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Crypto In, ESG Out, and Private Equity Ascendant: Federal Guidance and a Circuit Court Decision Reveal Changing Landscape for 401(k) Plans and ERISA Fiduciaries

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Over the last decade, “alternative investments” (including cryptocurrency and private equity) have attracted increased interest from ERISA[1] investors. But these investments have not been available to 401(k) plans except in select instances. That may be changing.

In late May, the Ninth Circuit Court of Appeals issued an opinion affirming the dismissal of claims alleging that the decision to allow 401(k) plan participants to invest in private equity and hedge funds violated ERISA. The decision coincided with actions taken by the Department of Labor (the “DOL”) to rescind existing guidance disfavoring the inclusion of cryptocurrency in 401(k) plans as well as prior guidance that permitted the consideration of “ESG” factors (discussed below) in selecting ERISA plan investments. The DOL has also signaled that it is exploring new guidance broadening the availability of private equity investments in 401(k) plans. Together, these developments

[1] The Employee Retirement Income Security Act of 1974, as amended.

reflect a notable change in how investment decisions involving 401(k) plans and other ERISA plans may be scrutinized by regulators and the courts in the near future.

Background

Under ERISA, plan fiduciaries (the individuals responsible for making investment decisions for ERISA plans) are held to among the highest standards of conduct under federal law. In particular, ERISA fiduciaries are required to satisfy a "duty of loyalty" (the duty to act solely in the best interests of plan participants) and a "duty of prudence" (the duty to act with the same care and diligence that a reasonably prudent person would exercise in the same context). Importantly, determining whether a fiduciary has fulfilled these duties requires a careful analysis of the fiduciary's methods and processes, not simply investment results. Against this backdrop, many alternative investments and digital assets have been less prevalent in 401(k) plans than in the individual investment market.

Rescission of Prior ESG Guidance

In 2022, the DOL promulgated a regulation permitting ERISA plan fiduciaries to consider environmental, social, and governance ("ESG") factors in investment decisions. The regulation acknowledged that such factors may be relevant to fiduciaries' investment risk-and-return analyses. While the 2022 regulation neither required nor incentivized the consideration of ESG factors in ERISA plan investments, it allowed these factors to be considered when material to enhancing returns or reducing risk and permitted the factors to be used as "tie-breakers" for competing investments that would "equally serve" the interests of ERISA plan participants. The regulation thus linked ESG factors to ERISA's twin duties of prudence and loyalty: if a reasonably diligent and careful person would consider ESG factors to have a material impact on an investment risk-and-return analysis and would not subordinate the economic interests of ERISA plan participants to noneconomic considerations, then ERISA fiduciaries may do the same. However, the current DOL has made clear that it does not hold the same position.

On May 28, 2025, the DOL gave an early indication of where it intends to move. Specifically, the government filed a status report in a protracted lawsuit involving the current ESG regulation, declaring that it will no longer defend the regulation and will rescind and replace it as part of its Spring Regulatory Agenda. Under the Administrative Procedure Act, complete Rescission of the regulation requires notice-and-comment rulemaking, which has not yet occurred. Such proposed rulemaking is likely to prohibit outright—or at least to discourage strongly—the use of ESG factors in ERISA plan investment risk-and-return analyses, even as "tie-breakers."

Rescission of Prior Crypto Guidance

Also in 2022, the DOL issued guidance regarding ERISA plan investments in cryptocurrency. The guidance urged fiduciaries to "exercise extreme care" when considering whether to add cryptocurrency options to 401(k) plan investment menus. The DOL's rationale was based on concerns regarding price volatility, lack of informational transparency, and risk of losing cryptocurrency passwords (locking customers out of their accounts permanently). Historically, ERISA and the DOL gave deference to plan fiduciaries to make investment decisions using a totalityof-the-circumstances approach, and did not issue guidance allowing or prohibiting investments in any particular asset class. However, the 2022 cryptocurrency guidance departed from this investment-neutral stance by suggesting that *any* investment in digital assets by 401(k) plans could violate ERISA fiduciaries' duty of prudence. Though this guidance did not have the force of law or include specific penalties, it made clear that ERISA fiduciaries faced investigative action if they chose to include cryptocurrency investments in 401(k) plans.

The current DOL has rescinded its 2022 "extreme care" guidance, in another break from existing ERISA guidance. In doing so, the DOL notes that it considers the discouragement of digital asset investing in 401(k) plans to be a significant and improper regulatory overreach. Thus, rather than steering 401(k) plan fiduciaries away from cryptocurrency and other digital asset investments, the current DOL has returned investment discretion to such fiduciaries by neither prohibiting nor expressly encouraging investments in these products. Importantly, while the DOL's new stance regarding digital assets may signify how it would view such investments, the agency's position will not insulate fiduciaries from employee claims or other private actions under ERISA's fiduciary duty and prohibited transaction provisions.

Additional Ongoing Deregulatory Efforts

In addition to the recent changes noted above, on July 1, 2025, the DOL rescinded a series of regulations that it described as "obsolete," in an effort to streamline the rules applicable to employers and plan fiduciaries. The first final rule rescinds regulations for insurance policies issued to retirement plans and insurers established on or before December 31,1998, that outline which assets of an insurance company issuing a "guaranteed benefit policy" are considered plan assets under ERISA. In its Rescission, the DOL said it was "not likely" that any impacted plan contracts remain in place, such that the prior regulation "no longer serves any useful purpose." The second final rule acts to repeal three interpretive bulletins issued following the original enactment of ERISA in 1974. These bulletins included guidance on certain prohibited transactions, the advancement of funds to plan fiduciaries intended to cover plan expenses, and jurisdiction where parallel regulations exist under both the DOL and the Internal Revenue Service. The DOL stated these bulletins are "no longer needed" due to subsequent guidance and regulations on the same issues. The third final rule issued by the DOL rescinds a safe harbor rule issued in 2008 for the selection of annuity providers by individual retirement account plans covered by Title I of ERISA. In the final rule, the DOL takes the position that a "more streamlined" but substantially similar safe harbor was put in place under the SECURE Act, enacted by Congress in 2019.

While these three final rules, in and of themselves, do not represent a significant policy shift, they further signal the priority of deregulation at the federal level. In fact, in a July 1, 2025 news release, the DOL indicated it will make "aggressive deregulatory efforts" going forward, including 63 specific deregulatory items, with further details forthcoming.

Increased Interest in Private Equity Investment

Even as the prominence of private equity has grown significantly over the last two decades, investment opportunities in these vehicles have remained limited in 401(k) plans due to their more complex fee structure and longer time horizons, among other reasons. Advocates who favor broadening the availability of private equity investments to 401(k) plan participants argue that such private market investments provide greater diversification to a 401(k) plan's investment portfolio and the potential for higher returns than those typically achieved in public markets. Coinciding with the current DOL's more permissive stance on the investment of digital assets in 401(k) plans, there is now an increased push for the DOL to issue guidance that would broaden the opportunity for private equity investments in 401(k) plans.

In 2020, the DOL received an inquiry regarding its views on the inclusion of private equity funds as investment alternatives in 401(k) plans. In response, on June 3, 2020, the DOL issued an Information Letter intended to clarify its position on the ERISA considerations associated with this issue. The Information Letter noted that fiduciaries could, under certain conditions, offer an asset allocation fund with a private equity component without violating ERISA. But, given what the DOL viewed as potentially higher risks associated with private equity investments (as compared to publicly traded investments), it urged fiduciaries to act cautiously and analyze the risks and rewards of offering private equity investments in 401(k) plans. Further, the Information Letter's guidance was limited to private equity in the context of diversified investment vehicles (such as target date funds) and did not make allowance for private equity as a stand-alone investment option in 401(k) plan investment menus.

The DOL clarified its 2020 Information Letter with a supplementary statement on December 21, 2021, also addressing the inclusion of private equity funds in individual account plans (including 401(k) plans). Expanding on the 2020 Information Letter, the DOL reiterated that ERISA fiduciaries who include private equity investment options must continue to prudently select and monitor these investments made available to participants in individual account plans, taking into account the unique needs of the plan's participants and beneficiaries, and relying on the expertise of qualified asset managers where appropriate. And, like the 2020 Information Letter, the DOL's 2021 supplementary statement limited the inclusion of private equity to target date funds and other similar asset allocation vehicles for 401(k) plans. Taken together with the 2020 Information Letter, the DOL's guidance to date indicates that an ERISA fiduciary who decides to include private equity investments in a 401(k) plan or other individual account plan must possess the requisite expertise to responsibly manage these alternative investments, in order to satisfy the fiduciary's duty of prudence under ERISA. But changes may be coming.

As of June 2025, reporting suggests that there is renewed interest at the federal level to consider avenues to do just that. The Securities and Exchange Commission has also indicated that it may reconsider rules limiting who can invest in private equity funds, writ large. While these reported intentions have not yet resulted in tangible policy changes, they reflect a growing interest in expanding alternative investment options for 401(k) plans and a larger push to allow participants to exercise greater decision-making power in choosing their retirement investments.

The Ninth Circuit Decision in *Anderson v. Intel*

On May 22, 2025, in *Anderson v. Intel*,[2] the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's decision dismissing allegations that the trustees of Intel Corporation's proprietary retirement funds breached their ERISA fiduciary duties of prudence and loyalty. Specifically, Intel's customized 401(k) plan offered hedge funds and private equity funds as part of its larger menu of investments, along with traditional stocks and bonds. The company disclosed these investments to its participants, explaining that the offerings endeavored to decrease volatility but risked performing less favorably than equity-heavy funds during rising financial markets.

The case was brought by participants in the Intel 401(k) plan alleging that the plan trustees' decision to include hedge funds and private equity funds in the plan's investment lineup "drastically departed from prevailing standards of professional asset managers." The plaintiffs alleged further that doing so violated the trustees' ERISA duty of prudence by breaking from what a reasonably prudent person would do under the same investment scenario and violated the trustees' ERISA duty of loyalty by steering the plan's assets into companies in which the trustees had conflicts of interest. The Court of Appeals was unconvinced by the plaintiffs' reasoning and affirmed the lower court's dismissal for failure to sufficiently state claims for either breach.

In its opinion, the court emphasized that ERISA's duty of prudence is evaluated prospectively—based on investment methods actually employed by the fiduciary—rather than retrospectively by analyzing the results of the investment. It then held that a plaintiff that asks the court to draw an inference of imprudent methods based on investment results must also provide a sound basis for comparison of investments with similar objectives. The court determined that the plaintiffs failed to provide an adequate comparison in support of their breach of duty of prudence claim. The court also rejected the plaintiffs' per se challenge to including hedge funds and private equity in a 401(k) plan's menu of investment options as inherently too risky to be prudent. The court reasoned that the duty of prudence is not assessed on an investment-by-investment basis but instead by looking at the portfolio as a whole. The court also affirmed dismissal of the plaintiffs' ERISA duty of loyalty claim. In doing so, the court found that the plaintiffs alleged only *potential* conflicts of interest on the part of the plan's trustees and reasoned that such potential conflicts of interest do not, in and of themselves, automatically violate ERISA's duty of loyalty. Specifically, potential or even incidental benefits to fiduciaries as a result of their plan investments do not, without more, establish a plausible claim for breach of the duty of loyalty.

Writing in a separate concurrence, Circuit Judge Berzon wrote that ERISA duty of prudence claims require a comparison between the defendant ERISA fiduciary and the hypothetical "prudent man" contemplated by ERISA, which comparison does not itself require additional facts to survive a motion to dismiss. That is, though fact-to-fact comparisons of different plans are often considered the strongest method for plaintiffs who wish to state a fiduciary breach claim under ERISA, such factual comparisons are not explicitly required by ERISA's statutory language. The concurrence also suggested that some investment methods simply could be too risky to be prudent under *any*

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2 *Winston Anderson, et al. v. Intel Corporation Investment Policy Committee, et al.*, No. 22-16268 (May 22. 2025).

circumstances (using lottery tickets as an example) but did not suggest that private equity and hedge fund investments fall into that category.

Importantly, while the Ninth Circuit's decision addresses only the pleading requirements to state a claim for relief under ERISA, the decision reflects a reluctance to establish a per se rule against ERISA fiduciaries including certain investments in private equity funds and hedge funds in a 401(k) plan's investment options. Ultimately, ERISA fiduciaries have discretion to consider a range of relevant facts and circumstances in their investment decisions, including in private equity funds and hedge funds.

Key Takeaways

While the DOL's rollback of prior ERISA guidance (and its exploration of issuing new guidance) is not connected directly to the *Anderson* decision, the combination of these developments may signal a less-restrictive regulatory investment environment for ERISA plan fiduciaries. However, that flexibility may be constrained somewhat by the current DOL's less-ESG friendly outlook. Thus, while the trend appears to be moving in a more permissive direction for ERISA fiduciaries—including plan sponsors, plan administrators, and investment managers—considering new investment approaches in light of these developments, plan fiduciaries and investment professionals must adhere to their ERISA fiduciary obligations in all instances and should continue to monitor new regulatory developments in this area.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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