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

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

applicable rules, along with suggestions as to what market participants such as investment managers, fund sponsors, insurance companies, recordkeepers and intermediaries, as well as plan fiduciaries can do now.

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

Summary of Executive Order

Specifically, the Executive Order:

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

More specifically, the Executive Order:

- Requires that the DOL take the following actions listed in the next bullet point, and in so doing mandates that it prioritizes steps “that may curb ERISA litigation that constrains fiduciaries’ ability to apply their best judgment in offering investment opportunities to relevant plan participants”:
- Seeks to clarify within 180 days the “appropriate fiduciary process associated with offering asset allocation funds containing investments in alternative assets under ERISA”:
 - Identify the criteria that fiduciaries should use to prudently balance potentially higher expenses against the objectives of seeking greater long-term net returns and broader diversification of investments;
 - Advises the DOL to consider issuing additional rules or guidance that “clarify the

duties that a fiduciary owes to plan participants under ERISA” when deciding whether to make available to plan participants an asset allocation fund that includes investments in alternative assets; and

- Directs the SEC to work with the DOL to “consider ways to facilitate access to investments in alternative assets by participants in participant-directed defined-contribution retirement savings plans” and specifically calls attention to two existing SEC regulations and guidance relating to accredited investor and qualified purchaser status which have historically limited participant access to Alternative Asset funds based on their individual financial status.

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

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

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

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

In addition, on September 23, 2025, the DOL also issued an advisory opinion (Advisory Opinion 2025-04A) the press release for which indicated that it "is another step forward towards our goal of giving plan fiduciaries the flexibility to design

retirement investment strategies that meet the needs of American workers" and noted that the DOL intends to issue a notice of proposed rulemaking regarding ERISA's fiduciary duties "when deciding whether to make available to plan participants an asset allocation fund that includes investments in alternative assets, including potential safe harbors."⁵

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

The Current Commercial Environment

Why Alternative Assets?

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

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

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

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

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

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

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

Defined Contribution Plan Utilization of Alternative Assets

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

Under these "Allocator" arrangements, a given platform provider, such as a recordkeeper, insurance company, investment manager, or other financial institution is responsible for implementing a multi-strategy account, a portion of which is allocated to one or more third-party managers with expertise in a variety of strategies, one or more of which may be specific to Alternative Assets. Model portfolios, target-date funds, life-cycle funds, and similar products partner an "allocator" or "glide path manager" with (usually) third party managers responsible for managing the different sleeves—including those dedicated to Alternative Assets strategies.²³ Access to Alternative Assets typically has been structured through a US registered mutual fund, a bank collective fund, or a managed account. One of the world's largest asset managers has noted that its "research suggests that including [Alternative Assets] within a target date solution can offer a host of benefits for retirement savers: better risk-adjusted returns, diversification, stable cash flows and inflation protection."²⁴ The Executive Order appears to focus

particular attention on this approach, without necessarily foreclosing the possibility of other structures.

An ERISA Market Failure? The "Fear Factor"

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

It turns out, however, that there has been enormous growth in lawsuits against ERISA and other plan fiduciaries. In 2024, excessive fee class action litigation surged by 35 percent with even more ERISA class actions scheduled for 2025.²⁶ Excessive fee class action claims generally have alleged that fiduciaries of defined contribution plans subject to ERISA breached their fiduciary duties by (1) failing to adequately negotiate and/or monitor the fees charged by Plan service providers (fund managers, administrators, and recordkeepers, etc.); or (2) selecting imprudent investment options for Plan participants and/or failing to monitor performance and reassess those options consistent with their fiduciary obligations under ERISA. The allegations often make comparisons to passive funds, such as index funds, that do not offer active investment management and thus usually provide an "apples to oranges"

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

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

Indeed, organizations such as the HR Policy Association and the American Retirement Association are apparently so concerned that they have asked the DOL for interim "sub-regulatory" guidance.³⁰ While recent litigation in the defined benefit plan space associated with respect to pension risk transfers, including those with respect to Athene Annuity and Life, and IBM and its independent fiduciary partner, State Street Global Advisors, over their selection of their insurer may not at first glance appear directly on point, those cases raise risk-based

concerns for Plan fiduciaries and may have contributed to a ripple effect in the defined contribution plan space. At the very least, one survey found that 43 percent of Plan sponsors have chosen not to offer lifetimes income options, citing significant litigation risk.³¹

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

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

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

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

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

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

"Uncertainty and ambiguity can chill consideration of such assets while also incentivizing unnecessary litigation."³⁶

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

2020 And 2021 Information Letters and Executive Order in Context

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

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

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

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

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

or sub-regulatory guidance, such as a regulation, or even a DOL advisory opinion letter.

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

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

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

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

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

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

No less potentially impactful is that the Executive Order specifically calls out possible changes to accredited investor and qualified purchaser status by the SEC “to accomplish the policy objectives of this order.” Both definitions impose financial qualifications on investors in funds unregistered under the 1940 Act. And separate changes from the SEC

should not be discounted, particularly where they proceed in parallel with the stated policy objectives.

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NOTES

- ¹ DOL News Release at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20250528>.
- ² Practising Law Institute, *The SEC Speaks in 2025—Day 2* (May 20, 2025).
- ³ Paul S. Atkins, Prepared Remarks Before SEC Speaks (May 19, 2025).
- ⁴ ADI 2025-16-Registered Closed-End Funds of Private Funds, available at https://www.sec.gov/about/divisions-offices/division-investment-management/fund-disclosure-glance/accounting-disclosure-information/adi-2025-16-registered-closed-end-funds-private-funds?utm_medium=email&utm_source=govdelivery. Prior to Director Greiner’s announcement, the SEC Staff held to a longstanding policy of requiring closed-end funds that invest more than 15 percent of their net assets in underlying private funds to restrict sales to investors that satisfy the accredited investor

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

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

⁶ "Solving the private markets allocation gap: From products to portfolio construction," *BlackRock and Partners Group*, September 2024, available at <https://www.partnersgroup.com/-/media/Files/PI/Partnersgroup/Universal/news-and-views/solving-the-private-markets-allocation-gap-from-products-to-portfolio-construction.pdf>.

⁷ <https://www.blackrock.com/corporate/investor-relations/larry-fink-annual-chairmans-letter>.

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

⁹ Robert Crothers, Jamie Magyera, Nick Nefouse, Stacey Tovrov, "The Power of Private Markets: Unlocking the Benefits of Private Assets in Defined Contribution Plans," *BlackRock Whitepaper*, June 2025, available <https://www.blackrock.com/us/individual/literature/whitepaper/power-of-private-markets-dc-plans.pdf>.

¹⁰ "Do private assets belong in 401(k) plans?," *Vanguard Insights*, September 23, 2025, available at [https://corporate.vanguard.com/content/corporatesite/us/en/corpl/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/corpl/articles/do-private-assets-belong-in-401k-plans.html#:~:text=Vanguard%20research%20shows%20that%20hypothetical,after%20fees)%20over%2040%20years).

¹¹ <https://lam.gs.com/en-noladvisors/insights/article/2025/private-markets-new-frontier-retirement-savings>.

¹² Burcu Esmer and Bilge Yilmaz, "Private equity could transform your retirement, Wharton alternative

investment experts say, but only if it adapts to protect savers," *Fortune*, August 24, 2025.

¹³ *Id.*

¹⁴ Robert Steyer, "Schroders: 45% of DC participants would invest in capital markets, but few are 'very knowledgeable' and 53% cite risk," *Pensions & Investments*, August 25, 2025. Report available at <https://www.schroders.com/en-us/us/institutional/clients/defined-contribution/us-retirement-survey/private-markets/>.

¹⁵ *Id.*

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

¹⁷ James Van Bramer, "Litigation Risk Thwarts Plan Sponsor Innovation, per American Benefits Council," *PlanSponsor*, October 7, 2025.

¹⁸ *Id.*

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

²⁰ *Id.*

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

²² Van Bramer, *supra* n. 17.

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

²⁴ "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>.

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

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

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

²⁷ *Cunningham v. Cornell University*, 604 U.S. ____ (2025).

²⁸ Miriam Gottfried, Dylan Toker, and Matt Wirz, “Trump Executive Order to Help Open Up 401(k)s to Private Markets,” *Wall Street Journal*, July 15, 2025.
²⁹ *Id.*

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

³¹ Van Bramer, *supra* n. 17.

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

- Funds that are “actively managed” (i.e., funds with an investment adviser who continually researches, monitors, and actively trades the holdings of the fund to seek a higher return than the market) generally have higher fees. The higher fees are associated with the more active management provided and sales charges from the higher level of trading activity. While actively managed funds seek to provide higher returns than the market, neither active management nor higher fees necessarily guarantee higher returns.
- Funds that are “passively managed” generally have lower management fees. Passively managed funds seek to obtain the investment results of an established market index, such as the Standard and Poor’s 500, by duplicating the holdings included in the index. Thus, passively managed funds require little research or trading activity. If the services and investment alternatives under your plan are offered through a bundled program, then some or all of the plan service costs may not be separately charged to the plan or to your employer. For example, the asset-based fees charged on investments may subsidize these costs. Compare the services received in light of the total fees paid.

- Plans with more total assets may be able to lower fees by using special funds or classes of stock in funds, which generally are sold to larger group investors. “Retail” or “brand name” funds, which are also marketed to individual and small group investors, tend to be listed in the newspaper daily and typically charge higher fees. Let your employer know your preference.
- Optional features, such as participant loan programs and insurance benefits offered under variable annuity contracts, involve additional costs . . .
- Retirement plans, such as 401(k) plans, are group plans. Therefore, your employer may not be able to accommodate each employee’s preferences for investment options or additional services.

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

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

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

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

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

³⁸ Following the release of the 2020 Information Letter, the SEC on June 23, 2020 issued a risk alert

highlighting compliance issues in examinations of registered investment advisers that manage private equity funds or hedge funds. The SEC Risk Alert, in a passage cited by the DOL in the 2021 Supplement, states that certain deficiencies under private equity funds and hedge funds “may have caused investors in private funds to pay more in fees and expenses than they should have or resulted in investors not being informed of relevant conflicts of interest concerning the private fund adviser and the fund.”

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

⁴⁰ ERISA Proc. 76-1, § 3.01.

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

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Will the Trump Administration Re-‘Order’ 401(k) Plan ‘Alternatives’?: Part 2

By Steven W. Rabitz

This article is the second 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 appeared in the December 2025 issue of *The Investment Lawyer*, provided an overview of the 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 concerns regarding alternative assets in 401(k) plans. This Part 2 focuses on the tensions inherent in the law that historically

have served as substantial headwinds for 401(k) plan access to such strategies and provides a deeper dive into currently available pathways with a focus on recent Securities and Exchange Commission (SEC) reforms and traditional operational constraints that continue to make some strategies highly challenging under the Employee Retirement Income Security Act of 1974 (ERISA).

The next installment will explore 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 will include 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.

Though this examination is released in several portions, given the complexities involved, all portions should be read in combination with the others. Please note that capitalized terms not otherwise defined herein have the meanings assigned to them in Part 1.

Historical Multiplicity of Legal Regimes and Structural Constraints

The rules applicable to Plan participation in Alternative Assets in some cases work at cross purposes. Attempts to solve some of the issues that have

historically thwarted Plan access presented by one regulatory regime often result in offsetting challenges under another one. In addition, apart from those often-conflicting rules, there are ERISA rules that are separate and have independent significance. This section first discusses the statutory “tug of war” and then proceeds to address the circumstances under which an investment option can become subject to ERISA. It describes some of the challenges that ERISA “plan assets” status may invite, as well as some of the primary exceptions from such treatment and their constraints. It then turns to other provisions of ERISA that are likely to be most relevant to an investing Plan fiduciary’s calculus as to whether or not to choose a strategy involving Alternative Assets as a Plan option as to which Alternative Assets strategy sponsors would likely need to be sensitive.

Statutory Tug of War

The structural legal constraints associated with the offering of Alternative Assets in Plans are not new, but they are complex. Open-end registered mutual funds—mainstays of many Plan lineups—do not often work well with many Alternative Assets strategies as a standalone. Specifically, open-end registered funds require daily liquidity, with limitations on the amount of illiquid assets the fund may hold.¹ Many Alternative Assets strategies are unable to maintain daily liquidity because investors want the fund to be invested in Alternative Assets to a greater extent than would be consistent with offering daily liquidity. Alternative Assets strategies, like private equity, presume a longer-term investment horizon and often require a commitment for a duration typically ranging from 3 to 10 years, and potentially longer in challenging markets. Alternative Assets strategies also employ techniques to potentially boost investment returns. Leverage (borrowing to gain greater investment exposure and potential opportunities) typically magnifies investment returns, leading to higher highs and lower lows.

Operating an Alternative Assets strategy for open-end mutual funds under the Investment

Company Act of 1940 (1940 Act) often would be unduly constraining and likely disrupt the basic value proposition offered by those strategies; and closed-end registered funds also face challenges for certain strategies.² These strategies therefore typically need to be offered in a way that except them from 1940 Act coverage. The most commonly used exception from registration under the 1940 Act for private (unregistered) funds is Section 3(c)(7). This exception requires that the fund’s investors be qualified purchasers (QPs) or knowledgeable employees (KEs). Being a QP requires having substantial investible assets and being a KE means being associated in certain capacities with the fund or its manager.³ Under SEC guidance, for purposes of the determination of QP and KE status the fund would need to look through to each Plan participant that chooses to allocate a portion of his or her Plan account balance to the fund.⁴ Most Plan participants are neither QPs, nor KEs with respect to any given third-party fund, thereby making the Section 3(c)(7) exception from the 1940 Act registration of limited assistance.⁵

Similar concerns exist under the Securities Act of 1933. Most unregistered funds rely on an exemption from registration associated with the offering of interests in the fund. The most commonly utilized exception presumes that almost all investors are accredited investors (AIs).⁶ It is fair to say that most Plan participants are not QPs, KEs, or AIs.

One might be tempted to conclude that the way to offer Alternative Assets funds in a Plan is to limit them only to participants who are QPs and AIs. While that would likely solve the 1940 Act and Securities Act of 1933 considerations, it would trigger a countervailing set of equally formidable challenges. This is because the Internal Revenue Code of 1986, as amended (Code) requires compliance with a set of baroque statutory and regulatory provisions as a condition for the Plan’s “qualification” as a tax-deferred vehicle. Failure to satisfy any one of those requirements results in Plan disqualification, with the possibility that all participants are then subject to US Federal income tax on their plan accounts.⁷

Under the Code, a plan cannot discriminate in favor of “highly compensated” participants at the expense of “non-highly compensated” participants with respect to any plan “benefit, right or feature.” Because investment options may be regarded as a “benefit, right or feature,” those rules could effectively require “equal access” for all participants to all investment options offered under the Plan.⁸ Stated differently, if these tax rules would work to require that a Plan offering a Section 3(c)(7) exempt unregistered fund as an investment option must give access to all Plan participants, then doing so could result in the fund’s failure to satisfy the Section 3(c)(7) exception. Thus, solving the challenges under the 1940 Act and Securities Act of 1933 by limiting Plan participant access in an unregistered fund investment option to QPs, KEs, and AIs could result in nondiscrimination test concerns while not placing such a restriction could cause the fund to lose its securities law exceptions.

Some Alternative Assets strategies may be managed in a way that requires neither registration under the 1940 Act nor reliance on the Section 3(c)(7) exception. National banks sponsor collective investment trusts (also referred to as bank collective investment trusts, collective trust funds, collective investment funds, and frequently with the abbreviations of CIT, CIF, BCT and others) which are subject to Regulation 9 (Reg. 9) under regulations issued by the Office of the Comptroller of the Currency (OCC). Collective investment trusts are also established by state-chartered institutions (which frequently adopt similar rules to Reg. 9). These collective investment trusts have their own separate exception from 1940 Act registration where they are maintained by a bank.⁹ That exception from the 1940 Act—Section 3(c)(11)—does not impose the above QP and AI related limitations and thus is more conducive for Plan access, regardless of the given participant demography. The tradeoff, however, is that bank collective funds are “plan assets” subject to ERISA’s fiduciary responsibility and prohibited transaction rules.¹⁰ While some Alternative

Assets strategies can work within ERISA’s restrictive parameters (although often with a lot of effort), others have proved much more challenging. It is to that topic to which this article turns next. In addition, collective investment trusts are available only to certain types of investors under applicable US Federal income tax (and securities) rules; generally, only ERISA plans, certain US Federal or state governmental retirement arrangements and other collective investment trusts.¹¹

ERISA Plan Assets and Exceptions: Unregistered Private Funds

Collective investment trusts are subject to ERISA at the first investment of any ERISA assets. US registered mutual funds are exempt from the fiduciary responsibility and prohibited transaction rules of ERISA regardless of the quantum of plan investment. But unregistered funds are neither such category. This raises two threshold questions. The first is whether the unregistered fund will become subject to ERISA (that is, “plan assets”). If a fund manager wishes to consider managing a “plan assets” fund subject to ERISA it must examine whether it is even feasible (and if so, what impediments and limitations would apply) to do so given the strategy. If the manager does not want the unregistered fund to become “plan assets” subject to ERISA, the next question is whether an exception is available, and whether the fund can comply with the restrictions of that exception.

If subject to ERISA, the fund and its investment manager must comply with extremely broad and rigid fiduciary responsibility and prohibited transaction rules or they (and other parties to transactions involving the fund’s assets) can suffer substantial penalties. The manager may have to restore losses and disgorge any profits relating to a breach of fiduciary duty arising in connection with any prohibited transaction.¹² In some respects the prohibited transaction could become subject to other equitable relief.¹³ There also is the possibility of an additional 20 percent civil penalty under Section

502(l) of ERISA in the case of a judicial settlement with the Department of Labor (DOL). Those “prohibited transaction” rules come in two varieties. First, are the so-called *per se* prohibited transaction rules of Section 406(a) of ERISA and its accompanying provisions under Section 4975 of the Code. These prohibited transaction rules cover virtually every transaction entered into by a plan assets fund and every service imaginable provided to it. Most managers of plan assets funds operate on the premise that each and every transaction entered into by the fund manager on behalf of the plan asset fund is a potential prohibited transaction for which an exemption is required.¹⁴ Counterparties and service providers to plan assets funds—such as broker-dealers, banks, futures commissions merchants, trustees and custodians, swap counterparties, and valuation agents—are potentially subject to rescission and confiscatory excise taxes on prohibited transactions as well, even though they are merely counterparties and service providers acting without fiduciary or privileged authority with respect to the plan assets funds. This reality leads to justifiable nervousness when they deal with plan assets accounts.¹⁵ Given the risk profile, most require contractual assurances from the fund and the manager that an exemption is available and is met.¹⁶

Congress and the DOL have promulgated numerous exemptions from these “*per se*” prohibited transaction rules that allow most common financial transactions to proceed for a plan assets fund where the counterparty is not related to the manager or any affiliates and is not a person (and is not affiliated with a person) having certain fiduciary authority with respect to material plan investors in the fund. Probably the most ubiquitous is the so-called QPAM Exemption or Prohibited Transaction Class Exemption (PTCE) 84-14 which provides broad relief from the *per se* prohibited transaction rules in ways that other transaction-specific exemptions, which are limited to a particular type of transaction, cannot provide either alone or when used in concert.¹⁷ For example, while there is a transaction-based

exemption for purchases and sales of securities with US banks and US registered broker-dealers, there is no such exemption for extensions of credit from or to such institutions (other than in connection with the purchase or sale of securities), and there is no transaction-specific exemption for swaps.

ERISA’s second set of prohibited transaction rules—its broad self-dealing proscriptions, are also challenging, but their burden may vary based on the particular strategy. Section 406(b)(1) of ERISA prohibits a fiduciary from dealing with plan assets under its authority for its own interest or account. Section 406(b)(2) of ERISA prohibits a fiduciary in its individual or other capacity from acting in a transaction involving the plan assets under its authority on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan assets under its authority. Section 406(b)(3) prohibits a fiduciary from receiving any consideration for his own personal account from any party dealing with the plan assets under the fiduciary’s control in connection with a transaction involving such assets.

All “plan assets” mandates generally must be mindful of fee related conflicts that may apply in incentive or performance fees or allocations as well as with respect to base management fees. These potential self-dealing conflicts often are more easily resolvable for liquid strategies with annual net asset value-based fees and often are most challenging for “realization based” fee structures.¹⁸ Separately, practitioner views vary about the extent to which there could also be fee-related conflicts when a fee is based on invested capital and the manager also retains substantial discretion to determine when to call investor money in a commitment-based fund.¹⁹

Aside from fees, most Alternative Assets strategies (and especially traditional private equity and private credit) also have to contend with other potential self-dealing prohibited transactions. Any transaction of a plan assets fund with or involving the manager or its affiliates generally involves a prohibited transaction. This would include “warehousing” transactions because principal (and riskless principal)

transactions between a plan assets fund and its manager or affiliate (or other advised accounts) generally would constitute a nonexempt prohibited transaction. “Season and sell” transactions involving plan assets funds raise similar issues. Any transaction by the plan assets fund that causes the manager or any affiliate to earn any direct or indirect compensation (very broadly construed) could be a prohibited transaction. Separate “vertical conflicts” could arise, for example, where a plan assets fund owns a certain position in a given issuer or borrower’s capital structure, where other accounts under the management or advisement of the manager or its affiliates, or even the franchise itself in a proprietary capacity, have an interest in other positions in that issuer or borrower’s capital structure. Where those interests come into conflict, a self-dealing prohibited transaction could arise.²⁰ “Horizontal conflicts” could also occur where the plan assets fund is unfairly placed at a disadvantage vis-a-vis other accounts of the manager, its affiliates, or the franchise. That also can arise where the plan assets fund bears a portion of the expense or cost of other accounts of the manager or its affiliates (or the franchise in its proprietary capacity).²¹ Cross-trades generally are prohibited, even though they can be said to benefit all accounts involved.²² It is arguably possible that disparate interests of different investors within a fund could create conflicts under ERISA under certain circumstances, for example, if not properly addressed, through the operation of a fund’s capital call structure, or the allocation of investment opportunities, including those that may arise with respect to a defaulting investor that frees up investment capacity.

Traditional private equity managers have historically found it especially challenging to operate under these broad and restrictive ERISA self-dealing rules. In addition to the considerations mentioned above there are other common practices of such strategies that are in many cases antithetical to ERISA’s self-dealing prohibited transaction rules.²³ Some Alternative Assets funds, such as those that focus on US listed equities may be better suited to comply

with these self-dealing prohibitions. Others, particularly those involving hard-to-value or illiquid assets, may raise additional challenges. Even though some managers have found success in managing a plan asset private credit strategy, doing so is still highly restrictive, costly, and challenging.

Assuming a manager has concluded that it cannot (or does not wish to) manage a given unregistered fund as plan assets subject to ERISA, there is additional planning required. When it accepts one or more equity investments by any account subject to the fiduciary responsibility provisions of ERISA or the analogous provisions of Section 4975 of the Code, the fund must meet one or more of the exceptions from an ERISA plan assets “taint.” A regulation promulgated by the DOL, as modified by Congress in 2006, prescribes rules for when such an account’s equity investment in an entity, such as an unregistered fund, may result in the fund becoming subject to the same provisions applicable to the plan account.²⁴ Exceptions, such as the so-called 25 percent test (or 25 percent limitation) and the venture capital operating company (or VCOC) exception each come with their own burdens.²⁵ Those exceptions are common to many unregistered funds already in existence that have historically accepted defined benefit plan money and thus are already well known to many managers.

Other Structural and Design Challenges

Termination of Contracts on Reasonably Short Notice Requirement

ERISA requires that plan fiduciaries be able to terminate the plan’s contract “without penalty to the plan on reasonably short notice under the circumstances.”²⁶ This would include any contract involving plan assets and a service provider, and in the case of a plan assets fund, this typically involves a “termination” of the fund’s manager. Practically speaking, because an investor generally cannot fire a fund manager by itself, termination is effected through the plan’s redemption or transfer from the

investment fund. The regulations further stipulate that the reason for this specific rule is “to prevent the plan from becoming locked into an arrangement that has become disadvantageous.”²⁷

The regulations offer that a “long-term lease which may be terminated prior to its expiration (without penalty to the plan) on reasonably short notice under the circumstances” is not generally deemed to be unreasonable. In several opinion letters, the DOL appears to have become comfortable with a 60-day and a 90-day notice period.²⁸ Helpfully, the regulations also note that the “provision in a contract or other arrangement which reasonably compensates the service provider or lessor for loss upon early termination of the contract, arrangement, or lease is not a penalty.” Practice varies in how these regulations may be interpreted. In connection with penalties, the regulations refer to a “minimal fee in a service contract” which is “charged to allow recoupment of reasonable start-up costs.” The regulations also note that “a provision in a lease for a termination fee that covers reasonably foreseeable expenses related to the vacancy and reletting of the office space upon early termination of the lease is not a penalty.” But the DOL also notes that a provision does *not* reasonably compensate for loss “if it provides for payment *in excess of actual loss* or if it *fails to require mitigation of damages.*” [emphasis supplied] Therefore, there is some risk of prohibited transaction exposure where the termination (or other fee) exceeds the “actual loss” by any quantum.

Strategies such as traditional private equity and real estate are by their very nature premised on a long investment period such that early investor exits would not be practicable. In such cases, the fund would just not work. It would thus arguably seem reasonable that the “under the circumstances” prong of this rule could be interpreted to take this into account: “under the circumstances” for a leveraged buyout fund should be viewed differently from “under the circumstances” for a US listed equity strategy. It is important to point out that some fund structures involve withdrawals that are paid over a period of

time. In other cases, the investor may be provided with a note. In the latter case, care must be taken to assure that the note does not result in a nonexempt prohibited transaction by reason of the extension of credit between the withdrawing plan on the one hand, and the fund, the manager or other investors in the fund on the other. Moreover, additional care must be taken to ensure that the note does not run the risk of intra-fund conflicts under ERISA.²⁹ These “delayed” withdrawal features generally are inconsistent with how most Plans currently expect to operate.

Regardless, since most plan investors in such funds have traditionally been defined benefit pension plans, many Alternative Assets funds have had to manage not only the legal constraints associated with this termination provision, but also commercial expectations and the legal calculus of plan fiduciaries considering the fund. Defined benefit plans’ tolerance for liquidity restrictions has been comparatively more flexible than for Plans but not limitless. Some fund managers have now been able to engineer these provisions to accommodate the needs of some Plan investors, particularly Allocator products. But it is clear that as of this writing, there is no one-size-fits-all solution and challenges remain for stand-alone direct-access single-strategy Alternative Assets funds.

ERISA Section 404(c)

Most Plans operate to comply with Section 404(c) of ERISA. Section 404(c) shields fiduciaries from liability for investment losses from participant investment decisions in a Plan. While it insulates Plan fiduciaries from liability of participant selections of investments offered under the Plan, it does not relieve them from ERISA responsibility or from liabilities associated with the prudent selection and monitoring of the investment option lineup itself.

At their most elemental, regulations issued under Section 404(c) of ERISA require that a Plan (i) offer a selection of at least three “core” diversified investment choices with materially different risk and return characteristics which in the aggregate enable the participant choosing among them to achieve a

portfolio with aggregate risk and return characteristics at “any point within the range normally appropriate for the participant” and each of such three, when combined with investments in other alternatives, “tends to minimize through diversification the overall risk of a participant’s” portfolio; (ii) provide sufficient education and information about the plan to allow participants to make informed investment decisions; and (iii) provide the ability to change investment allocations at least quarterly, but with a frequency appropriate to the volatility of the investment options.³⁰

Perhaps the biggest potential challenge for direct access to single-strategy Alternative Assets mandates (but not necessarily for Allocator products) is prong (iii) immediately above. The ERISA Section 404(c) regulations differentiate among the “core investment options” and other alternatives. For those other alternatives, liquidity may technically exceed the three-month frequency threshold. Perhaps most instructive in this regard, is the fact that the preamble to the Section 404(c) regulations expressly contemplate it. That language specifically references the availability of an illiquid real estate limited partnership investment that prohibits “transferability of ownership during the first three years.”³¹

What is crucial to note, however, is that for purposes of ERISA Section 404(c) compliance, *all* investment options under the Plan must give the participant “the ability to transfer among investment options *with a frequency appropriate for each investment’s market volatility . . .*” The regulations provide 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.*” [Emphasis supplied].³²

In the context of Alternative Assets strategies, fiduciaries (and thus fund sponsors seeking Plan

investment) would likely need to address (or consider, in the case of fund sponsors) the following:

- How does an ERISA fiduciary assess “the market volatility to which an alternative investment fund may reasonably be expected to be subject?”
- How does one then consider the frequency with which a participant should be given concerning investment instructions?
- Are there structural requirements (sizeable liquidity buffer?) that may be called for and what impact would that be on returns?
- How does an ERISA fiduciary calibrate its “risk/return” from a legal liability standpoint?

Separately, 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]³³ How a Plan fiduciary may “periodically review” volatility in the context of long-duration strategies like traditional private equity funds could understandably leave some Plan fiduciaries unsettled. What is a “frequency commensurate with the volatility of” the investment alternative when dealing with inherently volatile asset classes? The preamble itself acknowledges the difficulty, saying it is “not feasible [to offer an example or further guidance] because the application of the general volatility rule depends on the particular facts and circumstances which characterize each investment alternative, including its economic environment.”³⁴

Qualified Default Investment Alternatives

Qualified Default Investment Alternatives (QDIAs) are pre-selected investment options for Plans approved by the Plan’s fiduciaries that are used as “defaults” when participants do not direct how they want their Plan accounts allocated. QDIAs help ensure that even those who don’t actively manage their investments in their Plan have a diversified

portfolio aligned with their retirement goals. They are often target-date funds, balanced funds, or managed accounts. The Pension Protection Act of 2006 (PPA) added the QDIA provisions to ERISA to address concerns that participants who could otherwise save for retirement choose not to, or more correctly, fail to take the steps necessary to enroll in their employers' plans.³⁵ Moreover, there was concern that employers had not adopted automatic enrollment features because of fears that they would be liable for investing participant account balances without affirmative investment instructions. The PPA and subsequent regulations issued by the DOL removed impediments to employers adopting automatic enrollment, including employer fears about legal liability for market fluctuations and the applicability of state wage withholding laws.³⁶ Those rules had prevented many employers from adopting automatic enrollment or had led them to invest workers' contributions in low-risk, low-return "default" investments that were regarded as sub-optimal.

While a comprehensive discussion concerning QDIA requirements is beyond the scope of this article, it is important to point out that only certain investment options are permissible for the protections afforded under guidance. A QDIA must be managed by an investment manager meeting the requirements of ERISA Section 3(38), a professional trustee, or the plan sponsor who is a named fiduciary, be a registered investment company under the 1940 Act, or be one of certain limited purpose principal preservation vehicles. Because of their diversified nature, QDIAs are unlikely able to be structured as a single-strategy direct access product. However, they are conducive to multi-strategy Allocator arrangements.

The remainder of this section proceeds on this assumption.³⁷ Most recently, the DOL issued Advisory Opinion 2025-04A in which the requesting party (Alliance Bernstein or AB) sought confirmation that an option where Plan participants can receive a guaranteed lifetime income stream through the use of a variable annuity contract could form a portion of a QDIA. The advisory opinion describes

AB's lifetime income strategy portfolios (LIS) pursuant to which AB constructs multiple allocation portfolios using investments on a Plan's investment lineup that are unique to the Plan participant, and which includes a guaranteed lifetime income component. While the AB LIS product has been reportedly offered/utilized for years, AB sought confirmation that the LIS could qualify as a QDIA "to provide plan sponsors with certainty when offering the LIS program and other similar programs as QDIAs." The advisory opinion clarified that in selecting the insurers for the LIS program, AB can follow ERISA's safe harbors (including, as discussed below, Section 404(e) of ERISA). These safe harbors include a number of requirements (such as engaging in an objective and thorough search, considering financial capacity and cost, and obtaining certain representations from the insurer) that, if met, protects plan fiduciaries from accusations of imprudence when selecting a plan's annuity.³⁸ In many respects, this development demonstrates Allocator strategies containing less liquid assets as feasible for QDIAs, including the use of guaranteed lifetime income streams through variable annuity contracts as a component.³⁹

Importantly, DOL regulations contain a broad prohibition on the imposition of transfer or withdrawal fees in connection with withdrawals from a QDIA. Specifically, it provides that no fees, restrictions or expenses may be imposed on any transfer or permissible withdrawal from a QDIA within the 90-day period beginning on the participant's first elective contribution made to the Plan.⁴⁰ The regulations specifically provide that this precludes the imposition of any surrender charges, liquidation, exchange or redemption fees or similar expenses in connection with the liquidation of or transfer from a QDIA.⁴¹

Perhaps most relevant to the discussion is the regulations' requirement that a participant or beneficiary on whose behalf assets are invested in a QDIA must be able to transfer, in whole or in part, assets in the QDIA to any other investment alternative available under the Plan with a frequency

consistent with that afforded to a participant or beneficiary who elected to invest in the QDIA, but not less frequently than once within any three month period.⁴² Accordingly, Allocator strategies structured as QDIAs will need to manage liquidity to achieve these objectives, which may not always be easy, especially where there may be sudden precipitous drops in public asset values. Nevertheless, there are indications that some market participants have met, or are on their way to meeting this challenge.

Pathways: Current and Future

Some Alternative Assets strategies are offered as a direct stand-alone fund. Examples include a single private equity or a standalone hedge fund. Others, as mentioned above, are Allocators where a given provider offers a balanced multi-strategy fund or product as to which Alternative Assets are a mere component among many. Still others may be Allocators across a single-strategy, such as a fund of private equity funds. From the product design perspective and the Plan fiduciary's vantage point a diversified approach to Alternative Assets offered under a multi-strategy Allocator product mitigates some of the "idiosyncratic risks that can exist within individual private market asset classes."⁴³ In this way, it may have certain appeal to Plan clients and product sponsors alike. Where exposure to Alternate Assets is merely a sleeve of an Allocator mandate, Alternative Assets fees can be blended with comparatively less expensive public assets that comprise the overwhelming majority of the portfolio. Proponents of Allocators have pointed out that the value of Alternative Assets in a broad multi-strategy product such as a target-date fund may outweigh the Alternative Assets' incrementally higher cost.

These Allocator arrangements remain a current focus because they appear to be the best solution yet introduced to the market for addressing a fundamental problem with the use of Alternative Assets in Plans: Alternative Assets are not actively traded (by definition) and Plans today provide daily liquidity to participants. The challenge is how to value

Alternative Assets for Plan liquidity purposes, and the answer may not always be simple or straightforward. Especially in market liquidity crises, which have tended to occur within the retirement savings years of most persons, there are likely going to be hard questions about how to reconcile claims based on valuation uncertainty.

But that does not mean, of course, that stand-alone Alternative Assets strategies should be regarded as unappealing. Nevertheless, in the current world, as described above, such single-strategy mandates in unregistered private funds are challenged because of the need to look through to participants' QP and AI status. While future guidance may change that situation, for present purposes, this section assumes that unregistered funds are largely unavailable to direct Plan investments. Whether they can be separately accessed through "plan assets" vehicles such as collective investment trusts (or less likely for practical reasons, managed accounts), will depend, at least in part, on whether the strategy is conducive for operation under ERISA. Meanwhile, growing opportunities may exist for registered closed-end funds, discussed below, which raise neither a "plan assets" taint nor the QP and AI related complexities.

At least at present, pathways for Allocator strategies that involve a sleeve of exposure to Alternative Assets would appear to suffer comparatively fewer structural and legal speedbumps. Because target-date and similar Allocator products continue to be growing in popularity and usage for Plans, with some studies suggesting that 85 percent (or more) of all Plans having a target-date or similar Allocator product, it would appear that Allocators are better positioned to offer access to Alternative Assets in Plans—at least for the foreseeable future.⁴⁴ This section addresses the pathways for both the Allocator and single-strategy direct approaches, however, first discussing the possibilities of registered funds, including both open-end and closed-end products, along with recent developments. It then proceeds to cover collective investment trusts. Finally, the section briefly covers managed accounts.

Registered Funds: Opening a Closed-(End) Door?

Overview

As noted above, the investment activities of a fund registered under the 1940 Act are not subject to the fiduciary responsibility and prohibited transaction rules of ERISA and Section 4975 of the Code. While this exclusion may be viewed favorably by some product sponsors, registration under, and compliance with the 1940 Act is not burden-free. Many fund sponsors choose not to register their alternative strategy funds under the 1940 Act for a host of reasons, as discussed above. Registered funds are subject to more extensive disclosure requirements than many other comparable financial products, such as separately managed accounts, and arguably, collective investment trusts, and private pools, although in some cases, those other products elect to harmonize aspects of their disclosure to investors to provide a more apples-to-apples comparison for Plan fiduciaries and for certain participant-facing ERISA regulatory reporting purposes. But more fundamentally, open-end registered funds often impose conditions that do not work well with Alternative Assets strategies.

Most importantly, open-end funds' limits on illiquid assets largely prevents them from investing in most Alternative Assets, while Alternative Assets strategies require limitations on liquidity so that the strategy can be deployed in a manner to maximize the intended value proposition. Thus, for such funds there is an inherent structural tradeoff between a fund's liquidity capacity and its ability to pursue its longer-term investment objectives. It is true that the 1940 Act does not completely limit open-end registered investment companies' assets from investing in illiquid assets. But its 15 percent cap is often highly challenging, if not impossible to achieve.⁴⁵

Unlike open-end registered funds, traditional closed-end registered funds offer greater flexibility for the fund when it comes to liquidity. Historically, however, most Plans have avoided selecting them

for their investment lineups, with liquidity concerns serving as a major headwind. Traditional closed-end registered funds do not issue redeemable shares but instead issue a fixed number of shares that trade intraday on stock exchanges at market-determined prices. Investors in a closed-end fund buy or sell shares through a broker, just as they would trade the shares of any publicly traded company. Thus, when compared to registered open-end funds which allow for daily transactions at net asset value, registered closed-end funds do not offer redemption rights, and have a fixed number of shares that trade on an exchange the value of which is based on market forces (which may not reflect the fund's net asset value). They are thus not required to meet daily shareholder redemptions as is the case for open-end registered funds. However, unlike open-end registered funds which substantially limit the amount of the funds' assets that can be held in illiquid assets, a traditional closed-end registered fund does not face the same degree of these impediments.

In addition to traditional closed-end registered funds there are non-listed closed-end registered funds. Those include interval funds and tender-offer funds. Interval funds are permitted to continuously offer their shares at net asset value (NAV) following their initial offering. Most interval funds differ from traditional closed-end registered funds in that they typically do not offer liquidity via the secondary market (that is, they typically are not listed on an exchange). Instead, they buy back shares by making periodic repurchase offers at NAV in compliance with SEC Rule 23c-3 under the 1940 Act.⁴⁶

Specifically, Rule 23c-3 under the 1940 Act provides that an interval fund must allow for the repurchase of its securities from shareholders at periodic, predetermined intervals. An interval fund must adopt a fundamental policy that provides (i) that the fund will make periodic repurchase offers, (ii) the periodic intervals between "repurchase request deadlines," (iii) the schedule of the repurchase request deadlines or the means of determining the repurchase request deadlines, and (iv) the maximum

amount of time between each repurchase request deadline and the next repurchase pricing date.⁴⁷

Interval funds repurchase schedules are required by Rule 23c-3 to be quarterly, semi-annually, or annually. At each periodic interval, an interval fund must offer to repurchase between 5 percent and 25 percent of its common shares outstanding on the repurchase request deadline.⁴⁸ Purchases of interval funds thus resemble open-end mutual funds in that their shares typically are continuously offered and priced daily. However, unlike an open-end registered fund, shares are not continuously available for redemption but are repurchased by the fund at scheduled intervals (for example, quarterly, semi-annually, or annually). Moreover, unlike open-end registered funds which limit illiquid assets to 15 percent of the portfolio, closed-end registered interval funds may permissibly hold 75 to 95 percent of their assets in illiquid assets, (although additional limitations may apply so the fund maintains sufficient assets to cover repurchases).

A tender-offer fund usually offers greater flexibility to the fund on the periodicity of repurchases, with less predictability to investors. Tender offer funds generally are unlisted and continuously offer their shares at NAV. Unlike registered open-end funds and interval funds, there are no historic limits on the holding of illiquid assets (although as a practical matter, many maintain at least some liquidity buffer). Unlike interval funds which are committed to effect repurchases at fixed predetermined intervals to assure the appropriate levels of liquidity, tender offer funds repurchase shares on a discretionary basis through a tender offer which must comply with SEC Rule 13e-4 under the Securities Exchange Act of 1934 by filing a Schedule TO.

Some of these types of funds hold infrequent tender offers (for example, one every two to three years), but many offer them more regularly (for example, quarterly). The fund board must determine, usually based on the advice of the fund's sponsor, when a tender offer will be commenced and the number of shares to be redeemed in each tender offer.⁴⁹ Tender

offer funds often are used for pools of assets, such as funds of funds, whose liquidity flows may be more episodic than those of other strategies. For example, a tender offer fund holding a portfolio of privately offered hedge funds could pay repurchase proceeds when received by the tender offer fund after the tender offer fund has requested withdrawal from its portfolio hedge funds—even for several months.

Because of liquidity challenges, closed-end registered funds have not been traditionally offered under most Plan investment lineups. But the recent developments described below may offer some promise and new opportunities.

Business Development Companies

Business Development Companies (BDCs) are hybrid types of closed-end funds that primarily invest in small and medium-sized private companies, developing companies, and distressed companies that do not otherwise have access to lending. In particular, BDCs must invest at least 70 percent of their assets in domestic private companies or domestic public companies that have market capitalizations of \$250 million or less. They differ from other closed-end funds in that they are not registered under the 1940 Act but instead elect to be subject to and regulated by certain provisions of the 1940 Act. Thus, unlike registered open-end and closed-end funds, BDCs do not necessarily fall outside of ERISA's fiduciary and responsibility provisions. In this respect, many believe that they are more akin to unregistered funds for purposes of ERISA's "look-through" rules described above. Typically, BDCs seek to comply with either the 25 percent limitation, the VCOC exception or another exception referred to as the "publicly offered securities exception" to avoid "plan assets" status. All BDCs must be SEC reporting entities (for example, filers of 10Ks, 10Qs, 8Ks, etc.) and are subject to the same rules and regulations as one another under the federal securities laws.

Like many "evergreen" or "permanent capital" funds, BDCs can be offered with no fixed lifespan, in contrast to many unregistered closed-end funds.

The fund has no stated end date and assets under management are not subject to decrease as a result of redemptions or other withdrawals of capital. BDCs may be either traded (that is, listed on the New York Stock Exchange or Nasdaq), publicly offered but not traded, or “private” pursuant to which shares are sold through private placement with fundings occurring through capital call features common to many unregistered private equity and private credit funds. The selection of which type of fund to use is primarily determined by asset managers’ preferences for timing to market and target investors, including investors’ needs for liquidity, and the receptiveness of the various distribution channels to the asset managers’ product offerings.

“Publicly traded” BDCs appear to be in the minority and offer the most liquidity for investors. Non-traded BDCs conduct continuous offerings at NAV per share.⁵⁰ Such BDCs are not listed on an exchange and thus generally have limited liquidity (for example, via discretionary share repurchases) prior to conducting a liquidity event, such as an initial public offering (IPO). Liquidity events generally are scheduled to occur five to seven years after launch. QP or AI status is not required for a non-traded BDC; however, there are often state law (blue sky) issues that may make Plan investments challenging. Many state rules require that eligible investors earn \$70,000 or more in order to avoid state law registration. Where a relevant state’s blue-sky laws would look through the Plan to its underlying participants, all of its participants may effectively be required to meet that threshold. One can imagine circumstances where this will always be true, but there are many in which it may not be true, and monitoring for any given plan population could be burdensome.

Private BDCs are not listed on an exchange and have limited liquidity. (However, many private BDCs offer quarterly liquidity through tender offers, similar to interval funds, even though, as compared to interval funds, they also have flexibility to avoid offering liquidity in certain quarters). These kinds

of BDCs do not register their offerings under the Securities Act of 1933. Thus, investors in private BDCs must generally be AIs. Given existing law as described above, each participant of an investing Plan would effectively need to be an AI if the private BDC were to be offered because of the interaction between SEC look-through rules and tax qualification rules. Private BDCs would therefore appear to be challenging for participant-directed Plans in much the same way as are unregistered funds—at least prior to becoming traded—which is often anticipated three to five years from launch.

BDCs often are thought to offer the US federal income tax efficiencies of a registered fund and require the diversification mandated by the US federal income tax rules applicable to registered funds, while being less restrictive on leverage and affiliated transactions. In fact, when compared to closed-end registered funds, BDCs have a higher leverage limit.

Recent Developments

Like open-end registered funds, closed-end registered funds historically have been precluded from investing more than 15 percent of their assets in Alternative Assets unregistered funds, unless the closed-end fund was limited to investors who were AIs and each such investor’s initial investment was \$25,000 or more. This restriction has itself been a major impediment for most Plans since, as discussed above, most Plan participants are not AIs—and limiting access to such an investment option to only those that are AIs could raise potential disqualification issues for a Plan under the Code.

Effective May 19, 2025 registered closed-end funds that do not explicitly limit their unregistered fund exposure to the 15 percent threshold are now able to invest in other unregistered funds without limiting their investor base to AIs or imposing the \$25,000 minimum investment requirement.⁵¹ As a large portion of the investing public does not satisfy the net worth or income requirements for AI status, the discontinuance of the restriction will expand significantly the pool of eligible investors for closed-end

funds having a focus on Alternative Assets markets investments through unregistered funds.

Separately, the SEC has granted recent exemptive relief for certain registered closed-end interval funds. Specifically, in at least one case the SEC permitted such funds to make repurchase offers to its common shareholders every month in an amount not less than 2 percent of the common shares outstanding on the repurchase request deadline, subject to a “repurchase adjustment” and to provide notification to its common shareholders of an upcoming repurchase offer no less than seven and no more than 14 calendar days in advance of the repurchase request deadline.⁵² The SEC in that case indicated that “there is no public interest nor investor protection concern that justifies prohibiting monthly repurchase offers of not less than [2] percent of the common stock outstanding on the repurchase request deadline” and also indicated that “monthly repurchases would provide significant benefits to common shareholders because their investments will be more liquid than an investment in a fund conducting only quarterly repurchase offers.”⁵³

Noteworthy are several new interval funds aiming to provide access to public and private equity markets through a single integrated solution. Over time, and subject to market conditions, these funds seek to allocate target amounts of net assets to stated percentages between publicly traded equity securities and private equity strategies. These new funds build on the launch in recent years of interval funds focused on credit strategies.

Application

Recent developments in closed-end registered funds may provide new avenues for Plan access to Alternative Assets strategies. How these recent changes will impact the Plan market remains to be seen. At the end of the day, any successful stand-alone direct single-strategy closed-end registered fund will need to be palatable to a given Plan fiduciary’s risk-reward calculus. The same holds true for Allocator product sponsors who wish to consider

closed-end registered funds as a component. Much remains uncertain, but greater exploration of closed-end registered funds is an increasing possibility, not only for multi-strategy Allocators such as a target-date fund or life-cycle fund, but also as a stand-alone single-strategy “Allocator.” For example, closed-end registered funds could be good candidates for a “fund of private equity funds” suitable on either a standalone basis for Plans or, more likely as of this writing, as part of a third-party Allocator.⁵⁴ It would still remain more difficult, however, to manage a true private equity strategy through a registered closed-end fund. The same potential holds true for BDCs, especially with respect to private credit.

The recent changes to portfolio limitations that had historically applied to closed-end registered funds may help accelerate this exploration. While it is beyond the scope of this article to discuss all the comparative pros and cons of any given registered closed-end fund or BDC, the opportunity would certainly seem ripe for examination.

The use of a closed-end registered fund or BDC may offer some comparative legal and structural advantages over other corporate forms. Unlike a strategy that is delivered through a collective fund or separate account, a closed-end registered fund would be subject to the restrictions of the 1940 Act, but not the prohibited transaction rules of ERISA and the Code. Registered closed-end funds could also serve as Allocators in which the closed-end fund acts as a fund-of-funds that invests in closed-end registered funds or unregistered funds.

Whether product sponsors are able to build new “mousetraps” out of registered funds, open or closed, will be interesting to see. Future regulatory guidance will be important in this regard, along with the product innovation it will invariably spur. However, one of the keys is that all registered funds—open-end or closed-end, as well as BDCs—offer all of the investor protections of the 1940 Act, including with respect to fees, leverage, independence and disclosure. As in ERISA, the 1940 Act related nuances associated with such products can be important,

and product manufacturers would be wise to consult counsel whom they believe to have top-of-market experience given the constantly evolving legal and regulatory dynamics.⁵⁵

Collective Investment Trusts

Generally

Collective investment trusts may be offered as a stand-alone strategy of Alternative Assets. They may be accessed not only directly by Plans, but by managers of Allocator products structured as collective investment trusts at a “top” or allocating level. Such Allocator products may include asset allocation funds like target-date or life-cycle funds as well as other vehicles designed to access Alternative Assets strategies as a component of an overall diversified strategy. In addition to a multi-strategy Allocator, this category could also include a fund-of-funds approach that is strategy specific: for example, a bank collective fund that invests solely in private equity funds. In all of these Allocator arrangements, there is an “allocator” which in the context of a target-date or life-cycle fund is often referred to as a “glidepath” manager. As collective investment trusts presuppose for both SEC and other (that is, OCC or state banking or trust law) purposes that the trust be maintained by a bank (or trust company), only banks or trust companies may sponsor these vehicles. That said, it is common as of this writing for many bank- or trust-company sponsored institutions to engage sub-advisers where prudent so long as the trustee still retains the requisite management and control.⁵⁶

Collective investment trusts have been widely used by Plan investors for decades and available evidence suggests they will continue to grow in market share, particularly for defined contribution plans. While such funds have historically accommodated many traditional strategies, their recent growth has been at least in part due to target-date life-cycle and similar allocation strategies that have found collective investment funds to be particularly advantageous.⁵⁷

It is perhaps no surprise why collective investment trusts appear to be a favored product of choice for many Allocators and Plans. Many point to certain advantages of managing liquidity concerns occasioned by participant outflows, re-balancings, and other withdrawals. Collective investment trusts have been touted for their flexibility in dealing with recordkeepers, and in particular, for their ability to net public assets against participants’ Alternative Assets inflows and outflows. Lockheed was reported to have incorporated a private equity strategy into its Plan, with the aim of gradually increasing such exposure over a two-year period until it reaches target allocations.⁵⁸ Earlier in 2025, there were reports that a private equity co-investment sleeve managed by Neuberger Berman was added to the plan. In addition, it was announced that State Street Investment Management launched a new target date fund that provides access to both public and private market exposures in a diversified strategy, with the Alternative Assets strategy being delivered through a pooled vehicle managed by Apollo.⁵⁹ Empower has been reportedly using bank collective investment trusts in partnering with several private investments fund managers and custodians, including Apollo, Franklin Templeton, Goldman Sachs, Neuberger Berman, PIMCO, Partners Group and Sagard.⁶⁰ There were announcements about BlackRock and Goldman Sachs Asset Management creating similar strategic partnerships with Great Gray⁶¹ and Voya with Blue Owl Capital also involving collective investment trusts.⁶² Partners Group and Prudential (PGIM) have also been reported to have partnered to bring multi-asset portfolios to Plans.⁶³ No doubt there are other such partnerships that will have launched as of this writing.

In contrast to registered funds—either of the open-end or closed-end variety—collective investment trusts are subject to ERISA at the first dollar of ERISA investment. As noted above, ERISA imposes a number of constraints on the operation of many funds and requires compliance both with ERISA “per se” and self-dealing prohibited transaction rules.

These include many of the “horizontal” and “vertical” conflicts, as well as fee-related, “termination without penalty” provisions and the more basic “per se” party in interest prohibited transaction rules.

With respect to the per se party in interest prohibited transaction rules, collective investment trusts may enjoy some competitive advantages. Most are often able to make use of PTCE 91-38, which is a special exemption specifically designed for and applicable only to bank collective investment trusts. Like the QPAM Exemption, PTCE 91-38 provides broad relief from otherwise nonexempt “per se” prohibited transactions with unrelated counterparties as well as certain otherwise prohibited transactions with respect to certain employer securities. While in many cases, the QPAM Exemption also may be available, PTCE 91-38 would appear to offer some distinct comparative advantages, particularly for private credit strategies.⁶⁴ In addition, PTCE 91-38 does not contain the disqualification provisions of Part I(g) of the QPAM Exemption. These provisions, which have been recently revised and expanded by the DOL, have the potential for increasingly enormous “bite.”⁶⁵ None of this is to say that the QPAM Exemption is not going to continue to be widely used by investment managers when managing plan accounts. However, the fact that bank collective investment trusts have another broad-based exemption that is comparable, if not, in some cases, favorable, may confer certain advantages.⁶⁶

While PTCE 91-38 and the QPAM Exemption both offer broad relief, other exemptions from the per se prohibited transaction rules may also be available even if many are limited to specific transactions.⁶⁷ Collective investment trusts also offer other structural advantages, including flexibility on fees and comparatively less expense on certain items when viewed against registered funds. These include marketing expenses and distribution costs. Some have also found them better able to provide customized solutions when compared with registered fund products. Collective investment trusts may also enjoy

advantages in terms of speed with which they may be brought to market as against registered funds.

As noted above, collective investment trusts are not regulated by the SEC. Indeed, they are chiefly designed to be a pooled investment vehicle that relies on an exemption from registration from the 1940 Act—Section 3(c)(11) of that statute. This does not mean that they are not regulated. Quite the contrary. As noted above, at its acceptance of any ERISA money, the collective investment trust immediately becomes subject to the fiduciary responsibility and prohibited transaction rules of ERISA. Moreover, most collective investment trusts are regulated by the OCC or by relevant State banking and trust authorities. Collective investment trusts are also regulated by the Internal Revenue Service (IRS) with regard to the funds’ tax qualification.⁶⁸

Collective Investment Trusts Investing in Third-Party Funds

Many collective investment trusts may serve as the allocator in an Allocator product. As is the case with any ERISA fiduciary in a “fund of funds” product or otherwise in selecting investment managers, there are considerations for the Allocator (or fund of funds manager or manager selector) and for the downstream fund in which the Allocator (fund of funds or investing plan) invests. An Allocator structured as a collective investment trust will be “plan assets” and the trustee or other fiduciary with authority over the fund will be charged with prudently managing the strategy in accordance with the dictates of ERISA and its exacting requirements. This involves the prudent selection and monitoring of such downstream funds, including fees, manager capacity and capabilities, liquidity and other terms and conditions the Allocator fiduciary deems to be prudent to consider. It may also be required to negotiate the terms and conditions of the investment. In short, it involves the fiduciary of the investing collective investment trust undertaking a robust process not dissimilar to plans investing directly into the downstream strategy, or of a fund-of-funds or other

manager selection service where the manager acts in a fiduciary capacity.

Many Allocators are exploring the recent innovations and regulatory changes with respect to closed-end registered funds, but some have been structured to serve as components for such Allocators for some time. Many are finding it difficult to match legal and commercial requirements so that they “line up” with the demands of the Allocators, although recent anecdotal market information suggests that this may change.

When a given downstream fund in which a collective investment trust invests is itself a collective investment trust or an unregistered fund that may be “plan assets,” additional undertakings beyond a prudence analysis usually are required. Specifically, these relate to the collective investment trust’s comfort with the downstream fund’s approach to ERISA compliance.⁶⁹ Regardless of this point, it also will be important to assure that the Allocator has appropriately delegated its authority to any “plan asset” downstream fund manager.⁷⁰ Where delegation is proper, the delegator’s responsibility is limited to the Allocator’s selection, retention, and monitoring of the downstream fund manager. An improper delegation, at a minimum, would leave the Allocator potentially liable for the acts and omissions of the downstream manager. Note that satisfaction of proper delegation does not in any way limit the Allocator’s responsibility to prudently select and monitor the downstream managers or strategies in its product—regardless of whether they may be “plan assets.” There also are reputational risks and the practical costs of successfully defending against a claim should something go wrong.

Then there is the perspective of the downstream fund manager. One of the advantages of registered downstream funds (even if closed-end) is that they are not only exempt from ERISA but also do not have many of the capacity issues of unregistered funds relying on the 25 percent test. While a downstream fund that is itself a collective fund generally will be subject to ERISA, downstream funds that are

neither collective investment trusts nor registered funds under the 1940 Act will need to consider whether they are able, and willing, to assume ERISA fiduciary responsibility. When the third-party unregistered fund determines it is unwilling or unable to manage the fund as “plan assets,” the manager of that fund will not wish to impair its own ERISA exception status. Issues of ERISA investor capacity may be relevant for certain third-party funds, particularly if relying on the 25 percent test described above.⁷¹ Underlying third-party unregistered fund managers also would need to be confident that investments from the collective fund would not jeopardize their own funds’ securities law exemption. This should generally not be problematic if the downstream fund is itself also a collective fund or a registered closed-end fund. But even if it is an unregistered alternative fund, the fact that the Allocator itself is housed in a collective fund may be helpful. From the perspective of the downstream third-party unregistered fund, investments by bank collective funds usually do not usually raise the sorts of QP and AI issues that would come along with a Plan’s direct investment in the unregistered fund. In addition to the Section 3(c)(7) and Section 3(c)(1) exemptions from the 1940 Act registration, the applicability of Section 3(c)(11) and Section 3(c)(3) exceptions from registration under the 1940 Act also may be helpful depending on the circumstances.⁷²

Collective investment trusts that invest in third-party funds also need to be mindful about ERISA’s self-dealing proscriptions. Potential issues could arise with respect to valuation (less likely for registered closed-end funds than unregistered funds), and in particular, fees. Collective investment trust Allocators would need to consider not only the prudence of fees, but also the possibility of fee conflicts. Since many of the third-party downstream funds may charge different fees, legal, mechanical, operational, and commercial considerations often arise.⁷³ Additional considerations can be necessary, particularly, when the Allocator sponsor is affiliated with a private equity firm or other large diversified

financial institution engaged in banking, brokerage, underwriting, loan syndications, or other activities. Potential prohibited transaction issues could arise in such contexts when the downstream “plan asset” fund engages in certain transactions on behalf of that fund with or through the Allocator or its affiliates.

In addition, there are many features of such an Allocator plan asset bank collective fund besides their fees that raise the potential for other inadvertent prohibited transaction exposure. While fee and termination provisions are important parts of a successful design, the product would likely need to be thoroughly “scrubbed” for many of these “below the radar” issues. The complexity of the strategy may involve important nuances, but our experience strongly suggests that to assure that a given fund or strategy is operated properly under ERISA always involves considerable time, energy, and expertise to get it right.⁷⁴

Collective Investment Trusts Investing in Affiliated Funds

There also are collective investment trusts that invest in affiliated fund strategies. To be sure, many of the same considerations that are applicable to bank collective investment trust that invest in third-party funds would be equally salient here. Collective investment trusts that invest in affiliated funds still need to be mindful of prudence, duties of loyalty, diversification, fee conflicts, “termination on reasonable notice” and “without penalty” provisions, costs, liquidity, terms and conditions and other key features discussed above.

But investing in affiliated funds raises potential and quite separate prohibited transaction issues from those by investing in third-party unaffiliated funds. Unlike third-party investment vehicles, the fiduciary or its affiliates may have an interest (financial or otherwise) in the downstream affiliated fund. Certainly, there is the potential issue of “double dipping” on investment management fees (a practice generally frowned on in our experience regardless of ERISA related considerations).

But there also may be other interests for a trustee to allocate to any given affiliated fund. Conflicts such as these could give rise not only to potential breaches of loyalty under ERISA (as well as similar violations under Reg. 9), but also nonexempt prohibited self-dealing transactions. Fortunately, Congress enacted broad relief that many collective-investment trust complexes rely on when the investment is in an affiliated bank collective investment trust. Section 408(b)(8) of ERISA offers relief from ERISA’s prohibited transaction rules (and those of the Code) where an investment manager, having discretion over plan assets, causes those assets to be invested in a collective investment trust maintained by the manager, or other affiliate, where the bank or trust company receives no more than reasonable compensation, and such transaction is expressly permitted by the instrument under which the plan (or plan asset vehicle, such as a collective investment trust) is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who engages the trustee or affiliate manager.⁷⁵ Thus, Section 408(b)(8) is often utilized for relief from prohibited transactions where an investment manager of a separately managed ERISA account directs the plan account into a collective investment fund sponsored and maintained by a trustee which is the manager of the separate account or its affiliate where the plan independently approves and the fees are reasonable. It also affords relief for trustees of collective investment trusts to direct the assets of that fund into other collective investment trusts sponsored or maintained by the same trustee, or another affiliate trustee. Such structures offer the possibility of a “collective fund of affiliated collective investment trusts.” Many already are common in the marketplace, particularly in the target-date and life-cycle fund markets. In such cases, the participation agreement for the collective investment trust typically contains express permissive language for investment in other affiliated collective investment trusts, which is signed by the investing plan

fiduciary (independent of the collective investment trust sponsor).

Of course, not all downstream affiliated funds that a collective investment trust may wish to access are bank collective investment trusts. Some may be open-end registered mutual funds sponsored and managed by the trustee or affiliate. Some collective investment trusts also utilize PTCE 77-4, which allows a collective investment trust to allocate its assets to an affiliated open-end registered mutual fund meeting certain conditions.⁷⁶ PTCE 77-4 requires that the investing (independent) plan fiduciary be provided certain written information about the registered funds, prospectuses, and full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan (or collective investment trust) account and the investment company, including the nature and extent of any differential between the rates of such fees, the reasons why the fiduciary or investment adviser may consider investments in such affiliated registered funds appropriate, and whether there are any limitations on the fiduciary or investment adviser with respect to which the plan (collective investment trust) assets may be invested in the registered fund, and the nature of such limitations.⁷⁷ On the basis of the disclosure and prospectuses provided, independent plan fiduciaries must consent to the manager being able to allocate the assets under its management to the affiliated open-end registered fund whose information has been provided. This consent must be in writing.

In addition, PTCE 77-4 conditions relief on either foregoing (or offsetting) the collective investment trust level investment management, investment advisory or similar fee with respect to the allocation of assets directed to an affiliated open-end registered fund, or that the investment company's investment management, investment advisory or similar fee be offset against the account level (that is, the collective investment trust) investment management, investment advisory or similar fee. No loads, commissions, or other similar payments may be received by the

trustee, adviser, or any affiliates in connection with the collective investment trust's purchase and holding of such affiliated registered fund shares. As a matter of practice, collective investment trusts that anticipate investments in affiliated open-end registered funds typically will include in the participation agreement the necessary disclosures required along with prospectuses of all the possible such funds that could be expected to be utilized. Since affirmative written consent is required for the exemption, a "phonebook" or "kitchen sink" approach for disclosure at the time of investment is often regarded as most efficient.

It should be noted that there is no published prohibited transaction exemption dedicated to investments in either affiliated closed-end registered funds or unregistered funds. Allocating collective investment trust assets to such affiliated investments (or affiliated registered funds without reliance on PTCE 77-4) raises the potential for nonexempt prohibited transactions, and a fiduciary considering allocating plan assets on a discretionary basis to any such affiliated closed-end registered fund or unregistered fund would likely need to conclude that there was no prohibited transaction involved with respect to the purchase or holding of the investment for which an exemption would be required in the first place.

Managed Accounts

A managed account is an account of a plan, such as a Plan, that is not pooled with other investors. Managed accounts may be preferred when a plan wishes particular specification, customization, or other investment or tax-related attributes that may otherwise make a pooled strategy suboptimal because these features are undervalued by other investors. Some Plans prefer the greater transparency that often comes along with managed accounts. Separately managed accounts often offer better pricing than pooled funds, because they do not incur the types of set up, fund administration costs, and other regulatory associated with funds.

Increasingly, managed accounts may be favored where Plan fiduciaries wish to create individualized

participant accounts based on the specific participant's personalized goals. They thus offer the possibility for more personalized asset allocation than pooled vehicles such as a bank collective investment trust, so that different participants in the same Plan may have different allocations that are designed to match specific individualized investment profiles. At the same time, while offering such flexibility, managed accounts may also result in higher liquidity constraints, because they cannot generally benefit from the liquidity of other participants' accounts under the product. Separate accounts have historically been available to larger plan accounts and have been less accessible by smaller plans. However, with the rapid increase in products and services targeted at the retail market, this may be changing.

A separately managed account of an ERISA plan is subject to ERISA. Depending on what the separate account is invested in informs the complexity of ERISA-related limitations and compliance. Some Allocator products may be delivered through a separately managed account rather than a pooled vehicle. One sponsor has been reported to have taken this approach in concert with downstream investments in collective investment trusts. It has been reported that this sponsor uses managed accounts to provide a tailored investment approach and a collective investment trust that pools the capital and invests it in the sponsor's flagship US private equity fund.

Managed accounts increasingly are accessed by retail investors through broker-dealer, banking, wealth management, insurance company, or other similar platforms. Many such financial institutions may be poised to offer companies participant-specific management of their respective Plan accounts. As most generally will take on fiduciary responsibilities, significant planning and structuring is often involved at the financial institution level—no different from the full panoply of fiduciary responsibility and prohibited transaction discussed throughout.⁷⁸ Many diversified financial firms already manage substantial amounts of ERISA money and are well

familiar with the constraints associated with prohibited transactions, and in particular, potential conflicts with their affiliated “sell sides.” However, many financial institutions also have been providing “advice-only” services at the participant level in retail, high net worth, private wealth management, and private banking businesses. In such circumstances, when the institution provides advice that rises to the level of fiduciary status, many have sought to comply with PTCE 2020-02, a new exemption that allows advice fiduciaries to make recommendations to plans and participants (unaffiliated with the institution) with respect to investments (service based compensation, and more limited relief for principal transactions with the institution), and to earn variable compensation when the advice-giver and institution has satisfied numerous “impartial conduct standard,” conflict mitigation, disclosure and other requirements.⁷⁹ However, PTCE 2020-02 is not available for discretionary management.

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NOTES

- ¹ Rule 22e-4 under the 1940 Act.
- ² In addition, the 1940 Act imposes diversification requirements on funds that assert their status as a “diversified company.” Under Section 5(b)(1) of the 1940 Act, a registered fund must comply with the “75-5-10 Rule,” which requires that at least 75 percent of the fund’s assets must be invested in cash, government securities, securities of other registered investment companies, and other securities; within that 75 percent basket, no more than 5 percent of the fund’s total assets may be invested in the securities of any single issuer; and within that same 75 percent basket, the fund cannot own more than 10 percent of the outstanding voting securities of any single issuer. Under SEC Staff positions, funds that operate for three years or more consistent with these requirements become “diversified companies” and must continue to comply with them. Moreover, tax rules impose limitations so that (1) no single issuer can exceed by value 25 percent of the value of the fund’s total assets, and (2) the value of the sum of the assets invested in issuers whose values exceed 5 percent of the fund’s total assets or of which the fund holds 20 percent of the voting stock cannot in the aggregate exceed 50 percent of the fund’s total assets. *See* Section 851(b)(3) of the Internal Revenue Code. The effect of this test is that a fund with a modest cash position and no government securities would need to hold securities from at least 12 different issuers. In total, these provisions make it difficult for a registered fund to operate a traditional private equity strategy, although such a vehicle may be conducive for a fund-of-funds strategies that is diversified.
- ³ 15 USC § 80a-2(a)(51); Rule 3c-5, 17 CFR 270.3c-5. Relying on the KE definition also requires that the manager of the Alternative Assets be an affiliate of the Plan sponsor, which raises separate risks and considerations.
- ⁴ *See* H.E. Butt Grocery Company, SEC No-Action Letter (avail. May 18, 2001) (HEB); Standish, Ayer & Wood, Inc. Stable Value Group Trust, SEC No-Action Letter (avail. Dec. 28, 1995) (Standish Ayer); PanAgora Group Trust, SEC No-Action Letter (avail. Apr. 29, 1994) (PanAgora).
- ⁵ Section 3(c)(1) of the 1940 Act provides a separate exception for privately offered funds in which there are no more than 100 investors. When investing in an unregistered fund through a participant directed 401(k) Plan, the SEC has indicated that *each* participant must be counted for purposes of the 3(c)(1) limitation, and *each* participant must be looked at for qualified purchaser and knowledgeable employee status. *See, e.g.*, PanAgora Group Trust and H.E. Butt Grocery Company, *supra* n.4.
- ⁶ For individuals, “accredited investor” status currently requires either a net worth of \$1 million (excluding the positive value of the individual’s primary residence) or an annual income of \$200,000 (\$300,000 with a spouse or domestic partner) in each of the prior two years, with a reasonable expectation of the same earnings in the current year.
- ⁷ A plan that becomes disqualified could have calamitous repercussions as all participants would become subject to US Federal income tax on their account balances, and in some cases, result in additional excise tax penalties.
- ⁸ *See*, Treasury Regulation § 1.401(a)(4)-4.
- ⁹ Regulation 9 Section 9.18(a)(1) refers to common trust funds, while Regulation 9 Section 9.18(a)(2) refers to those collective investment funds that are based on the trust’s exemption from US Federal income taxation by qualifying under Rev. Rul. 81-100, 1981-1 C.B. 326 and its progeny. This article deals with these “(a)(2)” trusts which will generally seek to meet the Section 3(c)(11) exception from 1940 Act registration. For purposes of the Section 3(c)(11) exception under the 1940 Act, the term “bank” is defined under Section 2(a)(5) of the 1940 Act to include state-chartered banks and trust companies with fiduciary authority that is “similar to those permitted for national banks.”
- ¹⁰ 29 CFR 2510.3-101(h).
- ¹¹ Rev. Rul. 81-100, 1981-1 C.B. 326.
- ¹² Section 409 of ERISA.
- ¹³ *See generally* ERISA § 502(a).

- ¹⁴ These “per se” prohibited transaction rules apply to transactions between a plan assets fund and “parties in interest” as defined under ERISA, or disqualified persons, the term used in Section 4975 of the Code. For purposes of organizational clarity, references to “parties in interest” should be read as including those of disqualified persons under the Code, understanding that there are some minor differences between the two. Parties in interest include persons that sponsor the plan, act as fiduciaries to the plan, and most broadly, those that provide services to the plan along with certain affiliates of any of the foregoing. Given the difficulties of determining at any juncture whether any financial institution may be providing services to any given plan—for example, brokerage, consulting, advisory, management, trustee, custodial or other financial services (or may do so during the life of the intended transaction)—most managers operate on the presumption (although not necessarily the conclusion) that each and every financial counterparty or service provider, and potentially in the context of a credit fund or direct lending fund—every borrower since, it is possible that the borrower may be a plan sponsor or an affiliate—is or may become a party in interest, thus necessitating the availability of one or more prohibited transaction class exemptions. Fortunately, Congress and the DOL have issued class exemptive relief that are commonly used, discussed in part, below.
- ¹⁵ Note that a party to a nonexempt prohibited transaction (such as a bank, broker-dealer, futures commissions merchant, swap counterparty, or other financial intermediary transaction with the plan assets fund) is required to report the nonexempt prohibited transaction to the Federal government, it must rescind the transaction and make whole any losses to the affected plan account, and it must additionally pay excise taxes of 15 percent of the “amount involved” in the nonexempt prohibited transaction for each year or part of year the transaction is outstanding and not fully corrected. In certain cases, an additional 100 percent excise tax may be assessed. Certain so-called continuing transactions, such as extensions of credit embedded in the purchase and holding of a bond or note may produce cascading excise tax exposures. *See* Rev. Rul 2002-43, 2002-2 C.B. 85. “Sell side” firms are generally keenly aware of this potential exposure. “In effect, the counterparty is exposed to what may be colloquially characterized as a ‘put’ risk on a transaction-by-transaction basis, as well as to an excise tax risk. The counterparty may have yet additional losses or costs associated with the termination or adjustment of any hedges entered into with respect to the offending transaction,” Steven W. Rabitz and Andrew L. Oringer, “A ‘Clear’ Guide to Swaps and to Avoiding Collateral Damage in the World of ERISA and Employee Benefit Plans,” in *ERISA Fiduciary Law*, (Oringer & Rabitz, eds.) (Bloomberg Law, 2022).
- ¹⁶ In most cases, the satisfaction of the conditions to the exemption is under the control of the plan party or the fiduciary making the decision on behalf of the plan party to engage in the transaction on behalf of the plan (or plan assets fund). In the context of a plan assets fund, this would typically be the fund’s investment manager.
- ¹⁷ Most managers of unregistered private “plan assets” funds usually regard the availability of the QPAM Exemption as a “must,” even though, as a technical matter, other prohibited transaction exemptions may be available to a given transaction. As distinguished from other exemptions which are transaction-specific, “it is the time-tested QPAM Exemption, unlike many other exemptions, that provides for broad relief with conditions that are not generally tied to the type of transaction or service involved, without requiring the use of any particular form or type of investment vehicle.” Dechert LLP Testimony at United States Department of Labor Employee Benefits Security Administration, “Hearing on Proposed Amendments to Qualified Professional Asset Manager Exemption (Prohibited Transaction Class Exemption 84-14),” Nov. 17, 2022, pp. 151-194, transcript available at https://www.dol.gov/sites/dolgov/files/ebsa/pdf_files/hearing-transcript.pdf. It is our experience that the availability of the QPAM Exemption is often an unstated (and some cases stated) requirement by banks,

broker-dealers, futures commissions merchants, swap counterparties and other service providers and counterparties when dealing with plan assets funds. It is not atypical for plan assets funds, and their managers (in their individual or corporate capacities) to be required to make representations and in some cases provide indemnities that the transaction or service will not result in a nonexempt prohibited transaction by reason of the availability of the QPAM Exemption (or some other mutually agreeable exemption).

¹⁸ Under Section 406(b)(1) of ERISA, a fiduciary cannot act in a manner that is adverse to the plans whose assets it manages. *See also* 29 CFR 2550.408b-2(e):

A fiduciary may not use the authority, control, or responsibility which makes such person a fiduciary to cause a plan to pay an additional fee to such fiduciary (or to a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) to provide a service.

The DOL believes that this provision includes a prohibition on a fiduciary using its authority to affect its own compensation or the timing of its compensation. Although it may not be immediately obvious, according to the DOL, potential prohibited transactions may arise where a manager merely has the power to value the fund's assets—even when charged to act solely in the best interest of the plan assets account. The entire universe of DOL guidance on incentive fees is contained in four advisory opinions, cited below, and in all of them, only a small portion of the investments of the portfolio subject to the incentive fee had readily available market price quotations. For this small remainder that did not have readily available market quotations an independent appraiser approved up-front by the plan account was required. In many cases, the use of a third-party independent valuation agent may thus reduce this particular risk. Separately, "realization" based fees are common for most private equity "carried interest" or incentive

fees and may raise separate significant concerns under ERISA. The DOL's general insistence on regularly-scheduled periodic incentive arrangements being based on **realized and unrealized** gains and losses avoids two potential abuses: a fee based only on realized gains might cause a manager to accelerate the disposition of portfolio assets prematurely in order to crystalize its performance fee, which could give the manager benefits such as additional short-term cash or provide increases in the immediate incentive compensation of the sponsor's employees. It may also distort performance results by enhancing immediate returns to the detriment of a more accurate longer-term picture. More fundamentally, a realization-based fee also may incentivize an investment manager to sell the highest performing assets first so that it achieves the performance hurdle allowing it to take the fee, while allowing lesser performing assets to remain in the portfolio. This has been traditionally difficult to manage for most private equity funds given the nature of the fee and the waterfall structure which generally calls for payments to the sponsor (or affiliate) after the fund returns the investors' initial capital and has met a pre-determined "hurdle rate" (minimum return).

See DOL Advisory Opinion 89-28A (Sept. 25, 1989); DOL Advisory Opinion Op. 86-20A (Aug. 29, 1986); DOL Advisory Opinion Op. 86-21A (Aug. 29, 1986); and DOL Advisory Opinion Op. 99-16A (Dec. 9, 1999). The DOL has also separately granted individual exemptive relief in certain cases.

¹⁹ In our experience, many fund managers have taken steps to reduce the potential for such risks. A manager of a plan assets fund would already be under a duty to call capital when it was solely in the best interests of the investing plans. There are some who argue that the manager's authority is merely contractual; facts and circumstances are critical for the analysis.

²⁰ Conflicts may arise where the issuer is impaired or there is an insolvency and different clients of the same family of managers may have different risks or interests in the issuer as a result. The inquiry is highly dependent on the facts and circumstances.

Possible violations of Section 406(b)(2) and Section 406(b)(1) of ERISA could arise in such situations where the plan assets funds' interests are compromised. The absence of a prohibited transaction should not necessarily automatically be presumed if a manager seeks to act in the collective interest of all of its affected accounts. In some contexts, the use of an independent fiduciary may be called for. However, it is important to point out that while a credit-triggering issue is often the cause of potential conflicts, it is not necessarily exclusively so. There may also be some circumstances in which impermissible conflicts could be found to exist under ERISA even where there is not an impairment of the issuer and could occur merely by buying, holding or selling a position in which other accounts of the manager or its affiliates (or of the manager or its affiliates themselves) have divergent interests. To be sure, most sophisticated managers in our experience do not lose sight of their responsibilities to act with an "eye single" towards the interest of the plan assets under their management and have developed substantial protocols reasonably designed to meet the compliance burdens associated with ERISA's "exclusive benefit" rule and to avoid self-dealing prohibited transactions. *See, Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982), cert denied, 459 U.S. 1069.

Note that the above examples assume that the ERISA accounts are all only in one position in an issuer or borrower's capital stack. Even greater complexities would arise, of course, if ERISA accounts are in multiple positions in the issuer of borrower's capital structure.

²¹ An example of the extent to which these rules are applied can be seen with respect to "soft dollar" research. But for the statutory relief afforded by Section 28(e) of the Securities Exchange Act of 1934, as amended, which pre-empts ERISA, a manager could likely not execute a transaction on behalf of a plan assets fund and receive research credits unless the research would only be used for the exclusive benefit of that account itself. Information being fungible, this

is often easier said than done, since once obtained, it may be utilized for other clients across the franchise—or the franchise itself. *See, A. Richard Susko & Steven W. Rabitz, "ERISA Aspects of Soft Dollar Arrangements," Practising Law Institute, Pension Plan Investments: Confronting Today's Issues* (1999).

Similarly, plan assets accounts cannot be used to "fill out" an order and investment opportunities must be allocated in a way and operationalized in a manner that does not result in an impermissible benefit to the manager or otherwise to other fiduciary accounts of the manager or its affiliates. Managers should be aware that ERISA's exclusive benefit rule under Section 404 as well as prohibited transactions under Sections 406(b)(1) and (2) can be implicated. Most managers in our experience have policies and procedures that are designed to allocate opportunities fairly and objectively among similarly situated accounts.

²² *Notice Requesting Information on Cross-Trades of Securities by Investment Managers*, 63. Fed. Reg. 13696 (Mar. 20, 1998) (emphasis added) (1998 Notice Requesting Information) (stating that "[w]here an investment *manager has investment discretion with respect to both sides* of a cross trade of securities and at least one side is a [Plan] . . . a violation of Section 406(b)(2) would occur"). The [DOL] has also taken the position that by representing the buyer on one side and the seller on the other in a cross trade, a *fiduciary acts on behalf of parties that have adverse interests to each other*. Moreover, the prohibitions embodied in Section 406(b)(2) of ERISA are per se in nature. "*Merely representing both sides of a transaction* presents an adversity of interests that *violates* Section 406(b)(2) even absent fiduciary misconduct reflecting harm to a plan's beneficiaries. [Emphasis supplied]" *Id.*

See also Reich v. Strong Capital Management Inc., No. 96-C-0069, USDC, E.D. Wis. (June 6, 1996); *Cutaiar v. Marshall*, 590 F.2d 523 (3d Cir. 1979). The DOL noted that ". . .[w]hen identical trustees of two employee benefit plans whose participants are not identical effect a loan between the plans without

a [Section] 408 [of ERISA] exemption, a per se violation of ERISA exists.” *Cuitair*, 590 F.2d at 529. Congress and the DOL have issued exemptive relief but those have been of very limited use. *See*, John V. O’Hanlon, Kaitlin McGrath, Steven W. Rabitz and Andrew L. Oringer, “Cross Trading in Focus: Decoding the Regulatory Framework,” 26 *Investment Lawyer*, No.2 (Feb. 2019).

²³ These include otherwise commonly (and commercially) accepted provisions and practices relating to expense reimbursements, the receipt of direct or indirect compensation arising out of the fund’s investment in portfolio companies (for example, directors’ fees, IPO-related fees, financing fees, break-up fees, monitoring fees, deal fees, loan origination fees, administrative services fees, asset management fees, consulting services fees etc.), co-investments, formation of successor funds, deal flow allocations, warehousing, cross transactions, termination and penalty provisions, and other conflicts which may involve the manager, its affiliates, and their respective managed or advised accounts.

²⁴ 29 CFR 2510.3-101, as modified by Section 3(42) of ERISA. The purpose of these provisions is to prevent investment managers from avoiding ERISA (and the Code’s) fiduciary responsibility and prohibited transaction rules by managing assets indirectly through other entities.

²⁵ The 25 percent test requires that less than 25 percent of each class of equity interests in the fund be held by ERISA and similar investors (after disregarding the investment of certain non-plan persons associated with the fund being tested). *See* 29 CFR 2510.3-101(f), as modified by Section 3(42) of ERISA. The VCOC exception requires compliance with a host of conditions, including that the fund’s first long term investment and during certain specified annual periods the value of the assets of the fund be primarily in “operating companies” (which is its own term of art), as to which the fund negotiates direct contractual management rights. The fund must also exercise such management rights (although the specifics may vary among strategies). While conducive to many private

equity funds that choose not to rely on the 25 percent test, this exception has more limited use among private credit strategies unless the strategy involves active management by obtaining and exercising contractual management rights obtained from the qualifying borrower. Passive “buy and hold” strategies are not good candidates for this exception. *See* 29 CFR 2510.3-101(d). There is also the publicly offered securities exception, but it is generally not conducive to most traditional unregistered private funds that do not wish to be publicly available, 29 CFR 2510.3-101(b)(2)-(4).

²⁶ 29 CFR 2550.408b-2.

²⁷ *Id.*

²⁸ *See, e.g.*, DOL. Advisory Opinion 96-15A (August 7, 1996) (60-day notice for asset manager termination permitted); DOL Advisory Opinion 92-08A (Feb. 2, 1992) (60 day redemption notice for investing plan in pooled fund); Prohibited Transaction Exemption 95-100, issued to Fidelity Management Trust Company, 60 Fed. Reg. 55864 (Nov. 3, 1995); Application No. d-09500 (appearing to sanction a 90-day termination period for a single client withdrawal, but 60-days for multiple client pooled funds).

²⁹ In the context of an unregistered private fund that seeks to comply with the 25 percent limit, sponsors would need to carefully consider the risk of inadvertently creating a separate class of equity interests. Additional complexities could arise with respect to so-called “liquidating” classes, features that as of this writing appear to be more common with European-based funds than those of American managers. It is our experience that liquidating classes are generally avoided in the market when there are any ERISA (or similar) investors given the complexities and difficulties involved, or, conversely, that such accounts are prohibited from investing in the fund where those classes are part of the fund structure.

³⁰ 29 CFR 2550.404c-1; 5. The first requirement could be satisfied by a simple three-fund lineup, including equity (stock), fixed income (bond), and capital preservation (money market or stable value) funds where the equity and fixed income funds are sufficiently

diversified. Most Plans, of course, offer significantly more investment options. In the equities category alone, there are diverse types of investment styles (*i.e.*, core, value, or growth) each of which may be paired with a different market capitalization focus (*i.e.*, large, medium, small or “total market”)—and that ignores specialty strategies like real estate and differences between active and passively managed products. The second condition required for compliance under the ERISA Section 404(c) regulations is satisfied through disclosure, given prior to the participant’s first allocation to an investment in the Plan, and provided every year thereafter, and other specified quarterly information.

Very generally, the regulations require certain Plan-related information, including general Plan information about how participants give investment directions, administrative expense information (such as fees and expenses for general administrative services that are deducted from participants’ accounts, including legal, accounting, and recordkeeping services), and expense information for specific services based upon actions taken by the participant (such as a fee for taking out a loan). In addition, the rules require identifying information for each investment (such as the type of investment), performance data, benchmark information, fee and expense information, and website addresses providing additional information about investment options. This information is typically presented in a comparative format to aid easy comparison of investment options. While the disclosure rules are detailed, most 401(k) plan administrators and recordkeepers have generally been able to comply with these rules.

³¹ See 57 Reg. Fed. 57 (46914) (1992).

³² *Id.* “[A limited partnership investment option which contains a three-year lock-up] would, however, be subject to the general volatility rule . . . (which requires that the frequency of opportunity to give investment instructions be determined relative to the anticipated market volatility of the investment) as a condition to affording section 404(c) relief for amounts invested in that alternative.”

³³ *Id.*

³⁴ *Id.*

³⁵ According to the DOL, one-third of eligible workers do not participate in their employers’ 401(k)-type plans. Studies suggest that automatic enrollment plans (in which workers “opt-out” of plan participation rather than “opt-in”) could reduce this rate to less than 10 percent significantly increasing retirement savings. <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/factsheets/default-investment-alternatives.pdf>.

³⁶ Auto-enrollment was premised on behavioral economic theory and an emphasis on “choice architecture.” Evidence suggested that many employees were either too busy, lazy, inertial or otherwise to take the steps needed to elect to participate in their employer’s 401(k) plan. What was thought to be needed was a “nudge” so that employees’ participation was automatic, with an option to opt-out rather than opt-in. See Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (2008). The SECURE 2.0 Act of 2022 (Division T of the Consolidated Appropriations Act, 2023, Pub. L. 117–328) requires most new Plans (established for plan years following December 31, 2024) to automatically enroll employees unless they opt out. New plans must start contributions at a minimum of 3 percent of pay, increasing by one percent each year until they reach 10 percent.

³⁷ QDIA investment strategies may include: (1) a “lifecycle” or “target date” strategy that applies generally accepted investment theories, is diversified so as to minimize the risk of large losses and that is designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures based on the participant’s age, target retirement date (such as normal retirement age under the plan) or life expectancy; (2) a “balanced” fund that applies generally accepted investment theories, is diversified so as to minimize the risk of large losses and that is designed to provide long-term appreciation and capital preservation through a mix of equity and fixed income exposures consistent with

a target level of risk appropriate for participants of the plan as a whole, but which does not necessarily take into account the risk tolerances, investments or other preferences of an individual participant; (3) a “managed account of plan investment options” that applies generally accepted investment theories, allocates the assets of a participant’s individual account to achieve varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures, offered through investment alternatives available under the plan, based on the participant’s age, target retirement date (such as normal retirement age under the plan) or life expectancy; or (4) certain investment options offered by a State or Federally regulated financial institution designed to preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with liquidity, but only for 120 days.

³⁸ DOL Advisory Opinion 2025-04A states that under the program under consideration: “Participants may specify the percentage of their account balance to be allocated to the [account that will be allocated to lifetime income] and that will receive lifetime income protection. For participants who do not make a selection, the plan sponsor selects a default allocation percentage.”

³⁹ Based on public statements and reported stories, some product sponsors have considered in-plan annuity options, and out-of-plan annuity options. In the former case, it is possible that the sponsor could choose to remain responsible for one or more of the following: selecting the provider or providers; monitoring the provider or providers; and providing advice or taking discretion to allocate the participant’s account balance to an annuity option. In some cases, a sponsor may choose to be more circumspect in its authority given the potential for fiduciary exposure and conflicts and may also leverage investment education tools for participants’ decisions. In the latter case, the participant gains access to an annuity by converting the plan at an eligible distribution event (i.e., meeting normal retirement age under the plan) into a rollover IRA, through which an annuity is

then purchased at the direction of the participant. In the former case, the participant typically provides a direction at a specific time (i.e., age 55) where it may decide to cause their account balance to be allocated to the annuity made available in the Plan.

⁴⁰ 29 CFR 2550.404c-5(c)(5).

⁴¹ *Id.*

⁴² 72 Fed. Reg. 60452, 60455-56 (October 24, 2007).

⁴³ Brendan Curran, head of U.S. Retirement at State Street Global Investors, as quoted in Hannah Zhang, “Tapping the trillions: private equity’s 401(k) ambitions,” *Private Equity International*, July 7, 2025.

⁴⁴ The data support an ever-growing number of Plans utilizing target-date or similar fund strategies, even if the individual results may differ. A 2024 Vanguard report found that 96 percent of Plans offered target-date funds at year-end 2024. An important factor driving the use of target-date funds is their role as an automatic or default investment strategy. The qualified default investment alternative (QDIA) regulations promulgated under the PPA continue to influence adoption of target-date funds. Among Plans designating a QDIA, 98 percent were target-date funds. Two percent were balanced funds. 84 percent of all participants used target-date funds, and 71 percent of target-date investors had their entire account invested in a single target-date fund, “How America Saves,” *Vanguard Viewpoints* (June 2025). “At year-end 2022, 85 percent of 401(k) plans, covering 88 percent of 401(k) plan participants, included target date funds in their investment lineup.” Sarah Holden, Steven Bass and Craig Copeland, “401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2022,” *EBRI Issue Brief*, (April 30, 2024); “By 2027, target-date funds will capture roughly 66% of all 401(k) contributions, and about 46% of total 401(k) assets will be in TDFs, according to a 2023 estimate by Cerulli Associates, a market research firm,” Greg Iacurci, “Target-date funds — the most popular 401(k) plan investment — don’t work for everyone,” *CNBC Personal Finance*, (Jan 6, 2025).

⁴⁵ Rule 22e-4 under the 1940 Act. Some open-end registered funds have sought exposure to private equity

and other strategies, but they are the exception rather than the rule. Almost always they are not made through direct investments in Alternative Assets but through other funds which in turn hold such assets. But even holding Alternative Assets through unregistered funds does not relieve the pressure on the 15 percent illiquid asset cap: the underlying funds in which the registered fund invests likely also have liquidity constraints and thus could be counted for purposes of the registered open-end fund's 15 percent limit.

⁴⁶ There are some interval funds, however, that are listed on an exchange and are bought and sold in the secondary market—and these funds continue to make periodic repurchases at NAV via Rule 23c-3.

⁴⁷ Rule 23c-3(a)(1) under the 1940 Act.

⁴⁸ Rule 23c-3(a)(3) under the 1940 Act.

⁴⁹ Many tender offer funds institute a repurchase policy that sets a schedule as to when investors can expect the fund to tender for the repurchase of shares. However, the fund must reserve for board approval as noted above prior to commencement each tender offer.

⁵⁰ In the past two years, however, there has been significant growth in “perpetual-life” non-traded BDCs, which are designed to have an indefinite duration and reduce the risk of such BDCs being forced to liquidate assets during market downturns.

⁵¹ ADI 2025-16 - Registered Closed-End Funds of Private Funds, available at https://www.sec.gov/about/divisions-offices/division-investment-management/fund-disclosure-glance/accounting-disclosure-information/adi-2025-16-registered-closed-end-funds-private-funds?utm_medium=email&utm_source=govdelivery.

⁵² *In the Matter of Lord Abbett Credit Opportunities Fund, et al.*, Rel. No. IC- 35663 (July 1, 2025) (notice), Rel. No. IC- 35699 (July 29, 2025) (order).
⁵³ *Id.*

⁵⁴ *See supra* n.2.

⁵⁵ Significant breadth is required and interdisciplinary teamwork is often involved in our experience. As examples of recent current developments that relate to this multidisciplinary approach, see the

following sampling from Dechert LLP: <https://www.dechert.com/knowledge/podcasts/2025/8/committed-capital-sidecar-new-order-targets-401k-plan-alternatives.html>; <https://www.dechert.com/knowledge/onpoint/2025/8/new-order--targets--401-k--plan--alternatives--president-takes-.html>; <https://www.dechert.com/knowledge/onpoint/2025/9/sec-s-investor-advisory-committee-issues-recommendations-to-faci.html>; <https://www.dechert.com/knowledge/onpoint/2025/8/sec-staff-weighs-in-on-expanded-retail-access-to-private-funds.html>; <https://www.dechert.com/knowledge/onpoint/2025/4/sec-eases-burden-of-co-investment.html>.

⁵⁶ See 12 CFR Part 9.18(b)(2); OCC Comptroller's Handbook, Investment Management Services (2001), at 135, (“In the context of investment management, this section authorizes a national bank to delegate its fiduciary authority to third-party service providers such as investment managers, advisers, property managers, appraisers, and custodians”); Questions and Answers 12 CFR Part 9, OCC, Q&A No. 15 (May 15, 1997); 12 CFR 9.18(b)(2) (1997); Fiduciary Activities of Nat'l Banks, 60 Fed. Reg 66163, 66169 (Dec. 21, 1995) (preamble to proposed amendment to Reg. 9); DOL Advisory Opinion 2006-07A (Aug. 15, 2006); DOL Advisory Opinion 96-15A (Aug. 7, 1996); DOL Advisory Opinion 2007-03A (June 8, 2007); Frank Russell Trust Company, SEC No-Action Letter (Jul. 11 1980). The balance of responsibilities between the trustee and sub-adviser may involve some tension between competing regimes. *See*, Part I(c) of PTCE 84-14 (discussed further below).

⁵⁷ *See*, Ted Godbout, “CITs Lead Over Mutual Funds Grows,” *Plan Sponsor Council of America*, Feb. 13, 2025, available at <https://www.psc.org/news/psca-news/2025/1/cits-lead-over-mutual-funds-grows/>; Robert Steyer, “Among target-date funds, CITs are now bigger than mutual funds: Morningstar,” *Pensions & Investments*, Aug. 9, 2024.

⁵⁸ Remy Samuels, “Fiduciary Risk Continues to Pose Barrier to Mass Adoption of Alts in DC Plans,” *PlanSponsor*, March 3, 2025; Remy Samuels,

“Empower to Offer Private Investments in 401(k) Plans,” *PlanSponsor*, May 14, 2025.

⁵⁹ “State Street Global Advisors Announces State Street Target Retirement IndexPlus, Providing Defined Contribution Investors Access to Both Public and Private Markets Exposures,” *BusinessWire*, April 10, 2025.

⁶⁰ *Id.*; Samuels, *supra* n.58.

⁶¹ Anne Tergeson, “BlackRock Deepens Push Into Private Investments for the Masses,” *Wall Street Journal*, June 26, 2025; Leo Almazora, “Goldman Sachs’ new private credit fund aims to bring alternatives to 401(k) plans, joining a wave of asset managers targeting the DC market.” *InvestmentNews*, July 21, 2025.

⁶² James Van Bramer, “Ahead of Executive Order, What to Know About Private Equity in 401(k) Plans,” *PlanSponsor*, July 18, 2025.

⁶³ Sophie Baker, “PGIM, Partners Group collaborate to bring multi-asset portfolios to the masses,” *Pensions & Investments*, September 17, 2025.

⁶⁴ First, the QPAM Exemption excludes securities lending transactions (with the plan assets fund as lender) from coverage, while PTCE 91-38 does not appear to do so. Second, while the QPAM Exemption only provides relief for otherwise nonexempt per se prohibited transactions, PTCE 91-38 also provides limited self-dealing Section 406(b)(2) relief. Third, PTCE 91-38 also provides helpful relief for certain transactions between the collective investment trust and certain contributing sponsors (and affiliates) of investing multiemployer plans. Fourth, PTCE 91-38 also provides additional relief from the separate employer securities and real property prohibited transaction rules of Section 407 of ERISA. Fifth, while most of the relief listed above applies when there is no single plan (or group of related plans) that owns more than 10 percent of the interests in the collective investment trust, Section 1(b) of PTCE 91-38 provides relief for these otherwise prohibited transactions—as well as relief under Section 406(b)(1) of ERISA—where the person opposite the transaction with the collective investment trust (or providing

the service to the collective investment trust) is not the bank, trust company or any affiliate maintaining the collective investment trust and is otherwise a party in interest solely because it provides services to the 10 percent or more plan (or collective investment trust) or is an affiliate of such a person. Like the QPAM Exemption, PTCE 91-38 also requires that at the time the transaction is entered into, and at the time of any subsequent renewal thereof, the terms of the transaction are not less favorable to the collective investment trust than the terms generally available in arm’s-length transactions between unrelated parties. *Cf.* Section 408(b)(17)(B).

⁶⁵ If the investment manager (*i.e.*, the QPAM) or certain of its affiliates is convicted of certain felony crimes—regardless of whether those convictions have anything to do with the conduct of the investment management business, let alone the pension investment management business—the exemption becomes unavailable for 10 years, and a manager generally needs to apply for individual relief. Many observers believe the DOL’s historical approach to individual relief occasioned by a QPAM Exemption disqualification event changed demonstrably under the Obama Administration with an approach that was arguably more punitive and exacting than in years prior. This is the case even where the prohibited misconduct occurred at an affiliate that was not engaged in the pension investment management business or the investment management business at all and was otherwise generally “firewalled” from the offending businesses for a host of legal and regulatory reasons. Indeed, shock waves were felt when two institutions, BNPP and RBS were denied individual relief. Brian Croce, “DOL Denies BNP Paribas Exemption to Manage U.S. Retirement Assets,” *Pensions & Investments*, December 21, 2018; Hazel Bradford, “Labor Department Denies RBS Request for Money Management Exemption,” *Pensions & Investments*, October 13, 2016. Obtaining individual relief has been made more difficult by recent changes in the procedures pursuant to which applicants must seek individual exemptive relief. *See* 89

Fed. Reg. 4662. Even more recent changes to the QPAM Exemption in 2024 enhance the potential scope of such prohibited misconduct, including certain deferred prosecution agreements and non-prosecution agreement. For a broader overview of the recent amendments to PTCE 84-14, *see*, Steven W. Rabitz and Jonathan W. Schuch, “Not Quite QPAMdemonium: DOL Issues Final Changes to the QPAM Exemption,” *Dechert LLP News & Insights*, available at <https://www.dechert.com/knowledge/onpoint/2024/4/not-quite-qpamdemonium--dol-issues-final-changes-to-the-qpam-exe.html>. For some of the challenges of the proposed changes to the QPAM Exemption, *see* Dechert LLP Testimony at United States Department of Labor Employee Benefits Security Administration, “Hearing on Proposed Amendments to Qualified Professional Asset Manager Exemption (Prohibited Transaction Class Exemption 84-14),” *supra*, n.17.

⁶⁶ Sub-advisers to a collective investment trust may often seek to rely on the QPAM Exemption where PTCE 91-38 is not available. Since arrangements between trustees maintaining collective investment funds and sub-advisers may vary significantly, the choice of the particular exemption or exemptions utilized is highly facts and circumstances dependent.

⁶⁷ Other common exemptions that may be utilized include PTCE 75-1 (for certain purchases and sales of securities from US registered broker-dealers and banks); PTCE 2006-16 (for certain securities loans with the collective investment trust as lender); Section 408(b)(2) of ERISA (for US futures transactions executed on an agency market); and the statutory exemption for foreign exchange transactions under Section 408(b)(18) of ERISA and the accompanying section of the Code, Section 4975(d)(21). That said, as noted herein, individual exemptions, are limited to the transactions covered by them and are thus far more restrictive than broader institutional exemptions such as the QPAM Exemption and PTCE 91-38. *See supra* n.17. In certain cases, the statutory exemption located at Section 408(b)(17) of ERISA and its corresponding provision of Section

4975(d)(20) of the Code may be considered. Certain institutions may also have received individual exemptive relief.

Although not discussed in detail in this article, insurance company pooled separate accounts may offer many of the same ERISA-related benefits and challenges as collective investment trusts. For example, they have an exemption (PTCE 90-1) that offers similar coverage to PTCE 91-38. Insurance company pooled investment accounts are similar arrangements to bank collective funds but are established and maintained by insurance companies pursuant to the provisions of state laws relating to separate accounts. They are pooled by holding assets which fund obligations under several insurance contracts. Generally speaking, as in the case of bank collective funds, but for the Section 3(c)(11) exception, such funds would be required to be registered under the 40 Act. Insurance company pooled accounts are typically regulated by the DOL under ERISA as well as the applicable state insurance company in the State in which the sponsoring insurance does business.

Note that separate accounts that are investment options for variable annuities that are sold broadly to the public *are* investment companies and required to be registered as such. *See, Prudential Ins. Co. of America*, SEC Investment Co. Act Release No. 3620, Jan. 22, 1963.

⁶⁸ Compliance with Rev. Rul 81-100 1981-1 C.B. 326 and its progeny is an essential for this purpose.

⁶⁹ An Allocator product may, to some extent, require the plan sponsor, or plan participant, to direct it to allocate a specified percentage or amount of assets to a given asset class or strategy. Depending on the exact nature of the direction, it is possible in such scenarios that the top-tier Allocator would not act as an ERISA fiduciary with respect to the selection of the particular sleeve, the manager of the sleeve, or the amount allocated to the sleeve. Countervailing considerations may exist under both Reg. 9 and Section 3(c)(11) of the 1940 Act which would be facts and circumstances dependent.

⁷⁰ *See* Section 402(c) of ERISA.

⁷¹ The VCOC and real estate operating company (REOC) exceptions may be available in actively managed private equity, real estate and similar strategies, and where applicable, which would not have the same capacity constraints as funds relying on the 25 percent test limitations.

⁷² Definition of “qualified purchaser,” Section 80a-2(a)(51) of the 40 Act; Cornish & Carey Commercial, Inc., SEC No-Action Letter, 1996 SEC No-Act. LEXIS 625 (June 21, 1996). An unregistered private fund that accepts investments from a collective investment trust that takes investments from defined contribution plans does not generally need to count plan participants as beneficial owners of the private fund provided the collective investment trust and trustee are able to satisfy the definition of QP. This assumes that the collective investment trust was not formed for the specific purpose of investing in the unregistered fund. *See* Rule 2(a)(51)-3(a) under the 1940 Act.

⁷³ Where an Allocator’s fee includes an incentive or performance fee, and that fee, in turn, is dependent, in part, on the performance of the underlying funds in which the Allocator invests, additional care must be taken. For purposes of valuing the assets from which it computes its fee, the Allocator would likely rely on the third-party downstream managers’ marks. However, arguably, it is possible that timing and other conflicts could arise unless the Allocator adhered to a strict “buy and hold” approach to the downstream funds.

⁷⁴ A description of all of these issues cannot be undertaken in this article. Suffice it to say that a plan assets fund with such an Alternative Assets strategy requires a significant amount of work, involving many traps for the unwary. Some of the potential for prohibited transactions have been mentioned throughout, but the list is not exhaustive and depends on the specific facts. Additional prohibited transaction issues could arise, for example, if the collective investment trust invests in independently managed private equity or venture capital funds and those funds, in turn, obtain

financing from an affiliate of the sponsor of the collective investment trust. Similar issues could arise where the downstream independent fund into which the collective investment trust invests is a hedge fund, and the hedge fund has certain trading relationships with the collective investment trust fiduciary or its affiliates. *See* 29 CFR 2550.408b-2(f), Example 5. Each arrangement requires an in-depth analysis with expert practitioners in ERISA, fund formation, bank regulatory and other allied subject matters.

⁷⁵ Technically, Section 408(b)(8) would also apply to a pooled investment fund maintained by an insurance company qualified to do business in a State. The analysis for insurance company pooled separate accounts would be similar in respects to bank collective investment trusts. Insurance company separate accounts are not generally discussed in detail in this article but remain yet another possible viable approach for Allocator strategies.

⁷⁶ Where a collective trust contemplates allocations to both proprietary and third-party funds or strategies, additional prohibited transaction considerations may apply.

⁷⁷ PTCE 77-4 would allow a manager or affiliate to retain certain administrative and servicing fees paid by the registered open-end fund. PTCE 77-4 also applies to registered mutual funds that are ETFs. Advisory Opinion 2002-05A (Jun. 2002).

⁷⁸ Separately managed accounts would not be able to rely on PTCE 91-38; but as noted above, Section 408(b)(8) may be available when the manager of a separate account takes discretion to allocate the account to a collective investment trust maintained by it or another affiliate.

⁷⁹ For an overview of PTCE 2020-02, *see* Steven W. Rabitz, Andrew Oringer and Aryeh Zuber, “Will ERISA’s Fiduciary Exemption ‘Rollover’ to the New Administration? DOL Issues Year-End Package Relating to ‘Investment Advice,’ *Dechert LLP*, available at <https://www.dechert.com/content/dam/dechert%20files/knowledge/onpoint/2021/1/Will-ERISAs-Fiduciary-Exemption-Rollover-to-the-New-Administration.pdf>.

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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.

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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/knowledgeonpoint/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 long-standing 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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