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Private Equity and Venture Capital Investments for 401(k) Plans?

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On August 7, President Donald Trump signed an executive order (**Democratizing Access to Alternative Assets for 401(k) Investors**) that has been widely – and mistakenly – reported to open 401(k) plan assets to "alternative asset" investments, including private equity (PE) and venture capital (VC) vehicles, such that a flood of new capital will be available for such investments (see this related **fact sheet**).

While 401(k) and other defined contribution (DC) savings plans (as opposed to defined benefit pension plans) may eventually offer participants an opportunity to invest more widely in alternative assets – i.e., assets beyond the conventional mix of publicly traded mutual funds, stocks, bonds and collective investment trusts (CITs) that now dominate the investment mix of DC plans – any such change will not result solely from the executive order and likely will take considerable time to crystallize in any broad-based form. However, the order may serve as a robust catalyst for that process. This alert focuses particularly on what alternative asset sponsors like PE and VC funds should know now.

What's changed?

So far, nothing really. To be clear, investment by DC plans in alternative assets is not presently prohibited, and indeed investment by pension plans in such assets is commonplace. A principal barrier to such investments is that they raise significant liability concerns for the sponsors of DC plans and especially the fiduciaries responsible for choosing and monitoring the investment options under such plans. The Employee Retirement Income Security Act of 1974 (ERISA) imposes significant duties on fiduciaries to protect plan participants when choosing the investment options made available to participants, along with personal liability for failing to discharge those duties. As a result, and considering the hundreds of 401(k) cases related to investments over the last several years (some of which have resulted in significant liability), there has been considerable and widespread reluctance to make alternative investments available to DC plan participants. That is not likely to change dramatically in the near-term absent a dramatic change in the field of play.

Neither an executive order nor even buy-in and new rules and guidance from the Department of Labor (DOL), Securities and Exchange Commission, Department of the Treasury or other regulators are likely to change market practice overnight, or on their own. ERISA provides individual plan participants – and not just the regulators – the ability to bring claims for breach of fiduciary duty. Historically, the informed views and regulations of a responsible governmental agency would have carried great weight in a court's evaluation of such a claim, but the US Supreme Court's 2024 abandonment of so-called *Chevron* deference makes those views materially less important.

Will there be additional rulemaking?

Eventually. Rulemaking in this area is fraught and extremely slow. Witness the DOL's efforts to establish new fiduciary duty rules over the past 15 years – rules that still now remain in flux from legal challenges. Further, the views of presidential administrations and governmental regulators are fickle. The DOL in the first Trump administration took steps to facilitate alternative asset

investments by **issuing an information letter to a PE-affiliated manager**, but those efforts were largely disavowed as inappropriate for 401(k) plans barely a year later by the DOL under the ensuing Biden administration in a December 21, 2021, **Supplemental Statement**. And that Supplemental Statement has now been rescinded by the Trump DOL following promulgation of the executive order, as noted in this **press release**. What may be different during Trump 2.0 is public traction. For example, earlier this year, **Larry Fink's 2025 Annual Chairman's Letter to investors in BlackRock** loudly and visibly championed an easing of the path to inclusion of such investments in DC plan investment lineups.

Are there practical and operational constraints in connection with investments in alternative assets?

Yes. Even if the momentum continues and ERISA fiduciary constraints are addressed, there are severe structural and operational problems facing DC plans as opposed to pension plans – for example, how to address the relative illiquidity of alternative asset investments. It's tough to fund a plan participant's lump-sum cash distribution request when part of the account is invested in a bridge construction project or some other illiquid asset. Current recordkeeping platforms are built around liquid investments that are valued daily. Plan fiduciaries and recordkeepers would need to adapt to contend with less frequent valuation schedules, capital calls, distribution timing, etc. Moreover, the fee structure and risk profiles of alternative investments are generally less transparent than those of publicly traded securities, which creates issues under fee disclosure requirements of DC plans. Digital assets pose unique challenges related to custody, cybersecurity, private key management, etc. that will need to be resolved.

If these and other legal obstacles can be overcome, surmounting any economic roadblocks will be easy. The ingenuity of the market is unstoppable when mere commercial obstacles lie in the way of progress.

Is there anything to do now?

We think it is likely that, eventually, alternative investment options will find their way into more DC plans in some form or another. In the meantime, PE, VC and other alternative asset sponsors should consider what they might be able to contribute to a strengthening of the present traction, whether that includes reaching out to government regulators, plan fiduciaries or other stakeholders, or proactively working on solutions to the commercial and structural challenges posed by alternative assets that might make them more appropriate as offerings in DC plans. We at Cooley stand ready to talk with you about your best path forward.

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