



## White House issues executive order: “Democratizing Access for Alternative Assets for 401(k) Investors”

August 12, 2025

United States

On August 7, 2025, the White House issued an executive order called “Democratizing Access to Alternative Assets for 401(k) Investors” (Order). The Order focuses on 401(k) plans and other participant-directed defined contribution retirement plans subject to the fiduciary provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The White House directed the Department of Labor (DOL) to facilitate the

# EVERSHEDS SUTHERLAND

direct and indirect investment by plans and plan participants in “alternative assets” (Alternative Assets). To that end, the Order states that the DOL should coordinate its rulemaking with other regulators, including the Securities and Exchange Commission (SEC) and the Department of the Treasury (Treasury). The DOL must act within 180 days from the date of the Order. The Order also directs the SEC to look at some of its rules and guidance that may inhibit ERISA-covered plans and participants from investing in Alternative Assets.

## **Purpose of the Order**

The Order states, “It is the policy of the United States that every American preparing for retirement should have access to funds that include investments in alternative assets when the relevant plan fiduciary determines that such access provides an appropriate opportunity for plan participants and beneficiaries to enhance the net risk-adjusted returns on their retirement assets.” The Order notes that participants in governmental plans and other retirement programs not subject to ERISA are able to make investments in Alternative Assets, while participants in ERISA-covered plans do not have the same opportunities. The administration explains that compliance and litigation risk caused by the ERISA statute and DOL regulations are barriers to ERISA-covered plans allowing investments in Alternative Assets. The Order also suggests that existing SEC regulations and guidance may also be a barrier.

## **Definition of “Alternative Assets”**

The Order defines the term “alternative assets” very broadly to include several types of securities and other interests. These include direct and indirect investments in the following:

- **Interests in private market entities (e.g., equity or debt that is not traded on public exchanges);**
- **Equity and debt interests in real estate;**
- **Commodities; and**
- **Interests in “projects financing infrastructure development.”**

Alternative Assets also include the following:

# EVERSHEDS SUTHERLAND

- “[H]oldings in actively managed investment vehicles that are investing in digital assets” and
- “[L]ifetime income investment strategies including longevity risk-sharing pools.”

The breadth of the Alternative Assets definition signals that the DOL and other federal regulators will look to produce guidance that will encourage plans to offer a wide variety of assets and products to plan participants.

## Directions to the DOL and SEC

The Order directs the DOL to review past and present regulations and sub-regulatory guidance for purposes of determining whether such guidance inhibits a 401(k) plan from “making available to participants an asset allocation fund that includes investments in alternative assets.” In this regard, the Order requires the DOL to review its Supplemental Private Equity Statement, which has been viewed by plan fiduciaries as suggesting that investments in private equity and other Alternative Assets are not appropriate under ERISA. We expect that the Statement will be revoked or substantially revised.

The Order also directs the DOL to promulgate regulations, including “appropriately calibrated safe harbors,” and other guidance with the “aim to identify the criteria that fiduciaries should use to prudently balance potentially higher expenses against the objectives of seeking greater long-term net returns and broader diversification of investments.” Additionally, the DOL should “clarify the duties that a fiduciary owes to plan participants under ERISA when deciding whether to make available to plan participants an asset allocation fund that includes investments in alternative assets” and “prioritize actions that may curb ERISA litigation that constrains fiduciaries’ ability to apply their best judgment in offering investment opportunities to relevant plan participants.”

The DOL, pursuant to the Order, should as appropriate consult with Treasury, the SEC, and other applicable regulators, including as to “parallel regulatory changes” that may be incorporated by such agencies. Furthermore, the SEC, in consultation with the DOL Secretary, should “consider ways to facilitate access to investments in alternative assets by participants in participant-directed defined-contribution retirement savings plans.” In this regard, the Order specifically points to the SEC’s regulations and guidance on “accredited investor” and “qualified purchaser” status.

## Observations

The Order signals that the DOL, the SEC, and other regulators will be looking to enable plan sponsors, investment advisers, insurance companies, financial technology companies, and other retirement plan market participants to make Alternative Assets available under ERISA-covered plans, particularly those that are participant-directed. Therefore, the next 180 days (and beyond) will be a key time for such companies to work with the DOL, the SEC, and other regulators to assure that they craft thoughtful and helpful regulations and guidance. The following are some of our observations regarding the Order.

### Direct Versus Indirect Investment

The use of the terms “direct” and “indirect” indicates that the administration intends that a plan and its participants should be able to directly hold interests in at least some Alternative Assets and should be able to invest in funds or other pooled investment vehicles that invest in some Alternative Assets (e.g., real estate). However, most of the Order otherwise addresses indirect investment. Additionally, the Order focuses on asset allocation funds like a target date or life cycle funds, but does not address other types of funds that may invest in Alternative Assets.

Historically, due to compliance and operational concerns, ERISA-covered plans have not allowed direct investments in certain Alternative Assets (e.g., private equity funds) unless participants choose to invest through a self-directed brokerage account or brokerage window feature available under the plan. On the other hand, such plans have been more inclined to indirectly invest in Alternative Assets through

# EVERSHEDS SUTHERLAND

pooled investment vehicles like collective investment trusts and insurance company pooled separate accounts. Companies in the industry should urge the DOL and regulators to address both. For example, the DOL could issue a regulation clarifying that plan fiduciaries do not have a fiduciary duty regarding the investments available and the participant investment decisions made under the plan's self-directed brokerage account or brokerage window. Such an effort would likely need to be coordinated with the SEC so that current SEC regulations and guidance governing broker-dealer activities, including recommendations, are not inconsistent with the administration's objectives. Furthermore, while guidance regarding Alternative Assets in asset allocation funds is important, the DOL should also provide guidance on funds with other types of investment strategies that may include Alternative Assets.

## Digital Assets

The definition of Alternative Assets includes "digital assets," but only to the extent they are part of an "actively managed fund" that invests in digital assets. The Order does not mention in the definition the direct investment in digital assets (e.g., through a self-directed brokerage account), the use of related technologies (e.g., the blockchain) in retirement plans, or legal issues that may arise when including digital assets in the plan, either directly or indirectly (e.g., ERISA's indicia of ownership and trust requirements). Companies may wish to encourage the DOL to address the inclusion of digital assets and the use of related technologies more broadly than set forth in the Order.

## Lifetime Income

The Order also applies to "lifetime income investment strategies including longevity risk-sharing pools." The inclusion of lifetime income should be welcome news to plan sponsors, asset managers, and insurance companies. However, to further encourage ERISA-covered plan and participant adoption of lifetime income solutions, any guidance issued by the DOL should be broad enough to encompass the many different solutions in the marketplace and such guidance likely needs to go beyond just "investment strategies." Additionally, coordination with Treasury is important because changes to or clarification of income tax regulations and applicable IRS guidance are necessary to promote the uptake of these solutions. For example, although Congress in the SECURE Act attempted to address some of the tax issues that were viewed by some as a barrier to lifetime income adoption, there are still substantial questions to be addressed (for example, the joint and survivor requirements and portability).

## Adoption of Safe Harbors and Other Regulations and Guidance

The Order recognizes that the DOL should adopt regulatory "safe harbors" where appropriate. Undoubtedly, plan sponsors and named fiduciaries have a strong preference for "safe harbors," and the promulgation of them is more likely to encourage plans to include Alternative Assets. However, the DOL must consider that "safe harbors" may have to be tailored to address investments in different Alternative Assets. Further, the actions taken by the DOL should address prohibited transactions that may arise under section 406 of ERISA and section 4975 of the Internal Revenue Code of 1986, as amended, when offering Alternative Investments. The DOL, hopefully, will consider appropriate prohibited transaction exemption relief, including revisiting some of its long-standing prohibited transaction class exemptions and guidance related to mitigating prohibited transactions.

## Coordination Among Regulators

The Order directs the DOL to work with other federal regulators, which in this case likely will be the SEC, Treasury, and the Office of the Comptroller of the Currency (OCC). This is encouraging because, in the past, such coordination in other rulemaking and guidance projects has not always been apparent. However, it is critical to implement the policy set forth in the Order. We should also not forget that state insurance, securities, bank, and trust company regulators may also have to be considered when Alternative Assets are involved. Although section 514 of ERISA provides for the broad preemption of state law, state insurance laws are saved from preemption. Additionally, other state laws could still apply to regulated parties (e.g., registration, distribution, digital assets).

## ERISA Litigation

# EVERSHEDS SUTHERLAND

A key consideration is the litigation risk that plan fiduciaries face, particularly plan sponsors and named fiduciaries, under the civil enforcement provisions of section 502 of ERISA. The statute provides that plan participants can sue a fiduciary for losses and other equitable relief in the event a fiduciary to the ERISA-covered plan breaches one or more of its fiduciary duties under ERISA. Importantly, neither the Order nor efforts by regulators can stop plaintiff-side class action attorneys from filing suits alleging violations of ERISA. However, we believe that the DOL, in coordination with other regulators, can craft concrete and thoughtful regulations, including safe harbors, and other guidance that will be helpful in the defense of these lawsuits. The DOL intervening in ERISA suits as amici or otherwise is also helpful. For example, the DOL recently filed an amicus brief in an ERISA suit involving forfeitures.

## Conclusion

The Order signals that the DOL, the SEC, Treasury, and the OCC, as applicable, will issue coordinated regulatory and sub-regulatory guidance that will facilitate offering Alternative Assets to ERISA-covered plans. This is consistent with the words of Daniel Aronowitz, the nominee for Assistant Secretary to the DOL's Employee Benefits Security Administration. Mr. Aronowitz stated during his confirmation hearing that one of his goals at DOL will be "modernizing defined contribution plans to include alternative investments, such as private equity and cryptocurrency." Therefore, there will be excellent opportunities for our clients to invest and create opportunities to invest in Alternative Assets.

We believe that Eversheds Sutherland is in a unique position to help our clients influence the DOL, the SEC, Treasury, the OCC, and state regulators in crafting meaningful regulations and guidance and in the development of products and services due to our deep technical experience in all the applicable areas of the law and our close relationships with the regulators. Please reach out to us with any questions.

---

*If you have any questions about this Legal Briefing, please feel free to contact any of the attorneys listed or the Eversheds Sutherland attorney with whom you regularly work.*

---

*The materials on the Eversheds Sutherland website are for general information purposes only and do not constitute legal advice. While reasonable care is taken to ensure accuracy, the materials may not reflect the most current legal developments. Eversheds Sutherland disclaims liability for actions taken based on the materials. Always consult a qualified lawyer for specific legal matters. To view the full disclaimer, see our Terms and Conditions or Disclaimer section in the footer.*

# EVERSHEDS SUTHERLAND

## Services

Business Development Companies	→
Crypto Assets	→
Financial Services Regulation	→
Insurance	→
Pensions and Retirement Plans	→
Private Equity	→
Tax	→

## Industries

Alternative Assets	→
Financial Services	→
Real Estate	→
Technology	→

## Business Topics

Executive Order Tracker	→
-------------------------	---

## Key contacts

EVERSHEDS  
SUTHERLAND



David Kaleda

Partner

Washington, DC, United States



Adam B. Cohen

Executive Partner

Washington, DC, United States





EVERSHEDS  
SUTHERLAND



Issa J. Hanna

Partner

New York, United States



Clifford E. Kirsch

Partner

New York, United States





EVERSHEDS  
SUTHERLAND



Michael B. Koffler  
Partner  
New York, United States



Angela Montez  
Special Counsel  
United States



EVERSHEDS  
SUTHERLAND



Amber M. Allen  
Counsel  
United States



Miriam Goldsmith Krieger  
Senior Counsel  
Washington, DC, United States



EVERSHEDS  
SUTHERLAND



Holly H. Smith  
Senior Counsel  
Washington, DC, United States



Carolyn A. Garcia  
Associate  
Washington, DC, United States



# EVERSHEDS SUTHERLAND

## Latest Insights

LEGAL UPDATES	Amendments to FINRA Rules 5130 and 5131 allow non-traded and Private BDCs to...	→
LEGAL UPDATES	UK: Property (Digital Assets etc) Bill set to become law	→
LEGAL UPDATES	Entering the digital (asset) age: White House report recommends changes to the...	→
LEGAL UPDATES	Highlights from the NAIC Summer 2025 National Meeting	→

## Latest News

FIRM NEWS	Trump order opens door for modern tontines in 401(k) plans	→
FIRM NEWS	Eversheds Sutherland augments its position in the Czech Republic	→
FIRM NEWS	Eversheds Sutherland Welcomes Amy Hughes as Real Estate Counsel, Bolstering...	→
CLIENT NEWS	Eversheds Sutherland advises Pulse Clean Energy on multi-million-pound finance...	→

## Latest Events

IN-PERSON   SEPTEMBER 09, 2025	Basic foundations of US employment law	→
VIRTUAL   SEPTEMBER 16, 2025	Employment law in the Qatar Financial Centre	→
VIRTUAL   SEPTEMBER 16, 2025	Webinar - The Invisible Threat: Your Essential Guide to Modern Brand Protection in...	→
VIRTUAL   SEPTEMBER 23, 2025	AI and UK HR: innovation and compliance	→