RULES & REGULATIONS

Bringing alternatives to DC plan participants tops 2026 regulatory priorities

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While much of year one of Trump 2.0 was spent getting key officials in place and navigating the longest government shutdown in U.S. history, experts expect year two to be busy at regulators like the Securities and Exchange Commission and Department of Labor, with the administration's push to broaden access to private markets atop the to-do list.

President Donald Trump in August signed an executive order "democratizing access to alternative assets" for 401(k) plans. The order classified six items as "alternative assets," including private equity, real estate, digital assets and longevity risk-sharing pools.

Trump gave DOL officials until Feb. 3 to craft guidance and rule proposals, reexamine past and present positions, and consult with other federal regulators in order to fulfill the order. Also, Trump directed the DOL to "prioritize actions that may curb ERISA litigation that constrains fiduciaries' ability to apply their best judgment in offering investment opportunities to relevant plan participants."

Though incorporating alternatives assets in plan lineups is legal under the Employee Retirement Income Security Act, plan sponsors have historically steered clear for fear of litigation and other concerns like fees, liquidity and transparency.

Daniel Aronowitz, whom the Senate confirmed in September to lead the DOL's Employee Benefits Security Administration, said in his confirmation hearing that he would "restore discretion to plan fiduciaries as Congress intended in the ERISA statute, so that fiduciaries, not the government or plaintiff lawyers, decide what is best for America's participants."

Legal sources said they expect the DOL to initiate a rule-making process and issue guidance aimed at providing sponsors with comfort in offering alternatives assets to participants.

Andrew L. Oringer, partner and general counsel for the Wagner Law Group, said he expects the DOL and SEC to work together to execute Trump's order.

"I think that there is a likelihood that that we will see some kind of a coordinated effort that potentially really changes the game," he said.

In addition to working with the DOL, Trump's order mandates the SEC to facilitate access to alternatives assets for participant-directed DC plans by revising applicable regulations and guidance. Specifically, the order instructs the agency to consider changing existing SEC regulations and guidance related to accredited investor and qualified purchaser status.

Marc Elovitz, partner and global head of investment management regulatory at law firm McDermott Will & Schulte, noted that there's still a long way to go to bring private markets to the masses.

"Executive orders can be a great way of establishing a policy position on something, but actually making it happen is more challenging," he said. "And the big hurdle for democratization or retail-ization of private markets is the litigation risk."

"There's not a silver bullet in terms of 'we're going to make this feasible very, very easily,'" Elovitz added. "So the jury's still out on whether there's going to be a fix to that that will operationalize it in a meaningful way."

The SEC's makeup

In public remarks, SEC Chair Paul Atkins and commissioners Hester Peirce and Mark Uyeda have each made the case for expanding access to private markets for retail investors.

"The private markets are really essential and great, and they've grown tremendously obviously over the last few decades," Atkins said in October. "If you talk to any sort of asset managers, or even pension fund managers, they'll tell you that you cannot have a balanced, diverse portfolio if you don't have exposure these days to the private markets."

SEC Commissioner Caroline Crenshaw, who is leaving the agency on Jan. 3, expressed a different viewpoint in December.

"Unleashing the private markets' insatiable hunger for capital on retail investors' wallets will come back to bite regulators, but not before Main Street American savings have been looted," said Crenshaw, the commission's lone Democrat, in 2025.

The SEC is set up to have five commissioners. No one party can control more than three seats at a given time. That means the party in the White House has a 3-2 majority when all seats are filled. After Crenshaw's departure, there will be a 3-0 Republican majority, and Trump has given no indication he intends to fill the two vacant Democratic seats.

Alyssa Horton, a partner at law firm Ropes & Gray, said it's often helpful to hear why a commissioner dissents from a rule-making, but Crenshaw's departure won't have a major impact on the SEC's agenda.

"It is just kind of nice sometimes to see the differing viewpoints, but from a practical perspective, a 3-0 (vote) or a 3-1 (vote) doesn't mean anything in terms of rule-making," she said.

Key priorities: proxy firms, crypto and disclosures

Some other issues the SEC will be focused on in 2026 are proxy-advisory firms, shareholder proposals, cryptocurrency and corporate disclosures.

On Dec. 11, Trump signed an executive order critical of proxy-advisory firms Institutional Shareholder Services and Glass Lewis & Co., and directed the SEC and other regulators to rescind existing rules or develop new ones to curb the firms' "enormous influence."

Also, the SEC should consider revising or rescinding all rules and guidance related to Securities Exchange Act Rule 14a-8 that are "inconsistent with the purpose of this order." Rule 14a-8 concerns shareholder proposals and sets the ground rules for including and excluding such proposals on a company's proxy ballot.

In November, the SEC announced it would not act as a referee on requests to exclude shareholder proposals this proxy season, a departure from the norm. That change gives companies more responsibility over the process and could lead to more shareholder proposals making it on to company ballots in 2026 if companies fear a legal challenge as a result of their decision, sources said.

Atkins has said he wants to "depoliticize shareholder meetings" and make it more difficult for activist investors to get certain shareholder proposals onto company proxy ballots as part of a broader effort to entice more companies to go public.

"It is very clear that the administration and this commission is not a fan of the imposition on public companies (concerning) social agenda initiatives," McDermott Will's Elovitz said.

On digital assets, the SEC established a Crypto Task Force in 2025 to develop a comprehensive regulatory framework for cryptocurrencies.

Amy Jane Longo, a partner at Ropes & Gray, said she'll be watching to see if the SEC proposes a rule in 2026 to exempt certain crypto tokens from stringent securities laws.

"Folks, I think, are hopeful there'll be some movement there early next year," Longo said.

To that end, Atkins in a November speech said he hopes the commission will consider "a package of exemptions to create a tailored offering regime for crypto assets that are part of or subject to an investment contract."

Also top of mind at the SEC is a push to reduce reporting requirements for public companies. Atkins has endorsed a Trump idea for the agency to move to semiannual, rather than quarterly reporting.

Trump, Atkins and other proponents argue that the existing quarterly reporting requirements are too onerous and costly and lead to short-termism where companies are too focused on meeting quarterly targets instead of managing for their long-term strategy.

But investors largely oppose the idea, arguing that timely and fulsome disclosures are crucial for making investment decisions.

What's on tap at the DOL

In addition to executing Trump's order on private markets, sources expect the DOL's EBSA to wrestle with a few familiar topics: fiduciary investment advice and environmental, social and governance investing.

In its latest regulatory agenda, the DOL said a new investment advice rule will be proposed by the end of May.

Previously, a federal appeals court in December granted the DOL's request to dismiss its appeal to a consolidated lawsuit challenging a Biden-era fiduciary investment advice rule.

During the previous administration, the federal government filed an appeal in the 5th U.S. Circuit Court of Appeals in New Orleans to defend its Retirement Security Rule, which was finalized in 2024.

Among other things, the Retirement Security Rule would change the five-part test for determining if someone qualifies as a fiduciary so that one-time advice — including rollovers to IRAs or annuity purchases — must be in an investor's best interest.

In two separate lawsuits, annuity and insurance groups challenged the rule, and two district court judges halted its implementation before it took effect.

Richard Nowak, co-leader of ERISA litigation at law firm Mayer Brown, noted that despite the DOL's appeal getting dismissed, the Retirement Security Rule isn't officially dead. The two district court judges simply halted the rule's implementation but didn't make any judgement on its merits, so the legal challenge now heads back to the district court level.

But the Wagner Law Group's Oringer said that both district court judges have already expressed skepticism regarding whether the Retirement Security Rule could survive the respective challenges. "Thus, while procedurally there may be more for the district courts to do, substantively it would seem that that the die may well have already been cast," he said.

With that in mind, sources expect the DOL to begin a new rule-making process.

"I do think it's probably most likely the Department of Labor comes in and says, 'We're going to engage in rulemaking and sort of scrap this and put something else out there, as opposed to having all these hanging chads left potentially from different litigation," Nowak said.

The DOL over multiple administrations — Obama, Trump 1.0 and Biden — have issued rules or guidance on fiduciary investment advice, but court battles and administration changes have kept things in flux for the last decade.

"The hope is that whatever comes out will enable consistency and certainty going forward and not again flipping," Nowak said. "Because if there's a flip again in three years, it just makes everyone's life very difficult."

Elsewhere, EBSA has also said it's working on a new rule on the extent to which retirement plan fiduciaries may consider ESG factors when selecting investments.

In Trump 1.0, the DOL finalized a rule that said ERISA fiduciaries could not invest in "nonpecuniary" vehicles that sacrifice investment returns or take on additional risk.

Biden administration officials said that the Trump 1.0 rules produced a chilling effect on ESG consideration so in 2022, the DOL finalized a rule that officials described as neutral. The Biden-era rule made clear that retirement plan fiduciaries could consider ESG factors when making investment decisions and maintained the department's position that fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals.

That Biden-era rule faced legal challenges and a federal court in 2025 granted the Trump administration's request to halt the case.

Now, the DOL in Trump 2.0 is working on a new rule that it aims to unveil by the end of May, according to the latest regulatory agenda.

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