VOLUME 79 ◆ NUMBER 9

Employee Benefit Plan Review

Presidential Order Instructs Regulators to Help Facilitate 401(k) Access to Alternative Asset Investments, Including Private Equity and Private Credit

By Joshua B. Deringer, Joshua J. Waldbeser, Bradford P. Campbell and Jeffrey R. Blumberg

On August 7, 2025, President Trump signed an executive order, Democratizing Access to Alternative Assets for 401(k) Investors,[1] which instructs the Department of Labor (DOL) to issue regulations or guidance within 180 days on the fiduciary considerations under ERISA for including alternative assets within "asset allocation funds" for 401(k) and other participant-directed defined contribution plans. The order also instructs the Securities and Exchange Commission (SEC) to consider how to facilitate access to alternative assets for retirement plan participants by revising applicable regulations and guidance.

As defined in the executive order, "alternative investments" include private market investments in equity, debt and other nonpublicly traded instruments; actively managed investment vehicles holding digital assets; lifetime income investment strategies including longevity risk-sharing pools; and direct and indirect investments in commodities, real estate (including debt secured by real estate interests) and projects financing infrastructure development.

The executive order dovetails with the stated policy priorities of Daniel Aronowitz, the administration's nominee to head the DOL's Employee Benefits Security Administration, who indicated in his June 5, 2025, Senate confirmation hearing that, if confirmed, he intends to provide regulatory clarity on a number of matters, including "modernizing defined contributions plans to include alternative investments, such as private equity and cryptocurrency."

It should be understood that the executive order does not change existing law or regulation, and it does not explicitly require the DOL or SEC to adopt any particular rule or guidance. However, the policy mandate is clear, and the executive order builds even further on existing regulatory momentum to facilitate access to private markets for retirement plan investors.

Summary of the Executive Order

The overall policy embodied in the executive order is set forth as follows:

> [E]very American 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.

The executive order criticizes the role of "regulatory overreach," as well as fears over the potential for opportunistic lawsuits against plan fiduciaries, as factors discouraging innovation in the investment options made available to 401(k) and other defined contribution plan participants.

To help implement the policy considerations set forth in the executive order, it requires the DOL to:

- Within 180 days, reexamine its past and present guidance regarding the duties of ERISA fiduciaries in connection with making available to participants an asset allocation fund that includes investments in alternative assets;
- Within 180 days, as deemed appropriate and consistent with applicable law, seek to clarify its position on alternative assets, and the appropriate fiduciary process associated with offering asset allocation funds containing investments in alternative assets under ERISA; and
- Propose rules, regulations or guidance, as deemed appropriate, clarifying the duties that a fiduciary owes to plan participants under ERISA when deciding whether to make available to plan participants an asset allocation fund that includes investments in alternative assets, which may include "appropriately calibrated" safe harbors.

In carrying out these directives, the DOL is instructed to coordinate other agencies, including the Department of Treasury and the SEC, as necessary, to carry out the stated policy objectives including with respect to parallel regulatory changes.

The executive order separately requires the SEC to work in consultation with the DOL, to consider how to facilitate access to alternative investments for defined contribution plan participants, including possible revisions to current SEC regulations and guidance.

Asset Allocation Funds

While the executive order's definition of "alternative assets" is quite broad, and would clearly encompass investments in private equity funds, private credit funds and similar vehicles, the specific mandates provided to the DOL focus exclusively on the fiduciary considerations associated with "asset allocation funds" that include investments in alternative assets (as opposed to direct private fund investments). This focus denotes an important, and sometimes misunderstood, distinction.

There are certain legal and regulatory impediments that effectively preclude 401(k) plans from offering direct investments in private funds to plan participants. Probably most notably, the SEC generally takes the position that, if a plan participant can elect an investment in a private fund (meaning a fund that relies on the 3(c)(1) or 3(c)(7) exemption under the Investment Company Act of 1940), the applicable investor suitability requirements and other restrictions apply to the individual participant on a "look-through" basis, as opposed to the plan itself. This severely restricts the ability to invest in private funds through 401(k) and other participant-directed plans. For example, each plan participant, rather than the plan as a whole, may be treated as a separate beneficial owner when applying the 100-beneficial owner limitation imposed on 3(c)(1) funds. Likewise, many participants do not satisfy the net worth or income tests for "accredited investor" status (as defined in SEC Rule 501 adopted under Regulation D)[2] and even fewer satisfy the more arduous "qualified purchaser" standard that applies to 3(c)(7) funds.[3]

Because of these factors (and certain others), industry efforts largely have not focused on achieving direct private fund access for 401(k) plan participants. Rather, the primary focus has been on achieving "indirect" access, where private funds are merely included as part of broader investment options for participants that also include exposures to traditional asset classes such as public equities, public debt and the like. Target date funds, balanced funds and managed accounts are examples of investment alternatives that could include some exposure to alternative asset "sleeves" as part of a broadly diversified asset allocation.

Properly structured, vehicles employing this type of approach can avoid most of the legal impediments that otherwise preclude private market investments by participant-directed plans. Of particular importance, through a short series of no-action letters, the SEC staff has provided guidance on the circumstances in which a private fund can be made part of a broader investment option under a participant-directed plan.[4] Where the requirements set forth in the guidance are satisfied, the plan, rather than each participant, is treated as the investor. It is far more likely that the plan, rather than each participant individually, will satisfy the applicable requirements, and this also means that the investment option can be made available to all participants on an equivalent and nondiscriminatory basis.

In short, it is possible under current law to include private funds and other alternative assets as part of broader investment options offered to 401(k) plan participants, and some plans do so. To date, collective investment trusts (CITs) have been

the primary vehicle used for this purpose. Very large plans may also offer customized asset allocation portfolios to participants that include exposures to alternatives.

Following the executive order, it is possible that forthcoming guidance from the SEC staff and other regulators could facilitate increased direct access for 401(k) participants to private funds. However, we expect the primary focus to continue to be on expanding indirect access to private markets and other alternatives through different types of broad-based, well-diversified vehicles – i.e., the types of "asset allocation funds" addressed in the executive order – which may include CITs, registered funds, plan-specific "white labeled" portfolios and otherwise. Among other reasons, such offerings are likely to be more palatable to plan sponsors and other fiduciaries.

ERISA Fiduciary Considerations for "Asset Allocation Funds"

ERISA clearly permits retirement plans to invest in alternative investments – defined benefit pension plans have done so for many years. While different fiduciary considerations are presented by defined contribution plans, investment options for 401(k) plan participants can legally include allocations to private funds and other alternative assets if properly structured. However, some plan fiduciaries may have been hesitant to do so because of uncertainty surrounding the applicable fiduciary considerations, and because of concerns over potential ERISA liabilities, uncertainties compounded by the lack of consistent DOL guidance.

In June 2020, during President Trump's first term, the DOL issued an information letter[5] in which it concluded that a fiduciary could, consistent with its duties under ERISA, offer a professionally managed asset allocation fund that includes a reasonable allocation to private equity. In deciding whether to do so, the information letter identified certain considerations that fiduciaries should take into account. To briefly paraphrase, they included:

- Whether the fund offers the potential for increased diversification within an appropriate range of expected net-of-fees returns;
- Whether the fund is overseen by plan fiduciaries (using third-party experts as necessary), or managed by investment professionals having the capabilities, experience and stability to manage the fund in light of the nature, size and complexity of the private equity investments; and
- Whether the allocation to private equity is limited in a way that addresses additional costs, complexity, disclosures and liquidity, and whether the fund has features for valuation and liquidity to facilitate necessary transfers, exchanges and withdrawals.

The information letter also indicates that plan fiduciaries should consider such factors as their employee demographics and plan terms; whether they have the skills, knowledge and experience necessary (or need to seek the assistance of a professional adviser); and the sufficiency of participant disclosures when determining whether to offer an asset allocation fund with a private equity component.

In December 2021, during President Biden's term, the DOL issued a "supplemental" statement on the issue of private equity (PE) within defined contribution plans[6] that, while stopping short of withdrawing the information letter guidance, took a cautionary tone and indicated that the information letter should be relied upon only in narrow circumstances, concluding in part that:

> A plan-level fiduciary that has experience evaluating PE investments in a defined benefit pension plan to diversify investment risk may be suited to analyze these investments for a participant-directed individual account plan, particularly with the assistance of a qualified fiduciary investment adviser. The Department cautions against application of the Information Letter outside of that context. Except in this minority of situations, plan-level fiduciaries of small, individual account plans are not likely suited to evaluate the use of PE investments in designated investment alternatives in individual account plans.

Per the executive order, when re-examining its guidance the DOL is specifically instructed to consider whether to rescind its December 2021 supplemental statement. This is almost certain to occur, given that DOL had already rescinded prior Biden-era guidance regarding cryptocurrency-related investments prior to the issuance of the new executive order.[7] Likewise, the DOL's clarification of its position on alternative assets will likely seek to reinforce the guidance in the 2020 information letter, with broader application to other alternative assets.

Over the longer term however, implementing the policy goals of the executive order – encouraging the consideration of alternative assets within asset allocation funds by providing clear fiduciary standards and liability protections – would be better served by notice and comment rulemaking. Whether such rulemaking might include a safe harbor for the inclusion of alternative assets, and how objective any fiduciary standards established for evaluating alternatives might be, will be key considerations; but in any case, a rulemaking would be more effective in giving comfort to plan fiduciaries than merely another installment of subregulatory guidance that would be more susceptible to further back-and-forth "clarification" and

"supplementation" with each change in administration.

Potential Changes to SEC Guidance

While the executive order's mandate to the DOL is relatively clear and focuses on establishing clear fiduciary standards and protections, the mandate to the SEC is a bit more open-ended. Presumably it would focus on two things: (1) increasing access to alternative assets for plans as a general matter, and (2) broadening the scope of fund vehicles that can provide indirect access to alternative investments. On the first point, the only examples noted in the executive order of revisions to current guidance that are to be considered by the SEC relate to the application of the "accredited investor" and "qualified purchaser" rules. Presumably, any changes would focus on loosening the standards under which plan participants can select investments that include private funds without having the applicable investor suitability requirements apply at the individual participant level (rather than at the level of the plan).

On the second point, the SEC could consider a number of measures that would further help enable registered funds – as opposed to just CITs or customized plan solutions (which are generally only achievable for the largest and most well-heeled plans) – to play a bigger role in delivering access to private markets. In particular, interval funds and other limited liquidity closed-end funds (CEFs) such as tender offer funds are well-positioned to provide the structure needed to accommodate investments in private markets within defined contribution plans. Registered CEFs, which offer periodic (typically quarterly) liquidity and are regulated under the Investment Company Act of 1940, allow for meaningful allocations to illiquid assets while maintaining important investor protections, such as board oversight, daily net asset values (NAVs) and audited financial statements.

The SEC has already started down this path by abolishing its former staff position (which was never adopted in formal SEC guidance or rulemaking) of requiring CEFs that wanted to hold more than 15% of their assets in certain types of private funds to limit investors to "accredited investors" and impose certain initial investment minimums. This June 2025 policy change effectively cleared a key obstacle to allow many CEFs, particularly interval and tender offer funds, to distribute shares continuously through intermediaries without specific suitability requirements – a crucial development for retirement plan inclusion.

As retirement plan providers and asset managers respond to regulatory changes made pursuant to the president's directive, interval funds and other CEFs are expected to emerge as principal access vehicles to investments in private markets, potentially as stand-alone plan options or, more likely, as underlying components within target date funds, balanced funds and other multi-asset solutions. Revisions or guidance updates to a number of other SEC rules and policies could further help to facilitate this, such as the three below.

The Fund-of-Funds Rule

Rule 12d1-4, the fund-of-funds rule adopted by the SEC in 2020, facilitates higher levels of investments by one registered fund in the shares of another registered fund in certain cases, but restricts "complex investment structures" where an acquiring fund invests in a second-tier fund that itself invests in other funds and/or private fund interests.[8] Without amendment or clarification, this rule could have consequences contrary to the policies embodied in the executive order. For example, it could restrict the ability of open-end funds (i.e., mutual funds, which continue to be a primary investment option for 401(k) plans given their daily liquidity, etc.) from achieving private markets exposure indirectly through a professionally managed interval fund or other CEF.

Liquidity Management Programs

Along similar lines, under Rule 22e-4 most open-end funds (i.e., mutual funds) are required to classify assets by liquidity and maintain minimum levels of highly liquid investments.[9] This framework poses challenges when applied to investments in limited liquidity vehicles that in turn invest in illiquid assets such as private market vehicles.

Acquired Fund Fees and Expenses

A third regulatory area warranting reconsideration in light of the executive order is the treatment of acquired fund fees and expenses (AFFE) and related disclosure rules. Current AFFE requirements can overstate the cost of investing in fund-of-funds structures that include interval funds or private market vehicles, making them appear less competitive relative to direct investments or CITs. Modernizing the AFFE rules would help to ensure a level playing field and more accurate fee comparisons between competing products (i.e., between registered funds and CITs) and assist plan fiduciaries with making well-informed decisions.

In Summary

- The executive order does not change existing law or regulation, and it does not explicitly require the DOL or SEC to adopt any particular rule or guidance. However, the policy mandate is clear, and the executive order builds even further on existing regulatory momentum to facilitate access to private markets for retirement plan investors.
- While the executive order's definition of "alternative assets" is quite broad, and would clearly encompass investments in private

equity funds, private credit funds and similar vehicles, the specific mandates provided to the DOL focus exclusively on the fiduciary considerations associated with "asset allocation funds" that include investments in alternative assets (as opposed to direct private fund investments). This focus denotes an important, and sometimes misunderstood, distinction.

- Over the longer term, implementing the policy goals of the executive order – encouraging the consideration of alternative assets within asset allocation funds by providing clear fiduciary standards and liability protections – would be better served by notice and comment rulemaking.
- While the executive order sets a clear policy direction, it leaves many details to the regulators. The DOL has until early February 2026 to reevaluate and clarify its positions on the fiduciary considerations associated with asset allocation funds that invest in alternative assets. More formal rulemaking, which would likely be more effective, would take longer to finalize. For the SEC, the exact scope and subject matter of any forthcoming guidance is somewhat harder to predict, but the agency has the opportunity to revisit provisions that would help support the policy goals.

Conclusion

The executive order marks a significant milestone in the effort to democratize access to private markets. However, while it sets a clear policy direction, it leaves many details to the regulators. The DOL has until early February 2026 to reevaluate and clarify its positions on the fiduciary considerations associated with asset allocation funds that invest in alternative assets. More formal rulemaking, which would likely be more effective, would take longer to finalize. For the SEC, the exact scope and subject matter of any forthcoming guidance is somewhat harder to predict, but the agency has the opportunity to revisit a number of provisions that would help support the policy goals of the executive order, including by helping to broaden the types of investment funds that can be used as "access vehicles" for plans desiring professional managed exposure to private markets and other alternative assets.

Notes

1. https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/.
2. "Accredited investor" status currently requires either a net worth of $1 million (excluding the positive value of the individual's primary residence) or an annual income requirement of $200,000 ($300,000 with a spouse or domestic partner) in each of the prior two years, with a reasonable expectation of the same earnings in the current year.
3. Of course, plan fiduciaries and recordkeepers have no practical means to verify and track investor eligibility requirements on a participant-by-participant basis. Moreover, there is a concern that making particular investment options available only to certain wealthy plan participants – due to investor restrictions applicable to the fund – could in turn cause violations of the nondiscrimination rules that apply with respect to the "benefits, rights and features" offered under qualified retirement plans.
4. While a full review of the various SEC no-action letters is beyond our scope, it is generally required that the private fund constitute less than 50% of the investment option's assets, that the investment option have a "generic" investment objective, and that certain other restrictions and requirements are observed to ensure that the option is not a mere conduit to facilitate the private fund investment.
5. https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020.
6. https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement.
7. Rescission of the "supplemental" statement on private equity within defined contribution plan investment alternatives would continue the existing regulatory trend for the DOL. For example, in its recent Compliance Release 2025-01, the DOL rescinded a 2022 release from the agency that had cautioned plan fiduciaries to exercise "extreme care" when considering cryptocurrency investment options for plan participants, indicating a current viewpoint that ERISA's fiduciary standards should be applied on a neutral basis as to investments in different asset classes. See https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2025-01.
8. 17 C.F.R. § 270.12d1-4 (Fund-of-Funds Rule).
9. 17 C.F.R. § 270.22e-4 (Liquidity Risk Management Programs).

The authors, attorneys with Faegre Drinker Biddle & Reath LLP, may be contacted at joshua.deringer@faegredrinker.com, joshua.waldbeser@faegredrinker.com, bradford.campbell@faegredrinker.com and jeff.blumberg@faegredrinker.com, respectively.