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# Alternative Investments in 401(k) Plans: Executive Order Implications and Key Fiduciary Considerations

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## Introduction

Many financial professionals and investment experts have endorsed the use of alternative investments in the construction of modern portfolios. However, there has been historical uncertainty as to how alternative investments should be incorporated into 401(k) plans and other defined contribution plans ("Plans") that offer investment menu options ("Investment Options") and other investment management service options (collectively, "Investment Solutions") to their participants. Fortunately, a recent executive action from the White House has signaled a shift toward a more favorable regulatory environment for Investment Solutions that incorporate alternative investments. This article examines the evolving regulatory landscape in this area and discusses the key considerations for Plan fiduciaries who are interested in giving their Plan participants access to alternative investments through the Plan's Investment Solutions.

## Background on Trump Executive Order and Agency Guidance, Past and Present

*Executive Order Overview*

After much anticipation, President Donald Trump issued Executive Order 14330, "Democratizing Access to Alternative Assets for 401(k) Investors," (the "Executive Order") on August 7, 2025.[2] The Executive Order calls for expanded access to private market investments and other alternative assets for Plans and their participants. It expressly provides that it is the "policy of the United States" that Plan participants should have access to funds that include investments in alternative assets. While the Executive Order itself does not implement any changes to existing regulations or guidance, it directs the Department of Labor ("DOL") and related agencies to take specific implementation actions by February 3, 2026 (or 180 days following the issuance of the order).

The Executive Order directs the DOL to (1) reexamine past and present guidance on a Plan fiduciary's duties under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), when considering the use of an asset allocation fund that includes alternative investments as an Investment Option for Plan participants; (2) clarify the DOL's position on alternative assets and the appropriate fiduciary process associated with offering asset allocation funds containing alternative investments under ERISA; and (3) propose regulations or other guidance, including "appropriately calibrated safe harbors," to reduce legal uncertainty. The Executive Order also directs 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."[3]

Further, the Executive Order requires the DOL to consult and coordinate with the Treasury Department, the Securities and Exchange Commission ("SEC"), and other federal regulators as necessary to implement the order. It also directs the SEC, in consultation with the DOL, to consider ways to facilitate access to investments in alternative assets for Plan participants, including by potentially revisiting existing guidance relating to "accredited investor" and "qualified purchaser"

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[2] *See* Executive Order 14330, *available at* https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/.
[3] *Id.*

status.[4] It should be noted that the Executive Order broadly defines "alternative assets" to include (1) private market investments, including direct and indirect interests in equity, debt or other financial instruments that are not traded on exchanges; (2) direct and indirect investments in real estate; (3) holdings in actively managed investment vehicles that are investing in digital assets; (4) direct and indirect investments in commodities; (5) direct and indirect interests in projects financing infrastructure development; and (6) lifetime income investment strategies.

*Impact on Existing DOL Guidance*

The direction given in the Executive Order is the latest in a history of intermittent, and sometimes vacillating, guidance concerning the ERISA fiduciary requirements that apply to non-traditional and alternative investments. Roughly three decades ago, the DOL provided general guidance on how plan fiduciaries should evaluate these types of investments in its 1996 Information Letter to the Comptroller of the Currency, which addressed the utilization of derivatives in particular in ERISA pension plans.[5] The 1996 Information Letter generally stated that "investments in derivatives are subject to the same fiduciary responsibility rules in the same manner as are any other plan investments."[6] But it also noted that certain derivatives may require "a higher degree of sophistication and understanding on the part of plan fiduciaries than other investments."

Following the 1996 Information Letter, the ERISA Advisory Council[7] studied and issued reports on the use of alternative assets in retirement plans in 2006, 2008, and 2011. These reports included numerous recommendations to the DOL, which were not implemented by the agency.[8] Thereafter, the DOL's Office of Inspector General in its 2013 report (the "OIG Report") opined on the need for the agency to provide additional guidance and oversight for plans holding alternative investments, particularly those that are hard to value.[9] The DOL took exception to the OIG Report, stating in its response letter that the Inspector General's finding was not "an objective, substantiated observation." The DOL response letter simply affirmed the agency's view that alternative investments are subject to the same fiduciary responsibility rules that apply to other plan investments and confirmed that the fiduciary guidance in its 1996 Information Letter on derivatives was also generally applicable to alternative investments.

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[4] *Id. See also* Fact Sheet: President Donald J. Trump Democratizes Access to Alternative Assets for 401(k) Investors, *available at* https://www.whitehouse.gov/fact-sheets/2025/08/fact-sheet-president-donald-j-trump-democratizes-access-to-alternative-assets-for-401k-investors/.

[5] *See* DOL Information Letter 03-21-1996, *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/03-21-1996.

[6] *Id.*

[7] The ERISA Advisory Council has 15 members appointed by the Secretary of Labor as required by statute, and its purpose is to advise the Secretary and to submit recommendations regarding the Secretary's related functions.

[8] *See* 2006 ERISA Advisory Council, "Report of the Working Group on Prudent Investment Process," *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2006-prudent-investment-process; 2008 ERISA Advisory Council, "Report on Hard to Value Assets and Target Date Funds," *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2008-hard-to-value-assets-and-target-date-funds; 2011 ERISA Advisory Council, "Hedge Funds and Private Equity Investments," *available at* https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2011-hedge-funds-and-private-equity-investments.pdf.

[9] See DOL Office of Inspector General – Office of Audit, "EBSA Needs to Provide Additional Guidance and Oversight to ERISA Plans Holding Hard-To-Value Alternative Investments," (Sept. 30, 2013), *available at* https://www.oig.dol.gov/public/reports/oa/2013/09-13-001-12-121.pdf.

The DOL did not issue further substantive guidance in this area until its 2020 Information Letter, in which it confirmed that an asset allocation fund with a private equity component may be offered as an Investment Option to Plan participants. This guidance identified the relevant factors that Plan fiduciaries should consider when evaluating the risks and benefits of offering such Investment Option to Plan participants.[10] Following a change in administration, the DOL issued a Supplemental Statement in 2021, cautioning that the 2020 Information Letter does not "endorse or recommend" Investment Options with private equity allocations, and that fiduciaries of small plans are "not likely suited to evaluate" the use of private equity investments in Investment Options.[11] While the 2021 Supplemental Statement did not directly overturn the substantive fiduciary principles set forth in the 2020 Information Letter, the abrupt tonal change had a "chilling effect" on the potential adoption by Plans of Investment Options with private equity allocations. However, shortly after the issuance of the Executive Order which directed the DOL to review its prior guidance, the DOL rescinded the 2021 Supplemental Statement on August 12, 2025, citing a return to a "neutral, principled-based approach to fiduciary investment decisions."[12]

The DOL's guidance regarding Plan investments in cryptocurrency has undergone a similar tonal shift in connection with the change in administration. While the DOL initially issued guidance in 2022 directing plan fiduciaries to exercise "extreme care before they consider adding a cryptocurrency option to a 401(k) investment menu for plan participants," such guidance was subsequently rescinded in 2025 following the change in the administration.[13] In rescinding the 2022 guidance, the DOL indicated that it was returning to its neutral approach where it will not single out particular investments or strategies for additional or special scrutiny.

In 2025, the DOL also issued an advisory opinion on lifetime income, one of the types of alternative assets that was explicitly referenced in the Executive Order.[14] The guidance addressed how a lifetime income product can satisfy the requirements to be a qualified default investment alternative ("QDIA"). In its news release announcing this new guidance, the DOL indicated its

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[10] *See* DOL Information Letter 06-03-2020, ***available at*** https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020. The Letter articulates five factors for fiduciaries to consider when evaluating the risks and benefits associated with the investment alternative: (1) whether the addition of the fund to the plan's menu would give participants the opportunity invest among more diversified options; (2) whether the fund manager has the capabilities and experience with respect to private equity investments; (3) whether the fund has appropriately limited its allocation to private equity, and has adopted valuation and liquidity features designed to provide liquidity for plan participants; (4) consideration of plan features and participant profile; and (5) whether the plan fiduciary has the required skills or needs assistance from investment professionals to evaluate the fund.

[11] *See* DOL Supplemental Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives, ***available at*** https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement.

[12] DOL News Release, "US Department of Labor Rescinds 2021 Supplemental Statement on Alternative Assets in 401(k) Plans," ***available at*** https://www.dol.gov/newsroom/releases/ebsa/ebsa20250812.

[13] *See* DOL Compliance Assistance Release No. 2022-01, ***available at*** https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01. This guidance was subsequently rescinded by DOL Compliance Assistance Release No. 2025-01, ***available at*** https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2025-01.

[14] *See* DOL Advisory Opinion 2025-04A, ***available at*** https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2025-04a.

intent to engage in proposed rulemaking in accordance with the Executive Order, to clarify the fiduciary duties required when "deciding whether to make available to plan participants an asset allocation fund that includes investments in alternative assets, including potential safe harbors."[15]

*Impact on Existing SEC Guidance*

Historically, many institutional investors and high-net-worth individuals have been able to obtain exposure to alternative investments by investing in private funds. Under existing SEC rules, access to such private funds typically has been limited to investors who are able to meet the regulatory standards for "accredited investors"[16] and/or "qualified purchasers."[17] Under the Securities Act of 1933, as amended (the "Securities Act"), accredited investors may be permitted to purchase securities, including interests in private funds, through private offerings that are exempt from registration. Additionally, under the Investment Company Act of 1940, as amended (the "Company Act"), private funds are not required to register as an "investment company" when they satisfy an available exemption, such as the exemption under Section 3(c)(7) of the Company Act for private funds that limit investors to qualified purchasers.

Due to these restrictions under the Securities Act and the Company Act, private funds generally cannot be offered as Investment Options to Plan participants, since the participants in any given Plan will undoubtedly include individuals who do not meet the accredited investor and/or qualified purchaser standards as applicable. As noted above, the Executive Order directs the SEC to consider ways to facilitate access to investments in alternative assets for Plan participants in consultation with the DOL, and the SEC is expected to consider revisions to its existing guidance relating to accredited investor and qualified purchaser status. It should be noted that there is also Congressional interest in providing statutory relief in this area, as legislation has been introduced to codify the Executive Order.[18]

Instead of investing directly in private funds with holdings in alternative assets, investors can also invest in closed-end funds[19] that are formally registered with the SEC under the Company Act ("Fund of Private Funds" or "FOPF") which, in turn, obtain exposure to alternative assets by investing in such private funds. Historically, as part of the registration review process for a Fund of Private Funds, the SEC staff has taken the position that a FOPF investing 15% of more of its portfolio assets in private funds must impose eligibility restrictions. Specifically, the FOPF must require each investor to meet accredited investor standards and make a minimum initial investment of $25,000.[20] But following the issuance of the Executive Order, SEC staff announced a change in this position, stating that SEC staff will no longer require (through its review and comments on

[15] DOL News Release, "US Department of Labor Continues to Boldly Implement President Trump's Executive Order on Alternative Assets in 401(k) Plans," *available at* https://www.dol.gov/newsroom/releases/ebsa/ebsa20250923.
[16] *See* 17 C.F.R. § 230.501(a). The SEC last made substantial update to this definition in 2020.
[17] *See* 15 USC § 80a-2(a)(51).
[18] H.R. 5748, Retirement Investment Choice Act.
[19] Closed-end funds generally include funds that issues a fixed number of shares through an initial offering, and such shares are then traded on a secondary market.
[20] See SEC Accounting and Disclosure Information 2025-16 – Registered Closed-End Funds of Private Funds, *available at* 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.

registration statements/filings) a Fund of Private Funds to either (i) include accredited investor and minimum investment requirements; or (ii) limit its private fund investments to 15% of fund assets.[21] Additionally, recent comments from the SEC Chairman indicate that the agency will work closely with the DOL on implementation efforts.[22]

**ERISA Considerations for Plan Fiduciaries**

In light of the DOL's recent confirmation of its neutral stance in the case of Plan investments that include alternative assets, Plan fiduciaries may wish to consider offering Investment Solutions that incorporate alternative investments for the benefit of their participants. When exploring and considering such Investment Solutions, Plan fiduciaries should adhere to the general fiduciary standards of ERISA and should also keep on the lookout for the pending safe harbor guidance pursuant to the Executive Order.

*Types of Investment Solutions Which May Include Alternative Assets*

Asset allocation funds, such as target-date funds ("TDFs"), are routinely included in the menu of Investment Options for Plans and their participants. Consistent with the general fiduciary principles under existing DOL guidance, asset allocation funds that are intended to be used as Investment Options may include alternative assets in their underlying portfolios in a prudent manner. For example, a suite of TDFs could feature a glide path with prudent allocations to private equity and/or private debt investments in addition to traditional asset classes.

Managed Account arrangements are substantively similar to asset allocation funds in that they offer an "all in one" Investment Solution for Plan participants. When a Managed Account option is selected by a Plan participant, a professional investment manager (the "Managed Account Provider") will make customized allocation decisions for the participant account based on the personalized data that is available, such as the participant's age or risk tolerance. In addition, when making investment allocations for a participant account, the Managed Account Provider will typically utilize all or some of the Plan's Investment Options ("Core Options"). However, the Managed Account Provider may also utilize other investment funds ("Non-Core Options") for the participant's Managed Account, which are not otherwise available for selection by Plan participants. From a participant's perspective, a Managed Account is a service provided by the Managed Account Provider, rather than an investment fund. But given the substantive similarity of Managed Account arrangements to asset allocation funds, they should be viewed similarly from a Plan fiduciary perspective. Accordingly, consistent with the general principles under existing DOL guidance, Managed Account arrangements may incorporate alternative investments in the same way that asset allocation funds may include alternative investments. In order to obtain exposure to alternative investments, a Managed Account Provider will typically select an alternative investment fund for use as a Non-Core Option. When doing so, it should select such Non-Core Option and determine the Managed Account's allocation to such Non-Core Option (in addition to allocations to the other Core and Non-Core Options) in a prudent manner.

[21] *Id.*

[22] *See* Statement by Paul S. Atkins, SEC Chairman, "Remarks at the Investor Advisory Committee Meeting," (Sept. 18, 2025), *available at* https://www.sec.gov/newsroom/speeches-statements/atkins-091825-remarks-investor-advisory-committee-meeting#_ftnref7.

Custom TDFs, which are typically maintained by the largest of Plan sponsors, are another type of Investment Solution that bears an operational resemblance to Managed Accounts. Under both Custom TDF and Managed Account arrangements, Plan participants will rely on an investment manager to determine the investment allocations for their individual Plan accounts. In order to establish a Custom TDF, the Plan sponsor will engage a third-party investment manager ("Custom TDF Manager") to create a suite of customized target-date portfolios that invest in Core Options from the Plan's investment menu as well as additional Non-Core Options selected by the Custom TDF Manager. The asset allocations for the Custom TDF will generally become more conservative over time, based on a customized glidepath that has been constructed by the Custom TDF Manager based on participant demographics of the Plan.

Just as alternative investment funds may be utilized as Non-Core Options for Managed Account arrangements, they may also be utilized in Custom TDFs. Similarly, Custom TDF Managers may select alternative investment funds for use as Non-Core Options in their Custom TDF portfolios in accordance with general fiduciary principles under existing DOL guidance. Thus, Custom TDF Managers must act prudently when selecting an alternative investment fund and determining the Custom TDF portfolio's level of exposure to such fund. Unlike Managed Accounts, each Custom TDF portfolio will frequently be "unitized" so that a daily unit value for the portfolio is calculated, mimicking the daily share value of a TDF organized as a mutual fund. Even though a Custom TDF portfolio is not legally organized as a separate fund entity, Plan participants effectively "own" units representing fractional exposure to the overall portfolio. Accordingly, the unit value of the Custom TDF portfolio will be based on the value of the portfolio's underlying investments in the applicable Core Options and Non-Core Options, including any alternative investment fund.

*Reviewing the Overall Prudence of the Investment*

ERISA's fiduciary duties generally require a review of the overall prudence of the applicable Investment Solution offered to the Plan's participants.[23] For example, Plan fiduciaries would have a duty to prudently select and monitor the Plan's menu of Investment Options, including any asset allocation fund with exposure to alternative assets.[24] When a Plan offers a Managed Account service as an Investment Solution for participants, these fiduciary duties would similarly apply to a Plan fiduciary's selection and monitoring of the Managed Account Provider. Consistent with longstanding DOL guidance, the Plan fiduciary should generally consider the qualifications of the Managed Account Provider, the quality of its services as well as the reasonableness of its fees.[25] It should also specifically consider how the Managed Account Provider intends to utilize Core Options and Non-Core Options as applicable, including any alternative investment fund. With respect to a Plan's offering a Custom TDF option to participants, these fiduciary duties would similarly apply to the selection and monitoring of the Custom TDF Manager. Thus, Plan fiduciaries should generally examine the Custom TDF

[23] ERISA § 404(a)(1)(B); 29 C.F.R § 2550.404a-1(b).
[24] *See Tibble v. Edison, Int'l,* 575 U.S. 523, 530 (2015) ("...the duty of prudence involves a continuing duty to monitor investments and remove imprudent ones...").
[25] *See* DOL Information Letter to Diana Orantes Ceresi from Bette J. Briggs (Feb. 19, 1998), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/02-19-1998, and DOL Information Letter to Theodore Konshak from Bette J. Briggs (Dec. 1, 1997), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/12-01-1997.

Manager's qualifications, services and fees. They should also specifically evaluate the glidepath designed by the Custom TDF Manager as well as its use of Core Options and Non-Core Options, including any alternative investment fund.

*Fee and Cost Structure Considerations*

Introducing alternative asset exposure into Plans raises complex questions about fees and cost transparency, and how Plan fiduciaries can best monitor and evaluate these fees. Unlike traditional vehicles, such as mutual funds, where expense ratios are standardized and readily benchmarked against the expense ratios of other similar funds, alternative asset strategies can involve higher and more complex fees structures that are not easily benchmarked.

For example, many alternative investment funds have both an asset-based management fee and a performance-based fee that provides additional compensation when the fund outperforms a stated hurdle rate. The calculation of the performance-based fee can often be complex. Additionally, alternative investment arrangements may involve layered fund vehicles, which in turn involve layered management fees or other administrative costs, such as fees for early redemption or placement. To the extent there is limited transparency around these expenses, Plan fiduciaries may find it difficult to estimate and evaluate the reasonableness of such fees and to find appropriate benchmarks for comparative purposes. When considering whether such fees are appropriate, Plan fiduciaries should evaluate the fees in light of all relevant facts and circumstances. Such evaluation may require the use of experts familiar with alternative assets.

*Liquidity Risks*

From an operational standpoint, 401(k) plans and other Plans must meet a range of participant transactions on demand, including payroll contributions, plan loans, investment allocation changes as well as benefit distributions and involuntary cashouts. For these reasons, it is customary for Plans to utilize Investment Options with daily liquidity, giving Plan participants the ability to purchase and sell their beneficial interests in the Plan's various Investment Options on a daily basis. Due to the daily liquidity demands of Plans, in the case of Managed Accounts and Custom TDF arrangements, it is customary to rely on Core and Non-Core Options that are similarly liquid.

On the other hand, alternative assets such as private market and real estate investments are generally illiquid. In addition, many asset allocation funds only permit redemptions on a quarterly basis, and they may reserve the right to further limit or delay redemptions at their discretion. Consequently, a "liquidity mismatch" may arise when a Plan holding alternative investments is unable to generate sufficient cash to meet its immediate needs due to the illiquidity of such alternative investments.

When considering an asset allocation fund with an alternative asset component as a potential Investment Option for the Plan's menu, Plan fiduciaries should consider the fund's ability to meet the Plan's ongoing liquidity demands. In particular, Plan fiduciaries may consider whether (or not) the fund's liquidity cushion is adequate and whether (or not) the fund's ongoing allocation to illiquid assets will remain within an acceptable range. When considering Managed

Account and Custom TDF arrangements that utilize an alternative investment fund as a Non-Core Option, Plan fiduciaries may similarly evaluate how the corresponding Managed Account Provider or Custom TDF Manager intends to meet the Plan's ongoing liquidity requirements, focusing on the Managed Account or Custom TDF arrangement's liquidity cushion and its target allocation to the alternative investment fund.

*Valuation Risks*

Valuation can be a significant challenge when integrating alternative assets into a Plan, in light of their "hard to value" and illiquid nature. Unlike traditional mutual funds investing in highly liquid securities with readily available market quotations, alternative assets can be more difficult to value. Such valuations can be nuanced and complex, and valuation methodologies may also vary based on the type of investment. In the case of asset allocation funds (with daily valuation to accommodate Plans), the asset allocation fund manager will generally determine the "fair value" of any portfolio allocation to alternative assets.  With respect to alternative investment funds that serve as Non-Core Options in Managed Account or Custom TDF arrangements, the applicable fund manager will similarly determine the "fair value" of its underlying alternative investments.

It is not uncommon for asset allocation funds and alternative investment funds utilized by Plans as Investment Options or Non-Core Options ("Plan-Level Funds"), to gain exposure to alternative assets by investing in other alternative investment funds ("Underlying Alternative Funds").  In practice, the fair valuation of a Plan-Level Fund's interest in an Underlying Alternative Fund may be based on the valuation reports provided by the Underlying Alternative Fund's manager, which are often provided at periodic intervals on a lag basis (e.g., quarterly reports provided with a 30-day lag). This can present challenges if there is a reliance on "stale" valuations or if any adjustments are reported by the Underlying Alternative Fund's manager during interim periods. Another related issue is the "true-up" risk that arises when the valuation of a Plan-Level Fund is based on a real-time valuation of its interest in Underlying Alternative Funds, but a substantial discrepancy in such valuation is later revealed when the Underlying Alternative Funds' managers ultimately release their valuation reports on a lag basis. Additionally, volatility is also a concern since certain private assets by their nature are susceptible to valuation swings, making them challenging to report and value.

As these valuation issues can be complex for hard-to-value assets, one option for fiduciaries is to hire an independent valuation agent or a third party pricing service. While not currently mandated by the DOL, such engagement may be viewed as part of a "prudent" process, especially if the applicable Plan fiduciary lacks such expertise.

*Fiduciary Risk and Litigation Exposure*

While the Executive Order specifically directs the DOL to prioritize actions that may curb ERISA litigation, managing fiduciary risk and litigation exposure are important considerations for Plan fiduciaries considering Investment Solutions with exposure to alternative investments. These risks may be managed by following a prudent process when making the investment selection and documenting such process. Recent court decisions have emphasized that the duty of prudence is assessed based on processes, not outcomes.

For example, in *Anderson v. Intel Corporation Investment Policy Committee*, the plaintiffs alleged that the 401(k) plan fiduciaries breached their fiduciary duties by investing a portion of the plan's Custom TDF assets in hedge funds and private equity funds, benefitting Intel at the expense of Plan participants.[26] The plaintiffs claimed that the Plan's investments in these alternative assets resulted in inferior performance and higher fees. The District Court initially dismissed the case for failure to identify a meaningful benchmark and provide other plausible allegations to support the claims of breach of fiduciary duties. Following its de novo review of the matter, the 9th Circuit affirmed in favor of the defendant Plan fiduciaries. In its decision, the 9th Circuit cited the DOL's position in its 2020 Information Letter that offering an asset allocation fund with a private equity component as an Investment Option is not inconsistent with the fiduciary duties of ERISA. The court confirmed that prudence should be assessed in light of a Plan's entire portfolio and found that Intel provided Plan participants with transparent disclosures regarding the Plan's investments. The court also determined that the plaintiffs' allegations were insufficient to prove that an inadequate process led the fiduciaries to select the investments.

Similarly, in another investment underperformance case, *Waldner v. Natixis Investment Managers, L.P.*, the plaintiffs alleged that the Plan's offering of proprietary mutual fund options, which included a global alternatives fund, was imprudent.[27] In its ruling in favor of the defendant Plan fiduciaries, the court focused on the Plan fiduciaries' processes, rather than outcomes. In fact, the court cited a number of factual steps that had been taken, demonstrating adherence to a prudent process, including the use of outside legal and financial experts to review the funds and assist with drafting the plan's investment policy statement ("IPS"), conducting education on ERISA fiduciary duties for investment committee fiduciaries, regular review of quarterly reports on the funds' performance, and holding regular investment committee meetings documented by minutes.

Given these recent decisions, the key takeaway for Plan fiduciaries considering an Investment Solution that includes exposure to alternative assets is to develop, follow and document a prudent process to show the diligence and review behind selecting such investments. While an ERISA Plan fiduciary cannot be fully insulated from the risk of litigation, maintaining a well-documented and prudent decision-making process is the strongest defense against potential claims. However, Plan fiduciaries should continue to monitor litigation activity and should be mindful of any increased risk in exposure to the extent the alternative investment becomes controversial.

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[26] 137 F.4th 1015 (9th Cir. 2025). Following the decision, the plaintiffs filed a petition for certiorari on October 20, 2025. The petition is currently pending.

[27] No. 21-10273-LTS, 2025 LX 206326 (D. Mass. June 26, 2025).

*Participant Considerations*

Another important consideration for Plan fiduciaries considering exposure to alternative investments is to determine the suitability of the Investment Solution based on the needs of the participant population. As part of fulfilling the ERISA duties of loyalty and prudence, Plan fiduciaries should assess whether participants can understand the various characteristics of the investment vehicle and determine whether the investment is appropriate for the Plan's demographics. This involves considering the investment's volatility, liquidity, fees and other costs, and litigation risk, among other factors.

Although alternative investment funds may be incorporated as Non-Core Options into Managed Account and Custom TDF arrangements, there are still outstanding questions as to whether alternative investment funds may be offered directly as Investment Options to Plan participants. From a policy perspective, there are concerns that individual Plan participants may lack the expertise and knowledge necessary to appropriately evaluate an alternative investment fund. Thus, an alternative investment fund option may raise participant suitability and fiduciary concerns under ERISA. There may also be securities law restrictions that limit a Plan's ability to offer an alternative investment fund to individual Plan participants directly. Although the Executive Order is generally viewed as being supportive of giving Plan participants access to alternative investments, it does not state or otherwise suggest that alternative investment funds should be offered directly to Plan participants as Investment Options. In any event, Plan fiduciaries should create and maintain sound processes for evaluating the suitability of the Plan's Investment Options offered to participants, including any Investment Option that includes exposure to alternative assets.

Additionally, participant communications and education are critical, as alternative investments are often more complex, and a common concern is that participants may not understand the underlying investment. Plan fiduciaries offering such investments should consider participants' overall level of financial literacy when developing participant communications and other educational materials. These participant materials should be reviewed to ensure they include plain English explanations and comprehensive information about the nature, risks, fees, and liquidity constraints with respect to alternative investments, so participants can be well-informed. When alternative assets are offered through professionally managed options, participant communications should also highlight the role of the professional manager and how the alternative allocation fits within the broader portfolio.

## Conclusion

Interest in alternative assets within 401(k) plans and other Plans is continuing to grow. While we await further regulatory guidance from the DOL and related agencies, Plan fiduciaries must consider how to balance innovation with meeting the required fiduciary duties under ERISA. Addressing various issues now in preparation will ensure any move into alternative assets aligns with ERISA's fiduciary standards and serves participants' best interests.