

Memorandum

President Orders Department of Labor and Securities and Exchange Commission to Democratize Access to Alternative Assets for 401(k) Plans

August 7, 2025

President Donald Trump signed an executive order today (the “Executive Order”)¹ that has the potential to redefine how millions of Americans save for their retirement. The Executive Order directs the U.S. Department of Labor (“DOL”) to issue new guidance to provide 401(k) plan fiduciaries with greater protection against litigation when offering investment options that include “alternative assets”—including private equity, credit and real estate, digital assets, commodities and infrastructure investments—and directs the U.S. Securities and Exchange Commission (“SEC”) to facilitate access to alternative assets for participant-directed defined contribution retirement savings plans by revising applicable regulations and guidance. The Executive Order is part of President Trump’s wider initiative to adopt a slate of legislation and policies promoting industry access to private market alternative investments.

Key Takeaways

The Executive Order, and the DOL guidance that is expected to follow, marks a watershed moment in the industry’s long-standing efforts to democratize access to the economy’s private markets and is a major milestone for alternative asset sponsors seeking to tap into the more than \$12 trillion defined contribution retirement plan market, of which nearly \$9 trillion is held in 401(k) plans.

We anticipate a surge in product development by target date funds and private fund sponsors. Specifically, we forecast growing interest in evergreen, semi-liquid funds (*e.g.*, interval funds or private fund structures that provide periodic liquidity) as the most likely type of investment option utilized by these plan sponsors in their target date mutual funds. For plan sponsors using collective investment trusts rather than mutual funds in their 401(k) lineups, alternative asset sponsors may also want to set up a collective investment trust that would invest a significant portion of its assets into an interval fund and/or potentially other liquid and/or semi-liquid funds, including private fund structures. Further, consistent with market activity over the past several months, we would expect to see more announcements of joint ventures or cooperation arrangements between plan sponsors and alternative asset managers to design jointly asset allocation funds with private markets exposure. Ultimately, market reactions will depend on the contours of the DOL and SEC regulatory actions in response to the Executive Order and the reactions of 401(k) plan fiduciaries. In that regard, formal rulemaking by the DOL, including the

¹ Democratizing Access to Alternative Assets for 401(k) Investors – The White House (Aug. 7, 2025), available [here](#).

issuance of a safe harbor, is likely to be more impactful than DOL guidance in advancing the aims of the Executive Order to encourage plan fiduciaries and sponsors to take advantage of alternative investment opportunities.

Background

401(k) plans typically offer a lineup of investment options into which plan participants can direct the investment of their contributions. Most (but not all) of these investment options are commingled funds, such as target date funds, which are structured as either collective investment trusts or registered investment companies. A plan committee or third-party consultant or adviser usually acts as the fiduciary responsible for populating the plan's lineup of investment options.

To date, plan fiduciaries have been reluctant to offer investment options that have material allocations to alternative assets in their 401(k) plan lineups due to uncertainty regarding fiduciary responsibilities and liability under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). This reluctance stems from perceptions regarding illiquidity, risk of loss, fee structures, lack of publicly available information, and the attendant potential liability to plan fiduciaries surrounding many of these alternative asset classes. Additionally, guidance issued by the DOL over the past five years on this topic (as described below) has fluctuated based on the prevailing political party in office, increasing the uncertainty and reluctance of plan fiduciaries to provide participants with opportunities to invest in private market alternatives.

2020 TRUMP INFORMATION LETTER

On June 3, 2020, the DOL under the first Trump Administration issued an information letter (the "2020 Letter")² seeking to clarify that fiduciaries of individual account plans (such as 401(k) plans) could include alternatives as a modest component of a professionally managed, diversified investment option (*e.g.*, a target date fund, target risk fund, or balanced fund) (a "Managed Asset Allocation Fund").³ The 2020 Letter proved to be a significant first step toward opening the doors of private market opportunities to 401(k) plan participants, providing them with access to the universe of alternative investment options that have long been regarded for their greater diversification and potential to produce higher risk-adjusted returns.

Specifically, the 2020 Letter reiterated that ERISA does not prohibit plan fiduciaries from including an allocation to private markets as a part of a larger Managed Asset Allocation Fund and, in fact, provided a useful framework for plan fiduciaries to consider when evaluating the prudence of alternative investments. To provide further comfort to plan fiduciaries when considering alternative asset classes, the 2020 Letter described specific

² U.S. DEPARTMENT OF LABOR, *Information Letter* (Jun. 3, 2020), available [here](#).

³ The 2020 Letter does not address the possibility of offering 401(k) participants the ability to directly invest in private markets investments (*e.g.*, a private fund or private fund-of-funds).

structuring alternatives for a Managed Asset Allocation Fund with a private markets component that could be utilized.⁴

The 2020 Letter outlined various factors that would demonstrate that a plan fiduciary has properly selected a Managed Asset Allocation Fund⁵ in compliance with its prudence obligations under ERISA:

- *Expenses.* A plan fiduciary should consider whether including alternatives as a component of a Managed Asset Allocation Fund provides appropriate diversification, taking into account the range of expected returns after fees (including, but not limited to, management fees and performance compensation) over a multi-year period.
- *Diversification.* A plan fiduciary should consider its specific plan population, and whether adding private markets diversification to the investment option makes sense in connection with the plan population. Specifically, a plan fiduciary would likely want to take into account the age of its participants, employee turnover rate, and contribution and withdrawal patterns. The longer return horizons typical of some alternative assets may be more appropriate for some participant populations than others, making target date funds a particularly attractive candidate to test the waters.
- *Liquidity.* Participants in a 401(k) plan can change investment options and/or withdraw from the plan upon certain life events. The 2020 Letter provides that a fiduciary may limit private markets investments in an investment option to a specified percentage to ensure that a Managed Asset Allocation Fund can satisfy redemptions or fund capital contributions to a private fund. The DOL suggested that a fiduciary may consider limiting illiquid investments to 15% of a registered open-end fund. Though the DOL did not require the plan fiduciary to adopt such a limitation, in our experience, solutions currently under consideration contemplate alternative asset allocations at less than 15%.⁶ In addition, products under consideration often include cash buffers to address the (daily) liquidity needs of the plans' participants.⁷
- *Valuation.* Because of the illiquid nature of private markets investments, valuation issues can arise, which are more acute in 401(k) plans because of their daily contribution and withdrawal requirements. The DOL

⁴ For example, a Managed Asset Allocation Fund that is designed as a target date fund could be structured as a separate account with an allocation to private funds where either the plan's investment committee or an outside investment manager is responsible for selecting the various alternatives investments to be included in the target date fund. Or, in other cases, the alternatives component of a Managed Asset Allocation Fund could simply be an investment by the Managed Asset Allocation Fund in a private fund-of-funds.

⁵ There is an open question as to whether alternative assets could be offered through a 401(k) plan's "brokerage window." A brokerage window, offered through a plan's recordkeeper, is a feature of some plans that allows participants access to vastly more investment options than those listed on the plan lineup. In limited instances, we are aware of cryptocurrency and environmental, social and governance (ESG) funds being offered through brokerage windows. In the case of a private fund, even if a recordkeeper were willing to include the fund in its brokerage window, relatively few participants of 401(k) plans qualify under the federal securities law as "qualified purchasers" or "accredited investors," thereby limiting the utility of plan participants' direct access to private funds via a plan's brokerage window.

⁶ In the case of a private fund that is relying on the exception under Section 3(c)(7) of the U.S. Investment Company Act of 1940, as amended, then such fund can comprise no more than 50% of the plan investment option's assets. This effectively acts as a hard cap on the plan's indirect private fund exposure. See SEC No-Action Letter to H.E.B. Investment & Retirement Plan and H.E. Butt Grocery Company (May 18, 2001), available [here](#).

⁷ A liquid buffer presents two issues: (1) drag on performance; and (2) potential for a negotiation sticking point over whether the alternative asset sponsor will be responsible for managing the buffer. If the buffer is cash/short-term instruments of the collective investment trust's assets, for example, then the management of those assets is subject to ERISA's requirements.

notes that the plan fiduciary could require that the private markets components included in the Managed Asset Allocation Fund be independently valued according to agreed-upon valuation procedures that satisfy the Financial Accounting Standards Board Accounting Standard Codification (ASC) 820, “Fair Value Measurements and Disclosures.”

- *Sophistication of Fiduciary.* The plan fiduciary should be sufficiently sophisticated with the prerequisite skills, knowledge, and experience to select, evaluate, and monitor Managed Asset Allocation Funds with private markets components. Alternatively, the plan fiduciary could delegate that responsibility to a sophisticated ERISA investment manager that acts as a fiduciary in selecting investments.
- *Adequacy of Participant Disclosure.* Alternatives investments are often complex and involve a certain level of inherent risk. The plan fiduciary must provide robust disclosure to plan participants such that they can understand the character and risks of these private markets investments.

2021 BIDEN SUPPLEMENTAL INFORMATION LETTER

In 2021, the DOL under the Biden Administration issued a “supplemental” information letter (the “2021 Letter”),⁸ which effectively cautioned plan fiduciaries against incorporating alternative assets into 401(k) plans. Notably, the DOL opted to issue the 2021 Letter in lieu of withdrawing the 2020 Letter, thereby allowing continued use of the fiduciary framework provided by the 2020 Letter, as described above. Nonetheless, the issuance of the 2021 Letter may have discouraged some plan fiduciaries who otherwise were considering the inclusion of alternatives in a 401(k) plan investment option.

MARKET DEVELOPMENTS

Despite the 2021 Letter, there have already been significant developments in bringing Managed Asset Allocation Funds with alternatives components to the 401(k) plan market. Fund sponsors can partner with third-party trustees that will act as ERISA fiduciaries to the plan’s investment option (*e.g.*, the collective investment trust that operates as the standalone investment option within the plan lineup). While alternatives exposure has become more common in customized target date funds structured for a specific plan sponsor, off-the-shelf products with alternatives components are still limited. Naturally, many of the plan sponsors actively considering incorporating indirect alternatives exposure into their 401(k) plans are those that sponsor defined benefit (*i.e.*, pension) plans, because these large and long-established plan sponsors already have familiarity with alternative assets, such as private funds, from their defined benefit plan investments.

2025 Trump Executive Order

The Executive Order establishes a new Federal policy, namely, “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

⁸ U.S. DEPARTMENT OF LABOR, *Supplement Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives* (Dec. 21, 2021), available [here](#).

the net risk-adjusted returns on their retirement assets.” To achieve this policy, the Executive Order targets “burdensome” litigation risk and “stifling” regulatory guidance that have largely impeded 401(k) plan participant access to alternative asset classes when investing under the plan.

To this end, the Executive Order provides the following directions to the DOL, each of which must be addressed by February 3, 2026:

- Re-examine the DOL’s past and present guidance regarding a fiduciary’s duties under Section 404 of ERISA in connection with making available to participants an asset allocation fund that includes investments in “alternative assets” (including considering whether to rescind the 2021 Letter).
- Clarify the DOL’s position on “alternative assets” and the appropriate fiduciary process associated with offering asset allocation funds containing investments in alternative assets under ERISA. This clarification must 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.
- Propose rules, regulations, 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.” Notably, the DOL may (but is not required to) provide one or more safe harbors as part of any such rules, regulations or guidance.⁹
- Consult, as appropriate, with 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.

The Executive Order separately mandates the SEC (in consultation with the DOL) to consider ways to facilitate access to investments in “alternative assets” by participants in 401(k) plans and other participant-directed defined-contribution retirement savings plans. While the extent of the anticipated SEC rulemaking or guidance remains to be determined, it may include (i) revisions to existing SEC regulations and guidance relating to accredited investor and qualified purchaser status (which is specifically noted in the Executive Order), (ii) a reassessment of disclosure requirements relating to acquired fund fees and expenses, which can distort the true cost of asset allocation funds through which individuals save for retirement and (iii) a reconsideration of the SEC’s liquidity rule, which categorically disadvantages allocations to alternative assets, even in funds that are designed to be held for the long term. The SEC has until February 3, 2026, to meet this directive.

The Executive Order defines “alternative assets” as “(i) private market investments, including direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the managers of such investments, if applicable, seek to take an active role in the management of such

⁹ The contemplated safe harbor would likely require the adoption of a formal regulation. We anticipate that the safe harbor would be narrow in scope and would provide protection to plan fiduciaries when selecting a Managed Asset Allocation Fund with an alternatives component, provided certain concrete steps are followed, potentially including enhanced disclosure and monitoring requirements.

companies; (ii) direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate; (iii) holdings in actively managed investment vehicles that are investing in digital assets; (iv) direct and indirect investments in commodities; (v) direct and indirect interests in projects financing infrastructure development; and (vi) lifetime income investment strategies including longevity risk-sharing pools.”

The upshot of the Executive Order is that it is likely to increase the percentage of target date funds and managed accounts that are allocated to alternative assets. If the DOL decides to issue a safe harbor, it would likely need at least six months to reach final regulation form. The expectation is that, in the near term, the DOL will rescind the 2021 Letter and encourage continued reliance on the 2020 Letter while contemplating a safe harbor rule. As noted above, to effectuate fully the aims of the Executive Order, formal regulation is likely to be more impactful than further guidance. Rule-making is more likely than guidance to make plan fiduciaries and sponsors comfortable, particularly given the back-and-forth guidance under prior administrations. Courts also are more likely to respect a formal rule, mitigating the risk of litigation uncertainty.

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