



## New Executive Order Directs Agencies to Facilitate 401(k) Access to Private Equity, Cryptocurrency, and Other Alternative Investment

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### INTRODUCTION

On August 7, President Trump signed an executive order (the **EO**, White House fact sheet [here](#)) directing the Department of Labor (**DOL**), the Securities and Exchange Commission (**SEC**), and the Department of the Treasury (**Treasury**) (including the Internal Revenue Service (**IRS**)) to review and revise guidance and regulations to facilitate the inclusion of alternative investments—such as private equity, cryptocurrency, and other nontraditional assets—in participant-directed 401(k) defined contribution (**DC**) retirement plans. The DOL also put out a statement heralding the EO.

The EO signals continued interest in expanding investment options for DC plan participants, but any changes will depend on future regulatory action by the DOL, SEC, and IRS. The EO follows action in May of this year by the DOL to rescind its 2022 guidance that discouraged fiduciaries from including cryptocurrency options in DC plans.

Defined benefit retirement plans have long included private equity, real estate, venture capital, and other alternative assets in their investment mixes. However, introducing these assets into DC plans with daily valuation and participant-directed investments raises both practical and fiduciary issues.

### BACKGROUND

In June 2020, toward the end of the first Trump administration, the DOL issued an Information Letter concluding that a fiduciary would *not* violate ERISA's duties of prudence and loyalty *solely because* it made a professionally managed asset-allocation fund (e.g., a target-date, target-risk, or balanced fund) with a private-equity sleeve available as a designated investment alternative under a participant-directed DC plan. The Information Letter emphasized some of the benefits of private equity, but it also stressed that fiduciaries must perform a rigorous evaluation—examining the manager's experience, the strategy's liquidity features, valuation practices, and fee structure, and the demographics and needs of the participant population—before selecting such an option and must monitor it thereafter.

In 2021, the Biden-era DOL released a "Supplement" cautioning that the 2020 Information Letter should not be read as a blanket endorsement of private equity in DC plans. The Supplement went on to provide some cautionary guidance.

## NEW GUIDANCE

Echoing the 2020 Information Letter, the EO directs the DOL to review fiduciary guidance on alternative asset investments in DC plans and to clarify the DOL's position on alternative assets and fiduciary process for offering funds with exposure to such assets. The following asset classes are included in the directive:

- Private market investments, including private equity, debt, and other financial instruments.
- Interests in real estate.
- Actively managed investment vehicles investing in digital assets.
- Commodities.
- Interests in projects financing infrastructure development.
- Lifetime income investment strategies, including longevity risk-sharing pools.

The EO also directs the Secretary of the DOL to consult with her counterparts at Treasury, the SEC, and other federal regulators to determine whether parallel regulatory changes should be made at those agencies. It also instructs the SEC to review applicable regulations and guidance to enhance participant-directed DC plans' access to alternative assets.

As a result, any actual changes resulting from the EO will take time as the various agencies issue new guidance.

## ANALYSIS

Alternative asset managers are closely watching developments in hopes of accessing the approximately \$12.5 trillion DC plan market. Several large providers recently announced plans to offer investment options that include private equity, private credit, and private real estate.

Despite the potential benefits of alternative assets (e.g., potential for increased returns due to illiquidity premium and increased diversification), including alternative assets in DC plans presents issues for plan fiduciaries. Many of the alternative investment options include greater complexity, higher fees, less liquidity, less disclosure, and more risk than publicly traded investments. These issues have led to congressional inquiries as well as concerns from plan sponsors and fiduciaries about litigation risk.

Recently, the Ninth Circuit Court of Appeals affirmed dismissal of claims that fiduciaries breached their fiduciary duties by allocating portions of certain custom target-date and diversified funds to hedge funds and private equity investments. Plaintiffs argued that the allocations were imprudent because the funds underperformed standard equity-heavy funds and incurred higher fees. The Ninth Circuit rejected those arguments, reasoning that the plaintiff failed to compare these funds' performance to a "meaningful benchmark."

## WHAT PLAN FIDUCIARIES SHOULD DO NOW

As noted, it will take some time for the DOL and other agencies to issue more detailed guidance. As plan fiduciaries are approached by their recordkeepers and investment consultants about possibly adding alternative assets to their DC plans, they will want to consider the key elements of the 2020 Information Letter and the 2021 Supplement:

- Fiduciaries must perform a rigorous evaluation—examining the manager's experience, the strategy's liquidity features, valuation practices, and fee structure, and the demographics and needs of the participant population—before selecting such an option and must monitor it thereafter.
- Plan fiduciaries must possess—or hire—appropriate expertise to evaluate whether to invest in alternative investments. This can be particularly tricky for fiduciaries that do not already maintain a defined benefit plan with alternative investments.

Plan fiduciaries that are considering adding alternative assets to their DC plans should:

- Monitor forthcoming guidance from the DOL, SEC, and IRS before making plan changes involving alternative investments.
- Identify experts that can help plan fiduciaries assess whether these alternative assets are right for DC plan participants, and if so, who can help select and monitor alternative investments. For example, a growing number of DC plan fiduciaries are delegating the selection and monitoring of investment options to ERISA Section 3(38) investment managers, commonly referred to as Outsourced Chief Investment Officers (**OCIOs**). OCIOs may have the expertise and tools necessary to evaluate whether and in what capacity alternative assets are in the best interests of DC plan participants.
- Review the current Investment Policy Statement and governance frameworks to determine whether they need updating to address these new asset classes.
- Evaluate litigation risk carefully in light of recent court decisions and pending regulatory developments.

Please contact a member of the Winston & Strawn Employee Benefits & Executive Compensation Practice or your Winston relationship attorney for further information.

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