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Will the Trump Administration Re-‘Order’ 401(k) Plan ‘Alternatives’?: Part 3

By Steven W. Rabitz

This article is the final installment of an expansive 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. The Trump Administration’s recent Executive Order to open up private funds and assets to investment by tax-favored retirement vehicles and accounts is analytically ambitious, as the regulation of those vehicles is extensive and involves a number of very important public policy considerations. Those include questions of government expense through tax incentives, investor protections having a long history and the regulation of pension fiduciaries in the interest of ensuring adequate retirement savings to broad sectors of the US population. This multi-series article is intended as a comprehensive reference guide to the principal relevant considerations.

Part 1, which was published in the December 2025 issue of *The Investment Lawyer*, provided 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 continued by summarizing some prior history, moved on to outline concerns of plan fiduciaries and then offered some of the reasons proponents

and opponents have concerning alternative assets in 401(k) plans. Part 2, published in the January 2026 issue, focused on the tensions inherent in the law that have historically served as substantial headwinds for 401(k) plan access to such strategies and also provided a deeper dive into currently available pathways and a focus both on recent SEC reforms and traditional operational constraints that continue to make some strategies highly challenging under the Employee Retirement Income Security Act of 1974 (ERISA).

This Part 3 now explores a series of policy recommendations to the several regulators impacted by the Executive Order. The proposals have been developed in a manner designed to promote the objectives of the Executive Order while remaining consonant with the purposes of the applicable rules. This portion of the three-part article also includes 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 in light of evolving legal and commercial developments. Please note that capitalized terms without definitions herein have the meanings assigned to them in Parts 1 or 2, respectively. All three installments should be read in concert.

Suggestions and Opportunities

Introduction

This section addresses possible steps that could be considered by regulators to advance the objectives of the Executive Order. It first describes the distinct kinds of regulatory guidance that may be issued and then proposes specific ideas for consideration. It then looks at technical fixes of specific existing regulatory provisions that the Department of Labor (DOL), the Securities and Exchange Commission (SEC) and the Internal Revenue Service (IRS) may each consider addressing the “ERISA market failure” that has caused an overproduction of fear from opportunistic lawsuits and the underapplied demand for Alternative Assets associated with otherwise prudent choices.

The points offered are not intended to be exclusive or even mutually exclusive. Given the multifarious dimensions of the technical challenges involved, a combination of several of the proposals, ideally applied across different regulators, would result in the most effective way to achieve the policy objectives of the Executive Order. The most successful approach likely would be one in which the relevant regulators not only coordinate on their initiatives but also act in concert with a common purpose. This is not the place to assess whether any given suggestion or area of exploration included below may need to address any such challenges of Constitutional or statutory authority; it is, however, to make clear that it is important and that policymakers will need to be mindful of it. This article proceeds on the presumption, though not necessarily the legal conclusion, that the points proposed or suggested may meet those tests.

As noted, the Executive Order states “that every 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.” In addition, it boldly sets a course for regulators to take care that Plans and participants are not “*relegated . . . to asset classes whose returns lack the very same long-term net benefits allowed for and achieved by public pension plans and other institutional investors.*” Indeed, recent data from the public pension space reinforces this point, with the Massachusetts Pension Reserves Investment Trust reporting annualized private equity returns of 18.5 percent over the past 10 years, and the Vermont Pension Investment Commission reporting a 10-year private equity portfolio return of 20.48 percent.¹ Moreover, the Executive Order criticizes regulatory “overreach” and has a stated purpose of curtailing “encouragement of lawsuits filed by opportunistic trial lawyers” and also seeks to redress the “ERISA market failure” of undue fear that Plan fiduciaries face from litigation. [emphasis supplied].

A reasonable reading of the policy is that regulators should not discourage the inclusion of Alternative Assets where a Plan fiduciary reasonably believes that access to Alternative Assets may “enhance” risk-adjusted returns on retirement assets. This would include consideration of returns net of fees, however structured. Stated differently, the Executive Order would appear to call for increased choice, decreased impediments, and fiduciary empowerment. Indeed, it could be regarded as embracing modernization and generally accepted investment theories. Many of these generally accepted approaches posit that Alternative Assets can and do often “enhance” a portfolio’s risk-adjusted return. As one financial commentator put it “to help manage risks and possibly boost returns, everyday investors should think about including alt investments in their portfolios.”² Many current adherents of one such prevailing theory—modern portfolio theory—believe that a “diversified portfolio can contain between 10 percent and 20 percent alternative investments, including real estate.”³ And as the world’s largest asset manager, Blackrock put it, “we anticipate private assets will continue to outperform public assets over the coming decade.”⁴

The “going private” trends discussed earlier in “The Current Commercial Environment—Introduction: Why Alternative Assets?” in Part 1 of this article may add greater impetus to the effort, especially when one considers that the top 10 companies in the S&P 500™ now account for nearly 40 percent of that index’s total market capitalization.⁵ A holistic policy also would take into consideration those steps that may be appropriate to address the “fear factor” through the targeted fine-tuning of existing regulations, other sub-regulatory guidance or other informal advice that may help to shift the ground in shaping expectations.

Although the Executive Order seeks action, nowhere does it suggest that Plan fiduciaries should abrogate their existing standards of care under ERISA. Stated differently, under a successfully and properly designed set of regulatory pronouncements, avenues for Plan participant access to Alternative Assets would proliferate through a combination of structural and regulatory reforms and innovation and collaboration, while Plan fiduciaries would continue to make selections based on a prudent process.

While the Executive Order does not say so specifically, one potential area of focus is the reality that today’s Plans exist chiefly in a daily liquidity environment. While that often is regarded as a benefit, there are some potential drawbacks that have received recent attention. As policymakers worry whether retirees are at risk of outliving their retirement savings, successive presidential administrations, the Treasury Department, the IRS, DOL and even Congress have struggled to find workable solutions that deliver actual results. One approach could look to modernize participant-directed Plans with a renewed focus on products that focus on the long-term, rather than short-term liquidity needs.

For example, among the concerns that policymakers may have that could drive the ultimate outcome of regulatory change is associated with a sub-optimally frequent substitution of or rebalancing among investment options in Plans. Many policymakers look at Plans as *long-term* investment

vehicles. Day-trading in a Plan is usually frowned on, not only because of the heavy administrative burdens, but because some evidence suggests that it results in suboptimal outcomes.⁶ More generally, there are empirical findings that many retail investors (including Plan participants) “overreact” to precipitous dips in the stock market and then wait too long to jump back in.⁷ Query whether daily liquidity should continue to be a presumed norm across all investment options offered in a Plan. Could better long-term retirement savings outcomes result if participants reallocated their Plan balances with less frequency? Could that objective, in turn, be enhanced with allocations of at least a portion of their account to Alternative Assets strategies? Would doing so bring Plan participant outcomes more in line with institutional investors (including defined benefit ERISA plans), whose access to Alternative Assets strategies has promoted the opportunity for more diversified, and in some cases, better returns?

Such a turn in thinking may be Copernican. But it could also serve to modernize Plans to bring them in line with standard investment theory and enhance participant returns. Although neither ERISA nor DOL regulations use the words “modern portfolio theory,” many often regard it as an important feature of prudent fiduciary behavior: examining the relationship between risk and reward, the value of diversification in portfolio construction, and the importance of understanding tolerance for volatility given an investor’s goals. This approach also reflects the realities of changes to the market more globally. As the number of publicly traded companies in the United States has roughly halved since the 1990s, and trends suggest more of the same for the foreseeable future, prudent policy dictates that something be done to assure that Plan participants are not left out in the cold for want of opportunity.

Apart from those considerations, it is important to consider that Supreme Court guidance last year may also impact the ultimate policy choices selected—as well as the durability of any guidance promulgated. The deference courts must provide any

regulatory pronouncement or guidance arising out of the Executive Order may present separate challenges; and broader developments that may have their own dynamics under administrative law may help inform the consequences.⁸

The Executive Order contemplates action by the DOL, SEC, the IRS, and others. But there are many ways regulatory actions can be taken, and each type of action has its own level of authority and importance. There may be substantive as well as procedural reasons why a given agency may choose to pursue one path or another. “Legislative” rules, such as regulations, can be promulgated only after notice and comment rulemaking proceedings, and “interpretive” rules, generally are issued without any such formalities, and therefore more efficiently and swiftly.⁹

Because of the rigor of a notice and comment period, including a mandatory cost-benefit analysis, regulations have historically been given the greatest authority and deference.¹⁰ Sub-regulatory or interpretive actions, by contrast, do not require such rigor and thus can be more easily altered, and even revoked or replaced upon a change in administration. Thus, when considering any future guidance issued by the agencies pursuant to the Executive Order, substance as well as the form of guidance will be important to assess. And those two factors, in turn, will likely impact the degree to which commercial expectations and cultural changes may proceed.

Principles-Based Plan-wide Structural Changes

SEC: Modernize Qualified Purchaser and Accredited Investor Definitions

As discussed above, the SEC Staff has taken the position through guidance, such as the Standish Ayer, PanAgora, and HEB Letters that for purposes of determining whether an unregistered fund meets the Section 3(c)(7) exception from registration under the Investment Company Act of 1940 (the 1940 Act), one must generally look-through a

participant-directed Plan to determine the qualified purchaser (QP) status of the individual participant. Similar constraints apply for purposes of determining whether a Plan participant is an accredited investor (AI) under the Securities Act of 1933. As further discussed above, since many participants in Plans may not be either QPs or AIs, a Plan would need to limit availability to investment options relying on the Section 3(c)(7) exception and AI exception to only those participants who met those criteria. But that in turn raises questions about the possibility of the Plan’s qualification for US Federal income tax purposes.

The Executive Order appears to be well aware of this dilemma. In fact, it calls on the SEC to “facilitate[] access to investments in alternative assets in participant-directed retirement savings plans” and expressly mentions that “[s]uch facilitation may include, but not be limited to, consideration of revisions to existing SEC regulations and guidance relating to accredited investor and qualified purchaser status.” How the SEC might address these goals remains to be seen. SEC guidance that alters its longstanding view concerning participant look-throughs could be a game-changer in and of itself, but countervailing policy goals could prove to be an obstacle. Such a modernization in approach, if it were implemented, would undoubtedly open new opportunities for Plan investment in those funds. And, assuming that liquidity related legal and commercial concerns are appropriately addressed, especially in the case of a stand-alone fund strategy, but certainly at least, within the context of such a strategy being a component of an Allocator product, those changes could have profound effects for Plans and fund sponsors alike. While Allocators may find that relief helpful, stand-alone direct-access Alternative Assets strategies could particularly benefit.

In considering that change, the SEC may come to appreciate that existing protections for Plan participants may have been overlooked. As the SEC has recognized, the exception “provided by Section 3(c)(7) reflects Congress’s recognition that financially

sophisticated investors are in a position to appreciate the risks associated with certain investment pools and do not need the protections of the [1940 Act].”¹¹ Congress specifically noted in this regard that “[g]enerally, [sophisticated] investors can evaluate on their own behalf matters such as the level of a fund’s management fees, governance provisions, transactions with affiliates, investment risk, leverage, and redemption rights.”¹²

But consider the ERISA fiduciary’s role in selecting the investment option on the Plan’s menu in the first place. Plan fiduciaries, as discussed above, are held to the highest standard of behavior under applicable law and would be responsible for making those decisions, including those like the ones cited by Congress—“management fees, governance provisions, transactions with affiliates, investment risk, leverage, and redemption rights”—when they decide to include an Alternative Assets strategy as an option (or part of an option) on the Plan lineup. When those fiduciaries do not have the requisite expertise, they are required to obtain it from those who have it. Given such protection, and especially ERISA’s “highest standard of care at law” expectation of prudent behavior, is it time for the SEC to consider whether the protections in its existing policy are appropriate?¹³ Stated differently, where an ERISA fiduciary believes that a given investment option is appropriate for individual Plan participants and ERISA already provides and contemplates participant access to Alternative Assets, should the SEC’s position serve as a veto?

It is worth mentioning again that most Plans rely on Section 404(c) of ERISA. As discussed in “Historical Multiplicity of Legal Regimes and Structural Constraints—Other Structural and Design Challenges—ERISA Section 404(c)” in Part 2 of this article, that section does not in any way limit a Plan fiduciary’s responsibility to prudently select and monitor investment options offered under the Plan. It in fact places additional constraints, discussed above, as a condition for the relief from liability associated with individual participants’

choices as to how they allocate their accounts. It is true that participants are left with the choice—both the promise, and the limitations—of their investment decisions within the Plan. But nowhere in ERISA Section 404(c) or its regulations is there any indication that particular funds or strategies are per se off-limits. In fact, as noted above, DOL expressly acknowledges and in other places implicitly recognizes the possibility of Alternative Assets funds and strategies such as real estate.

Presumably, the premise behind ERISA Section 404(c) is choice architecture, where each investment option may be adjudged to be a prudent part of a well-diversified portfolio. In this light, ERISA could be seen as the ultimate guardian against less potent regulatory protections, also the DOL has already concluded that Plan participants need no additional protections if the contours of ERISA Section 404(c) are satisfied. That alone is a powerful reason for the SEC to reconsider its historical position and quite possibly deem it exiguous in light of those safeguards in concert with the objectives of the Executive Order.¹⁴

DOL: Address the Fear Factor and Modernize Relevant Rules and Exemptions

As discussed above, one of the major impediments to Plan adoption of Alternative Assets strategies has been fear of litigation. This “ERISA market failure” can be seen as a rational response to the threat of litigation, and a concomitant artificially depressed level of demand for Alternative Assets strategies, resulting in a suboptimal outcome for all (other than, potentially, plaintiffs’ lawyers). As discussed above, lawsuits are not just a theoretical threat. They have been proliferating over the past years and finding expression in what many observers consider ever more eyebrow-raising theories. Although the number of complaints filed against ERISA plans has risen precipitously, this is only part of the story. Many do not ever see a courtroom. While at first glance this may appear to embolden Plan sponsors’ positions, the threat of the lawsuit itself appears to have had

chilling effects. Even if Plan sponsors believe they can prevail on the merits, there is still some quantum of risk that the plaintiffs may prevail: an unsympathetic judge or the unforeseen variables that emerge in the fog of complex litigation may play unanticipated roles. Plus, as at least one SEC Commissioner has pointed out, such lawsuits “are often driven by hindsight bias and very permissive pleading standards. . . . [t]he risk of getting sued creates a chilling effect. Even when ERISA fiduciaries act prudently being second guessed can deter them from offering innovative or diversified investment options.”¹⁵

Independent of that consideration, many may not wish to invest in an expensive and costly trial, especially when it involves one-sided discovery. It is certainly plausible that plaintiffs’ lawyers are aware of this calculus, regardless of the actual merits of any given case. While not suggesting any deviation from their professional responsibilities, this dynamic may add fuel to the fire. The bottom line is that the existing incentives for Plan sponsors do not balance in favor of taking action that gives rise to litigation risk, even if a sponsor’s assessment is that taking the risk is the right and prudent thing to do from the perspective of enhancing participant retirement savings.

On this point, as the Executive Order states, “[b]urdensome lawsuits that seek to challenge reasonable decisions by loyal, regulated fiduciaries, and stifling Department of Labor guidance issued since my first term . . . have denied millions of Americans opportunities to benefit from investment in alternative assets.” The Executive Order further seeks to “relieve . . . litigation risk.” The reference to the “encouragement of lawsuits filed by opportunistic trial lawyers” is itself arguably remarkable. While stopping short of the broadside (and erroneous) allegation that all claims are spurious, it nonetheless seeks to dampen perceived frivolous claims so that they do not unnecessarily inhibit otherwise prudent investment choices. In this regard, it is important to note that the Executive Order in fact sticks closely to ERISA’s original purpose. Legal uncertainty was never supposed to be a hallmark of ERISA, and it in

fact runs counter to the original purpose of establishing rules that provide clarity to those which it regulates.¹⁶ As one seminal court decision stated, ERISA was designed “to create a system that is [not] so complex that administrative costs, or litigation expenses unduly discourage employers from offering [plans subject to ERISA] in the first place.”¹⁷ Assuming the merits of the Executive Order’s position, while this statement is made in the context of impediments to offering plans, it perhaps can be equally said about potential stumbling blocks to offering otherwise prudent investment options in Plans.

Indeed, the fiduciary duty of prudence under ERISA is a central pillar of US pension law, a standard of conduct that is the highest under the law because pension promises are unique. They involve promises by companies to pay employees decades later for services rendered by employees today. In turn, employees often rely on these promises for sustenance in their retirement years. Nevertheless, by practical necessity, the promises to pay decades later are supported by a foundation that is focused on process. When considering any investment strategy for a plan governed by ERISA, a fiduciary must consider all the facts and circumstances relevant to the plan’s aims and the best interest of the Plan participants. ERISA does not require plan fiduciaries to make the “best” choice with hindsight. Instead, it requires that fiduciaries use a prudent process to pick investments and manage fees. Monday morning armchair quarterbacks are not supposed to prevail in “gotcha” lawsuits, where the game design, the training, the practice and the coaching have all followed a prudent process. Indeed, as the DOL noted recently, a fiduciary standard “does not measure compliance by reference to how investments subsequently performed or turn [advice givers] into guarantors of investment performance; rather, the appropriate measure is whether the [investment advice provider] gave advice that was prudent and in the best interest of the [plan account] at the time the advice is provided.”¹⁸

Although fees and liquidity are crucial elements for any Plan fiduciary, they should be considered in light of the specific reasons that the Plan fiduciaries may have for approving a given strategy. Just as the role equity strategies play may justify a higher fee when compared to fixed income strategies in the Plan, the role that Alternative Assets play also may justify a higher fee than other investment strategies. Fees should be evaluated on the nature and breadth of the investment services provided while giving due attention to the character of the Plan and the needs of its participants. With this in mind, fee structures for certain Alternative Assets strategies may involve incentive fees, performance fees or “carried” interests (or allocations); but that is not a concept that is foreign to ERISA investors or Plan mandates. “Realization based” performance fees or allocations that are common in private equity strategies have not traditionally been impediments to ERISA investors. While as mentioned above, strategies like private equity have historically been managed under an exception from ERISA’s “plan assets” treatment, fiduciaries of ERISA investors have long invested in strategies with these features because – like most other investors – they understand that they help to align the interests of the strategy sponsor or manager and the investors. This “I get paid, when you (the investor) get paid” approach is not only expected by investors for specific strategies, but is also often demanded by them. From a more technical perspective, the DOL has issued a series of advisory opinions on the permissible structure of incentive fees, clearly evidencing that there is nothing inherently inconsistent between an incentive fee and ERISA.

Certain DOL prohibited transaction exemptions also contemplate Alternative Assets strategies with different fee structures, including (presumably) performance-based and carried interest arrangements. PTCE 2020-02 offers relief from ERISA’s (and the Code’s) prohibited transaction rules where a qualified fiduciary provides advice to a Plan (or IRA) with respect to the selection (and in many cases, monitoring) of its investments. These would include

Alternative Assets arrangements. Noteworthy in this regard is that the advice-giver must act solely in the best interest of the Plan (or IRA) and adhere to fiduciary standards. To be sure, an advice fiduciary would need to carefully consider the fee structure and the expected net-of-fees return in order to do its job and to comply with the exemption. But additionally noteworthy is the fact that this exemption is commonly used in respect of accounts that are outside of the institutional market, including, for example, retail-oriented allocator products with professional managers who may choose to allocate a portion of Plan accounts to an Alternative Assets strategy. Of course, the value proposition that the Alternative Assets product delivers to its investor is critical, and in that regard, there are many who believe that performance fees (including “realization based” fees) have been an ingredient in delivering desired net-of-fee returns. The key is not the fees and compensation viewed in isolation, but in the context of the desired risk-adjusted return.

Of course, a prudent fiduciary also will wish to consider the quality of the service provider, its track record, infrastructure, compliance history, and other factors deemed to be prudent. But there is not necessarily an “enhanced” duty of care merely because of the nature of the strategy. ERISA has not changed its standard of prudence.

Noteworthy with respect to Allocator products in this respect is the fact that the use of a professional manager that undertakes to manage allocations among different strategies in a multi-asset target-date or similar product may not introduce greater risks than what many professional investment managers of Plan accounts already do on a daily basis. Fiduciary investment managers in respect of Plans frequently make allocations on behalf of plan assets accounts in such products as derivatives, collateralized loan obligations, commercial and residential mortgage-backed securities, and similar investments, all of which could be argued to involve at least as high, if not higher, a level of financial sophistication than what is required for professional Allocators in

respect of investments in Alternative Assets. In any event, it is of course critical that a Plan's fiduciary have the requisite level of understanding and sophistication to evaluate any product or service for the Plan. When the fiduciary may not be familiar with a given product or strategy, it would need to leverage outside experts who are. The DOL has repeatedly indicated that a fiduciary's duty may require it to utilize outside experts where it does not already have the expertise.

In enacting ERISA, Congress thought it appropriate to defer to prudent expertise instead of prescribing permissible and impermissible asset classes or investment products, so long as impermissible conflicts of interest were not present and custody of the assets could be assured. Understanding that ERISA calls for a prudent process serves as a critical but foundational principle for purposes of addressing the problem identified by the Executive Order and for the potential remedies that may be involved. The Executive Order asks regulators to grapple with the question of whether the incentives provided under current law are appropriately balanced to elevate the hard-to-overstate-the-importance-of public policy goal of improving retirement savings in the United States. What follows is a series of possible steps the DOL may take to reframe decisions concerning Alternative Assets in a way that reasserts the intended purposes of Congress and the long-standing operation of the statute. Generally speaking, these suggestions try wherever possible to retain the existing principles-based architecture of ERISA so that they can be applied to all investment choices made by fiduciaries in respect of selection of options for Plan menus. The suggestions below are intended as stand-alone areas for exploration, but they need not be adopted in isolation. As indicated throughout, to best serve the interests of the policy dictated by the Executive Order, many of these could be considered in tandem. As mentioned above, if effected in concert with actions from other regulators with the same purpose, they could have even potentially greater impact.

Consideration 1: Offer Principles-Based Safe-Harbor Applicable to All Plan Investment Options

One of the ways in which the DOL could address the "fear factor" associated with including Alternative Assets exposure on Plans' investment menus would be to offer greater clarity on the specific steps a fiduciary's prudent process should entail and the impact of such a process on fiduciary risk. For example, the DOL could continue to emphasize and reinforce that while fees and expenses must be reasonable, they always must be evaluated in light of the actual services being provided and the returns to investors after fees. Reasonableness should be determined based on the marketplace for services.

This guidance would be universal: applicable to a fiduciary's decision calculus across *all* investment options offered under a Plan—not just those that involve Alternative Assets. Such "neutral principles" would be no less applicable to the selection of passive or index funds than to strategies that feature high-risk/high reward. The DOL could, for example, make it clear that a fiduciary will be deemed to have discharged its duty under ERISA when selecting and monitoring an investment option for a Plan, in circumstances in which the fiduciary is not conflicted with respect to the consideration of the investment option (for example, in a way that could result in a nonexempt prohibited transaction under Section 406(b) of ERISA and the corresponding provisions of the Internal Revenue Code), and the fiduciary (1) gives due consideration to the investment option's risks in light of its potential returns, (2) considers the investment option's costs in light of those that are present for the asset class or strategy, and considers whether those costs are reasonable in light of the services being provided, (3) where the fiduciary determines that it does not have sufficient expertise to make the relevant determinations, engages the services of an unconflicted fiduciary adviser or other consultant(s) as necessary or appropriate, (4) considers whether any limitation on the investments in question (for example, as a percentage of

a participant's or beneficiary's portfolio) would be appropriate given the Plan's particular demographics, (5) reviews in detail whether any specific additional disclosure is necessary or appropriate, and (6) memorializes in writing the fiduciary's process as necessary or appropriate and its final determinations as to how to proceed.

It would be important to make clear that comparisons should be narrowly tailored to the strategy under consideration. Apples to apples comparisons are important. For example, when considering a private credit strategy, direct lending, asset-based lending, or special situations should be evaluated as separate categories, and then each such category should then only be evaluated based on whether it emphasizes capital preservation, return maximization, or the inclusion of equity kickers, which each such sub-category, in turn, should only be evaluated based on the further category of portfolio composition, such as senior debt, distressed debt, or mezzanine debt. Finally, each of these 36 categories should be evaluated based on substantially similar expected durations. Similar considerations would apply to private equity funds (for example, buyouts, venture capital, growth-oriented, distressed debt, infrastructure and secondaries being one set of comparables; the percentage of the stake in the company being another, such as minority, controlling or wholly owned positions; and the expected investment period and end of fund being another).

Such a pronouncement would make it clear that a fiduciary would satisfy its duties of prudence by meeting the above criteria. This, in turn, has two advantages. First, it already would comport with existing law and most practitioners' ordinary understanding of it. Second, it would give comfort to Plan fiduciaries, and direction to courts, that conformity with the above can be outcome determinative. A plaintiff generally would not be able to succeed in challenging a Plan fiduciary where the fiduciary gave due consideration to the factors above and memorialized these in writing. In other words, a fiduciary would be held liable only when it is expected to be

held liable: when it was not doing its job. When a fiduciary clearly abrogated its responsibilities—for example, by acting where a reasonable person would determine that it lacked the requisite expertise to evaluate the investment, or where a reasonable person could conclude that the fiduciary failed to give due attention to the above considerations—liability may still (rightly) attach. But when the fiduciary gave due consideration to those factors and memorialized the conclusions, it will have done its job.

The concept of a principles-based safe harbor for prudence considerations under ERISA is not novel. Congress recently enacted one in the form of Section 404(e) of ERISA under analogous circumstances. Section 404(e) provides a safe harbor for annuity selection. That safe harbor was enacted to address a similarly perceived “ERISA market failure” in the selection of plan annuities. Specifically, given the lengthy duration of annuity provider payout obligations, which may exceed decades, many plan fiduciaries had been historically concerned about the potential for claims of a fiduciary breach, and resulting liability, if a provider that appeared financially sound and fully capable of satisfying all of its obligations at the time of its selection should experience financial distress many years later. In ways that are eerily like the “fear factor” plaguing Plan fiduciaries' considerations of Alternative Assets strategies, many plan sponsors historically worried that the benefit of hindsight would work against them. Plaintiffs could allege that the seeds of an insurer's deteriorating financial condition should have been known at the time of selection, and that the fiduciaries making the choice failed to make appropriate assessments.

As an alternative to the above principles-based safe-harbor, Section 404(e) of ERISA could be leveraged and adapted by crafting a similar prescriptive safe-harbor focusing on process—at least with respect to Alternative Assets or Allocators that make use of them.¹⁹ Indeed, it would appear that many of the elements of that provision could be adapted for present purposes. For example, Congress addressed

the fact that the fee and cost structure of insurance products are different from more traditional investments and required under Section 404(e) that a fiduciary consider the product's "costs" including "fees and commissions" "in relation to the benefits and product features." Similarly, consideration of the "costs" and "fees" of Alternative Assets strategies should be evaluated "in relation to" anticipated net-of-fee returns. Presumably, this would include those fee structures commonly utilized for a given product or strategy. Similar to Section 404(e) of ERISA, with respect to the selection of an Alternative Assets strategy, or an Allocator employing one or more Alternative Assets strategies, a fiduciary could be deemed to have satisfied its obligations under the prudence provisions of Section 404 of ERISA if (a) it engages in an objective, thorough and analytical search for the purpose of identifying products and providers that offer identified Alternative Assets strategies, (b) with respect to each such provider or product, it considers the financial expertise of the provider to satisfy its obligations in respect of the product, and (c) it considers the cost (including fees and other compensation of the sponsor) of the Alternative Assets strategy, or component of an Allocator that uses one or more Alternative Assets strategies, to determine if reasonable when compared to similarly situated substantially identical strategies. While not necessary, this safe-harbor could also provide an additional safe-harbor with respect to clause (b), which would be deemed to be satisfied if the manager of the Allocator or Alternative Assets strategy, respectively, is a US registered investment adviser, bank, or other entity that could otherwise qualify as an "investment manager" under Section 3(38) (without regard to any written acknowledgment of fiduciary status where the pooled fund in question is not "plan assets"). The safe harbor also could outright affirmatively state, as is the case in Section 404(e), that there is no requirement by the Plan fiduciary to select the product with the lowest cost. The same type of "apples to apples" comparison

described above concerning the more general safe-harbor outlined directly above also should be applied.

Aside from reinforcing the primacy that ERISA places on a prudent process, this approach also has the advantage of having already had the blessings of Congress (and recently so) under relatively analogous circumstances. In addition, as noted above, some of the key ingredients in Section 404(e) of ERISA would appear to be highly transferable to the Alternative Assets context. Such an approach leaves prudence as the deserved king, consistent with the intents of ERISA. Moreover, from the vantage point of achieving the desired aims of the Executive Order, there is in fact some quantitative evidence that approaches like Section 404(e) can be effective in reducing any embedded "fear factor."²⁰

Consideration 2: Clarify Aspects of ERISA Section 404(c)

As noted above, existing regulations under Section 404(c) condition relief on "the ability to transfer among investment options *with a frequency appropriate for each investment's market volatility . . .*". The regulations continue that "[i]n no event, however, is such a restriction reasonable unless, with respect to *each* investment alternative made available by the plan, it permits participants and beneficiaries to give investment instructions with a frequency which is appropriate *in light of the market volatility to which the investment alternative may reasonably be expected to be subject.*" Moreover, the preamble to the Section 404(c) regulations suggests that fiduciaries of an ERISA Section 404(c) plan "*should periodically review the volatility* of its investment alternatives to ensure that the transfer frequency permitted with respect to each alternative continues to be appropriate." [Emphasis supplied].

While these elements are principles-based, additional consideration could be given to making clarifications to existing regulations, or less powerfully, but still potentially helpful, sub-regulatory guidance. The aim would be to provide greater direction

concerning fiduciaries' expectations. An approach similar to that described under "Consideration 1" could be applied here—again across all categories. For example, in the context of Allocator strategies such as broad-based target-date or other similar strategies, "the market volatility to which the investment alternative may reasonably be expected to be subject," could be satisfied if a fiduciary prudently engaged in an objective and analytical search of identifying several providers with a substantially similar strategy and considered the volatility of each such provider's product. Similarly, with respect to direct access stand-alone funds, a fiduciary would be deemed to have properly determined the "appropriateness" of the product's volatility with similar analysis. As discussed in Consideration 1 above, comparison categories should be similarly narrowly constructed. Investment options with daily liquidity are, of course, likely in their own such category.

An analogous approach also could apply to the "should periodically review the volatility" expectations of ERISA Section 404(c). Guidance could provide that the measurement of periodicity should be in line with the liquidity, exit, and secondary market transfer parameters of substantially identical products—again narrowly tailored to maintain "apples to apples" comparisons as discussed above. Investment options with daily liquidity would be examined differently from a stand-alone investment option such as, say, leveraged buyout funds with an investment period of three years for which there is no general expectation of secondary market transactions. That investment option would in turn be analyzed differently from a substantially similar strategy with either a different investment period, or more flexible transfer provisions.

Consideration 3: Address Other Recent Litigation

The DOL may also wish to consider issuing regulations and/or other guidance designed to directly address frivolous litigation. The recent Supreme Court case in *Cunningham v. Cornell University* has

only added fuel to the flame of the "fear factor" which the Executive Order is designed to address.²¹ Despite ruling favorably for the defendants in that case, the Supreme Court appears to have confirmed that the mere hiring of a service provider to a plan subject to ERISA is sufficient to survive a motion to dismiss in cases involving nonexempt prohibited transactions. Many observers have worried that plaintiffs' firms' solicitation of plan participants to sue plan fiduciaries will only increase.²² Generalizations in mainstream media stories about this topic can be, and often are, misleading, because the issues implicated are deep in the weeds, which the mainstream media by its nature can't get into. That does not mean it isn't proper to try to explain these issues to a mainstream audience, but they are inherently complicated and so those explanations can easily be politicized in the current environment. This may add more fuel to the flames.²³

While many of the other potential action items described in this section may be helpful, there is still a generalized fear that likely needs to be addressed more broadly. Plan fiduciaries do not need to look far to discover causes of worry outside of the Alternative Assets space. As noted above, the proliferation of litigation more generally across all plans—whether or not participant-directed Plans and independent of Alternative Assets—has had a harmful effect that cannot but help to sway the decision calculus on fiduciaries' consideration of Alternative Assets strategies. As specific examples, there have been Plan fiduciaries who have been sued for not offering passive investment funds, while others claimed that the defendants were imprudent because they did offer such funds.²⁴ There are those who have sued Plan fiduciaries because they believed it imprudent for their plan to offer more than one investment in the same style, while others complained that including only one investment option in a given style was imprudent.²⁵ Some alleged that fiduciaries acted imprudently by offering risky investments, while others alleged that fiduciaries acted imprudently because they were too risk-averse.²⁶ It is no wonder why Plan

fiduciaries are fearful as they effectively face “diametrically opposed” liability theories placing them in a “cursed-if-you-do, cursed-if-you-don’t” situation.²⁷ When possible, the DOL should develop guidance on this front to address this conundrum.

Legislative changes would likely be more effective in eliminating such imbalances. More recently, SEC Commissioners have been among those who have weighed in on the need for legislative changes. Commissioner (and former Acting Chair) Mark Uyeda said litigation reform concerning Plan exposure to Alternative Assets strategies is “not about shielding bad actors,” but ensuring responsible fiduciaries aren’t punished for good-faith decisions. Uyeda further noted that “ERISA does not require perfection. It requires prudence . . . [and] without such reform, the threat of opportunistic lawsuits will continue to chill innovation and discourage fiduciaries from offering more diversified investment options—even when those options are in the best interest of participants.”²⁸ As of this writing, Congress is considering several possible reforms that may address these issues, in whole or in part. For example, Representative Randy Fine (R-FL) has introduced a bill called the “ERISA Litigation Reform Act” which would, among other matters, change the burdens of proof for those raising non-exempt prohibited transaction claims under Section 406(a) of ERISA and mandate limitations on discovery unless “particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.”²⁹ For present purposes, given the highly contingent nature of any such proposals, this article does not otherwise address these legislative initiatives, except to acknowledge that they could dramatically alter the picture and calculus.³⁰ That said, there are still likely many steps the DOL can take, formally, informally or otherwise, that could help bring greater balance and reason. Even if it were to only issue sub-regulatory or informal guidance, the impact from the DOL could be sizeable. The DOL might also consider filing *amicus curiae* briefs, where applicable, to shore up established understandings

in line with the purposes of the Executive Order. It appears that the DOL has in fact already taken some steps in this direction. In one recently filed amicus brief to the Supreme Court concerning a Plan sponsored by Home Depot, it argued that Plan participants should be required to prove harm when accusing Plan sponsors or investment committees of breaches of fiduciary duty.³¹ In the past – and in particular, in this very case when argued before the 11th Circuit – the DOL had maintained the exact opposite.³² The DOL has in fact historically submitted that the onus should be on the defendants to disprove that their alleged misconduct caused losses. Five circuits agree with the older DOL position, so that plaintiffs must prove a breach and a loss under common trust principles, after which the burden then shifts to defendants to prove that the breach did not cause the loss. Two circuits, including the 11th – rejecting the DOL’s earlier amicus – have put the burden of proof on the plaintiffs. The DOL under the current Administration has now done a *volte face*, agreeing with the 11th Circuit’s decision that it previously opposed. It has now “concluded that the relevant authorities are better understood as leaving the burden of proof on ERISA plaintiffs.”³³

It is potentially noteworthy that the plaintiffs in this case against Home Depot elected to drop their challenge of the 11th Circuit’s decision to the Supreme Court following this amicus brief. Certainly, that was the DOL’s impression. Reacting to the decision by the plaintiffs to withdraw the appeal, Solicitor of Labor Jonathan Berry released a statement that “[t]his decision speaks volumes.” Assistant Secretary of Labor Daniel Aronowitz echoed that “[t]his outcome should provide reassurance to the regulated community that the Department of Labor is committed to ending regulation by litigation and to defending ERISA as Congress intended . . .”³⁴

Similarly, in another recent case, the DOL submitted an amicus brief to the Supreme Court concerning the pleading standards for a class action challenging a Plan sponsor’s selection of a target-date fund.³⁵ There it recently argued that the Sixth

Circuit erred when it permitted the case to proceed even though the plaintiffs did not provide a comparable benchmark (other than a S&P target-date fund index) to support the allegation that the investment option underperformed. The DOL in this amicus brief emphasized that since there was no evidence that the target-date investment option in question was designed to meet or beat this particular S&P target-date fund index “[t]he fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the [fiduciaries’ investments] were an imprudent choice at the outset.” Requiring that fiduciary prudence must be evaluated prospectively and that fiduciaries must be “afforded broad latitude to tailor strategies, objectives, and risks to the varied needs of plan participants,” it also went so far as to assert that “it is doubtful that a market composite index like the S&P [target date fund] benchmark could ever qualify as a meaningful benchmark” because “it reflects an amalgamation of the different characteristics of [target date] strategies.” Most recently, the DOL has taken a similar position in a Second Circuit case involving Yale University, reversing an earlier Biden Administration amicus brief in 2023.³⁶

Finally, at a recent conference, it was reported that Assistant Secretary of Labor Daniel Aronowitz, commented that “[w]e want to restore ERISA *as a law process*, and we want to push back on regulation by litigation . . .”³⁷ This focus on “process” was buttressed with comments at the same conference by DOL Deputy Secretary Keith Sonderling, who was reported as stating that “[w]hen the federal government files an amicus brief in a case, it carries significant weight because we are the experts.”³⁸ In a *Wall Street Journal* article covering this event, Mr. Sonderling reportedly hit the “fear factor” issue head on: “We have an industry living in fear . . . that a judge or lawyer is going to second guess decisions. . . . We have to eliminate that.”³⁹ [Emphasis added].

Apart from any formal guidance that may be issued, statements such as these standing alone can shape perceptions. In addition to what appears to

be the immediate net impact of the DOL’s amicus brief to the Supreme Court in the Home Depot case—the plaintiffs’ withdrawal of their appeal – statements such as those by Assistant Secretary Aronowitz to end “regulation by litigation” and to emphasize instead “ERISA as a law process” in combination with DOL Deputy Secretary Sonderling’s affirmation of “an industry living in fear” and a desire to “eliminate” reflect an emphasis early on in the current Administration upon which future guidance may build. One only needs also to recall the substantial impact on plans and market participants that recent DOL guidance on collateral considerations associated with plan investments such as environmental, social, governance (ESG) and other related matters has had.⁴⁰ One should therefore not underestimate the importance and practical effects that shifts in emphasis and tone by regulators may have on public perceptions and behavior.

Consideration 4: Modernize Regulations and In-Scope Prohibited Transaction Exemptions

The DOL may be able to provide an outsized impact simply by modernizing two important rules. The first relates to Business Development Companies (BDCs) and the “plan asset regulation.” The second involves bringing a widely used and important prohibited transaction class exemption up to date to create a level playing field that is fund structure agnostic. As discussed above, regulations issued by the DOL, as modified by Section 3(42) of ERISA, provide rules when an entity can become “plan assets” subject to ERISA when accounts subject to the fiduciary responsibility and prohibited transaction provisions of ERISA or the analogous provisions of Section 4975 of the Internal Revenue Code (Code) make an equity investment. As also noted above, some vehicles, such as bank collective investment trusts are treated as per se subject to ERISA at the first amount of ERISA investment. By contrast, by both statute and regulation, registered funds under the 1940 Act are not subject to these “tainting” rules of ERISA and Section 4975 of the Code.

BDCs are not technically “fully registered” under the 1940 Act. But they are highly regulated vehicles structured as closed-end funds that elect to be subject to the special BDC provisions of the 1940 Act. BDCs are subject to most of the provisions of the 1940 Act (including the need for an independent Board, limits on leverage, and anti-affiliation provisions). In addition, BDCs are reporting companies under the Securities Exchange Act of 1934, as amended, and are required to file reporting company forms such as Forms 10Qs, 10Ks, and 8Ks. Moreover, not only is the investment manager required to comply with the relevant standards of care for registered funds under the Investment Advisers Act, but the BDC is a fully SEC regulated entity. There would appear to be no compelling policy reason to differentiate closed-end registered funds on the one hand, and BDCs on the other for purposes of the plan asset rule’s “taint.” Certainly, the investor protections in both cases are substantially similar.

By updating the regulation to treat BDCs the same as all other registered funds for purposes of ERISA’s plan asset rule, the DOL could significantly enhance the accessibility for Plan investments in Alternative Assets funds. At present, BDCs often rely on the 25 percent test, which by definition places a cap on plan investment. They also rely on the “publicly offered exception” which in today’s evolving marketplace sometimes raises unanticipated interpretative or operational issues associated with the application of its presumptions (which many sponsors relying on the exception strive to adhere to). To the extent they arise, it may often result in additional layers of complexity and at a minimum, delay. In other cases, a BDC may rely on the Venture Capital Operating Company (VCOC) exception, but its availability is highly dependent on the strategy itself. Amending the plan asset regulation in a way that harmonizes the treatment among similarly situated and regulated products should thus be a consideration.

One separate avenue for modernization could come through updates to PTCE 77-4. As discussed

above, PTCE 77-4 allows fiduciaries, including investment managers and investment advisers, to use their investment authority with respect to plan assets under their charge to purchase, hold and sell shares of open-end registered investment companies as to which the manager or affiliate is sponsor or manager of the registered fund. Conditions to PTCE 77-4 include affirmative written consent by a fiduciary independent of the manager empowered to make such decisions after receipt of the underlying registered fund’s prospectuses, certain additional fee and related materials, and the reasons why the account may be directed into (and limitations on such direction into) such funds. PTCE 77-4 also requires that the manager offset either the account level investment management, investment advisory, or similar fee by such fees at the investment company, or waive the investment management, investment advisory, or other fee at the registered open-end registered fund level. In other words, an express condition of reliance on PTCE 77-4 is that the manager may not “double dip” on investment management, investment advisory fees or similar fees at the account level and then at the registered fund level. As noted above, regardless of the structure of a fund’s fee or compensation structure, a fiduciary would need to understand the value proposition of the fund and assess whether the compensation is appropriate to achieve the desired risk-adjusted returns.

PTCE 77-4 has been very useful and is widely implemented across the market. But it technically only provides relief for investments in affiliated US registered open-end mutual funds. It does not, for example, apply to investments in US registered closed-end funds, or unregistered funds. Comparably, as discussed above, Section 408(b)(8) of ERISA often is used for investments in affiliated bank collective investment trusts which the investment manager or an affiliate maintains (although as a technical matter, there is no per se condition that requires the avoidance of “double dipping” of management fees).⁴¹

Many discretionary managers have been reluctant to allocate plan assets under management or advisement to affiliated registered closed-end funds or unregistered funds—even when there is no “double dipping” of investment management, investment advisory or similar fees. While there are undoubtedly circumstances in which one could reasonably conclude that no conflict exists under ERISA’s self-dealing prohibited transaction rules that would necessitate an exemption like Section 408(b)(8) or PTCE 77-4, there are situations in which a manager may not always reach a desired level of comfort. Given ERISA’s penalties, including the possibility for excise taxes, confidence levels would likely need to be very high. In such cases, the lack of an exemption available to the transaction may impede otherwise desired transactions in the interest of plan participants.

Updating PTCE 77-4 so that it applies to closed-end registered funds as well as unregistered funds would level the playing field across fund types and give greater possibilities especially for Allocator products. It also would have the added benefit of modernizing the exemption to keep pace with current commercial realities. Such a change could have an additional correlative impact that is favorable. It could provide a powerful signal that the DOL recognizes funds other than those that are open-end and registered under the 1940 Act can, and do have, appeal for the ERISA market. Insofar as such a change could be implemented, it could also indirectly address the “ERISA market failure” of the “fear factor” associated with Alternative Assets funds as a strategy.

DOL and IRS: Consider Employer Contributions as Basis for Reform

Plans allow participants to elect to defer a portion of their compensation. But many Plans contain additional sources of contribution from the employer. Many Plans call for employer “matching” contributions and employer profit sharing

contributions. Others also make qualified non-elective contributions (QNECs). An employer may make such contributions to the Plan for any number of reasons. While elective deferrals often are viewed as “participant” contributions, these employer-based contributions often are seen by management as “company” contributions—after all, they come not from the participants’ salaries, but from the sponsor’s bottom line. Consistent with this perception, it is perhaps not a surprise that in many cases employer contributions may be more likely to impose vesting conditions. With this in mind, when a Plan sponsor concludes as a matter of philosophy, conviction or concern for employees, that it is in the best interest of its workforce to have exposure to a given investment, including a diversified or balanced strategy so as to have sufficient funds for retirement, it may be able to mandate that the “employer” portion be invested in one or more designated vehicles or funds. It may choose to do so as a matter of Plan design—not as an investment decision. To at least some degree, it may be possible to characterize such a Plan-prescribed requirement as a sponsor-driven “business decision,” or in technical ERISA terms, a “settlor” function, although to be sure the facts and circumstances would be critical and it is likely that there would still be some quantum of fiduciary responsibility involved; for example in the implementation of the investment option.

While this approach is intended to be product and strategy agnostic, it would not preclude the possibility of Alternative Assets exposure. For example, an Allocator strategy that included exposure to Alternative Assets might be one among many choices for Plan sponsors so philosophically inclined. Enabling plan sponsors who wish to do so in a settlor capacity may be an area for additional DOL and the IRS consideration, and where appropriate, meaningful guidance. Those pathways are of course, currently possible, but are very sparingly used. Could DOL and IRS offer comfort that such

a decision, if undertaken, and properly documented in the Plan's governing agreements is a "settlor" function?⁴² Would it help to calm the nerves of those who may have been waiting on the sidelines but who earnestly believe that, say, a target-date or other Allocator strategy is critical for retirement security or that, say, that participant exposure to a particular asset class or asset classes (including Alternative Assets) is important? Regulatory pronouncements that set an enabling tone for those who wish to explore this approach may be yet another way to address the "fear factor." The establishment of parameters pursuant to which a Plan design feature such as this could be respected as a settlor function could be enormously helpful. Of course, not every Plan sponsor may believe that such a structural change is warranted, and in fact, it is likely that many do not. But for those that do, such guidance could be welcome.⁴³

Additional Alternative Assets Centered Suggestions for Consideration

In considering policy options, we would expect that the DOL, SEC, IRS, and other regulators will focus attention on the extent to which the "fear factor" has impeded Plan fiduciary efficient decision-making. Depending on their conclusions, the DOL in particular may choose to move beyond purely principles-based propositions that are indifferent to the strategy of Plan investment options and instead focus on other specifics applicable to Alternative Assets. There are both benefits and detriments to this approach. To depart from standards that are product and strategy agnostic, a regulator would likely need to conclude that more tailored solutions—including potential safe-harbors applicable to strategies involving Alternative Assets—need to be considered. If the DOL wishes to consider such a tailored approach to Alternative Assets, it may wish to approach them separately for each of the Allocator and direct-access stand-alone models.

This next section offers some limited ideas for more tailored proposals. It neither favors nor disfavors these when compared with the principled-based

action items discussed in "Suggestions and Opportunities—Principles-Based Structural Changes—DOL: Address the Fear Factor and Modernize Relevant Rules and Exemptions," above. Nevertheless, such possibilities are likely to take different shapes and forms, and some may work better with Allocator arrangements than single-strategy direct-access funds. The below addresses each of these.⁴⁴

Allocator Products

"Principles Based" Safe Harbor

Section "Consideration 1" in "Suggestions and Opportunities—Principles-Based Structural Changes—DOL: Address the Fear Factor and Modernize Relevant Rules and Exemptions" above offered a principles based safe harbor under ERISA that could be applicable to all investment options on a Plan menu. But the DOL could choose to focus just on Alternative Assets, and even then, it could home in on the Allocator approach. One alternative safe harbor targeted solely at Alternative Assets under an Allocator model would be one similar to that suggested by the Committee on Capital Markets Regulation (CCMR). The CCMR proposes a safe harbor in which "the fiduciaries apply a specified and detailed review methodology in connection with their decision to offer the Investment Option. This safe harbor would require the use of an asset allocation fund with exposure to a combination of Alternative Assets and more liquid assets so that beneficiaries retain the ability to move their account assets into and out of [the Allocator] on a daily basis."⁴⁵ The proposal envisions that "a fiduciary should determine in good faith that the [Allocator's] investment strategy, fees, and overall liquidity are consistent with the plan's characteristics and the needs of plan participants, and that the asset allocation fund would allow participants to invest their accounts among more diversified investment options within an appropriate range of targeted returns."⁴⁶ The proposal also includes a presumption

for fiduciaries to rely on written disclosures provided by the asset allocation fund about the fund's investment portfolio, valuation and liquidity practices, and managers. In this regard, CCMR believes that "the proposal of a clear safe harbor will reassure plan sponsors that they ought not to be exposed to meritless litigation on the basis of the unique liquidity and fee structures of such Alternative Assets that do not in fact affect whether offering an [Allocator] with exposure to such funds is prudent."⁴⁷

While incorporating many of the elements of those discussed in Consideration 1 above, including those of ERISA Section 404(e), the CCMR proposal is by its own terms limited solely to Alternative Assets and even further limited to Allocator products. The CCMR proposal also offers proposed regulatory language that is well thought out and should be seriously considered to the extent the pathway of choice by the DOL is both Alternative Assets and Allocator specific. It should be of interest both to regulators as well as market participants and commentators alike.

Percentage Limitations

Should the DOL wish to depart from an exclusively principles-based approach limited to Allocators with Alternative Assets as described in Suggestions and Opportunities—Additional Alternative Assets Centered Suggestions for Consideration—Allocator Products—'Principles Based' Safe Harbor" immediately above, it could separately (or additively) choose to incorporate quantitative parameters. The regulations under ERISA generally, or Section 404(c) and the Qualified Default Investment Alternative (QDIA) regulations specifically, could be adapted to permit a "safe harbor" for maximum percentages of Allocator assets that may be invested in Alternative Assets. Most industry experts have suggested corridors that they believe are defensible under modern investment theory, but no doubt the DOL will want to consider a number of factors in this regard. A safe harbor also could be conditioned on the Allocator manager adhering to an applicable standard of care,

for example, if structured as a collective investment trust or managed account, an ERISA fiduciary standard of care, or if a pooled investment vehicle that is not "plan assets" compliance with the Investment Advisers Act of 1940. Such a safe harbor also could provide for a "de-escalation" requirement based on age: requiring that the QDIA or other Allocator not be permitted to allocate more than a specified percent of the fund to Alternative Assets strategies at or near the age of retirement, unless imprudent to be so.

Direct Access Standalone Single Strategies

Again, should the DOL wish to depart from principles-based solutions and instead offer some quantitative-based rules, regulations under ERISA could be promulgated to permit a "safe harbor" of participant account allocations to stand-alone direct-access single manager Alternative Assets strategies up to a specific percentage or level. Corridors that are appropriate likely will be different from those, if any, that may be established for Allocator products. No doubt, as above, the DOL will want the careful input of experts. Providing such additional protection may bring the much desired "balance" that the Executive Order appears to seek. It furthers the Executive Order's objectives of correcting the "ERISA market failure" while still leaving intact ERISA's primary duties.

The DOL could consider whether such maximum percentages allocated to stand-alone direct-access single funds should change over time—decreasing as the participant nears retirement. Such an approach may work particularly well if, and should likely be coupled with a complementary alternative: Either the participant is limited to such maximum percentages or the participant receives unconflicted individualized fiduciary advice with respect to the prudent selection of, and monitoring of any such investment choice. The decision to hire and monitor participant-available investment advisers would be made by the Plan's fiduciaries and thus would be fiduciary decisions themselves.

Many Plans already offer participant-level tools, and in some cases, third-party individualized investment advice. Professionals at regulated entities such as banks, broker-dealers, investment managers, and insurance companies routinely provide fiduciary advice. The Pension Protection Act of 2006 reflected Congress' attempt to encourage the provision of investment advice to participants in compliance with ERISA (and the analogous provisions of the Code).⁴⁸ Since that time, the DOL has crafted several pathways it believes are suitable for this purpose. Thus, consideration may be made to offering safe-harbor relief for standalone funds or products under ERISA Section 404(c) on percentage limitations as described above, or the use of a qualified professional individual professional (QPIP) as opposed to a qualified professional asset manager (QPAM). A QPIP would need to be defined. As a starting point, the DOL could look to professionals already entitled to rely on other existing principles-based exemptions, such as PTCE 2020-02. A policy option that offered either defined limits as to which a participant could allocate his or her account or the use of a QPIP could solve a number of challenges while still providing effective protections.

What Can Be Done Now?

What Can Financial Institutions Do Now?

It is difficult to know what guidance may be forthcoming. However, there are several steps Allocators and other fund sponsors may wish to actively explore in the present. These include feasibility analyses, product design innovations, and client and business partnership possibilities. It also includes product engineering, market testing, ramping up operations, back-office and other related functions, and seeking competitive advantages where possible. The most successful providers may be those that either correctly anticipate market and legal developments, already have top-rated products and established relationships with commercial partners or those that can design their products with the

optionality to pivot to emerging rapid changes in demand and requirements. Needless to say, given the multiple statutes involved, the use of sophisticated counsel who are expert on each and every front is essential.

Allocators and stand-alone single-strategy direct access fund managers will need to assess the legal structures they intend to use, and how much development of infrastructure, compliance and operations that may be required. Right now, it would appear that Allocator products are better situated to be able to deliver access to Alternative Assets strategies. But this is nothing new. This comparative advantage exists because of longstanding legal and structural issues as well as their comparative advantage in addressing liquidity related concerns. Given the fact that Allocator strategies such as target-date, life-cycle, and similar products have grown to occupy an outsized percentage of Plan menus and participant accounts, it would appear that many Alternative Assets fund sponsors would look to this pathway first. Even with regulatory changes, the path to direct-access to stand-alone single-strategy funds may continue to be aspirational at least in the near short term, although not necessarily for the long term.

Registered mutual fund platforms may be well-equipped to approach registered products in this space. Product sponsors with banks and trust companies in this regard may already have a competitive advantage in both the potential deployment of useful ERISA prohibited transaction exemptions and likely have better flexibility to define and meet the needs of competitive pricing. This is true to a lesser extent for sub-advisers with good relationships with banks or trust companies that maintain collective investment trusts and which seek expert investment advice for their products. Those who have the capability to offer closed-end registered funds or BDCs may find themselves with other competitive advantages. They also may be able to penetrate direct-to-plan products either in private credit or private equity fund-of-funds. But the private asset

percent limitations for open-end registered funds may continue to be a headwind for direct-access stand-alone funds—especially for private equity strategies. Closed-end registered funds also may be well positioned for Allocators’ lineups, and perhaps as their own strategy-specific fund-of-funds or other stand alone option. Nevertheless, product sponsors will need to assess the extent to which they may be responsible for maintaining liquidity to meet the demands of any particular Allocator. Those who do not have the scale to launch such funds will need to acquire them quickly. Like any product undertaking, a build out takes time, which in this case, should not be understated especially in light of the high degree of attention involved, and the plethora of many “early first movers.”

Market participants that serve as Allocators will also want to assure that they have developed a desirable way of managing liquidity while they execute on allocations to Alternative Assets exposure. They will need to adopt valuation protocols for current pricing on assets with “stale” data from illiquid assets. Stand-alone strategies will need to develop acceptable liquidity parameters in ways that are both responsive to consumer/Plan (or Allocator) expectations and that preserve the basic economic value proposition. Those who develop products with specific partners in mind may have a leg-up in both delivery and desirability. Some stand-alone strategies may wish to not only examine their competitive advantages but also retain flexibility to offer variations on a theme that are scalable. The needs of each Plan and each Allocator are likely not to be homogeneous, and the stand-alone fund sponsor that is able to create a product that “fits” with many Allocator partners may develop certain advantages.

It should be clear to anyone who has read this article to this point that liquidity is a central, if not defining, challenge associated with Plan access to Alternative Assets. Channeling a famous passage in the Babylonian Talmud, this challenge is at the very essence, and the rest is all commentary.⁴⁹ But, not entirely, as there are other legal and structural issues

as well. Where valuation limits liquidity, managers may wish to reexamine their approaches to make themselves more attractive to Allocators and other Plan fiduciaries. Some may find it feasible, at least in part with respect to some of the assets in the pool, to adopt guidelines (disclosed to investors) that apply to Alternative Assets. Managers may seek to work on and confirm scenario analyses on intra-period cash flows, develop objective methodologies for valuing assets by giving effect to pricing that is occasioned by sales and acquisitions at known transaction prices, including assumptions on estimated expenses as well as management and performance fees, and the incorporation of quoted market transactions or market fluctuations of similar securities. There is no doubt that significant amounts of work may be required and there is likely no one best approach.⁵⁰

Then there are the comparatively less exciting, but equally critical issues associated with “plumbing.” Stand-alone strategies likely will need to pay careful attention to how cashflows interact with the “plumbing” of any Allocator investor, or any direct-investing Plan. Sponsors of Allocator products may need to develop ways to retain liquidity and create synergies and flexibility at the Plan client level. Some are already focusing on issues like how to deal with changes to investment target allocations when the market moves. Changes in public assets may cause the Alternative Assets allocation to exceed the stated threshold (and potentially also result in higher fees to the Plan). Of course, overcompensating for that possibility can result in a suboptimal allocation to Alternative Assets in the first place, raising not only return issues but also fiduciary responsibility considerations. There are many issues to be tackled, and these are just the tip of the iceberg.

Fund sponsors may separately wish to consider taking steps now in their fund documentation so that they are flexible enough to accommodate future direct Plan investors or Allocator products. Provisions that are category-specific are common (in different forms and variations) for ERISA defined benefit plan investors, some bank holding company

investors, and other investors with specific regulatory constraints (often offshore) are already common in many funds. Many may need to be adjusted to prepare for the possibility of new influxes from Plans, should circumstances be propitious. Fortune favors not only the bold; it favors the prepared. In this spirit, fund sponsors may wish to consider adding provisions to their funds' organizational documents and subscription documents that are designed to deal with issues that may be particular to Plan investors and Allocator sponsor investors. These could include potential liquidity and valuation requirements, as well as exit provisions and reporting and transparency considerations. Sponsors should try to anticipate the needs of such investors on both commercial and legal (including in some cases, ERISA fiduciary) axes and should consider how to best tailor those preparations in a manner designed to address them quickly, efficiently, and inexpensively.

There are no guarantees. This is a potentially rapidly-changing arena with several prominent first movers and many moving targets. Depending on the ERISA-status of the Alternative Assets strategy, as well as the 1940 Act registered status of the investment, there may be additional legal considerations, including affiliated transaction limitations and restrictions. In the case of a plan assets fund, the ERISA compliance burdens should not be underestimated both with respect to the anti-self-dealing prohibited transactions described herein and the "per se" prohibited transaction rules. Veterans of successful plan assets funds know that it is rare for a fund to become ERISA compliant on a dime (both in terms of temporal and financial measurements). In addition, 1940 Act registered Alternative Assets strategies may need to evaluate their subscription documents to assure that their questionnaires appropriately contemplate responses from Allocator fund sponsors. Registered funds in particular (as well as BDCs) will likely need to consult with sophisticated legal counsel not only to work through the existing and evolving 1940 Act issues, but to better understand how

their products can best be positioned to be attractive to Plan sponsors and Allocators alike. Sponsors of all Alternative Assets strategies considering playing in this space should be mindful of potential confidentiality issues in a Plan market.

Taking steps such as these not only may be preparatory but can confer a competitive advantage. They signal to Plans and Allocator sponsors a readiness to streamline and facilitate investment with a sensitivity to their concerns. In a world hyper-focused on ERISA prudence, being able to demonstrate excellence may be a highly outcome determinative factor. Early preparation may minimize the requests for "one-off" side-letters and enable successful strategy sponsors to set the landscape of the competitive market, rather than have it dictated to them by others.

Finally, intermediaries such as banks, broker-dealers, and insurance companies may wish to consider whether these developments offer opportunities for them. While many already provide investment advice to Plans, there may be a growing need for participant-specific advice—including the "QPIP" idea discussed above. Whether an existing institution's current platform is equipped both substantively and technically to liaise with other market providers and consumers will be something businesspeople will no doubt wish to focus on. For some institutions, there are tradeoffs that will need to be considered, including some that may be "zero-sum" because of regulatory reasons that include ERISA.

What Can Plan Fiduciaries Do Now?

Plan fiduciaries need to comply with their duties under ERISA. To the extent they believe Alternative Assets strategies would be appropriate for their Plans, they should continue to remain informed about current developments, obtain expert advice and consultations, and, where appropriate, do appropriate diligence on any given product or service under consideration. Fiduciaries should work with their advisors to understand given strategies, underlying assets, risk profiles, liquidity opportunities, valuation considerations, fees and other costs

associated with Alternative Assets strategies. To the uninitiated, Alternative Asset classes tend to have their own lexicon that can present a learning curve: getting up that curve may be a good place to start. As industry experts themselves note, “manager due diligence for private assets is more complex and resource-intensive than for public assets, and top managers may have limited capacity or charge higher fees.”⁵¹ Indeed, a fiduciary’s duty of prudence associated with Alternative Assets strategies may require it to retain the assistance of experts when the fiduciary does not have the required expertise to conduct this evaluation itself. Many investment consultants already have this expertise, although to be sure, some Plan sponsors (depending on their industry) may have it available internally.

Depending on market developments, Plan fiduciaries may continue to prefer Allocator products for the foreseeable future. This is not just because they can be used as target-date, life-cycle, and potentially QDIA related investment options, but because implicit in an Allocator strategy is the Allocator’s own exercise of investment expertise. In addition, Plan participant appetite for Allocator products such as target-date funds continues to grow, stoking producer supply and innovations within that channel.⁵² Nevertheless, all of the products under consideration and discussed herein require a regulatory standard of care that presumes financial sophistication and gravitas. Regardless of the product or strategy under consideration, having a prudent process is central. ERISA makes clear “fear factors” do not win the day when a fiduciary adheres to a diligent process. Can a Plan fiduciary determine that a given Alternative Assets strategy is prudent for Plan participants and can it make its decision in accordance with ERISA’s exacting prudent standards? ERISA and available caselaw, most notably the recent *Intel* decision would strongly say so. Should a Plan fiduciary be able to prudently select an Allocator that has some investments in Alternative Assets? The answer would appear to be the same. And in addition to the *Intel* case, a recent decision in Massachusetts

continues to support first principles. In that case, the defendants prevailed against accusations by plaintiffs that the Plan’s offering of proprietary mutual fund options, which included a global alternatives fund, was imprudent.⁵³ That court focused on the steps the Plan fiduciaries took that demonstrated a prudent design of a prudent process. These action items – which included the use of outside legal and financial experts to review the funds and assist with drafting the Plan’s investment policy statement, frequent education and training of the investment committee members on ERISA and the demands associated with being an ERISA fiduciary, and regular investment committee meetings and documented minutes – can arguably serve as the starting point for Plan fiduciaries’ own development of a more tailored and individualized prudent process when considering Alternative Assets strategies. This decision is reassuring in that it continues to place primacy on prudence and process. Plan fiduciaries should continue to develop, implement, follow and document a prudent process. “Showing your work” isn’t just a recipe for success in high school mathematics. It can instill confidence in the integrity of a prudent decision-making process.

However, the current environment is litigious, and the costs involved in defending such suits can be high. Hopefully, the Executive Order’s directive to the DOL to address this “fear factor” and “ERISA market failure” will provide much needed comfort. Plan fiduciaries should continue to remain current with developments, even as they explore future possibilities.

In addition to the above, Plan sponsors may wish to explore operational issues that may arise in the offering of Alternative Assets. That is particularly the case where the investment alternative has different liquidity features from other investment options offered under the Plan. The details of these considerations run far beyond the scope of this article, but discussions with existing vendors and partners, such as Plan recordkeepers to understand capabilities and limitations may be energy well spent. Some Plans

considering products with less than daily liquidity and their recordkeepers are already addressing potential operational concerns. Working together in partnership, some have adopted Plan-wide mechanisms pursuant to which the Plan aggregates all participant contributions and distributions on any given day and then nets them against each other before any net contributions are allocated to an Alternative Assets strategy under the Plan. Such innovations and collaborations will likely proliferate and it may be in Plan fiduciaries' interests to kick-start discussions to keep abreast of both existing challenges, and potential solutions. Plan fiduciaries contemplating Alternative Assets should also honestly assess the needs and wants of their participants. Part of this is an inquiry into the level of financial sophistication of the population and its ability to understand some of the particular opportunities and risks presented. Not all investments are appropriate for all Plan populations: this is not only true about Alternative Assets strategies, but also many other investment options. Where Plan fiduciaries believe that the inclusion of Alternative Assets exposure is appropriate, they may also wish to enhance participant communications and education. Business partners, such as the Plan's investment consultants, recordkeepers and other professionals may be able to help increase financial literacy generally, and if desired, identify those complexities of Alternative Assets more specifically. Plain English explanations about the nature, risks, fees, and liquidity constraints with respect to Alternative Assets investment options would be important – whether offered through an Allocator model or otherwise.

Finally, Plan sponsors may wish to consider structural issues associated with their Plans. Those sponsors who believe that their participants are missing out on the opportunities other institutional investors have by not having access to Alternative Assets may choose to consider a Plan design change. Such “settlor” functions could include re-examining a Plan's governing instruments with a view towards encouraging the possibility of longer

holding periods—and Plan prescribed investment of employer contributions in Allocators or other strategies where consistent with the sponsor's business wishes. By allowing younger employees in the Plans to enroll immediately upon hire and allowing them to remain invested in the Plan even as they switch jobs or retire, Plan participants may be better able to achieve the benefits of certain Alternative Assets. Where Plan sponsors feel so philosophically inclined, they may explore the challenges and pathways to achieve desired objectives in accordance with their risk-reward paradigms.

Conclusions

Alternative Assets strategies are thought by many to offer significant benefits and have been well utilized for decades by institutional investors, including defined benefit pension plans subject to ERISA, for decades. A combination of legal and structural issues such as competing legal regimes that may work at cross purposes and liquidity related considerations have combined with the threat of opportunistic lawsuits to create significant headwinds for Plan access to such strategies. A number of recent highly publicized product launches have proceeded on pathways promoted as “new” but which upon closer inspection had been generally known to work by those who have been experts in the field for many years. Indeed, this “Allocator” approach continues to offer the most likely path of success in the near term. With the growth of target-date, life cycle, and similar strategies, and as new Allocators have entered the market, the case for an expanded role of Alternative Assets in Plans has received renewed attention more broadly. But so has the ERISA “market failure” and no less importantly, the regulatory “tug of war” discussed in Part 2 of this article. This focus and the issuance of the Executive Order may offer the possibility for structural and interpretative reforms, which in part may also address the perceived “ERISA market failure” in connection with Plan fiduciaries' decision calculus concerning Alternative Assets.

Recent parallel SEC changes to closed-end registered funds offer additional possibilities, although there are still challenges that suggest there is room for further growth in the space. What is clear is that product manufacturers, whether stand-alone Alternative Assets managers or Allocator sponsors, along with Plan fiduciaries, intermediaries and recordkeepers will all need significant legal and operational support in considering these changes. As this article demonstrates, the issues are multifarious and the solutions are not monolithic. There is little “copy and paste” and the amount of work that is required by firms to bring their products to market should not be understated. They will be best aided by lawyers that are able to bring to the table comprehensive solutions with subject matter experts across allied fields such as ERISA, the 1940 Act, the Securities Act of 1933 and the Securities Exchange Act of 1934, Regulation 9 and related bank regulation, not to mention legal experts in fund formation and distribution, contracts, Blue Sky and, where applicable other financial regulation such as broker-dealer and insurance.

Much also will depend on what changes stem from the Executive Order and the product innovation and cultural shifts it may promote. The ultimate success of whether the “ERISA market failure” is corrected will be when a sufficient number of Plans and Plan sponsors come to conclude that the “fear factor” was (channeling Franklin D. Roosevelt) more about fearing fear than fear itself. Until that time, however, it seems that rightly or wrongly, at least while the issues are hypothetical rather than real, fear—or fear of fear—remains part of the contemporary landscape. At such time as the choice becomes a real one, and one or more high-profile Plan sponsors indeed include Alternative Assets-centric choices in the investment menu, it will be interesting to see whether Plan sponsors more generally start to pursue appropriate nonconflicted procedural prudence and proceed to expand their menus. While it is too early to predict the shape of things to come arising out of the Executive Order, impactful structural and

cultural changes, should they come, may ultimately have lasting effect.

Mr. Rabitz is Partner, and Co-Practice Group Leader, Employee Benefits and Executive Compensation, and Chair National Fiduciary Practice, Dechert LLP, New York; Adjunct Professor, New York University School of Law. B.A. Brandeis; J.D., LL.M. (Taxation), New York University School of Law. Mr. Rabitz thanks his partner John W. Schuch as well as Brie Michaelson an associate in Dechert LLP’s Employee Benefits and Executive Compensation Group, New York for their thought leadership, comments, and assistance. The author also wishes to acknowledge the help and contributions of his colleagues at Dechert LLP, and in particular, those of Douglas P. Dick, Allison M. Fumai, Mark Perlow, Richard Horowitz, William Bielefeld, Kevin F. Cahill, Clay Douglas and Alex Karampatsos, and also wishes to acknowledge the valuable insights from Andrew L. Oringer and Arthur H. Kohn.

NOTES

- ¹ On Massachusetts, *see* Pension Reserves Inv. Mgmt. Bd., *Pension Reserves Investment Trust Fund Annual Comprehensive Financial Report* (June 30, 2024), available at <https://www.mapension.com/wp-content/uploads/2024/12/PRIT-Annual-Comprehensive-Financial-Report-06302024.pdf>; on Vermont, *see* Vt. Pension Inv. Comm’n, *2025 Annual Report* (Jan. 15, 2025).
- ² David Wieland, “How Leveraging Alternative Assets and Modern Portfolio Theory Can Help Investors Improve Returns,” *Kiplingers*, December 4, 2021.
- ³ *Id.*
- ⁴ “How private markets could improve retirement outcomes,” *BlackRock Retirement Perspectives*, June 26, 2025, available at <https://www.blackrock.com/us/financial-professionals/practice-management/defined-contribution/insights/private-markets-in-tdfs>.

⁵ Stephen Alpher, “The Biggest 10 Stocks Now Have the Largest Concentration on Record,” *Seeking Alpha* (Apr. 3, 2024), available at <https://seekingalpha.com/news/4500712-the-biggest-10-stocks-now-have-the-largest-concentration-on-record>.

⁶ See, for example, Takeshi Yamaguchi, Olivia S. Mitchell, Gary R. Mottola, and Stephen P. Utkus, “Winners and Losers: 401(k) Trading and Portfolio Performance, Working Paper 2007-154, *University of Michigan Retirement Research Center* (2007).

⁷ Indeed, in the first quarter of 2025 alone, there is evidence that the largest percentage of plan participants rushed to exit equities strategies since 2020, with “above-normal” trading activity on 29 of the 60 trading days in the first quarter, largely because of fears over the current administration’s tariff policies. Remy Samuels, “401(k) Participants Show High Trading Activity Amid Market Volatility,” *PlanSponsor*, April 4, 2025; John Sullivan, “401(k) Trading ‘Historically High’ During Tariff Turmoil, However . . .” *NAPA*, available at <https://www.napanet.org/news/2025/4/401k-trading-historically-high-during-tariff-turmoil-however/> April 8, 2025.

⁸ *Loper Bright Enterprises v. Raimondo*, 603 U.S. ____ (2024). This case has been read as having put an end to so-called *Chevron* deference. Taking its name from the 1984 case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), *Chevron* deference required federal courts to defer to agencies’ reasonable resolutions of ambiguities in the statutes they administer. With the advent of this case, the Court expanded the grounds for challenging agency regulations and other actions and has increased the likelihood of success for mounting those challenges. For further background, see <https://www.dechert.com/knowledgelonpoint/2024/7/supreme-court-ends-chevron-deference--limits-agency-power.html>.

⁹ Richard A. Posner, “The Rise and Fall of Administrative Law,” 72 *Chicago-Kent Law Review* 953 (1996).

¹⁰ The advent of the *Loper Bright* case and the new post-*Chevron* world has likely reduced mandatory court

deference to agency actions. However, the general view as of this writing is that courts will be much more likely to give greater weight to formal rulemaking than to less formal guidance.

¹¹ See H.E. Butt Grocery Company, SEC No-Action Letter (avail. May 18, 2001) (HEB).

¹² See S. Rep. No. 293, 104th Cong., 2d Sess. 10 (1996).

¹³ In addition to the changes mentioned concerning the SEC’s change of position with respect to certain closed-end registered funds, it is also potentially noteworthy that the SEC recently changed its longstanding position in connection with the standing instructions on the voting of proxies. See, <https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/exxon-mobile-091525>.

¹⁴ Should changes to the QP and AI standard not be made, a similar result could be achieved by clarifying the provisions in the applicable Treasury regulations that condition tax qualification of a 401(k) Plan on there being no benefit, right, or feature that discriminates in favor of “highly compensated employees” at the expense of “non-highly compensated employees.” The applicable rules to determine whether a given plan meets appropriate coverage and nondiscrimination are highly prescriptive and detailed. For present purposes, however, because an investment option may be regarded as a “benefit, right or feature,” this rule is seen by some as arguably prohibiting the offering of an unregistered fund relying on the Section 3(c)(7) exception from 1940 Act registration to participant-directed 401(k) plans where the participants under the plan who qualify as QPs or AIs are predominantly highly compensated employees. However, the basis for relaxing the nondiscrimination rules in this particular context may be unclear and, moreover, it is possible that an approach that allows wealthier participants to invest while not allowing less-wealthy participants to do so could raise difficult political issues.

¹⁵ Mark Uyeda, “The Diversification Deficit: Opening 401(k)s to Private Markets,” *Remarks at the ICI Retail Alternatives and Closed-End Funds Conference* (Nov.

20, 2025), available at <https://www.sec.gov/newsroom/speeches-statements/uyeda-remarks-diversification-deficit-opening-401ks-private-markets-112025>.

¹⁶ See, Lon L. Fuller, *The Morality of Law* (1964); Cass Sunstein & Adrienne Vermuele, *Law and Leviathan: Redeeming the Administrative State* (2020); Richard Epstein, *The Dubious Morality of Modern Administrative Law* (2020).

¹⁷ *Variety v. Howe*, 516 U.S. 489, 497 (1996).

¹⁸ Preamble to PTCE 2020-02, 85 FR 82821 (2020).

¹⁹ Section 404(e) of ERISA provides:

Safe harbor for annuity selection

(1) In general. With respect to the selection of an insurer for a guaranteed retirement income contract, the requirements of subsection (a)(1)(B) will be deemed to be satisfied if a fiduciary—

(A) engages in an objective, thorough, and analytical search for the purpose of identifying insurers from which to purchase such contracts;

(B) with respect to each insurer identified under subparagraph (A)—

(i) considers the financial capability of such insurer to satisfy its obligations under the guaranteed retirement income contract; and

(ii) considers the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features of the contract and administrative services to be provided under such contract; and

(C) on the basis of such consideration, concludes that—

(i) at the time of the selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract; and

(ii) the relative cost of the selected guaranteed retirement income contract as

described in subparagraph (B)(ii) is reasonable.

(2) Financial capability of the insurer. A fiduciary will be deemed to satisfy the requirements of paragraphs (1)(B)(i) and (1)(C)(i) if—

(A) the fiduciary obtains written representations from the insurer that—

(i) the insurer is licensed to offer guaranteed retirement income contracts;

(ii) the insurer, at the time of selection and for each of the immediately preceding 7 plan years—

(I) operates under a certificate of authority from the insurance commissioner of its domiciliary State which has not been revoked or suspended;

(II) is in accordance with the laws of its domiciliary State under applicable statutory accounting principles;

(III) maintains (and has maintained) reserves which satisfies all the statutory requirements of all States where the insurer does business; and

(IV) is not operating under an order of supervision, rehabilitation, or liquidation;

(iii) the insurer undergoes, at least every 5 years, a financial examination (within the meaning of the law of its domiciliary State) by the insurance commissioner of the domiciliary State (or representative, designee, or other party approved by such commissioner); and

(iv) the insurer will notify the fiduciary of any change in circumstances occurring after the provision of the representations in clauses (i), (ii), and (iii) which would preclude the insurer from making such representations at the time of

issuance of the guaranteed retirement income contract; and

(B) after receiving such representations and as of the time of selection, the fiduciary has not received any notice described in subparagraph (A)(iv) and is in possession of no other information which would cause the fiduciary to question the representations provided.

(3) No requirement to select lowest cost. Nothing in this subsection shall be construed to require a fiduciary to select the lowest cost contract. A fiduciary may consider the value of a contract, including features and benefits of the contract and attributes of the insurer (including, without limitation, the insurer's financial strength) in conjunction with the cost of the contract.

²⁰ See, Ted Godbout, "In-Plan Annuities Gain Momentum, But Concerns Linger," *National Association of Plan Advisors* (Jun. 3, 2024) (noting that "[t]he SECURE Act removed some of the obstacles that had deterred plan sponsors from adopting [annuities] products and now we are beginning to see growth and momentum in this market.").

²¹ *Cunningham v. Cornell University*, 145 S. Ct. 1020 (2025).

²² Some plaintiffs' law firms have taken out advertisements targeting plan participants indicating that they are "conducting an investigation" about potential violations of ERISA and inviting plan participants to share their information. The use of the term "investigation" arguably gives the impression that the firm has been hired to investigate irregularities, when a more honest characterization may be that it is more like fishing expedition.

²³ See, for example, Andrew Ross Sorkin, "The Rules of Investing Are Being Loosened, Could it Lead to the Next 1929?," *New York Times Magazine*, October 13, 2025. The title of Mr. Sorkin's piece is arguably misleading, at least, as has been argued in this article, when it comes to Plan investments in Allocator strategies. Their viability has been known to specialists for decades without any need to

"loosen" any "rules," although certainly the "fear factor" has served as a powerful disincentive for broader adoption. The piece also suggests, for example, that regulators "have begun opening the door for 401(k) savers to put money into semiliquid private-equity and credit funds," but it is unclear what is meant here: the door has in fact been open for some time in respect of Allocator arrangements and even some private credit strategies, particularly when managed in a collective investment trust. Moreover, Mr. Sorkin cautions that retirement investors may not be reading the "fine print" by which he apparently means "You may not be able to get your money back when you need it most." But many Allocator products that feature Alternative Asset exposure have worked hard to minimize or even eliminate this concern. More curious is that the products cited to in the feature appear to be available to a broad investor base and are not tailored for Plans. In some cases, they may not even be available for Plans because they are unable to satisfy one or more rules in the regulatory "tug of war." For them, the door remains shut as of this writing, and there has not been any "loosening."

²⁴ See, for example, *Moreno v. Deutsche Bank Ams. Holding Corp.*, 2016 WL 5957307, at *6 (S.D.N.Y. Oct. 13, 2016); See, for example, Am. Compl. ¶ 108, *White v. Chevron Corp.*, No. 16-cv-0793-PJH (N.D. Cal.), ECF No. 41.

²⁵ See, for example, *Sweda v. Univ. of Penn.*, 2017 WL 4179752, at *10 (E.D. Pa. Sept. 21, 2017), *rev'd in part*, 923 F.3d 320 (3d Cir. 2019); Am. Compl. ¶ 52, *In re GE ERISA Litig.*, No. 17-cv-12123-IT (D. Mass.), ECF No. 35.

²⁶ For example, *In re Citigroup ERISA Litig.*, 104 F. Supp. 3d 599, 608 (S.D.N.Y. 2015), *aff'd sub nom.*, *Muehlgay v. Citigroup Inc.*, 649 F. App'x 110 (2d Cir. 2016); *St. Vincent v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 711 (2d Cir. 2013); *Brown v. Am. Life Holdings, Inc.*, 190 F.3d 856, 859-860 (8th Cir. 1999) (accusation of an overly safe portfolio); Compl. ¶ 2, *Barchock v. CVS Health Corp.*, No. 16-cv-61-ML-PAS, (D.R.I.), ECF No. 1 (alleging

investment by plan’s stable value fund in conservative money market funds and cash management accounts was impermissibly imprudent because too cautious).

²⁷ For example, *Evans v. Akers*, 534 F.3d 65, 68 (1st Cir. 2008).

²⁸ Mark Uyeda, *supra* n. 15.

²⁹ H.R. 6084, 119th Cong. (1st Sess) (Nov. 18, 2025), available at <https://www.congress.gov/bills/119th-congress/house-bill/6084/text/ih?overview=closed&format=xml>.

³⁰ These include (a) requiring that plaintiffs have the burden of proving loss causation and (b) heightening pleading standards for breaches of fiduciary duties so that plaintiffs must make their allegations with particularity, that is, demonstrate that the challenged fiduciary act or omission was not within a reasonably prudent range so that no other fiduciary acting prudently and reasonably could have reached such a decision when a prudent process was otherwise demonstrated. Some have argued that legislative changes should be modeled on the Private Securities Litigation Reform Act (PSLRA) which raised the bar for securities fraud claims by requiring plaintiffs to plead with specificity. *See*, Private Securities Litigation Reform Act of 1995, Public Law 104-67, 109 Stat. 737 (1995). The idea would be that the law would require that any retirement plan ERISA-related litigation should require clear, particularized allegations of fiduciary breach, with it not being enough merely to state a claim that there was a fiduciary breach because a plan included Alternative Assets investments. This approach would likely envision plaintiffs being required to identify specific recommendations, decisions, or processes that allegedly failed to meet ERISA’s standards of prudence and loyalty.

³¹ Brief for the United States as Amicus Curiae, *Pizarro v Home Depot*, No. 24-620 S. Ct.

³² *Pizarro v. Home Depot, Inc.*, 11th Cir., No. 22-13643, amicus brief 2/10/23 at 11-20 (stating that “[t]he district court incorrectly placed the burden of proof on the participants to show loss causation, when it should have applied a burden-shifting framework, adopted from trust law, that places the burden to

disprove loss causation on the fiduciary after a plaintiff demonstrates a fiduciary breach and a related loss”). In response to invitations from the Supreme Court, the DOL has also weighed in similarly: U.S. Amicus Br. at 7-12, *Putnam Invs., LLC v. Brotherston*, 587 U.S. 959 (2019) (No. 18-926); U.S. Amicus Br. at 8-11, *RJR Pension Inv. Comm. v. Tatum*, 575 U.S. 902 (2015) (No. 14-656), and has also submitted other amicus briefs in response to the question over the past 35 years. Brief for the United States as Amicus Curiae, *Pizarro v Home Depot*, No. 24-620 S. Ct at p. 18, note 3.

³³ Brief for the United States as Amicus Curiae, *Pizarro v Home Depot*, No. 24-620 S. Ct, p. 3.

³⁴ US Department of Labor statement on withdrawal of Supreme Court petition in *Pizarro v. Home Depot*, Jan. 9, 2026, available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20260109>.

³⁵ Brief for the United States as Amicus Curiae, *Parker-Hannifin Corp. v. Johnson*, No. 24-1030 S. Ct.

³⁶ *Vellali v. Yale Univ.*, 2d Cir., No. 23-1082, motion docketed 1/5/26; Jacklyn Willie, “Labor Department Repudiates Pro-Worker ERISA Brief in Yale Case,” *Bloomberg Law* (Jan. 5. 2006).

³⁷ Brian Croce, “DOL wants to end ‘regulation by litigation,’ issue more ERISA guidance, legal briefs,” *Pensions & Investments* (Jan 7. 2026).

³⁸ *Id.*

³⁹ Matt Wirz, “Labor Department Promises Rule on 401(k) Private Investments,” *Wall Street Journal*, Jan 7. 2026.

⁴⁰ For example, pronouncements over successive administrations concerning plan investments captured market-wide attention in both legal and commercial circles. Until the prior Trump Administration, all such guidance was sub-regulatory, but that did not stop many from being highly tuned into every jot and tittle. Many spent inordinate amounts of energy trying to divine distinctions and interpretations that risked the forest not just for the trees, but in some cases the leaves. *See, for example*, Cathy Botticelli, Rick S. Horvath, and Mark D. Perlow, Dechert LLP, “An Update on ESG Litigation Risks

in the United States,” *Harvard Law School Forum on Corporate Governance*, available at <https://corpgov.law.harvard.edu/2025/03/13/an-update-on-esg-litigation-risks-in-the-united-states/>; Andrew Oringer, Steven Rabitz, Julien Bourgeois, Aryeh Zuber, and Michael Binko, “ERISA’s Social Goals? ESG Considerations under ERISA,” 27 *The Investment Lawyer*, 9 (Sept. 2020) *see also*, Steven W. Rabitz and John W. Schuch “Something to Get ESGCited About? DOL Finalizes ERISA ESG and Proxy Related Rules,” *Dechert OnPoint*, (Nov. 22, 2022), available at <https://www.dechert.com/knowledge/onpoint/2022/11/something-to-get-esgcited-about-.html>; Andrew L. Oringer, Steven W. Rabitz and Naina Kamath, “More ESGcitement from the DOL—New Proposed Investment/Proxy ERISA Regulations,” *Dechert OnPoint* (Nov. 2021), available at <https://www.dechert.com/content/dam/dechert%20files/knowledge/onpoint/2021/11/2021-ESG-DOL-Proposed-Rule.pdf>; Andrew L. Oringer and Steven W. Rabitz, “An ESGplanation of ERISA’s New Regulation on Social Investing,” *Dechert OnPoint* (Nov. 12, 2020), available at <https://www.dechert.com/knowledge/onpoint/2020/11/an-esgplanation-of-erisa-s-new-regulation-on-social-investing.html>; Andrew L. Oringer and Steven W. Rabitz, “A DOL Proxy Vote Against ESG?—New ERISA proposal May Limit Plans’ Exercise of Shareholder Rights,” *Dechert OnPoint* (Sept. 2020), available at <https://www.dechert.com/content/dam/dechert%20files/knowledge/onpoint/2020/9/ADOLProxyVoteAgainstESGNewERISAProposal.pdf>; Andrew L. Oringer and Steven W. Rabitz, “An ESGciting Development-Proposed Regulation on ESG Considerations Under ERISA,” *Dechert OnPoint*, (Jun 30, 2020), available at <https://www.dechert.com/knowledge/onpoint/2020/6/an-esgciting-development---proposed-regulation-on-esg-considerat.html>; Andrew L. Oringer and Steven W. Rabitz, “ERISA’s Social Goals? ESG Considerations Under ERISA,” *Dechert OnPoint* (May 15, 2020), available at <https://www.dechert.com/knowledge/onpoint/2020/5/erisa-s-social-goals--esg-considerations-under-erisa.html>.

⁴¹ It is our experience that in practice, the charging of multiple levels of management fees among affiliated bank collective investment trusts is rarely done for commercial and other reasons.

⁴² The caselaw offers instances of support, and those of concern in this regard. For examples of those that are potentially supportive, *see* *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Akers v. Palmer*, 71 F.3d 226, 230 (6th Cir. 1995), (“a company is only subject to fiduciary restrictions when managing plan assets, but not when deciding what the terms are to be”); *Scott v. Aon Hewitt Fin., Advisors, LLC*, No. 17 C 679, 2018 WL 1384300 (N.D. Ill Mar. 19 2018) (hiring a subadvisor to provide investment advice to the plan was a business decision and “not a fiduciary function”). It should also be noted that even if the decision to mandate that employer contributions be invested in specified investment options codified in the plan’s governing documents and the DOL and IRS were to provide further comfort on this point, circumstances could arise with respect to the implementation of those settlor acts which may implicate ERISA’s fiduciary rules.

⁴³ To be sure, this approach would need to consider the US Supreme Court’s decision in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). In that case, a duty of prudence was held to trump a fiduciary’s obligation to follow the plan’s terms: “. . .the duty of prudence trumps the instructions of the plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary.” The Court quoted Section 410 of ERISA for support: “with limited exceptions . . . any provision in any agreement or instrument which purports to relieve a fiduciary from responsibility . . . for any . . . duty under this part shall be void as against public policy.” *Id* at 421. It may be possible to distinguish *Dudenhoeffer* from the facts that may be presented under this proposal, particularly since *Dudenhoeffer* dealt with the potential for “insider” conflicts that are inherent when a company permits its own stock as an investment in the plan. To be sure, facts and circumstances will be important, but even with any

such guidance from the DOL, it is likely that there will still remain some quantum of fiduciary responsibility even with respect to aspects of implementation.

⁴⁴ One additional possible enhancement for any proposed solution would be to consider enhancing disclosure. Since ERISA already mandates robust participant-level disclosure concerning a range of plan-level and investment-level information, these could also be accompanied by “bold type” language concerning Alternative Assets investment allocations. Participants could be required to be prompted to read and acknowledge select information about some of the special limitations concerning such alternatives. Or the DOL could separately mandate that as a condition for investment in Alternative Assets strategies, participants partake in investor education sessions run by a third-party designed to familiarize them with basic investment concepts, asset allocation models, and interactive materials, much as are provided under existing regulations. 29 CFR 2509.96-1. The DOL could prescribe specific investor concepts in those fora that are appropriate to alternative investments and designed to highlight both the intentions and the risks involved.

⁴⁵ “Expanding Opportunities for U.S. Investors and Retirees: Private Markets,” *Committee on Capital Markets Regulation* (Aug. 2025), available at <https://capmktreg.org/wp-content/uploads/2025/08/CCMR-Expanding-Access-to-Private-Markets-08.07.25-Final.pdf>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ “Investment Advice and the Pension Protection Act of 2006,” Congressional Research Service Report, March 11, 2008 (RS22514). <https://www.everycrsreport.com/reports/RS22514.html#:~:text=Section%20>

[601%20of%20the%20Pension%20Protection%20Act%20of%202006%20\(%22PPA,without%20fear%20of%20fiduciary%20liability](https://www.everycrsreport.com/reports/RS22514.html#:~:text=Section%20601%20of%20the%20Pension%20Protection%20Act%20of%202006%20(%22PPA,without%20fear%20of%20fiduciary%20liability).

⁴⁹ R. Hillel replied: ‘Do not do unto others what is hateful to you. That is the entire Torah, the rest is all commentary. Now go and study’. *Babylonian Talmud, Tractate Shabbat*, 31a (Vilna ed.), R. Hillel.

⁵⁰ Managers that focus on “J curve” alternative strategies (such as traditional private equity)—or those that are utilized in Aggregator strategies—may also seek to take certain steps. “J Curve” refers to a trend applicable to private equity and other alternative investment funds that draw down capital for investments over time, which in many cases, results in a moderate decline in value of the fund’s term, due to the accrual of investment-related fees and expenses before any investment gains occur. The trough of the J curve illustrates graphically how the value of the plan’s investment may be temporarily reduced. Investing in assets with different maturities or vintage years may smooth some of the J curve’s effects. Many may wish to consider fund-of-funds with different fund vintages for this purpose.

⁵¹ “Do private assets belong in 401(k) plans?” *Vanguard Insights*, September 23, 2025, available at [https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/do-private-assets-belong-in-401k-plans.html#:~:text=Vanguard%20research%20shows%20that%20hypothetical,after%20fees\)%20over%2040%20years](https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/do-private-assets-belong-in-401k-plans.html#:~:text=Vanguard%20research%20shows%20that%20hypothetical,after%20fees)%20over%2040%20years).

⁵² “Pathways: Current and Future—Registered Funds: Opening a Closed-(End) Door?” in Part 2 of this article.

⁵³ No. 21-10273-LTS, 2025 LX 206326 (D. Mass. June 26, 2025).

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