EPI comment on DOL’s proposed rule on “Fiduciary Duties in Selecting Designated Investment Alternatives”

Public Comments • By Monique Morrissey • June 11, 2026

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June 1, 2026

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

Re: Fiduciary Duties in Selecting Designated Investment Alternatives, RIN 1210-AC38

Dear Assistant Secretary Aronowitz:

I submit these comments on behalf of the Economic Policy Institute (EPI) on the Department of Labor’s (DOL) Notice of Proposed Rulemaking on Fiduciary Duties in Selecting Designated Investment Alternatives.

EPI is a nonprofit, nonpartisan think tank that has worked for 40 years to center working families in economic policy discussions.

EPI strongly opposes the Employee Benefits Security Administration’s (EBSA’s) proposed rule on Fiduciary Duties in Selecting Designated Investment Alternatives. The rule would gut protections for retirement savers in 401(k) and other participant-directed plans covered by the Employee Retirement Income Security Act of 1974 (ERISA). In addition to our comments here, EPI has signed onto a joint comment letter with other consumer, retiree, and worker advocacy organizations expressing concern that the rule would add complexity, raise fees, and return us to an era when retirement plan participants had little protection from poor investment choices. This letter will expand on that letter to critique some of the economic arguments made in support of the proposed rule.

This letter will focus on risk, questioning EBSA's claim that loosening protections for retirement savers will maximize risk-adjusted returns by providing access to alternative investments.

- EBSA attempts to redefine fiduciaries' duty of prudence in selecting investment options as "maximizing risk-adjusted returns net of fees" no matter the risk rather than balancing the goals of maximizing returns and minimizing risk. (Unless otherwise noted, quotations are from the proposed rule.)
- EBSA ignores the fact that retirement savers face a worse principal-agent problem than defined benefit pension funds, since investment options are chosen by plan fiduciaries but participants bear the risk of losses.
- EBSA ignores the fact that even if pension funds that invest in alternative assets earn an illiquidity and risk premium (a big "if"), and even if individual retirement savers retire at the time they planned to (another big "if), individual retirement savers with limited investment horizons face greater timing risk and should be more risk averse.
- EBSA assumes that any asset class that does not move in sync with stock and bond markets adds useful diversification even if it is a speculative asset with a zero expected real return that only adds volatility.
- EBSA's case for asset class diversification rests on modern portfolio theory, which assumes investors are well-informed and risk-averse, which is not a realistic description of markets for alternative assets.
- EBSA focuses narrowly on asset class diversification, ignoring the fact that adding alternative assets can concentrate rather than spread risk if these assets cannot be indexed.

Plan fiduciaries must adhere to a duty of prudence and a duty of loyalty.

Under ERISA, fiduciaries may be sued by participants or the Department of Labor (DOL) for breach of these duties when selecting investment options for participant-directed plans. Fiduciaries are required to have or obtain the expertise and information to make substantively sound decisions—going through the motions or acting with good intentions is not enough.

With minor exceptions, such as limits on employer stock, ERISA does not specify what types of investments may be included in 401(k) and similar plans. Nevertheless, plan fiduciaries, using their good judgement and leery of lawsuits, have generally avoided alternative investments that cannot be marketed to small and unsophisticated (nonaccredited) investors in other contexts. Instead, fiduciaries have increasingly moved toward low-cost index funds and similar broadly diversified and publicly traded investments that are recognized as appropriate options for retirement savers.

Lawsuits on behalf of plan participants who suffer losses from fiduciaries' failure to uphold their duties are a critical enforcement tool. According to AARP, “Courts have repeatedly recognized that these cases play a meaningful role in improving plan governance, reducing excessive fees, and protecting participants’ long-term retirement security, without burdening employers that comply with the law.”[1]

The stated purpose of the proposed rule is to expand access to alternative investments.

EBSA claims that the threat of lawsuits harms retirement savers by limiting investment options available to plan participants. EBSA claims that “regulatory burdens and litigation risk…interfere with the ability of American workers to achieve…the competitive returns and asset diversification necessary to secure a dignified and comfortable retirement.”

The proposed rule includes a list of alternative assets that President Trump earlier mentioned in an executive order, including private equity, private credit, digital assets (“crypto”), and commodities.

EBSA notes that under ERISA these assets are not explicitly prohibited from being included among investment options in participant-directed plans. However, EBSA warns that plan fiduciaries may be excluding more complex investment options “not necessarily in response to a prudent assessment of whether the features in those investments are best suited to the needs of plan participants and beneficiaries, but rather because of the risk of litigation if plan fiduciaries depart from more traditional investments in favor of more creative or novel options.” It provides no evidence for that assertion and does not rebut the valid presumption that this could be the framework operating as intended: fiduciaries have made prudent assessments, found these assets wanting, and decided against them— recognizing that doing otherwise would appropriately expose them to litigation risk.

EBSA reframes the goal as maximizing risk-adjusted returns” *no matter the risk* rather than balancing risk and return.

According to EBSA, ERISA gives fiduciaries “maximum discretion and flexibility” to determine which investment options “offer the opportunity for participants to maximize risk-adjusted returns on their retirement assets net of fees.”

However, the goal of ERISA, as the name makes clear, is *retirement income security*, not “maximizing risk-adjusted returns net of fees.” Under ERISA, fiduciaries are required to select a diversified menu of investment options that minimize the risk of large losses for retirement savers.[2] Such losses can be caused by sharp downturns or by cumulative underperformance over many years. Retirement savers will face both types of risk if they invest directly or indirectly in the alternative assets listed in the proposed rule.

Leverage is the most obvious way to maximize risk-adjusted returns, but also the most obvious way to amplify the risk of large losses. Reputable financial advisors do not advise retirement savers to maximize risk and return through leverage, even in the case of early career workers who have more time to adjust their contributions to the plan if their risky strategy fails.

EBSA ignores the subject of leverage entirely in the proposed rule, as well as any discussion of the appropriate level of portfolio risk for retirement savers (except to claim that asset diversification reduces it). Implicitly, then, EBSA's self-described "asset-neutral" approach is also neutral with respect to the amount of risk retirement savers should face, focusing only on maximizing returns for any level of risk. This is especially dangerous given the widespread but mistaken belief that investment returns will average out over long investment horizons.[3]

Encouraging risky investments harms not only unsophisticated retirement savers, but also taxpayers who subsidize accounts intended to help ordinary workers save for retirement.

Though certain risky investment options may benefit wealthy participants with a high risk tolerance, the tax advantage is intended to promote retirement savings, and retirement security, for ordinary workers, not amplify wealth inequality.

Regulatory agencies have repeatedly warned of alternative asset risks.

DOL and other regulators previously acknowledged the risks associated with private market investments, including opacity, lack of regulatory oversight, complexity, illiquidity and high fees. In a June 3, 2020, letter to private equity managers, DOL noted that private equity investments had longer time horizons, higher fees, no easily observed market value, and were subject to different regulatory requirements and oversight than publicly traded securities.[4]

The letter suggested that plan fiduciaries might want to limit private equity investments to a specified percentage of a fund, have the investments independently valued according to agreed-upon financial standards, and require additional disclosures to meet the plan's ERISA obligations to report information about the current value of the plan's investments. These suggestions were generally ignored in the proposed rule.

After the Securities and Exchange Commission (SEC) issued a risk alert on June 23, 2020,[5] warning that private equity and hedge fund investors may have paid more in fees and expenses than they should have and may not have been informed of conflicts of interest,

DOL issued a supplemental statement on December 21, 2021,[6] citing the SEC warning and stakeholder comments challenging the earlier letter's uncritical acceptance of some industry talking points, notably the claim that private equity could "offer plan participants who have longer investment horizons an equities-based investment choice that may enhance retirement outcomes when compared to investment choices containing only publicly traded securities." The DOL statement also noted that while some fiduciaries have experience evaluating private equity investments for defined benefit pensions, many fiduciaries of small individual account plans do not.

The DOL statement was rescinded in response to President Trump's executive order of August 7, 2025,[7] without addressing any of the issues raised about the advisability of including private market investments among 401(k) plan options.

DOL and other regulators have also previously been highly skeptical of crypto as an investment, let alone one offered to retirement savers. On May 11, 2021, the SEC issued a staff statement warning that Bitcoin and Bitcoin futures were highly speculative investments.[8] On January 10, 2024, SEC Chair Gary Gensler went further, describing Bitcoin as “primarily a speculative, volatile asset that’s also used for illicit activity including ransomware, money laundering, sanction evasion, and terrorist financing.”[9] The Federal Reserve and other bank regulatory agencies also issued multiple warnings about crypto assets.[10]

Citing the SEC warnings, DOL issued guidance on March 10, 2022, advising 401(k) plan fiduciaries to exercise “extreme care” before adding cryptocurrencies to plan options, noting that they were difficult to valuate, even by experts, and posed custodial and recordkeeping concerns.[11]

The Federal Reserve and other bank regulators rescinded their guidance on April 24, 2025, and DOL followed suit on May 28, 2025, without addressing any of the issues raised about crypto risks. Beginning in 2025, the SEC also adopted a more accommodating stance toward crypto, for example, asserting that meme coins were not subject to federal securities laws[12] and dismissing an enforcement action against Coinbase.[13]

The SEC prevents firms from marketing private assets to small (“retail”) investors for good reasons.

Laws including the Investment Company Act and Investment Advisers Act, both enacted in 1940, give the SEC the authority to regulate securities marketed to retail investors.[14] In addition to requiring consistent valuations and disclosures, these laws—and regulations and guidance based on them—limit the use of leverage and guard against potential conflicts of interest.[15] The sale of private funds that do not meet these requirements is generally limited to sophisticated “accredited” investors or “qualified purchasers.”

These laws are intended to protect investors who are not equipped to assess the value or risk of private market investments. During the Biden administration, the SEC proposed rules that recognized that even accredited investors in private funds were not provided with sufficient information or protection from conflicts of interest.[16] The rules were overturned by the Fifth Circuit Court of Appeals based on the assumption that investors in these funds were sophisticated and able to bear losses, not that they had adequate information and protection.[17]

Are risk, illiquidity, and complexity opportunities to earn higher returns?

EBSA acknowledges some of the obvious disadvantages of alternative investments, but frames these as opportunities to earn a premium for accepting these risks:

> Alternative asset investments are often less liquid than the publicly traded stock and bond funds that are held by funds that plan fiduciaries often make available to plan participants. Illiquid investments generally offer an illiquidity premium to investors who are willing to hold their investment, for some time, without selling it

> for cash. Many retirement savers, particularly younger workers, have long investment time horizons until retirement and, therefore, fit the profile of an investor who can benefit from a liquidity premium.

EBSA elsewhere alludes to “obstacles that cause a relatively higher risk premium when compared to traditional investments, such as illiquidity or information asymmetry,” but suggests that an expanded market tailored to the needs of retirement savers could reduce liquidity and valuation risks:

> As this market matures a new equilibrium should be reached where there is a larger pool of viable and vetted investments, expanded by alternative assets, for asset managers to o��er to plan sponsors. The tradeoff for this increased market penetration is a reduction in illiquidity premium. As the risks associated with investment in alternative assets falls, so too does the risk premium investors in the assets will enjoy.

The idea that retirement savers could knowledgeably accept such tradeoffs ignores the fundamental problem that information asymmetry, complexity, and lack of regulatory oversight make reliable ex ante valuation of private market assets impossible.[18] Expanding the market, whether or not it improves liquidity, does not address this fundamental problem.

Private market investments should be niche products for sophisticated investors.

The accurate valuation of public assets is made possible by the mandatory disclosure of relevant information and market signals from daily trading. A key feature of public markets is two-sided competition, wherein knowledgeable buyers and sellers eliminate biased prices so that even unskilled and uninformed investors can get a fair shake.[19] These sources of information are generally unavailable to private market investors, who in most cases must also contend with complex structures, strategies, and incentives.

Private markets are characterized by asymmetric information, so outside investors cannot assume that investment opportunities are fairly priced. Institutional investors instead rely on private fund managers’ past performance, reputational risk, and performance incentives in deciding whether to enter into limited partnerships with fund managers, known as general partners. Institutional investors with clout can also demand access to information that may not be provided to all limited partners and would not be made available to retirement savers. However, general partners’ incentives are blunted and distorted by their ability to earn millions in fees, and often in related party transactions, even when funds underperform or sustain losses, a problem exacerbated by the favorable tax treatment of fund managers’ share of investment returns, known as carried interest. Past performance, meanwhile, has been found to be a weak predictor of future performance.

In a comment submitted about the proposed rule, former investment banker Jeffrey Hooke and business school professor Michael Imerman estimated that private market investments should earn a premium of 200-500 basis points over their public counterparts to compensate for illiquidity, leverage and opaque financial reporting. Far from earning such a premium, Hooke and Imerman estimate that over 95% of state pension plans investing in private assets fail to beat a 60-40 stock-bond benchmark over long periods.[20] Even if some institutional investors with superior clout and expertise can expect higher risk-adjusted returns by investing in private market assets, the wide dispersion in fund performance suggests that other institutional investors are not assured of benefiting from these investments and that retirement savers would fare even worse.[21]

The expected real return on purely speculative assets is zero.

With private market investments, the challenge lies in gauging the expected risk and return of underlying assets. With most crypto and other speculative assets, there is no expectation of profit unless the buyer has better information than the seller. At best, these assets are "digital gold," used as a store of value, a means of exchange, or a hedge against inflation, but with added risks associated with custody, safekeeping, and regulatory uncertainty.[22]

As the SEC acknowledged last year, some crypto assets can be compared to physical collectibles like rare tulip bulbs, baseball cards, and Beanie Babies because they are nonproductive investments.[23] Under the Economic Recovery Tax Act of 1981, most physical collectibles are banned from tax-favored retirement plans because they "do not contribute to productive capital formation."[24] Though digital collectibles, unlike physical collectibles, are not currently banned from investment options offered to participants in tax-favored retirement plans, it is not clear why they should be exempted.[25]

Similar to much crypto, commodity futures are largely speculative and regulated by the Commodities Future Trading Commission (CFTC), though investors may be compensated for hedging the risk of producers or consumers. *The New York Times* recently described how the CFTC's enforcement capacity has been hollowed out and the agency has become captive of crypto and prediction markets.[26]

A market for speculative assets exists for the same reason there are casinos, racecourses, and prediction markets: A subset of the population, rather than being risk averse, likes to gamble. However, gambling does not belong in tax-subsidized accounts intended to promote retirement income security.

Assessing the performance of private funds poses serious challenges.

The debate around whether investing in private market assets is worth the high fees, risk, and illiquidity is complicated by a lack of consistent disclosure requirements. As documented by Oxford University professor Ludovic Phalippou and others, private equity general partners, when marketing themselves to pension funds and other potential investors, cite irrelevant or misleading statistics, sometimes manipulating the timing of valuations or excluding funds that have been committed but not yet invested to inflate reported returns.[27]

Given the subjectivity of internal valuations and evidence that they are misleading and manipulated, limited partners' return on investment can only be known once assets have been sold and the proceeds distributed. This happens too infrequently to be useful in making investment decisions, a problem exacerbated by the fact that private fund managers can prevent limited partners from fully exiting.[28]

Even after the return on investment is known to limited partners, it is difficult to know whether the return was sufficient to compensate for risk and illiquidity, since the degree of leverage and other risk factors is generally unknown to outside investors.

The available evidence does not show that alternative assets improve risk-adjusted returns. Because performance metrics reported by private equity and other alternative assets are unreliable, researchers have looked at whether institutional investor portfolios that include these investments have outperformed benchmarks composed of broad stock and bond indices. Many found that they did not, especially in the years since the 2008 financial crisis.[29]

For example, a 2022 report from the Center for Retirement Research at Boston College found that public pension funds that invested more in alternative investments did not have higher returns, though the investments may have served to dampen reported volatility.[30] Similarly, researchers at the Canada Pension Plan Investment Board found that while private equity appeared to outperform stocks before the financial crisis, it did not do so on a risk-adjusted basis.[31]

A more positive study published by the Georgetown Center for Retirement Initiatives found that 401(k) participants would have seen slightly higher returns over a 20-year period if target date funds had included private equity and other alternative investments.[32]

However, even this industry-funded study showed that large-cap U.S. stocks outperformed private equity in the decade after 2011. The study relied on a proprietary database of pension fund returns that is subject to major revisions and may not include a representative sample of pension funds.

Perhaps the most telling indicator of private funds' mediocre performance is the industry's resistance to providing comparable metrics *even to their own investors*. In 2024, after the SEC attempted to standardize information about fees and performance provided to limited partners in private funds,[33] the industry challenged the rule before the Fifth Circuit Court of Appeals, which sided with the industry on the basis that access to the funds was generally limited to "some of the most sophisticated and wealthiest investors."[34] Of course, this will no longer be true if private assets are marketed to retirement savers.

The proposed "safe harbor" does not protect retirement savers—or fiduciaries.

At the heart of the proposed rule is what EBSA describes as a process-based "safe harbor" that would shield fiduciaries who adhere to the process from liability even if the investment options they select for the plan are poor choices. EBSA lists six factors that fiduciaries should consider when selecting investment options: performance, fees, liquidity, valuation, benchmarking, and complexity.

In EBSA's view, fiduciaries who follow the six-step process should be granted a "presumption of prudence" and given "the discretion and flexibility to determine when designated investment alternatives, including those that contain alternative investments, offer the opportunity for participants to maximize risk-adjusted returns on their retirement assets net of fees.”

This check-the-box process does not give fiduciaries the tools they need to assess opaque, complex, illiquid, and largely unregulated investments. The proposal also does not address disclosures to plan participants, who would be even less prepared to make informed decisions.

The types of alternative investments listed in the proposal, by their nature, cannot be reliably evaluated according to the criteria in the process-based rule, even assuming fiduciaries have the skill and experience to understand complex structures and incentives.

Without additional disclosure requirements and regulatory oversight, for example, it is impossible to reliably assess risk and liquidity in private assets in order to choose a comparable benchmark.

ERISA lawyers warn that the regulatory “safe harbor” may give fiduciaries a false sense of security without shielding them from lawsuits.[35] The proposed rule assumes that courts will defer to the agency in granting a “presumption of prudence” to fiduciaries, even though no such presumption exists in the statute and the U.S. Supreme Court recently ruled in *Loper Bright* that courts should exercise independent judgement in interpreting laws rather than deferring to agency interpretations.

EBSA assumes that diversifying across asset classes reduces risk.

EBSA emphasizes that ERISA does not restrict plan fiduciaries from considering any type of asset class, suggesting that all types should be made available to retirement savers. This is akin to arguing that since USDA dietary guidelines do not explicitly ban junk food, it should be part of every diet.

EBSA cites modern portfolio theory to argue that “the optimal constrained portfolio will have lower risk-adjusted returns than that of an unconstrained portfolio.” Modern portfolio theory is a highly abstract model that relies on unrealistic assumptions, including perfect information and perfectly liquid markets, that clearly do not describe private markets.

Though markets for crypto and other speculative assets can be highly liquid and do not depend on access to information, modern portfolio theory also assumes that investors are risk averse, and risk-averse investors do not engage in pure speculation.

Modern portfolio theory can be a useful approximation of reality, for example, in support of passive investment in publicly traded securities. But it cannot preclude the existence of overpriced assets designed to lure naïve investors into private markets where information is asymmetric and the “smart money” has no way to capitalize on better information through short selling.

Diversification across asset classes does not necessarily reduce risk, especially if the asset that is added is itself not diversified.

Diversification across asset classes can be a valid reason to expand the range of available investment options to retirement savers. However, whether an asset class will improve risk-adjusted returns depends on net returns, volatility, and correlation with stocks and other portfolio assets.

Alternative investments are often touted for their supposed low volatility and low correlation with stocks. But as Morningstar and others have pointed out, this reflects infrequent valuations and should not be mistaken for low risk: “With low disclosure and transparency, frequent use of leverage, and valuations that are both lower in scale and frequency than public markets, [private investments] should be considered one of the riskiest asset classes in an investor’s portfolio, despite often being sold as having lower risk profiles.”[36]

Private assets tend to be correlated with their public counterparts: private equity with stocks, private credit with bonds, etc. Speculative assets such as crypto may be less correlated with traditional investments, but the volatility in returns is essentially noise—adding risk without a risk premium since investors in these assets are not risk averse. EBSA’s narrow focus on asset class diversification ignores the fact that adding alternative assets can concentrate rather than spread risk if the assets themselves are not diversified.

A major concern is that indexing is generally not possible with private assets. A target date fund composed of broad market indices is more diversified than one that includes a 15% private equity fund with holdings in 10 companies selected and overseen by the same general partners.

There are important differences between pension funds and individual retirement savers.

The proposed rule implements a section of President Trump’s August 7, 2025 Executive Order, “Democratizing Access to Alternative Assets for 401(k) Investors,” which argues that that since most defined benefit (DB) pension funds invest in alternatives, participants in 401(k) and other defined contribution (DC) plans are being disadvantaged.[37]

This ignores key differences between DB pensions and DC plans, notably the fact that fiduciaries who select DB pension investments are employed by the party that bears the risk (the plan sponsor). In contrast, DC plan sponsors and their fiduciary advisors choose the investment options but the risk of losses falls on retirement savers.

Illiquid investments can trip up retirement savers who need to tap their savings earlier than planned due to unanticipated health shocks, job loss, or caregiving responsibilities. Firms marketing target date and asset allocation funds with limited private asset “sleeves” assure retirement savers that between the more liquid assets in the fund and incoming contributions, cashing out early will not be a problem. However, this assumes a stable market—no panic selling—and that investors who cash out will not be saddled with high fees with little to show for it.

Less often noted than the illiquidity issue is the fact that timing (or “sequence-of-returns”) risk should make retirement savers more risk averse than pension funds and other institutional investors with indefinite investment horizons even if they do not cash out early.[38] Whereas pension funds and university endowments continuously buy and sell assets on behalf of overlapping generations of beneficiaries, retirement savers are more sensitive to poor investment performance over limited investment horizons, especially once workers have built up savings and are approaching retirement.

Retirement savers will be defaulted to high-cost and risky investments.

EBSA suggests that both direct and investments in alternative assets should be permitted, raising the possibility that retirement savers—including those close to retirement—could put all their retirement savings in crypto and other risky assets. However, EBSA suggests that "a more likely scenario…is that these alternatives would be included as one part of a menu option," citing as examples target date funds and asset allocation funds with annuity or private equity components similar to those the industry has begun marketing to retirement savers. Target date and balanced asset allocation funds can be "qualified default investment alternatives" (QDIAs) into which participants can be defaulted unless they opt out.

The idea that alternative investments could be embedded in target date and similar funds is not reassuring. Retirement savers who are defaulted into QDIAs are generally unsophisticated investors who will need to rely on their investments to cover living expenses in retirement and have been led to believe that these defaults are relatively safe. DOL's website describes default investments as investments "that generally minimize the risk of large losses and provide long term growth."[39]

If the proposed rule takes effect, many workers could unknowingly invest 15% or more of their retirement savings in assets that DOL has previously characterized as high-cost, complex, illiquid, and difficult to evaluate, reversing what has been a welcome shift to low-cost passive investments.

401(k) investment options have improved in recent years with the widespread adoption of target date and balanced funds composed of low-cost stock and bond indices and similar broadly diversified passive investments. This has enabled retirement savers to lower costs, automatically rebalance portfolio allocations, adjust portfolio risk as workers approach retirement, and maximize diversification across publicly listed securities.

The rule would harm not only retirement savers, but also the broader economy.

The aggregate value of largely unregulated private funds, including both private equity and private credit, now approaches that of regulated public funds.[40] While it is highly concerning that unregulated private markets are growing at the expense of public ones, the solution is extending disclosure requirements and other investor protections to private markets, not increasing the size of unregulated markets that expose investors and other economic actors to exploitation and excessive risk.

Private equity has often been a destructive force in the economy. It has a reputation for loading companies up with debt, stripping them of assets, and often driving them into bankruptcy, leaving workers, suppliers, and other stakeholders high and dry.[41] Businesses destroyed by private equity often operate in sectors like hospitals and newspapers where the damage to communities extends far beyond workers and suppliers.

Private equity's fee structure incentivizes risk because general partners reap a share of gains when gambles pay off but are largely insulated from losses, which are borne by lenders and other investors. This is exacerbated by the preferential tax treatment of general partners' share of earnings. Experts have also expressed alarm over the rapid expansion of unregulated private credit, which poses a threat to financial stability.

The proposed rule comes at an especially bad time. Agency understaffing, weakened enforcement, federal legislation, and a Supreme Court decision in *Anderson v. Intel* could exacerbate the potential effects of the rule.

Experts warn that deregulation could fuel a speculative bubble like the one in the roaring 1920s.[42] When the bubble pops, everyone will pay, whether they were playing or not. As University of Chicago Law School Professor William Birdthistle, the former director of the SEC's Division of Investment Management, warns:

> The administration is…encouraging individual retirees to vouchsafe their life savings to exotic financial offerings like private equity. Private equity is, as the name suggests, notoriously opaque, which means retirees would know little about what they're investing in. The White House and the private fund lobby argue that this policy will "democratize" access to alternative assets and promote "better returns." But such a plan, which comes with neither the information nor the protections needed to defend investors from serious economic risks, is as compelling as a plan to "democratize" brain surgery. [43]

The proposed rule is supported by a financial industry seeking new investors and plan sponsors hoping to reduce litigation risk, not retirement savers.

Whether or not alternative investments have performed well in the past, market saturation, higher interest rates, and other factors will likely reduce future returns. A shrinking client base has made it hard for private equity funds to exit their investments and return funds to clients. Investors in private credit funds have also become skittish due to concerns about lending standards and valuations, prompting some firms to restrict redemptions.[44]

A survey conducted on behalf of AARP found that "Americans have little interest in adding private market investments and cryptocurrency to workplace retirement accounts."[45] As institutional and wealthy investors try to offload underperforming funds, retirement savers will be given access to the dregs even as overall quality declines. Retirement savers will be "buying a pig in a poke"—assuming they are even aware they are buying a pig.

We need to better regulate alternative investments, not to loosen regulations protecting retirement savers.

Financial regulations, including disclosure requirements and fiduciary rules, serve multiple purposes. They protect investors, prevent systemic risks such as bank runs, and disclose information needed for financial markets to direct capital to productive uses, rather than activities that do not promote economic growth but simply transfer wealth to insiders from those with less information like most retirement savers and small investors.

Without reliable and comparable information, it is difficult for even sophisticated investors to know whether alternative investments are worth their high cost. We need better regulations to help all investors make informed decisions and guard against conflicts of interest; to fix incentives that encourage value-destroying business practices by private equity and other underregulated financial industries; and to curtail abuse of tax-favored plans by wealthy investors, who have an incentive to load 401(k) accounts up with assets that are difficult to value in order to skirt contribution limits and take maximum advantage of tax subsidies tied to investment returns.

Rather than weakening protections for retirement savers, DOL should work with other agencies to regulate private markets to enable all investors to make informed decisions and protect the economy.

For these reasons, I urge EBSA to withdraw the proposal. Working families need retirement income security, not risky and costly investments ill-suited for small investors.

Thank you for considering my comment.

Respectfully submitted,

Monique Morrisey, Ph.D.
Senior Economist
Economic Policy Institute

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1. AARP, "ERISA Litigation Reform: Myth vs. Fact," accessed June 1, 2026. https://www.aarp.org/content/dam/aarp/politics/advocacy/2026/03/erisa-litigation-reform-myth-v-fact.pdf

2. DOL, "Fiduciary Responsibilities," web page accessed May 25, 2026. https://www.dol.gov/general/topic/retirement/fiduciaryresp

3. Paul Samuelson, "Risk and Uncertainty: A Fallacy of Large Numbers," Scientia, Vol. 98, pp. 108-113. https://www.casact.org/sites/default/files/database/forum_94sforum_94sf049.pdf. John Rekenthaler, "How Time Horizon Affects the Odds of Equity Investing," *Morningstar*, October 19, 2023. https://www.morningstar.com/columns/rekenthaler-report/how-time-horizon-affects-odds-equity-investing

4. Louis J. Campagna, Information Letter 06-03-2020, EBSA, June 3, 2020. https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-

5. SEC Office of Compliance Inspections and Examinations, Risk Alert, June 23, 2020. https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf

6. DOL, "Supplement Statement on Private Equity in Defined Contribution Plan Designated

Investment Alternatives," December 21, 2021. https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resourcecenter/information-letters/06-03-2020-supplemental-statement

7. DOL, "US Department of Labor Rescinds 2021 Supplemental Statement on Alternative Assets in 401(k) Plans," August 12, 2025. https://www.dol.gov/newsroom/releases/ebsa/ebsa20250812

8. SEC, "Staff Statement on Meme Coins," February 27, 2025. https://www.sec.gov/newsroom/speechesstatements/staff-statement-meme-coins

9. Gary Gensler, "Statement on the Approval of Spot Bitcoin Exchange-Traded Products," January 10, 2024. https://www.sec.gov/newsroom/speeches-statements/gensler-statement-spot-bitcoin-011023

10. Board of Governors of the Federal Reserve System, "Federal Reserve Board announces the withdrawal of guidance for banks related to their crypto-asset and dollar token activities and related changes to its expectations for these activities," April 24, 2025. https://www.federalreserve.gov/newsevents/pressreleases/bcreg20250424a.htm

11. EBSA, "401(k) Plan Investments in "Cryptocurrencies," Compliance Assistance Release No. 2022-01, March 10, 2022. https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-andcompliance/compliance-assistance-releases/2022-01

12. SEC Division of Corporation Finance, "Staff Statement on Meme Coins," February 27, 2025. https://www.sec.gov/newsroom/speeches-statements/staff-statement-meme-coins

13. SEC, "SEC Announces Dismissal of Civil Enforcement Action Against Coinbase," February 27, 2025. https://www.sec.gov/newsroom/press-releases/2025-47

14. Caroline Crenshaw, Remarks at the Investment Company Institute's 2025 Investment Management Conference, March 26, 2025. https://corpgov.law.harvard.edu/2025/03/26/remarks-by-commissioner-crenshaw-at-the-investmentcompany-institutes-2025-investment-management-conference/

15. Caroline Crenshaw, Remarks at the Investment Company Institute's 2025 Investment Management Conference, March 26, 2025. https://corpgov.law.harvard.edu/2025/03/26/remarks-by-commissioner-crenshaw-at-the-investmentcompany-institutes-2025-investment-management-conference/

16. SEC, "SEC Enhances the Regulation of Private Fund Advisers," August 23, 2023. https://www.sec.gov/newsroom/press-releases/2023-155

17. United States Court of Appeals for the Fifth Circuit, "National Association of Private Fund Managers et al. v. Securities and Exchange Commission," June 5, 2024. https://www.govinfo.gov/content/pkg/USCOURTS-ca5-23-60471/pdf/USCOURTS-ca5-23-60471-0.pdf

18. American Federation of Teachers, Americans for Financial Reform Education Fund, and

American Association of University Professors, “From Public Pensions to Private Fortunes: How Working People’s Retirements Line Billionaire Pockets,” July 2025. https://ourfinancialsecurity.org/resources/publicpensionsprivatefortunes; Stephen Deane, “Private Markets: Governance Issues Rise to the Fore,” CFA Institute Research and Policy Center, June 2024. https://rpc.cfainstitute.org/sites/default/files/-/media/documents/survey/private-markets-governanceissues-rise-to-the-fore.pdf; Alexander Ljungqvist, “The Economics of Private Equity: A Critical Review,” CFA Institute Research Foundation Literature Review, 2024. https://rpc.cfainstitute.org/sites/default/files/-/media/documents/article/rf-brief/economics-of-private-equity.pdf.

19. Holger Spamann, Indirect Investor Protection: The Investment Ecosystem and Its Legal Underpinnings, Journal of Legal Analysis, Volume 14, Issue 1, 2022, Pages 17–79, https://doi.org/10.1093/jla/laac003

20. Jeffrey Hooke and Michael Imerman, comment on proposed regulation RIN 1210 AC 20, April 13, 2026. https://www.regulations.gov/comment/EBSA-2026-0166-6564

21. Jeffrey Ptak, “Look Before You Leap When Investing in Private Funds,” Morningstar, July 29, 2025. https://www.morningstar.com/funds/look-before-you-leap-when-investing-private-funds; Linge Sun and Nicholas Reade, “Performance Dispersion in Alternative Asset Classes, CAIS, November 18, 2022. https://www.caisgroup.com/articles/performance-dispersion-in-alternative-asset-classes

22. Stephen Deane and Olivier Fines, “Cryptoassets: Beyond the Hype,” CFA Institute, January 2023. https://rpc.cfainstitute.org/sites/default/files/-/media/documents/article/industry-research/crypto-beyondthe-hype.pdf

23. SEC, “Staff Statement on Meme Coins,” February 27, 2025. https://www.sec.gov/newsroom/speechesstatements/staff-statement-meme-coins

24. Internal Revenue Service, “Retirement topics – Plan assets,” web page accessed May 25, 2026. https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-plan-assets

25. In 2023, the Treasury Department and Internal Revenue Service (IRS) announced that they planned to issue guidance relating to the treatment of nonfungible tokens as collectibles. IRS, “Treatment of certain nonfungible tokens as collectibles,” Notice 2023-27, March 21, 2023. https://www.irs.gov/pub/irs-drop/n-23-27.pdf; David Block and Davide Levine, “IRS Announces Intention to Issue Guidance on NFTs,” Groom Law Group, March 29, 2023. https://www.groom.com/resources/irs-announces-intention-to-issue-guidance-onnfts/

26. Sharon LaFraniere and David Yaffe-Bellany, “How Prediction Markets and Crypto Firms Steamrolled a Watchdog Agency,” The New York Times, May 24, 2026. https://www.nytimes.com/2026/05/24/us/howprediction-markets-and-crypto-firms-steamrolled-a-watchdog-agency.html

27. Ludovic Phalippou, “An Inconvenient Fact: Private Equity Returns & The Billionaire

Factory," University of Oxford, Said Business School, Working Paper, June 10, 202. https://dx.doi.org/10.2139/ssrn.3623820; American Federation of Teachers et al., op. cit. July 2025.

28. Robert S. Harris, Tim Jenkinson, Steven N. Kaplan, and Ruediger Stucke, "Has Persistence Persisted in Private Equity? Evidence from Buyout and Venture Capital Funds," Journal of Corporate Finance, Volume 81, August 2023. https://doi.org/10.1016/j.jcorpfin.2023.102361.

29. American Federation of Teachers et al., op. cit. 2025; Dan Chung and Brad Neuman, "Debunking Private Equity Prestige," Alger Insights, April 2024. https://www.alger.com/Pages/Content.aspx?pageLabel=Insights-Commentary-Debunking-Private-Equity-Prestige

30. Jean-Pierre Aubry, "Public Pension Investment Update: Have Alternatives Helped or Hurt?" Center for Retirement Research at Boston College Issue in Brief 22-20, November 22, 2022. https://crr.bc.edu/publicpension-investment-update-have-alternatives-helped-or-hurt/

31. Jean-François L'Her, Rossitsa Stoyanova, Kathryn Shaw, William Scott, and Charissa Lai, "A Bottom-Up Approach to the Risk-Adjusted Performance of the Buyout Fund Market," Financial Analysts Journal, 72(4), 36–48, December 27, 2018. https://doi.org/10.2469/faj.v72.n4.1https://www.tandfonline.com/doi/abs/10.2469/faj.v72.n4.1

32. Angela M. Antonelli, "Has the Lack of Asset Diversification in DC Retirement Plans Been a Costly Missed Opportunity?" Georgetown University Center for Retirement Initiatives in Conjunction with CEM Benchmarking, June 2023. https://cri.georgetown.edu/wp-content/uploads/2023/06/GeorgetownCRI-CEm- Benchmarking_Lack-of-Asset-Diversification-CRI-paper.pdf

33. SEC, op. cit., August 23, 2023.

34. U.S. Court of Appeals for the Fifth Circuit, op. cit., June 5, 2024.

35. James Van Bramer, "Unpacking the DOL 'Safe Harbor' for Alternative Investments," Plan Advisor, April 14, 2026. https://www.planadviser.com/unpacking-the-dol-safe-harbor-for-alternative-investments/

36. Amy C. Arnott, Christine Benz, David Reyna, and Jack Shannon, "2026 Diversification Landscape," Morningstar, April 14, 2026. https://www.morningstar.com/content/csassets/v3/assets/blt9415ea4cc4157833/blta0fddf23ec4df239/69ddb33e160be843c15e5ad3/Diversification_Landscape_2026.pdf

37. United States, Executive Office of the President. Executive Order 14330: Democratizing Access to Alternative Assets for 401(k) Investors, August 7, 2025. https://www.whitehouse.gov/presidentialactions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/

38. Amy C. Arnott, "Sequence of Returns: What It Means and How to Deal," Morningstar, August 9, 2021. https://www.morningstar.com/retirement/sequence-returns-what-it-means-

how-deal

39. EBSA, “FAQs about Retirement Plans and ERISA,” web page accessed May 25, 2026. https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-anderisa

40. SEC Office of the Advocate for Small Business Capital Formation, Annual Report 2024. https://www.sec.gov/files/2024-oasb-annual-report-print.pdf

41. Eileen Appelbaum and Rosemary Batt, Private Equity at Work, The Russell Sage Foundation, May 2014. https://www.russellsage.org/publications/book/private-equity-work

42. Andrew Ross Sorkin, “The Rules of Investing Are Being Loosened. Could It Lead to the Next 1929?” The New York Times, October 13, 2025. https://www.nytimes.com/2025/10/13/magazine/investing-private-equitycrypto-crash-1929.html

43. William A. Birdthistle, “Trump Is Pushing Us Toward a Crash. It Could Be 1929 All Over Again,” The New York Times, November 7, 2025. https://www.nytimes.com/2025/11/07/opinion/donald-trump-great-gatsbyroating-20s-sec.html

44. Maureen Farrell, “New Limits on Investors and a Debt Downgrade Add to Private Credit Woes,” The New York Times, March 24, 2026. https://www.nytimes.com/2026/03/24/business/moodys-private-creditdowngrade.html

45. Bryan Miller, “Americans Have Little Interest in Adding Private Market Investments and Cryptocurrency to Workplace Retirement Accounts,” AARP, November 20, 2025. https://www.aarp.org/pri/topics/work-financesretirement/financial-security-retirement/private-market-and-cryptocurrency-investments/