

New Executive Order Seeks to Facilitate Alternative Investments in 401(k) Plans

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On August 7, 2025, President Trump signed an Executive Order titled “Democratizing Access to Alternative Assets for 401(k) Investors.” This Executive Order has the potential to significantly change how retirement savings assets in employer-sponsored defined contribution plans, such as 401(k) plans, can be invested.

Today, the vast majority of large defined contribution plans permit participant-directed investments. A plan’s investment menu is determined by the plan’s fiduciaries. Historically, plan fiduciaries have been hesitant to include alternative assets on these investment menus for fear that these investment options would be deemed imprudent and would subject the fiduciary to the risk of DOL enforcement action or participant litigation. The Executive Order signals a distinct policy shift by the federal government intended to expand investment options for participants in employer-sponsored defined contribution plans to allow for investment in “alternative assets,” defined as:

- Private market investments (e.g. private equity or private debt)
- Real estate
- Digital assets
- Commodities
- Infrastructure financing projects
- Lifetime income strategies, including longevity risk-sharing pools

Specifically, the Executive Order provides the DOL with 180 days to:

- Review its existing guidance regarding ERISA fiduciary duties relating to the inclusion of alternative assets on employer-sponsored defined contribution plan menus, including consideration of whether to rescind the “December 21, 2021 Private Equity Statement” issued by the Biden DOL, which had cautioned against the inclusion of such investments. (Spoiler Alert: The DOL has already rescinded the 2021 Statement.)
- Clarify its position on the inclusion of alternative assets in such plans, as well as the appropriate fiduciary process and relevant criteria to prudently balance the higher expenses typically associated with alternative assets against the potential for higher long-term net returns and diversification goals. As part of this directive, the DOL is instructed to prioritize actions to curb ERISA litigation against plan fiduciaries, which has exploded in recent years.

In carrying out these tasks, the DOL is directed to coordinate with other relevant federal regulators, such as Treasury and the SEC.

It is important to note that—notwithstanding this Executive Order—there will still be significant challenges associated with inclusion of such alternative assets on plan menus. These types of investments carry substantial risks. Investments in these alternatives are typically quite volatile, illiquid, riddled with complex fee structures, and generally lack transparency. These characteristics don’t mesh well with the requirements associated with participant-directed plans. It is also possible that the guidance issued by the DOL pursuant to the Executive Order will be vacated by a court or

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reversed by a future administration. Given this uncertainty, it will be incumbent on plan fiduciaries to carefully assess these issues when deciding whether to offer these alternative assets as investment options to participants in their employer-sponsored defined contribution plans.

Should you have any questions regarding the topics contained in this alert, please contact the authors of this alert or your Miller Canfield attorney.