Executive Order Clears Path for Alternative Assets in 401(k) Plans

August 7, 2025

On August 7, 2025, President Trump signed an Executive Order (the "Executive Order") intended to democratize access to alternative assets for 401(k) plan investors. The Executive Order directs the Secretary of Labor (the "Secretary") to "seek to clarify the Department of Labor's position on alternative assets and the appropriate fiduciary process associated with offering asset allocation funds containing investments in alternative assets under ERISA." The Executive Order further provides that the "clarification must aim to 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."

As part of this clarification, the Executive Order instructs the Secretary to consider whether to rescind the Department of Labor's (the "DOL") December 2021 Supplemental Private Equity Statement (the "Supplement"), described in greater detail below.

The Executive Order further directs the Secretary to propose rules, regulations or guidance, including appropriately calibrated safe harbors, "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." In carrying out the Executive Order's directives, the Secretary is instructed to "prioritize actions that may curb ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants."

The Executive Order also directs the Secretary, as appropriate, to consult with the Secretary of the Treasury, the Securities and Exchange Commission and other federal regulators, and to make any appropriate parallel regulatory changes, to carry out the policy objectives stated in the Executive Order.

Summary of the Executive Order

The Executive Order declares:

> 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.

The Executive Order defines alternative assets to include six categories of investments:

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

In the Executive Order, the President observes that more than 90 million Americans participate in employer-sponsored defined contribution plans, but that a

> combination of regulatory overreach and encouragement of lawsuits filed by opportunistic trial lawyers have stifled investment innovation and largely relegated 401(k) and other defined-contribution retirement plan participants to asset classes whose returns lack the very same long-term

> net benefits allowed for and achieved by public pension plans and other institutional investors.

The Executive Order emphasizes that, in deciding whether to make investments inclusive of alternative assets available to such defined contribution plan participants, the fiduciaries of such plans "must carefully vet and consider all aspects of private offerings, including investment managers' capabilities, experiences and effectiveness managing alternative asset investments."

It further notes that, in issuing the June 2020 DOL information letter (the "PE Information Letter"), the prior Trump administration recognized that "prudent Federal action could encourage the proliferation of investment strategies under which a portion of retirement plan participants' interests are allocated to alternative assets, as is the case for institutional investors."

Prior Conflicting DOL Guidance

The DOL has twice previously addressed in sub-regulatory guidance whether private equity investments can be included within an asset allocation fund made available as an investment option in a participant-directed 401(k) plan in compliance with ERISA's fiduciary duties. Most practitioners believe that the current state of that facially contradictory guidance has had a chilling effect on the introduction of alternative assets as a component of an investment option for participants under 401(k) plans.

In June 2020, the DOL issued the PE Information Letter that concluded that fiduciaries that make such an investment option available after engaging in a detailed and deliberative process would satisfy their fiduciary obligations under ERISA. In our Debevoise Update on the PE Information Letter, which may be found here, we stated:

> The Department's guidance states unequivocally that a fiduciary that follows an objective, thorough and analytical process can, consistent with its ERISA fiduciary duties, offer 401(k) plan participants the opportunity to invest in private equity, with the objectives of allowing all participants to better diversify their portfolios, providing participants with longer investment horizons the opportunity to better align their investments to those horizons and offering all participants the opportunity for the superior net-after-fee returns realized by institutional investors, including defined benefit plans, from such investments. Moreover, the guidance explains how a fiduciary can conduct such a process consistent with ERISA's fiduciary duties and offers practical solutions on managing the

> liquidity constraints that are inherent in private equity. While not expressly addressed in the letter, which focused on investment products with a private equity component, the logic of the guidance could also be applied to the introduction of other forms of alternative investments into a multi-asset class fund, so long as the fiduciary tailors its analysis and evaluation of the risks unique to that category of investment.

In December 2021, the DOL issued the Supplement to the PE Information Letter "to ensure that plan fiduciaries do not expose plan participants and beneficiaries to unwarranted risks by misreading the [PE Information Letter] as saying that PE—as a component of a designated investment alternative—is generally appropriate for a typical 401(k) plan." While the stated purpose of the Supplement was to clarify that the DOL was not endorsing the introduction of private equity investments as a component of a 401(k) plan's investment options, the Supplement further noted:

> A plan-level fiduciary that has experience evaluating PE investments in a defined benefit pension plan to diversify investment risk may be suited to analyze these investments for a participant-directed individual account plan, particularly with the assistance of a qualified fiduciary investment adviser. *The Department cautions against application of the Information Letter outside of that context. Except in this minority of situations, plan-level fiduciaries of small, individual account plans are not likely suited to evaluate the use of PE investments in designated investment alternatives in individual account plans.*[1]

Our Debevoise Update on the Supplement can be found here.

The Impact of Litigation on Investment Choice

In recent years, numerous lawsuits have been filed with respect to individual account plans asserting violations by plan fiduciaries of their duties under Section 404 of ERISA. Among other things, these suits have alleged that the fiduciaries have selected investment options that charge excessive fees or underperform other available investment options, often by making comparisons to index funds that do not offer active investment management and accordingly have less risk mitigation and less diversification of investments. Unless these claims can be dismissed on the pleadings, these cases can subject the plan fiduciaries and/or the plan sponsors to substantial

[1] Emphasis added.

litigation expense and time-consuming and distracting due diligence, regardless of the ultimate merits of the claims.

A case that is illustrative of the burdens imposed on fiduciaries in addressing claims against a fiduciary predicated on choosing to introduce alternative assets as an investment option is that brought initially in 2019 against the fiduciaries of 401(k) plans sponsored by Intel Corporation.[2] The claim in that case alleged violations of ERISA's fiduciary duties related to the fiduciaries offering private investment fund alternatives not traditionally offered within a 401(k) plan as an investment choice under the Intel 401(k) plans. In May 2025, the Ninth Circuit Court of Appeals would appear to have finally resolved this litigation—after approximately six years of litigation in this case and 10 years from when the first action against the Intel fiduciaries was filed[3]—by affirming the district court's 2022 holding that the plaintiffs failed to plausibly allege a fiduciary breach under ERISA.

As we stated in our Debevoise Update on the Ninth Circuit's decision, which may be found here:

> The key takeaway from the courts' rulings in this litigation, and the correct answer under ERISA's fiduciary construct, is that there is no one-size-fits-all approach to asset allocation or investment options that can be made available in participant-directed defined contribution plans. The Intel plan fiduciaries made a thoughtful and deliberate decision to include private funds in the various investment options to dampen volatility and mitigate the risk of large losses during down periods in the broader debt and equity markets. The plaintiffs' efforts to compare the performance of these investments to funds with different investment objectives and risk mitigation strategies was a key factor in the lower court's dismissal—imprudence cannot be established with an apples-to-oranges comparison. The same reasoning applied to the allegations that investors in the Intel plans incurred higher fees. As with the performance allegations, the Ninth Circuit concluded that the fact that different kinds of funds with distinct objectives and approaches carried different fees did not in itself demonstrate imprudence where the reference funds did not seek to mitigate risk in a similar manner as the funds offered through Intel plans. In addition, the Ninth Circuit noted that Intel had disclosed the fact that,

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2 *Anderson v. Intel Corp. Inv. Policy Comm*., No. 22-16268 (9th Cir. May 22, 2025).

3 The case dismissed in the Ninth Circuit followed an earlier suit filed in 2015 that proceeded to the Supreme Court to determine when a claimant had actual "knowledge" for purposes of applying ERISA's statute of limitations. *Intel Corporation Investment Policy v. Sulyma*, 586 U.S. 178 (2020). Sulyma joined as a plaintiff in the action filed in 2019.

> given their broad diversification, the funds would not compare favorably with equity-heavy funds during bull markets.

While the case against the Intel fiduciaries establishes that challenges from claimants must focus on whether the fiduciaries fulfilled their fiduciary duties by following a prudent process in deciding to offer private investment fund alternatives to plan participants, most fiduciaries (and the plan sponsors that will have to fund any such litigation) likely will not have the appetite or resources to withstand the expense and disruption of such a multiyear litigation. The Wall Street Journal recently reported that plaintiff attorneys are actively preparing for litigation, anticipating that the introduction of private equity and other alternative assets into 401(k) plans will trigger new lawsuits based solely on the attributes of these investments (and regardless of whether the plan fiduciaries follow a prudent process as required by ERISA).

Intent of the Executive Order and Benefits of a Regulatory Safe Harbor

The Executive Order declares that it is the policy of the United States to provide every American preparing for retirement "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." Its recited objective is to "relieve the regulatory burdens and litigation risk that impede American workers' retirement accounts from achieving the competitive returns and asset diversification necessary to secure a dignified, comfortable retirement."

Although the Executive Order permits the DOL to address these issues as the Secretary determines to be appropriate, including by issuing sub-regulatory guidance, it is highly unlikely that such guidance would achieve the objectives of the Executive Order. A rule, in contrast to guidance, would be the strongest action that could be undertaken by the DOL and would reflect a comprehensive notice-and-comment period. Courts would also be more likely to give weight to a regulation than sub-regulatory guidance. Accordingly, plan fiduciaries would be more confident in relying on a rule providing for a safe harbor than guidance on steps that could be taken to limit liability.

Sub-regulatory action can easily be revoked or replaced upon a change in administrations, as was the case when the DOL issued the Supplement and essentially withdrew and reversed the guidance provided in the PE Information Letter. The Supplement stated that it was issued in response to comments from certain stakeholders, none of which were identified to the public. Fear that a similar fate would await any sub-regulatory guidance issued in the second Trump administration would forestall plan fiduciaries from taking any significant actions in reliance on such guidance. A regulation can also be rescinded, but only with an appropriate process and opportunity for comment, and presumably with appropriate relief for those who have acted in reliance on the prior regulation.

Based on public commentary that has been reported following speculation that the Executive Order would be issued, there will be many constituencies seeking to comment on this issue and interested in any action that the DOL decides to take. Undertaking a regulatory process would set forth a well-defined path to provide all interested parties an equal opportunity to present their views in a public forum. It would afford an opportunity for any valid concerns regarding the initiative to be evaluated and appropriately addressed. Using the guidance of the PE Information Letter as the foundation for constructing such a safe harbor regulation would provide such plan fiduciaries with appropriate comfort that the decision to add alternative assets into an investment option would likely not give rise to burdensome litigation. The PE Information Letter addressed an asset allocation fund inclusive of alternative assets selected by professional asset managers with the objective of offering participants the opportunity to seek enhanced returns and access to greater diversification of their investments. The PE Information Letter suggested appropriate guardrails to assure that such alternative assets would represent only a minority of the fund's investments to enable the allocation fund to address participants' benefit responsive needs. Specifically, the fund contemplated by the PE Information Letter

> would be offered as part of a multi-asset class vehicle structured as a custom target date, target risk, or balanced fund. Each asset allocation fund with a private equity component would have a sufficient pool of assets to diversify the exposure of plan participants to the private equity investments with other investments in a range of asset classes with different risk and return characteristics and investment horizons. The asset allocation fund's overall exposure to private equity investments would have a target allocation that does not exceed a specified portion of the fund's assets, with the remainder of the fund's portfolio invested in publicly traded securities or other liquid investments with readily ascertainable market values. In this manner the fund would be designed to provide sufficient liquidity to participants to take benefit distributions and direct exchanges among the plan's investment line-up in accordance with plan terms and to meet periodic capital calls on private equity investments.

The PE Information Letter expressly recognized that adding PE investments within an asset allocation fund offered as a 401(k) plan investment option presented different risks and benefits relative to typical public market investment options. The letter specifically identified several considerations and factors, including the long-term horizon of such investments, the absence of public market valuations, higher fees and more complex structures, that the plan fiduciaries considering an investment alternative including such assets had to evaluate in making that decision. It then stated that, following such evaluation, the plan fiduciaries would have to "make a considered decision about whether the characteristics of the investment alternative align with the plan's characteristics and needs of plan participants, taking into account, among other things, the investment alternative's investment allocation and strategy, fees and other expenses, and the nature and duration of any liquidity restrictions, the participants' ability to access funds in their accounts (e.g., loans and distributions when employees separate from service with the sponsoring employer), and their ability to change investment selections on a potentially frequent basis." The Executive Order is consistent with the PE Information Letter, which references a determination by the plan fiduciary that the investment manager has "the capabilities, experience, and stability to manage an asset allocation fund that includes private equity investments."

Accordingly, to fulfill the intent of the Executive Order, we believe that the DOL would be well advised to issue a safe harbor regulation that builds upon the thoughtful and thorough guidance it initially provided in the PE Information Letter. Among other things, that guidance directed the plan fiduciaries considering adding private equity investments, or other alternative assets, as part of an investment option available to participants:

- to evaluate the expected net-after-fees returns to be derived from such investments;
- to confirm that the plan fiduciaries either have the experience themselves, or engage advisors who have the experience, to properly evaluate the risks and benefits of including the alternative assets in the applicable investment option;
- to evaluate the capabilities, experience and stability of the managers making the investments on behalf of the asset allocation fund;
- to assure adequate liquidity to address participants' benefit responsive needs; and
- to assure that there were independent valuations of the alternative assets using recognized valuation processes.

Having the DOL issue such a safe harbor regulation would (i) reverse the opposite inference created by the Supplement, (ii) establish reasonable and appropriate protections for the 401(k) participants who elect to direct the investment of their accounts into such a fund and (iii) reduce the specter of unwarranted litigation by properly focusing any challenge to the fiduciaries' decision on the process that they undertook in reaching their judgement, rather than cherry-picked comparisons to investments with materially different characteristics and materially different risk-adjusted target returns. A reasonable and appropriate safe harbor should also assure that the interests of participants are properly protected by identifying the factors that the plan fiduciaries should consider and evaluate, and what expertise they need to draw upon, to make the decision to add alternative assets to the plan's investment options. Consistent with the holding in the Ninth Circuit's decision in the *Intel* case, the safe harbor should also assure that any legal challenge to the fiduciaries' decisions would be focused on the quality of the process followed in making those decisions.

What Comes Next

The road to fulfilling the intent of the Executive Order, and in promulgating any new regulatory guidance, whether in the form of a safe harbor regulation or otherwise, will not be without obstacles. Any regulatory proposal must comply with the Administrative Procedure Act's notice-and-comment requirements. Accordingly, the Secretary will first publish a proposed rule, invite public comment—customarily for 60 days—and then consider those comments before issuing any final rule. It should be expected that those opposing this initiative will marshal their forces to submit numerous comments on any proposed regulation, regardless of the merits or thoughtfulness of the proposal.

Democratic opposition to this initiative, most notably from Senator Elizabeth Warren, has already emerged. Senator Warren recently challenged Empower's inclusion of private market investments in 401(k) plans, raising concerns about investor protections. Her detailed inquiries—and Empower's responses—preview key arguments likely to be raised during the comment period on any proposed regulation. It is unquestionable that Senator Warren's voice will grow louder, and will be joined by others, as the Secretary works toward implementing the directives of the Executive Order. However, the Secretary's efforts to provide a rule that achieves the objectives of the Executive Order would make available to plan participants "the very same long-term net benefits allowed for and achieved by public pension plans and other institutional investors."

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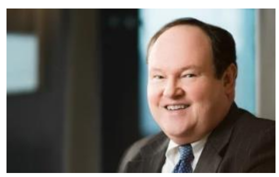

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