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President Trump Issues Executive Order to Allow for 401(k) Plans to Invest in Private Equity and Other Alternative Assets

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On August 7, 2025, President Trump issued a highly anticipated executive order (the EO), directing the U.S. Department of Labor (the DOL) to evaluate potential regulatory changes to broaden the investment options available to participants in defined contribution (DC) plans, such as 401(k) plans. In particular, the EO directs the DOL to consider what changes to the existing regulatory framework would be required to make alternative assets, including private equity, private credit, real estate and digital assets, available as investment options to DC plan participants. The order is seen as the first step toward easing legal and regulatory barriers that have historically limited such investments.

Background: The DOL's Shifting Regulatory Posture

The EO builds upon a June 3, 2020, information letter issued by the DOL under the first Trump administration, which stated that including a professionally managed, diversified fund option with a private equity component in a DC plan lineup could be consistent with a fiduciary's duties under the Employee Retirement Income Security Act of 1974, as amended (ERISA). While the 2020 letter did not break new legal ground, it provided assurance to plan fiduciaries that DC plan participants could be offered access to investments with private equity exposure, so long as the investment otherwise complied with ERISA's fiduciary standards.

However, the Biden administration subsequently narrowed this position. In December 2021, the DOL issued a supplemental statement clarifying that the 2020 letter should not be read as a regulatory endorsement of private equity in DC plans. The DOL emphasized the inherent complexities of alternative investments, including illiquidity,

longer investment horizons, reduced transparency and distinct regulatory treatment — characteristics that may pose unique risks for DC plan participants.

The Executive Order

The EO's stated purpose is to allow DC plan participants to access the potential growth and diversification opportunities associated with "alternative assets," which consist of direct and indirect interests in the following:

1. Private equity and private debt;
2. Real estate, including real estate-backed debt instruments;
3. Actively managed investment vehicles holding digital assets;
4. Commodities;
5. Infrastructure development projects; and
6. Lifetime income strategies, including longevity risk-sharing pools.

The EO notes that these asset classes represent an increasingly large portion of public pension and defined benefit retirement plan portfolios and often deliver competitive returns and increased diversification. Accordingly, the EO provides that it is the policy of the U.S. to allow all retirement savers to access funds with exposure to alternative assets when the plan's fiduciary determines that such funds provide DC plan participants with an appropriate opportunity to enhance their net risk-adjusted returns.

Specifically, the EO directs the secretary of labor to take the following actions within the next 180 days:

- Review prior and existing DOL guidance regarding the inclusion of alternative assets in DC plan investment lineups, with particular consideration of whether to rescind the DOL's December 2021 supplemental statement;
- Clarify the fiduciary duties and process for evaluating exposure to alternative assets, including criteria for use by plan fiduciaries considering offering alternative assets and potential safe harbors for plan fiduciaries. The secretary has been instructed to prioritize actions that would prevent litigation risk from unduly constraining a fiduciary's best judgment in selecting investment alternatives for DC plans; and
- Consult the Department of the Treasury, the Securities and Exchange Commission (SEC) and other federal agencies to identify additional regulatory changes needed to effectuate the EO's objectives.

The EO also directs the SEC, in consultation with the DOL, to consider ways to facilitate investments in alternative assets by participant-directed DC plans. This may include revisiting applicable regulations and guidance, such as those related to accredited investor and qualified purchaser status.

Key Considerations

Nature of DOL Action

The EO authorizes the DOL to determine whether the DOL action, including any safe harbors, should be in the form of a rule or guidance. If the agency pursues formal, concrete rulemaking, such measures are more likely to be authoritative to a court, provide DC plan fiduciaries with greater comfort in including alternative assets in their investment menus and create meaningful, lasting changes in the retirement plan market. By contrast, subregulatory guidance (e.g., information letters, compliance assistance releases, FAQs) will carry less weight with courts and fiduciaries and be more susceptible to revision or reversal by future administrations.

Market Movement

Following President Trump's 2024 re-election, market participants widely anticipated renewed efforts to expand access to alternative assets for DC plans. In recent months, major recordkeepers, asset managers and private fund sponsors have begun forming strategic partnerships to design products suitable for inclusion in DC plan investment menus. The collaborations often involve collective investment trust (CIT) structures with allocations to alternative assets managed by one or more investment managers in target date funds or funds used in adviser-managed accounts. The CITs often invest in existing registered or private funds. The EO is expected to increase such activity.

Litigation Risk

The risk, or perceived risk, of litigation has an impact on plan fiduciaries' willingness to offer a particular investment option in DC plans, especially newer, more "novel" options. Over the past 20 years, ERISA lawsuits have often successfully targeted plan fiduciaries for excessive fees or underperformance of DC plan investment options. While the EO encourages strategies to curb unnecessary litigation, it remains unclear

whether regulatory action alone can significantly reduce exposure, given that ERISA creates a private right of action (i.e., right to bring a lawsuit to enforce rights) for plan participants and beneficiaries. Any meaningful litigation reforms will likely require congressional action.

Fee Sensitivity

DC plans — particularly large, institutional ones — have embraced low-cost, highly liquid investment vehicles such as index funds and ETFs. In contrast, private equity and other alternative assets typically carry higher management and performance fees. In order to include alternative assets in their DC plan offerings, fiduciaries will need to be comfortable that they offer better net risk-adjusted returns or other significant benefits over the historically more popular options, like index funds.

Liquidity and Valuation

Most investment options available in DC plans offer daily liquidity and rely on NAV-based pricing. Alternative assets are typically less liquid and more difficult to value on a daily basis. Private fund sponsors targeting the DC plan market would be advised to develop products that offer DC plans sufficient liquidity and frequent pricing.

Operational Complexity

Accessing DC plan capital may require significant adjustments in fund structure, disclosure practices and platform compatibility. This may include, for private fund sponsors, adapting to plan recordkeeping systems and evolving disclosure expectations and requirements.

Fund Sponsors: Next Steps

While the EO does not itself change the law, it signals a clear intention by the Trump administration to revisit the DOL's stance on DC plan access to alternative assets. For private fund sponsors and plan service providers, this represents both an opportunity and a call to prepare. Private fund sponsors seeking to tap into the DC plan market should consider:

- Assessing the structural viability of their strategies for DC plan platforms;

- Evaluating legal and operational readiness, including fee benchmarking, liquidity management and participant disclosure protocols;
- Collaborating with DC plan service providers with whom they have existing relationships;
- Engaging proactively with regulators and DC plan investors throughout the stakeholder consultation phase; and
- Monitoring developments closely, particularly with respect to any safe harbor frameworks or enhanced fiduciary guidance issued by the DOL, the SEC and other agencies.

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- 11 June 2024 Kirkland Alert AIFMD II Q&A for Fund Sponsors