Letter from Investment Company Institute

September 24, 2025

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

Dear Mr. Aronowitz:

We congratulate you on your confirmation as Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA). The Investment Company Institute (ICI)[1] and our members look forward to working with you to advance the interests of America's workers as they save for a financially secure retirement.

ICI strongly supports efforts to promote retirement security for US workers. As a trade association representing the asset management industry in service of individual investors, ICI is especially attuned to the needs of retirement savers. The asset management industry plays a significant role in US retirement savings by making available the investment products through which pension plans, defined contribution (DC) plans, and individual retirement accounts (IRAs) invest. Total US retirement assets were $45.8 trillion as of June 30, 2025,[2] with our members managing a large portion of these assets through regulated funds, collective investment trusts (CITs), and separate accounts.

[1] The Investment Company Institute (ICI) is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $40.6 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 120 million investors. Members manage an additional $10.5 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

[2] *See* ICI, Quarterly Retirement Market Data.

ICI strongly supports regulatory policies and EBSA initiatives that build upon the successes of 401(k) plans and other DC savings arrangements to improve retirement security for Americans, while reducing unnecessary regulatory burdens. The US private retirement system has been a success story, helping Americans save for their retirements.[3] We appreciate the Administration's initiatives to reduce overly burdensome rules and regulations.[4] Thoughtful actions to reduce regulatory burdens, including through new or amended regulations and advisory opinions which clarify the application of ERISA to particular facts,[5] further this goal and help provide greater clarity for plan sponsors, asset managers, and other retirement plan service providers.[6]

We detail below several matters that are of interest to our members. These issues include recommendations in areas where the current regulatory framework imposes costs that outweigh their benefits, has created an unduly burdensome environment, or is not supported by applicable law. In some instances, the lack of appropriately targeted guidance has created uncertainty that leads industry participants to either pursue unnecessarily onerous workarounds or decide not to pursue transactions that would be beneficial to plans and their participants. This regulatory burden and uncertainty are not in the best interests of retirement savers, as it limits the investment options and services available to them.

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[3] Voluntary employer-sponsored retirement plans and IRAs are key to the US retirement system's success. The evidence shows that the typical retiree maintains a high share of their pre-retirement income through a combination of Social Security benefits and income from retirement plans and IRAs. More than 70 percent of Americans over age 70 receive income from retirement plans and IRAs, either directly or through a spouse. Indeed, employer plans and IRAs are an important source of income for all but the lowest-income retirees. While the lowest income groups rely more on Social Security than do higher earners, when one considers all retirement income sources these lowest income groups replace a *higher* share of their spendable income in retirement. These statistics, and other results from new research analyzing tax data, challenge assertions that the voluntary components of the US retirement system are failing and are leaving retirees too reliant on Social Security. While these misleading narratives rely on official government income statistics which are derived from household surveys, studies comparing household surveys with administrative tax data (by ICI economists and others) have shown that these household surveys *substantially undercount* retirement income from employer plans and IRAs. For a discussion of the complementary components of the US retirement system and the role each component plays, see Chapter 8 in the *2025 Investment Company Fact Book*.

[4] Letter from Eric J. Pan, President & CEO, and Paul G. Cellupica, General Counsel, ICI, to Russell T. Vought, Director, Office of Management and Budget (May 12, 2025).

[5] We believe that sub-regulatory guidance can provide valuable clarity to the regulated community. We caution the Department of Labor (Department), however, against creating new rules through sub-regulatory guidance, whether advisory opinions or another form, which are effectively regulation in disguise.

[6] *See* Executive Order, Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Regulatory Initiative (White House February 19, 2025); Presidential Memorandum, Directing the Repeal of Unlawful Regulations (April 9, 2025) (Presidential Memorandum).

Our recommendations cover the following areas.

- *QPAM Exemption.* The Department of Labor should withdraw the 2024 amendments to the "qualified professional asset manager" (QPAM) exemption and engage more openly and thoroughly with the regulated community on additional changes to the exemption to ensure its continued efficient operation. These further changes to the exemptive framework should include removal of the disqualification provisions of the exemption to restore the role of plan fiduciaries.
- *ERISA Class Action Litigation*. We urge the Department to take steps to discourage, rather than encourage, meritless litigation against plan sponsors and fiduciaries. The employer-sponsored retirement plan system is a voluntary one, and recent Department practices such as an overly plaintiff-friendly amicus program and the surreptitious sharing of information with class action plaintiffs' lawyers threaten the viability of these plans. Plan participants and beneficiaries are better protected when the Department is not encouraging costly meritless litigation. The Department also should consider providing guidance to plan fiduciaries on decisions that are frequently targeted by class action plaintiffs' lawyers.
- *DC Plan Investments in Private Market Strategies.* As confirmed in recent Department guidance, ERISA does not endorse or reject any particular types of plan investments. We commend the Department for rescinding prior guidance that discouraged DC plans from including investments in private market assets. The Department should take additional steps in furtherance of President Trump's August 7, 2025 Executive Order (EO)[7] to clarify the appropriate fiduciary process associated with offering asset allocation funds containing such investments and to identify the criteria for plan fiduciaries to use in evaluating these investments.
- *Fiduciary Advice Rulemaking.* The Department should finally end its largely unsuccessful 15-year effort to redefine when a party is a fiduciary under ERISA in connection with providing investment advice. Pending the outcome of litigation challenging the validity of the 2024 rulemaking, the Department should ensure that clear and reasonable standards apply to the determination of whether a communication rises to the level of fiduciary advice. The five-part test set forth in the 1975 regulation[8] provides this

[7] Executive Order, *Democratizing Access to Alternative Assets for 401(k) Investor* (White House August 7, 2025).

[8] Under the five-part test (described in 29 CFR §2510.3-21(c)(1)), a person is a fiduciary only if they (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (2) on a regular basis, (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary, that (4) the advice will serve as a primary basis

necessary clarity. The Department also should provide non-enforcement relief with respect to interpretive guidance issued in 2020 and 2021 that has since been vacated by federal courts.

- *Investment Duties Rule.* The Department, in revising the Investment Duties Rule, should reaffirm that the financial interests of participants and beneficiaries take precedence, should neither endorse nor reject any particular types of plan investments, and should not inadvertently increase the risk of litigation against retirement plan sponsors and fiduciaries. The Department should ensure that the rule allows plan fiduciaries and their investment managers to determine what factors are relevant to a risk and return analysis. Regarding the exercise of shareholder rights, the rule should avoid prescriptive provisions that would add cost, burden and liability to plan fiduciaries, should allow plan fiduciaries to efficiently and effectively exercise their voting authority, and should promote a well-functioning and cost-efficient proxy system.
- *Administrative Exemptions Process.* The Department should rescind the 2024 amendments to the Prohibited Transaction Exemption (PTE) Procedures and work with the regulated community to examine the administrative exemptions process and identify areas for potential improvement.
- *Participant Disclosures.* ICI supports efforts to improve the effectiveness of participant communications, including through the consolidation of communications, flexibility as to the specific content and design of communications, and efforts to provide disclosures to participants and beneficiaries at times when they can make the most effective use of the information. We urge the Department to consider the principles described herein as you work to implement the various SECURE 2.0 Act provisions impacting participant disclosures.
- *America First Investment Policy.* As the Department works to implement the Administration's America First Investment Policy, we look forward to working with you and your staff to ensure that any new requirements imposed on plans are both consistent with ERISA and administratively feasible, while supporting the retirement savings goals of Americans.

for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan.

I. Reform the QPAM Exemption, Including Withdrawing the 2024 Amendments and Eliminating the Disqualification Provisions

The PTE for QPAMs is intended to facilitate routine transactions by regulated financial institutions investing assets for employer-provided retirement plans. The exemption provides a streamlined process whereby a plan retains a third-party investment manager that can then engage in transactions with parties in interest with respect to the plan. For more than 40 years, it has allowed investment managers to efficiently deliver sophisticated investment strategies to ERISA plans while appropriately protecting plans and their participants. An entity's qualification to act as a QPAM has become in effect a "Good Housekeeping seal of approval" that retirement plans may prefer when retaining an investment manager, irrespective of whether an engagement requires reliance on the QPAM exemption.

Over the years, as the asset management industry has grown and investment managers have become more diversified and multinational in their operations, the Department has adopted more expansive interpretations of the requirements of the exemption. This expansion has been magnified by increasingly aggressive conditions placed on entities seeking individual PTEs to continue to serve as QPAMs that run contrary to the deregulatory goals of the exemption.[9] Most recently, in 2024, the Department finalized significant changes to the QPAM exemption. These changes, which were initiated by the Department in 2022 without any meaningful stakeholder engagement,[10] have made this critical exemption unavailable in an even wider range of circumstances. Where the exemption remains available, the changes make it more difficult and expensive for parties to utilize, impede otherwise routine plan transactions, and have reduced the investment opportunities available to retirement plans and their participants.[11]

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[9] *See* Proposed QPAM Class Exemption, 47 Fed. Reg. 56945, 46-47 (December 21, 1982). Since 2013 the Department has imposed dozens of conditions on these entities seeking individual exemptions such as external audits, internal compliance reviews, and mandated contractual terms with clients, even where the disqualifying conduct had nothing to do with plans or even with the firm's asset management division.

[10] This failure to seek meaningful stakeholder engagement prior to proposing the amendments was inconsistent with the policy of an Executive Order that requires, among other things, that "regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among … experts in relevant disciplines [and] affected stakeholders in the private sector…." and that "[b]efore issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking." Exec. Order No. 13563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 § 2 (2011).

[11] ICI's concerns with the amended QPAM exemption are detailed in our comment letters to the Department and to OMB. Letter from ICI and other Trades to OMB (December 6, 2023); Letter from Elena Barone Chism, Deputy General Counsel - Retirement Policy, Shannon Salinas, Associate General Counsel - Retirement Policy, and David

Our concerns include, but are not limited to, the following:

- The exemption's disqualification and ineligibility provisions are overbroad, unnecessary and improperly supplant the discretion of plan fiduciaries to determine whether and on what terms to continue to retain a QPAM following material legal or other developments. The following are examples of the disqualification regime's overreach.
    - Basing ineligibility for the exemption on convictions for foreign crimes improperly subjects a QPAM's eligibility to the decisions of non-US courts, particularly as the scope of disqualifying criminal convictions includes conduct associated with business activity unrelated to those of managing ERISA plan assets.
    - This overreach is further exacerbated by including the activities of remotely related entities with as little as a five percent direct or indirect ownership interest in the QPAM. Attributing to a QPAM the activities of affiliates and five percent owners can lead to the QPAM's disqualification even where the QPAM and the other entity are managed completely independently of each other.
    - Prohibited misconduct includes a QPAM (or *any* affiliate or five percent direct or indirect owner of the QPAM) entering into a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA) with a US federal or state prosecutor or regulatory agency in connection with criminal allegations covering the same overbroad scope of disqualifying criminal convictions. Treating DPAs and NPAs as tantamount to an admission of guilt ignores the numerous legitimate reasons a non-culpable party may decide to enter into a DPA or NPA.
    - An additional vaguely defined category of prohibited misconduct (beyond criminal convictions or entering into a DPA or NPA), covering a wide range of actions that may have no more than a tenuous connection to a QPAM's activities, allows the Department to act as both judge and executioner in determining whether to revoke eligibility for the exemption.

  The net effect of these provisions is to make it very difficult for an asset manager that is part of a large, diversified global financial services business to serve as a QPAM without running afoul of some disqualification condition. This overreach is particularly obvious

A. Cohen, Associate General Counsel - Retirement Policy, ICI, to Chris Cosby, Director, Office of Exemption Determinations, EBSA (April 6, 2023); Letter from David Abbey, Deputy General Counsel - Retirement Policy, Elena Barone Chism, Associate General Counsel - Retirement Policy, and Shannon Salinas, Associate General Counsel - Retirement Policy, ICI, to Chris Cosby, Director, Office of Exemption Determinations, EBSA (October 11, 2022).

considering that Congress decided when fiduciaries are to be disqualified from serving plan clients when it enacted Section 411 of ERISA.[12] This expansive approach to disqualification reflected in the QPAM exemption appears to be included solely to permit Department staff to impose overly costly audit requirements on QPAMs in an arbitrary and capricious manner.

- The transition period following ineligibility includes restrictions on the terms both of a QPAM's engagement and of a plan's investments that are overbroad and create conflicts with the legal structures of these investments. The one-year limit on the transition period artificially and unreasonably constrains a QPAM's ability to seek individual PTE relief pursuant to a process entirely under the control of the Department. To the extent the Department were to retain a disqualification regime with a transition period, we urge the Department to include extended transition period relief so that QPAMs and their client plans are not subjected to the potentially abrupt loss of exemptive relief while an individual PTE application is pending.
- The Department has improperly leveraged ERISA's administrative exemptions process to appoint itself as the global arbiter of multinational entities' "culture of compliance," both in the amended QPAM exemption and when considering individual exemption requests following QPAM disqualification. Investment managers under ERISA already are subject to supervision and regulation by a variety of regulators, including the Securities and Exchange Commission (SEC), which is their primary regulator with respect to investment advisory activities. The SEC, which oversees these investment managers under the Investment Advisers Act of 1940 and the Investment Company Act of 1940, is better situated to weigh these compliance considerations.
- The QPAM exemption requires that a QPAM plan, initiate, and negotiate any proposed plan investment. As a practical matter, many investments that are beneficial to a plan are brought to a plan's or a QPAM's attention by parties-in-interest. The fact that a proposed investment was negotiated by another party also should not preclude a QPAM from independently determining that the transaction (including its terms) is beneficial to and in the interests of a plan and its participants. Additionally, in many transactions, multiple entities may be operating under the QPAM exemption, including but not limited to the common practice of using multiple advisors and/or sub-advisors.[13]

[12] Section 411 of ERISA prohibits certain persons from serving or holding various positions with plans following conviction for a broad list of enumerated crimes.

[13] As a practical matter, it is not feasible for multiple advisors, each of whom may be relying on the QPAM exemption, to each be individually responsible for planning, initiating, and negotiating a proposed investment on

- The Department's incomplete cost/benefit analysis failed to consider many of the costs of these amendments. Among other things, the Department provided no evidence that the QPAM exemption was not working as intended and appears to not have considered evidence that the existing restrictions in the QPAM exemption already were overbroad.

ICI Recommendation:

The 2024 amendments to the QPAM exemption should be withdrawn in their entirety, the disqualification provisions should be removed,[14] and the Department should work with the regulated community to identify additional modifications that would improve the QPAM exemption framework. The QPAM exemption was overbroad even prior to its amendment, including among other things with respect to its ineligibility provisions—in particular those relating to criminal convictions. As noted above, a plan's fiduciaries are best positioned to determine whether to continue to retain an entity as asset manager, subject to the requirements of section 411 of ERISA.

The ineligibility provisions also ignore the fact that entities serving as investment managers under ERISA already are subject to supervision and oversight by their primary regulator as required by ERISA section 3(38), as well as disqualification under ERISA section 411 from the ability to serve as an adviser or fiduciary to an employee benefit plan.

II. Refocus Efforts to Discourage Frivolous ERISA Class Action Litigation

In recent years there has been a veritable flood of ERISA class action litigation against sponsors and fiduciaries of DC retirement plans. More than 500 ERISA "fee cases" were filed just from 2016 to 2024. Class action plaintiffs' lawyers know that if they can survive a motion to dismiss and trigger costly discovery, they likely will be able to extract a settlement and a healthy attorneys' fee award. Individual plan participants, meanwhile, often receive minimal recoveries. The mere specter of being sued can lead plan sponsors and service providers to shy away from newer, innovative retirement investment products and services that may improve participant outcomes. These lawsuits, and the uncertainty they create for plan

behalf of a plan. Similarly, both CIT trustees and their advisors may separately rely on the QPAM exemption. We urge the Department to engage with the regulated community to better understand the practical limitations of common investment management structures to help ensure that further regulatory action in this area does not inadvertently constrain otherwise beneficial structures utilized by retirement plans.

[14] In the immediate term, we urge the Department to grant individual QPAM exemptions without including the increasingly aggressive conditions we have seen in these exemptions since 2013.

sponsors, threaten the very existence of the voluntary employer-sponsored retirement system and harm the plan beneficiaries ERISA is designed to protect.

The White House's recent EO regarding alternative assets acknowledges the "burdensome lawsuits that seek to challenge reasonable decisions by loyal, regulated fiduciaries" and directs that the Department "prioritize actions that may curb ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants."[15]

While we recognize that EBSA, and the Department more broadly, has limited tools to stem the tide of frivolous private litigation, historically the Department has actually encouraged these lawsuits through—among other efforts—the recently disclosed information sharing between the Department and class action plaintiffs' lawyers and a lengthy record of plaintiff-friendly amicus briefs. Last year it became publicly known that for a number of years the Department had been entering into "common interest agreements" with ERISA class action plaintiffs' lawyers, and was sharing confidential information the Department gathered in the course of EBSA audits.[16] The Department did not disclose to the plans being audited either the existence of these agreements or, more importantly, that the Department was feeding information to the lawyers suing them. In many if not all cases (not all of these instances are public), the plans and plan sponsors were not the subject of any EBSA activities other than ordinary course audits. We believe that this practice is wholly inappropriate, as it effectively allows the Department to "litigate in the shadows" as it seeks to expand on the Department's own efforts by regulating through litigation.[17] Moreover, it circumvents the judicially supervised civil discovery process provided for in the Federal Rules of Civil Procedure.

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[15] EO, § 3(c).

[16] *See* Letter from Chairwoman Foxx, House Committee on Education and Workforce, to Larry D. Turner, Inspector Gen., DOL OIG (November 21, 2024); *see also* Letter from Chairman Wahlberg, House Committee on Education and Workforce, to Larry D. Turner, Inspector Gen., DOL OIG (January 23, 2025).

[17] *See Harrison v. Envision Management Holding, Inc. Board of Directors et al.*, Magistrate's Order, p.16, No. 1:21-cv-00304-CNS-MDB (D. Colo. September 11, 2024), *aff'd*, Order, No. 1:21-cv-00304-CNS-MDB (D. Colo. January 13, 2025). We believe it is an abuse of the regulatory process for the Department to attempt to regulate through litigation. This abuse is multiplied where the Department seeks to surreptitiously influence private litigation in which it is not even a party. To this end, ICI has expressed our support for the Balance the Scales Act (HR 2958), as well as the EBSA Investigations Transparency Act (HR 2869). See Letter from Eric J. Pan, President & CEO, ICI, to Representatives Lisa McClain and Michael Rulliand (August 8, 2025). The EBSA Investigations Transparency Act addresses EBSA's lengthy and burdensome audits by requiring DOL to submit annual, redacted reports to Congress regarding the status of EBSA investigations. The Balance the Scales Act increases transparency and oversight of how DOL engages with plaintiffs' attorneys in cases regarding employee benefit plans by requiring

The Department also has for many years pursued an unbalanced plaintiff-friendly *amicus* program. Through submissions as *amicus curiae*, the Department has consistently sought to push the boundaries of ERISA to the detriment of plan sponsors. We believe the proper function of the Department's *amicus* program should be to ensure the consistent and proper application of ERISA by the courts, and not to encourage an across-the-board adoption of interpretations that maximize potential liability for plan fiduciaries and service providers.

ICI Recommendation:

Cease common interest agreements. The Department should promptly cease its ill-advised practice of sharing information with plaintiffs' lawyers and should disclose to the parties whose materials were shared both the materials that were shared and any operative common interest agreements.

File amicus briefs. EBSA also should work with the Solicitor of Labor to consider whether the historical criteria for determining when the Department will seek to opine as *amicus curiae* are appropriate. We welcomed the Department's decision to weigh in in favor of the plan sponsor in a recent amicus brief.[18] We urge the Department to submit additional amicus briefs in support of plan sponsors in ERISA litigation where warranted, including in lawsuits involving unsupported excessive fee or underperformance claims. Additionally, further to the goal of not discouraging plan sponsors and plan service providers from incorporating new products and services into retirement plans, we recommend the Department consider also filing amicus briefs in suits challenging innovative practices. Many of these suits may move forward merely because a plan fiduciary chose to innovate. Being a first mover with regard to offering beneficial plan products and services should not subject a party to a lawsuit, and such suits also stifle the type of innovation the EO encourages.

Issue targeted guidance. Another powerful tool at the Department's disposal is guidance, whether regulatory or sub-regulatory. The retirement industry, including plan fiduciaries, looks to Department guidance as they engage in their prudent fiduciary processes. Such guidance can be helpful not only to fiduciaries in offering plan investment opportunities as noted in the EO, but also across the entire range of fiduciary decisions that may be

DOL to provide annual reports to Congress on assistance it provided to plaintiffs' attorneys for potential use in civil actions under ERISA § 502(a).

[18] Brief of the US Secretary of Labor as Amicus Curiae Supporting Defendant-Appellee, *Hutchins v. HP, Inc.*, Docket No. 24.1, No. 25-826 (9th Cir. July 9, 2025), *on appeal fro*m Order Granting Motion to Dismiss Plaintiff's First Amended Class Action Complaint, Docket No. 71, No. 5:23-cv-05875 (N.D. Cal. Feb. 5, 2025).

challenged in court. As the Department considers steps it can take to stem the tide of frivolous litigation, we urge you to not discount the impact guidance can have in helping achieve this goal. For example, the Department could clarify its expectations as to a prudent evaluation of an investment alternative, including confirming that no single factor is necessarily dispositive, providing guidance on the selection of benchmarks for investment alternatives and service providers, and addressing the consideration of risk-adjusted investment performance net of fees and expenses.[19]

Advocate for statutory litigation reform. Lastly, to encourage the continued health of the voluntary employer-sponsored retirement system, the Department could engage with Congress to consider statutory changes to ERISA's civil enforcement provisions to reduce the volume of meritless private litigation against plan fiduciaries. Ensuring the continued health and viability of these plans is consistent with congressional intent and policy in enacting ERISA, as it helps protect the interests and benefits of plan participants.[20]

III. Facilitate the Ability to Incorporate Private Market Strategies in DC Plan Investments

Private markets have experienced significant growth in the past decade, with private capital assets under management rising substantially from $5 trillion at the end of 2014 to $16 trillion at the end of 2024.[21] Meanwhile there are fewer domestic public companies in the US, falling from a peak of 7,339 in 1996 to around 4,000 at the end of 2024.[22] Defined benefit pension plans have benefitted from greater diversification and higher returns as private markets have grown; 27 percent of pension fund assets were allocated to alternative assets as of 2023.[23] Unfortunately, DC plans have not fully participated in these benefits due to a number of factors, including regulatory uncertainty and litigation risk. As new opportunities for investment growth continue to shift to private market strategies, DC plan investors risk being further relegated to second class investors behind institutional investors, defined benefit plans, and affluent retail

[19] To the extent any such guidance is sub-regulatory in nature, we urge the Department to exercise care to avoid the perception that it is imposing new rules on plan fiduciaries without following proper procedures for notice and comment as required by the Administrative Procedure Act.

[20] *See* 29 U.S.C. § 1001(b).

[21] *See* PitchBook, *Global Private Market Fundraising Report: Q1 2025* (May 23, 2025).

[22] *See* "total equity market - number of listed companies (domestic)" for the Nasdaq and the NYSE, available through the report generator at the World Federation of Exchanges.

[23] *See* Fidelity Investments, *A study of allocations to alternative investments by institutions and financial advisors*, Ex. 2, Fidelity Institutional Insights (2025).

investors. We believe it is important for DC plans to have a clear path to more broadly diversify into private market strategies.

The White House's recent EO titled *Democratizing Access to Alternative Assets for 401(k) Investors* states the following policy of the Administration:

> It is the policy of the United States that every American preparing for retirement should have access to funds that include investments in alternative assets[24] when the relevant plan fiduciary determines that such access provides an appropriate opportunity for plan participants and beneficiaries to enhance the net risk-adjusted returns on their retirement assets.[25]

To this end, the EO directs the Department, within 180 days, to:

- Reexamine the Department's guidance on a fiduciary's duties in connection with including alternative asset investments in asset allocation funds, including considering whether to rescind the Department's 2021 Supplemental Private Equity Statement;[26]
- Clarify its position both on alternative assets and on the appropriate fiduciary process for offering as plan investment options asset allocation funds which include alternative assets.
- Consult as appropriate with other regulators, including the Department of Treasury and the SEC, to determine whether any other regulatory changes are needed to carry out the EO's policy objectives.

While the EO does not mandate the form of any Department guidance to further its purposes, the EO specifies that the Department shall:

- Aim to identify criteria that fiduciaries should use to balance potentially higher expenses against the objectives of higher long-term net returns and broader asset diversification;

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[24] For purposes of the EO, "alternative assets" includes "private market investments, including direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the managers of such investments, if applicable, seek to take an active role in the management of such companies." EO, § 3(a).

[25] EO, § 2.

[26] *See* US Department of Labor Supplemental Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives (December 21, 2021), *supplementing* Letter from Louis J. Campagna, EBSA, to Jon W. Breyfogle, Groom Law Group (June 3, 2020).

- Propose rules, regulations, or guidance that clarify the duties that a fiduciary owes to plan participants when offering an asset allocation fund that includes investments in alternative assets, which may include appropriately calibrated safe harbors; and
- Prioritize actions that may curb ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants.

Private market asset managers have extensive experience supporting different investors' needs, whether for institutions, high net worth individuals, or pension funds. While the nature of DC plans may necessitate somewhat different fund features including in the areas of transparency, liquidity, daily valuation, and oversight, we expect that, like other investment innovations, private market strategies can be successfully adapted to the needs of the DC plan market. Properly implemented, extending access to private market strategies to all retirement investors will offer them greater diversification opportunities and the choice to decide if they wish to pursue potentially better returns over time.

The SEC's Division of Investment Management recently issued guidance affirming SEC Chairman Atkins' earlier public endorsement of expanding retail investor access to private market strategies such as hedge funds and private equity funds through SEC-regulated vehicles.[27] ICI supports efforts to expand this access for all investors, including retirement investors, through these and other investment vehicles, including managed account programs.[28]

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[27] ADI 2025-16 - Registered Closed-End Funds of Private Funds, Division of Investment Management (SEC August 15, 2025) (confirming elimination of the informal staff policy that registered closed-end funds that invest in private funds either (i) include accredited investor status and minimum investment requirements or (ii) limit their private fund investments to 15% of their assets.). *See* The Honorable Paul S. Atkins, Chairman, SEC, *Prepared Remarks Before SEC Speaks*, The SEC Speaks in 2025, Washington DC (Practising Law Institute May 19, 2025) (endorsing SEC actions to reconsider limits on closed-end fund sales to retail investors). *See* Natasha J. Greiner, Director, Division of Investment Management, *Remarks During Panel Discussion*, The SEC Speaks in 2025, Washington DC (Practising Law Institute May 20, 2025) (announcing that as of May 19, 2025, SEC staff "will no longer provide comments limiting the ability of retail investors to invest in registered closed-end funds that invest in private funds").

[28] *See* Eric J. Pan, President & CEO, ICI, *ICI President's Address, 2025 Leadership Summit - Playing a Bigger Game: Why ICI Is Moving Into Private Markets*, ICI Leadership Summit, Washington DC (ICI May 1, 2025); Letter from Eric J. Pan, President & CEO, and Paul Cellupica, General Counsel, ICI, to The Honorable Paul S. Atkins, Chairman, SEC (April 11, 2025), pp. A-4 - A-5.

ICI Recommendation:

Guidance for plan fiduciaries pursuant to the EO. We look forward to working with you and your staff to address the various considerations attendant to expanding DC plan access to private market strategies as contemplated by the EO. The regulatory framework should provide comfort and clarity to plan fiduciaries, while maintaining appropriate investor protections for plan participants and beneficiaries. As the preeminent voice of the asset management industry for the benefit of retail investors, including retirement investors, ICI is well positioned to address questions as they may arise.

We appreciate the Department's prompt action following the EO to withdraw the Biden Administration's "Supplemental Statement" on the Department's 2020 Information Letter.[29] The press release announcing the withdrawal helpfully noted the Department's various concerns with the Supplemental Statement. We agree with the Department that the Supplemental Statement deviated from the fundamental principles of ERISA. The 2020 letter outlines a framework of relevant factors for plan fiduciaries to consider if they choose to explore private equity as a component of a larger diversified, managed fund.[30] It presents a straightforward application of ERISA's duty of prudence to an inquiry regarding the selection of an asset allocation fund with a limited allocation to private equity for a participant-directed individual account plan.[31] It does not endorse

[29] *See* News Release, *US Department of Labor rescinds 2021 supplemental statement on alternative assets in 401(k) plans* (August 12, 2025).

[30] The 2020 letter described several considerations that a plan fiduciary should evaluate in determining to include an investment vehicle with an allocation to private equity, including for example whether the fund would offer an opportunity for diversification within an appropriate range of expected returns net of fees; whether the fund is overseen or managed by investment professionals with appropriate qualifications and experience; and whether the fund has limited the allocation to private equity in a way that addresses cost, complexity, liquidity, and other issues.

[31] Recently the Ninth Circuit cited the 2020 letter in affirming dismissal of a case brought against Intel. The suit challenged the prudence of incorporating certain hedge funds and private equity funds into the portfolios of custom target date and global diversified funds offered within Intel's 401(k) plan. In finding that there was no plausible allegation of a breach of prudence, the court quoted cases stating that "the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole" and noted that generalized attacks on hedge funds and private equity funds as a category have been rejected by courts. It then quoted the 2020 letter, saying that "a fiduciary may properly select an asset allocation fund with a private equity component as a designated investment alternative for a participant directed individual account plan." *Anderson v. Intel Corp. Inv. Policy Comm.*, No. 22-16268 (9th Cir. May 22, 2025).

private equity investments or imply that private market strategies are appropriate in all cases.

As the Department stated in withdrawing the Supplemental Statement, the statement imposed new standards on plan sponsors that have no basis in ERISA and departed from the Department's historically neutral, principles-based approach to fiduciary investment decisions. This position also reflects the Department's statement in rescinding the 2022 Compliance Assistance Release on cryptocurrency investments: "[w]hen evaluating any particular investment type, a plan fiduciary's decision should consider all relevant facts and circumstances and will 'necessarily be context specific.'"[32] Indeed, ERISA does not prohibit a fiduciary from selecting any particular type of investment alternative or asset class, and the Department does not have authority to reject particular types of investments for any category of plan. To these ends, we urge the Department to consider further guidance reaffirming these points, as well as the guidance in the 2020 Information Letter.

In addition, as directed by the EO, the Department should take further action to ensure that retirement savers have access to funds that include private market investments when the relevant plan fiduciary determines that such access provides an appropriate opportunity for plan participants and beneficiaries to enhance the net risk-adjusted returns on their retirement assets.

Modernize PTE 77-4. As part of a broader set of initiatives intended to encourage and expand access to private market strategies, the Department should consider amending PTE 77-4 to expand its scope to cover additional product structures beyond open-end mutual funds. PTE 77-4 is a long-standing, commonly used class exemption that exempts from the prohibited transaction restrictions the purchase and sale by an employee benefit plan of shares of an open-end investment company registered under the Investment Company Act of 1940 when a fiduciary with respect to the plan (e.g., an investment manager), or an affiliate thereof, is also the investment adviser for the investment company. The range of investment vehicles and strategies used in retirement plans today (including as building blocks within traditional fund structures) has expanded, particularly in DC plans where open-end mutual funds, CITs, and other pooled investment products all compete to be included in investment lineups. Investment managers designing products for retirement plans work with a variety of

[32] *See* EBSA Compliance Assistance Release 2025-01 (May 28, 2025) (citing *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014)).

structures in addition to open-end registered mutual funds, especially in the context of multi-asset portfolios (like target date funds) that allocate to alternative investment strategies. An expanded exemption should cover all investment products, including (among other things) all registered investment companies (not just open-end, but closed-end funds as well), CITs, business development companies, and private funds, while maintaining the exemption's existing robust protections for plans and participants.[33]

Modernizing PTE 77-4 to accommodate the incorporation of a wider range of product structures would advance the goals of the EO by providing investment managers with greater efficiency and flexibility to offer plan participants access to innovative investment strategies. They could rely on the specific set of conditions set forth in PTE 77-4, rather than a patchwork of class and individual exemptions. Such an expansion would encourage the product innovation that was stifled under the prior Administration and reduce costs for retirement savers, both of which are priorities of the current Administration. This change also would complement other Department efforts targeted at providing guidance to plan fiduciaries who are evaluating investments that incorporate private market strategies.

We look forward to working with the Department in its effort to provide further clarity to fiduciaries of DC plans considering private market strategies and to remove any artificial impediments preventing DC plans from diversifying into private assets.

IV. Resolve Status of 2024 Fiduciary Advice Rulemaking and Provide Retroactive Nonenforcement Relief Related to Vacated Interpretive Guidance

The Department in 2024 finalized extensive amendments to the rules governing when a party is a fiduciary under ERISA in connection with providing investment advice.[34] This was the latest chapter in the Department's ill-considered and largely unsuccessful 15-year effort to improperly expand fiduciary status beyond true relationships of trust and confidence and extend ERISA Title I fiduciary standards of conduct to IRAs. We are hopeful that EBSA, under

[33] In particular, PTE 77-4 prevents charging multiple layers of advisory or management fees (i.e., "double-dipping") and does not provide relief for the receipt of a sales commission. It also requires disclosures to a second plan fiduciary (who is independent of the adviser; typically, the client or its consultant) specifically addressing issues relevant to the plan fiduciary's decision-making, and the consent of that independent fiduciary.

[34] We refer here not only to the Retirement Security Rule: Definition of an Investment Advice Fiduciary, but also to the amendments to various prohibited transaction class exemptions that were promulgated along with the Rule.

your leadership, will abandon efforts to regulate beyond its statutory authority and restore clear lines between fiduciary advice and permitted sales conduct.

As ICI noted in our comment letters and testimony, the 2024 fiduciary rulemaking suffers from numerous legal and practical flaws.[35] We believe the Department's attempt through regulation to expand EBSA's oversight of IRAs is inconsistent with the Department's statutory authority. In addition, the 2024 rulemaking effectively treats as fiduciary advice sales conversations and other interactions where there is no true relationship of trust and confidence. Rules governing fiduciary status must provide clarity and must not impede commonplace financial interactions that help investors make informed decisions. To this end, fiduciary status under ERISA should only apply where, as the Fifth Circuit held in *Chamber of Commerce v. United States Department of Labor*,[36] the existence of a relationship of trust and confidence is clear.

The 2024 rulemaking also failed to meet the Administrative Procedure Act's standards for economic analysis and notice and comment requirements. In this regard, the rulemaking's regulatory impact analysis (RIA) was wholly insufficient, both as to its quantification of the anticipated benefits of the rulemaking and as to its costs. As ICI previously pointed out, the proposal's RIA failed to quantify any purported benefits of the proposal, while likely grossly underestimating the costs of the changes—both the direct costs of implementation and the costs to investors from loss of access to information and assistance.[37] Furthermore, the RIA failed to factor in the significance of developments in the retirement and fund markets over the past two decades, which negated the need for the Department's proposal. These market developments include retirement investors incurring substantially lower fees for investing in mutual funds, the rise of head-to-head competition between broker-sold and no-load funds,

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[35] In addition to testifying during Day 2 (December 13, 2023) of the Department's hearing on the 2024 fiduciary rulemaking, ICI submitted a comment letter to the Department, testified during a US House of Representatives hearing, and published other commentary. *See* ICI Testimony for DOL Hearing on Fiduciary Proposal (December 13, 2023) (Statement of ICI); Letter from Eric J. Pan, President & CEO, and Elena Barone Chism, Deputy General Counsel - Retirement Policy, ICI, to Office of Regulations and Interpretations, Office of Exemption Determinations, EBSA (January 2, 2024); Protecting American Savers and Retirees from DOL's Regulatory Overreach: House Subcommittee on Health, Employment, Labor, and Pensions (February 15, 2024) (statement of ICI dated February 29, 2024); Lei Li et al., GAO Analysis Misrepresents Case for DOL Fiduciary Rule, ICI Viewpoints (December 17, 2024); Elena Barone Chism, *The DOL's Hurried Fiduciary Rule Poses Lasting Harm to Investors*, ICI Viewpoints (April 12, 2024).

[36] *Chamber of Commerce*, 885 F.3d 360 (5th Cir. 2018).

[37] *See Appendix: ICI's Economic Analysis of the Department's Proposed Rulemaking on Definition of an Investment Advice Fiduciary* in Letter from Eric J. Pan, President & CEO, and Elena Barone Chism, Deputy General Counsel - Retirement Policy, ICI, to Office of Regulations and Interpretations, Office of Exemption Determinations, EBSA (January 2, 2024).

and a sea-change by financial intermediaries and investors away from load- to no-load share classes (or funds).[38]

Moreover, the Department initiated the rulemaking shortly after numerous other regulatory changes (including the SEC's Regulation Best Interest and the Department's PTE 2020-02) impacting the very practices the Department sought to regulate, without allowing time for the benefits of these other changes to be realized or even attempting to measure such benefits.[39] This rush to a rule was exacerbated by a very short public comment period (with a hearing *during* the comment period) that was unprecedented, with negative impacts that were particularly amplified for a rulemaking of this magnitude.

ICI Recommendation:

> *Status of 2024 rulemaking.* As you are aware, the 2024 fiduciary rulemaking is currently stayed pending the resolution of litigation in two federal district courts.[40] To the extent that the litigation continues and the courts do not vacate the rulemaking, we urge the Department to expeditiously rescind the amendments to the definition of fiduciary investment advice and the amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128, which make those exemptions unavailable for the provision of investment advice. We note that the 2024 amendments to PTE 2020-02 contained some helpful provisions that expanded the availability of the exemption. These deregulatory amendments should be

[38] *Id*.

[39] The SEC adopted Regulation Best Interest and the Form CRS Relationship Summary in 2019 and, in Commission interpretations the same year, confirmed the fiduciary duty applicable to investment advisers and when a broker-dealer's advisory services are "solely incidental" to its primary business as a broker-dealer. *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019); Form CRS Relationship Summary; Amendments to Form ADV, 84 Fed. Reg. 33492 (July 12, 2019); Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33669 (July 12, 2019); Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, 84 Fed. Reg. 33681 (July 12, 2019). The Department in 2020 finalized PTE 2020-02, which set parameters around advice to retirement investors. Also in 2020, the National Association of Insurance Commissioners (NAIC) adopted a model best interest standard for annuity product sales, which standard has been adopted by the vast majority of states. NAIC Suitability in Annuity Transactions Model Regulation (Spring 2020).

[40] The effective date of the rulemaking has been stayed by two federal district courts pending resolution of lawsuits challenging the rulemaking. *FACC v. DOL*, No. 6:24-cv-00163 (E.D. Tx. filed May 2, 2024), *stay appealed*, No. 24- 40637 (5th Cir.); *ACLI, et al. v. DOL*, No. 4:24-cv-00482-O (N.D. Tx. filed May 24, 2024), *stay appealed*, No. 24- 20890 (5th Cir.).

preserved, whether as part of a new rulemaking or a considered amendment that rescinds the other changes to PTE 2020-02.[41]

Nonenforcement relief. In addition to resolving the 2024 rulemaking, the Department also should address the status of, and provide nonenforcement relief with respect to, earlier interpretive guidance related to the definition of fiduciary advice issued in 2020 and 2021, which has since been repudiated by courts. The preamble to PTE 2020-02,[42] and subsequent FAQ guidance issued in 2021,[43] provided commentary regarding the Department's interpretation of the regulation's five-part test for fiduciary status, primarily in the context of a recommendation to roll over from a Title I ERISA plan to an IRA (governed by Title II of ERISA).[44] Two federal courts now have vacated the Department's assertion that when an investment advice provider has not previously provided advice but expects to regularly make investment recommendations regarding an IRA as part of an ongoing relationship, the advice to roll assets out of an employee benefit plan into the IRA would be the start of an advice relationship that satisfies the regular basis requirement of the five-part test.[45] We urge the Department to provide nonenforcement relief for firms that accepted fiduciary status in order to comply with the now vacated interpretation. This relief should apply both retroactively and prospectively with respect to any prohibited transactions occurring as a result of good faith, but imperfect, efforts to comply with PTE 2020-02, as well as for transactions

[41] The beneficial deregulatory amendments to PTE 2020-02 include the extension of PTE 2020-02 to broadly cover principal transactions (including sales of closed-end fund shares traded on a principal basis at inception) and robo-advice.

[42] Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 82798 (December 18, 2020)

[43] *See* Frequently Asked Questions, *New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions* (DOL April 2021).

[44] *See* preamble at 85 Fed. Reg. 82798, 82805. The preamble explained how the "regular basis" prong of the five-part test should apply to rollovers, noting that "advice to roll assets out of a Title I Plan into an IRA where the investment advice provider has not previously provided advice but will be regularly giving advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the regular basis prong."

[45] *See American Secs. Ass' v. DOL*, No. 8:22-cv-330 (M.D. Fl. February 13, 2023); *Federation of Americans for Consumer Choice v. DOL*, No. 3:22-CV-0243-K-BT (N.D. Tx. July 9, 2025). *See also Carfora v. Teachers Ins. Annuity Assoc. of America*, No. 21 Civ. 8384, 2022 BL 343104 (S.D.N.Y. Sept. 27, 2022) (rejecting claims that TIAA-CREF acted as an ERISA fiduciary in connection with soliciting participants to roll their balances out of employer-sponsored plans and into IRAs).

which were not authorized under the original PTE 2020-02, but would have been authorized under amended PTE 2020-02.

Beyond these specific recommendations, we encourage the Department to engage with the regulated community before considering any further changes to the rules governing investment advice. ICI and our members would welcome the opportunity to meet with you and your staff to discuss further.

V. Adhere to Fundamental ERISA Principles in Amending the Investment Duties Rule

The Department recently confirmed that it will engage in a new rulemaking on the subject of the Investment Duties rule and that it "intends to move through the rulemaking process as expeditiously as possible."[46] The Investment Duties regulation, which provides guidance to ERISA fiduciaries on satisfying their duties of prudence and loyalty in their investment decisions with respect to ERISA plans, was issued in 1979.[47] From 1994 to 2018, the Department issued seven interpretations addressing the appropriate role of environmental, social, and governance (ESG) factors (sometimes called economically targeted investments) in investment selection and the exercise of shareholder rights.[48] In 2020, the Department amended the regulation through two separate amendments addressing investment selection and the exercise of shareholder rights. Then, in 2022, the Department finalized additional amendments to the 2020 rulemaking.[49] Throughout this period of fluctuating guidance and regulatory amendments, the underlying ERISA principles have not changed. Fiduciaries must act solely in the interest of a plan's participants and beneficiaries, and for the exclusive

[46] *See* Letter from US Department of Justice to US Court of Appeals for the Fifth Circuit, dated May 28, 2025, regarding *Utah v. Chavez-DeRemer*, No. 23-11097, *State of Utah v. Chavez-DeRemer,* Docket No. 335, No. 23-11097 (5th Cir.).

[47] *See* Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37221 (June 26, 1979).

[48] The Department has changed its stance several times regarding fiduciaries' consideration of ESG factors (initially referred to as "economically targeted investments" (ETIs)) in investment selection and the exercise of shareholder rights, going back to 1994, in the form of several Interpretive Bulletins (IBs) and a 2018 Field Assistance Bulletin. Regarding investment selection, see IB 94-1, 59 Fed. Reg. 32606 (June 23, 1994); IB 2008-01, 73 Fed. Reg. 61734 (October 17, 2008); and IB 2015-01, 80 Fed. Reg. 65135 (October 26, 2015). Regarding exercising shareholder rights, see IB 94–2, 59 Fed. Reg. 38860 (July 29, 1994); IB 2008–02, 73 Fed. Reg. 61731 (October 17, 2008); and IB 2016–01, 81 Fed. Reg. 95879 (December 29, 2016). Field Assistance Bulletin 2018–01 (April 23, 2018) was intended to clarify, not replace, IB 2015-01 and IB 2016-01.

[49] *See* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (December 1, 2022), *amending* Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 (November 13, 2020) *and* Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658 (December 16, 2020).

purpose of providing benefits, which means that a fiduciary may not subordinate the economic interests of participants and beneficiaries to other objectives and may not sacrifice investment return or take on additional investment risk to promote benefits or goals unrelated to participants' and beneficiaries' economic interests.

ICI Recommendation:

We believe the 2022 final rule strikes an appropriate balance with respect to the fiduciary principles governing investment selection and affords fiduciaries the discretion to determine what factors are relevant in assessing the potential financial impact of an investment. ICI looks forward to working with you to ensure that any further amendments to the rule maintain this balance and do not impose new unnecessary regulatory burdens. We recommend consideration of the following principles as you move forward.

- ICI supports the long-understood tenet of ERISA described above that plan fiduciaries must be focused on the economic interests of a plan's participants and beneficiaries.
- The regulated community would benefit from a neutral rule that will stand the test of time, in contrast to the fluctuating interpretations issued over the last 30 years.
- The rule should allow fiduciaries to consider whatever factors they reasonably believe are financially relevant, even if those considerations may be categorized by some as being under the umbrella of ESG factors, and should not suggest that fiduciaries face increased risk if they do consider such factors for their economic relevance.
- The Department should not articulate different or heightened standards that apply only to certain investments or investment strategies. Rather, the rule should be neutral regarding types or categories of investments, instead allowing fiduciaries to exercise their judgment under the prudence and loyalty duties. As the Department itself explained in its recent release regarding 401(k) plan investment in cryptocurrencies, the Department traditionally has articulated a neutral approach to particular investment types and strategies, and when

evaluating any particular investment type a plan fiduciary's decision should consider all relevant facts and circumstances.[50]

- Any changes to the proxy voting provisions of the rule should result in a principles-based rule that allows plan fiduciaries to decide whether and how to vote any proxies presented to them, consistent with their duties of prudence and loyalty, without including any overly prescriptive requirements that will add cost, burden, and liability to plan fiduciaries. The rule should not impede the ability of investment managers and other plan fiduciaries to efficiently and effectively exercise their voting authority.
- The Department should take particular care that any regulation it issues on this topic does not have the unintended consequence of increasing the risk of litigation against retirement plan fiduciaries (for example, special documentation requirements beyond the standard ERISA requirements that could create a road map for lawsuits).

We encourage you to engage with the regulated community on this topic before publishing a proposed regulation. We believe it is important that the Department proceed carefully in this space, given that the precise articulation of the rules for investment selection will impact investment decisions beyond the consideration of ESG factors (for example, how a fiduciary may consider alternative investments such as private market investments) and could have unintended consequences.

VI. Rescind the 2024 Amendments to the Prohibited Transaction Exemption Procedures

The Department last year finalized extensive updates to the procedures governing the process by which parties apply for an administrative PTE under ERISA section 408(a).[51] These updates significantly increase the burdens of seeking and complying with both individual and class PTEs, require public disclosure of otherwise confidential business information as a condition to applying for a PTE, and effectively impose new standards not previously part of the PTE process.[52] Additionally, the Department's cost/benefit analysis failed to meet the requirements set forth in the Presidential Memorandum.

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[50] See *supra,* note 32.

[51] Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications, 89 Fed. Reg. 4662 (January 24, 2024) ("PTE Procedures").

[52] ICI highlighted our concerns with the amendments to the PTE Procedures in our comment letter on the proposed rulemaking. *See* Letter from David Abbey, Deputy General Counsel - Retirement Policy, and Shannon

Our concerns regarding the amended PTE Procedures are heightened by the fact that two of the rulemakings discussed herein—the 2024 fiduciary advice rulemaking and, more significantly, the currently effective amended QPAM exemption—directly implicate the administrative PTE process. Given the significant adverse implications for a party no longer eligible for an existing class exemption (whether statutory or administrative), we are concerned that the PTE Procedures provide little comfort that individual exemptions will realistically be available to parties going forward.

ICI Recommendation:

> We recommend that the Department rescind the 2024 amendments to the PTE Procedures, and work with the regulated community to examine the administrative exemptions process and identify areas for potential improvement. We also recommend that the Department reconsider its interpretations of the basic criteria for granting an administrative exemption under ERISA section 408(a). Among other things, we are concerned that the Department's interpretations of the meaning of "administratively feasible" and "protective of the rights of participants and beneficiaries of such plan" have led to PTEs that are unreasonably challenging for the regulated community to implement, and that seek to inappropriately guarantee a plan's return on investments. ICI and our members look forward to working with you and your staff in this effort.

VII. Enhance the Effectiveness of Participant Disclosures

ICI supports efforts that help DC plan participants fully understand their retirement plans and the investments available to them. We believe that clear and efficient communications can lead to greater participation in these plans and better results for retirement savers. We have submitted comment letters over the past several years that provide suggestions for improving the effectiveness of retirement plan disclosures.[53]

Salinas, Associate General Counsel - Retirement Policy, ICI, to Acting Assistant Secretary Ali Khawar, EBSA (May 31, 2022).

[53] *See* Letter from Elena Chism, Deputy General Counsel - Retirement Policy, and Shannon N. Salinas, Associate General Counsel - Retirement Policy, ICI, to Office of Regulations and Interpretations, EBSA (May 22, 2024) (responding to RFI pursuant to SECURE 2.0 Act § 319 – Effectiveness of Reporting and Disclosure Requirements); Letter from Elena Chism, Deputy General Counsel - Retirement Policy, Shannon N. Salinas, Associate General Counsel - Retirement Policy, and David A. Cohen, Associate General Counsel - Retirement Policy, ICI, to Office of Regulations and Interpretations, EBSA (October 10, 2023) (responding to RFI on SECURE 2.0 Act reporting and disclosure requirements); Letter from David M. Abbey, Deputy General Counsel - Retirement Policy, and Shannon N. Salinas, Assistant General Counsel - Retirement Security, ICI, to Office of Regulations and Interpretations, EBSA (November 22, 2019) (responding to 2019 proposed e-delivery safe harbor and accompanying RFI); Letter from

We also believe that the retirement plan disclosure regime would benefit from simplification and consolidation, as contemplated by numerous provisions of the SECURE 2.0 Act. These provisions include:

- Section 319, which requires that the Department, Department of Treasury, and Pension Benefit Guaranty Corporation review and report to Congress on existing reporting and disclosure requirements for retirement plans, including their effectiveness, and make recommendations to consolidate, simplify, standardize, and improve such requirements;
- Section 340, which directs the Department to review its fee disclosure regulation for participant-directed individual account plans[54] and explore how the disclosures could be improved to enhance participants' understanding of fees; and
- Section 341, which directs the Department and the Department of Treasury to adopt regulations permitting a DC plan to consolidate certain required notices.

There is a common sentiment that DC plan participants are overwhelmed by the many disclosures they receive, and that they simply do not read them. ERISA's required disclosures are often technical and, notwithstanding their importance, may not necessarily be designed in a way that would encourage recipients to read them. Our comment letters make a number of suggestions that we believe can increase the likelihood of DC plan disclosures being read and more easily understood by retirement investors.[55] A key element of these suggestions is providing greater flexibility for plan sponsors and their service providers in providing disclosures. Plan sponsors understand the unique characteristics of their particular workforces and are best positioned to determine—working with their service providers—what design, delivery, and content criteria will best serve their plan participants.

Paul Schott Stevens, President & CEO, ICI, and Brian H. Graff, CEO, American Retirement Association, to Preston Rutledge, Assistant Secretary, EBSA (April 30, 2018) (transmitting Peter Swire and DeBrae Kennedy-Mayo, *2018 Update to Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery*); Letter from David M. Abbey, Deputy General Counsel - Retirement Security, and Shannon N. Salinas, Assistant General Counsel - Retirement Security, ICI, to Larry Good, Executive Secretary, ERISA Advisory Council, DOL (August 18, 2017) (providing input to the ERISA Advisory Council on its study topic "Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors").

[54] *See* 29 CFR 2550.404a-5.

[55] Our comment letters cite ICI research that suggests DC plan participants do benefit from existing disclosures, as evidenced by a tendency to concentrate their assets in lower-cost funds and to have age-appropriate asset allocations. We nonetheless see significant room for improvement in the required notices and disclosures framework.

ICI Recommendation:

Principles for improving disclosures. We look forward to working with you and your staff as you work to implement the above SECURE 2.0 Act provisions impacting participant disclosures. In the meantime, the Department should consider the following principles, which are further detailed in our comment letters.

- To provide more effective disclosures to participants, the Department should encourage efforts to consolidate and simplify disclosures where possible. Consolidation would focus participants on the key information relevant to the decisions they must make, while ensuring that more detailed information is available if needed. The Department could facilitate consolidation by encouraging electronic delivery where possible and by addressing liability concerns that plan sponsors and service providers may have due to consolidating notices.
- The Department should encourage flexibility in the design of disclosures. Plan sponsors and their service providers have for years been using design elements to increase participants' engagement and comprehension. However, we caution against requiring any particular design elements. The issuance of rigid design and content criteria for plan communications risks stifling innovation and efforts to determine—through consideration of participant behavior—what design and content elements work best to achieve the goals of increasing participant understanding of the plan and producing better outcomes.
- Notices are most effective when the participant receives them at the point in time at which a decision relevant to the participant needs to be made. Decisions typically need to be made when employees become eligible to participate, when they terminate employment, when they experience some type of life event, or when there is a change to the plan or the investments available. The Department could permit or encourage disclosures made at salient moments. This would ensure that information relevant to particular decisions is available when needed.
- Given the variability of plan populations, we urge the Department not to add new standards for comprehension levels or for providing disclosures in languages other than English.

Electronic delivery. The SECURE 2.0 Act in section 338 also makes changes to the rules for using electronic delivery of participant notices by requiring that plan participants receive paper statements in certain cases and directing the Department to update its

regulations to incorporate new requirements for allowing participants to opt for paper disclosures more broadly. We have a strong interest in ensuring that the implementation of section 338 does not detract from the successful framework for electronic delivery established by the Department over the years. To this end, the Department should not modify the 2002 electronic delivery safe harbor beyond the narrow change specifically mandated by section 338 because the safe harbor has proven effective for participants for over 20 years. Similarly, changes to the 2020 electronic delivery safe harbor are not needed because the conditions specified by section 338(b)(2) of the Act duplicate either requirements that are already included in the safe harbor or existing practices.

One step the Department could take to increase regulatory efficiency is to coordinate with the Department of Treasury and Internal Revenue Service (IRS) on the electronic delivery standards. Specifically, the Department should urge IRS to confirm that a plan that meets the standards in the Department's 2020 safe harbor is deemed to meet the IRS's standards applicable to notices and disclosures that fall under the IRS's jurisdiction. As we have previously explained, this coordination would provide flexibility to plans and would streamline compliance.[56]

VIII. Engage with Stakeholders in Implementing the America First Investment Policy

The White House earlier this year announced an America First Investment Policy, pursuant to which investments by US persons in foreign adversary companies are discouraged.[57] Among other things, the Policy aims to "restore the highest fiduciary standards as required by [ERISA], seeking to ensure that foreign adversary companies are ineligible for pension plan contributions." The Policy directs the Department to "publish updated fiduciary standards under [ERISA] for investments in public market securities of foreign adversary companies."[58]

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[56] *See* Letter from Elena Chism, Deputy General Counsel - Retirement Policy, and Shannon N. Salinas, Associate General Counsel - Retirement Policy, ICI, to Office of Regulations and Interpretations, EBSA (May 22, 2024) (responding to RFI pursuant to SECURE 2.0 Act § 319 – Effectiveness of Reporting and Disclosure Requirements); Letter from David M. Abbey, Deputy General Counsel - Retirement Policy, and Shannon N. Salinas, Assistant General Counsel - Retirement Security, ICI, to Office of Regulations and Interpretations, EBSA (November 22, 2019) (responding to 2019 proposed e-delivery safe harbor and accompanying RFI).

[57] Presidential Action, *America First Investment Policy* (White House February 21, 2025).

[58] The Policy defines "foreign adversary" to include the People's Republic of China, including the Hong Kong Special Administrative Region and the Macau Special Administrative Region; the Republic of Cuba; the Islamic Republic of Iran; the Democratic People's Republic of Korea; the Russian Federation; and the regime of Venezuelan politician Nicolás Maduro. While not specifically defined in the Policy, "foreign adversary companies" appears to refer to companies owned or controlled by (either through actual or effective ownership or control), or

ICI Recommendation:

As you and your staff work to determine the implications of the Policy for retirement plans, including DC plans, we would welcome the opportunity to work with you to ensure that any resulting requirements are not only effectively administrable by the asset managers serving these plans and consistent with ERISA, but also that they do not increase costs for working Americans as they save for retirement. Restrictions on retirement plans' ability to invest in companies with ties to foreign adversaries will add complexity to the management of plan assets, and it is important to consider these factors in determining how to implement the Policy.

Compliance could be further complicated if restrictions apply to investments held within a pooled investment vehicle that a plan invests in, such as a mutual fund. A look-through rule for mutual funds and other pooled funds could significantly narrow the range of investment options available to ERISA plans. For example, plans may be precluded from using numerous index funds and participants would be less globally diversified. More broadly, limitations such as this could impede a plan fiduciary's ability to focus solely on the financial interests of participants and beneficiaries in managing plan assets, which as you know is a fundamental tenet of ERISA. We therefore recommend that the Department carefully consider how to minimize any unintended consequences that could result from implementing the Policy for ERISA plans.

affiliated with, a foreign adversary government or its military; as well as investments (including those by funds) directed or facilitated by foreign adversaries or foreign adversary companies.

Conclusion

ICI and our members look forward to working closely with you and your colleagues in EBSA to develop appropriate and effective regulatory policies in the above areas, as well as in any other retirement-related areas on which EBSA may determine to focus. We would welcome the opportunity to meet with you and to convey in person our strong interest in EBSA's retirement priorities. In the meantime, we would be happy to provide additional information on these issues or to discuss any of these matters with you.

Sincerely,

/s/ Eric J. Pan

Eric J. Pan
President & CEO

/s/ Elena Chism

Elena Barone Chism
Deputy General Counsel - Retirement Policy

cc: The Honorable Keith E. Sonderling, Deputy Secretary of Labor