

CLIENT ALERT

New Executive Order Lays the Groundwork for ERISA 401(k) Plan Investment in Private Equity and Other Alternative Assets

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On August 7, 2025, after months of anticipation by investors and financial service providers alike, the White House issued an executive order entitled “[Democratizing Access to Alternative Assets for 401\(k\) Investors](#)” (the “Order”). The Order represents a meaningful shift in policy priorities under the U.S. Employee Retirement Income Security Act of 1974, as amended (“ERISA”), by directing certain federal agencies to review and, if appropriate, to take formal regulatory steps to expand the ability of 401(k) and other defined contribution retirement plan participants to invest in private equity and other alternative investments.¹

Specifically, the Order directs the Department of Labor (the “DOL”), the Securities and Exchange Commission (the “SEC”), and the Department of Treasury (the “Treasury”) to review existing guidance, rules and regulations and to

¹ While this client alert is primarily focused on the implications of expanded investment opportunities in private equity and other kinds of financial instruments that are not traded on public exchanges, the Order identifies a range of alternative assets for the DOL to consider in its review. These additional types of alternative assets include real estate and related debt instruments, commodities, infrastructure, digital assets, and certain lifetime income products.

take appropriate actions to promote the White House's goal of expanding alternative asset investment opportunities for such ERISA plans. The Order does not itself change existing law but instead makes clear that these agencies should use the tools in their power to consider doing so. As noted below, many questions remain, but the ultimate changes that result from the Order could be far-reaching for plan sponsors, fiduciaries and asset managers and could create opportunities for investments in private equity and other alternative assets by ERISA 401(k) plans.

Stated Policy Goals

The Order contains three sections ("Purpose," "Policy," and "Democratizing Access to Alternative Investments") but it can be understood as equal parts policy statement and agency directive. With respect to the policy statement, the Order notes that, even though more than 90 million people participate in employer-sponsored defined contribution plans, the "vast majority of participants" in these plans lack the opportunity to invest in alternative asset investments, unlike "many wealthy Americans and government workers who participate in public pension plans." In other words, the Order aims to create parity between traditional ERISA defined benefit pension plans and ERISA 401(k) plans and similar individual account plans with respect to their access to these kinds of assets.

While not stated in the Order, there are practical reasons for the difference in investments owned by defined benefit plans, on the one hand, and defined contribution plans, on the other. Namely, the assets in a defined benefit plan are usually comprised entirely of employer contributions, while defined contribution plans typically contain a combination of employer and employee contributions. This matters both because, in a defined benefit plan, the retirement benefit liability is borne by the employer, and the amount of each individual participant's benefit amount is guaranteed regardless of any underperforming investments in the plan. However, in a 401(k) plan or other participant-directed plan, the risks associated with any investments are ultimately borne by the participant individually, meaning the stakes of each investment are significant. Similarly, lawsuits alleging violation of ERISA's fiduciary duties and prohibited transaction rules are more common in defined contribution plans than in defined benefit plans.

This distinction notwithstanding, the Order identifies the following broad policy objective:

"It is the policy of the United 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."

As the Order notes, the DOL took preliminary steps toward expanding access to private equity investments through an [Information Letter issued on June 3, 2020](#). Importantly, this June 2020 guidance was subsequently followed by a ["Supplement Statement" issued by the DOL on December 21, 2021](#) under a different administration. The 2021 Supplement Statement, while leaving the 2020 Information Letter intact, was less encouraging of private equity in 401(k) plans and encouraged plan fiduciaries to be cautious in making such investments. The Order explicitly directs the DOL to review the 2021 Supplement and to expand upon the 2020 guidance at the agency level.

Key Agency Directives

Against the backdrop of these policy goals, the Order acknowledges the DOL's prior sub-regulatory guidance and directs the agency to clarify its positions regarding application of ERISA's fiduciary duties to alternative assets within 180 days of the issuance of the Order. The DOL wasted no time in examining these pieces of guidance. Less than one week after the Order was issued, the DOL rescinded the December 2021 Supplement Statement, noting in its rescission statement that the Supplement Statement, which encouraged caution by plan fiduciaries, had a chilling effect on alternative asset investment by 401(k) plans.

The Order also directs the DOL to consider various mechanisms, including new guidance, safe harbors, and clarifications, that align ERISA's fiduciary standards with broader access to alternative investments. Though specific guidance has not yet been issued, the DOL's role in squaring ERISA's particularly onerous duties of prudence and loyalty is a critical component of this policy directive. Thus, any forthcoming DOL guidance could address topics such as the processes used for the prudent selection of investments, rules governing investment diversification, how assets outside of the public market should be valued, and how investment liquidity should be factored into investment decisions.

Further, the Order directs the SEC, in coordination with the DOL and the Treasury, to review regulations that govern access to certain investments—particularly “accredited investor” and “qualified purchaser” thresholds. Unlike the directives to the DOL, the portion of the Order directing SEC action does not contain a particular timeline nor does it provide the same specificity in the kinds of changes anticipated. As with the DOL, the kinds of specific policy changes proposed by the SEC remain to be seen, though potential updates could include opening asset classes to defined contribution plan participants that are currently limited to high-net-worth and institutional investors, including defined benefit pension plans.

Remaining Questions

As noted above, while the Order makes its policy goals clear, it leaves much to be determined on an implementation level. As such, any meaningful analysis of the new regulatory landscape applicable to ERISA 401(k) plan fiduciaries and financial services providers will ultimately depend on the kinds of guidance and/or rulemaking that come from these directives. Many questions remain, such as:

- (i) What new forms of guidance—if any—will the DOL issue that clarify the application of ERISA fiduciary duties to alternative investments;
- (ii) Whether the DOL will promulgate formal regulations that are subject to the notice-and-comment rulemaking process or whether the DOL will rely on sub-regulatory guidance that is not subject to those formalities;

- (iii) Whether the SEC will modify existing guidance and rules that govern 401(k) plan participant access to private equity and other alternative asset products; and
- (iv) Whether these and other potential changes will create opportunities for private equity and other alternative asset products to be offered directly to 401(k) plans alongside other asset class options or whether such products will be limited to inclusion in broader asset allocation funds or target date funds, as is the case today.

Further, the Order specifically notes that litigation risk and regulatory uncertainty may have deterred plan sponsors from offering new products. The Order directs the DOL to explore measures that reduce ERISA fiduciary liability exposure, which raises the question of whether some kind of broader ERISA litigation reform at the congressional level will take place in conjunction with action at the agency level. The extent to which plan sponsors and fiduciaries are comfortable offering private equity and other alternative investments to 401(k) plan participants may depend on whether such ERISA litigation reform gains traction.

Likewise, much of the legal framework at issue in the Order turns on the statutory language contained in ERISA itself, which is the starting place for the DOL's interpretive rules, regulations and guidance. Ultimately, any long-term changes to the fundamental notions of ERISA prudence and loyalty, and ERISA's far-reaching prohibited transaction rules, as they are currently understood, will have to come not from the DOL, but from Congress. As a statute now more than a half century on the books, litigation challenges are likely to follow any Executive Branch attempts to revise core concepts of ERISA occurring outside of the legislative process.

How the agencies will respond to the Order on a long-term basis is not yet clear. As of now, there are more questions than answers. Nonetheless, this is the first step towards potentially meaningful changes to existing law and guidance that could create important opportunities for ERISA plan sponsors and asset managers alike. Willkie has an array of subject matter experts in the areas relevant to the Order, including ERISA, asset management (including securities law and private funds), digital assets, and corporate. We are watching developments in this area closely.

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