

Strategic Perspectives

Federal government ready to expand 401(k) offerings

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Highlights

- Employees with 401(k)s may gain exposure to investment in private markets, crypto, and real estate.
- Employees will need to educate themselves about the risks of non-traditional investment options.
- Implementation and acceptance by employers, funds, and employees may not be immediate.
- As with similar ESG rules, questions will linger about regulatory continuity from one administration to the next.

Inside

Mechanics of the executive order	2
Why private equity and what risks?.....	2
Crypto and real estate.....	3
Early reactions.....	4
Looking ahead.....	5

The Trump Administration issued an executive order directing the DOL and other federal financial regulators to mull how their regulations may be revised to allow employee retirement savers who contribute a portion of their earnings to 401(k) plans to gain exposure through those plans to alternative assets such as private equity investments, real estate investments, and digital assets. The [executive order \(Fact Sheet\)](#) calls on the Department of Labor to reconsider its regulations and guidance within 180 days and calls for the SEC to likewise reconsider its regulations but without a specific time frame. The DOL and SEC would have to coordinate any regulatory moves because their authorities separately address different aspects of the retirement savings market.

Still, big questions remain even if the DOL and SEC are able to coordinate their rules to make the Trump 401(k) EO a reality. Chief among them is whether employers and fund companies will be willing to expand the lineup of investment options they make available to 401(k) participants. Likewise, will employees demand access to alternative asset investment options and will they understand and accept the potentially increased risk of allocating a portion of their savings to alternative assets?

These questions will likely be answered in due time. For now, the push to get

employees invested in private market assets can be viewed through the lens of four major developments:

- Repeated and futile efforts by lawmakers and regulators to revive initial public offerings (IPOs) in the face of seemingly endless private capital;
- Lawmakers and regulators, including the SEC, who are increasingly open to expanding who can invest in private markets;
- The decade-long, and at times unsteady, rise of the crypto industry that suddenly found its political footing and a presidential supporter; and
- A possible cautionary tale grounded in DOL rules for environmental, social, and governance (ESG) investments that portend alternative asset regulations and/or guidance that likely will use hazy language to achieve the Trump Administration's desired goal and which could give employers and funds pause and leave employees confused.

One additional question is whether, given the controversy and easy regulatory reversals of ESG investment rules, will employees' portal into the world of private investments last beyond the current Administration? Each of the four major trends are addressed in sidebars that seek to shed light on the several components of the Trump 401(k) EO.

Mechanics of the executive order

According to the executive order, the DOL must reconsider its guidance regarding fiduciary duties and alternative asset investments for 401(k) plans and other defined contribution plans that are subject to the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, the executive order calls for the DOL to clarify its position regarding alternative assets and the fiduciary process for offering asset allocation funds that contain these assets. The DOL is directed to act within 180 days and must also consider whether to rescind its December 21, 2021, Supplemental Private Equity Statement.

The text of the executive order spells out the purpose of the policy change:

“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 EO defines “alternative assets” to cover a wide range of investments, including:

- Private market investments;
- Interests in real estate;
- Holdings in actively managed investment vehicles that are investing in digital assets;
- Investments in commodities;
- Interests in projects financing infrastructure development; and
- Lifetime income investment strategies including longevity risk-sharing pools.

The executive order also anticipates the potential that retirement offerings in alternative assets may result in additional costs to plan participants. As a result, the DOL is directed to provide criteria under which ERISA fiduciaries can “prudently balance potentially higher expenses against the objectives of seeking greater long-term net returns and broader diversification of investments.”

Under the executive order, the SEC, in consultation with the DOL, also would be directed to facilitate access to alternative assets for participant-directed defined-contribution retirement savings plans via updates to the agency’s regulations and/or guidance. Here, the executive order directs the SEC to consider whether changes may be needed to existing rules governing accredited investor and qualified purchaser status. Unlike with the DOL, the executive order does not direct the SEC to take action within a fixed time frame.

Moreover, the DOL would have to consult with the Treasury Department and other federal agencies (including the SEC) regarding whether any other federal agencies need to amend their regulations to accommodate 401(k) and related plan offerings of alternative assets.

Why private equity and what risks?

By way of background, for more than a decade, lawmakers and multiple Democratic and Republican administrations have grappled with how to spur more high growth startup companies. To date, the most prominent example is the Jumpstart Our Business Startups (JOBS) Act of 2012, which eased some securities regulations for emerging growth companies, revised the rules for some exempt offerings, and created an alternative offering system for securities-based crowdfunding.

What will DOL language look like?

DOL rulemaking and/or guidance may remain somewhat vague regarding alternative asset investments, as did prior [Biden](#) and [Trump](#) Administration standards for ERISA fiduciaries and ESG investments, a possible analog. On ESG, both administrations adopted rules that generally barred a fiduciary from subordinating the interests of participants/beneficiaries to other objectives and barred a fiduciary from sacrificing returns or taking on more risk to promote other goals.

The DOL under Biden and Trump, however, defined those other goals differently:

- **Biden:** Benefits or goals unrelated to interests of participants/beneficiaries in retirement income or financial benefits under the plan.
- **Trump:** Non-pecuniary benefits or goals.

But both administrations allowed for exceptions when a fiduciary encounters competing investments (Biden) or is unable to distinguish investments based only on pecuniary factors (Trump):

- **Biden:** Fiduciary not barred from mulling collateral benefits other than investment returns regarding competing investment options.
- **Trump:** Fiduciary may use non-pecuniary factors as the deciding factor.

Expect DOL rules and guidance on alternative asset investments to follow a similar pattern as did prior DOL rulemakings on ESG investments.

SEC more open to expanding private fund investments

SEC officials across two administrations have expressed openness to considering rules that could allow retail investors to access private market investments:

- In prepared remarks to the Practising Law Institute's [SEC Speaks 2025](#) gathering in Washington, D.C., SEC Chair Paul S. Atkins suggested that the SEC should be open to easing the restrictions on investments in closed-end funds, which he noted typically invest in private equity funds and hedge funds. Atkins said his intent is for the Commission to mull whether such action could give retail investors more opportunities to diversify their holdings consistent with their investment time frames and risk profiles.
- Natasha Vij Greiner, then-Director of the SEC's Division of Investment Management, noted in a [speech](#) that registered investment companies' holdings of private funds had increased significantly since 2019 and that closed-end funds may be a more flexible way for more investors to gain exposure to private markets. "As a result, I believe it is appropriate to consider under what circumstances private fund investments should be available to investors who are not accredited investors or qualified purchasers, through these registered fund vehicles," said Greiner. "That said, robust disclosure is appropriate for funds that are available to retail investors and that invest in complex assets like private funds."
- But the legal liability of closed-end funds will be decided by the U.S. Supreme Court this coming term. In June 2025, the justices [agreed to hear](#) a case asking the question whether Section 47(b) of the Investment Company Act creates an implied private right of action. The outcome of the case could influence whether fund companies, if allowed by the SEC, will become more open to retail investors. The Supreme Court in recent decades has generally been hostile to creating new implied private rights of action, at least when they are not grounded in an express statutory grant by Congress.

Yet many retail investors remain shut out of exempt offerings because of the need, with few exceptions, to be an accredited investor, typically a wealthy person who in the words of the Supreme Court can fend for themselves by using their wealth and presumed financial sophistication to negotiate for financial disclosures before making an investment in a private company. Part of the impetus for the 401(k) executive order likely arises from Congress's inability to significantly revise the JOBS Act or for regulators to take other actions that might spur more IPOs.

Historically, ERISA fiduciaries to 401(k)s and other types of retirement funds have offered traditional investment opportunities, such as managed stock and bond funds and stock and bond index funds that, even if managed, track broad-based indices. The only significant departure would be for plans that allow employees to also accumulate company stock, which can raise questions about employees who aggressively acquire company stock and thus potentially greatly increase their risk profile by becoming overconcentrated in company stock.

So why the push for private equity now?

Those who advocate that retirement funds should provide their investors with exposure to private equity typically argue that, because private markets have been awash in cash for roughly the last decade, more fast-growing startup companies now elect to remain private longer and that in turn has reduced the number of IPOs that would provide new equity offerings for managed and index funds to include in the funds they offer to employees through 401(k)s.

But it is also noteworthy that some index funds that track popular stock indices have become disproportionately weighted in favor of the stocks of a very small number of mostly very large technology companies. Allowing employees to gain private equity exposure may help provide a degree of investment diversification overall, but if the private companies included in a fund's offering lean toward a particular industry, such exposure may not address the weighting issue that has recently bedeviled some major stock indices. Employees also will need to assess their risk tolerance when deciding whether to opt into funds that offer exposure to private equity, a world in which the underlying investments often are less liquid and may not pay off, if they ever do, for many years.

Crypto and real estate

Real estate-based funds and funds based on digital assets, like funds providing exposure to private equity, can produce significant profits, although they too carry risks unique to the real estate markets and to the markets for digital assets. The most recent real estate example is the subprime mortgage market crash during the Great Recession. The occasional crypto winters also offer a cautionary tale, but some crypto assets have soared in value since the beginning of the second Trump Administration, at least in part,

The DOL and alternative assets

- [DOL Information Letter](#) (June 3, 2020)—The first Trump Administration DOL, in reply to an inquiry by a law firm representing private market firms, stated that a plan fiduciary would not violate ERISA solely because the fiduciary includes a professionally managed asset allocation fund with a private equity component in an ERISA-covered individual account plan.
 - ERISA requires a plan fiduciary to prudently select and monitor any designated investment alternatives under a plan.
 - The private equity component of the proposed asset allocation fund would not be available for direct investment by plan participants.
 - The DOL noted the different fiduciary duties for such investments at pension funds versus 401(k)s, while also noting that private investments have complex structures and strategies, longer time horizons, higher and more complex fees, different regulatory disclosure duties than public investments, and that valuations can be problematic.
- [DOL Supplemental Statement](#) (Dec. 21, 2021)—The Biden Administration DOL clarified that the 2020 Information Letter was not intended to convey the view that a private equity component of a designated investment alternative is generally appropriate for a typical 401(k) plan.
 - The Supplemental Statement was partially inspired by a June 23, 2020, [Risk Alert](#) issued by the SEC's Office of Compliance Inspections and Examinations (now the Division of Examinations), in which it was found that some private fund advisers fell short of their duties regarding conflicts of interest, fee disclosure, and ethics codes. The Division of Examinations published a [follow-up Risk Alert](#) on January 27, 2022, addressing additional areas of concern.
 - The Supplemental Statement also reflected public comments that the Information Letter excluded viewpoints outside the PE industry and expressed concern that big pension fund advisers could aid selection of PE investment for 401(k)s, but advisers at smaller funds may lack the needed sophistication.
- [DOL rescinded](#) the Supplemental Statement on August 12, 2025.

based on the expectation that the current administration will continue to be more friendly to crypto markets and is likely to maintain a lighter touch on crypto regulation, especially now that a statutory framework is in place for the payment stable coin portion of crypto markets.

It remains to be seen what regulations the DOL and/or SEC may adopt to implement the executive order on alternative

assets. One possible speedbump towards implementation could be litigation over the validity of any regulations aimed at allowing 401(k) plans to offer funds with exposure to alternative asset investments.

Moreover, it also remains unknown if any regulatory changes will remain in place such that there is continuity between the current administration and future administrations. Recent Democratic and

Republican administrations, for example, have issued dueling DOL regulations on environmental, social, and governance (ESG) investing and the related ERISA fiduciary duties, with Republicans favoring rules limiting investments to those with a pecuniary purpose and Democrats seeking to expand the types of investments that can meet an ERISA fiduciary's duties.

Early reactions

Labor Secretary Lori Chavez-DeRemer, whose agency will likely do most of the heavy lifting to implement the executive order via rulemaking and/or guidance, welcomed the opportunity to provide retirement savers with more options within their 401(k) plans.

Said Chavez-DeRemer: "The Department of Labor already took action to rescind the Biden Administration's guidance that disadvantaged crypto investments. This Executive Order further supports our efforts to improve flexibility and eliminate unfair one-size-fits-all approaches, and I applaud President Trump for taking decisive action."

According to Deputy Labor Secretary Keith Sonderling, who commented in the same [press release](#) as Chavez-DeRemer, the executive order may provide a means for workers who do not qualify as accredited investors to gain exposure to alternative assets. "[The] Executive Order directs the Department of Labor to level the playing field for all Americans saving for retirement by breaking down barriers to investment opportunities previously accessible only to certain pension plans and the very wealthy," said Sonderling.

Representatives French Hill (R-Ark), Chair of the House Financial Services Committee, and Ann Wagner (R-MO), Chair of the House FSC's Subcommittee on Capital Markets, indicated they would use their Congressional oversight posts to work with the DOL and the SEC to implement the executive order.

Tone from the top: whole of government to embrace digital assets

The second Trump Administration has taken an all-in approach to promoting digital assets and crypto, in contrast to the first Trump Administration and both the closing months of the Obama Administration and the intervening Biden administration, all of which aggressively enforced existing laws in the digital asset and crypto space.

SEC Chair Paul S. Atkins, in his [Keynote Address at the Crypto Task Force Roundtable on Tokenization](#) (May 12, 2025), suggested the breadth with which he sees blockchain impacting securities practice in both the regulatory and enforcement settings:

“Just as the shift to digital audio revolutionized the music industry, the migration to on-chain securities has the potential to remodel aspects of the securities market by enabling entirely new methods of issuing, trading, owning, and using securities.”

“Policymaking will no longer result from ad hoc enforcement actions. Instead, the Commission will utilize its existing rulemaking, interpretive, and exemptive authorities to set fit-for-purpose standards for market participants. The Commission’s enforcement approach will return to Congress’ original intent, which is to police violations of these established obligations, particularly as they relate to fraud and manipulation.”

“However, existing registration exemptions and safe harbors may not be entirely fit-for-purpose for certain types of crypto asset offerings. I view this construct of staff pronouncements as extremely temporary – Commission action is both vital and necessary.”

“This is a significant step toward modernizing the U.S. retirement system and empowering American workers with greater choice for how they grow their savings,” said Hill and Wagner in a [joint statement](#). “Facilitating the inclusion of private assets in 401(k) plans will help unlock new avenues for long-term financial security for everyday Americans.”

In the Senate, Banking Committee Ranking Member Elizabeth Warren (D-Mass) issued a

[statement](#) in which she echoed much of what some consumer groups had said by focusing on Wall Street’s role in opening up risky investment opportunities for retirement savers.

“President Trump just granted private equity billionaires their biggest wish: access to Americans’ retirement savings,” said Warren. “But it’s a rotten deal: the data shows private equity has failed to deliver the returns it has promised while saddling investors with exorbitant fees.

Trump’s executive order will expose Americans’ retirement savings to risky investments with little transparency and weak protections— as well as to highly volatile crypto assets.”

Other reactions from interest groups tended to fall into two camps: those in favor and those strongly opposed. The private equity sphere and some groups representing funds expressed support for the proposal:

- [Investment Company Institute](#)
- [American Investment Council](#)
- [Managed Funds Association](#)

By contrast, consumer-oriented groups tended to find fault with the proposal’s potential to add risk to employees’ retirement accounts:

- [Better Markets](#)
- Americans for Financial Reform ([statement 1](#); [statement 2](#))

Looking ahead

The DOL has 180 days from the date of the EO to review its current rules and guidance for purposes of implementing the EO with, presumably, additional rules or guidance to be proposed or issued sometime after that review is complete. The consultations between DOL and other federal regulators and the SEC’s role in facilitating access to alternative assets under the EO are not constrained by a specific time frame. Even assuming the fastest possible implementation of the EO, employers and funds will need to make key decisions about whether to include alternative assets in 401(k) menus. Employees will need to become educated about any new investment options and then decide what level of additional risk, if any, they are willing to accept.

Securities practitioners should know about these blockchain actions

- **Congress:** [Guiding and Establishing National Innovation for U.S. Stablecoins \(GENIUS\) Act](#) (Pub. L. 119–27) became law on July 18, 2025.
- **Congress:** [Digital Asset Market Clarity \(CLARITY\) Act of 2025](#)—The bill was passed by the House with strong bipartisan support, but its fate remains uncertain because the Senate has proposed a slightly different version of the legislation. Overall, the bill would divide crypto regulation between the SEC and the CFTC.
- **White House:** President’s Working Group [report](#) on crypto (July 30, 2025).
- **SEC:** Project Crypto—A Commission-wide effort to modernize agency rules to facilitate on-chain activities. The initiative was announced by SEC Chair Paul S. Atkins in a speech titled [American Leadership in the Digital Finance Revolution](#) (July 31, 2025).
- **SEC:** [Crypto Task Force](#).
- **SEC:** staff guidance:
 - Division of Corporation Finance—[Statement on Certain Liquid Staking Activities](#) (Aug. 5, 2025).
 - Division of Corporation Finance—[Crypto Asset Exchange-Traded Products](#) (July 1, 2025).
 - Division of Corporation Finance—[Statement on Certain Protocol Staking Activities](#) (May 29, 2025).
 - Division of Trading & Markets—[Withdrawal of Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities](#) (May 15, 2025).
 - Division of Corporation Finance—[Offerings and Registrations of Securities in the Crypto Asset Markets](#) (Apr. 10, 2025).
 - Division of Corporation Finance—[Statement on Stablecoins](#) (Apr. 4, 2025).
 - Division of Corporation Finance—[Statement on Certain Proof-of-Work Mining Activities](#) (Mar. 20, 2025).
 - Division of Corporation Finance—[Staff Statement on Meme Coins](#) (Feb. 27, 2025).
- **SEC:** Exchange-traded products (ETPs)—The Commission [announced](#) in July 2025 that, by a 3-1 vote with Commissioner Caroline A. Crenshaw (D) dissenting, it will [allow](#) in-kind creations and redemptions for crypto exchange-traded products (ETPs). Previously, redemptions were allowed only on an in-cash basis. The orders applied to The Nasdaq Stock Market LLC, Cboe BZX Exchange, Inc., and NYSE Arca, Inc. The Commission also approved an ETP holding both spot bitcoin and spot ether, options on some spot bitcoin ETPs, flexible exchange (FLEX) options on shares of some BTC-based ETPs, and increased position limits for listed options on some BTC ETPs.
- **DOL:** In 2022, the Biden Administration’s DOL issued [guidance](#) urging plan fiduciaries to use “extreme care” before adding crypto to a 401(k) plan’s menu. This guidance was based on crypto’s speculative and volatile nature, plan participants’ lack of understanding about crypto, unique challenges associated with crypto custody and recordkeeping, difficulty related to the valuation of crypto, and an evolving crypto regulatory environment. In 2025, however, the 2022 guidance was [rescinded](#) by the second Trump Administration’s DOL, primarily to restore a “neutral” approach to plan investment options and because the “standard of ‘extreme care’ is not found in [ERISA] and differs from ordinary fiduciary principles thereunder.”