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DEPARTMENT OF LABOR ADVANCES PROPOSED RULE EXPANDING 401(K) ACCESS TO PRIVATE CAPITAL

While the administration's 180-day target deadline has now passed, the U.S. Department of Labor ("DOL") has begun the formal rulemaking process in response to last August's executive order that could significantly reshape and further intertwine two rapidly growing segments of the financial industry: private capital and retirement planning.

President Donald Trump's August 7, 2025, Executive Order on "Democratizing Access to Alternative Assets for 401(k) Investors" (the "Order")[1] directed the DOL, within 180 days, to clarify the fiduciary process for evaluating alternative assets in 401(k) plans, identify criteria for balancing higher costs against potential long-term benefits and propose rules or safe harbors aimed at reducing litigation that may discourage prudent use of alternative investments.

Although that 180-day deadline technically expired on February 3, the proposed rule could be released within weeks or even days. On January 13, the DOL submitted its proposed rule to the Office of Management and Budget ("OMB") for interagency review, the final step that precedes publication of significant federal regulations. OMB review typically lasts anywhere from several weeks to several months; under applicable timelines, it is expected to conclude on or before April 23.

Upon release, the DOL proposed rule is expected to be followed by a public comment period of between 30 and 90 days, after which the DOL will incorporate feedback into a final rule that could be adopted as early as later this year.

KEY TAKEAWAYS

- Although the U.S. Department of Labor ("DOL") missed the February 3 deadline to release its proposed rule publicly, the proposal remains under review at the Office of Management and Budget and is expected to be released by mid-April.

[1] Executive Order 14330, "Democratizing Access to Alternative Assets for 401(k) Investors," August 7, 2025. https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/

• The Trump administration's August 2025 executive order established a new policy objective of expanding access for defined contribution plans (such as 401(k) plans) into alternative assets, such as private equity and venture capital, and directed the DOL and the Securities and Exchange Commission (the "SEC") to facilitate that objective.
• Potential changes to ERISA and securities regulation could open a new channel of capital into private equity and venture capital from defined contribution plans as early as 2026 or 2027.
• Widespread direct access by defined contribution plan participants to private funds would likely require strong SEC action and, in particular, changes to the definitions of "accredited investor" and "qualified purchaser."

I. Background

While defined benefit plans ("DB Plans") have for decades allocated a meaningful share of their assets into alternative investments (including private equity and venture capital), defined contribution plans ("DC Plans") have been slower to do so due to a combination of structural, market and regulatory constraints.

A DB Plan (such as a traditional pension) promises participants a specified retirement benefit funded and guaranteed by the employer, while a DC Plan (such as a 401(k) or 403(b)) provides individual accounts funded by employer and employee contributions and the earnings thereon, with investment risk and outcomes borne by the participant.

DB Plans have been able to incorporate private market strategies in part because assets are pooled and managed by professional fiduciaries with long investment horizons and no participant-level liquidity requirements. Large public pension plans, sovereign wealth funds and endowments deploy significant portions of their portfolios to private markets, further highlighting the relative lack of direct access within participant-directed retirement plans. By contrast, DC Plans are typically participant-directed, daily valued, and designed to permit frequent contributions, withdrawals, and reallocations, resulting in structural challenges for incorporating inherently illiquid and periodically valued private market investments. (While DC Plans can legally be invested on a pooled basis without participant direction, this is increasingly rare).

The question of whether DC Plans should be allowed to invest in alternative assets has been a long-running public policy debate. Proponents believe that access to alternative assets could enhance diversification and result in potentially higher returns for retirement accounts. Detractors believe, among other things, that alternative investments introduce a new level of investment risk and that there are significant liquidity risks.

Nonetheless, DC Plans hold nearly $14 trillion in assets, one of the largest and fastest-growing pools of long-term capital in the United States.[2] Even a modest shift of DC Plan assets from public equities and bonds into alternative assets could represent a tidal wave of new capital for private markets.

The Order, noting that over 90 million Americans in DC Plans generally lack the ability to invest in alternative assets through those plans, seeks to reduce the regulatory burdens and litigation risks that have historically impeded retirement account access to those products, which are typically more illiquid than publicly traded securities and may often feature fees and/or other compensation (such as carried interest).

Sponsors and fiduciaries of 401(k) plans are subject to fiduciary duties under the U.S. Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA fiduciary standards are among the most exacting under American federal law, strictly enforced, and designed to protect participants and their retirement savings from imprudent and/or opaque investment products. These duties, along with other securities law constraints and liquidity considerations, have historically limited the ability of 401(k) plans to invest widely in private capital. Moreover, given the lengthy periods during which capital is locked up for a standard closed-end private equity or venture capital fund, investments in alternative assets may not be appropriate for investors who are within 10 to 15 years of retirement and are seeking relatively less aggressive and more liquid approaches to investment.

The Order listed the following in its definition of "alternative assets," contemplating a universe of assets even wider than merely private equity and venture capital, including also cryptocurrency, real estate and commodities:

a. private market investments, including direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the managers of such investments, if applicable, seek to take an active role in the management of such companies;

b. direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate;

c. holdings in actively managed investment vehicles that are investing in digital assets;

d. direct and indirect investments in commodities;

[2] "ICI Data Shows Retirement Assets Reached a Record $48.1 Trillion," PR Newswire, January 15, 2026. https://finance.yahoo.com/news/ici-data-shows-retirement-assets-175700357.html

e. direct and indirect interests in projects financing infrastructure development; and

f. lifetime income investment strategies including longevity risk-sharing pools.

The Order also instructed the Securities and Exchange Commission (the "SEC") to consider ways to facilitate access to investments in alternative assets by participants in DC Plans, including revisions to existing SEC regulations and guidance relating to "accredited investor" and "qualified purchaser" status.

II. DOL Rulemaking

The Order, issued August 7, 2025, directed the DOL, within 180 days, to: (i) reexamine its prior guidance regarding ERISA fiduciary duties in connection with offering asset allocation funds that include alternative assets; (ii) clarify the fiduciary process for evaluating such investments, including how fiduciaries should balance higher costs against potential long-term return and diversification benefits; (iii) propose rules, guidance, or calibrated safe harbors addressing fiduciary duties in this context; and (iv) prioritize actions that may curb ERISA litigation constraining fiduciaries' ability to offer alternative investment opportunities.

In the first Trump administration, the DOL issued an information letter in June 2020 (the "2020 Letter")[3] confirming that 401(k) plan fiduciaries could prudently select and monitor private equity exposure within diversified investment options. Though non-binding, the financial industry viewed the 2020 Letter as providing a useful framework for incorporating private capital into DC Plan investment menus while satisfying ERISA's stringent fiduciary standards.

In December 2021, however, the DOL under the Biden Administration issued a supplemental statement to the 2020 Letter (the "2021 Statement"),[4] cautioning that plan fiduciaries may not be able to prudently evaluate private capital investment options, as required by ERISA, without third-party advisors. This chilled the enthusiasm generated by the 2020 Letter.

Within a week of the 2025 Order, the DOL rescinded the 2021 Statement.

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[3] "Information Letter 06-03-2020," U.S. Department of Labor. https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020

[4] "U.S. Department of Labor Supplement Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives," U.S. Department of Labor, December 21, 2021, rescinded August 12, 2025. https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement.

Offering alternative assets involves heightened litigation risk. Most recently, the Ninth Circuit's decision in *Anderson v. Intel Corp.* has become a touchstone in the debate over private equity investments in retirement plans, as it permitted ERISA fiduciary-breach claims challenging private equity allocations in a target-date structure to survive the pleading stage.[5] The Supreme Court granted certiorari in *Anderson* on January 26, 2026, ensuring continued judicial scrutiny of fiduciary standards in this area. The pending *Anderson* litigation may influence the DOL to address ERISA litigation more directly, potentially via a "safe harbor" provision for DC Plan fiduciaries considering alternative investment assets.

III. Securities Law Matters

Although the investment industry is widely awaiting the proposed DOL regulations, the SEC component is no less significant.

In concept, DC Plan participants could obtain exposure to private capital in two ways. First, they (or plan fiduciaries acting on their behalf) could cause 401(k) or other plans assets to be invested directly into private funds. Second, plans could offer registered funds that, in turn, invest directly in private funds. Both approaches currently face substantial constraints under U.S. securities law.

A. Direct Investment into Alternative Assets

In the direct investment scenario, the U.S. Securities Act of 1933 (the "Securities Act") limits investment in most private placements to accredited investors. For most individuals, that requires either (i) a net worth exceeding $1 million (excluding value of primary residence) or (ii) income of at least $200,000 individually (or $300,000 jointly) in each of the two most recent years.[6] Although the SEC has not increased these dollar thresholds since the adoption of Regulation D in 1982, they still exclude a substantial portion of the 90 million Americans participating in DC Plans.

Furthermore, private funds rely on exemptions from registration as investment companies under Section 3(c)(1) or 3(c)(7) under the U.S. Investment Company Act of 1940 (the "1940

[5] 137 F.4th 1015 (9th Cir. 2025).

[6] The term "accredited investor," most recently expanded by the SEC in 2020, is defined in Rule 501 of Regulation D under the Securities Act. In addition to the net worth ($1 million, excluding primary residence) and income ($200,000 individually or $300,000 jointly) thresholds for individuals, the definition also includes certain licensed professionals and "knowledgeable employees" of private funds, without regard to wealth or income. For entities, including corporations, partnerships, limited liability companies, certain trusts, employee benefit plans, and family offices, the standard generally requires at least $5 million in assets, though regulated financial institutions (such as banks, broker-dealers, registered investment advisers and small business investment companies) qualify automatically, as does any entity in which all equity owners, in turn, are themselves accredited investors.

Act"), both of which impose ownership limits. A Section 3(c)(1) fund may have no more than 100 beneficial owners, while a Section 3(c)(7) fund may admit only qualified purchasers, a far more stringent standard than "accredited investor." A natural person is a qualified purchaser if he or she owns at least $5 million in investments.[7]

This framework explains why the Order specifically directs the SEC to consider revising both the definitions of "accredited investor" and "qualified purchaser."

B. Indirect Investment through Registered Funds

Registered funds likewise face structural hurdles when investing directly into private equity and venture capital. The vast majority of registered funds are mutual funds and exchange-traded funds ("ETFs"), both open-end funds offering daily liquidity. Mutual funds comprise around 67% of all registered funds, with ETFs comprising an additional 28%, and taken together, represent nearly the entire universe of registered funds.[8] Only the remaining small segment of registered funds, including tender offer funds, interval funds and other more traditional closed-end funds that offer periodic liquidity, are generally capable of meaningful investment in private capital.

Since 2002, the SEC staff had applied an informal rule during both the Securities Act and 1940 Act registration review process whereby registered funds investing in private funds were expected either to (i) limit aggregate private fund exposure to approximately 15% of total assets or, (ii) require all investors to be accredited investors and establish a $25,000 minimum investment.

Shortly after assuming office, SEC chair Paul Atkins indicated in a May 19, 2025 speech that he requested that the SEC staff reconsider the informal 15% rule, pointing to the growth of private markets and concerns that many retail investors are missing

[7] The term "qualified purchaser" is defined in Section 2(a)(51) of the 1940 Act. In general, individuals must own at least $5 million in investments to qualify, although certain "knowledgeable employees" of a private fund are deemed qualified purchasers without regard to their personal wealth. Certain family offices and trusts with at least $5 million in investments may also qualify. For most entities, the threshold is at least $25 million in investments, though an entity whose equity owners are all themselves qualified purchasers will likewise be treated as a qualified purchaser. Section 2(a)(51) authorizes the SEC to define and, by rule, add categories of persons who may be treated as qualified purchasers for purposes of the Act. For purposes of the "qualified purchaser" definition, "investments" generally include securities and other financial instruments (such as stocks, bonds, investment funds, and similar assets), but exclude primary residences and property used for personal purposes, and are calculated on an unleveraged basis in accordance with SEC rules.

[8] "Registered Fund Statistics, Form N-PORT Data, period ending September 2024," Division of Investment Management Analytics Office, February 4, 2025. https://www.sec.gov/files/investment/im-registered-fund-statistics-20250204.pdf

opportunities to invest in high-return asset classes.[9] In August 2025, the SEC staff issued Accounting and Disclosure Information guidance (ADI 2025-16)[10] relaxing the 15% rule for closed-end funds that invest in private funds ("CE-FOPFs"), instead emphasizing structural investor protections. Those include: (i) that the CE-FOPF be managed by a registered investment adviser, (ii) that a board of directors exercises oversight over the CE-FOPF and (iii) the CE-FOPF must make certain periodic disclosures and bear liability for material omissions and misstatements. This shift in regulatory approach could open a much wider pool of investment capital from the public into private capital, including registered private equity funds of funds.[11]

Despite these steps, the 1940 Act continues to constrain registered fund participation in private funds because Sections 3(c)(1) and 3(c)(7) require private funds to remain limited to 100 beneficial owners or exclusively qualified purchasers. Investors in a registered fund are typically "looked through" for purposes of these thresholds, such that a registered fund investing in a private fund could cause the private fund to exceed ownership limits or include non-qualified purchasers, effectively preventing broad registered-fund participation.

The SEC staff's longstanding position, as reflected in a series of no-action letters between 1992 and 2001further reinforced this constraint by treating each DC Plan participant as individual beneficial owners for Section 3(c)(1) purposes, except under a set of limited conditions that have proven impractical for most registered funds to satisfy in practice.[12]

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[9] Paul Atkins, "Prepared Remarks Before *SEC Speaks*," May 19, 2025. https://www.sec.gov/newsroom/speeches-statements/atkins-prepared-remarks-sec-speaks-051925

[10] "ADI 2025-16 – Registered Closed-End Funds of Private Funds," Division of Investment Management, August 15, 2025. https://www.sec.gov/about/divisions-offices/division-investment-management/fund-disclosure-glance/accounting-disclosure-information/adi-2025-16-registered-closed-end-funds-private-funds?utm_medium=email&utm_source=govdelivery.

[11] Atkins's speech, and the effective relaxation of the informal 15% limitation, followed the SEC's April 29, 2025 order (*FS Credit Opportunities Fund et al.*), which modernized and streamlined exemptive relief governing co-investment by closed-end registered funds and business development companies. Section 17(d) of the Investment Company Act of 1940 and Rule 17d-1 thereunder prohibit a registered investment company from participating in a "joint transaction" with an affiliated person absent an SEC order. As a result, registered funds seeking to co-invest alongside affiliated private funds have historically been required to obtain exemptive relief, and such orders typically imposed detailed allocation methodologies, board oversight and reporting requirements, and conditions designed to ensure participation on substantially equivalent economic terms.

[12] In *Intel Corp.* (Nov. 18, 1992) and *PanAgora Group Trust* (Apr. 29, 1994), the SEC staff indicated that participants in a defined contribution plan investing in a Section 3(c)(1) fund could be treated as individual beneficial owners of the fund's securities, effectively "looking through" the plan for purposes of the 100-owner limit. In *Standish, Ayer & Wood, Inc. Stable Value Group Trust* (Dec. 28, 1995), the staff permitted a participant-directed plan to be treated as a single investor subject to specified conditions (including fiduciary investment discretion and diversification limits), and in *H.E.B. Grocery Co.* (May 18, 2001) reaffirmed and extended that framework, including to Section 3(c)(7) funds.

Together, these statutory and interpretive positions have significantly curtailed the ability of registered funds to invest directly and at scale in traditional private equity and venture capital funds. It is conceivable that, in implementing the Order, the SEC staff revisits this line of interpretation and relaxes its treatment of 401(k) and other DC Plans under Sections 3(c)(1) and 3(c)(7).

IV. Conclusion

As the financial industry awaits both the DOL's proposed rule and potential SEC action, private fund managers and DC Plan fiduciaries alike are preparing for what could be a once-in-a-generation regulatory shift integrating private capital and retirement planning. If implemented as contemplated by the Order, these changes could materially expand retail access to private capital and reshape the long-term structure of U.S. retirement portfolios.

We continue to monitor DOL and SEC developments, and we will provide additional updates as they emerge.

Please reach out to Kevin Lees, Scott Museles or Kimberly Mann at Shulman Rogers if you have any questions.