

# What To Expect As Trump's 401(k) Order Materializes

By **Elizabeth Dyer, Robin Bergen and Brandon Hammer** (September 9, 2025)

On Aug. 7, the Trump administration released the heavily anticipated Executive Order No. 14330, which represents a significant development and a 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 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, it directs the U.S. Securities and Exchange Commission 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."

This article provides a brief overview of the executive order, addresses its high-level implications on the SEC, and examines the current landscape regarding cryptocurrencies and 401(k) plans.

## What does the executive order do?

The order directs the DOL to: (1) reexamine its guidance relating to a fiduciary's duties under the Employee Retirement Income Security Act 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.

It also states that 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." [1] Further, the order directs the DOL to consult with the secretary of the U.S. Department of the Treasury, the SEC and other federal regulators "as necessary to carry out the policy objectives of this order." [2]

The order defines "alternative assets" as:

- Direct or indirect investments in private market investments (including "equity, debt or other financial instruments that are not traded on public exchanges" and inclusive



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of investments with active managers), real estate (including equity and debt investments secured by underlying real estate), commodities, and projects financing infrastructure development;

- Investments in "actively managed investment vehicles that are investing in digital assets"; and
- "Lifetime income investment strategies including longevity risk-sharing pools."

Notably, in addition to private equity and real estate, this definition includes private credit and investment funds that invest in digital assets, e.g., cryptocurrencies.

### **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. It specifically mentions possible revisions to SEC regulations and guidance relating to accredited investor and qualified purchaser status.

Revisions to SEC regulations and guidance, unlike amendments to the statutes to which the regulations and guidance relate, do not require congressional action and can be adopted by the SEC (in the case of rules) or issued by SEC staff (in the case of guidance). We believe this aspect of the order was intended to facilitate quick changes, and to empower SEC Chair Paul Atkins to act more directly in line with the Trump administration's goals in this area.

In May, 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.[3]

The SEC's plan to reconsider its prior position reflects the significant growth and increased oversight in private markets since 2002, and a desire to align regulation with modern market realities. With the executive order's direction, we expect this plan to gain momentum.

After revisiting its position, the SEC could take numerous steps in this area. Among others, we anticipate it could consider rule amendments to lower the income and wealth standards for accredited investors, in addition to lowering the minimum investment requirements for closed-end funds investing in private funds.

More directly responsive to the executive order would be rule amendments, or potentially guidance, that directly allow 401(k) plan participants to invest in alternative assets that are currently limited to accredited investors and qualified purchasers. For example, the SEC could take the position that investments by those participants are deemed to be made by accredited investors and qualified purchasers if the plan sponsor is an accredited investor and qualified purchaser (most of which are), similar to the requirements today for certain trusts and managed accounts.

Whether the SEC would also require plan sponsors in this case to undertake certain diligence or other actions before making that investment available to its 401(k) plan participants is one of many practical questions the SEC will need to address before moving forward in this area.

## **What can we expect with regard to crypto?**

Although the DOL has not expressly stated what guidance it will provide in relation to investment funds investing in digital assets, the current administration's broader approach to cryptocurrency may provide an indication of what the DOL will do.

By way of background, in March 2022, the DOL issued a compliance assistance 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>[4]</sup> In May of this year, the DOL reversed course and issued a new compliance assistance release, which rescinded the 2022 release in its entirety.<sup>[5]</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.'"

In the months since President Donald Trump's inauguration, federal financial regulators have dramatically shifted their stance toward digital asset activities. Of particular note, the U.S. banking regulators, the U.S. Commodity Futures Trading Commission and the SEC have, like the DOL, rescinded prior guidance stating that digital asset activities should be subject to greater scrutiny, care or analysis, or that otherwise treated digital assets differently from other asset classes.

For example, on Jan. 23, less than a week after Trump was inaugurated, the SEC withdrew a staff accounting bulletin that had required firms custodial crypto-assets to include those assets on balance sheets in light of the greater risks they presented.<sup>[6]</sup> And in March, the CFTC withdrew a staff advisory that had warned derivatives clearing organizations to consider the risks of digital asset activities more carefully than other assets.<sup>[7]</sup>

Additionally, federal banking regulators have withdrawn prior statements requiring banking organizations to obtain preapproval for digital asset activities.<sup>[8]</sup>

The agencies have also taken specific steps to facilitate and encourage digital asset activities. The SEC, for instance, established a crypto task force in January that is considering various kinds of exemptive relief from securities regulations to facilitate tokenization, while the CFTC has explored steps to promote trading of digital assets on designated contract markets.

These actions align with the views the administration has expressed in the president's July 30 working group report.<sup>[9]</sup> In that report, the administration made clear that its policy is to take a technology-neutral approach to financial regulation and to eliminate the prior administration's practice of imposing special or additional requirements on digital assets.

In the eyes of the current administration, that practice effectively amounted to the regulators utilizing financial regulation to outlaw digital assets.<sup>[10]</sup> The report further expresses the policy view that financial regulators need to take steps to promote digital assets so as to make "American digital asset markets to become the deepest and most liquid in the world."<sup>[11]</sup>

In view of these policies and precedents, the DOL may be inclined to build on its 2025 crypto release and encourage plan fiduciaries to consider digital assets through similar

standards as those that apply to other assets. Moreover, the DOL may seek to identify particular encumbrances that limit plan fiduciaries' willingness to make digital asset investments and draft safe harbors targeted to those specific issues.

### **What comes next?**

The executive order does not usher in any immediate regulatory changes. While we expect there to be significant media coverage of the order, it is important to keep in mind that its implementation will likely involve lengthy regulatory processes. 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.

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[1] See Executive Order – "Democratizing Access to Alternative Assets for 401(k) Investors." August 7, 2025 available at <https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/>.

[2] See the Executive Order.

[3] See <https://www.sec.gov/newsroom/speeches-statements/atkins-prepared-remarks-sec-speaks-051925>.

[4] 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>.

[5] 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>, 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."

[6] <https://www.sec.gov/rules-regulations/staff-guidance/staff-accounting-bulletins/staff-accounting-bulletin-122>.

[7] See CFTC Letter No. 25-08 (Mar. 28, 2025). See also CFTC Letter No. 25-13 (providing guidance on the materiality standard required for referrals to the agency's Division of Enforcement); CFTC Letter No. 25-14 (providing interpretative guidance clarifying the U.S. person status of certain entities for purposes of the cross-border application of certain

registration requirements in light of prior enforcement actions).

[8] See, e.g., OCC Letter No. 1183 (rescinding OCC Letter No. 1179, which required pre-approval for OCC-regulated banks to engage in digital asset activities, and affirming that national banks and federal savings associations can engage in digital asset custody, DLT, stablecoin reserve, usage and issuance activities); OCC Letter No. 1184 (affirming further that national banks and federal savings associations can engage in digital asset custody and execution services); FDIC Letter No. 7-2025 (permitting FDIC-supervised institutions to engage in digital asset activities without pre-approval); Federal Reserve Board Announces the Withdrawal of Guidance for Banks Related to Their Crypto-Asset and Dollar Token Activities and Related Changes to its Expectations for These Activities (Apr. 24, 2025), available at <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20250424a.htm>.

[9] See Strengthening American Leadership in Digital Financial Technology (July 30, 2025), available at <https://www.whitehouse.gov/wp-content/uploads/2025/07/Digital-Assets-Report-EO14178.pdf>.

[10] Id. at 6.

[11] Id. at 7.