

June 1, 2026

The Honorable Daniel Aronowitz

Assistant Secretary

Employee Benefits Security Administration, Department of Labor

200 Constitution Avenue NW

Washington, D.C. 20210

Re: Fiduciary Duties in Selecting Designated Investment Alternatives; 29 CFR Part 2550; RIN 1210-AC38

Dear Assistant Secretary Aronowitz,

The Institutional Limited Partners Association (ILPA) appreciates the opportunity to comment on the Department of Labor's (DOL) proposed regulation addressing Fiduciary Duties in Selecting Designated Investment Alternatives (RIN 1210-AC38). On behalf of our members, the more than 625 institutional investors from more than 50 countries who invest as Limited Partners (LPs) and collectively represent more than \$3 trillion USD invested in private assets, we thank the DOL for its openness to address the "comprehensiveness and applicability" of the "non-exhaustive list of factors" that should be "consider[ed] when selecting investment options."¹

ILPA's membership represents all categories of small and large institutional investors into private markets,² many of which are held to their own fiduciary standards, including US-based private pensions that are directly governed by the Employee Retirement Income Security Act of 1974 (ERISA) and US-based public pensions that often treat ERISA standards as their model. ILPA's global membership also includes endowments, foundations, insurance companies, development financial institutions, family offices, and sovereign wealth funds, each of which abides by its own defined fiduciary duty standard as set by the organization, statute, or regulation.

ILPA is the only global membership organization dedicated exclusively to advancing the interests of LPs and their beneficiaries in private markets. Since our founding almost 25 years ago, we have been focused on empowering LPs to "maximize their performance on an individual, institutional, and collective basis."³

ILPA and its members recognize the importance of the proposed regulation's policy objectives and support American workers' ability to secure a "comfortable and dignified retirement." We also agree with SEC Commissioner Uyeda that the "optimal level of exposure to private investments" for defined contribution plans is "not zero."⁴ However, the proposed regulation, as currently written, does not fully align with the institutional process that LPs follow today (especially if the LP itself owes fiduciary duties)

¹ Fiduciary Duties in Selecting Designated Investment Alternatives (March 31, 2026), *available at*: <https://www.federalregister.gov/documents/2026/03/31/2026-06178/fiduciary-duties-in-selecting-designated-investment-alternatives>.

² The scope of this commentary is intentionally narrow; institutionally, our members invest in both closed and open-end funds, liquid and illiquid strategies; however, ILPA's mandate is oriented towards private markets, with a particular focus on private equity (PE) funds, as reflected in ILPA-issued standards and best practices.

³ Institutional Limited Partners Association homepage (as viewed May 26, 2026), *available at*: <https://ilpa.org/>

⁴ *Supra* 1.

to deeply evaluate the magnitude of operational and investment risk exposure and assess this against the return potential of any private markets' investment.

The points in this comment letter are targeted towards areas in the proposed regulation that would benefit from (1) a more comprehensive set of factors, aligned with the rigor of the private markets' investment decision-making process and (2) additional clarity to ensure the process-based safe harbor can be consistently followed.

These views are based on ILPA's longtime role as an industry leader in educating LPs,⁵ as well as in setting standards and best practices⁶ designed to strengthen governance, transparency, and alignment of interests between LPs and General Partners (GPs) across private markets.

This comment letter aims to provide greater insight into the practices that exist within the private markets industry to "objectively, thoroughly, and analytically consider"⁷ potential investments from a risk lens and the typical private fund dynamics between LPs and GPs. This letter also addresses key elements of the six factors that should be further clarified or more closely considered in the final guidance: performance, fees, liquidity, valuation, performance benchmark, and complexity.

Executive Summary⁸

ILPA members know firsthand about the "return-enhancing opportunities in alternative asset funds"⁹—nearly 60% of LPs do not think their organization could meet its performance requirements without investing in PE.¹⁰ In past industry comment letters, we've identified that "private equity has delivered enormous long-term financial benefits to LPs, and by extension, the millions of people and essential programs they serve."¹¹

As such, our members have experienced the benefits of private markets that are identified throughout the proposed regulation, such as "private-equity markets have grown nine-fold, while public markets have only doubled," access to broader American economy given "an increasing number of U.S. companies remaining private and utilizing private sources to raise revenue," "growth and diversification," "perform[ance] during market downturns," and the view that including private markets in the portfolio allows investors to "maximize risk adjusted returns on investment, net of fees, across their entire portfolio."¹²

However, our members also recognize the "complicated" and "highly variable nature" of private markets and the associated challenges that are identified throughout the proposed regulation, such as "reduced day-to-day insight into the value of their investments than traditional assets," "information

⁵ ILPA offers LP-oriented courses on many of the factors outlined in the proposed regulation, available at: <https://ilpa.org/education/ilpa-institute/>.

⁶ ILPA has a suite of standards and best practices for the private market industry, covering "Principles & Best Practices," "Legislation & Regulation," and "Templates, Standards, & Model Documents," available at: <https://ilpa.org/industry-guidance/>.

⁷ *Supra* 1.

⁸ The points presented in the Executive Summary are more fully expanded on throughout the remainder of the comment letter – the Executive Summary should not be read without the full context of the comment letter.

⁹ *Supra* 1.

¹⁰ ILPA, *ILPA Private Fund Advisers Analysis*, available at: <https://ilpa.org/resources-tools/resource-library/ilpa-private-fund-advisers-analysis/>.

¹¹ ILPA comment letter on *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews* rule (April 25, 2022), available at: <https://www.sec.gov/comments/s7-03-22/s70322-20126586-287243.pdf>.

¹² *Supra* 1.

asymmetry,” that they “require particularized analysis to understand their liquidity, valuation, and fees,” the importance of manager selection given the “degree of performance dispersion among managers,” “the uncertainty about how alternative assets will perform in the future,” and that there is “[n]o consensus among plans about which private equity funds to invest in.”¹³

To address this, as the DOL identifies, our members have built institutional processes that “emphasiz[e] the importance of prudent investment selection”¹⁴ to understand the risks associated with private markets. These processes have been built and refined over decades, based on LPs’ experiences engaging in the private market landscape, which is described by the American Investment Council (AIC) as follows: “[b]y Congressional design, investment in private equity is reserved primarily for investors with significant investment holdings— who are well-positioned to appraise a private equity investment, have the experience and leverage to negotiate appropriate investment terms, and are best able to absorb investment losses should they occur.”¹⁵

As such, ILPA recommends the DOL address the following areas:

- There are additional key risk factors of operational and investment due diligence that need to be added as either standalone factors, as part of the broader performance factor, or as part of each factor, to get a better view into evaluating risk to achieve the stated objective to “offer the opportunity for participants to maximize risk-adjusted returns on their retirement assets net of fees”¹⁶
- Legal review must be included as a factor, given the substantial role this plays in dictating how a private market fund plays out over its 10-15 year life
- Recognizing that interpretative guidance on monitoring is expected in the near term—it is critical that monitoring be an integrated portion of the process-based safe harbor approach as it goes hand-in-hand with diligence and legal review and touches on all six factors in meaningful ways
- Prominent points for further clarification related to education of plan participants, engagement with continuation funds, specific risks associated with evergreen/retail vehicles, use of advisors, and additional details across all six factors about the data required to satisfy the process-based safe harbor

Important Assumptions

Our assertions in this comment letter are informed by several important assumptions, namely that Target Date Funds (TDFs) will likely be the main channel utilized by defined contribution plans to access alternative investments, but that even where a TDF is the structure used, fiduciaries must comprehend the risk of any underlying products in which the fund invests. Further, our commentary is predicated on the idea that fiduciaries are selecting investments without the use of an advisor, as a benchmark against which the clarity and comprehensiveness of the factors outlined and process-based safe harbors should be evaluated.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ American Investment Council (AIC) comment letter on *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews* rule (April 25, 2022), available at: <https://www.sec.gov/comments/s7-03-22/s70322-20126669-287340.pdf>.

¹⁶ *Supra* 1.

Use of TDFs

We recognize that the DOL itself “anticipates that the main channel through which the proposal would lead to greater defined contribution plan investment in alternative assets would be within target date funds.”¹⁷ The nature of TDFs assumes that private market funds will be a layer down as an underlying fund investment, with the TDF serving as a wrapper. There are comparable designs in the institutional space with investments in Fund of Funds or Secondary Managers that are deeply rooted in the same focal points highlighted across operational and investment risk.

View of Risk at Underlying Funds in TDF

As described throughout this letter, understanding risk is at the heart of ILPA members’ due diligence and legal negotiation processes. While we recognize that there is a difference in the due diligence carried out for the TDF wrapper vs. the underlying fund investment, understanding the risk of the underlying investments is explicitly listed as a fiduciary responsibility for plan fiduciaries in prior DOL guidance. In *The Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries* guidance, the key point “Understand the fund’s investments – the allocation in different asset classes (stocks, bonds, cash), individual investments, and how these will change over time” asks: “Do you understand the principal strategies and risks of the fund, or of any underlying asset classes or investments that may be held by the TDF?”¹⁸

Traditional, Drawdown Private Market Funds

We focus the bulk of our analysis on traditional, drawdown private market funds. We recognize there are differences between traditional, drawdown private market funds and evergreen/retail vehicles in key areas such as the flow of capital, redemptions, investment timing, valuations, reporting, negotiations, and governing documents (with additional nuances depending on the evergreen/retail vehicle’s offering type). We understand that the underlying private market funds included in TDFs may be one or a combination of traditional, drawdown private market funds and/or evergreen/retail vehicles. While we focus predominantly on the nature of traditional, drawdown private market funds for simplicity, we do provide perspective on evergreen/retail vehicles in certain areas of the comment letter and have previously published analysis on the risks and issues associated with evergreen/retail vehicles.¹⁹

Use of Advisors

While the use of an advisor²⁰ is recommended throughout the proposed regulation, it is not a requirement for plan fiduciaries to hire an advisor as long as the plan fiduciary has “appropriately consider[ed] the complexity of the designated investment alternative and determine[d] that it has the skills, knowledge, experience, and capacity to comprehend it sufficiently to discharge its obligations

¹⁷ *Ibid.*

¹⁸ DOL, *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries*, available at: <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/target-date-retirement-funds-erisa-plan-fiduciaries-tips.pdf>.

¹⁹ ILPA, *ILPA Retail Capital Analysis: Primer and Questions to Ask GPs*, available at: <https://ilpa.org/resources-tools/resource-library/ilpa-retail-capital-analysis-primer-and-questions-to-ask-gps/>

²⁰ We use advisor shorthand for a “professional that is an ERISA fiduciary—such as an investment advice fiduciary as defined in section 3(21)(A)(ii) of ERISA or an investment manager as defined in section 3(38).”

under ERISA and the governing plan documents.”²¹ Thus, we provide our recommendations for the factors as if a plan fiduciary were not hiring an advisor, to ensure the factors and process-based safe harbor are comprehensive and clearly outlined.²²

Private Funds Overview

Overview

Private fund investments provide LPs with access to investment opportunities that they may not be able to access directly on their own behalf, leading to desirable portfolio diversification with allocation across vintage year, size, sector, strategy, and geography.

At the most basic level, traditional, drawdown private market funds²³ are established by a sponsor entity (colloquially referred to as a manager), which typically controls the GP that operates the fund. The manager, acting through the GP on behalf of the fund, seeks capital from investors that will participate in the fund’s investment returns but will not participate in the management or control of the fund. Such investors are colloquially referred to as limited partners.

The GP has a fiduciary duty to make decisions on behalf of its client, which in this case is the fund. This means that a single LP cannot dictate what happens in a fund in which they invest. Given that many LPs themselves are fiduciaries, before deciding to invest in a fund²⁴ managed by a GP (who will then select and manage portfolio company investments), LPs carry out a fund underwriting process during which they conduct due diligence, make an investment decision to proceed or not, and then negotiate on the fund’s legal documents (and once again, must make a decision to proceed or not depending on the results of the negotiations).²⁵

During the fund underwriting, LPs “typically conduct extensive due diligence”²⁶ of the GP to evaluate risk²⁷—both with (1) investment risk and the GP’s ability to execute on the fund’s stated strategy (typically referred to as investment due diligence, IDD), as well as with (2) operational risk and the soundness of the GP’s operations (typically referred to as operational due diligence, ODD).

Prior to investing in a private fund, in addition to the due diligence process, LPs will also typically “negotiat[e] vigorously.”²⁸ The key risk items reviewed in due diligence serve as the framework for how the fund anticipates being run at the time of diligence based on how predecessor funds have been run in the past and the latest views on how the fund will be run going forward – the actual contractual framework that dictates how the fund being diligenced will be run and the nature of the relationship

²¹ *Supra* 1.

²² We provide additional recommendations on the complexity factor later in the Review of Factors section.

²³ See note in the Important Assumptions section about *Traditional, Drawdown Private Market Funds*.

²⁴ See note in the Important Assumptions section about *Use of TDFs*.

²⁵ ILPA highlighted issues with LPs’ ability to switch GPs if they are dissatisfied with the terms during negotiations in ILPA, *ILPA Private Fund Advisers Analysis*, available at: <https://ilpa.org/resources-tools/resource-library/ilpa-private-fund-advisers-analysis/>.

²⁶ As described in the Opening Brief for Petitioners, by the “Private Fund Managers” (collectively, the National Association of Private Fund Managers, Alternative Investment Management Association (AIMA), American Investment Council (AIC), Loan Syndications and Trading Association (LSTA), Managed Funds Association (MFA), and National Venture Capital Association (NVCA)), in the United States Court of Appeals for the Fifth Circuit case against the Securities and Exchange Commission (SEC) related to the *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews* rule, available at: <https://ilpa.org/resources-tools/resource-library/gp-side-brief/>.

²⁷ See note in the Important Assumptions section on *View of Risk at Underlying Funds in TDF*.

²⁸ *Supra* 26.

between the GP and LPs for the next 10-15 years comes through the legal contracts signed prior to the fund's closing. Additional detailed review and negotiations of the contractual language found in the Limited Partnership Agreement (LPA), Private Placement Memorandum (PPM), Subscription Agreement, Management Agreement, as well as investor-specific side letters and the package of terms provided in the Most Favored Nation (MFN) compendium,²⁹ are another critical component of the investment decision-making process.

By investing in a private fund, LPs commit to provide capital from time to time, as requested by the GP via a drawdown or capital call notice. As passive investors, LPs do not get involved in the fund's investment process beyond providing capital. They do not have discretion about which investments are made or have any role in the day-to-day operations of the fund. At the time an LP invests in a private fund, the GP has typically not yet made any investments. Post fund closing, the GP directs the fund to seek out and make investments in portfolio companies that the GP deems, in its discretion and consistent with its fiduciary duty, to be attractive and within the remit of the fund's governing documents, including relevant agreements with LPs.

Due Diligence

Operational Due Diligence (ODD) seeks to review operational risk, principally related to the investment manager, with a focus on key items such as internal controls, policies and procedures, and regulatory or legal concerns. Beyond the investment manager, there is also a focus on the ultimate parent organization, affiliates, related parties, and service providers used.

Investment Due Diligence (IDD) seeks to review investment risk, principally related to the GP's ability to execute on the fund's stated strategy through their investments, with a focus on key items such as macroeconomic/market conditions, track record, leverage effect, sourcing, value-added contribution, concentration, limitations on exits, competition, and regulatory or legal concerns.

Overall, due diligence is a process to evaluate the magnitude of operational and investment risk exposure and assess this against the return potential. It involves detecting increased likelihood of operational failures and underperformance, and informs the view of the manager, including assessment of firm culture and franchise health.

The process needs to be tailored towards the specific investment manager and their strategy, size/maturity, industry, geography, and use of service providers. LP due diligence can be carried out internally by the LP or can be contracted out to a third-party service provider (or a hybrid of both). In addition to in-depth data requests and review, due diligence can also include onsite visits, reference checks, and background checks.

As a reference point, the ILPA DDQ 2.0³⁰ contains 40 pages of questions (a combination of Yes/No and detailed response questions), requests 89 documents, and includes an additional 8 appendices with more detailed data requests. The DDQ covers the key risk factors that are central to due diligence, such as:

- Firm, Org, and Fund Structure

²⁹ ILPA provided insight into the design of a "best-in-class" MFN process in ILPA, *ILPA Private Fund Advisers Analysis*, available at: <https://ilpa.org/resources-tools/resource-library/ilpa-private-fund-advisers-analysis/>.

³⁰ The ILPA DDQ 2.0 is a leading industry standard and best practice for due diligence, with over 50,000 downloads in the nearly five years since its release, available at <https://ilpa.org/resources-tools/resource-library/due-diligence-questionnaire/>.

- Key Persons/Succession Planning and Team
- Investments, Valuations, Reporting, and Cash Controls
- Investment Strategy, Investment Process, and Track Record
- Macroeconomic and Market Environment
- Alignment of Interests and Fund Terms
- Service Providers
- Legal, Regulatory, and Compliance
- IT Systems/Cybersecurity and Business Continuity

Legal Review

The legal review seeks to sort through the mosaic of information contained within the various legal documents and the tradeoffs identified in the negotiation process to make sense of how all the moving pieces fit together. This is all done to determine the actual costs of investing in the fund and to underwrite the fund's core risks.

While each LP will have different views and specific needs, which can be captured through their side letter, there are general points of emphasis for all LPs during the legal review. The two broad buckets are fund economics and fund governance. Fund economics focuses on points such as the management fee, fee offsets, GP commitment, partnership expenses, carried interest and the distribution waterfall, valuations, and the reporting that covers all these points. Fund governance focuses on points such as key persons, time and attention, standard of care, fiduciary duty, and removal.

With the nature of private fund dynamics and the 10-15 year life of the fund, an additional challenge with the legal review and crafting of the legal documents is securing protections for the world that exists today, with considerations for the future (unknown) world. In practice, legal documents may be silent on a particular investment tool that did not exist at the time the fund closed and, as such, was not considered directly in the legal documents. The permissible use of this tool can then be open for interpretation by the GP, or broad language in the legal documents can be used to give clearance to use the tool. Real-life examples where LPAs were silent on the use of an investment tool in the last 10-years (the minimum life of fund under contract) include subscription lines of credit, NAV-based facilities, continuation vehicles, and retail capital.

This is why, to supplement the legal documents that dictate the nature of the relationship, the private markets industry—led by ILPA—sought to develop a principles-based approach to outline the course of engagement across the themes of governance, transparency, and alignment of interest,³¹ and introduce standards and best practices to put guardrails in place when new tools need corrective action.³²

For funds an LP invests in, an important element of due diligence is the ongoing review and monitoring of the key risk factors identified during the initial due diligence and legal review. This can

³¹ ILPA released the latest version of its principles, ILPA Principles 3.0, in June 2019, 10-years after the first ILPA Principles document was released to the industry, available at: <https://ilpa.org/industry-guidance/principles-best-practices/ilpa-principles/>.

³² In all the examples provided, ILPA has come out with guidance to educate members on the use of the tools, put in guardrails for more considered use going forward, while also developing due diligence questions to ensure the tools are asked about during the underwriting stage to evaluate risk, and promoting standardized legal language to ensure the treatment is clearly outlined.

include a review of quarterly reporting,³³ quarterly calls, annual meetings, periodic visits, and even an annual version of the DDQ.

Regulatory Nature of Private Markets

Due diligence and legal review play a critical role in the decision-making process for private markets investing, given the long-term commitment and the additional risks associated with these investments. Another reason is the regulatory nature of private markets.³⁴

The regulatory environment in the US for traditional, drawdown private market funds³⁵ is fundamentally different than that of the regulatory environment for “mutual funds and other publicly offered pooled investment vehicles that are ‘investment company[ies]’ and required to register with the [SEC].”³⁶

As identified by the “Private Fund Managers” in their opening brief before the Fifth Circuit in the case against the SEC related to the *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews* rule:

*Because private funds serve large, predominantly institutional, investors capable of protecting their own interests, Congress deliberately exempted them from the prescriptive regulatory regime applicable to publicly offered investment vehicles.*³⁷

In the same brief, the “Private Fund Managers” went on to explain (related to “mutual funds and other publicly offered pooled investment vehicles”):

To protect retail customers who invest in these vehicles, Congress has subjected registered investment companies to extensive regulation under the Investment Company Act of 1940, which governs virtually every aspect of their operations, including their: boards of directors, functions and activities, size, contractual relationships, capital structure, dividend payments, lending relationships, distributions, redemptions, and repurchases of securities, and reports and financial statements

*In short, the Investment Company Act restricts investment companies’ “management structure,” “investing behavior,” and “types of transactions”—all to protect Main Street investors.*³⁸

In the private markets space, all these aspects that have extensive regulations under the Investment Company Act of 1940 are subject to negotiations and therefore must be factored into the legal

³³ ILPA has produced several quarterly reporting templates to raise the bar for transparency in private markets through standardized reporting across key topics such as Fees/Expenses, Performance, and Portfolio Company Data, available at: <https://ilpa.org/industry-guidance/templates-standards-model-documents/ilpa-templates-hub/>.

³⁴ To be clear, ILPA is not advocating for the current private markets regulatory environment to change. We are simply highlighting the realities of investing in private market funds, as described by the “Private Fund Managers”, which will, in turn, be the realities for TDF providers and advisors that choose to invest in traditional, drawdown private market funds to get private market exposure for 401(k) investors, the majority of which are “retail investors” and “Main Street investors” (i.e., everyday Americans).

³⁵ Traditional, drawdown private market funds—more accurately stated, the private fund adviser responsible for the fund—are subject to limited SEC oversight, including “reporting, recordkeeping, and examination requirements,” as outlined by the Fifth Circuit Court of Appeals in their final opinion in the case related to the *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Review* rule, available at: <https://ilpa.org/resources-tools/resource-library/final-opinion-from-the-u-s-court-of-appeals-for-the-fifth-circuit/>.

³⁶ *Supra* 26.

³⁷ *Ibid.*

³⁸ *Ibid.*

contracts and a focus of the diligence carried out by LPs in order to get comfortable with the potential associated risk.

This is a feature, not a bug, of investing in private markets, given the “disclose and consent” nature of handling both conflicts and other operational aspects that are “extensively” regulated in “mutual funds and other publicly offered pooled investment vehicles.”³⁹

As identified by AIMA in their comment letter for the SEC’s *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews* rule:

*The Commission has historically relied on a regime of disclosure and consent with respect to private funds and advisers, in recognition of the fact that (i) private fund investors do not need the full scope of protections afforded to retail investors under the Advisers Act, and (ii) the Commission’s resources should not be allocated away from retail investors to sophisticated investors that are better able to advocate for themselves in negotiations with fund advisers.*⁴⁰

LPs have continued to invest in private markets for all the beneficial reasons referenced by the DOL in the proposed regulation, and their ability to do so under a differentiated regulatory context is due to having the necessary processes in place to evaluate potential investments and identify the appropriate balance of risks and potential returns.

In a comment letter for the SEC’s *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews* rule, AIC highlighted:

*Investors with this degree of sophistication—many of whom, such as pension plans, owe fiduciary duties to their beneficiaries—would not (and could not) be shifting their capital to private equity if they lacked sufficient information to make responsible, remunerative investment decisions, or if they were unable to achieve satisfactory contractual terms through negotiation with fund advisers.*⁴¹

The information requested in due diligence outlined for private markets is significantly greater than that outlined by the DOL in the proposed regulation. This is driven by the fact that LPs (especially those who owe fiduciary duties to their beneficiaries) need a “sufficient” level of data to make “responsible, remunerative investment decisions” and need to factor in legal review to “achieve satisfactory contractual terms” with their investments.⁴²

Review of Factors

Performance, Fees, and Performance Benchmark

As described in this letter, the most important time for an LP vis-à-vis a fund (i.e., when it has agency and discretion) is the period leading up to its commitment to the fund. Because of the long-term commitment being made, an LP that is about to deploy capital (especially if the LP itself owes fiduciary duties) will expend time and energy prior to making its commitment to diligence and understand the GP, the fund’s investment objectives, and the related legal contracts to evaluate risk and carry out an

³⁹ *Supra* 26.

⁴⁰ Alternative Investment Management Association (AIMA) comment letter on *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews* rule (April 25, 2022), available at: <https://www.sec.gov/comments/s7-03-22/s70322-20128423-291344.pdf>.

⁴¹ *Supra* 15.

⁴² *Ibid.*

institutionalized process that “emphasizes the importance of prudent investment selection.”⁴³ As emphasized throughout this letter, once the decision to partner with the GP is made, the LP is subject to its binding commitment to the fund; it has no discretion or control over the fund’s investments and must trust the GP to deploy capital in a manner consistent with the LP’s expectations, GP’s disclosures and contractual undertakings, and all applicable laws and regulations.

To satisfy the process-based approach for the performance, fees, and performance benchmark factors, the proposed regulation highlights the use of risk measures (such as Sharpe Ratio), review of historical performance (net of fees), taking into account additional risks that investors are exposed to (“economic, market, sector, and investment-specific risks and counterparty risks”), receiving “total expense ratio figures” and “detailed information about the investment strategies and fee structures,” reviewing items like “risk, return, liquidity, and allocation profile,” and selecting a “meaningful benchmark” to compare the “risk-adjusted expected returns” against.⁴⁴

While these are helpful points—each a component of the due diligence and legal review process outlined in this letter—they do not capture the comprehensive process necessary to have “sufficient information” to make “responsible, remunerative investment decisions,” nor the role of legal review in “achieve satisfactory contractual terms” with investments.⁴⁵

As such, ILPA recommends that more comprehensive factors be introduced to fully evaluate risk, value, performance, fees, and performance benchmark, and that additional clarity be provided for these factors to ensure plan fiduciaries can appropriately follow the process-based safe harbor.

Comprehensive

- There are additional key risk factors of operational and investment due diligence that need to be added as either standalone factors, as part of the broader performance factor, or as part of each factor, to get a better view into evaluating risk to achieve the stated objective to “offer the opportunity for participants to maximize risk-adjusted returns on their retirement assets net of fees”⁴⁶
- Legal review must be included as a factor, given the substantial role this plays in dictating how a private market fund plays out over its 10-15 year life
 - This includes many points central to the factors covered in the proposed regulation, such as the fees charged, reporting on performance, fees, and valuations, the use of leverage, fiduciary duties, use of continuation vehicles, restrictions on LP-led secondaries, and counterparty treatment
 - With the nature of TDFs and the use of advisors, there are also opportunities for conflicts to emerge with contractual terms that are ultimately more beneficial to the TDF provider or advisor rather than plan participants
- Recognizing that interpretative guidance on monitoring is expected in the near term—it is critical that monitoring be an integrated portion of the process-based safe harbor approach as it goes hand-in-hand with diligence and legal review, and touches on all six factors in meaningful ways

⁴³ *Supra* 1.

⁴⁴ *Ibid.*

⁴⁵ *Supra* 15.

⁴⁶ *Supra* 1.

- More quantitative data is required beyond just the references to historical performance figures, Sharpe Ratios, expected performance, and total expense ratio-cash flow data, portfolio company data, different performance metrics beyond IRR, deal log, fee schedules, distribution waterfall models, and valuation details

Clarity

- With performance and performance benchmark—need clarity on the preferred performance methodology for net performance and the view into with and without the impact of subscription lines of credit⁴⁷
- With performance and performance benchmark—need clarity on historical data used for review and assumptions being made about TDF wrappers that include privates with simulated returns, given the dispersion that exists and challenges with making generalizations about “private market” performance when access to top-tier GPs is a critical part of LPs investment approach⁴⁸
- With fees—need clarity on the level of detail for historical fee data for the underlying private market fund investments⁴⁹
- With performance and fees—need clarity on the expected level of education to provide plan participants so that they can understand the provided reporting and make informed decisions, given the complexity of performance and fees in private markets (and the degree to which it is different than reporting on performance and fees in mutual funds, for example)
- With performance benchmark—need clarity on the “meaningful benchmark” to use when evergreen/retail vehicles are part of the investment mix, as benchmarks in this space typically do not go back for a full 10-year time period, and traditional private market benchmarks are not entirely relevant given different structural designs and performance expectations

Liquidity

As described in the proposed regulation, TDFs offer a mechanism to address “concerns about the liquidity and pricing considerations of alternative assets.”⁵⁰ Given the long-term nature of TDFs, they align with an LP’s traditional time horizon and long-term focus.

However, there are key differences between TDFs and LPs that require additional consideration. While in design, a TDF is long-term in nature, there are known and valid scenarios (as outlined in the proposed regulation) that require full redemptions at the individual and/or plan level. Thus, a TDF is at times “semi-long-term,” which parallels some of the challenges with redemptions faced by evergreen/retail vehicles, previously more commonly referred to as “semi-liquid vehicles.”⁵¹

Comprehensive

⁴⁷ ILPA, *ILPA Performance Template*, available at: <https://ilpa.org/industry-guidance/templates-standards-model-documents/ilpa-templates-hub/ilpa-performance-template/>.

⁴⁸ As the DOL references in the proposed regulation, “However, financial markets are dynamic and constantly changing in response to innovation, demographics, debt, economic movements, and other factors. This means that historical returns are not indicative of future performance for any asset. The uncertainty about the future performance of alternative assets is particularly heightened, however, given their liquidity and valuation characteristics.”

⁴⁹ ILPA, *ILPA Reporting Template*, available at: <https://ilpa.org/industry-guidance/templates-standards-model-documents/ilpa-templates-hub/ilpa-reporting-template/>.

⁵⁰ *Supra* 1.

⁵¹ Morningstar, *Blue Owl Offers a Harsh Lesson for Semiliquid Fund Investors*, available at: <https://www.morningstar.com/alternative-investments/blue-owl-offers-harsh-lesson-semiliquid-fund-investors>.

- There are additional key risk factors associated with liquidity that need to be added (for diligence at the TDF wrapper level)⁵²
- Recognizing that interpretative guidance on monitoring is expected in the near term—it is critical that monitoring be an integrated portion of the process-based safe harbor approach, as liquidity monitoring is paramount to the success of introducing illiquid investments into a product that offers redemptions

Clarity

- With liquidity—need clarity on the limits on the illiquid portion of a TDF’s portfolio
 - The DOL highlights the “most likely outcome would be plan sponsors choosing an option that allocates a small proportion of a fund to alternative assets to aid in diversification and potentially offer a high expected risk-adjusted net return”⁵³
 - However, commenters have referenced the benefits of allocating as much as 30% to illiquid products⁵⁴
 - The implications are meaningful across risk management, portfolio management, and expected returns, including the intersection with how selling private market positions on the secondary market typically plays out (with the seller typically selling at a discount) against the requirement that a retirement plan have the ability to “convert a designated investment alternative’s assets into cash without a reduction in value.”⁵⁵ If this scenario with a retirement plan converting its assets into cash plays out with a portfolio that is 30% illiquid, especially during a market downturn when questions on valuations might be most prevalent, there will undoubtedly be a reduction in value.
- With liquidity—need clarity on if plans will be able to introduce a similar penalty-based approach for “early redemptions” from TDFs with private markets, as described in the *lifetime income* example⁵⁶
- With liquidity—need clarity on the approach if TDFs become more actively traded by plan participants during different market cycles or, for example, if questions about valuations of the underlying investments come under regulatory or media scrutiny
- With liquidity—need clarity on the expectations from GPs and legal language requirements related to LP liquidity and transfer rights (i.e., LP-led secondaries)

Valuation

The valuation factor has elements of alignment with standard private market valuation practices, looking at the use of the quarterly valuations through a “conflict-free, independent process according to valuation techniques that satisfy the Financial Accounting Standards Board (FASB) Account Standards Codification 820 on Fair Value Measurement” and references to “financial statements prepared in accordance with U.S. generally accepted accounting principles.”⁵⁷

⁵² This will be unique to TDF wrapper-oriented due diligence, as it is not a relevant component for traditional LP due diligence; as such, there are no long-standing key risk factors of operational and investment due diligence that cover this.

⁵³ *Supra* 1.

⁵⁴ National Association of Investment Companies (NAIC) comment letter on *Fiduciary Duties in Selecting Designated Investment Alternatives* regulation (May 27, 2026), available at: <https://www.regulations.gov/comment/EBSA-2026-0166-40851>.

⁵⁵ *Supra* 1.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

However, valuations are complex, especially in the current market environment, and require careful review during due diligence, legal review, and ongoing monitoring to effectively evaluate risk at the outset and on a go-forward basis.

There are additional considerations here specific to evergreen/retail vehicles given the outsized role valuations play on points like price, performance, unrealized performance, management fee, carried interest, and net inflows/outflows. These same challenges would apply to any TDF based on the built-in liquidity designs of the products. As referenced by Apollo CEO Mark Rowan when talking about “day one markups in secondaries funds,” a practice he described as “mak[ing] no sense”⁵⁸:

*This leads to mispricing on a short-term basis, which was not that important in institutional funds where investors were not coming and going. But it turns out to be very important in evergreen funds where investors have the opportunity to receive at least a portion of liquidity on a quarter-by-quarter basis.*⁵⁹

Comprehensive

- There are additional key risk factors directly associated with valuations within operational and investment due diligence that should be added to the valuations factor
- Recognizing that interpretative guidance on monitoring is expected in the near term—it is critical that monitoring be an integrated portion of the process-based safe harbor approach, as valuation review is a core part of quarterly monitoring for LPs—with reviewing (1) valuation methodologies and any changes to methodologies reported, (2) quarterly valuations themselves and any changes quarter-to-quarter, (3) valuations during periods of active fundraising, and (4) infrequent write-downs of non-performing investments and the corresponding impact on management fees
- There is additional risk associated with valuations related to evergreen/retail vehicles that need to be addressed
 - Valuations—and the corresponding impact on unrealized gains—play an outsized role in performance of evergreen/retail vehicles⁶⁰
 - In evergreen/retail vehicles that can charge carried interest, unrealized performance is factored into the Fund NAV and the carried interest calculation, a structure that creates a strong incentive to artificially inflate valuations (this is not the case with the structure of traditional, drawdown private market funds)⁶¹

⁵⁸ Important to note, this practice, also referred to as “NAV squeezing,” can be carried out while following ASC 820 and U.S. GAAP.

⁵⁹ Citywire, *Ares CEO defends day-one markups in secondaries*, available at: <https://citywire.com/pro-buyer/news/ares-ceo-defends-day-one-markups-in-secondaries/a2490733>.

⁶⁰ Research shows that unrealized gains can make up much more than realized gains, with 69% of gains across a subset of 16 evergreen funds driven by unrealized gains, with this number increasing to 77% when removing one fund from the sample, as reported by EDHEC Infra & Private Assets Research Institute, *Evergreens: The Tree That Never Sheds*, available at: https://edhecinfraprivateassets.com/wp-content/uploads/2025/10/2025_private_equity_evergreens.pdf.

⁶¹ ILPA, *ILPA Retail Capital Analysis: Primer and Questions to Ask GPs*, available at: <https://ilpa.org/resources-tools/resource-library/ilpa-retail-capital-analysis-primer-and-questions-to-ask-gps/>

- Given the impact valuations have on unrealized gains and how carried interest is structured, there is an outsized impact with the existence of “NAV squeezing,” the practice of making secondary purchases at a discount and immediately marking up the paper NAV to the official NAV (or substantially higher)^{62,63}

Continuation Vehicles

The example covering an investment directly into a continuation fund⁶⁴ in the valuation factor raises several questions about the particular use case as it breaks the TDF model used throughout the proposed regulation. It is not expected that a traditional, drawdown private market fund would be available to select within the list of designated investment alternatives, let alone an investment directly into a CV. More broadly, the example raises questions about the applicability of private markets in defined contribution plans if the conflicts associated with a CV result in a failed process.

A CV is inherently conflicted, as the GP sits on both sides of the transaction.⁶⁵ Given this, the conflicts of a CV cannot be fully removed. Instead, the conflicts can only be mitigated, with the remaining conflicts evaluated by LPs as part of their roll/sell decision, which involves a modified form of due diligence and legal review.

Comprehensive

- There are additional key risk factors directly associated with CVs within operational and investment due diligence that should be added to the valuations factor
- Recognizing that interpretative guidance on monitoring is expected in the near term—it is critical that monitoring be an integrated portion of the process-based safe harbor approach, as CVs are connected to monitoring across portfolio company data and valuations, as well as insight provided at Limited Partner Advisory Committee (LPAC) meetings,⁶⁶ Annual General Meetings (AGMs), and other touchpoints the LP has with the GP

Clarity

- With CVs—need clarity on the implications of the example, as the use of CVs is significant in private markets (with almost 20% of exits coming from CVs in 2025)⁶⁷ and is an active

⁶² Wall Street Journal, *Funds Are Booking Big One-Day Windfalls Buying Private-Equity Stakes*, available at: https://www.wsj.com/finance/investing/funds-are-booking-big-one-day-windfalls-buying-private-equity-stakes-664f3423?mod=article_inline.

⁶³ Wall Street Journal, *The Future Ain't What It Used to Be for These Funds*, available at: <https://www.wsj.com/finance/investing/hamilton-lane-private-assets-alternative-funds-8862f32e?mod=Searchresults&pos=2&page=1>.

⁶⁴ The term continuation fund and continuation vehicle (CV) can be used interchangeably - the acronym CV can also be thought of as meaning “conflict vehicle,” as referenced in Financial Times, *Private equity investor body sounds alarm on ‘conflict vehicles’*, available at: <https://www.ft.com/content/88c4bafb-a329-47fa-b1f6-8c9d7c51bc10?syn-25a6b1a6=1>.

⁶⁵ S&P Global, *Muted exits push private equity continuation funds to 8-year high*, available at: <https://www.spglobal.com/market-intelligence/en/news-insights/articles/2026/5/muted-exits-push-private-equity-continuation-funds-to-8-year-high-101656507>.

⁶⁶ This is the first reference to the LPAC in our comment letter, which is another governance tool for LPs to ensure proper alignment with GPs. A seat on the LPAC and the role of the LPAC itself are other considerations as it relates to due diligence and legal review.

⁶⁷ Financial Times, *Private equity backers raise new conflict concerns over sweetheart deals*, available at: <https://www.ft.com/content/ded6dc6f-9632-450d-ac62-ad80614436da?syn-25a6b1a6=1>.

investment target for traditional, drawdown private funds, and to an even greater degree, for evergreen/retail vehicles given their focus on secondaries to get vintage year and J-curve diversification

- If investing in a CV (either by “rolling” interests or by being part of a secondary fund that invests in a CV) means that the named fiduciary does not satisfy the valuation safe harbor, then private markets should likely not be part of the consideration set given the frequency of use of CVs and that do not want to be a “forced seller” that cannot ever participate in potential upside of a “trophy asset”
- If even being part of a fund that has CV transaction (even if the named fiduciary elects to sell) means that the named fiduciary does not satisfy the valuation safe harbor, then private markets should not be part of the consideration set given the frequency of use of CVs
- With CVs—need clarity on the interplay with monitoring on portfolio company data and valuations data to ensure there is transparency into potential CVs
- With CVs—need clarity on the required data to be provided to the named fiduciary to aid in the roll/sell decision making process⁶⁸
- With CVs—need clarity on the required legal review to aid in the roll/sell decision making process⁶⁹
- With CVs—need clarity on the role the TDF provider or advisor can play on a LPAC relating to the LPAC vote to waive conflicts

Complexity

As highlighted in the Important Assumptions section about the *Use of Advisors*, we recommend a more comprehensive process with greater clarity to ensure plan fiduciaries have the necessary framework to follow, considering that the use of an advisor is not required. Given the complexity of private markets, we strongly encourage plan fiduciaries to engage an advisor, especially if they lack experience with private markets. However, the notion that using an advisor itself represents a “prudent process” across the full suite of safe harbors raises concern.

We recognize that many advisors that would be used by plan fiduciaries are used by institutional investors, and that many advisors already have substantial experience navigating the complexities of private market funds. However, we want to ensure that the factors and process-based safe harbors are comprehensive and have the necessary clarity, as they also need to serve as the framework to apply to the advisors in their work on behalf of plan fiduciaries.

We anticipate an increase in advisors entering this space, and while plan fiduciaries are required to make a “prudent selection of an investment professional,” it is important to have a clear standard for all advisors to be held to and clarity on the “skills, knowledge, experience, and capacity to comprehend” needed to effectively navigate the complexities of private markets. Not all advisors are created equal,

⁶⁸ ILPA created the Continuation Fund Disclosure Template to standardize a more comprehensive level of transparency to assist LPs in the roll/sell decision, ILPA, *Continuation Fund Disclosure Template*, available at: <https://ilpa.org/resources-tools/resource-library/continuation-fund-disclosure-template/>.

⁶⁹ ILPA created Continuation Fund guidance in 2023 to introduce guardrails and provide parameters for a well-run CV process. Just three years later, we are actively working to update this guidance given the increased use of CVs and ongoing challenges with how the process is playing out. ILPA, *Continuation Funds: Considerations for Limited Partners and General Partners*, available at: <https://ilpa.org/resources-tools/resource-library/continuation-funds-considerations-for-limited-partners-and-general-partners/>.

and not all advisors are well-suited to serve in this critical capacity on behalf of plan fiduciaries with private markets in mind.

Clarity

- With advisors—need clarity on the measure of “skills, knowledge, experience, and capacity to comprehend” the complexities of private markets, as not all advisors are created equal
- With plan fiduciaries—need clarity on the measure of “skills, knowledge, experience, and capacity to comprehend” the complexities of private markets, in instances where plan fiduciaries do not make use of an advisor

Closing

We thank the DOL for considering our comments. We appreciate your willingness to engage with the industry to position the final regulation to support American workers’ ability to secure a “comfortable and dignified retirement.” We would welcome the opportunity to engage directly with the DOL to provide further insight on “established investment principles”⁷⁰ to ensure stakeholder input is fully integrated into the regulation process.

In case of questions, or to request additional information, please contact ILPA’s Managing Director, Industry Affairs, Neal Prunier, at nprunier@ilpa.org.

Sincerely,



Jennifer Choi

Chief Executive Officer

Institutional Limited Partners Association (ILPA)

⁷⁰ *Ibid.*