

DOL Begins to Act Under the New Executive Order Aimed to Increase Alternative Investments in Retirement Plans

Executive Summary

On August 7, 2025, President Trump issued an [Executive Order](#) (the “Order”) designed to increase access to investment in certain Alternative Assets (defined below), including private equity, through Internal Revenue Code Section 401(k) and other defined contribution retirement plans. The Order directs the Secretary of Labor (the “Secretary”) to take specific steps to review and clarify the position of the Department of Labor (the “DOL”) with respect to Alternative Assets. As these steps may include the rescission of old guidance and promulgation of new rules, regulations, or guidance designed in part to curb certain ERISA¹ litigation that “constrains fiduciaries’ ability to apply their best judgment in offering opportunities” to plan participants, the DOL has, within days of the Order being issued, rescinded 2021 guidance issued under the Biden administration. The Securities and Exchange Commission (the “SEC”) is also tasked with considering ways to facilitate access to Alternative Assets by defined contribution plan participants.

For these purposes, Alternative Assets are generally defined as:

- private market investments;
- direct and indirect interests in real estate (including debt instruments secured by the same);
- holdings in actively managed investment vehicles invested in digital assets;
- direct and indirect investments in commodities;
- direct and indirect interests in projects financing infrastructure; and
- lifetime income investment strategies including longevity risk-sharing pools.

Overview of the Order

Encouragement of access to non-traditional investments such as Alternative Assets in retirement plan accounts has varied dramatically depending on the administration in office. The Order is intended to more broadly expand access to investments in Alternative Assets. To accomplish this, the Order was designed, in part, to facilitate the rescission of the [DOL’s December 21, 2021 Supplemental Private Equity Statement](#) (the “Supplemental Statement”), which was issued during the Biden administration in response to [prior guidance regarding private equity investment](#) under retirement plans that had been issued by the DOL during the first Trump administration (the “2020 Letter”). The Supplemental Statement was rescinded on August 12, five days after the issuance of the Order.

¹ The Employee Retirement Income Security Act of 1974

In addition, within 180 days of the date of the Order (by February 3, 2026), the Secretary must reexamine the DOL's prior guidance on fiduciary duties under ERISA with respect to offering asset allocation funds that include investments in Alternative Assets. Within the same timeframe, the Secretary must, as she deems appropriate and consistent with applicable law, clarify the DOL's position on Alternative Assets and the fiduciary processes associated with including them in asset allocation funds. As part of this clarification, the Secretary is directed to identify the criteria that fiduciaries should use to prudently balance higher expenses with potentially greater long-term returns and diversification. The Secretary is also generally tasked with providing guidance and possible safe harbors regarding a fiduciary's duties when deciding to offer a fund including Alternative Assets.

The Order clarifies that the Secretary must, as appropriate, consult with the Secretary of the Treasury and the SEC as well as other regulators to achieve any required parallel regulatory changes. Similarly, the Order directs the SEC, in consultation with the Secretary, to facilitate defined contribution plan participant access to Alternative Assets. This may be achieved by revision of current SEC regulations as well as the publication of additional guidance.

Impact of Rescission of the Supplemental Statement

The 2020 Letter is regarding an inquiry involving the inclusion of professionally managed asset allocation funds with a private equity component in defined contribution plans with participant-directed individual accounts. The 2020 Letter indicates that an individual account plan fiduciary may offer this type of investment without violating Title I of ERISA. However, the 2020 Letter includes several important qualifications to this statement.

First, the 2020 Letter indicates that there is a difference between offering private equity in a professionally managed fund and offering it directly as an investment in a defined contribution plan. The 2020 Letter also includes a number of factors the plan fiduciary should consider when deciding whether to offer an asset allocation fund with a private equity component. These factors generally include i) whether adding such a fund would increase diversification within an appropriate range of fees and diversification of risks over a longer term period, ii) whether such a fund is managed by skilled and experienced professionals, and iii) whether such a fund limits the private equity component appropriately. Additionally, the 2020 Letter highlights the importance of reviewing the fund in light of the plan's specific features and needs of its participants. Furthermore, the DOL reminds the plan fiduciary, as it should with all investment alternatives, to consider whether the fiduciary has the skills, knowledge, and experience to determine whether it needs professional assistance with its decision making and also to continually monitor the asset allocation fund with a private equity component once selected. Finally, careful attention must be paid to the information provided to participants enabling them to make an informed decision regarding selecting such fund as an investment.

The Supplemental Statement clarified that the 2020 Letter was not an endorsement or recommendation of including asset allocation funds with a private equity component as investment options in defined contribution plans. The Supplemental Statement also highlighted the sections of the 2020 Letter that outlined the DOL's expectations regarding the expertise required for plan fiduciaries to prudently select and monitor such funds, including as plan investment options.

The Supplemental Statement cautioned that the guidance provided in the 2020 Letter is not applicable to the majority of plan fiduciaries, and explained 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.” The DOL also noted that the duty of prudently selecting and monitoring designated investment alternatives is not extinguished by Section 404(c) of ERISA.

Therefore, to the extent the Supplemental Statement simply interpreted the 2020 Letter, rather than changed its language, the rescission of the Supplemental Statement does not materially change the guidance applicable to asset allocation funds with a private equity component offered as investment options under defined contribution plans. However, the rescission appears to signal the DOL’s willingness to interpret the 2020 Letter in a broader manner.

Takeaways

The Order and the DOL’s speed to take initial action thereunder clearly indicates a continued interest by the current administration in the expansion of access to Alternative Assets in defined contribution retirement accounts. As noted above, the 2020 Letter is no longer qualified by the Supplemental Statement, and although that change, in and of itself, does not appear to permit plan sponsors to immediately offer asset allocation funds with a private equity component as investment options with impunity, it is the first step towards a significantly more open environment, and it appears that within the next six months we can expect more significant regulatory changes in this arena.

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