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Bringing alternative assets to retirement accounts: Four steps the administration should prioritize

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President Trump's August 7, 2025 retirement plan Executive Order underscores the administration's objective to make alternative assets available to defined-contribution plan participants. Below, we identify four steps the Department of Labor and the Securities and Exchange Commission should prioritize to achieve this goal.

President Trump's Executive Order (EO) calls for expanding defined-contribution (DC) plan participants' access to alternative assets, which are defined as interests in private market assets, real estate, vehicles that invest in digital assets, commodities, projects that finance infrastructure development, and lifetime income investment strategies. Although plan fiduciaries are not currently prohibited from offering such investments on plan menus, regulatory burdens and litigation risks generally make them reluctant to do so. Accordingly, the EO directs the Department of Labor (DOL) and the Securities and Exchange Commission (SEC), in broad strokes, to take actions to address these hinderances. Below are specific measures the agencies, and the administration as a whole, should consider to achieve the purposes of the EO.

I. Don't focus only on "asset allocation" funds

While "asset allocation" funds, which provide diversified exposure to a variety of assets and strategies and may rebalance over time to shift from seeking capital appreciation to seeking to provide income (e.g., target date funds), are the focus of the EO and will likely be the initial product through which plan participants gain exposure to alternative assets, the administration's initiative should not stop there. Asset allocation funds that invest a limited portion of their portfolio in alternative assets will be suitable options for some participants, but many participants may wish to customize their exposures to alternative assets more than can be done with asset allocation funds. To truly democratize access to alternative assets, plan participants should be able to select the individual investment exposures they prefer based on their personal objectives, without also having to invest in the non-alternative assets in an asset allocation fund. This reflects the reality that 401(k) and other DC plans typically do not offer only target date funds, but also allow their participants to choose between a variety of equity and bond funds. Retirement investors should have the ability to more precisely choose the type and extent of alternative assets they will invest in.

To ensure retirement investors have appropriate choices, the administration should prioritize facilitating the inclusion of funds regulated under the Investment Company Act of 1940 (the 1940 Act) that focus their investment strategies on alternative assets (Regulated Alternatives Funds) on DC plan menus. These Regulated Alternatives Funds – such as business development companies (BDCs) and closed-end 1940 Act funds that are listed or operate as interval or tender offer funds – can invest substantially all of their portfolios in alternative assets and thus would provide plan participants with much greater freedom of choice on alternative assets and specific strategies than asset allocation funds. Even though they invest in alternative assets, Regulated Alternatives Funds still offer all of the investor protections of the 1940 Act, including with respect to fees, leverage, independence and disclosure. While asset allocation funds inherently provide limitations on the amount of a participant's exposure to alternative assets, as we discuss below, similar prudent

limitations can be instituted at the participant account level without limiting a participant's ability to select more customized exposures to alternative assets.

II. Adopt a regulatory safe harbor

Fear of private litigation brought under the Employee Retirement Income Security Act of 1974 (ERISA), which governs DC and other private-sector retirement plans, is one of the primary factors preventing plan fiduciaries from adding alternative asset investments to their plans. To protect plan fiduciaries from unwarranted litigation, while still ensuring that plan fiduciaries adhere to responsible practices, the DOL should, as contemplated by the EO, adopt a clear safe harbor that, if satisfied, would result in a plan fiduciary being deemed to have satisfied its duty of prudence to plan participants with respect to its inclusion and selection of alternative asset investments in a plan. As discussed above, we believe the safe harbor should contemplate the inclusion of both asset allocation funds and Regulated Alternatives Funds in a plan.

Regulation will be more effective than guidance

The DOL indicated recently that it intends to issue a notice of proposed rulemaking to carry out the EO, which we believe represents a positive step. A safe harbor adopted by the DOL pursuant to formal rulemaking will be much more effective in protecting plan fiduciaries from unwarranted litigation than mere regulatory guidance. First, agency guidance is more prone to rescission or changes by future administrations than are regulations. In fact, the DOL already issued two somewhat conflicting pieces of guidance on fiduciary duties in the context of alternative investments — an information letter during the first Trump administration that concluded that fiduciaries could satisfy their fiduciary duty of prudence when offering private equity investments in managed asset allocation funds, and a supplemental statement during the subsequent Biden administration that generally cautioned against offering such investments, with the DOL rescinding the supplemental statement shortly after the issuance of the EO. This regulatory back-and-forth has done nothing to alleviate plan fiduciaries' uncertainties in this area.

Second, the goal of the safe harbor should be to protect plan fiduciaries from actions brought in court by private litigants. Although the rebalancing of the administrative state in the post-*Chevron* world has reduced mandatory court deference to agency actions (as discussed in this Davis Polk client update), courts will be much more likely to respect a safe harbor adopted through formal rulemaking by the DOL than to give significant weight to less formal guidance.

Elements of the safe harbor

To effectively incentivize plan fiduciaries to provide alternative assets as choices on plan menus through asset allocation funds and Regulated Alternatives Funds, the DOL's safe harbor should establish clear criteria and deem plan fiduciaries that comply with them to have satisfied their fiduciary duty of prudence under ERISA with respect to the decision to include alternatives funds in plan menus. A plan fiduciary that complies with the safe harbor would thus be relieved from liability for any losses from plan participants' investments in such funds by reason of a breach of duty of prudence.

The safe harbor's criteria should be designed to prevent plan participants from over-allocating their account balance to alternatives funds or having insufficient liquidity, while also ensuring that the available alternatives funds meet reasonable standards. In particular, we believe the primary elements of the safe harbor should be:

1. **Account-level allocation limits**. We expect the DOL to at least consider whether the safe harbor should include a limit on aggregate exposure to alternative assets within a retirement account. If the safe harbor does include such a cap, it should be set at a reasonable level to permit plan participants sufficient flexibility to choose to have meaningful exposure to alternative assets. Additionally, any such cap on account balance allocated to funds with investments in alternative assets should factor in the extent of each fund's exposure to alternative assets (e.g., a Regulated Alternatives Fund that invests entirely in alternative assets would use up more cap space than an asset allocation fund with only a 15% allocation to alternative assets). This allocation limit should apply at the time of an account's acquisition of an interest in an alternatives fund, as opposed to being an ongoing limit, so as not to require accounts to rebalance their investment allocations simply because relative values change over time.

2. **Fee and expense limits**. The safe harbor should only apply where the expense ratios of the included funds were comparable to (or less than) the industry average for similar-type funds, as reasonably determined by the plan fiduciary through benchmarking. This requirement potentially could be deemed to be satisfied automatically if the selected funds' expense ratios (net of any fee waivers or reimbursements) were not in the highest quintile of expense ratios of a group of comparable funds selected by an independent benchmarking service, although that should not be the exclusive means for a plan fiduciary to comply with this requirement.

3. **Liquidity minimums**. Under the safe harbor, there should be a requirement that any included alternatives funds offer periodic liquidity deemed appropriate by the plan fiduciary based on the plan participants' attributes and needs, but no less frequently than quarterly (consistent with existing DOL regulations on the frequency of investment instructions from plan participants). Exchange-listed Regulated Alternatives Funds would meet this requirement by default.

4. **Disclosure**. The safe harbor should require included alternatives funds to provide their investors with adequate disclosure. In light of the disclosure requirements under the 1940 Act, any Regulated Alternatives Fund or 1940 Act-registered asset allocation fund would be deemed to satisfy this criteria, as would any product that is a public reporting company registered under the Securities Exchange Act of 1934.

5. **Standard diligence**. In choosing among different alternatives funds for inclusion and retention in a plan, a plan fiduciary should be required under the safe harbor to undertake the same level of diligence and monitoring as is required under ERISA for the inclusion and retention of any other specific investment option. Importantly, this requirement would apply to the selection and retention of any specific alternatives fund over another, not to the decision to include alternatives funds in general in the plan. The safe harbor should deem this element to be satisfied if either (a) the plan fiduciary has conducted the requisite diligence and monitoring or (b) a sophisticated professional advisor, such as one that meets the requirements of a "qualified professional asset manager" (QPAM) under ERISA's QPAM exemption, retained by the plan fiduciary recommended the inclusion and retention of the alternatives funds in the plan.

6. **Appropriate other investment options**. To satisfy the safe harbor, the plan fiduciary should be required to provide plan participants with non-alternative-asset investment options sufficient for a plan participant to be able to create an appropriately diversified and liquid portfolio.

In addition, to the extent that the administration eventually also explores the direct inclusion of true private funds investing in private equity, private credit and other private alternative assets in DC plans, the above criteria could be adjusted to cover these as well, such as by imposing more restrictive allocation limits on them or requiring an additional layer of fiduciary oversight (e.g., requiring individual participants to work with a professional fiduciary investment adviser on their investment in such funds).

III. Don't forget about IRAs

While the EO focuses primarily on 401(k) and other DC plans, in order to truly make alternative asset investments available to all Americans saving for retirement, the administration must keep in mind that many Americans do not have access to DC plans, but instead save for retirement through Individual Retirement Accounts (IRAs). Indeed, the Trump administration's Council of Economic Advisers recently published a study that shows that IRAs hold more assets than DC plans.

There are a number of ways that the administration could facilitate IRA access to alternative asset investments, including:

1. Revising the "Accredited Investor" and "Qualified Purchaser" standards applicable to investors in private equity, private credit and other private alternatives funds to include IRA investors that have been advised on the investment by an SEC-registered investment adviser.

2. Directing the IRS to provide more flexibility on the valuation and reporting requirements for IRA investments in alternative assets as these requirements currently discourage many IRA custodians from accepting investments in alternatives funds.

IV. Exempt BDCs and private funds with RIAs from plan asset look-through

BDCs and private funds are currently subject to ERISA's plan asset look-through rule and need to limit the amount of ERISA and IRA capital they can take in (generally under 25% of third-party capital), or rely on another exception (such as qualifying as a venture capital operating company (VCOC)), in order to avoid plan asset status. If these limits are not reconsidered, they may prevent BDCs and private funds from being willing or able to accept retirement investors to the extent necessary to meet the administration's goals.

To address this, we believe the DOL should consider exempting BDCs and private funds with registered investment advisers (RIAs) from the plan asset look-through rule (similar to how funds registered under the 1940 Act are currently exempt). While these changes could reduce certain protections otherwise available to retirement investors in BDCs and private funds with RIAs, investors in these funds (including retirement investors) should still be adequately protected because these funds are subject to other legislative and regulatory constraints — 1940 Act requirements and requirements under the Investment Advisers Act of 1940 (the Advisers Act) in the case of BDCs, and Advisers Act requirements in the case of private fund managers.

Conclusion

While it remains to be seen what actions the agencies ultimately take, we believe that prioritizing the four steps discussed above will help the DOL and the SEC meet the administration's goal of expanding access to alternative asset investments to retirement investors while providing the flexibility for a variety of innovative products to be made available to retirement investors.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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