

EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION INFORMATION MEMO

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The Trump Private Equity Order: What Plan Fiduciaries Need to Know Now

Background

On Aug. 7, 2025, the president issued an executive order that may result in an expansion in the types of holdings common in 401(k), 403(b) and other defined contribution plans.

Generally, a plan fiduciary's decision to offer a designated investment alternative is subject to fiduciary duties enumerated in section 404 of ERISA. Thus, fiduciaries have duties to prudently select and monitor designated investment alternatives.

On June 3, 2020, during the first Trump administration, the U.S. Department of Labor (DOL) issued an information letter providing guidance on selecting investment alternatives featuring private equity investments. The letter stated that a “plan fiduciary of an individual account plan may offer an asset allocation fund with a private equity component.” However, the letter also noted important fiduciary concerns, including complexity and relatively higher fees associated with private equity investments.

The Biden administration further clouded the outlook for these types of investments by issuing a “Supplement Statement” in 2021 “to ensure that plan fiduciaries do not expose plan participants and beneficiaries to unwarranted risks.” The Supplement Statement not only reiterated concerns of the original 2020 letter but also highlighted a Securities and Exchange Commission “Risk Alert” addressing concerns with private equity investments, including conflicts of interest, fees and nonpublic information.

New policy and stated motivation

Simply put, the new executive order states that American retirement savers should have access to investments in alternative assets—more on what that means later—when a plan fiduciary determines that those investments would enhance net “risk-adjusted” returns. According to the order, this policy is intended to bring 401(k) and other defined contribution plan (e.g., 403(b)) participants to parity with participants in public plans and defined benefit plans by expanding access to the “long-term net benefits” of alternative assets.

Alternative assets

So, what are investments in alternative assets? The executive order provides a list, and while much coverage has focused on private equity and cryptocurrency, the order is much broader than that. The order also includes real estate, commodities, infrastructure financing and pooled longevity risk sharing (which is an interesting concept with a historical legacy worthy of a discussion all its own). With respect to cryptocurrency, the order refers to holdings in actively managed investment vehicles that hold cryptocurrencies, rather than the cryptocurrencies themselves.

What action does the order actually take?

The order does not simply allow fiduciaries of defined contribution plans to start offering investments in alternative assets. The ERISA fiduciary framework discussed above continues to apply. Instead, the order directs the DOL,

in consultation with the Department of the Treasury and the Securities and Exchange Commission, to revisit earlier guidance and issue new guidance.

First and foremost, the order directs the secretary of labor to reexamine all guidance on ERISA fiduciary duties with an eye to allowing investments in asset allocation funds that hold alternative assets. In particular, the order instructs the secretary of labor to consider whether to rescind the 2021 Supplement Statement discussed above.

Second, the order instructs the secretary to clarify the “fiduciary process” used to offer asset allocation funds that hold alternative assets. Here, the order shows some restraint by requiring the guidance to balance the likely higher cost of such investments with their possible benefits, including better returns and diversification. Further, the secretary should propose new rules or guidance on fiduciary duties owed to plan participants in deciding whether to offer asset allocation funds holding alternative assets. The order instructs the secretary of labor to prioritize actions that would reduce litigation constraining plan fiduciaries.

Finally, the order directs the Securities and Exchange Commission to consider ways to facilitate access to investments in alternative assets in 401(k) and other defined contribution plans. Again, this is meant to be accomplished through revisions to guidance and regulations. In particular, the order calls out the rules on accredited investors and qualified purchaser status.

Takeaways

This order walks a fine line between taking actions to eventually allow 401(k) and other defined contribution participants access to investments in alternative assets and the dual constraints of ERISA’s statutory fiduciary framework and policy concerns about exposing plan participants to undue risk. In other words, while it doesn’t open the floodgates for these types of investments, it does take substantive steps towards their availability.

Further, it will take time for the agencies to revise their guidance. The order sets a 180 day deadline, but if the DOL goes the traditional notice and comment rulemaking route, finalizing any rule will take longer than that.

Nothing in the order would require plan sponsors to offer investments in alternative assets in their defined contribution plans. Even imagining a future where such investments in alternative assets are common in defined contribution plans, a suit alleging underperformance for only offering traditional investments seems farfetched.

If you are a plan fiduciary considering offering investments in alternative assets, you should first monitor future agency guidance closely as the details will matter. Second, consider building relationships with advisors with the right competencies to evaluate the prudence of such investments. Different classes of alternative investments may necessitate different advisors. Finally, ensure that your decision making process is well thought out and well documented.

If you have questions about how to prepare for an expanded 401(k) investment landscape, contact [Gregory Katz](#), any attorney in the [employee benefits and executive compensation practice](#) or the attorney at Bond with whom you are regularly in contact.

