June 1, 2026

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

**VIA ELECTRONIC SUBMISSION**

**Re: Request for Comment on Proposed Rule "Fiduciary Duties in Selecting Designated Investment Alternatives" (RIN 1210-AC38)**

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Dear Assistant Secretary:

The Crypto Council for Innovation ("CCI") respectfully submits these comments in response to the Department of Labor's ("DOL") Employee Benefits Security Administration's ("EBSA") Notice of Proposed Rulemaking regarding Fiduciary Duties in Selecting Designated Investment Alternatives (the "Proposed Rule").

By way of background, CCI is a global alliance of industry leaders within the digital assets industry committed to promoting the advantages of digital assets while showcasing their potential for market transformation. CCI's members represent various sectors within the digital asset ecosystem and share a common objective: advocating for responsible global regulation of digital assets to unlock economic opportunities, enhance quality of life, promote financial inclusivity and market innovation, safeguard national security, and counter illicit activities. CCI firmly believes that achieving these objectives necessitates well-informed, evidence-driven policy choices achieved through collaborative participation with regulators and policymakers.

CCI thanks the EBSA for providing its comprehensive and thoughtful Proposed Rule. CCI supports the Proposed Rule's overarching goal of reducing regulatory burdens and litigation risks that are restricting American workers' ability to access a high-quality and diverse range of investments through their retirement accounts to secure a dignified and comfortable retirement.[1]

[1] *See* 91 Fed. Reg. 16088 (Mar. 31, 2026) ("The overarching goal of the proposed regulation is to alleviate certain regulatory burdens and litigation risk that interfere with the ability of American workers to achieve, through

CCI also appreciates the current Administration's emphasis on increasing market innovation and asset diversification in retirement accounts, ensuring that American workers can maximize returns and balance risk while planning for retirement. Indeed, the Proposed Rule stems from Executive Order 14330, *Democratizing Access to Alternative Assets for 401(k) Investors* ("EO 14330").[2] EO 14330 established as the policy of the United States that every American worker preparing for retirement should have access to funds that include investments in "alternative assets" 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.[3] EO 14330 defined alternative assets to include holdings in actively managed investment vehicles that are investing in digital assets.[4] EO 14330 directed the DOL to reexamine its guidance regarding a fiduciary's duties under the Employee Retirement Income Security Act of 1974 ("ERISA") in connection with making asset allocation funds that include investments in alternative assets available to all Americans as they prepare for retirement. The Proposed Rule followed.[5]

CCI welcomes the opportunity to comment on the Proposed Rule. CCI supports the Proposed Rule's asset-neutral, process-driven framework because it is legally sound, provides regulatory clarity that reduces litigation risk, removes barriers to investments, and democratizes access to innovative financial assets without compromising investor protections. The Proposed Rule also appropriately moves beyond the prior Administration's flawed policy, as reflected in Compliance Assistance Release 2022-01,[6] and constrains future administrations from singling out politically disfavored asset classes through informal guidance. To further the goal of expanding access to alternative investments, CCI recommends that the DOL also consider easing structural impediments that currently lead many alternative asset managers to limit ERISA-subject investors' access to their funds to avoid falling under unworkable ERISA requirements designed for retirement plan fiduciaries rather than alternative asset fund managers.

their retirement accounts, the competitive returns and asset diversification necessary to secure a dignified and comfortable retirement.").

[2] Exec. Order No. 14330, 90 Fed. Reg. 38921 (Aug. 7, 2025), https://www.federalregister.gov/documents/2025/08/12/2025-15340/democratizing-access-to-alternative-assets-for-401k-investors.

[3] *Id.* at 38921.

[4] *Id.* at 38922.

[5] *Id.*

[6] U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Compliance Assistance Release No. 2022-01, 401(k) Plan Investments in "Cryptocurrencies," Mar. 10, 2022, https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01.

## I. The Proposed Rule's asset-neutral and process-driven standard is firmly rooted in the law.

The Proposed Rule is consistent with the objective, process-driven and asset-neutral framework that Congress adopted in ERISA. Section 404(a)(1)(B) of ERISA establishes a fiduciary's "duty of prudence" and provides, in relevant part, that "a fiduciary shall discharge his duties . . . 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."[7] As the Proposed Rule highlights, Section 404(a)(1)(B) is "plainly neutral to types or classes of designated investment alternatives that a fiduciary selects for the plan menu, so long as the fiduciary's selection process adheres to section 404(a)(1)(B)'s articulated standard of care."[8] In other words, Section 404(a)(1)(B) establishes *how* a fiduciary should choose investment options, not *what* investment options a fiduciary should choose.

Case law affirms the statute's process-based approach. For instance, in *Hughes v. Northwestern University*, the Supreme Court vacated the lower court's decision because that court failed to consider whether the fiduciaries failed to remove imprudent investments, not because the fiduciaries chose a prohibited type of investment asset.[9] Appellate courts have affirmed that ERISA's duty of prudence focuses on the process, not the result or the type of investment asset.[10] Indeed, even in the Compliance Assistance

[7] 29 U.S.C. § 1104(a)(1)(B).
[8] Proposed Rule at 16094.
[9] *Hughes v. Northwestern University*, 595 U.S. 170, 172-76 (2022).
[10] *See, e.g.*, *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996) ("courts measure [Section 404(a)(1)(B)'s] 'prudence' requirement according to an objective standard, focusing on a fiduciary's conduct in arriving at an investment decision, not on its results, ▯ asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment."); *See also Sacerdote v. New York Univ.*, 9 F.4th 95, 107 (2d Cir. 2021) (the standard for the duty of prudence "focuses on a fiduciary's conduct in arriving at an investment decision, not on its results"); *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 716 (2d Cir. 2013) ("a fiduciary's compliance with the prudent-man standard requires that the fiduciary give appropriate consideration to whether an investment is reasonably designed, as part of the portfolio ... to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment . . . Accordingly, the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole.") (cleaned up); *Cho v. Prudential Ins. Co. of Am.*, No. 25-1134, 2026 WL 74499, at *2 (3d Cir. Jan. 9, 2026) ("This duty of prudence is a process-driven obligation . . . [W]e do not assess the prudence of a fiduciary against a uniform checklist . . . Rather, we focus on the fiduciary's real-time decision-making process, and give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise and the difficult tradeoffs inherent in every investment decision.") (cleaned up).

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Release 2022-01, the prior administration's DOL did not go so far as to explicitly prohibit plan fiduciaries from adding a cryptocurrency option to a 401(k) plan's investment menu.[11]

## II. The Proposed Rule advances strong and sound policy objectives.

### a. The Proposed Rule reduces uncertainty and litigation risk for fiduciaries.

By providing a safe harbor structured around six factors—performance, fees, liquidity, valuation, benchmarking, and complexity—the Proposed Rule gives fiduciaries a clear, actionable roadmap for prudent investment selection. By "objectively, thoroughly, and analytically considering"[12] the articulated factors in selecting designated investment alternatives, a fiduciary's judgment regarding the factor or factors is presumed to be reasonable and is entitled to significant deference. This proactive clarity and deference will allow plan managers to more confidently evaluate and offer investment options, including digital assets, to plan participants, without fear of frivolous lawsuits.[13]

### b. The Proposed Rule democratizes access to financial products.

The Proposed Rule is a meaningful step toward democratizing access to sophisticated financial products for all Americans preparing for retirement. As EO 14330 highlighted from the outset, wealthy Americans planning for retirement can invest in digital assets, diversifying investment portfolios to manage risks and maximize returns across a variety of innovative market assets.[14] Yet, "the vast majority" of more than 90 million Americans do not have the opportunity to participate, either directly or through their retirement plans, in the growth, diversification, and risk-mitigation opportunities

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[11] *See* Compliance Assistance Release No. 2022-01 ("The Department cautions plan fiduciaries *to exercise extreme care* before they consider adding a cryptocurrency option to a 401(k) plan's investment menu for plan participants.") (emphasis added).
[12] *Id.*
[13] As the Proposed Rule notes, a 2025 American Benefits Council survey found that 29 percent of defined contribution plan sponsors had declined to offer services or investment options because peer plans were not doing so and they feared that an atypical offering could potentially draw a lawsuit. Courtney Zinter, *Am. Benefits Council*, *American Benefits Council Survey Finds: The Proliferating Risk of Baseless Retirement Plan Litigation is Harming Plan Participants and Retirement Security* (Oct. 2, 2025), https://www.americanbenefitscouncil.org/pub/?id=80095a3f-cbb8-e46c-854f-a475d2c68358. Further, over 500 excessive fee lawsuits have been filed since 2016, with over $1 billion paid in litigation settlements by plan sponsors. PSCA, *What Recent Developments in Litigation and DOL Enforcement Means for Plan Sponsors* (May 1, 2025), *https://www.psca.org/news/psca-news/2025/4/what-recent-developments-in-litigation-and-dol-enforcement-mean-for-plan-sponsors/*.
[14] EO at 38921.

inherent in alternative asset investments.[15] By reaffirming Section 404(a)(1)(B)'s process-based duty of prudence and providing a safe harbor for the selection of designated investment alternatives, the Proposed Rule enables fiduciaries to offer a broader range of diversified, competitive, and risk-adjusted investment options to *all Americans* investing for retirement. Removing roadblocks to lawful investment opportunities in alternative assets unlocks access to investment strategies and products that have traditionally been more easily available to institutional investors and high-net-worth individuals. The Proposed Rule thus fulfills a key purpose of EO 14330: ensuring that American workers can benefit from the same diversified investment strategies available to institutional investors.

**c. The Proposed Rule ensures investor protections remain in place.**

The Proposed Rule removes barriers to investment opportunities without relaxing any of the substantive protections that ERISA was designed to provide. For one, the safe harbor clarifies the duty of prudence in investment selection without weakening the fiduciary duty in any way. In addition, fiduciaries remain fully obligated under ERISA's duty of loyalty to act solely in the interest of plan participants and beneficiaries.[16] Finally, ERISA Section 406's prohibitions on self-dealing and transactions between plans and parties-in-interest will likewise remain in place under the Proposed Rule, providing an additional layer of protection against conflicted investment decisions regardless of whether a fiduciary satisfies the safe harbor. Together, these features ensure that the Proposed Rule strikes an appropriate balance between protecting plan participants and enabling fiduciaries to responsibly consider the full range of investment products that may be best suited for those they serve.

## III. The Proposed Rule appropriately rejects the DOL's prior 2022 guidance.

In March 2022, the DOL issued Compliance Assistance Release 2022-01, 401(k) Plan Investments in "Cryptocurrencies," which directed 401(k) plan fiduciaries to "exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan's investment menu."[17] This guidance was issued without notice and public comment, and the

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[15] *See* EO 14330 ("Many wealthy Americans, and Government workers who participate in public pension plans, can invest in, or are the beneficiaries of investment in, a number of alternative assets. Yet, while more than 90 million Americans participate in employer-sponsored defined-contribution plans, the vast majority of these investors do not have the opportunity to participate, either directly or through their retirement plans, in the potential growth and diversification opportunities associated with alternative asset investments.").

[16] *See* Proposed Rule at 16095 ("[N]othing in the proposed regulation excuses a fiduciary from complying with its obligations to act loyally or avoid prohibited conflicts of interest under sections 404(a)(1)(A) or 406 of ERISA respectively. Those are separate requirements, not impacted by the proposed regulation. *For the avoidance of doubt, the Department does not intend to relax the loyalty requirement or waive any conflict prohibitions in relation to a fiduciary evaluation of alternative assets.*") (emphasis added).

[17] Compliance Assistance Release No. 2022-01.

DOL has acknowledged that the Compliance Assistance Release was advisory, not binding authority.[18] Nonetheless, by singling out cryptocurrencies and their potential risks, this guidance significantly chilled investment in lawful digital asset investment options, slowed market growth, and restricted Americans' access to innovative retirement products. The DOL subsequently acknowledged the 2022 guidance was inconsistent with its historically neutral approach to investment types and rescinded it.[19] The DOL also made clear that the standard articulated in Compliance Assistance Release 2022-01, directing plan fiduciaries to exercise "extreme care," is "not found in the Employee Retirement Income Security Act (ERISA) and differs from ordinary fiduciary principles thereunder," including section 404(a)(1)(B)'s duty of prudence.[20]

Adopting a final rule consistent with the Proposed Rule's asset-neutral, process-driven safe harbor would be a bulwark against future attempts to adopt guidance similar to Compliance Assistance Release 2022-01. The Proposed Rule is grounded in the fundamental premise, established by ERISA Section 404(a)(1)(B), that a fiduciary's duty of prudence is neutral as to investment types. That duty of prudence centers on process, not the result or asset type, and places investment decisions in the hands of experienced fiduciaries and investment advisers, not a political administration. Informal guidance directed toward particular asset categories, digital assets or otherwise, wrongly implies that certain investments are favored or disfavored—an implication devoid of statutory support in ERISA. By enacting a clear framework through the notice and comment process, with stakeholder input, the Proposed Rule creates a principles-based standard and protects American workers from the distortions that short-term political pressure can impose.

## IV. The DOL should address fund-level structural barriers to fully achieve the Proposed Rule's policy goals.

While CCI supports the DOL's effort to promote an asset-neutral approach for retirement investments, the Proposed Rule addresses only one of two necessary conditions required to fully achieve that goal. The Proposed Rule is directed at reaffirming and clarifying the asset-neutral duty of prudence required of fiduciaries when including access to alternative investments in a 401(k) plan's menu of investment options. However, this focus on plan-level fiduciary process alone is insufficient to fully achieve the

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[18] *ForUsAll, Inc. v. United States Dep't of Lab.*, 691 F. Supp. 3d 14, 28 (D.D.C. 2023) ("the Department has reiterated that [Compliance Assistance Release 2022-01] is advisory rather than binding.").
[19] *See* U.S. Dep't of Lab., Emp. Benefits Sec. Admin., Compliance Assistance Release No. 2025-01, 401(k) Plan Investments in "Cryptocurrencies," May 28, 2025, https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2025-01.
[20] Compliance Assistance Release No. 2025-01.

Administration's policy goals as reflected in EO 14330 because it does not address a separate structural constraint at the fund level. Specifically, many alternative asset investment managers limit ERISA-covered plans to no more than 25 percent of the value of any fund or share class to avoid becoming subject to ERISA requirements that do not map neatly onto an asset manager or alternative asset fund.[21] This constraint operates independently of fiduciary conduct, meaning that even a fully prudent fiduciary acting within the Proposed Rule's safe harbor may find that the most competitive alternative investment funds have limited or no capacity for retirement capital. The result is a gap between the Administration's policy objectives under EO 14330 and what the Proposed Rule can deliver on its own. To best close this gap and directly address this obstacle, CCI respectfully requests that the DOL not only ease the burden on plan fiduciaries to demonstrate satisfaction of their ERISA duties, but also modernize the fund-level compliance framework by reducing impediments that currently deter alternative asset managers from welcoming higher levels of ERISA-covered plan participation in their funds, including disproportionate reporting obligations, fiduciary duties that extend beyond those that typically apply to a registered investment adviser, and restrictions on certain types of affiliate, principal, and agency cross transactions.

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CCI commends the DOL for issuing the Proposed Rule, and for its commitment to reducing regulatory burdens and litigation risks that have restricted American workers' ability to access a high-quality and diverse range of retirement investments. The Proposed Rule aligns the DOL's guidance with both ERISA and established case law, affirming that the duty of prudence is, at its core, a process-based inquiry—one that is neutral as to asset type and centers on the quality of a fiduciary's decision-making rather than the nature or type of investments chosen.

CCI supports the Proposed Rule and urges the DOL to finalize a rule that preserves these essential features. Specifically, by providing a safe harbor structured around six objective factors and affording fiduciaries a presumption of reasonableness when they objectively, thoroughly, and analytically consider those factors, the final rule would give fiduciaries additional clarity and confidence to evaluate and offer a full range of investment alternatives—including digital assets. Critically, a final rule that is faithful to the Proposed Rule's key features would help ensure that no innovative investment asset—including digital assets—can be singled out for discriminatory treatment.

[21] *See* 29 C.F.R. § 2510.3-101, as modified by Section 3(42).

The U.S. stands at a pivotal moment in the growth of digital assets. Finalizing a rule consistent with the aforementioned principles will signal to markets, innovators, and the world that the U.S. welcomes and supports the responsible integration of digital assets into the mainstream financial system, helping to cement U.S. leadership in the future of digital finance.

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CCI appreciates the opportunity to comment on the Proposed Rule and looks forward to working with the DOL throughout the rulemaking process.

Respectfully submitted,

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