 3(21) investment advice fiduciary, compares alternatives that are materially similar in their intended role but differ in methodology, participant experience, data collection, communications, investment implementation, and fees. One managed account service has higher fees than another alternative, but provides more robust participant disclosures, a more intuitive participant experience, better integration with the plan's recordkeeper, more effective collection and use of participant-specific information, stronger participant support, and a more disciplined and transparent methodology for constructing personalized portfolios. After analyzing the relevant considerations, the fiduciary determines the higher-fee managed account service is appropriate and this decision is prudent because the additional value warrants the higher fee.

This type of example would more directly reflect how fiduciaries evaluate value in the current defined contribution marketplace. It would also reinforce the Department's important conclusion that fiduciaries may consider both quantitative and qualitative factors when determining whether fees are appropriate.

2. Avoid Establishing a Default Reasonable Number of "Similar Alternatives"

ARA appreciates the Department's statement of principles regarding what constitutes a "reasonable number" of similar alternatives required for comparison. In particular, we agree that this determination depends on the relevant facts and circumstances. However, we recommend that the Department revise the examples to avoid suggesting that a fiduciary must consider a particular number of similar alternatives. Examples such as those in paragraph (h)(1) and (h)(5), which refer to a specific number of alternatives, could be misinterpreted by fiduciaries or courts as suggesting that a fiduciary must consider at least that number to satisfy the rule.

To preserve the Department's intended flexibility, **ARA recommends the examples in (h)(1) and (h)(5) refer more generally to "a reasonable number of similar alternatives" rather than using a specific number.** If the Department retains numbers in some examples, it should state clearly in the analysis that those numbers are illustrative only and are not intended to establish a minimum or presumptive standard.

3. Clarify the Selection Context in Lifetime Income Example

We support the Department's inclusion of an example recognizing that a lifetime income feature may provide value that justifies additional fees. This is a critical point. Lifetime income features may help participants manage longevity risk, provide retirement income certainty, and support the broader purposes of a retirement plan. However, **ARA recommends revising the example in paragraph (h)(3) to clarify the context in which this comparison is being made and distinguish the fiduciary's menu-level decision to include a lifetime income strategy from the fiduciary's selection of a DIA to fulfill that strategy decision.**

The example in paragraph (h)(3) currently states that the plan sponsor makes a plan design decision to add a lifetime income benefit, and the fiduciary then selects an asset allocation fund offered through a variable annuity contract. The example then compares that DIA to an existing DIA that is identical in all other material respects except that the existing DIA does not offer lifetime income—treating the two as “similar alternatives.”

As discussed above, the concept of “similar alternatives” applies when comparing options that could both satisfy a given plan investment menu strategy. If the fiduciary has already determined, as a menu-level matter, that the plan should include a lifetime income option, then the relevant comparison set would consist only of lifetime income alternatives because alternatives without a lifetime income feature would not satisfy the plan investment menu strategy the fiduciary is seeking to implement. Conversely, if the fiduciary is deciding whether to add a lifetime income feature to the plan at all, then comparison to an otherwise similar non-lifetime-income DIA may be appropriate.

In the example in paragraph (h)(3), the plan investment menu strategy that the fiduciary is fulfilling is a lifetime income strategy. Therefore, the allocation fund without a lifetime income option should not be a “similar alternative” in this context. If, by contrast, the plan investment menu strategy being fulfilled is simply to select an asset allocation fund (without any direction regarding the presence of a lifetime income feature), the example works well—the fund with a lifetime income feature would be a “similar alternative” to the fund that does not have a lifetime income feature because they both would satisfy the investment menu strategy being fulfilled and the fiduciary could rightly conclude the fees are justified by the additional value.

Therefore, we suggest the example in paragraph (h)(3) be revised by eliminating the first sentence of the facts and instead providing an introductory sentence such as the following:

A plan fiduciary has decided the plan investment menu should include an asset allocation fund.
The fiduciary does not specify whether or not such an asset allocation fund should include a lifetime income feature.

The example would then be revised to clarify that the investment selection is carrying out the fiduciary menu design decision rather than a settlor decision.

This revision would avoid confusion regarding the meaning of a “similar alternative” while preserving the critical point that lifetime income features add value that may justify additional fees.

iii. Liquidity: Avoid Unintentionally Favoring Mutual Funds

We support the Department's recognition that fiduciaries need not select only fully liquid products and that some limitations on liquidity may be appropriate when justified by increased expected value, such as risk-adjusted returns, income features, or other participant benefits.

However, the liquidity provisions should be refined to avoid unintentionally placing a thumb on the scale in favor of mutual funds or products that substantially replicate the liquidity requirements applicable under the Investment Company Act of 1940 (the “'40 Act”). It may be extremely costly, and in some cases impractical, for non-mutual fund vehicles to provide liquidity programs that substantially comply with the requirements applicable to open-end mutual funds. Although the proposed rule does permit a fiduciary to conduct their own diligence, not including an example showing satisfaction of that standard may be interpreted as the Department suggesting that funds that do not satisfy or substantially replicate the '40 Act liquidity requirements are presumptively less prudent.

To avoid this potential implication, **ARA recommends the Department add an example showing how a fiduciary can satisfy the liquidity factor for a product that does not substantially comply with '40 Act liquidity requirements.** Such an example might be formulated substantially as follows:

A plan fiduciary considers an asset allocation fund that includes a limited allocation to private assets and permits participant-directed transactions daily at the participant level, while imposing plan-level redemption limitations designed to protect remaining investors and maintain the fund's target allocation. The product does not represent that its liquidity risk-management program is substantially similar to that required of open-end mutual funds. The fiduciary, with assistance from a 3(21) investment advice fiduciary, reviews the product's target allocation to illiquid assets, redemption terms, historical and modeled cash flow data, line of credit or cash management policies, circumstances under which redemptions may be delayed or paid in installments, and the plan's expected participant-level and plan-level liquidity needs. The fiduciary concludes that the product's liquidity features are appropriate for the plan and documents that conclusion. The fiduciary satisfies the liquidity requirement even though the product does not substantially comply with the liquidity risk-management requirements applicable to open-end mutual funds.

This example would further the Department's asset-neutral approach and provide fiduciaries with practical guidance for evaluating products that may provide participant value but do not fit neatly within a mutual fund framework.

iv. Valuation: Enhance Discussion of Conflict Mitigation

We support the Department's emphasis on valuation as part of the proposed rule's safe harbor. Accurate and timely valuation is critical for participant-directed individual account plans. We recommend the examples in the valuation factor be clarified to avoid unintentionally creating new litigation avenues or imposing improper obligations on plan fiduciaries.

1. Application to '40 Act Funds

With respect to '40 Act funds, the example in subparagraph (j)(3) suggests that, when evaluating an open-end fund that includes some securities for which there is not a generally recognized market, the fiduciary is expected to review "the fund's publicly-available financial statements and valuation-related disclosures to confirm compliance with all applicable requirements under the Investment Company Act related to pricing and valuation of its shares." The final rule should not require plan fiduciaries to confirm compliance with the Investment Company Act. This inappropriately places the burden of policing compliance with the '40 Act on retirement plan fiduciaries.

Since compliance with the '40 Act is overseen by the Securities and Exchange Commission, ERISA fiduciaries should be able to rely on the regulated status of a '40 Act fund as reflecting compliance with the '40 Act, including the valuation requirements, absent actual knowledge to the contrary. **ARA recommends the final rule instead frame the obligation with respect to '40 Act funds as reasonable review and reliance upon the fund's regulated status, not independent confirmation of securities-law compliance.**

2. Conflicts of Interest

The proposed rule rightly raises the potential that conflicts of interest may affect valuations and highlights that fiduciaries need to evaluate the potential existence of such issues. ERISA has long ensured that fiduciaries avoid conflicts to the extent possible, and the final rule should not lower ERISA's standards regarding conflicts of interest. However, ERISA has also long acknowledged that conflicts are not always able to be completely eliminated, and, with due diligence and safeguards, such conflicts may be appropriately mitigated to avoid harm to the plan and the plan participants.

For example, the Department has long recognized that conflicts in investment structures can be addressed through carefully tailored prohibited transaction exemptions rather than categorical exclusion. For example, PTE 77-4 provides relief for certain investments by plans in open-end mutual funds affiliated with plan fiduciaries,

subject to protective conditions. As the Department considers the role of conflicts in modern investment vehicles, we encourage it to consider expanding PTE 77-4 or creating a similar exemption to provide comparable, appropriately conditioned relief for vehicles other than open-end mutual funds.

Similarly, the proposed rule should align with this long-recognized approach to conflicts. The proposed rule has only one example related to conflicts in paragraph (j)(4). The analysis subparagraph of that example provides that “[t]he named fiduciary must assess whether the assets have been or will be valued through a conflict-free and independent process” and requires inside knowledge regarding the intent of a manager to acquire assets that might be affected by a conflict of interest.

This language may lead a fiduciary to conclude, or a plaintiff’s attorney to argue, that any potential conflict causes the fiduciary to lose the presumption of prudence. Given ERISA’s long-standing allowance of conflicts in cases where the fiduciary takes appropriate action to ensure there is mitigation, **ARA recommends the conflicts factor be revised to focus on whether the fiduciary fulfilled its obligation to determine whether conflicts are appropriately identified, disclosed, managed, and mitigated—not whether every conceivable conflict has been eliminated.** This could be done by reframing the fiduciary’s actions in the existing example to focus on a lack of investigating, identifying, and understanding conflicts, rather than the mere existence of the conflict.

In addition to revising the existing example, **ARA recommends the Department add an example showing appropriate conflict mitigation.** Such an example might be formulated along the following construct:

A DIA invests in private assets that do not trade on a public exchange. The manager uses internal data and assumptions in preparing valuations, but the valuation process is subject to written policies, periodic review by an independent valuation committee, annual audit procedures, third-party valuation support for material assets, and disclosure of valuation methodologies and conflicts to investors. The plan fiduciary engages a 3(21) investment advice fiduciary to assist in the review and evaluation of designated investment alternatives. The 3(21) investment advice fiduciary reviews the valuation policies, the role of the independent valuation committee, the auditor’s report, the third-party valuation process, and the disclosures regarding conflicts and reasonably determines the procedures are reasonably designed to avoid or mitigate conflicts of interest. The fiduciary may prudently determine, with the advice of its 3(21) investment advice fiduciary, that the valuation process is adequate, notwithstanding the existence of potential conflicts that have been identified and mitigated.

This approach would better align the final rule with ERISA’s long-standing principles and preserve rigorous fiduciary standards while reflecting how valuation processes operate in practice.

v. Complexity: Incorporate Concept into the Other Relevant Factors

We agree with the Department’s underlying concern that fiduciaries must understand the investments they select, including the material features, fees, risks, liquidity terms, valuation practices, and participant implications of a DIA. However, we recommend that the Department consider eliminating “complexity” as a standalone factor.

As currently framed, complexity is not truly a separate prudence factor. Rather, complexity focuses on whether the fiduciary understands the product, which affects the fiduciary’s ability to evaluate the other factors. For example, a complex fee structure should be evaluated under the fee factor, complex liquidity restrictions under the liquidity factor, complex valuation methodologies under the valuation factor, etc. The fact that a product is complex is not, by itself, the relevant issue. The relevant issue is whether the fiduciary understands the material features well enough to evaluate them prudently and determine whether the DIA is appropriate for the plan.

A standalone complexity factor could be misread to suggest that complexity itself is a negative attribute or that complex products require a separate litigation inquiry beyond the substantive features that matter to the plan and participants. That would be inconsistent with the Department’s asset-neutral approach. Some investments or investment structures may be more complex than others but may still provide meaningful value when prudently evaluated and appropriately used.

Therefore, **ARA recommends the Department eliminate complexity as a standalone factor and incorporate the concepts from the complexity examples into the other relevant provisions.** One way to do this would be to add the following language to subsection (f)'s description of the safe harbor:

“To objectively, thoroughly, and analytically consider, and make determinations on the factors described in paragraphs (g) through (l), the fiduciary must determine that it has the skills, knowledge, experience, and capacity to comprehend the designated investment alternative sufficiently to evaluate such factor, or obtain the assistance from a qualified investment advice fiduciary, investment manager, or other individual.”

Both of the current complexity examples could then be moved to the fee factor—reflecting the need to understand complex fee structures and the value associated with fees for more complex products.

This approach would preserve the Department's important substantive point while reducing the risk that complexity becomes an amorphous, standalone litigation theory.

VI. Conclusion

We commend the Department for proposing a rule that emphasizes fiduciary process, preserves investment flexibility, and recognizes that ERISA does not require fiduciaries to select the lowest-cost, highest-return, or most conventional investment option in every circumstance. The proposed rule's asset-neutral approach and practical examples can help fiduciaries make better-documented, better-informed decisions for participants. The recommendations above are intended to strengthen the final rule by making it clearer, more administrable, and more effective in reducing unnecessary litigation risk, and we look forward to working with the Department in effecting this important rule.

ARA appreciates the opportunity to submit these comments on the proposed rule and would welcome the opportunity to discuss them further. Please contact Kelsey N.H. Mayo, Chief of Retirement Policy and Regulatory Affairs, at kmayo@usaretirement.org or (703) 516-9300 with any questions regarding this matter. Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/

Kelsey Mayo, Esq.
Chief, Retirement Policy and Regulatory Affairs
American Retirement Association