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Will the Trump Administration Re-'Order' 401(k) Plan 'Alternatives'?: Part 1

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This article is the first installment of a comprehensive discussion concerning the challenges imposed across multiple legal regimes and the potential opportunities associated with 401(k) plan access to alternative strategies such as private credit, private equity, and hedge funds. This Part 1 provides an overview of President Trump's recent Executive Order directing regulatory agencies to take action to enhance 401(k) plan access to such strategies, and continues by summarizing some prior history, moves on to outline concerns of plan fiduciaries and then offers some of the reasons proponents and opponents have concerning alternative assets in 401(k) plans. Future installments will focus on the tensions inherent in the law that have served as substantial headwinds for 401(k) plan access to such strategies and will provide a deeper dive into currently available pathways and a focus both on recent Securities and Exchange Commission (SEC) reforms and traditional operational constraints that continue to make some strategies highly challenging under the Employee Retirement Income Security Act of 1974 (ERISA); and finally, it will offer and explore a series of policy recommendations to the several regulators impacted by the Executive Order developed and analyzed in a manner designed to promote the objectives of the Executive Order while remaining consonant with the purposes of the applicable rules, along with suggestions as to what market participants such as investment managers, fund sponsors, insurance companies, recordkeepers and intermediaries, as well as plan fiduciaries can do now.

On August 7, 2025, President Trump issued an Executive Order (Executive Order) intending to expand access to alternative assets (such as private equity, real estate, and private credit) (Alternative Assets) in defined-contribution plans (such as 401(k) plans) governed by ERISA (such plans: Plans) by attempting to address "regulatory overreach" and "litigation risks" that have limited the offering of Alternative Assets in such Plans. The Executive Order will likely be cheered by many, including Plan sponsors seeking to obtain access to Alternative Assets investments in Plans, fund sponsors, and Plan participants themselves. But it is important to understand that the Executive Order is the first step in what will likely be a longer process of rulemaking at the federal agency level. Many stakeholders will be able to provide input and comments on these important next steps. Moreover, these events may also spur product innovation that themselves may help provide such access. Over time, it is possible that these and similar initiatives will draw greater participation by Plans in Alternative Assets strategies.

Summary of Executive Order

Specifically, the Executive Order:

- Directs the US Department of Labor (DOL) to reexamine its guidance (discussed briefly below) with respect to a fiduciary's duty under ERISA regarding Alternative Assets in Plans;
- Instructs the DOL to clarify its position on Alternative Assets and the appropriate fiduciary process associated with offering asset allocation funds (for example, target date funds) containing Alternative Assets;
- Directs the DOL to consult with the Secretary of the Treasury, the SEC, and other federal regulators to determine whether parallel regulatory changes should be made at those agencies to give effect to the purpose of the Executive Order; and
- Directs the SEC, in consultation with the DOL, to consider ways to facilitate access to Alternative Assets for Plans, including by considering revising existing SEC regulations and guidance.

More specifically, the Executive Order:

- Requires that the DOL take the following actions listed in the next bullet point, and in so doing mandates that it prioritizes steps "that may curb ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants":
- Seeks to clarify within 180 days the "appropriate fiduciary process associated with offering asset allocation funds containing investments in alternative assets under ERISA":
  - — Identify the criteria that fiduciaries should use to prudently balance potentially higher expenses against the objectives of seeking greater long-term net returns and broader diversification of investments;
  - — Advises the DOL to consider issuing additional rules or guidance that "clarify 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; and
- Directs the SEC to work with the DOL to "consider ways to facilitate access to investments in alternative assets by participants in participant-directed defined-contribution retirement savings plans" and specifically calls attention to two existing SEC regulations and guidance relating to accredited investor and qualified purchaser status which have historically limited participant access to Alternative Asset funds based on their individual financial status.

It is noteworthy that the Executive Order explicitly referenced digital assets (through actively managed vehicles that invest in digital assets) as an Alternative Asset, although this article does not address digital assets. This follows a May 28, 2025, DOL recission of its 2022 compliance release that "previously discouraged fiduciaries from including cryptocurrency options in 401(k) retirement plans."[1] The Executive Order also refers specifically to "asset allocation funds containing investments in alternative assets." While likely not intended to be an exclusive solution, it may imply recognition that asset allocation funds (including so-called target date and lifecycle funds) are likely the most efficient pathway forward given the existing legal challenges, the realities of Alternative Assets strategies' commercial parameters, and Plan fiduciary expectations and obligations. Indeed, it may be a tacit recognition of some of the high-profile product launches that have followed this model.

In parallel with the Executive Order, the SEC has issued related guidance aiming to enhance access to Alternative Assets across retail markets. On May 20, 2025, SEC Director of Investment Management Natasha Vij Greiner stated that the SEC Staff will no longer provide comments during the registration statement review process seeking to limit the

ability of retail investors to invest in closed-end funds registered under the Investment Company Act of 1940, as amended (the 1940 Act) that invest more than 15 percent of their net assets in underlying private funds.[2] Director Greiner's statement follows a speech by SEC Chairman Paul Atkins on May 19, 2025, during which he called for the SEC to expand retail access to private markets and promote innovation. Chairman Atkins acknowledged that a change in policy could "give all investors the ability to seek exposure to a growing and important asset class, while still providing the investor protections afforded to registered funds."[3] These pronouncements were then embodied in guidance on August 15 by the SEC Staff itself.[4]

As a general observation, it is important to appreciate that the tone of regulators, let alone presidential administrations, can help to frame how risks and opportunities are perceived. The Executive Order and related SEC guidance is intended to not only wrestle with structural technical issues but also shape an environment to promote greater comfort with Alternative Assets in Plans. Although specific predictions are perilous, at this juncture it appears that these developments will fortify emerging trends in the Plan context in which Alternative Assets strategies are offered as a component of an unrelated third-party's diversified product, such as a target-date fund, life-cycle, balanced fund, or other similar arrangement (also referred to herein as the "Allocator" approach or model). This development is in line with recent guidance issued during the first Trump Administration (2020 Information Letter) followed up by a pronouncement issued by the Biden Administration (2021 Supplement)—both of which contemplated Alternative Assets strategies offered in the context of a larger target-date fund context.

In addition, on September 23, 2025, the DOL also issued an advisory opinion (Advisory Opinion 2025-04A) the press release for which indicated that it "is another step forward towards our goal of giving plan fiduciaries the flexibility to design retirement investment strategies that meet the needs of American workers" and noted that the DOL intends to issue a notice of proposed rulemaking regarding ERISA's fiduciary duties "when deciding whether to make available to plan participants an asset allocation fund that includes investments in alternative assets, including potential safe harbors."[5]

These developments may open up new possibilities for more innovation by financial engineers to design products that provide access to strategies that previously have been unavailable for Plan participants on a standalone basis. And, indeed, while Allocator arrangements may continue to be the most likely to be utilized, such standalone single-strategy funds or products need not be proscribed. Channeling Neil Armstong when he became the first person to set foot on the moon, this may be the "first small step" from regulatory initiatives that may lead to greater "giant leaps" for Plan participants. Time will of course tell.

The Current Commercial Environment

Why Alternative Assets?

Alternative Assets have long been a staple for many institutional investors. The Executive Order notes that alternative assets "are an increasingly large portion of the portfolios of public pension and defined-benefit retirement plans and offer competitive returns along with diversification opportunities." Private equity has returned 14.3 percent over the past 20 years compared to 8.1 percent for a benchmark of global developed markets, according to a 2024 report by BlackRock and Partners Group.[6] Industry leaders, such as Larry Fink of BlackRock, have argued that while a good retirement system should "provide a safety net" a "great" one "also offers a ladder—a way to grow savings, compounding wealth year after year." Concentrating on lost opportunities, Mr. Fink asserted that "[r]ight now, the country focuses heavily on preventing people from hitting the floor, as we should. But the US

needs to put just as much effort into helping people climb to the ceiling—through investing."[7]

In a recent white paper, private equity net returns were shown to deliver 14.3 percent returns over the past 20 years, compared with 8.1 percent for the MSCI World Index, a benchmark index of developed-market large- and mid-cap stocks.[8] One of the largest asset managers in the world (BlackRock) estimated that adding Alternative Assets to Plans could boost returns by about 50 basis points per year and increase the amount of money in a 401(k) Plan by 15 percent over 40 years.[9] Another asset manager (Vanguard) estimated that hypothetical portfolios incorporating Alternative Assets (using a 10–20 percent allocation split between private equity and private debt) within target-date funds, assuming top-tier managers, could improve retirement wealth by 7 to 22 percent and retirement income by 5 to 15 percent (after fees) over 40 years.[10] In addition, Goldman Sachs has argued that private credit offers higher historical returns than traditional public credit markets, with loss ratios that are similar or lower. In a recent note, the firm said private credit's appeal lies in its ability to provide greater flexibility, customization, and certainty of execution, as well as the potential for portfolio diversification.[11]

There also are macroeconomic trends that favor consideration of Alternative Assets. According to the Academic Directors of Wharton's Harris Family Alternative Investments Program, since the 1990s, the number of publicly traded companies in the United States has roughly halved.[12] As more companies "go private," there is genuine concern that these larger trends will work to the detriment of Plans and their participants. As a result, Plan investors may be "missing out on much of today's economic growth, which is increasingly concentrated in private markets."[13] Perhaps participants are aware of these facts, as Plan participant interest in Alternative Assets appears to be growing: one survey found that 73 percent of Plan participants believe that Alternative Assets provide the opportunity for greater investment returns.[14]

Meanwhile, that same study also suggests that few participants are "very knowledgeable" about the asset class.[15] And some, like Senator Elizabeth Warren (D-MA) have offered their own challenges.[16] Countervailing concerns also revolve around the fact that valuation issues can arise more with Alternative Assets than listed stocks or bonds. Detractors point to the fact that assets invested in such strategies might face greater difficulties when participants need to take hardship withdrawals, for example, if they lose their job, need money immediately or have a retirement decumulation strategy that requires liquidity. Alternatives Asset strategies also tend to carry higher fees. And the big elephant in the room is that many corporate sponsors have been reluctant to embrace Alternative Assets for their Plans, citing litigation risks and the complexity of these investments. A recent survey by the American Benefits Council, an organization that advocates on behalf of plan sponsors, found that 89 percent of defined contribution plan sponsors and providers indicated that litigation risks are "very significant" or "somewhat significant" when they consider improving their Plans' services or changing their investment options.[17] The survey also concluded that one-quarter of respondents indicated they decided against providing more benefits to Plan participants out of concern of facing litigation.[18] Reducing the "fear factor" is a major aim of the Executive Order.

One recent piece from the *Wall Street Journal* called Alternative Assets a "Big Bad Idea for your 401(k)," arguing that "owning an alternative fund is a lot simpler than selling it. When you own it, you might take the manager's valuations for granted, even if that's a bad idea. When you sell it, the valuation matters—a lot. That's a risk."[19] Opponents of the idea note that public markets rely on what other investors believe they are worth—"not the managers," with some concluding that "an alternative fund can claim to be low risk and to be at least partly liquid—but, sooner or later, it won't be able to sustain both claims at once."[20] Some prominent academics have made their points fairly bluntly: "Private equity

kind of always gets what it wants in Congress, but I think it's a bad idea [to allow it in 401(k) plans]."[21] No doubt many in Congress would dispute this, but the central point remains: Alternative Assets strategies have both their cheerleaders and detractors.

Defined Contribution Plan Utilization of Alternative Assets

Plan utilization of Alternative Assets strategies historically has been low. One study suggested that only 2.2 percent of Plan sponsors offer alternative fund exposure in their Plans.[22] But a recent slate of highly publicized announcements strongly suggests that access to Alternative Assets is increasing. Names such as Apollo, BlackRock, Empower, Franklin Templeton, Goldman Sachs, Neuberger Berman, Blue Owl Capital, PIMCO, Partners Group, State Street and others have been widely reported as teaming up through one or more strategic partnerships to offer Plan participants the ability to invest in Alternative Assets.

Under these "Allocator" arrangements, a given platform provider, such as a recordkeeper, insurance company, investment manager, or other financial institution is responsible for implementing a multi-strategy account, a portion of which is allocated to one or more third-party managers with expertise in a variety of strategies, one or more of which may be specific to Alternative Assets. Model portfolios, target-date funds, life-cycle funds, and similar products partner an "allocator" or "glide path manager" with (usually) third party managers responsible for managing the different sleeves—including those dedicated to Alternative Assets strategies.[23] Access to Alternative Assets typically has been structured through a US registered mutual fund, a bank collective fund, or a managed account. One of the world's largest asset managers has noted that its "research suggests that including [Alternative Assets] within a target date solution can offer a host of benefits for retirement savers: better risk-adjusted returns, diversification, stable cash flows and inflation protection."[24] The Executive Order appears to focus particular attention on this approach, without necessarily foreclosing the possibility of other structures.

An ERISA Market Failure? The "Fear Factor"

Plans are subject to the broad fiduciary responsibility and prohibited transaction rules of ERISA and Section 4975 of the Code. While these duties are broad and deep, they do not necessarily preclude particular types of investment strategies or products. ERISA is not per se prescriptive in this regard. This includes the selection of investment strategies and investment products. There is no one prudent fund, one prudent service provider, or one prudent fee level that somehow renders everything else imprudent. Instead, there is a wide range of possible outcomes that may be selected under a prudent process and ERISA's exacting standards. Plan fiduciaries thus have the power to select and monitor providers and investments for Plans based on their informed assessment of the needs of their Plan and its unique participant base if implemented through a prudent process under ERISA standards of care. That standard has been described as the "highest standard at law."[25]

It turns out, however, that there has been enormous growth in lawsuits against ERISA and other plan fiduciaries. In 2024, excessive fee class action litigation surged by 35 percent with even more ERISA class actions scheduled for 2025.[26] Excessive fee class action claims generally have alleged that fiduciaries of defined contribution plans subject to ERISA breached their fiduciary duties by (1) failing to adequately negotiate and/or monitor the fees charged by Plan service providers (fund managers, administrators, and recordkeepers, etc.); or (2) selecting imprudent investment options for Plan participants and/or failing to monitor performance and reassess those options consistent with their fiduciary obligations under ERISA. The allegations often make comparisons to passive funds, such as index funds, that do not offer active investment management and thus usually provide an "apples to oranges"

comparison. Creative and new theories continue to emerge. Earlier this year, the US Supreme Court may have made it easier for plaintiffs' firms to bring such cases and harder for defendants to dismiss excess fee cases for 401(k) or 403(b) plans at an early stage of litigation before costly and burdensome discovery processes begin.[27]

There is a concern among many Plan sponsors and fiduciaries that selecting alternative investments for the investment lineup brings with it enhanced scrutiny, and the opportunity for additional litigation. This is in part due to fiduciary responsibilities of Plan fiduciaries and the desire to comply with Section 404(c) of ERISA. Section 404(c) of ERISA provides protection from ERISA fiduciary liability with respect to losses occurring by reason of participant decisions on how to allocate their account balance among Plan investment options, where those options have been prudently selected and monitored by the fiduciaries and certain other conditions are met. Recent trends may be affecting Plan sponsors' liability calculus in a way that disproportionately adversely impacts consideration of alternative strategies. As a recent *Wall Street Journal* article highlighted, "many companies remain concerned they would be sued by their employees over the higher fees associated with private-market investment products."[28] To quote one prominent observer, Martin Small, finance chief of BlackRock "We'll likely need to see litigation reform, or at least some advice reform in the United States to add private markets exposure" into defined-contribution retirement plans."[29]

Indeed, organizations such as the HR Policy Association and the American Retirement Association are apparently so concerned that they have asked the DOL for interim "sub-regulatory" guidance.[30] While recent litigation in the defined benefit plan space associated with respect to pension risk transfers, including those with respect to Athene Annuity and Life, and IBM and its independent fiduciary partner, State Street Global Advisors, over their selection of their insurer may not at first glance appear directly on point, those cases raise risk-based concerns for Plan fiduciaries and may have contributed to a ripple effect in the defined contribution plan space. At the very least, one survey found that 43 percent of Plan sponsors have chosen not to offer lifetimes income options, citing significant litigation risk.[31]

It is true that Alternative Assets strategies generally cost more than traditional asset classes. But it is already the case that some investment strategies simply cost more than others. Not only is this already well-known to Plan fiduciaries and consultants and widely reflected in 401(k) plan investment lineups. It is also acknowledged by the DOL itself.[32] In this vein, it is important to recognize that most Plans have a variety of strategies that run the gamut from passive to actively managed, core, growth, value, opportunistic, sector-based and geographic-based, with some in emerging markets, others offering counter-cyclical protection, and still others including heavy doses of exposure to real estate. Alternative Assets strategies would not seem inapposite. Indeed, so long as fiduciaries follow a prudent process in the selection of investment options, why should consideration of alternative investments be treated differently than more traditional strategies?

The ERISA Advisory Council, a body prescribed by statute, reinforces this conclusion. Instructive in this regard is a March 21, 1996 Information Letter to the Comptroller of the Currency, Eugene Ludwig (Ludwig Letter), regarding the investment of ERISA plan assets in derivatives. In the Ludwig Letter, the DOL indicated that the same fiduciary standards would apply when plan assets are invested in derivatives as when the assets are invested in other investments. The ERISA Advisory Council later implicitly accepted the approach of the Ludwig Letter when it considered ERISA Plan investments in hedge funds and private equity funds.[33]

Perhaps nowhere can the "fear factor" best be seen than in the recent litigation against Intel Corporation.[34] That litigation highlights the threats Plan sponsors face when they try to introduce alternative strategies into a Plan. There, over 60,000

participants in Intel's Plan were offered customized model portfolios and target date options that had exposure to alternative fund strategies. The plaintiffs alleged that the allocations to the Alternative Assets strategies were excessive and the cost of the model portfolios and target date funds too expensive relative to other products. In support of their claim, they noted that one of the strategies included an allocation of up to 37.2 percent in hedge funds and commodities. They also pointed to another investment option, which included approximately 56.22 percent allocations to hedge funds, private equity and commodities.

The US Supreme Court ultimately ruled in favor of Intel holding that a prudent fiduciary that properly evaluates the risk and returns of alternative investments can add them to the 401(k) Plan menu if, after an objective and thorough process, the decision is in the best interest of participants. That is consistent with ERISA's focus on a prudent process.[35] But the fact that the case proceeded the way it did has nonetheless caught the attention of many Plan sponsors and others. Unless claims such as these can be dismissed on the pleadings, the Plan fiduciaries and/or the Plan sponsors who include Alternative Assets exposure may face similar litigation. Even if they prevail on the merits, as did Intel, the expense and time-consuming and distracting due diligence can be threatening.

Seen against this background, the Executive Order could be said to address an "ERISA market failure"—an artificially depressed demand for otherwise prudent investments owing to the fear of litigation, the merits of which, in any given case, may be highly variable. The Executive Order says as much by aiming to "relieve the regulatory burdens and litigation risk that impede American workers' retirement accounts from achieving the competitive returns and asset diversification necessary to secure a dignified, comfortable retirement." And this sentiment is apparently widespread. Perhaps a senior official at the HR Policy Association best captured it: "Uncertainty and ambiguity can chill consideration of such assets while also incentivizing unnecessary litigation."[36]

That said, it is critical to understand what the Executive Order does not do. It does not call for the abrogation of ERISA or fiduciaries' standards of behavior. In this sense, the Executive Order is by no means an automatic pass on prudence, and in fact it re-emphasizes that fiduciaries "must carefully vet and consider all aspects of private offerings, including investment managers' capabilities, experiences, and effectiveness managing alternative asset investments." It seeks to retain ERISA's high standards of prudence without fiduciaries becoming unduly paralyzed by the threat of litigation.

2020 And 2021 Information Letters and Executive Order in Context

This is not President Trump's first foray into this challenging world. In 2020, an information letter was issued by the DOL under the first Trump administration relating to the use of private equity investments within professionally managed asset-allocation funds (for example, so-called target date funds) that are often used as investment alternatives for Plan participants and beneficiaries. Although the 2020 Information Letter likely broke no new legal ground, there was a significant amount of energy and discussion generated. Certainly, those that may have been concerned that the use of private equity investments for Plans was somehow inherently inconsistent with ERISA were likely comforted.[37] In many circles, the 2020 Information Letter seemed to have been viewed as a signal in favor of the possible inclusion of private equity strategies for Plans.

This 2020 Information Letter was followed by a subsequent supplemental information letter under the Biden Administration, which, in turn, had followed guidance from the SEC.[38] This 2021 letter offered a more reserved tone. It seems that the Biden Administration was concerned that it needed to follow up the 2020 Information Letter

"to ensure that plan fiduciaries do not expose plan participants and beneficiaries to unwarranted risks by misreading the letter as saying that private equity—as a component of a designated investment alternative—is generally appropriate for a typical 401(k) plan," fearing that absent such a pronouncement, "the representations [offered in the 2020 Information Letter] were not balanced with counter-arguments and research data from independent sources."

The 2021 Supplement cautioned "against application of the [2020] Information Letter" in the Plan-related context, stating that "plan-level fiduciaries of small, individual account plans are not likely suited to evaluate the use of private equity investments in designated investment alternatives in individual account plans." Referring to the SEC pronouncement, it also reminded market participants that the 2020 Information Letter contemplated that "[i]n no case would the private equity component of the asset allocation fund be available ***as a vehicle for direct investment by plan participants and beneficiaries on a standalone basis***. The [2020] Information Letter cautioned that ***direct investments in private equity investments present distinct legal and operational issues for fiduciaries of ERISA-covered individual account plans***." [Emphasis supplied.][39]

Ultimately, however, similar to the 2020 Information Letter, the 2021 Supplement did not seem to break any new analytical ground. Indeed, assuming that all technical legal requirements are satisfied, the basic principles under ERISA generally do not endorse or proscribe any particular investment strategy. The 2021 Supplement (as the 2020 Information Letter) of necessity operates through that prism. It should be considered that such information letters are expressive of points of view: "a written statement . . . that does no more than call attention to a well-established interpretation or principle of [ERISA], without applying it to a specific factual situation."[40] Thus, while highlighting a point of view, they do not rise to the level of regulatory or sub-regulatory guidance, such as a regulation, or even a DOL advisory opinion letter.

Following the Executive Order, on August 12, 2025, the DOL rescinded the 2021 Supplement noting that it "discouraged fiduciaries from considering alternative assets in 401(k) retirement plan investment menus" and further noting that it "marked a departure from previous department norms, which dictate a neutral, principles-based approach to fiduciary investment decisions, consistent with the requirements of [ERISA]."[41] The DOL reminded Plan fiduciaries that they should consider all relevant facts and circumstances when considering investments and that the DOL should not single out particular investments or strategies for special scrutiny.

Taken together, both letters outlined an approach that accounts for legal and commercial realities—realities that the Executive Order builds upon. The path taken by the 2020 Information Letter and the 2021 Supplement—Alternative Assets accessed through a target-date or similar multi-asset investment option—reflected an appreciation of the constellation of legal and commercial issues that have traditionally made direct access to an Alternative Assets fund so challenging. In so doing, it decidedly did not tackle Plan investments in an Alternative Assets fund on a stand-alone basis.

At first glance, the Executive Order appears to follow the tracks of the 2020 Information Letter and leaves open the question as to whether it will proceed beyond it. Both appear to focus attention on solutions in which Plans primarily access Alternative Assets through "target date" funds or "asset allocators" managed by a third party and where the Alternative Assets strategy is one among many other components of a diversified investment option. Indeed, some recent high-profile product announcements would appear to validate the fact that this approach has found commercial success.

The Executive Order, by contrast, is a directive from the White House across multiple agencies. Moreover, it is a command to take specific action,

which of course must now proceed through each agency's normal regulatory process. It is specific and proactive in that it calls for action items (1) that include timelines and deadlines, (2) within the context of a stated policy objective, (3) with regulatory guidance rather than a mere recitation of a point of view, and (4) with the possibility of one or more agencies taking important steps to help broaden access to an important asset class while safeguarding the protections of individual Plan participants.

The Executive Order also more broadly acknowledges the potential litigation "fear factor" that many Plan fiduciaries face when considering exposure to Alternative Asset classes—a sort of "ERISA market-failure." It refers to "burdensome lawsuits that seek to challenge reasonable decisions by loyal, regulated fiduciaries," "stifling Department of Labor guidance" and rules which promote the "encouragement of lawsuits filed by opportunistic trial lawyers." One stated purpose of the Executive Order is to promote a "correction" in the existing calculus of fiduciaries, so that they are able to carry out their responsibilities in accordance with ERISA's high standards of prudence without being unduly paralyzed by the threat of litigation. That said, and as noted above, the Executive Order is by no means an automatic pass on prudence, and in fact it re-emphasizes that fiduciaries "must carefully vet and consider all aspects of private offerings, including investment managers' capabilities, experiences, and effectiveness managing alternative asset investments." Its language also suggests that regulators should explore ways to help fiduciaries prudently balance potentially higher expenses against the objectives of seeking greater long-term net returns and broader diversification of investments.

No less potentially impactful is that the Executive Order specifically calls out possible changes to accredited investor and qualified purchaser status by the SEC "to accomplish the policy objectives of this order." Both definitions impose financial qualifications on investors in funds unregistered under the 1940 Act. And separate changes from the SEC should not be discounted, particularly where they proceed in parallel with the stated policy objectives.

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NOTES

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2 Practicing Law Institute, The SEC Speaks in 2025—Day 2 (May 20, 2025).

3 Paul S. Atkins, Prepared Remarks Before SEC Speaks (May 19, 2025).

4 ADI 2025-16-Registered Closed-End Funds of Private Funds**,** available at *https://www.sec.gov/about/divisions-offices/division-investment-management/fund-disclosure-glance/accounting-disclosure-information/adi-2025-16-registered-closed-end-funds-private-funds?utm_medium=email&utm_source=govdelivery*. Prior to Director Greiner's announcement, the SEC Staff held to a longstanding policy of requiring closed-end funds that invest more than 15 percent of their net assets in underlying private funds to restrict sales to investors that satisfy the accredited investor

standard and impose a minimum initial investment requirement of $25,000. Consistent with this policy, the SEC Staff would not grant acceleration of a closed-end fund's registration statement without a commitment by the fund to impose these restrictions during the disclosure comment process. For further information, *see https://www.dechert.com/knowledge/onpoint/2025/5/sec-staff-lifts-key-limit-on-retail-access-to-private-funds.html.*

5 The advisory opinion clarified that a lifetime income investment option can count as a qualified default investment alternative (QDIA) under ERISA and Section 404(c) of ERISA and its regulations. QDIAs are discussed further below.

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8 "Solving the private markets allocation gap: From products to portfolio construction," *supra* n.6.

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15 *Id.*

16 Senator Elizabeth Warren letter to Edward F. Murphy, III, Chairman of Empower, available at *https://www.banking.senate.gov/imo/media/doc/20250711%20Response%20Letter%20to%20Empower.pdf*.

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18 *Id*.

19 Jason Zweig, "Wall Street's Big, Bad Idea for Your 401(k)," *Wall Street Journal*, July 25, 2025.

20 *Id.*

21 Jeffrey Hooke, professor at the Johns Hopkins Carey Business School, quoted in "Trump could open up your 401(k) to private equity. Why market experts say it's a bad idea," *Pension Policy International*, July 17, 2025, available at *https://www.pensionpolicyinternational.com/us-trump-could-open-up-your-401k-to-private-equity-why-market-experts-say-its-a-bad-idea/.*

22 Van Bramer, *supra* n. 17.

23 In some cases, an allocation to a particular "sleeve" may be prefigured, prescribed, or mandated by the provider, the participant or the plan. For example, a target-date fund may be required to allocate X percent of a participant's balance at age 50 to strategy Y, or under some other formulaic or objective approach.

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25 Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982).

26 Daniel Aronowitz and Karolina Jozwiak, "401(k) Excessive Fee Litigation Spiked to 'Near Record Pace'

in '24," *PlanSponsor*, January 13, 2025, available at *https://www.planadviser.com/401k-excessive-fee-litigation-spiked-near-record-pace-24/*.

[27] Cunningham v. Cornell University, 604 U.S. ___ (2025).

[28] Miriam Gottfried, Dylan Toker, and Matt Wirz, "Trump Executive Order to Help Open Up 401(k)s to Private Markets," *Wall Street Journal*, July 15, 2025.

[29] *Id*.

[30] Austin Ramsey, "401(k)s Seek Clarity on Alternative Funds" *Bloomberg Law Benefits and Executive Compensation*, September 17, 2025.

[31] Van Bramer, *supra* n. 17.

[32] *Department of Labor, A Look at 401(k) Plan Fees* 1 (Sept. 2019), available at *https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/401k-plan-fees.pdf* which states:

- Funds that are "actively managed" (i.e., funds with an investment adviser who continually researches, monitors, and actively trades the holdings of the fund to seek a higher return than the market) generally have higher fees. The higher fees are associated with the more active management provided and sales charges from the higher level of trading activity. While actively managed funds seek to provide higher returns than the market, neither active management nor higher fees necessarily guarantee higher returns.
- Funds that are "passively managed" generally have lower management fees. Passively managed funds seek to obtain the investment results of an established market index, such as the Standard and Poor's 500, by duplicating the holdings included in the index. Thus, passively managed funds require little research or trading activity. If the services and investment alternatives under your plan are offered through a bundled program, then some or all of the plan service costs may not be separately charged to the plan or to your employer. For example, the asset-based fees charged on investments may subsidize these costs. Compare the services received in light of the total fees paid.
- Plans with more total assets may be able to lower fees by using special funds or classes of stock in funds, which generally are sold to larger group investors. "Retail" or "brand name" funds, which are also marketed to individual and small group investors, tend to be listed in the newspaper daily and typically charge higher fees. Let your employer know your preference.
- Optional features, such as participant loan programs and insurance benefits offered under variable annuity contracts, involve additional costs . . .
- Retirement plans, such as 401(k) plans, are group plans. Therefore, your employer may not be able to accommodate each employee's preferences for investment options or additional services.

[33] "Hedge Funds and Private Equity Funds," *Report to Secretary of Labor Hilda L. Solis by the ERISA Advisory Council*, November 2011, available at *https://www.dol.gov/sites/dolgov/files/ebsa/pdf_files/2011-hedge-funds-and-private-equity-investments.pdf*. The ERISA Advisory Council is prescribed by Section 512 of ERISA and its duties are to advise the Secretary of Labor and submit recommendations regarding the Secretary's functions under ERISA. The council consists of 15 members appointed by the Secretary of Labor. Three members are representatives of employee organizations (at least one of whom represents an organization whose members are participants in a multiemployer plan). Three members are representatives of employers (at least one of whom represents employers maintaining or contributing to multiemployer plans). Three members are representatives of the general public. There is one representative each from the fields of insurance, corporate trust, actuarial counseling, investment counseling, investment management, and accounting. Members must be qualified to appraise the programs instituted under ERISA. Members are appointed for three-year terms with five terms expiring on December 31 of each year. The council holds at least four meetings each year, which are open to the public. The council is subject to the Federal Advisory Committee Act.

[34] Anderson v. Intel Corp. Investment Policy Committee et al., 22-16268 (9th Cir. May 22, 2025).

[35] And consistent with other recent cases. A good example is Falberg v. The Goldman Sachs Group, Inc., No. 19 Civ. 9910 (ER), 2022 WL 4280634 (S.D.N.Y. Sept. 14, 2022), *affirmed*, Falberg v. The Goldman Sachs Group, Inc., No. 22-2689, 2024 WL 1081838 (2d Cir. Mar. 14, 2024), quoting Rinehart v. Lehman Bros. Holdings Inc., 817 F.3d 56, 63-64 2d Cir. 2016).

[36] Ramsey, n. 30, *ilmaz*, (quoting Gregory Hoff, assistant general counsel of the HR Policy Association).

[37] *See* "Targeting Private Equity: DOL Confirms that There Is No Bar to the Use of Private Equity in 401(k) 'Target Date' Funds," *Dechert LLP OnPoint*, June 5, 2020, available at *https://www.dechert.com/knowledge/onpoint/2020/6/targeting-private-equity--dol-confirms-that-there-is-no-bar-to-t.html*.

[38] Following the release of the 2020 Information Letter, the SEC on June 23, 2020 issued a risk alert highlighting compliance issues in examinations of registered investment advisers that manage private equity funds or hedge funds. The SEC Risk Alert, in a passage cited by the DOL in the 2021 Supplement, states that certain deficiencies under private equity funds and hedge funds "may have caused investors in private funds to pay more in fees and expenses than they should have or resulted in investors not being informed of relevant conflicts of interest concerning the private fund adviser and the fund."

[39] "The Pendulum Swings—Department of Labor Changes Its Tone for Private Equity Under 401(k) Plans," *Dechert LLP OnPoint*, December 27, 2021, available at *https://www.dechert.com/knowledge/onpoint/2021/12/the-pendulum-swings---department-of-labor-changes-its-tone-for-p.html*.

[40] ERISA Proc. 76-1, § 3.01.

[41] August 12, 2025. DOL Press Release at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20250812.*