

Expanding Horizons: President Trump's Executive Order to Broaden Access to Alternative Investments in 401(k) Plans

A Practical Guidance® Article by José M. Jara and Sheldon S. Miles, Fox Rothschild LLP



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This article discusses Executive Order 14330, [Democratizing Access to Alternative Assets for 401\(K\) Investors](#) which the Trump Administration issued on August 7, 2025.

Jeff Bezos once remarked, "Given a 10% chance of a 100 times payoff, you should take that bet every time." While this bold investment philosophy might tempt individual savers, the legal landscape surrounding pension plans demands a more cautious approach. On August 7, 2025, President Donald J. Trump issued a groundbreaking Executive Order titled "Democratizing Access To Alternative Assets For 401(k) Investors." This order signals a significant shift in retirement investment policies, aiming to expand the array of options available to participants in defined contribution plans such as 401(k)s.

A New Direction in Retirement Investing

Historically, 401(k) plans and comparable retirement plans have been confined to traditional asset classes such as stocks, bonds, and mutual funds. These restrictions were implemented to promote prudent management and to safeguard the interests of plan participants and beneficiaries. Nevertheless, critics contend that such limitations have restricted opportunities for maximizing retirement savings, particularly in light of the higher return potentials associated with alternative assets, including private equity, real estate, and hedge funds.

Under the Employee Retirement Income Security Act (ERISA), fiduciaries are required to act with the care, skill, prudence, and diligence that a prudent person would exercise under similar circumstances. This standard applies to all investment decisions, including those involving non-traditional assets. The U.S. Department of Labor (DOL) has issued regulations clarifying that fiduciaries must evaluate whether an investment is reasonably designed to further the plan's purposes, weighing factors such as risk, potential for gain, and portfolio fit. Notably, principles from modern portfolio theory—pioneered by scholars like Harry Markowitz—emphasize diversification and risk management, concepts that align with ERISA's prudence requirement.

Regulatory Oversight and Legal Precedents

Recent Supreme Court rulings reinforce the importance of ongoing oversight and evaluation of investment options. In *Hughes v. Nw. Univ.*, 595 U.S. 170 (2022), the Court

reaffirmed its earlier decision in *Tibble v. Edison Int'l*, 575 U.S. 523 (2015), emphasizing that fiduciaries must regularly monitor and remove imprudent investments—particularly those with excessive fees—rather than simply offering a broad menu of options.

Investments in alternative assets are not inherently imprudent under ERISA. Nevertheless, fiduciaries must conduct thorough due diligence and ensure that such investments align with the plan's objectives. The Ninth Circuit's recent decision in *Anderson v. Intel Corporation Investment Policy Committee*, 137 F.4th 1015 (9th Cir. 2025), highlights this point, ruling that claims of imprudence in investing in hedge funds and private equity failed because the plaintiffs did not demonstrate a valid comparison or risk mitigation strategy. This case underscores the necessity for fiduciaries to employ appropriate evaluation methods and maintain comprehensive documentation of their decision-making processes.

Expanding Investment Horizons

The recent Executive Order aims to reexamine existing regulatory frameworks that have, until now, constrained access to alternative investments within retirement plans. Proponents believe that, with proper safeguards and guidance, offering a broader spectrum of investment options can lead to improved long-term outcomes for retirement savers. By broadening the investment landscape, the order seeks to balance innovation with fiduciary responsibility, ultimately aiming to enhance the growth potential of retirement assets while maintaining prudent oversight.

In essence, this policy shift reflects an acknowledgment that, when properly managed, alternative investments can be a valuable component of a diversified retirement portfolio—potentially offering higher returns and better risk-adjusted outcomes for future retirees.

Key Provisions of the Executive Order

1. Re-evaluation of DOL Guidance on Private Equity in Retirement Plans

The Secretary of Labor (the Secretary) has been mandated to undertake a comprehensive review within 180 days of existing and prior guidance concerning ERISA fiduciary duties related to private equity investments.

This directive includes a thorough examination of guidance issued under the Biden administration, which advised caution regarding the inclusion of private equity in defined contribution plans. The concerns highlighted in these guidelines centered on elevated fees, liquidity challenges, and fiduciary risks associated with such investments. Significantly, on August 12, 2025, the DOL announced the rescission of its 2021 guidance.

2. Clarification and Development of Fiduciary Guidelines

The order further mandates that the Secretary, within the same 180-day window, clarify existing policies on offering alternative investments in 401(k) plans. This involves establishing clear criteria for ERISA fiduciaries to evaluate the higher expenses associated with private equity investments against potential benefits, such as enhanced diversification and improved net returns. Additionally, the DOL is tasked with proposing guidance that could include a safe harbor—a set of conditions under which fiduciaries can operate with confidence—aimed at reducing litigation risks and providing clearer decision-making pathways.

3. Interagency Collaboration and Regulatory Revisions

To facilitate broader access to alternative assets, the Secretary is encouraged to consult with the Secretary of the Treasury and the Securities and Exchange Commission (SEC). This collaboration may involve revising existing SEC guidance on who qualifies as an accredited investor or a qualified purchaser, thereby easing restrictions that currently limit certain institutional and high-net-worth individual investors from participating in private equity and similar investments.

The Executive Order seeks to expand access to alternative investments within retirement plans, encompassing private equity, debt, real estate, infrastructure projects, and digital assets. Historically, private and government defined benefit pension funds have incorporated private equity to achieve higher returns and diversification benefits. In contrast, most 401(k) plans have largely abstained from such investments due to concerns over elevated fees, limited transparency, liquidity constraints, and complex valuation processes.

Implications for Plan Sponsors and Participants

This Executive Order indicates a potential paradigm shift in retirement investing regulation, emphasizing a more permissive approach toward alternative assets. If successfully implemented, these changes could:

- **Increase Investment Options:** Participants could have access to a wider array of assets tailored to their risk tolerance and retirement goals.
- **Potential for Higher Returns:** By including private equity and other alternatives, plans might achieve superior long-term growth, especially during periods of economic expansion.
- **Enhanced Diversification:** Offering broader asset classes can help mitigate risks associated with traditional stocks and bonds.
- **Regulatory Clarity and Confidence:** Clearer guidelines and safe harbors could reduce fiduciary litigation and encourage plan sponsors to explore alternative investments.

While the executive order opens new avenues, it also raises questions about risk management, fee transparency, and participant protection. Private equity and alternative assets often entail higher fees, lower liquidity, and increased complexity, which require oversight and fiduciary responsibility. Fiduciaries can explore investments in alternatives, but their duty of prudence depends on the specific circumstances at the time of action. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014). Courts recognize that fiduciaries may face complex tradeoffs, requiring deference to reasonable judgments based on their expertise. Hughes v. Nw. Univ., 595 U.S. 170, 177 (2022).

Conclusion

President Trump's August 7, 2025, Executive Order signifies a pivotal step toward broadening access to alternative assets within retirement plans. As agencies like the DOL, SEC, and Treasury move to implement these initiatives, plan sponsors and fiduciaries must stay vigilant, carefully considering the opportunities and challenges that come with integrating alternative investments. This development could fundamentally reshape the landscape of retirement investing in the United States, presenting both promising prospects and highlighting the importance of fiduciary obligations.

Related Content

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- [Presidential Executive Actions Tracker](#)

Cases

- Anderson v. Intel Corp. Inv. Pol'y Comm., 137 F.4th 1015 (9th Cir. 2025)
- Hughes v. Nw. Univ., 595 U.S. 170, 142 S. Ct. 737, 211 L.Ed.2d 558 (2022)
- Tibble v. Edison Int'l, 575 U.S. 523, 135 S. Ct. 1823, 191 L.Ed.2d 795 (2015)
- Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 134 S. Ct. 2459, 189 L.Ed.2d 457 (2014)

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José focuses his practice on the Employee Retirement Income Security Act (ERISA) and employment litigation and counseling. He has extensive experience in representing corporations, tax-exempts, associations, pension funds, boards of trustees, Employee Stock Ownership Plans (ESOPs), defined benefit and defined contributions plans, multiple employer plans, multiemployer plans, and executives in areas of employment, ERISA, and other employee benefits law matters.

José's practice includes representing clients under investigation by the U.S. Department of Labor's (DOL) Employee Benefits Security Administration and defending clients from lawsuits filed by DOL's Office of the Solicitor regarding civil and/or criminal violations of ERISA.

He defends plan sponsors, boards of directors and fiduciaries against ERISA class action litigation alleging breach of fiduciary duty under ERISA, including excessive fees, imprudent investments, delinquent employee contributions and improper valuation of employer stock. In addition, José provides legal advice to plan sponsors and fiduciaries on fiduciary responsibilities, plan fees and expenses, plan asset regulations and ERISA-prohibited transactions and exemptions.

He also works with clients to correct retirement plan errors under the IRS Employee Plans Compliance Resolution System, fiduciary violations under the DOL Voluntary Fiduciary Correction Program and annual reporting failures under the DOL Delinquent Filer Voluntary Compliance Program.

José advises clients on a broad range of labor and employment law issues such as wrongful termination, sexual harassment and discrimination, restrictive covenants, retaliation and matters related to labor law such as grievances, arbitrations and collective bargaining. He also defends companies against EEOC charges and DOL wage and hour investigations, conducts interactive harassment training, carries out internal investigations and drafts employment and severance agreements.

In addition, José assists clients with professional liability insurance matters, providing legal counsel on Directors & Officers (D&O), fiduciary and Employment Practices Liability (EPL) insurance issues. He has served as monitoring and coverage counsel and provided legal advice to underwriters on a variety of provisions of the insurance policy.

José speaks frequently on ERISA and employment law topics. He recently delivered presentations on DOL and IRS Health and Welfare Plan audits, Fiduciary Issues in ESG Investing, ERISA Prohibited Transactions and Exemptions, 2021 Employment Law Issues on the Enforcers' Radar, ESOP challenges and enforcement activity, and sexual harassment in the workplace, among other subjects.

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Sheldon focuses his practice on employee benefits and executive compensation issues.

He assists companies, both private and public, with implementing and maintaining their employer-sponsored retirement and health plans, and nonqualified deferred compensation programs.

Sheldon routinely provides clients with practical and concise advice on matters relating to the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986 (the "Code"), including the following:

Qualified Retirement Plans

- Draft communications to plan participants such as Summary Plan Descriptions ("SPDs") and Summary of Material Modifications ("SMMs").
- Draft and prepare amendments to plan governing documents.
- Provide analysis related to controlled-groups and affiliated service groups.
- Correct plan operational failures under the Employee Plans Compliance Resolution System ("EPCRS").
- Draft and review service agreements in connection with plan investment advisors.
- Advise clients in connection with subscription agreements for potential plan investment vehicles.
- Advise plan fiduciaries to ensure that they are meeting their fiduciary duties under ERISA.
- Assist clients under DOL audit and those facing class action lawsuits relating to alleged breaches of their fiduciary duty requirements under ERISA.

Health Programs

- Advise clients regarding COBRA, the Patient Protection and Affordable Care Act, and HIPAA compliance.

Nonqualified Plans

- Draft employment agreements for executives, severance plans, ERISA "Top-Hat Plans" and Supplemental Executive Retirement Plans ("SERP").
- Advise clients relating to Internal Revenue Code Sections 83(b), 409A and 162(m).
- Correct nonqualified deferred compensation plan failures pursuant to the IRS's 409A correction program.

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