

## Insights

# A BOON FOR PRIVATE MARKETS:

## KEY TAKEAWAYS FROM THE EXECUTIVE ORDER ON ACCESS TO ALTERNATIVE ASSETS FOR 401(K) INVESTORS AND THE SEC'S 2025 SPRING POLICY AGENDA

Sep 05, 2025

On August 7, 2025, the President issued a widely-anticipated Executive Order<sup>[1]</sup> (“Order”) designed to facilitate broader access to alternative assets<sup>[2]</sup> for 401(k) plan participants. The Order recognized that wealthy investors, as well as public pension and defined benefit plans, invest in alternative assets so that these individuals and beneficiaries of these plans can share in the opportunities of alternative investments. However, 401(k) plan participants are prevented from sharing in these opportunities because fiduciaries have generally been unwilling to include alternative asset classes on the menu of 401(k) investment options. In order to address this inequity, the Order focused on relieving perceived regulatory burdens and litigation risk that had been preventing fiduciaries from offering alternative assets on the list of available 401(k) investments.

The Order specifically directed:

- the Department of Labor (“DoL”) to
  - reexamine, within 180 days, its guidance on fiduciary duties concerning alternative asset investments in ERISA-governed 401(k) and similar plans;
  - clarify, within 180 days, its position on alternative assets and the appropriate fiduciary process associated with offering asset allocation funds that invest in alternative assets; and
  - consult with the Securities and Exchange Commission (“SEC”) and other federal regulators to determine whether corresponding regulatory changes should be made by those agencies to effectuate the Order;
- the SEC to facilitate access to alternative assets for participant-directed defined-contribution plans by revising applicable regulations and guidance.<sup>[3]</sup>

In response to the Order, the DoL promptly rescinded 2021 guidance which had cautioned that fiduciaries of small, individual account plans were generally unlikely to be suited to evaluate the

use of private equity investments in plan investment menus.[4] The chilling effect of this caution broadly discouraged fiduciaries from considering alternative assets as a 401(k) plan option.

The rescission of this guidance is an important first step in expanding the availability of alternative assets for 401(k) plan participants, but it is far from self-executing. Fiduciaries should await the further DoL guidance due by early 2026 and related regulatory action in order to assess their comfort level with new regulatory and litigation protections before adding alternative assets to 401(k) plan menus.

On September 4, 2025, the SEC issued the Spring 2025 Unified Agenda of Regulatory and Deregulatory Actions (the “Spring Agenda”)[5], which outlines the Commission’s rulemaking priorities under the leadership of Chairman Paul Atkins. Several proposed rules cited in the Spring Agenda would appear to be directly responsive to the Order:

- Updating the Exempt Offering Pathways;
- Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies; and
- Regulation D and Form D Improvements

While we await the proposed rules themselves, we would anticipate that potentially significant changes are ahead for the private markets and their participants, with a specific focus on reducing compliance burdens and enhancing the variety of participants in private market transactions.

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[1] [Democratizing Access to Alternative Assets for 401\(k\) Investors – The White House](#) (Aug. 7, 2025); *see also* [Fact Sheet: President Donald J. Trump Democratizes Access to Alternative Assets for 401\(k\) Investors – The White House](#) (Aug. 7, 2025).

[2] The Order defines alternative assets as (i) private equity and other 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; (ii) direct and indirect investments in real estate; (iii) holdings in actively managed vehicles that invest in digital assets; (iv) direct and indirect investments in commodities; (v) direct and indirect interests in projects financing infrastructure development; and (vi) lifetime income investment strategies.

[3] The directive to the SEC particularly noted that such facilitation may include consideration of changes to its rules and guidance related to accredited investor and qualified purchaser status.

[4] [US Department of Labor rescinds 2021 supplemental statement on alternative assets in 401\(k\) plans](#) | U.S. Department of Labor (Aug. 7, 2025).

[5] [SEC.gov | Statement on the Spring 2025 Regulatory Agenda](#) (September 4, 2025). Please see BCLP's Client Alert on the [Spring Agenda](#).

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