



June 1, 2026

VIA ELECTRONIC SUBMISSION

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

Re: Fiduciary Duties in Selecting Designated Investment Alternatives; Docket No. EBSA-2026-0166.

Dear Assistant Secretary Aronowitz:

On March 31, 2026, the Employee Benefits Security Administration (EBSA) published a proposed rule aiming to clarify provisions of the Employee Retirement Income Security Act of 1974 (ERISA)¹ concerning a fiduciary's duty of prudence when selecting designated investment alternatives for a participant-directed individual account plan.² Additionally, EBSA intends to use this rule to further the objectives of Executive Order 14330, "Democratizing Access to Alternative Assets for 401(k) Investors,"³ specifically, the implementation of section 3(c) through this proposal's inclusion of alternative assets in asset allocation. The following letter constitutes the Office of Advocacy's (Advocacy) public comments on EBSA's proposed rule.

Advocacy appreciates the opportunity to provide comments on this proposed rule, as this rule, if finalized, will significantly expand the range of options available for the fiduciaries of small businesses when tasked with selecting designated investment alternatives. Advocacy acknowledges that this rulemaking has the potential to impact a fiduciary's propensity to incorporate small business investments into a participant-directed individual account plan, mainly through the execution of expanded fiduciary requirements under section 404(a)(1)(B) of ERISA. Advocacy supports thorough implementation of both ERISA and Executive Order

¹ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).

² 91 Fed. Reg. 16,088 (Mar. 31, 2026) (to be codified at 29 C.F.R. pt. 2550).

³ Exec. Order No. 14,330, Democratizing Access to Alternative Assets for 401(k) Investors, 90 Fed. Reg. 53,211 (Aug. 12, 2025).

14330, and, to protect the competitiveness of small businesses in the market, recommends additional clarifying provisions or agency guidance to best ensure that the promulgation of this proposed rule does not implicitly disfavor the growth of small businesses.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy in 1976 under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is a voice within the federal government that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the Small Business Administration (SBA) or the Administration.

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁵ If a rule is not expected to have a significant economic impact on a substantial number of small entities, agencies may certify it as such and submit a statement of the factual basis for such a determination that adequately supports its certification.⁶

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁷

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁸ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁹

B. Implementation of Executive Order 14330

On August 7, 2025, President Trump signed Executive Order 14330, pledging that his administration would "relieve the regulatory burdens and litigation risk that impede American

⁴ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁵ 5 U.S.C. § 603.

⁶ *Id.* § 605(b).

⁷ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

⁸ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

⁹ *Id.*

workers' retirement accounts from achieving the competitive returns and asset diversification necessary to secure a dignified, comfortable retirement.”¹⁰ While focusing on the profitability of employees' retirement accounts, Executive Order 14330 explicitly established that the “relevant plan fiduciary”¹¹ determines availability of alternative asset investments for Americans preparing for retirement, thus expanding overall access to investments in alternative assets for all plan fiduciaries, including those managing assets on behalf of any association or group containing participants and beneficiaries that are “American[s] preparing for retirement.”¹²

Comprehensive implementation of Executive Order 14330 implicates all plan fiduciaries managing a wide range of investment portfolios, including those belonging to employee organizations and, notably, small businesses. Executive Order 14330 not only sought to encompass all potential beneficiaries of plans furnishing retirement assets but also provided an exhaustive list of qualified alternative assets, including direct or indirect investments in real estate, commodities, and projects financing infrastructure.¹³ Though less liquid, these alternatives to traditional investment assets implicitly upend barriers to entry that barred small businesses from obtaining maximum returns on investment efforts.

Instead of relying on one single revenue stream, increasingly diversified portfolios offer more flexibility to plan fiduciaries through an assortment of prudently selected investments, while also adhering to ERISA's requirements concerning risk management. Executive Order 14330 directs the Secretary of Labor (Secretary) to prioritize actions that curb ERISA litigation risk, thereby reducing fiduciary reluctance to offer alternative investments. EBSA's proposed rulemaking reflects the directives of Executive Order 14330 by revisiting the regulatory framework governing asset management and investment in employer-sponsor defined-contribution plans, particularly the restrictions that have prevented the vast majority of American workers from “the potential growth and diversification opportunities associated with alternative asset investments.”¹⁴

C. The ERISA's Statutory Mandate

In 1974, Congress enacted ERISA in response to the rapid growth of employee benefit plans and increasing economic impact across state lines. Primarily, ERISA sought to “provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with the respect to the establishment, operation, and administration of such plans,”¹⁵ striving to maintain economic prosperity while also protecting the financial security of millions of employees and their dependents.

¹⁰ Exec. Order No. 14,330, 90 Fed. Reg. 38,921 (Aug. 12, 2025).

¹¹ *Id.*

¹² *Id.*

¹³ Exec. Order No. 14,330, 90 Fed. Reg. 38,921 (Aug. 12, 2025).

¹⁴ *Id.*

¹⁵ 29 U.S.C. § 1002(a).

Congress intended to define fiduciaries broadly as, “...a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority...respecting management of such plan.”¹⁶ In addition, they sought to define the discretionary authority of such fiduciaries as equally broadly. Limited only by the requirements to discharge his or her duties with respect to a plan “solely in the interest of the participants and beneficiaries...with the care, skill, prudence, and diligence...that a prudent man acting in a like capacity and familiar with such matters would use,”¹⁷ all other interpretations and determinations of risks and benefits are according to the fiduciary’s own perception of that particular plan.

Likewise, EBSA’s proposed rule reflects Congress’ deference to fiduciary discretion, allowing fiduciaries to determine which risk metrics to consider when evaluating investments,¹⁸ as well as how to determine the value proposition of a designated investment alternative,¹⁹ without any specific criteria or requirements concerning either determination. Moreover, the proposed rule’s requirement concerning the “meaningful benchmark” for each designated investment alternative is intentionally vague, allowing each plan fiduciary to determine benchmarks according to each designated investment alternative’s unique properties and emphasizing that “there is no presumption or preference against new or innovative designated investment alternative designs.”²⁰ When read together, these provisions highlight the extent to which fiduciaries can exercise discretion over plan management under ERISA, allowing each fiduciary to tailor and measure investments according to the participants’ and beneficiaries’ needs and desired alternative asset investment.

II. How Alternative Asset Investment Can Benefit Small Businesses

Many alternative asset vehicles that provide capital to small and emerging businesses remain inaccessible to typical retirement savers because of high minimum investment requirements, long lock-up periods, and high management fees. Small businesses face greater hurdles when attempting to access capital and financing because many investment vehicles, such as private equity funds and private debt funds (private credit), are limited.²¹ Carefully expanding access to alternative assets in employer-sponsored retirement plans can support capital formation for small businesses, while allowing small business employees to seek better risk-adjusted returns, consistent with their plan fiduciaries’ duties.

These are the potential small entities that would be impacted by the proposed rule:

- **Small business fiduciaries** are the directly affected entities and benefit from a more certain regulatory environment that will allow them to incorporate a broader range of assets into their offerings.

¹⁶ 29 U.S.C. § 1002(21)(A).

¹⁷ 29 U.S.C. § 1104(a)(1)(B).

¹⁸ 29 C.F.R. § 2550.404a-6(g)(1)(iii) (proposed rule) (cited in 91 Fed. Reg. 16,008 (proposed Mar. 31, 2026)).

¹⁹ 29 C.F.R. § 2550.404a-6(h)(1)(ii) (proposed rule) (cited in 91 Fed. Reg. 16,008 (proposed Mar. 31, 2026)).

²⁰ 9 C.F.R. § 2550.404a-6(k) (proposed rule) (cited in 91 Fed. Reg. 16,008 (proposed Mar. 31, 2026)).

²¹ SEC, Remarks at the 45th Annual Small Business Forum (Mar. 9, 2026),

<https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-small-business-forum-030926>.

- **Small employers (generally)** are indirectly affected and benefit from being able to provide their employees with retirement plans that offer a broader range of assets.
- **Small businesses seeking capital** are even more indirectly affected as they should benefit from increased capital going towards less traditional assets, since most traditional assets are either capital for governments or very large businesses.

The following are specific benefits small businesses can anticipate following the enactment of EBSA’s proposed rule:

- **Structured Diversification for Fiduciaries:** Diversification is a key part of any investment plan, allowing for effective risk management by ensuring that the fortunes of a plan’s participants and beneficiaries are not tied to only one or two securities or investments.²² This is especially important to a fiduciary’s ability to weather the inevitable peaks and valleys of investing, as alternative assets tend to have a less correlative relationship with traditional markets,²³ thereby stabilizing portfolios during economic downturns. By spreading capital across different asset classes, fiduciaries can reduce concentration risk and better mitigate overall portfolio volatility for participants.
- **Small Employers Expanded Offerings:** Many alternative asset investments are structured to generate passive, recurring income streams. This can be attractive to small businesses offering contribution plans and their employees as long-term investors. In its 2025 publication regarding passive activity and at-risk rules, the Internal Revenue Service (IRS) identifies two kinds of passive activities: “Trade or business activities in which you don’t materially participate during the year,” and “Rental activities, even if do materially participate in them, unless you’re a real estate professional.”²⁴ Alternative asset investments, as stated in Executive Order 14330, include “indirect interests in real estate,”²⁵ and “indirect investments in commodities,”²⁶ the latter of which are common in commodity Exchange-Traded Funds (ETFs) and index-linked funds. Because these investments can provide ongoing income without requiring day-to-day operational involvement from investors, they may align well with the needs of small business plan sponsors and participants seeking steady cash flows, provided that ERISA fiduciaries still perform appropriate due diligence and monitoring.
- **Increased Capital for Non-Publicly Traded Entities:** Between 1997 and 2024, the number of publicly traded companies in the United States has decreased by roughly 27.7 percent, with a decline in the number of initial public offerings (IPOs) concentrated

²² U.S. Sec. & Exch. Comm’n, *Diversifying Risk*, <https://www.sec.gov/resources-small-businesses/capital-raising-building-blocks/diversifying-risk> (last updated April 24, 2026).

²³ How to Diversify Your Portfolio with Alternative Investments, HARV. BUS. SCH. ONLINE BLOG (Sept. 27, 2021), <https://online.hbs.edu/blog/post/how-to-diversify-your-portfolio>.

²⁴ Internal Revenue Service, *Publication 925: Passive Activity and At-Risk Rules* (2025), https://www.irs.gov/publications/p925#en_US_2025_publink1000104566.

²⁵ Exec. Order No. 14,330, 90 Fed. Reg. 38,921, 38,922 § 3(a)(ii) (Aug. 12, 2025).

²⁶ *Id.* § 3(a)(iv).

among small companies.²⁷ This is significant to non-publicly traded small businesses, whose non-listed status prevents them from being able to sell shares directly to the general public, forcing these entities to rely on private financing channels, such as bank loans and venture and angel investments, which are typically more restrictive and costly.²⁸ By allowing fiduciaries to incorporate designated alternative assets into plans for participants and beneficiaries, the proposed rule could expand the capital available to private funds and vehicles that invest in small, non-public companies. This permits greater access to capital through a multitude of investment channels, rather than being limited to a select few financing avenues.

III. The Variety of Permitted Alternative Asset Investments Allow the Fiduciary to Tailor Investment Portfolios to the Specific Needs and Capital of a Small Business

ERISA’s fiduciary standards underscore the importance of risk mitigation in growing retirement assets for a small business employees, requiring that fiduciaries “diversif[y] the investments of the plan so as to minimize the risk of large losses,”²⁹ and to act with “care, skill, prudence, and diligence.”³⁰ Here, it is evident that Congress intended for plan fiduciaries to tailor financial management to each entity’s needs under that entity’s specific circumstances. Such specificity is paramount to the success of small businesses.³¹ By expanding access to alternative investment options, fiduciaries are empowered to pursue investment instruments most suitable for the financial goals and risk profiles of the small businesses sponsoring the plans and their employees, rather than employing a one-size-fits-all approach to maximizing risk-adjusted returns.

IV. Recommended Clarification and Further Agency Guidance

Executive Order 14330 directs the Department of Labor (DOL) to clarify the fiduciary process for offering asset allocation funds with alternative assets under ERISA by “identify[ing] the criteria that fiduciaries should use to prudently balance potentially higher expenses against the objectives of seeking greater long-term net returns and broader diversification of investments.”³² Additionally, ERISA authorizes the Secretary to “prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title,”³³ allowing the Secretary, acting through EBSA, to promulgate additional rulemaking and guidance to further ensure that fiduciary duties are discharged prudently for participants and beneficiaries in plans sponsored by both large and small businesses. The following are Advocacy’s recommendations for such

²⁷ Meketa Investment Group, *The Decreasing Number of Public Companies* (Sept. 2024), https://meketa.com/wp-content/uploads/2024/09/MEKETA_The-Decreasing-Number-of-Public-Companies_2024.pdf.

²⁸ U.S. Small Bus. Admin., *Fund Your Business*, U.S. Small Bus. Admin., <https://www.sba.gov/business-guide/plan-your-business/fund-your-business> (last visited May 28, 2026).

²⁹ 29 U.S.C. § 1104(a)(1)(C).

³⁰ *Id.*

³¹ U.S. Chamber of Commerce, *See the Data Behind America’s Small Businesses*, U.S. Chamber of Commerce, <https://www.uschamber.com/small-business/small-business-data-center> (last updated June 6, 2026).

³² Exec. Order No. 14,330, 90 Fed. Reg. 38,921 (Aug. 12, 2025).

³³ 29 U.S.C. § 1135.

additional guidance, aiming to ensure that the implementation of this proposed rule does not result in regulatory confusion or additional burdens on small businesses.

A. Regulating Third-Party Investment Advisors (TPIAs): Safe Harbors Against Implicit Disfavor Toward Small Businesses

EBSA established that the scope of this proposed rule would not be limited to asset allocation funds that invest in alternative assets, primarily because selective regulation of those funds “could create the impression that those asset allocation funds are either favored or disfavored.”³⁴ This reflects EBSA’s concern that implementation of its rules should not appear to favor or disfavor a particular fund, investment instrument, or even entity.

At the same time, Advocacy is concerned that the rule’s implicit encouragement for plan fiduciaries to utilize third-party investment advisors (TPIAs) could, in practice, disfavor investments in small businesses, primarily due to their perceived volatility. Large-cap companies with market values above \$10 billion often dominate their industries, enabling them to serve as a safer base for a diversified portfolio. Because small-cap and mid-cap stocks are perceived as riskier by comparison, TPIAs may be incentivized to advise fiduciaries to invest in large-cap companies, rather than support diversification of portfolios through increased investment in small businesses. For this reason, Advocacy recommends that EBSA issue further guidance emphasizing that diversification is a core fiduciary obligation and that it requires fiduciaries to spread investments across asset classes, sectors, and issuers to ensure that small businesses are not disfavored by the potentially narrow recommendations of TPIAs.

B. Collaboration With the Securities and Exchange Commission: Valuations Based on Investment Benchmarks for Small Business

As Executive Order 14330 requires, the Secretary shall “consult with the Secretary of the Treasury, the Securities and Exchange Commission (SEC), and other Federal regulators as necessary to carry out the policy objectives of this order.”³⁵ The Executive Order also directs the SEC to “consider ways to facilitate access to investments in alternative assets by participants in participant-directed defined-contribution retirement savings plans,”³⁶ including through revisions to existing SEC regulations and guidance, with a particular focus on accredited investor and qualified purchaser status.

As the DOL and SEC consider revisions to regulations governing access to alternative investments, including potential changes to accredited investor and qualified purchaser frameworks, analyzing the implications for small businesses will be critical. Many small and emerging companies, as well as smaller private funds and managers, rely on private offerings and other non-public capital formation channels that may be affected by the expansion of

³⁴ 91 Fed. Reg. 16,088 (proposed Mar. 31, 2026) (to be codified at 29 C.F.R. pt. 2550).

³⁵ Exec. Order No. 14,330, 90 Fed. Reg. 38,921 (Aug. 12, 2025).

³⁶ *Id.*

retirement plan offerings to private markets. These changes could influence which types of funds and strategies are viewed as appropriate for retirement plans, with potential consequences for smaller issuers and emerging managers that focus on financing small and medium-sized businesses.

Accordingly, Advocacy recommends the DOL engage with the SEC’s Small Business Capital Formation Advisory Committee. This committee provides a formal mechanism for the SEC to receive advice and recommendations on SEC rules, regulations and policy matters relating to small businesses, including smaller public companies.³⁷ Given this expertise and insight into small business concerns, Advocacy recommends that DOL formally include the Committee in its consultation process as it implements Executive Order 14330. This coordination honors the spirit of the Executive Order and will ensure smooth implementation accordingly.

C. Clarification Regarding Value: Benefits, Features, or Services

EBSA’s proposed standard allows fiduciaries to determine “any other value the designated alternative brings to furthering the purposes of the plan.”³⁸ This standard is especially vague and could benefit from further clarification. For example, the proposed rule describes a hypothetical scenario in which the named fiduciary selects the fund with “the highest fees and highest rating for customer service and communication,”³⁹ and still meets the regulatory requirements based on a cost-benefit analysis that weighs higher fees against services provided. Although EBSA includes a definition of “value” for which fiduciaries can determine the best plan for participants and beneficiaries, this definition is largely circular, only stating that the term includes “any benefits, features, or services other than risk-adjusted returns.”⁴⁰

ERISA also fails to define “services,” and no other provision in the Code of Federal Regulations provides a single, standalone definition in relation to the implementation of rules under ERISA. Advocacy therefore recommends that further guidance be provided on what constitutes a “benefit,” “feature,” and “service,” and which of these cannot be used by a fiduciary to justify reduced risk-adjusted expected returns. Such guidance would help ensure that fiduciaries’ exercise of discretion does not exceed the bounds established by ERISA, while also providing accountability for fiduciaries’ cost-benefit analyses and better protecting plan participants and beneficiaries.

D. Additional Recommendations

³⁷ Small Business Capital Formation Advisory Committee, U.S. Sec. & Exch. Comm’n, Small Business Capital Formation Advisory Committee, <https://www.sec.gov/about/advisory-committees/small-business-capital-formation-advisory-committee> (last visited May 28, 2026). *See also*, SEC Small Business Advocate Act of 2016, Pub. L. No. 114-284, 130 Stat. 1447 (2016).

³⁸ 9 C.F.R. § 2550.404a-6(h) (proposed rule) (cited in 91 Fed. Reg. 16,008 (proposed Mar. 31, 2026)).

³⁹ 9 C.F.R. § 2550.404a-6(h)(1)(i) (proposed rule) (cited in 91 Fed. Reg. 16,008 (proposed Mar. 31, 2026)).

⁴⁰ 9 C.F.R. § 2550.404a-6(h) (proposed rule) (cited in 91 Fed. Reg. 16,008 (proposed Mar. 31, 2026)).

Advocacy provides the following recommendations obtained in collaboration with its stakeholders:

- **Examples for Small-Employer Plans:** To better illustrate the rule’s impact on small employers, Advocacy recommends incorporating an additional example wherein a small-employer plan fiduciary is tasked with selecting a default investment alternative with a modest private-markets allocation and an in-plan lifetime-income feature.
- **Pooled Employer Plan Safe Harbor:** Because a growing number of small employers rely on pooled employer plans, Advocacy suggests providing an explicit clarification within the proposed rule confirming that the rule’s safe harbor applies to such plans.
- **SECURE Act:** The existing SECURE Act annuity-selection safe harbor⁴¹ relieves defined contribution plan fiduciaries from certain prudence requirements when selecting annuity providers for lifetime income products, proving invaluable to decreased litigation against certain plan fiduciaries that would be subject to those requirements. Advocacy therefore recommends that EBSA, in coordination with the Department of Treasury where appropriate, provide explicit confirmation that the proposed rule does not displace implementation of the SECURE Act.

V. Conclusion

The Office of Advocacy thanks EBSA for the opportunity to support this proposed rule and to provide recommendations regarding the specificity and application of its provisions. This rulemaking has the potential to expand opportunities for capital growth among small businesses, while also ensuring that EBSA policy aligns with ERISA’s statutory mandate. Fiduciaries must discharge their duties with respect to a plan “solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.”⁴² To provide maximum benefits to participants and beneficiaries, fiduciaries must have access to diversified investment opportunities, especially when managing participant-directed individual account plans.

To improve the proposed rule, Advocacy suggests that EBSA incorporate the aforementioned recommendations, utilizing its unique rulemaking authority under ERISA to ensure that both ERISA and Executive Order 14330 are carried out with their stated purposes. Doing so will help ensure that all Americans preparing for retirement – whether they be employed by a large, mid-size, or small business – can rely on plan fiduciaries to appropriately steward their finances to maximize each plan’s risk-adjusted returns.

⁴¹ 29 C.F.R. § 2550.404a-4.

⁴² 29 U.S.C. § 1104(a)(1)(A)(i)-(ii).

If you have any questions or require additional information, please contact me or Assistant Chief Counsel John Vatian at (202) 996-5299 or John.Vatian@sba.gov.

Sincerely,

/s/

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/s/

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Copy to: Mr. Mark Paoletta, Acting Administrator
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