ROB BONTA
STATE OF CALIFORNIA
ATTORNEY GENERAL

KWAME RAOUL
STATE OF ILLINOIS
ATTORNEY GENERAL

LETITIA JAMES
STATE OF NEW YORK
ATTORNEY GENERAL

DAN RAYFIELD
STATE OF OREGON
ATTORNEY GENERAL

DEPARTMENT OF LABOR
& INDUSTRY
PENNSYLVANIA

May 29, 2026
Via Federal eRulemaking Portal (http://www.regulations.gov)

Keith E. Sonderling
Acting Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Elizabeth Schumacher
Acting Director
Office of Regulations and Interpretations,
Employee Benefits Security Administration,
U.S. Department of Labor, Room N-5655,
200 Constitution Avenue NW,
Washington, DC 20210

Re: Notice of Proposed Rulemaking, *Fiduciary Duties in Selecting Designated Investment Alternatives*, 91 Fed. Reg. 16088 (Mar. 31, 2026), RIN 1210-AC38

Dear Acting Secretary Sonderling and Acting Director Schumacher:

We write on behalf of the California Attorney General, the Illinois Attorney General, the Oregon Attorney General, the New York Attorney General, and the Commonwealth of Pennsylvania's Department of Labor & Industry, joined by the Attorneys General of the States of

Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Rhode Island, Vermont, Virginia, and Wisconsin (collectively, States) to oppose the U.S. Department of Labor's ("DOL" or "Department") Notice of Proposed Rulemaking ("NPRM") entitled *Fiduciary Duties in Selecting Designated Investment Alternatives*, 91 Fed. Reg. 16088 (Mar. 31, 2026) ("proposed rule" or "proposal"). This rule, if finalized as proposed, would unjustifiably weaken the high standard governing the duty of prudence that applies to the fiduciaries who manage retirement plans governed by the Employee Retirement Income Security Act of 1974 (ERISA): a standard deliberately crafted by Congress and assiduously policed by the federal courts for the protection of workers and retirees, to ensure the financial soundness of the investments on which they depend for a dignified retirement. The States strongly oppose this proposal to create a "safe harbor" for fiduciaries who complete a procedural box-checking exercise, which contravenes established law and ERISA's investor-protection goals.

The experiences of the undersigned state law enforcers demonstrate that robust enforcement litigation creates accountability and deters unlawful and risky conduct, to the benefit of workers and investors. The proposed rule's focus on protecting plan fiduciaries from so-called "opportunistic trial lawyers," 91 Fed. Reg. at 16,088, instead of protecting workers and retirees from the loss of their hard-earned savings due to thoughtless or even incompetent plan management, evinces a basic misunderstanding of both ERISA's carefully-crafted civil enforcement scheme and ERISA's fundamental goal of ensuring that workers receive the retirement benefits they have worked so hard to earn. It also contradicts decades of clear Supreme Court and circuit court precedent upholding ERISA's fiduciary standard as the highest known to the law—the polar opposite of the deferential "presumption of prudence" the proposed rule seeks to create. *See id.*

Additionally, the proposal, if finalized, would harm workers and retirees because it aims to increase their exposure to risky, volatile, and poorly understood "alternative assets" like cryptocurrency and private credit, which could result in catastrophic financial losses. Those losses, in turn, would prejudice the States by increasing demand on our public assistance programs while simultaneously decreasing tax revenues. If finalized, the proposed rule would also require State outreach and education to protect residents from these new threats to their retirement security—despite the Department's baseless assertion that this proposed rule would not affect the States. For these reasons, DOL should not finalize this proposed rule.

I. The Proposed Rule Is Contrary to Law.

The stated purpose of the proposed rule is to clarify and provide "a safe harbor for a fiduciary's duty of prudence under the Employee Retirement Income Security Act of 1974 (ERISA) in connection with selecting designated investment alternatives for a participant-directed individual account plan, including asset allocation funds that include alternative assets." 91 Fed. Reg. at 16,088. The proposed rule in fact contradicts both key statutory provisions of ERISA and clear guidelines from the caselaw interpreting ERISA, undermining the very purpose of ERISA's fiduciary duty of prudence.

A. ERISA's Text and Purpose Require That Plan Fiduciaries Be Held to a High Standard of Prudence, Which the Proposed Rule Undermines.

ERISA is a worker-protection statute. Indeed, that is how the statute describes itself, stating in its very first section: "It is hereby declared to be the policy of this chapter to protect . . . participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b). Passed in the wake of numerous scandals in which workers and retirees were harmed by mismanagement of retirement plan assets,[1] it includes an explicit statutory finding that, "owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . [that] safeguards be provided with respect to the establishment, operation, and administration of such plans." 29 U.S.C. § 1001(a). The statute's express goal is to set "standards . . . assuring the equitable character of [retirement] plans and their financial soundness," including "standards of conduct, etc., for fiduciaries." *Id.*; § 1001(b).

To those ends, ERISA requires that private retirement plan assets "be held in trust." 29 U.S.C. § 1103(a). In this way, Congress invoked the "common law of trusts" to define the general scope of fiduciary authority and responsibility,[2] rather than explicitly enumerating all of the duties of trustees and other fiduciaries.[3] Congress did, however, explicitly define the duty of prudence that applies to fiduciaries who manage covered retirement plan assets, which is the subject of the proposed rule. Specifically, ERISA requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

This definition evidences a Congressional determination that the common law of trusts, left on its own, did not go far enough in protecting plan assets.[4] In *Varity Corp. v. Howe*, the Supreme Court noted:

> [E]ven with respect to the trust-like fiduciary standards ERISA imposes, Congress "expect[ed] that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans," *id.*, at 302, 3 Leg. Hist. 4569, as they "develop a 'federal common law of rights and obligations under ERISA-regulated plans.'"[5]

---

[1] *See, e.g.*, 119 Cong. Rec. 30368 (1973) (Hartke) (citing numerous retirement plan scandals); 119 Cong. Rec. 30042 (1973) (Bentsen) ("Instances of misuse and poor management of pension plan assets demonstrate the need for stricter controls."); 119 Cong. Rec. 30005 (1973) (Williams) (citing case of plan that deposited participants' funds in a bank where they "gathered no interest at all" as a "grievous abuse").

[2] H. R. Rep. No. 93-533 at 3-5, 11-13 (1973), 2 Legislative History of the Employee Retirement Income Security Act of 1974 (Comm. Print compiled for the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare by the Library of Congress), Pub. L. 93-406 at 2350-2352, 2358-2360 (1976)

[3] *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.,* 472 U.S. 559, 570 (1985).

[4] *See also* 29 U.S.C. § 1001(a); H. R. Rep. No. 93-533, *supra*, at 3-5, 11-13, 2 Leg. Hist. 2350-2352; 2358-2360; H. R. Conf. Rep. No. 93-1280 at 295, 302 (1974), 3 Leg. Hist. 4562, 4569.

[5] 516 U.S. 489, 497 (1996) (quoting *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110-111 (1989)).

In keeping with Congress's purpose in enacting ERISA, as discussed further below, that court-developed federal common law has repeatedly recognized that ERISA fiduciary duties are "the highest known to the law."[6]

Congress's choice to impose a high standard of prudence on ERISA fiduciaries, who manage large amounts of other people's money without their own "skin in the game," was deliberate. The stakes of a fiduciary's decisions are extremely high: as the legislative history reflects,[7] for the vast majority of Americans, Social Security will not suffice to meet their financial needs,[8] and they thus depend heavily on their fiduciary-managed retirement savings in order to support them in their later years. One imprudent decision by a fiduciary could result in significant losses to workers and retirees—most of whom do not have enough money saved for retirement in the first place, and can thus ill afford even small losses.[9]

Moreover, when fiduciaries select investment alternatives—meaning, when they decide which investments "participants are defaulted into" and where plan participants can invest their money if they opt out of the default, 91 Fed. Reg. at 16,103—they are often choosing between complex financial products, and the average worker or retiree cannot meaningfully "check their work." Most participants thus have no choice but to depend on the judgment of the fiduciary who manages their plan, underlining the necessity of holding such fiduciaries to the very highest standard—and the necessity of a robust enforcement mechanism permitting workers and retirees to avail themselves of a legal process that *can* check the fiduciary's work and hold them accountable for carelessness or incompetence. To that end, ERISA expressly states that it is "the policy of this chapter to . . . provid[e] for appropriate remedies, sanctions, and *ready access to the federal courts*," 29 U.S.C. § 1001(b) (emphasis supplied), and Congress enacted that policy through, *inter alia*, establishing a private right of action for plan participants and beneficiaries, and allowing for an award of attorney's fees, 29 U.S.C. § 1132(a); § 1132(g)(1).

Against this backdrop, the Department proposes to create a "safe harbor" for fiduciaries who merely assert that they "considered" an incomplete and insufficient list of six factors when selecting investment alternatives, with no inquiry into the *actual* "care, skill, prudence, and diligence" exercised by such fiduciaries. *See* 91 Fed. Reg. at 16,095 (The judgment of fiduciaries who "consider[] . . . any of the six factors outlined . . . is presumed to be reasonable and is

---

[6] *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982); *Jones v. Am. Gen. Life & Acc. Ins. Co.*, 370 F.3d 1065, 1071 (11th Cir. 2004); *Appvion, Inc. Ret. Sav. & Emp. Stock Ownership Plan v. Buth*, 99 F.4th 928 (7th Cir. 2024).

[7] 119 Cong. Rec. 30368 (1973) (Hartke).

[8] SOC. SEC. ADMIN., 2025 Statement Insert at 2 ("Financial planners generally agree retirees will need about 70-80 percent of preretirement earnings to enjoy a comfortable retirement. For an average worker, Social Security replaces about 40 percent of annual preretirement earnings."), https://www.ssa.gov/newsletter/Statement%20Insert%2025+.pdf.

[9] Tyler Bond & Joelle Saad-Lessler, NAT'L INST. ON RET. SEC., *Retirement in America: an Analysis of Retirement Preparedness Among Working-Age Americans* (Feb. 5, 2026), at 18 (As of December 2022, the median amount saved was only $955, and even among workers who had savings, the median amount was $40,000.), https://www.nirsonline.org/research/retirementinamerica2026/ [https://perma.cc/R5AH-9PYD].

entitled to significant deference."). This proposal is plainly contrary to the statute it purports to interpret. The contrast between ERISA and the proposed rule is stark: whereas ERISA is based on an express policy of protecting *workers*, the proposed rule is based on a policy of protecting *fiduciaries*, and whereas ERISA is based on an express policy of "providing . . . ready access to the federal courts" for plan participants, the proposed rule is based on a policy of *reducing* litigation brought by workers and retirees.[10] ERISA holds fiduciaries to the highest standard known to law, above and beyond even the protective standard of prudence established by the common law of trusts; the proposed rule, to the contrary, seeks to impose a *presumption* of prudence and deference to a fiduciary's decisions, no matter how thoughtless or foolish those decisions may be. 91 Fed. Reg. at 16,088.

There is no way to reconcile the proposed rule's safe harbor with the goals and requirements of ERISA's duty of prudence. Indeed, the proposed rule turns ERISA's carefully crafted, worker-protective statutory scheme on its head. Just as it improperly urges federal courts to defer to the decisions of plan fiduciaries, the Department claims that its topsy-turvy interpretation of ERISA is entitled to *Skidmore* deference from those same courts. 91 Fed. Reg. at 16,092. Not so. The proposed rule, if enacted, would violate both the text and the purpose of ERISA. It is thus contrary to law and entitled to nothing but a swift and successful action for vacatur under the Administrative Procedure Act.

B. The Proposed Rule Disregards and Contradicts Decades of Precedent Policing ERISA's Fiduciary Duties.

Courts applying ERISA have repeatedly emphasized the exacting nature of fiduciary obligations, rejected special presumptions favoring fiduciaries, and required context-specific judicial scrutiny of fiduciary investment decisions. The proposed rule departs from those principles, in defiance of these precedents, in multiple respects.

i. Courts Have Consistently Applied Exacting Fiduciary Standards Under ERISA.

ERISA intentionally imposes exacting standards on fiduciaries for good reason: more than 100 million workers' retirement savings, amounting to over $10 trillion, are entrusted to them.[11] The nature of ERISA's "prudent person" standard has been elaborated in a substantial body of case law, in which courts have emphasized ERISA's "high standards of fiduciary duty."[12] Courts have repeatedly recognized that ERISA fiduciary duties are "the highest known

[10] *See, e.g.*, 91 Fed. Reg. at 16,092 (complaining about "subjecting a fiduciary to constant Monday-morning quarterbacking"); *id.* at 16,093 ("[T]he Department is to prioritize approaches that are designed to curb litigation risk."); *id.* at 16,095 ("The Department is concerned that the prevailing climate of litigation poses significant challenges for plan sponsors and fiduciaries."); *id.* at 16,105 (complaining about "courts often allowing cases to proceed to discovery, which causes plans to spend millions in defense and creates settlement leverage for plaintiffs").

[11] Elizabeth A. Myers & John J. Tololeski, Cong. Research Serv., IF13193, *U.S. Retirement Assets: Data in Brief* (Apr. 1, 2026).

[12] *Tatum v. RJR Pension Investment Committee*, 761 F.3d 346, 355 (4th Cir. 2014).

to law."[13] This standard requires more than diligence and good intentions. As the Fifth Circuit explained, "a pure heart and an empty head are not enough."[14] Rather, an ERISA fiduciary must satisfy the standard of an investment professional: "A fiduciary's process must bear the marks of loyalty, skill, and diligence expected of an expert in the field."[15] Moreover, this standard applies not only to initial investment decisions, but also to a fiduciary's continuing duty to monitor plan investments and remove imprudent ones.[16]

ii. Supreme Court Precedent Rejects Special Presumptions Favoring Fiduciaries.

The Supreme Court's decision in *Fifth Third Bancorp v. Dudenhoeffer* is particularly instructive because it rejected precisely the sort of special judicial deference and fiduciary-favoring presumptions reflected in the proposed rule. In *Dudenhoeffer*, the Court unanimously rejected the "presumption of prudence" previously applied by several circuits in employee stock ownership plan (ESOP) cases, holding instead that "the same standard of prudence applies to all ERISA fiduciaries."[17]

The proposed rule expressly states that "arbiters of disputes should defer to fiduciaries under a presumption of prudence" when fiduciaries follow the processes described in the rule. 91 Fed. Reg. at 16,088. The rule likewise repeatedly characterizes its six enumerated factors and examples as "safe harbors" demonstrating prudence. *See id*. at 16,095. In practical effect, these safe harbors operate as presumptions favoring fiduciaries who satisfy selected procedural criteria. But in *Dudenhoeffer*, the Supreme Court rejected special presumptions designed to shield fiduciaries from ordinary judicial scrutiny under ERISA's statutory standards. The Court instead emphasized that meritless claims should be addressed through "careful, context-sensitive scrutiny of a complaint's allegations," not through fiduciary-favoring presumptions.[18]

The proposed rule also repeatedly emphasizes that fiduciaries possess "maximum discretion" in selecting investments. 91 Fed. Reg. at 16,094. ERISA unquestionably grants fiduciaries substantial discretion in making investment judgments, particularly where multiple reasonable alternatives may exist. But fiduciary discretion exists within—not outside—ERISA's

---

[13] *Appvion*, 99 F.4th at 943; *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003); *Donovan v. Bierwirth*, 680 F.2d at 272 n.8.

[14] *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983).

[15] *Mator v. Wesco Distribution, Inc*., 102 F.4th 172, 183 (3d Cir. 2024) (quoting *Sweda v. University of Pennsylvania*, 923 F.3d 320, 329 (3d Cir. 2019)). The Section 404(c) safe harbor limiting fiduciary liability when participants exercise control over their own investment choices does not eliminate fiduciary liability for selecting and monitoring plan investment options. *See, e.g., DiFelice v. U.S. Airways, Inc*., 497 F.3d 410, 418 n.3 (4th Cir. 2007).

[16] *See Tibble v. Edison International*, 575 U.S. 523, 529 (2015) ("This continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset.").

[17] 573 U.S. 409, 418–19 (2014).

[18] 573 U.S. at 425.

duties of prudence and loyalty. Acknowledging that fiduciary investment decisions often involve difficult professional judgments does not justify a presumption that those judgments are prudent. ERISA necessarily contemplates that some investment decisions may fall outside the range of reasonable professional judgment. If courts were required to defer whenever fiduciaries could articulate a plausible rationale for an investment decision, the prudent-person standard would lose much of its force.[19]

Nor does rejection of heightened judicial deference improperly invite hindsight review. Courts routinely recognize that a poor investment outcome does not itself establish imprudence.[20] At the same time, however, ERISA claims necessarily arise after investment decisions have been made, and courts cannot evaluate fiduciary conduct without considering the information available at the time of the challenged decision. The relevant inquiry is therefore not whether fiduciaries achieved favorable results, but whether they exercised the high level of care, skill, prudence, and diligence required by ERISA when making and monitoring investments.

iii. Existing Case Law Requires Context-Specific Judicial Scrutiny of Fiduciary Conduct.

The Department's reliance on *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), is also misplaced. *Firestone* addressed judicial review of benefits determinations and plan interpretations, not fiduciary investment decisions under ERISA's duty of prudence. The Supreme Court expressly limited its holding to benefits-denial cases and explained that deferential review derives from trust-law principles applicable where plan documents confer discretionary interpretive authority.[21] Nothing in *Firestone* supports importing deferential review into ERISA prudence litigation questioning whether a fiduciary met their statutory obligations when making an investment decision.

The proposed rule's reliance on discrete safe harbors is also impossible to reconcile with case law emphasizing that prudence must be evaluated holistically and contextually, assessing the substantive merits of the particular transaction. Courts evaluate fiduciary conduct based on "the totality of the circumstances" involved in each particular transaction, rather than through isolated consideration of individual factors.[22] And courts have emphasized that investment options must be evaluated in light of available alternatives and the objectives of the plan as a whole.[23] By segmenting fiduciary decision-making into individually protected, purely procedural

---

[19] *Cf. Kowalewski v. Detweiler*, 770 F. Supp. 290, 296 (D. Md. 1991) ("The Court does not see how it could simply ignore the prudent man standard, and instead apply the arbitrary and capricious standard when reviewing fiduciary conduct involving plan administration and management, without rendering the provisions of section 1104 a meaningless superfluity.").

[20] *See, e.g.*, *DiFelice*, 497 F.3d at 424; *Pension Benefit Guaranty Corp. ex rel. Saint Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F3d 705, 716 (2d Cir. 2013).

[21] *Firestone*, 489 U.S. at 108-11.

[22] *DiFelice*, 497 F.3d at 418.

[23] *See Stegemann v. Gannett Co*., 970 F.3d 465 (8th Cir. 2020).

components, the proposed rule, if enacted, would insulate imprudent decisions from the holistic and substantive review ERISA requires.

iv. Courts Permit Reliance on Objective Indicia of Imprudence to Infer Process Deficiencies.

Although courts appropriately focus on fiduciary process rather than investment outcomes alone, judicial precedent also recognizes that objective indicia of imprudence may support an inference that fiduciaries failed to conduct an adequate investigation or monitoring process.[24] Courts have likewise recognized the informational asymmetry inherent in ERISA fiduciary litigation, where key details concerning fiduciary deliberations and monitoring processes ordinarily remain within defendants' exclusive control prior to discovery.[25] As a result, courts appropriately permit plaintiffs to rely on circumstantial allegations concerning the objective characteristics of challenged investments to support an inference that fiduciaries failed to conduct an adequate investigation or monitoring process.[26] Restricting courts to deferential review of fiduciary process alone, as the proposed rule seeks to do, contradicts that precedent by insulating imprudent conduct from meaningful judicial scrutiny precisely where evidence regarding the selection process is inaccessible to plan participants damaged by an imprudent decision.

v. The Proposal Improperly Seeks to Diminish Continued Monitoring Obligations

The proposed rule is fundamentally at odds with case law which uniformly recognizes that fiduciaries possess a continuing duty to monitor plan investments and remove imprudent options. The Department correctly acknowledges that continuing monitoring obligations exist, *see* 91 Fed. Reg. at 16,094 (discussing *Hughes v. Northwestern University*, 595 U.S. 170 (2022)), but indicates that the same piecemeal six-factor safe harbors applied to initial investment selection would also apply to the ongoing duty to monitor investments. This is problematic for the very same reasons that the deferential safe harbor approach is inappropriate as applied to investment selection.

***

In sum, the proposed rule conflicts with settled law construing ERISA's fiduciary duties by departing from those precedents to introduce fiduciary-favoring presumptions, encourage deferential judicial review, fragment the prudence inquiry into isolated safe harbors, and minimize the significance of objective imprudence and continuing monitoring obligations. Those approaches are inconsistent with Supreme Court and circuit precedent applying ERISA's

[24] *See Johnson v. Parker-Hannifin Corp*., 122 F.4th 205, 216–18 (6th Cir. 2024).

[25] *See Braden v. Wal-Mart Stores, Inc*., 588 F.3d 585, 598 (8th Cir. 2009).

[26] *See e.g., Daggett v. Waters Corp*., 731 F. Supp. 3d 121 (D. Mass. 2024).

exacting fiduciary standards, which would render the proposed rule facially contrary to law if finalized.

II. The Proposed Rule Would Harm Workers and Retirees and Threaten States' Interests.

A. The Proposed Rule Would Harm Plan Participants.

As the Department acknowledges, "Defined contribution plan fiduciaries have generally avoided including investments that make them more vulnerable to claims of imprudence and potential litigation. As a result, defined contribution plans have severely limited incorporating alternative assets" such as cryptocurrency and private credit. 91 Fed. Reg. at 16,107; *id.* at 16,092-93 (defining "alternative assets" to include "private market investments" such as private equity and private credit, and "digital assets . . . including cryptocurrencies such as Bitcoin and other tokens"). By creating a safe harbor that weakens ERISA's strong fiduciary standard, the proposed rule seeks to change that, removing the deterrent of litigation in order to "expand the universe of potential investment vehicles" into the risky asset classes that fiduciaries previously and prudently avoided. *Id.* at 16,107. Indeed, the Department admits that the proposed rule, if enacted, would "result in expanded use of alternative assets within plan investment menus" and cause a significant "transfer from financial institutions that sponsor stocks and bonds to financial institutions that sponsor alternative investments." 91 Fed. Reg. at 16,110-11; *id.* at 16,112 (estimating that the proposed rule would "have about $178 billion and 4.5 million participants flowing each year into target date funds with alternative investments"); *id.* at 16,127. That transfer of revenue—meaning, a transfer of Americans' retirement savings—from highly regulated, well-understood investments into unregulated, poorly-understood, and risky financial vehicles like cryptocurrency and private credit, based on an empty box-checking exercise rather than a substantive assessment of the prudence of the fiduciary's decisionmaking, will harm workers and retirees. The proposal fails to consider those costs. *See, e.g.*, 91 Fed. Reg. at 16,110 (listing *no* costs to plan participants when listing the costs of the proposed rule); *id.* at 16,117 (admitting that the regulatory analysis makes no attempt to discern whether alternative assets "underperform" traditional investments—that is, are more likely to lose money).

i. Increased Use of Risky Alternative Assets Like Cryptocurrency, Private Equity, and Private Credit Would Harm Plan Participants.

By seeking to compromise the high standard of prudence that Congress and the courts have set for ERISA fiduciaries, discussed above, the proposed rule—as DOL acknowledges—would lead to more of Americans' retirement savings being invested in highly volatile and opaque asset classes such as cryptocurrency and private market investments. 91 Fed. Reg. at 16,127, 16,105-06. This would jeopardize workers' retirement security by putting their savings in danger of sudden and catastrophic loss. This is precisely the outcome that ERISA was designed to prevent. *See supra* Section I.A; *cf., e.g.*, § 1104(a)(1)(C) (setting for ERISA fiduciaries a default policy of seeking to "minimize large losses"); 26 U.S.C. § 408(a)(3) (excluding from IRAs certain investments deemed inconsistent with retirement goals); 28 U.S.C. § 408(m) (same).

The speculative nature of cryptocurrency markets has routinely led to extreme volatility that presents major risks for investors.[27] Because cryptocurrencies have no intrinsic value, prices swing wildly, without warning and without regard to the larger market, often driven by financial influencers on social media.[28] The chart below demonstrates the price swings, over the past five years, for Bitcoin, the first and most popular cryptocurrency, and Ethereum, the second-most popular cryptocurrency:[29]

	May 14, 2021	**May 14, 2022**	**May 14, 2023**	**May 14, 2024**	**May 14, 2025**	**May 14, 2026**
BTC	$49,682.98	$29,285.64	$26,788.97	$62,900.77	$104,167.33	$79,283.34
ETH	$4,079.06	$2,056.27	$1,800.50	$2,881.16	$2,610.06	$2,280.93

Other cryptocurrencies have fared worse: according to the crypto price aggregator CoinGecko, over 13.4 million cryptocurrency projects have failed between 2021 and 2025, wiping out investors each time.[30] Moreover, cryptocurrency investments are particularly susceptible to fraud losses, due to the opaque and unregulated nature of the market. Recent history is rife with examples, from the collapse of Luna and the so-called "stablecoin" TerraUSD thanks to now-convicted fraudster Do Kwon, which wiped out more than $40 billion in investor funds and set

[27] Press Release, N.Y. State Off. of the Att'y Gen., INVESTOR ALERT: Attorney General James Warns New Yorkers About Cryptocurrency Investment Risks (June 2, 2022), https://ag.ny.gov/press-release/2022/investor-alert-attorney-general-james-warns-new-yorkers-about-cryptocurrency; Press Release, N.Y State Off. of the Att'y Gen., Attorney General James Warns Investors About 'Extreme Risk' When Investing in Cryptocurrency, Issues Additional Warning to Those Facilitating Trading of Virtual Currencies (Mar. 1, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-warns-investors-about-extreme-risk-when-investing.

[28] Alan D. Jagolinzer, *Market and Regulatory Implications of Social Identity Cohorts: A Discussion of Crypto Influencer*s, 29 REV. ACCOUNT. STUD. 2298 (2024), https://link.springer.com/article/10.1007/s11142-024-09837-5; Alan Jagolinzer, *How Crypto Influencers Manipulate Vulnerable Investors*, UNIVERSITY OF CAMBRIDGE (June 25, 2024), https://www.jbs.cam.ac.uk/2024/how-crypto-influencers-manipulate-vulnerable-investors/ [https://perma.cc/4P9K-65FX;]; David Krause, *The Impact of Financial Influencers on Crypto Markets: Systemic Risks and Regulatory Challenges* (Feb. 19, 2025), http://dx.doi.org/10.2139/ssrn.5144847

[29] Bitcoin USD Price (BTC-USD), YAHOO FINANCE, https://finance.yahoo.com/quote/BTC-USD/history/ (last visited May 20, 2026). Ethereum USD Price (ETH-USD), YAHOO FINANCE, https://finance.yahoo.com/quote/ETH-USD/history/ (last visited May 20, 2026). The chart above does not fully convey the wild price swings experienced by Ethereum, which dropped from $4,831.09 on August 23, 2025, to $1,821.13 approximately six months later, on February 6, 2026. *Id.*

[30] Shaun Paul Lee, *Dead Coins: Over 50% of Cryptocurrencies Have Failed*, COINGECKO (last updated Apr. 17, 2026), https://www.coingecko.com/research/publications/how-many-cryptocurrencies-failed [https://perma.cc/DT8T-X8ZV].

off a chain reaction of bankruptcies across the cryptocurrency industry,[31] to the collapse of cryptocurrency exchange FTX at the hands of now-convicted fraudster Sam Bankman-Fried.[32]

The same lack of transparency and regulation makes cryptocurrency difficult to value—a flaw in alternative asset markets that the Department notes but fails to meaningfully consider. 91 Fed. Reg. at 16,093, 16,105. Many cryptocurrency platforms remain subject to little or no legal oversight whatsoever, allowing for self-dealing transactions on anonymous markets that obscure the process of price discovery.[33] The prevalence of unregulated offshore trading venues which have historically been associated with wash-trading and price manipulation also impedes plan fiduciaries' ability to accurately value this volatile asset class.[34] The Department's analysis of the purported benefits of alternative assets, tellingly, identifies no claimed benefits of investing in digital assets, including cryptocurrency. 91 Fed. Reg. at 16,118-122.

Private investments, such as private equity and private credit, suffer from similar flaws, and are similarly dangerous vehicles for retirement savings. Indeed, as this letter is being drafted, the private credit market is in deepening crisis, following the First Brands and Tricolor bankruptcies that have served as stark reminders of the dangers of these opaque and illiquid investments.[35] Private credit funds are even now facing heightened withdrawal requests[36] as

---

[31] Press Release, U.S. Dep't of Just., Crypto-Enabled Fraudster Sentenced For Orchestrating $40 Billion Fraud (Dec. 11, 2025), https://www.justice.gov/usao-sdny/pr/crypto-enabled-fraudster-sentenced-orchestrating-40-billion-fraud; Press Release, Sec. & Exch. Comm., Terraform and Kwon to Pay $4.5 Billion Following Fraud Verdict (June 13, 2024), https://www.sec.gov/newsroom/press-releases/2024-73.

[32] Press Release, U.S. Dep't of Just., Samuel Bankman-Fried Sentenced to 25 Years for His Orchestration of Multiple Fraudulent Schemes (Mar. 28, 2024), https://www.justice.gov/archives/opa/pr/samuel-bankman-fried-sentenced-25-years-his-orchestration-multiple-fraudulent-schemes.

[33] This would remain true for offshore and DeFi entities offering cryptocurrency to Americans, even if a federal market structure bill were passed.

[34] Carol Alexander & Daniel Heck, *Price Discovery in Bitcoin: The Impact of Unregulated Markets*, 50 J. OF FIN. STABILITY 2 (Oct. 2020) https://www.sciencedirect.com/science/article/abs/pii/S1572308920300759 [https://doi.org/10.1016/j.jfs.2020.100776]; N.Y. Off. of the Att'y Gen., Virtual Markets Integrity Initiative Report (Sep. 18, 2018) https://virtualmarkets.ag.ny.gov/#section3; Lin William Cong et al., *Crypto Wash Trading*, 69(11) MANAGEMENT SCIENCE 6427 (2022), https://www.nber.org/system/files/working_papers/w30783/w30783.pdf; *see also* Brett Hemenway Falk et al., *Detecting Crypto Wash Trades via Machine Learning*, RESEARCH POLICY, 2026, 105508 (May 12, 2026) (finding wash trading patterns in NFT marketplaces) https://www.sciencedirect.com/science/article/abs/pii/S0048733326000995 [https://doi.org/10.1016/j.respol.2026.105508].

[35] Eliza Ronalds-Hannon & Aaron Weinman, *From Tricolor to Saks, Bonds are Now Crashing at Breakneck Speed*, BLOOMBERG (Oct. 12, 2025) https://www.bloomberg.com/news/features/2025-10-12/first-brands-tricolor-wipeouts-show-cracks-in-credit-golden-age?sref=mQvUqJZj.

[36] Pritam Bisawas & Arasu Kannagi Basil, *Private Credit Jitters Trigger Caps on Redemptions, Tighter Lending*, REUTERS (Apr. 2, 2026) https://www.reuters.com/business/finance/private-credit-strains-ripple-through-wall-street-investors-grow-wary-2026-04-02/.

investors raise questions about their underwriting practices,[37] undisclosed concentrations in high-risk industries,[38] use of "payment-in-kind" deferrals to mask potential defaults,[39] and use of undisclosed off-balance-sheet leverage.[40] Now is not the time to funnel Americans' retirement investments into these risky vehicles.

These risks are heightened—and in many cases, enabled—by the opacity of private investment markets, which can stymie even sophisticated investment managers. In one example, although private equity and private credit funds "are supposed to mark their assets at fair market value each quarter," the lack of market quotes "opens the door for managers to rely on subjective pricing models," which then can simply be adopted without inquiry by other fund managers who invest in those funds.[41] The value of private funds can thus be reliant on a limitless series of other fund managers and sub fund managers, none of whom have fiduciary duties to protect retirement accounts, and none of whom truly know what these investments are worth. *See* 91 Fed. Reg. at 16,093 (acknowledging that private market investments can "come[] with reduced day-to-day insight into the value of their investments than investments in traditional assets").

Furthermore, the illiquidity of such investments creates heightened risks for retail investors like the workers and retirees who participate in ERISA retirement plans. By restricting the timing and amount of withdrawals, these alternative assets hinder a participant's ability to take a loan or hardship withdrawal against their retirement account in a time of great need.[42] This is a significant problem that the Department fails to consider. In recent years, up to 6% of people

---

[37] Finbarr Flynn & Harry Suhartono, *Pimco Sees Crisis of 'Bad Underwriting in Private Credit,* BLOOMBERG (Mar. 11, 2026) https://www.bloomberg.com/news/articles/2026-03-11/pimco-blames-sloppy-underwriting-for-private-credit-reckoning.

[38] Jack Pitcher & Matt Wirz, *Private Credit Exposure to Ailing Software Industry is Bigger than Advertised*, WALL ST. J. (Mar. 29, 2026) https://www.wsj.com/finance/investing/private-credits-exposure-to-ailing-software-industry-is-bigger-than-advertised-d80da378?mod=hp_lead_pos1.

[39] Toby Nangle, *It's Not a Default if You Never Ask for Cash: Right?*, FINANCIAL TIMES (Aug. 21, 2025) https://www.ft.com/content/db8fcc7a-ef7b-475c-b1c2-df57631d21ff?accessToken=zwAAAZ4ee7zakdPbj8x673tHXNOxwt9XYx0h_w.MEUCICt-EePchKyDua8VqnryvbuyJRCRR_dsrrCvWxxg6w05AiEArFC0pMRKSRo9Rn_Nb6S4yTblycNjUSob2NOy0Mo58Mw&sharetype=gift&token=ac516f30-eb17-41a2-9652-ac4825492024.

[40] Jonathan Weil, *How Private-Credit Funds Keep Debt Off Their Balance Sheets*, WALL ST. J. (May 1, 2026) https://www.wsj.com/finance/investing/how-private-credit-funds-keep-debt-off-their-balance-sheets-c5547e19.

[41] Jonathan Weil, *The Crazy Math Confronting Everyday Investors in Private Markets*, WALL ST. J. (Apr. 11, 2026) https://www.wsj.com/finance/investing/the-crazy-math-confronting-everyday-investors-in-private-markets-2e281d13?mod=Searchresults&pos=6&page=1.

[42] *See generally*, SEC. & EXCH. COMM., Private Equity Funds, https://www.investor.gov/introduction-investing/investing-basics/investment-products/private-investment-funds/private-equity [https://perma.cc/86RP-WUAA] ("[A]n investment in a private equity fund is often illiquid and it may be necessary to hold an investment in a private equity fund for several years before any return is realized.").

with Vanguard 401(k) accounts took a hardship withdrawal.[43] And, as recently noted in the Wall Street Journal, "During economic downturns, individuals typically sell their investments and stockpile cash to make ends meet. That will be harder to do if those investors hold stakes in private funds that limit withdrawals."[44] While stocks and bonds are easily liquidated to accommodate these requests, alternative investments may restrict an individual's ability to access retirement funds they depend on, *see* 91 Fed. Reg. at 16,099, creating the risk that workers' isolated episodes of financial distress will deepen into financial crisis.

Although the proposed rule permits a fiduciary to weigh the benefit of an "illiquidity premium to investors who are willing to hold their investment," 91 Fed. Reg. at 16,098, the proposed safe harbor would permit such investments if a fiduciary merely "considers" that factor, without regard to the substantive merits of the fiduciary's ultimate decision to separate plan participants from their own money for long periods of time. Thus, the proposed rule's safe harbor, if finalized, may lead to plan assets disappearing inside an expensive and illiquid black box that is inconsistent with the high standard of prudence required of plan fiduciaries.

ii. Risky Alternative Assets Increase the Need for Disclosure to Plan Participants, but the Proposed Rule Is Silent on Disclosure.

Because risks are inherent to all investment products, investment regulations emphasize the importance of disclosure, making sure that investors who choose riskier investment products do so with open eyes, fully aware of the losses they may suffer. When investments entail greater risk, the need for full, candid, and clear disclosure is concomitantly greater. The States, as securities regulators and as consumer and worker protection enforcers, have a strong interest in promoting disclosures that are straightforward, clear, and not misleading to investors. But the proposed rule, despite—by the Department's own admission—pushing plan assets into riskier alternative asset classes, which should be accompanied by enhanced disclosures, is utterly silent on the question of disclosure to plan participants. Instead, it offers a safe harbor focused entirely on documentation of process, without regard for a fiduciary's substantive duty to ensure that workers and retirees understand the investment alternatives included in their plans. The Department's failure to consider the need for heightened disclosure requirements as it undertakes rulemaking that will cause a massive transfer of workers' and retirees' savings into riskier asset classes is yet another serious deficiency in the proposed rule.

B. The Proposed Rule Threatens States' Interests.

---

[43] Anne Tergesen, *Record Numbers of Workers Are Raiding Their 401(k) Savings*, WALL ST. J. (Mar. 4, 2026), https://www.wsj.com/personal-finance/retirement/record-numbers-of-workers-are-raiding-their-401-k-savings-bc89d5c3; *see also* NAT'L INST. ON RET. SEC., *supra* n.9, at 19-20 (in 2022, 4.7% of workers took a withdrawal from their defined-contribution account balances, and those who did so withdrew an average of 19.7% of their account balance).

[44] Matt Wertz, *Moody's Sounds Alarm on Private Funds for Individuals*, WALL ST. J. (June 10, 2025), https://www.wsj.com/finance/investing/moodys-sounds-alarm-on-private-funds-for-individuals-8cd268c5?mod=hp_lead_pos2.

i. The Proposed Rule Would Harm the States By Jeopardizing Residents' Retirement Savings.

The Department asserts that that this proposal has "no implications for the States or the relationship or distribution of power between the national government and the States." 91 Fed. Reg. at 16,135. However, ERISA-covered plans constitute a significant portion of the States' retired residents' earnings and working residents' retirement savings. For example, in Maryland, 65% of households used 401(k)s as retirement vehicles according to 2023 U.S. Census Bureau data, one of the highest 401(k) prevalence rates in the country.[45] Under this proposal's relaxed prudence standard, an alarming number of residents within States' borders would likely suffer because of sudden introduction of the above risks into their retirement plans. This proposal would endanger the sufficiency of residents' retirement savings, while leaving them without an adequate method of recovering those funds.[46] Accordingly, States will have to undertake new responsibilities in providing for the dignity of their aging populations, incurring various new costs. These harms to the States, their economies, and their residents are not considered by the Department's proposal.

The effects of residents' insufficient retirement savings on the States and State economies are well-studied. For example, a 2018 report found that the Pennsylvania economy lost $2 billion in household spending in 2015 alone because of residents' insufficient retirement savings.[47] States will suffer from additional, significant reductions in household spending—and consequently, state tax revenue collection[48]—if the risks of this rule materialize and more workers and retirees lose their retirement savings. By refusing to acknowledge the probability that investing in risky, nontransparent alternative assets will endanger workers' retirement savings, this proposal also unreasonably fails to acknowledge or quantify the fiscal burdens to State economies and tax revenue that may result if the rule were finalized.

Workers who lose portions of their retirement savings in retirement increasingly rely on federal and state public assistance programs. The federal government administers several benefit programs that provide services to elderly residents, including medical care and housing programs. Even without this rule proposal, government expenditures on federal public assistance programs for the elderly were anticipated to grow from $110 billion in 2020 to $201 billion by

---

[45] Jaclyn DeJohn, *Retirement Savings by State – 2026 Study*, SMARTASSET (last updated Mar. 11, 2026) https://smartasset.com/data-studies/retirement-savings-2026 [https://perma.cc/7TH6-6WLB].

[46] ERISA expressly preempts any other form of legal remedy related to employee benefit plans. *See* 9 U.S.C. § 1144(a).

[47] Pa. Dep't of the Treasury & Econsult Solutions, Final Report, *The Impact of Insufficient Retirement Savings on the Commonwealth Of Pennsylvania*, at 23 (Jan. 25, 2018), https://patreasury.gov/pdf/Impact-Insufficient-Retirement-Savings.pdf.

[48] *Id.* at 26-27 (estimating that total lost Pennsylvania tax revenue, including lost sales tax, from reduced spending due to insufficient retirement savings was nearly $70 million in 2015).

2040.[49] Although this rule threatens to increase the number of workers and retirees with insufficient retirement savings, thus pushing more of the population onto public assistance programs, the Department fails to consider the resulting increased financial burden the federal government would suffer from this rule's implementation.

Many States also fund and implement their own public assistance programs for seniors, which would similarly be affected by this rule and the resultant increase in the population of individuals who would qualify for these programs. This rule proposal fails to account for increased burdens to the States' public assistance programs it would cause. For example, this rule, if finalized, would likely increase demand for Pennsylvania's income-based, state-funded prescription assistance programs for older adults, PACE and PACENET, as more seniors with insufficient retirement savings would be unable to afford their prescriptions.[50] These increased costs on the States would be substantial. For example, Pew Charitable Trusts predicts that the increased taxpayer burden on Pennsylvania because of insufficient retirement savings, even before this rule, will amount to $19 billion by 2040.[51] Across all state governments and the federal government, the total taxpayer burden from insufficient retirement savings is already predicted to reach $1.3 trillion by 2040.[52] The proposal's failure to acknowledge or quantify how it would add to these taxpayer burdens is unreasonable.

In addition to or alternative to relying on government public assistance programs, workers lacking sufficient retirement funds as a result of the rule's relaxed prudence standard may be forced to work past retirement age, exposing them to additional personal harms. Although some workers' health may benefit from remaining in the workforce longer, the ability to retire often improves individuals' health.[53] Conversely, being forced into the workforce longer, particularly when the decision is borne solely of financial necessity, often hurts workers'

---

[49] Pew Charitable Trusts, *The Cost of Doing Nothing: Federal and State Impacts of Insufficient Retirement Savings* (May 2023), https://econsultsolutions.com/pew-federal-and-state-impacts-of-insufficient-retirement-savings/ [https://perma.cc/S73J-RT39].

[50] 72 Pa. Stat. Ann § 3761-519. *See also* Or. Rev. Stat. Ann. § 458.375 (establishing Oregon's state-funded, income-based Elderly Rental Assistance program); 651 Mass. Code Regs. 3.01 (establishing Massachusetts' Home Care Program providing home care services to eligible seniors); Md. Code Ann., Health-Gen. §§ 15-1001-01–07 (establishing Maryland's Senior Prescription Drug Assistance Program).

[51] John Scott & Andrew Blevins, *State Automated Retirement Programs Would Reduce Taxpayer Burden From Insufficient Savings* (last updated June 2, 2023), https://www.pew.org/en/research-and-analysis/articles/2023/05/11/state-automated-retirement-programs-would-reduce-taxpayer-burden-from-insufficient-savings [https://perma.cc/S6MC-2C3R].

[52] *Id.*

[53] *See, e.g.*, Giacomo Pietro Vigezzi et al., *Impact of Retirement Transition on Health, Well-Being and Health Behaviours: Critical Insights from an Overview of Reviews*, 375 SOCIAL SCIENCE & MEDICINE 118049 (June 2025) https://www.sciencedirect.com/science/article/pii/S027795362500379X#sec4 [https://doi.org/10.1016/j.socscimed.2025.118049].

health, especially among low-wage earning older workers.[54] When workers are forced into the workforce longer, they are also more likely to experience unsafe working conditions, age discrimination, and violations of wage and hour protections.[55] This problem is worsened by the fact that many older workers, despite preferring traditional job arrangements, are forced into alternative work arrangements such as independent contracting as a result of retirement insecurity, often removing them from the scope of state worker protection laws and making state labor law enforcement more difficult.[56] The Department fails to consider that workers and their hard-earned retirement savings would bear not only the financial risk of this proposal's implicit encouragement to invest in uncertain, volatile, and risky assets, but also the risks of serious workplace harm.

ii. The Proposed Rule's Weakened Federal Fiduciary Standard Would Require State Action and Resources to Protect Workers and Retirees.

In addition to the aforementioned potential harms, States will incur public education costs as a result of this rule, which the proposal fails to address. This rule would compound the financial risk retirement plan participants already bear by adding a new layer of risk that workers may not yet fully appreciate. The nature and risks of alternative investments, especially highly volatile cryptocurrencies, are poorly understood,[57] and States will want to ensure residents have the necessary information to make informed investment decisions. The proposal fails to consider the ongoing costs of these education efforts regarding the risks of alternative assets that States would incur if this rule were finalized.

III. The Proposed Rule's Single-Minded Focus on Reducing Litigation Risk for Fiduciaries Shows the Department Failed to Consider the Benefits of Accountability and Deterrence.

---

[54] MARY GATTA & JESSICA HORNING, *Dying with Your Boots On: the Realities of Working Longer in Low-Wage Work*, *in* OVERTIME: AMERICA'S AGING WORKFORCE AND THE FUTURE OF WORKING LONGER, at 188-89 (Lisa F. Berkman & Beth C. Truesdale eds., 2022).

[55] *See, e.g.*, Monique Morrissey, ECON. POL'Y INST., *Many Older Workers Have Difficult Jobs that Put Them at Risk* (May 17, 2023), https://www.epi.org/publication/older-workers-difficult-jobs/#full-report (finding half of workers ages 50-70 engage in at least one physical activity that can lead to injury, and that more than half of older workers are exposed to at least one unpleasant, unhealthy, or potentially hazardous condition in their physical work environment at least a quarter of the time); Lisa A. Marchiondo et al., *Trajectories of Perceived Workplace Age Discrimination and Long-Term Associations With Mental, Self-Rated, and Occupational Health*, 74 J. GERONTOLOGY SERIES B, PSYCH. SCI. & SOC. SCI. 655 (2019) ("On average, older workers experienced gradual increases in age discrimination . . . suggest[ing] coworkers and supervisors may increasingly apply negative age stereotypes to workers as they age."), https://pmc.ncbi.nlm.nih.gov/articles/PMC6460336/.

[56] Teresa Ghilarducci, WORK, RETIRE, REPEAT: THE UNCERTAINTY OF RETIREMENT IN THE NEW ECONOMY, 129-133 (2024).

[57] For example, a 2025 study of cryptocurrency literacy identified that "advanced crypto literacy remains rare in the general population" and that almost 15% of individuals surveyed were unable to identify a single correct answer in a crypto literacy questionnaire. *See* Michael Jones et al., *Measuring Crypto Literacy*, 59 J. OF CONSUMER AFFAIRS 4:e70029 (Oct. 10, 2025), https://onlinelibrary.wiley.com/doi/full/10.1111/joca.70029.

The Department states openly that the purpose of the proposed rule is to reduce litigation risk to plans, plan managers, and plan insurers. 91 Fed. Reg. at 16,088, 16,093, 16,122-127. (Indeed, the NPRM mentions "litigation" or "litigation risk" more than 100 times.) It cites the costs from unsuccessful lawsuits as an unqualified harm to pension funds and fund managers, and safe harbor protection from litigation as an unqualified benefit. *See* 91 Fed. Reg. at 16,106-08, 16,110, 16,114-15. As law enforcers, however, the Attorneys General and State agencies who join in this comment know that litigation is an important tool for holding lawbreakers accountable—one that we use to protect our residents every day. We also know, based on our longstanding and extensive experience with just such enforcement work, that the potential for litigation is an important deterrent for risky decisionmaking. DOL's proposal unreasonably fails to consider those benefits, treating accountability and deterrence as evils to be avoided rather than as virtues to be encouraged.

The States acknowledge that the value of accountability and deterrence through litigation must, of course, be balanced against the risk of frivolous lawsuits and the costs that stem from them. But Congress struck just this balance in drafting ERISA and, in doing so, chose to create robust enforcement mechanisms. As explained above, Congress's goal was to protect vulnerable workers and retirees from imprudent, unscrupulous, or self-serving mismanagement of their retirement savings. To carry out that goal, Congress reasonably chose "ready access to the Federal courts"—that is, a strong private right of action—as the statute's primary enforcement mechanism. 29 U.S.C. § 1001(b).[58] The Supreme Court has consistently recognized ERISA's "careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans,"[59] and declared its "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care."[60]

The proposed rule seeks to tilt this deliberate balance toward protecting plan fiduciaries and away from protecting workers and retirees, by limiting plan participants' ability to seek redress for losses caused by a fiduciary's imprudence. This upsets the careful structure and attendant case law developed over decades, first by Congress and then by federal courts, discussed above. ERISA is designed to protect plan assets in order to ensure a secure and dignified retirement for American workers—and when the risk of lawsuits challenging imprudent behavior causes fiduciaries to think twice about endangering plan assets, that is exactly how the statute is *supposed* to work. *See* 91 Fed. Reg. at 16,106-07 (citing Michael Gropper, *Lawyers Setting the Menu: The Effects of Litigation Risk on Employer-Sponsored Retirement Plans* (Aug. 2025) for the proposition that "plans with a higher likelihood of being sued are more likely to exclude high volatility investments").

It is not in DOL's power to depart from the legal standard set by Congress and the courts, in the name of protecting sophisticated financial actors from the very litigation risk that incentivizes their compliance with ERISA's duty of prudence. As law enforcers, the undersigned

---

[58] *See also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) *citing* 120 Cong. Rec. 29942 (Aug. 22, 1974) (remarks of Sen. Javits).

[59] *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014) (internal quotation marks omitted).

[60] *Dedeaux*, 481 U.S. at 54 (citing *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 147 (1985)).

States know the power of that deterrent effect, and the power of litigation to right wrongs to our residents – power that Congress, in enacting ERISA, deliberately chose to put in the hands of workers and retirees, for their protection. The Department's failure to consider those benefits, treating litigation as an evil to be avoided instead of a tool carefully chosen by Congress to protect American workers, is yet another deficiency in this proposal.

IV. Conclusion

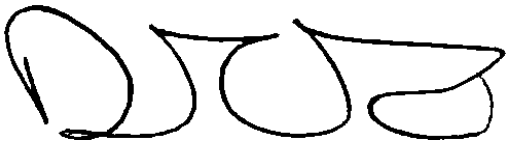
If finalized, the Department's attempt to eviscerate the longstanding duty of prudence standard for ERISA fiduciaries would contravene the purpose of ERISA, and expose American workers and retirees to risky investments that could leave them penniless at precisely the moment when they deserve to enjoy a peaceful and dignified retirement. The Department's failure to consider those risks, or to consider how this change to the standard would prejudice the sovereign States, is arbitrary and capricious. Moreover, the Department's proposal evinces a basic misunderstanding of the role of litigation in holding fiduciaries accountable and deterring improper or needless risk-taking. The fiduciary standard—including the duty of prudence—carefully crafted by Congress and cemented by decades of federal jurisprudence serves an essential function in protecting hard-working Americans' retirement savings from the incompetence or thoughtlessness of those who are entrusted to manage them. Undermining that standard, as the proposed rule expressly seeks to do, is contrary to law, and harmful to the States and all American workers. For these reasons, the States urge the Department to withdraw this proposed rule.

Sincerely,

ROB BONTA
California Attorney General

KWAME RAOUL
Illinois Attorney General

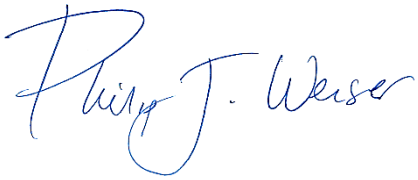
LETITIA JAMES
New York Attorney General



DAN RAYFIELD
Oregon Attorney General

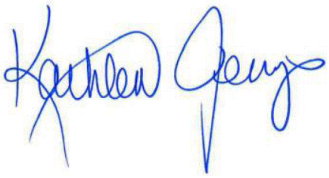
NANCY A. WALKER
Secretary
Pennsylvania Department of Labor & Industry

KRIS K. MAYES
Arizona Attorney General



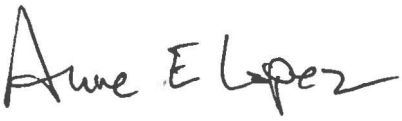
PHILIP J. WEISER
Colorado Attorney General

WILLIAM TONG
Connecticut Attorney General



KATHLEEN JENNINGS
Delaware Attorney General

BRIAN L. SCHWALB
District of Columbia Attorney General



ANNE E. LOPEZ
Hawai'i Attorney General

ANDREA JOY CAMPBELL
Massachusetts Attorney General

AARON M. FREY
Maine Attorney General

ANTHONY G. BROWN
Maryland Attorney General

DANA NESSEL
Michigan Attorney General

KEITH ELLISON
Minnesota Attorney General

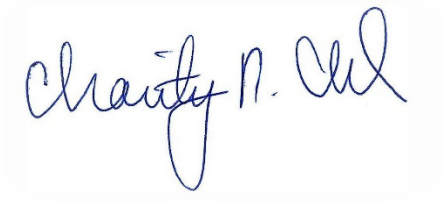
AARON D. FORD
Nevada Attorney General

JENNIFER DAVENPORT
New Jersey Attorney General

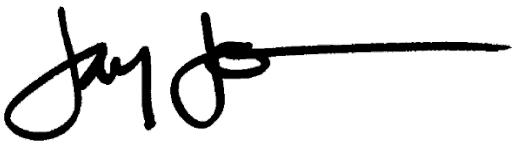
RAÚL TORREZ
New Mexico Attorney General

JEFF JACKSON
North Carolina Attorney General

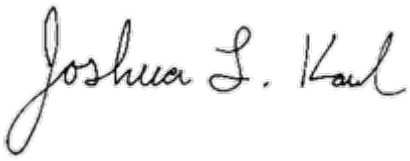
PETER NERONHA
Rhode Island Attorney General



CHARITY R. CLARK
Vermont Attorney General



JAY JONES
Virginia Attorney General



JOSHUA L. KAUL
Wisconsin Attorney General