

Employee Benefit ■ Plan Review

Can I Invest My 401(k) Account in Private Equity?

BY MARK C. JONES

The White House has issued Executive Order 14330, Democratizing Access to Alternative Assets for 401(k) Investors¹ (the Order), directing the Department of Labor (DOL) to issue guidance that facilitates investment in “alternative assets” by participants in 401(k) and other defined contribution (DC) plans. The stated goal of the Order is to give all retirement plan participants access to the same benefits of alternative investments – potentially higher returns and diversification of risk – that are already enjoyed by large investors and governmental plans.

Although many commentators have focused on the risks of allowing individuals with limited investment experience to direct their retirement savings into, say, cryptocurrency, the Order is in fact both broader and narrower than that example. It is broader in that it covers plan investments not only in digital assets such as crypto, but also private equity and debt, precious metals, real estate, infrastructure projects, and lifetime income insurance products. It is narrower, however, in that the Order itself (as opposed to its statement of purpose) focuses almost exclusively on investment through an asset allocation fund, such as a target date or lifecycle fund. This article will address questions raised by the Order.

ISN'T IT ALREADY POSSIBLE TO INVEST IN ALTERNATIVE ASSETS UNDER A RETIREMENT PLAN?

Yes. One point of view is that the Order merely lends support to investment products that already exist. After the DOL issued an Information Letter to a private equity investor in 2020² acknowledging the possibility of DC plan investment in private equity through professionally managed asset allocation funds – subject to considerations of liquidity, transparency, valuation and fees – large fund managers started to introduce such products within collective investment trusts (CITs). A Supplemental Statement³ to the 2020 Information Letter, issued in 2021 under a new administration, chilled the development of these products, advising fiduciaries to exercise “extreme care.” But these products have been marketed more heavily after Trump returned to office this year.

For example, in May of 2025, Empower announced a partnership⁴ with several fund managers, including Apollo, Franklin Templeton and Goldman Sachs, to offer private equity investments using CITs within managed accounts. Similarly, in June of 2025, BlackRock began offering⁵ target date funds (TDFs) that invest in private equity and debt. More recently, State Street rolled out a TDF⁶ with 10% exposure to private equity through Apollo. Because

CITs are regulated only at the state level, they have lower compliance costs than mutual funds as well as more lenient liquidity requirements. However, they are also less transparent.

DIDN'T CONGRESS ALREADY ISSUE RULES PERMITTING ALTERNATIVE INVESTMENTS?

Yes. The current administration has generally supported legislation entrusting investors to do their own risk analysis and requiring developers of new investment products to provide investors with the information needed to do so. President Trump supported and signed into law the GENIUS Act,⁷ which permits issuances of stablecoin by banks and other regulated entities and has signaled support for the Digital Asset Market Clarity Act,⁸ which would regulate the trade and development of digital assets. At the direction of the White House, the DOL also ended its defense in the Fifth Circuit of a rule that would have allowed fiduciaries to consider non-pecuniary environmental, social and governance factors in investment decisions and has moved to dismiss the appeal of the Fifth Circuit's stay on the implementation of regulations that extend fiduciary duties to a broader range of investment advisors and insurance brokers.⁹ Immediately following the issuance of the Order, the DOL rescinded its 2021 Supplemental Statement, on the grounds that the fiduciary duty of prudence should not change solely on the basis of asset class.

DOES THE ORDER CHANGE ERISA FIDUCIARY DUTIES?

No. The Order does not reduce the duties, standard of care or potential liability that applies to the fiduciaries who make investment decisions for retirement plans under the Employee Retirement Income Security Act of 1974,¹⁰ as amended (ERISA). These responsibilities include the duty to

act solely in the interest of participants, the duty to manage plan assets with due care and prudence, and the duty to diversify investments. A proliferation of class action lawsuits, particularly over the last 10 years, alleging a violation of these duties by fiduciaries that make available relatively expensive investment options or that turn out to perform poorly, have pushed fiduciaries toward conservative, inexpensive investment options such as index funds. Governmental plans have invested more heavily in private equity and real estate over the same period in part because the fund managers are generally not subject to ERISA. Although the Order directs the DOL to prioritize actions that curb frivolous litigation, the lack of transparency of many alternative investments, as well as their volatility, higher fees and illiquidity, make inclusion of them vulnerable to challenge.

Fiduciaries will need to be able to demonstrate that they followed a prudent process in selecting such options, including looking at the experience and capabilities of the fund manager, data that supports a desirable risk-adjusted reward, and investment management or collective trust agreements that were negotiated to reflect the needs of the participants. In May 2025, the U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of a claim based on breach of fiduciary duties, potentially worth billions, in *Anderson v. Intel Corp. Investment Policy Comm.*¹¹ At issue was the inclusion of private equity within some of the 401(k) investment options. Because the investment committee was able to demonstrate that it had an appropriate process in place to evaluate and monitor investments and that it followed that process, even if in hindsight some of the investments did not have the highest net returns relative to some other investment options over the same period, the appeals court ruled in their favor. Fiduciary committees

could also manage some of their fiduciary risk by running the investment decisions through a third-party investment manager that assumes fiduciary responsibility under Section 3(38) of ERISA.

ARE THESE INVESTMENTS ONLY FOR LARGE PLANS?

Not necessarily. To date, funds investing in alternative assets have been designed for large investors such as pension funds, that can meet minimum investment requirements and weather volatility. In this regard, the development of pooled employer plans under the Setting Every Community Up for Retirement Enhancement¹² (SECURE) Act of 2019, could help because they allow unaffiliated small employers to pool their assets together to negotiate fees and terms of investment that otherwise would not be available to small investors. In July of 2025, the DOL published a request for information in connection¹³ with the development of a fiduciary safe harbor that would encourage greater participation by small employers in these plans. If so, then some of the restrictions on and risk of investment in alternative assets could be reduced.

WOULD IT BE POSSIBLE TO OFFER ALTERNATIVE ASSETS OUTSIDE OF A CIT OR TDF?

Yes, with qualifications. Current regulations and rules of the Securities and Exchange Commission (SEC) make it challenging for fund managers to offer alternative assets to plans outside of a CIT. Investment through a mutual fund is challenging because of the registration, disclosure and liquidity requirements that apply to mutual funds under SEC rules. These requirements do not square well with private, illiquid or difficult-to-value investments.

However, even if the assets are contained within a CIT, the Order contemplates a broader range of asset allocation funds than merely a

TDF to hold them (although, with increased automatic enrollment under the SECURE 2.0 Act of 2022, TDFs will likely remain popular as a qualified default investment alternative). The Order, along with the DOL's 2020 Information Statement, covers, for example, investment through a managed 401(k) account. With the development of artificial intelligence modeling, managed accounts can be increasingly personalized to the needs of individual participants and their investment horizons, backed by the experience and reputation of a licensed investment manager. Managed 401(k) accounts can be relatively expensive, however, and the employer or its investment committee retain the fiduciary duty to prudently select the vendor and manage fees.

IS DIRECT INVESTMENT IN ALTERNATIVE ASSETS PERMITTED?

No. Direct investment in alternative assets by participants, including through a brokerage window, remains challenging, even under the Order. The SEC generally limits direct investment in private offerings to “accredited investors,” who have the income, assets, training or experience to bear a greater level of risk. (The Order directs the SEC to examine this requirement in light of the administration's desire to open alternative investment to more 401(k) participants.) Another challenge is compliance with Section 404(c) of ERISA, which places conditions, in addition to the standard fiduciary rules, on plans that permit participants to direct their own investment and assume the liability that comes with those decisions. The 404(c) regulations establish a safe harbor that requires a diverse menu of investment options, detailed disclosure of each investment's performance history,

management and fees, and liquidity that is “appropriate” for the investment's volatility (daily liquidity, for highly volatile investments). To date, alternative investments are not generally equipped to meet the disclosure and liquidity requirements, and, therefore, direct investment, including investment through a brokerage window, would continue to be limited.

STEPS TO TAKE NOW

The direction of the Order will be clearer when the DOL publishes guidance, which is expected in February of 2026. Until then, employers that have an interest in broadening their fund menu or tailoring their target date or lifecycle funds to include some exposure to alternative assets should discuss with their investment advisors what investment opportunities may be available. Most importantly, employers and their investment committees should review their fund selection process. That process should include, among other things, an investment policy that is broad enough to accommodate alternative assets but specific enough to demonstrate that the selection of any such investment, in the context of participants' needs and the plan's other offerings, is thorough, probing and legally compliant under ERISA and other applicable laws. Fiduciaries also need to document the considerations that they took into account in selecting any investment, whether it is alternative or mainstream, including external information reviewed, recommendations of third-party advisors and comparative data on performance, fees and fund management.

TAKEAWAYS

- The Order is good news for fund managers looking to broaden the range of investments that they

offer to private retirement plans, particularly within target date funds.

- Existing regulations would continue to require fiduciaries to have a process in place that demonstrates that they exercised care, prudence and loyalty in the selection of these investment options.
- The Order's description of risk-adjusted return as a legitimate consideration could support diversification by fiduciaries who have tried to avoid litigation by offering only highly conservative investment options. 🌟

NOTES

1. <https://www.federalregister.gov/documents/2025/08/12/2025-15340/democratizing-access-to-alternative-assets-for-401k-investors>.
2. <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020>.
3. <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement>.
4. <https://www.empower.com/press-center/empower-offer-private-markets-investments-retirement-plans>.
5. <https://www.blackrock.com/us/financial-professionals/practice-management/defined-contribution/insights/private-markets-in-tdfs>.
6. <https://www.ssga.com/us/en/institutional/capabilities/dc-overview/target-date-funds/state-street-target-retirement-index-plus-strategies>.
7. <https://www.congress.gov/bill/119th-congress/senate-bill/1582/text>.
8. <https://www.congress.gov/bill/119th-congress/house-bill/3633>.
9. *Utah vs. Chavez-DeRemder*, No. 23-11097 (5th Cir., May 28, 2025); *Federation of Americans for Consumer Choice v. United States Dept. of Labor*, No. 24-40637 (5th Cir. Nov. 24, 2025).
10. <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/erisa>.
11. <https://cdn.ca9.uscourts.gov/datastore/opinions/2025/05/22/22-16268.pdf>.
12. <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/secure-act>.
13. <https://www.dol.gov/newsroom/releases/ebsa/ebsa20250728>.

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