

April 15, 2026

Employee Benefits Administration

Department of Labor

200 Constitution Avenue, NW

Washington, DC 20210

We write to comment on proposed regulation RIN 1210 AC 20 that was issued in response to Executive Order 14330. We have not been compensated for this commentary.

### **Introduction**

To begin, public pension plan retirees and U.S. taxpayers may have left billions of dollars of wealth on the table over time as a result of allocations to alternative investments, reflecting the combined effects of fee drag and, in some cases, limited net outperformance relative to public market benchmarks.<sup>1</sup> As a result, the phenomenon of alternative investments and private assets entering the institutional lexicon has led to one of the greatest wealth transfers in U.S. history, from taxpayers and retirees to a relatively small group of alternative investment fund managers. The fee structures in private equity and alternative investments have provided large amounts of wealth to fund managers, concentrating ownership and economic influence in the hands of a relatively small group of individuals, who now exert meaningful influence across large segments of the U.S. economy. This influence is now evident in the political sphere, as reflected in the proposed regulation, which underscores the growing role of the alternative investment industry and highlights potential gaps between the actions of fund managers and the ethical/fiduciary responsibilities to investors and society at large. These changes have occurred largely outside of public attention without debate or scrutiny.

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<sup>1</sup> For purposes of this discussion, *fee drag* refers to the reduction in investor returns due to management fees, performance fees, and other expenses associated with alternative investments and private assets, fund managers while *underperformance* refers to situations in which, after accounting for these costs, returns fall short of comparable public market benchmarks. This has been documented extensively in the literature, e.g. Phalippou (2020), where it has been shown that private equity funds have, on average, delivered net returns broadly comparable to public equity benchmarks [COMMENT: THIS SUGGESTS PE IS DELIVERING DECENT RETURNS], while generating substantial fee income for fund managers. This suggests that for large institutional investors, including public pension funds, a significant share of gross returns is absorbed by fees rather than accruing to beneficiaries. Even modest net underperformance compounds materially: a 100-basis point shortfall applied to \$1 trillion in allocations implies approximately \$10 billion per year in foregone wealth, highlighting the economic significance of fees and benchmarking assumptions. See Ludovic Phalippou, "An Inconvenient Fact: Private Equity Returns and the Billionaire Factory," *The Journal of Investing*, December 2020, 30 (1): pp. 11 - 39

The DOL's summary of the regulation correctly states that 70% of defined benefit plans participate in alternative investments. Many state pension plans subscribe to the notion that a considerable portion of their portfolio should be in alternative investments, often up to 30% in private equity, hedge funds, private credit and infrastructure. Because of this strategy, over 95% of state plans fail to beat a well-diversified public market domestic 60-40 index over long stretches of time. The 60-40 index has been the "gold standard" for institutions, and a laundry list of independent studies, dating back to 2016, proves such shortfalls. The DOL failed to consider this data in explaining the proposed regulation.

CalPERS, the largest state plan at \$600 billion in assets and a bellwether for asset allocations among its peer pension managers, is one such example. Over the 10 years ended December 31, 2025, CalPERS recorded an annualized rate of return of 8.3%, i.e., 120 basis points, or 12.6%, lower than the 9.5% return of the world's largest index fund, the Vanguard blended fund that mirrors the 60-40 index.<sup>2</sup> A simple back-of-the-envelope analysis implies that CalPERS spends over \$3 billion a year on fees (\$30+ billion over 10 years) considering their allocations to alternative investments exceeded \$180 billion in 2024.<sup>3</sup> CalPERS underperformance is likely due to fee drag in alternative investments.

Policymakers, including the DOL, might reasonably ask why many public pension plans allocate significant capital to complex, alternative-heavy portfolios rather than relying more heavily on low-cost index strategies that have historically delivered strong risk-adjusted returns. This is an important question, and one that should be studied intensely in a different forum, and before launching the proposed regulation. A combination of institutional incentives, governance structures, and peer benchmarking dynamics may have contributed to the increased adoption of complex alternative investment strategies by pension funds over the last 20 years, even where net-of-fee benefits are uncertain. Furthermore, Ennis (2025) provides compelling evidence that since the Global Financial

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<sup>2</sup> See <https://www.calpers.ca.gov/investments/about-investment-office/investment-organization/investment-fund-values>. See also: <https://investor.vanguard.com/investment-products/mutual-funds/profile/vbiax>

<sup>3</sup> We were able to arrive at this approximation using the following logic since CalPERS does not disclose fees in its annual investment report. Taking a smaller state pension, New Jersey, that *does* provide detailed data on all fees and carry paid to private equity, private credit, hedge funds, and real estate investment funds, \$377.5 million in fees and expenses were paid on \$26.4 billion of alternative investments (approximately 140 bps), with an additional \$270.9 million in performance fees. On an all-in basis, this implies total costs approaching 250 basis points annually. See <https://www.nj.gov/treasury/doinvest/pdf/AnnualReport/AnnualReportforFiscalYear2024.pdf>. Applying this to the \$182 billion in allocations to alternative investments by CalPERS, we arrive at an all-in annual fee of over \$4.5 billion. It is possible that due to scale and relationships, CalPERS may have negotiated more attractive fees so even at an average fee of 175 basis points, this results in almost \$3.2 billion.

Crisis allocations by pension funds to alternative investments have increased, all the while being accompanied by significant underperformance.<sup>4</sup>

### **Fiduciary in General**

The DOL should be aware that some fiduciaries and investment advisors may be reluctant to recommend a simple 60-40 index-based portfolio, despite its benefits. The incentives just do not support it. Commissions are higher when there is more “churn” in the clients’ portfolios. These dynamics have been well known both to investment industry practitioners and well-studied in the academic literature as the “active versus passive” asset management debate.<sup>5</sup>

At the retail level, anecdotal evidence from both of us with various retirement accounts for older, unsophisticated friends and family members, suggests that wealth managers do utilize index funds and ETFs, yet try to hide this fact by “going in and out” of multiple funds constantly, in an attempt to mirror active management, which carries higher fees than passive management. These meaningless transactions can often result in 15-page monthly brokerage reports, which may be intended to justify a 1% annual fee.

At the institutional level, the fee-generating schemes are far more complex, particularly when alternatives enter the picture for complex institutional portfolios.

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<sup>4</sup> See Richard M. Ennis, “The Long-Run Performance of Public Pension Funds in the United States,” *The Journal of Investing*, August 2025, 34 (5): pp. 7 - 13

<sup>5</sup> The “active versus passive” debate in asset management goes back to Fama and French (2010) who documented that the high costs associated with actively managed mutual funds – which buy undervalued and sell overvalued securities – results in lower net returns to investors than passive investment strategies – i.e., buy and hold or indexed-based portfolios.

## Detailed Comments

This comment now addresses the six Safe Harbor Factors, which the new regulation intends to implement.

- **Factors 1 and 5, Performance and Benchmarks**

In our opinion, the DOL should not allow fiduciaries to select their own benchmarks for alternative investments. While flexibility in evaluating “risk-adjusted returns” is important, such standards may be applied inconsistently across fiduciaries. A conflict-laden fiduciary could creatively interpret this standard in multiple ways to advantage the alternatives industry. The DOL should mandate specific, verifiable public benchmarks that are already in use such as those listed below in Exhibit A.<sup>6</sup>

*Exhibit A: Potential benchmarks and premium (in basis points, bps) by alternative asset category*

	<b>Index/ Benchmark</b>	<b>Appropriate Premium Over the Benchmark for Illiquidity, Leverage and Opaque Financial Reporting</b>
Private Equity	S&P 500	+300 to 500 bps
Hedge Funds	Balanced ETF (e.g., iShares Core Growth)	+200 to 400 bps
Private Real Estate	S&P REIT	+200 to 300 bps
Infrastructure	US 10-Yr Bond	+250 to 400 bps

If the DOL compared the alternative industry’s performance relative to these benchmarks, and consults relevant independent studies, it would quickly discover that a majority of the alternative funds don’t beat their relevant benchmarks.<sup>7</sup> The private equity industry, for example, likes to say, “We beat the S&P 500,” but this claim is very sensitive to the time window. For example, private equity performance over the last

<sup>6</sup> Please note that these are just benchmark suggestions with ad hoc premium numbers. A formal benchmarking exercise would require more rigorous analysis.

<sup>7</sup> See “An Alternative View of Manager Selection Risk,” published by the CAIA Association (January 16, 2020): <https://caia.org/blog/2020/01/16/an-alternative-view-of-manager-selection-risk>

decade has been dismal.<sup>8</sup> If a requirement of a 3% annual premium was mandated by the DOL to reflect the lack of liquidity, leverage and opaque nature of these investments, 90% of alternative fund managers would immediately be disqualified.

The DOL should consider the practice of the fund managers' mark-to-markets for unrealized gains. The credibility of these marks, particularly in 2026, is dubious given the widely publicized overhang of unsold deals in private equity.<sup>9</sup> The self-reported portfolio values are rarely audited by outsiders, including independent accounting firms. Furthermore, alternative investment managers like to point out that they do hire third party valuation consultants to help them mark their books; however, the models that are used by these consultants are neither generally accepted nor publicly documented.<sup>10</sup>

Private credit, one such strategy in the alternative investment space, suffers from similar problems, as indicated in our 2025 peer-reviewed journal article which received widespread media attention from outlets including Bloomberg.<sup>11</sup> We show that private credit fails to beat appropriate benchmarks (leveraged loan index, i.e., a public equivalent) and has not returned capital to investors even for funds that are 10 years old.

Research has shown that when state pension plans devise annual investment benchmarks (in concert with their investment advisor fiduciary) the plans meet the custom benchmarks 90% of the time, yet these same that state pension plans fall short of a 60-40 index yet exceed manufactured benchmarks.<sup>12</sup> That same research article, published nearly three years ago, calls on the trustees of these funds to question the benchmarking and reporting of the fund staffers and consultants. It seems the DOL should take heed of this same advice, if for no other reason than to protect retirees' payments and wealth.

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<sup>8</sup> See the very recent independent analysis by McKinsey & Company "Private equity: Clearer view, tougher terrain," (February 10, 2026):

<https://www.mckinsey.com/industries/private-capital/our-insights/global-private-markets-report/private-equity>

<sup>9</sup> A study published last year by Upwelling Capital Group showed that the value of unsold deals declines as funds age. See "No Country for Old Funds," (Summer 2025)

<https://upwellingcapital.com/wp-content/uploads/2025/07/No-Country-for-Old-Funds-Summer-2025.pdf>

<sup>10</sup> This can be compared to other asset classes in less liquid markets, such as bonds. There are generally accepted models for how to value bonds that are held on banks' books – either the "trading book" or the "banking book" – and these models must be documented and validated according to post-GFC regulations. No such thing exists in the private market space.

<sup>11</sup> Jeff Hooke, Xiaohua Hu, and Michael B. Imerman, 2025, "Residual Risk: Benchmarking the Boom in Private Credit." *The Journal of Private Markets Investing* 24(1): p. 109

Available at <https://www.pm-research.com/content/ijjpriveq/24/1/109>

<sup>12</sup> See Richard M. Ennis, 2023, "Lies, Damn Lies, and Benchmarks: An Injunction for Trustees," *The Journal of Investing*, 32(4): pp. 6-16

Available at <https://www.pm-research.com/content/ijjinvest/32/4/6>

One of the authors of this letter has served as an expert witness working on private equity (PE) related cases and reviewed many confidential marketing documents issued by private equity fund managers. The documents are hidden from public view due to laws passed by state legislatures and these laws exclude such documents from FOIA requests for unknown reasons. The performance claims in these documents are misleading at best, and securities fraud at worst. Returns may be labeled gross of fees and may exclude the impact of now popular credit lines. Critical measures such as the TVPI ratio neglect to mention the unsold portion of assets, and the valuable PME measurement is always missing.

Total Value to Paid-In (TVPI) is a key private equity metric measuring a fund's performance by dividing the total value (realized distributions + unrealized residual value) by the paid-in capital. It indicates the total return multiple on invested capital, and it assumes the unsold portion (i.e., unrealized value) of a fund is worth what the PE manager estimates it is. Accepting this estimate is a critical assumption since many PE funds that are 12 years and younger have unsold assets comprising a considerable portion of their cumulative value.

A TVPI ratio above 1.0 indicates the fund earned a profit. For example, a 10-year investment with an 8% compounded return has a TVPI of 2.2, and the PE fund median is roughly 1.5. However, the ratio ignores the time value of money and does not compare a fund either to its peers or to public market equivalents.

The public market equivalent (PME) is a financial metric used to compare the performance of private equity investments to a public market benchmark, such as the S&P 500. It helps investors understand if the capital invested in a PE fund would have performed better than a stock market index. If the PME for a fund is higher than 1.0, then the fund did better than the benchmark; below 1.0 means it did worse. Like the TVPI ratio calculation, the PME assumes the unsold portion of a fund is worth what the PE manager estimates it is.

Private real estate funds, hedge funds, infrastructure funds, and private credit funds also have public market equivalents that could be used to calculate their own PME ratios. However, neither alternative asset managers nor their investors appear to use these calculations actively in their deliberations, although we believe such PMEs would be very useful.

Advisory and monitoring fees paid by portfolio companies to the private equity managers are also excluded, and the marketing documents, as noted, contain zero comparisons to public benchmarks. The use of the internal rate of return (IRR), which is often touted in such documents as the preferred metric for investment performance, has been shown for decades to be an unreliable measure due to it being easily manipulated as well as being subject to unrealistic reinvestment assumptions.<sup>13</sup> In our private credit study, we pointed out this same critique when it comes to private credit fund performance.

The internal rate of return (IRR) is a financial metric used to assess an investment's profitability by calculating its compound annual growth rate. It is the specific discount rate at which the Net Present Value (NPV) of all cash flows—both inflows and outflows—from an investment equals zero. IRR helps compare the potential return of different investments or capital projects. A higher IRR indicates higher potential profitability, although it does not measure the degree of risk. The IRR is expressed as an annualized percentage. For example, a zero coupon, 10-year, US Treasury bond has an IRR of 4.2% today.

Investment consultants, often referred to as “gatekeepers” to the large state plans, prepare summaries and analyses of these marketing documents. Such consultant reports have similar flaws and little probative value. Consultants take such fund marketing documents at face value with minimal due diligence. The consultants do not conduct independent accounting audits of funds’ books, do not visit on-site underlying portfolio companies, and do not complete independent valuations of prior funds’ unsold values using independently generated source data. Such work is needed to verify the managers’ claims, and the consultants’ lack of effort represents a remarkable oversight in our opinion, given the state plans’ investment commitments and heavy fee promises under 12-year alternative fund management contracts. Moreover, the consultants rely heavily on the historical performance of alternative managers’ old funds in recommending new funds, despite the evidence that there is negligible persistence in the alternative investment industry, i.e., the ability to repeat prior performance.<sup>14</sup> Aside from the institutions’ reluctance to challenge fund managers’ claims and poorly performing deals, this lack of due diligence could be the subject of many class action lawsuits.

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<sup>13</sup> This was first pointed out nearly two decades ago by Ludovic Phalippou in “The hazards of using IRR to measure performance: The case of private equity,” Fall 2008, *Journal of Performance Measurement*. Phalippou continues to show that IRR manipulation is a widespread problem in private equity and has gone so far as to say that “Any IRR over 15% is wrong.”

See <https://www.evidenceinvestor.com/post/how-irr-manipulation-deceives-private-equity-investors>

<sup>14</sup> The literature shows that while there is persistence in venture capital fund performance, there is notably lower performance persistence from traditional private equity buyout funds. See Robert S.Harris, Tim Jenkinson, Steven N. Kaplan, and Ruediger Stucke, 2023, “Has persistence persisted in private equity? Evidence from buyout and venture capital funds,” *Journal of Corporate Finance*, vol 81: 102361.

<https://doi.org/10.1016/j.jcorpfin.2023.102361>

The DOL should be aware that fiduciaries may exhibit a preference for well-established asset managers, in part due to perceived reputational benefits and litigation risk considerations. Evidence suggests that “big name” fund managers do not necessarily outperform smaller fund managers; in fact, the evidence shows that performance is highly dispersed and not consistently correlated with manager scale. As a result, this justification for manager selection may contribute to allocation decisions that exacerbate biases and that are not fully aligned with maximizing net-of-fee returns for beneficiaries.

Lastly, the legal documentation surrounding a private equity fund is voluminous and highly complex. We do not foresee wealth managers, investment consultants, or fiduciaries spending time and money on this important part of the due diligence process. There is much talk of the use of artificial intelligence (AI) in assisting with this, but this is an area of active research and one that the DOL should consider looking into in the future.

- **Factor 2 Fees**

In our experience and expert opinion, the annualized fees of alternatives range from 2% to 4%, including fixed fees and carried interest. This can amount to up to 15% to 20% of capital invested, and therefore the high fees will have a significant impact on returns. Such fees are roughly 60 times the current annual fees of an index fund.<sup>15</sup> Institutional investors rarely audit the fee calculations, and it is unlikely wealth managers will do so either. However, much more analysis is needed on this factor.

- **Factor 3 Liquidity**

Private equity, private real estate and infrastructure funds are by definition illiquid. While significant research has been done in recent years on the liquidity profile of novel fund structures, including public-private hybrid funds, retail investors and retirees are not known to be “patient capital”.<sup>16</sup> The growth in secondary markets for private assets does

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<sup>15</sup> The expense ratio on many Vanguard funds are in the 5-basis point to 7 basis point range which when compared to 400 basis points, the alternative investment fees are indeed up to 60 times as large. See <https://investor.vanguard.com/investment-products/>

<sup>16</sup> See, for example, Juliana Hadas, 2025, “Choose Your Vehicle: A Closer Look at Private Market Fund Structures” *The Journal of Private Markets Investing*, 24(1) and Wesley Phoa, 2025, “Public-private solutions: squaring the circle?” *The Journal of Private Markets Investing*, 24(1).

provide a liquidity “release valve” for these funds but transactions in secondaries are small relative to the outstanding investments in private markets. The “democratization of private markets and alternative investments” is a very important topic and although improving the liquidity of these investments will indeed make them more attractive to mainstream investors, they are still complex products and 401(k) participants – and perhaps many of their wealth managers – lack the initiative to read the fine print of these products.

- **Factor 4 Valuation**

Independent studies document that private equity fund investors rely heavily on manager discretion in assigning valuations to portfolio companies. This reflects the limited availability of public data surrounding market values of the illiquid assets in which they invest as well as the use of ad hoc heuristics and subjective models that are neither rigorously tested nor independently validated. Multiple valuation phenomena have been pointed out in the literature. Investors tend not to request information from managers and not to perform their own valuations

First, there is ample evidence of “smoothing,” whereby private equity funds mark-to-market their unsold assets so as to have a fund’s returns appear to be less volatile than the S&P 500 returns on a yearly basis. For example, in 2018 and 2022, the S&P 500 returns were negative 4% and negative 18%, respectively. Incredibly, the private equity industry claimed positive returns of 13% and 2%.<sup>17</sup> Such consistent outperformance, despite evidence to the contrary, should give the DOL and the SEC reason to examine the practices. Reported volatility in private markets may reflect the smoothing of valuation processes rather than the underlying economic risk of the assets themselves, a practice which has become known in the industry as “volatility laundering”.<sup>18</sup> A similar phenomenon appears in the private real estate fund business.<sup>19</sup>

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<sup>17</sup> See Jeffrey Hooke and Ken Yook, “The Relative Performances of Large Buyout Fund Groups,” *The Journal of Private Equity*, Vol. 20, No. 1 (WINTER 2016). Available at <https://www.jstor.org/stable/44396814>.

<sup>18</sup> See “Interview with Cliff Asness of AQR Capital Management,” by Michael B. Imerman in *The Journal of Private Markets Investing* 24, no. 3 (2026): pp. 136-139. <https://www.pm-research.com/content/ijjpriveq/24/3/136>

<sup>19</sup> <https://realestate.wharton.upenn.edu/alumni/alumni-survey/>, see also <https://www.reit.com/data-research/research/updated-cem-benchmarking-study-highlights-reit-performance> , <https://www.greenstreet.com/public-vs-private-commercial-real-estate-investing-similar-genes/>

Second, there is empirical evidence from academic research that underperforming private equity funds may report more optimistic valuations during fundraising periods.<sup>20</sup>

Third, as shown in the previously cited Upwelling Capital study, unsold private equity assets consistently fall in value after year 10 of an older private equity fund's life, strongly suggesting an upward bias as the fund managers market new funds in preceding years four to 10.

Asking a fiduciary to value the underlying assets of a private equity fund is an unrealistic endeavor. Valuing a large, private business is an expensive, involved process, and valuation consultants and/or accounting firms charge significant sums of money (usually over \$20,000) for an individual company report. With their complex capital structures, private equity companies', including venture capital firms', reports would run toward the high end of this scale. Thus, in evaluating multiple private equity funds, each with 10 portfolio investments, for example, the fiduciary is looking at an expense that can easily be six or seven figures per year. We would be interested to know – and implore the DOL to investigate – how many fiduciaries are paying out-of-pocket to verify these valuations and if so, how much they are spending. We do not think that 401(k) or pension fund participants should be subjected to this kind of uncertainty about their retirement investments.

- **Factor 6 Complexity**

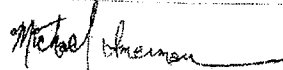
Between the two of us, there is collectively close to 75 years of experience working with private equity, investment banking, hedge funds, and commercial banking. Private equity and infrastructure legal documents are very lengthy and complex. Just the “carried interest” calculation consumes many pages, written in almost indecipherable English (“legalese”). For infrastructure deals, many of which are within the realm of “project finance” deals, the support and security documentation is complicated and voluminous. Requiring the fiduciary to carry out its obligations competently, in this respect, is dubious for all but the most sophisticated players. The situation, in our view, subjects 401(k) participants to unnecessary risk.

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<sup>20</sup> Gregory W. Brown, , Oleg R. Gredil, and Steven N. Kaplan, 2019, “Do private equity funds manipulate reported returns?” *Journal of Financial Economics*, 132(2): pp. 267-297.

This commentary is a prelude to what should be the DOL's broader role: evaluating the fiduciary framework governing the alternative industry's inclusion in public pension funds and other retail retirement accounts (e.g., 401(k)), especially given the well-characterized environment of limited transparency, illiquidity, and complexity, not to mention questionable conflicts of interest.

Best regards.



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