

# Feathering the Nest Egg: Executive Order Promotes 401(k) Access to Alternative Assets

August 8, 2025

On August 7, 2025, the Trump Administration released the heavily anticipated Executive Order, “Democratizing Access to Alternative Assets for 401(k) Investors” (the “Executive Order”), which represents a significant development and a positive step toward facilitating investment by defined contribution plans in private funds. Defined contribution plans, including 401(k) plans (collectively referred to herein as “401(k) plans”), represent a large source of investment capital, estimated to be more than \$12 trillion and steadily rising.

The Executive Order directs the U.S. Department of Labor (the “DOL”) to reexamine its past guidance regarding the investment of 401(k) plans in alternative assets and, to the extent deemed appropriate by the DOL, issue clarifying guidance. In addition, the Executive Order directs the U.S. Securities and Exchange Commission (the “SEC”) to, in consultation with the DOL, consider ways in which to facilitate the investment by 401(k) plan participants in alternative assets, which may include, without limitation, “consideration of revisions to existing SEC regulations and guidance relating to accredited investor and qualified purchaser status.”<sup>1</sup> Below is a set of questions and answers discussing high-level implications of the Executive Order.

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<sup>1</sup> Executive Order – “Democratizing Access to Alternative Assets for 401(k) Investors.” August 7, 2025 available at <https://www.whitehouse.gov/presidential-actions/executive-orders/>.

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## Why *this* topic for an Executive Order?

To properly contextualize the Executive Order, it is helpful to revisit a plan fiduciary's duties under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") when selecting and monitoring 401(k) plan investment options. Under ERISA, plan fiduciaries are obligated to prudently select and monitor investment options that are made available to 401(k) plan participants, and plan fiduciaries can be held liable for losses resulting from their failure to do so. When evaluating a specific investment alternative for inclusion as an investment option, plan fiduciaries "must engage in an objective, thorough, and analytical process that considers all relevant facts and circumstances and then act accordingly."<sup>2</sup>

Throughout the years, private funds have steadily been laying the groundwork to enable 401(k) plans to gain greater access to alternative assets. The Executive Order articulates a position that has been steadily gaining momentum—without greater access to investments in alternative asset classes, the more than 90 million 401(k) plan participants are missing out on the "potential growth and diversification opportunities associated with alternative asset investments" currently afforded to institutional investors, high-net-worth individuals and retirement plans for government workers.<sup>3</sup> Despite these growing sentiments, many 401(k) plan fiduciaries and managers of investment options (e.g., target-date funds) have been slow to incorporate exposure to alternative assets. Many plan fiduciaries and 401(k) investment managers have also been reluctant to offer investment options with alternative asset exposure due to unclear DOL guidance and concerns about ERISA liability—particularly the risk of participant lawsuits alleging imprudent investment selection based on higher risks, lower liquidity or excessive fees. The Executive Order specifically identifies the foregoing as impediments that the DOL should seek to address, stating that the

"administration will 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."<sup>4</sup>

## What does the Executive Order do?

The Executive Order directs the DOL to: (1) reexamine its guidance relating to a fiduciary's duties under ERISA in connection with making an asset allocation fund that includes alternative assets available to 401(k) plan participants, and (2) issue clarifying guidance, as it deems appropriate and consistent with applicable law, regarding the DOL's position on alternative assets and the process that 401(k) plan fiduciaries should follow when making asset allocation funds with exposure to alternative assets available to plan participants. The DOL "may include appropriately calibrated safe harbors" and "prioritize actions that may curb ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants."<sup>5</sup> Further, the Executive Order directs the DOL to consult with the Treasury Secretary, the SEC and other federal regulators "as necessary to carry out the policy objectives of this order."<sup>6</sup>

## How does the Executive Order define "alternative assets"?

The Executive order defines "alternative assets" as:

- Direct or indirect investments in
  - o "private market investments" (including debt, equity or other financial instruments that are not traded on public exchanges and inclusive of investments with active managers);

<sup>2</sup> See Information Letter 06-03-2020 available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020>.

<sup>3</sup> See the Executive Order.

<sup>4</sup> See the Executive Order.

<sup>5</sup> See the Executive Order.

<sup>6</sup> See the Executive Order.

- real estate (including equity and debt investments secured by underlying real estate);
- commodities;
- projects financing infrastructure development;
- Investments in actively managed investment vehicles that invest in digital assets (*e.g.*, cryptocurrencies); and
- lifetime income investment strategies including longevity risk-sharing pools.

Notably, this definition is simultaneously quite specific and also relatively broad—in addition to private equity and real estate, it includes private credit and investment funds that invest in digital assets (*e.g.*, cryptocurrencies).

### **What is the current landscape regarding 401(k) plans and alternative asset classes?**

In order to meaningfully anticipate what we can expect from the DOL, it is helpful to revisit the current regulatory landscape.

During the first Trump Administration, in June of 2020, the DOL tried to ameliorate concerns over including exposure to alternative assets in 401(k) plans by issuing an information letter (the “Information Letter”) discussing the inclusion of private equity within professionally managed and diversified 401(k) plan investment options.<sup>7</sup> By way of background, this type of guidance from the DOL is “informational only and is not binding on the [DOL] with respect to any particular factual situation.”<sup>8</sup> While not binding, the Information Letter was considered helpful because it confirmed that 401(k) plan fiduciaries could prudently

select an investment option that includes exposure to private equity.

The Information Letter specified certain factors that a plan fiduciary should consider when evaluating such an investment option, including: (1) whether the investment option will offer plan participants diversified risks over a multi-year period and provide an appropriate range of expected returns net of fees (including management fees, performance compensation and other fees that impact returns); (2) whether the investment option will be operated by investment professionals and overseen by plan fiduciaries with the requisite capabilities, experience and stability taking into account the nature, size and complexity of the private equity component; (3) whether the investment option’s allocation to private equity is sufficiently limited to reflect the unique characteristics of private equity (*e.g.*, cost, complexity, disclosure and liquidity); and (4) whether the investment option has adopted liquidity and valuation features sufficient to allow participants to take benefits under the plan and direct exchanges among available investment options in a manner consistent with the plan’s terms.<sup>9</sup> The Information Letter led some plan fiduciaries to focus on incorporation of private equity and private credit strategies into target-date funds and managed account products in order to provide appropriate diversification and mitigate liquidity concerns. While the DOL’s guidance was specific to private equity, many of the considerations discussed in the Information Letter could be helpful to fiduciaries evaluating other alternative asset classes.

In December of 2021, the DOL under the Biden Administration issued a supplemental statement to the Information Letter (the “Supplemental Statement”).<sup>10</sup> While the Supplemental Statement did not change the

<sup>7</sup> See Information Letter 06-03-2020 available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020>.

<sup>8</sup> See ERISA Procedure 76-1, Section 11 “Effect of Information Letters” available at: <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/filing-requests-for-erisa-aos>.

<sup>9</sup> See Information Letter 06-03-2020 available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020>.

<sup>10</sup> See “U.S. Department of Labor Supplemental Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives” available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement>.

fundamental principles set forth in the Information Letter, it did strike a different tone. The Supplemental Statement cautioned plan fiduciaries that they may not have adequate expertise to prudently evaluate investment options with exposure to private equity. As a result, plan fiduciaries may need assistance from qualified third party advisors to prudently make such evaluations. The Supplemental Statement likely chilled some of the momentum created by the Information Letter.

The Executive Order specifically directs the DOL to consider whether to rescind the Supplemental Statement.

### **What is the current landscape regarding cryptocurrencies and 401(k) plans?**

In March of 2022, the DOL issued Compliance Assistance Release No. 2022-01 (the “[2022 Crypto Release](#)”) expressing serious concern about cryptocurrencies and cautioning “plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan’s investment menu.”<sup>11</sup> In the 2022 Crypto Release, the DOL highlighted several difficulties faced by plan fiduciaries when evaluating cryptocurrencies, including: (1) the speculative and volatile nature of cryptocurrencies; (2) the difficulties associated with ensuring that participants make informed decisions in connection with investments in cryptocurrency; (3) custodial and recordkeeping issues arising as a result of the unique nature of cryptocurrencies; (4) concerns relating to the reliability and accuracy of cryptocurrency valuations; and (5) uncertainties created by the evolving regulatory landscape applicable to cryptocurrencies.

<sup>11</sup> See Compliance Release No. 2022-01 – “401(k) Plan Investments in ‘Cryptocurrencies’” available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01>.

<sup>12</sup> See Compliance Release 2025-1 – “401(k) Plan Investments in ‘Cryptocurrencies’” available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2025-01>.

Earlier this year, the DOL reversed course and issued Compliance Release 2025-01 (the “[2025 Crypto Release](#)”), which rescinded the 2022 Compliance Release in its entirety.<sup>12</sup> The DOL stated that the 2025 Crypto Release restored “the Department’s historical approach by neither endorsing, nor disapproving of, plan fiduciaries who conclude that the inclusion of cryptocurrency in a plan’s investment menu is appropriate. When evaluating any particular investment type, a plan fiduciary’s decision should consider all relevant facts and circumstances and will ‘necessarily be context specific.’”<sup>13</sup> Despite the DOL’s shifting guidance, plan fiduciaries have remained cautious about adding cryptocurrency exposure to 401(k) investment options. The 2022 and 2025 Crypto Releases did not alter a fiduciary’s core duties under ERISA, which continue to require the prudent selection and ongoing monitoring of investment options.

### **What can we expect from the DOL in response to the Executive Order?**

In order to comply with the Executive Order and within 180 days from the date of its publication (*i.e.*, by early February 2026), the DOL will likely issue clarifying guidance. We may see a notice of proposed rulemaking, which will include proposed regulations and invitation for public comment. If the DOL goes this route, after the comment period closes, the DOL will review and consider all comments and develop a final rule.

It is difficult to predict with certainty the substance of the guidance the DOL will issue. With respect to private equity, real estate, private credit and related private fund investments, the proposed regulations may seek to memorialize the guidance contained in the

[assistance-releases/2022-01](#). In rescinding the prior release, the DOL stated in full stating as follows: “[t]he 2022 release directed plan fiduciaries to exercise ‘extreme care before they consider adding a cryptocurrency option to a 401(k) plan’s investment menu for participants.’ The standard of ‘extreme care’ is not found in [ERISA] and differs from the ordinary fiduciary principles thereunder.”

<sup>13</sup> In connection with this statement, the DOL cited *Fifth Third Bankcorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014).

Information Letter and provide greater clarity and specificity, particularly with respect to criteria fiduciaries may look to in prudently balancing potentially higher fees against the potentially greater long-term net returns and investment diversification presented by alternative assets. The Executive Order also places emphasis on the DOL clarifying the fiduciary duties owed to plan participants when introducing alternative assets into a 401(k) plan's investment lineup. To this end and as contemplated by the Executive Order, the DOL may provide a "safe harbor" for plan fiduciaries who include investment options with exposure to these alternative assets, subject to specified conditions being met. There is precedent for the DOL providing "safe harbor" protection to plan fiduciaries; under the DOL's regulations relating to "qualified default investment alternatives" ("QDIAs"), plan fiduciaries will not be liable for losses resulting from the investment of a participant's assets in a QDIA, provided that specific requirements are met.<sup>14</sup> In this context, the DOL could require plan fiduciaries to consider specific factors and provide additional disclosures to plan participants in connection with selecting and monitoring investment options that hold private equity, real estate, private credit and other related alternative assets.

We may see the DOL handle guidance with respect to investment funds investing in digital assets (e.g., cryptocurrency) differently than other asset classes included in the definition of "alternative assets," especially given the unique risks presented by this asset class (as discussed in the now rescinded 2022 Crypto Release). As the DOL considers issuing clarifying guidance relating to funds investing in digital assets, it will do so against the backdrop of the current administration's focus on growth and innovation with respect to digital assets.<sup>15</sup>

<sup>14</sup> See 72 Fed. Reg. 60452. QDIAs are generally the default investment option for when a participant does not make active investment elections/decisions.

<sup>15</sup> See "Fact Sheet: The President's Working Group on Digital Asset Markets Releases Recommendations to Strengthen American Leadership in Digital Financial

## What can we expect from the SEC?

As noted above, the Executive Order directs the SEC to consult with the DOL and consider ways in which to facilitate greater access to investment by 401(k) plan participants in alternative assets. The Executive Order specifically mentions possible revisions to SEC regulations and guidance relating to accredited investor and qualified purchaser status.

Earlier this year, SEC Chair Paul Atkins signaled potential changes in how retail investors access private markets and announced plans to revisit the SEC's 2002 position that requires closed-end funds investing 15% or more of their assets in private funds to impose a \$25,000 minimum investment and limit sales to accredited investors, which has restricted retail investor access.<sup>16</sup> This reflects the significant growth and increased oversight in private markets since 2002, and a desire to align regulation with modern market realities.

## If you are a private fund sponsor or investment manager, what does this mean for you?

The Executive Order does not usher in any immediate regulatory changes. While we expect there to be significant media coverage of the Executive Order, it is important to keep in mind that the DOL's implementation of the Executive Order will likely involve a lengthy regulatory process. In addition, there are quite a few outstanding questions to be addressed by the DOL and the SEC before we see any significant changes in this space.

Against this backdrop, we expect private fund sponsors and investment managers to continue to explore avenues for the incorporation of alternative assets into 401(k) plans. To this end, we expect to see an increase in partnerships between private funds,

Technology" available at [Fact Sheet: The President's Working Group on Digital Asset Markets Releases Recommendations to Strengthen American Leadership in Digital Financial Technology – The White House](#).

<sup>16</sup> See <https://www.sec.gov/newsroom/speeches-statements/atkins-prepared-remarks-sec-speaks-051925>.



investment managers and traditional 401(k) platform providers. We may also see a greater number of plan fiduciaries willing to provide participants with access to alternative assets (including private funds) through managed accounts within 401(k) plans, though we expect this willingness may be tempered until the DOL and/or SEC take action pursuant to the Executive Order. These managed accounts typically require participants to opt-in, thus creating a natural avenue to ensure appropriate disclosures are provided and to mitigate claims from “unknowing” participants. It is worth noting that, in connection with the development of strategies that facilitate investment by 401(k) plans, private fund sponsors and investment managers may find themselves managing vehicles that are subject to ERISA and/or that rely on less familiar “plan asset” exceptions (*e.g.*, the “publicly offered securities” exception instead of the “venture capital operating company” and/or “less than 25%” exceptions). Private fund sponsors and investment managers exploring this market and the related developments should familiarize themselves with the compliance considerations involved in operating a “plan asset” ERISA fund (or relying on alternative “plan asset” exceptions noted above), as well as weigh the benefits and challenges of navigating this regulatory terrain.

We will continue to closely monitor these developments and will provide additional updates over time.

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