

Blog Post

What Employers Should Know About Trump's Executive Order on Expanding Access to Alternative Assets in 401(k) Plans

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Employer sponsored 401(k) investment menu offerings may be getting richer in diversified assets, including private equity, cryptocurrency, and other alternative asset investments, based upon a recent executive order signed by President Donald Trump on August 7, 2025, entitled “Democratizing Access to Alternative Assets for 401(k) Investors.” The Order directs the U.S. Department of Labor (DOL), in coordination with the Department of the Treasury and the Securities and Exchange Commission, to reexamine and potentially relax fiduciary guidance under ERISA regarding the inclusion of “alternative assets” in defined contribution plan investment menus. “Alternative assets” are broadly defined to include private market investments (private equity, private debt), real estate interests, actively managed vehicles investing in digital assets (including cryptocurrencies), commodities, infrastructure project investments, and lifetime income strategies.

The stated goal of the Order is to enable employers and plan sponsors to broaden diversification opportunities and enhance retirement outcomes for participants. Within 180 days, the DOL must review existing guidance, consider rescinding the December 21, 2021 [Supplemental Private Equity Statement](#) (which emphasized exercising significant caution before adding private equity options to

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investment menus), and propose rules or safe harbors clarifying how fiduciaries can prudently evaluate alternative asset options. While the Order does not change existing law, it directs federal agencies to explore regulatory and sub-regulatory changes that could expand the range of investments available to participants, potentially altering how fiduciaries assess and manage investment menus.

Current Fiduciary Framework Under ERISA

Employers that sponsor 401(k) and other ERISA-covered defined contribution plans almost always retain some level of fiduciary responsibility over the investment options offered. This responsibility applies whether the employer makes such decisions directly or delegates them to a committee or outside investment fiduciaries. Even when investment authority is delegated, the plan sponsor — as a plan fiduciary — must prudently select and monitor those managing the investment menu.

ERISA § 404(a)(1)(A)–(B) imposes duties of loyalty and prudence on plan fiduciaries. These duties require fiduciaries to act solely in the interest of participants and beneficiaries and with the care, skill, prudence, and diligence that a prudent person familiar with such matters would use under similar circumstances. For purposes of selecting a defined contribution plan's investment menu, DOL regulation § 2550.404a-1 provides that fiduciaries must consider the facts and circumstances of each investment option (including diversification, liquidity, and risk/return characteristics) and must follow a prudent process in selection and monitoring. ERISA does not generally mandate or prohibit specific asset classes for participant-directed defined contribution plans, but a well-documented fiduciary process is critical to defending investment menu decisions in court or during a DOL investigation.

Prior Guidance on Alternative Assets

Just three years ago, the DOL issued Compliance Assistance Release 2022-01 cautioning against inclusion of certain alternative assets in participant-directed plans. The Release warned fiduciaries to exercise “extreme care” before offering cryptocurrency or digital asset products as investment options, citing volatility, valuation challenges, custody risks, participant sophistication, and regulatory uncertainty. It also signaled an enforcement initiative targeting plans that add such options. While not a formal rule, the Release raised the perceived litigation and enforcement risk of including digital assets and other alternative assets.

Separately, the DOL’s 2020 Information Letter on private equity in diversified plan investment options confirmed that ERISA does not categorically prohibit such investments but stressed that fiduciaries must engage in a rigorous process to assess suitability for plan participants. The 2021 Supplemental Statement reiterated these cautions, emphasizing participant protection and the need to justify higher fees and complexity.

Next Steps for Plan Fiduciaries

The Order signals a potential shift in regulatory posture, but until the DOL issues new rules or guidance, the existing fiduciary standards and enforcement environment remain in place. Plan sponsors and fiduciaries considering alternative assets should:

- Monitor forthcoming proposals for new safe harbors or clarified prudence criteria.
- Review investment policy statements to address alternative asset evaluation and monitoring.
- Document all diligence on alternative assets, including analysis of liquidity, valuation, participant understanding, and cost relative to expected benefit.
- Prepare participant communications explaining the nature and risks of alternative investments

and consider enhanced education efforts.

While the Order raises the prospect of broader investment menus in 401(k) plans, plan sponsors and other fiduciaries should proceed under the current, more conservative standards until new guidance is issued. The key remains a well-documented, prudent process tailored to plan demographics and participant needs. For guidance regarding alternative investment options and regulatory compliance, employers, plan sponsors, and other fiduciaries should reach out to the Akerman Employee Benefits team.

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