

Benefits Report – August 2025

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Trump Administration Executive Order on Alternative Assets in Defined Contribution Plans: Fiduciary Considerations



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Just two months after releasing guidance opening the door to cryptocurrency investments in 401(k) plans (see *EBSA Compliance Assistance Release No. 2025-01* (<https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2025-01>), and our *Benefits Report* (<https://www.truckerhuss.com/newsletter/benefits-report-may-2025/#article1>), article regarding same), the Trump Administration has taken further steps to expand the investment landscape for defined contribution (DC) plans. Specifically, on August 7, 2025, President Trump issued the highly anticipated Executive Order entitled *Democratizing Access to Alternative Assets for 401(k) Investors* (<https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/>) (the “Order”). The Order directs the Department of Labor (DOL) to reexamine past and current guidance on alternative asset investments in DC plans, clarify fiduciary expectations, and consult with the Securities Exchange Commission (SEC), the Secretary of the Treasury (Treasury) and other regulators to ensure coordination, as appropriate. The Order also signals the possible development of fiduciary safe harbor strategies to help plan sponsors comply with their fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Significantly, on August 12, 2025—less than one week later—the DOL rescinded its December 21, 2021, *Supplemental Private Equity Statement*, which had discouraged ERISA fiduciaries from offering private equity investment offerings in participant-directed DC plans, especially small 401(k) plans. This swift rescission marks a dramatic policy shift, moving away from discouragement toward what the DOL describes as a “neutral, principle-based approach.” This policy shift appears to be consistent with the Order, which argues

that participants in DC plans, such as 401(k) plans, have been disadvantaged in comparison to participants in public pension plans and private defined benefit (DB) plans that have “long experienced the potential growth and diversification associated with alternative asset investments.”

The Order sets a 180-day deadline for the DOL to carry out its directives and release appropriate guidance clarifying the duties an ERISA fiduciary owes to plan participants when deciding whether to make available alternative asset investments in DC plans (potentially including streamlined fiduciary safe harbor compliance strategies). It is important to note, however, that the Order does not exchange existing law; instead, it is a policy direction for the DOL (in consultation with the SEC, Treasury, and other appropriate regulators, as may be appropriate) to reexamine fiduciary prudence as it relates to offering alternative asset investment options under participant-directed DC plans. This article addresses key considerations for plan fiduciaries in light of the Order, so they can understand what has changed and better prepare for the DOL that will follow.

Fiduciary Considerations

Defining “Alternative Asset” Investments

The Order broadly defines “alternative asset” investments to include private market investments (e.g., private equity, debt (private credit), and non-public instruments), real estate, digital assets, commodities, infrastructure financing projects, and lifetime income strategies. The Order recognizes the breadth of this definition, noting the intentionality of the drafting and explaining 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.”

Past Access and the TDF Pipeline

For some DC plan participants, access to alternative asset investments is not new. In fact, many plan participants have already accessed alternative asset investments—not through plan menus—but via self-directed brokerage windows. Self-directed brokerage windows—estimated to be available in roughly 38.8% of 401(k) plans (<https://www.pasca.org/news/pasca-news/2023/3/brokerage-window-availability/>)—may allow plan participants to choose from a wider range of investments, such as ETFs, REITs, and other vehicles. While brokerage windows broaden choice, plan fiduciaries must ensure clear disclosures regarding risks, accessibility, and participant responsibility. According to the Employee Benefit Security Administration (<https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-understanding-brokerage-windows-in-self-directed-retirement-plans.pdf>) (EBSA), ERISA fiduciaries should monitor the availability of brokerage windows and provide appropriate participant education.

The recent trend of gradually integrating alternative asset allocations within target-date funds (TDFs) is noteworthy. Asset managers are embedding private equity, real estate, infrastructure, and private credit into TDF glide paths to emulate DB-style diversification. For example, BlackRock has estimated (<https://www.blackrock.com/us/financial-professionals/practice-management/defined-contribution/insights/private-markets-in-tdfs>) that modest private market allocations could increase savings outcomes by roughly 15% over a 40-year horizon, and research from Georgetown University suggests (<https://cri.georgetown.edu/wp-content/uploads/2020/02/Georgetown-CRI-Policy-Report-20-01.pdf>) incorporating such alternatives into TDFs could raise annual retirement income by 17%, even in conservative scenarios. Also, TD Asset Management has introduced

https://www.td.com/content/dam/tdgis/document/ca/en/pdf/insights/thought-leadership/Leading-the-way.pdf?utm_source=chatgpt.com), TDFs with 20–25% private alternatives, consistent with allocations seen in institutional portfolios. Such inclusion of private equity components within professionally managed asset allocation funds was initially supported by the DOL in a [June 3, 2020 Information Letter](https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020) (<https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020>), and is restored as the DOL's current position following the rescission of the December 21, 2021, *Supplemental Private Equity Statement* discouraging such components. Still, the inclusion of alternative asset investments in TDFs is a significant consideration and brings additional fiduciary responsibilities, including valuation cadence, benchmarking, cost structures, and transparency. Plan fiduciaries must apply heightened due diligence, participant disclosure, and governance oversight when considering TDFs with alternative asset allocations.

Fiduciary Obligations

The Order emphasizes that alternative asset investments are not new to ERISA retirement plans, noting their long history in DB plans. However, the Order fails to acknowledge the significant differences between DB plans and DC plans, especially participant-directed defined contribution plans, like 401(k) plans. Notably, defined contribution plans, especially 401(k) plans, pose unique fiduciary and administrative challenges. While DB plans provide a guaranteed benefit to participants (i.e., the plan sponsor bears the investment risk), participants, not plan sponsors, bear the investment risk in participant-directed DC plans, and daily valuation and liquidity are expected. The Order itself does not alter ERISA's principle fiduciary standards, including the prudence and loyalty standards. Until the DOL issues further guidance, plan fiduciaries remain subject to ERISA's existing framework. Thus, plan fiduciaries should treat alternative investments with the same level of care and caution, and conduct robust due diligence, recognizing potential issues of valuation cadence, minimum investment thresholds, and benefits, rights, and features compliance.

Litigation

The Order expresses the Trump Administration's intent to "relieve the regulatory burdens and litigation risk that impede American workers' retirement accounts from achieving the competitive returns and asset diversification necessary to secure a dignified, comfortable retirement." Nonetheless, litigation concerns remain very real for plan fiduciaries. In fact, the Order simultaneously acknowledges that fiduciaries of 401(k) and other DC retirement plans have a duty to "carefully vet and consider all aspects" of alternative asset investment offerings, "including managers' capabilities, experiences, and effectiveness," and that the DC industry continues to be faced with "burdensome lawsuits" filed by "opportunistic trial lawyers." These acknowledgements underscore the challenges the DOL will likely face in attempting to simplify the complex nuances of ERISA's fiduciary duties of loyalty and prudence in the selection and monitoring of alternative asset investments, and the significant potential for private sector lawsuits.

In the last few years alone, hundreds of private sector ERISA fee litigation cases have been filed that focus on the prudence of investment selection, fees, and performance. The unique nature of alternative asset investments, including challenges in valuing assets, lack of benchmarks, variable manager tenure, comparative lack of regulatory oversight and significant investment complexity for the average investor, create uncharted and risky waters for plan fiduciaries. Industry organizations representing the plaintiffs' bar have already indicated that the complexity and volatility of alternative investments raise significant questions as to the prudence of such investments for a 401(k) plan's investment lineup, which are likely to give rise to a new wave of breach of fiduciary duty cases. Importantly, while the DOL may provide simplified fiduciary guidance in

support of alternative asset investments (potentially including safe harbor compliance strategies), following the 2024 Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), courts will not be required to defer to the DOL's interpretations of fiduciary responsibility when applying ERISA's statutory provisions. For these reasons, many fiduciary liability insurers have begun to ask questions about the inclusion of alternative asset investments as part of their renewal questionnaires. In short, plan fiduciaries must carefully vet any alternative asset investment offering. Beyond initial vetting, plan fiduciaries should also implement protocols to monitor such investments, educate participants about the risks and fees associated with such investments, and where applicable, consider pooled investment structures to reduce litigation exposure.

Liquidity and Benefits, Rights and Features

From an implementation perspective, many alternative asset investments pose inherent administrative complexities due to valuation cadence, limited liquidity, and effective availability. Because 401(k) plans are designed to provide daily valuations and near or immediate liquidity so that plan participants can change their investment elections without significant constraints, alternative asset investments may conflict with the needs of plan participants and required fiduciary timeframes. Furthermore, many alternative asset investments have minimum investment requirements. Such requirements may give rise to benefits, rights and features issues where an investment is only effectively available to a subset of the participant population with an adequate balance to enter into the investment. These complexities warrant careful consideration and collaboration between plan fiduciaries, advisors, recordkeepers and counsel to evaluate alternative investment vehicles for administrative feasibility.

The Road Ahead

While the DOL works to meet its 180-day deadline to provide guidance, alternative asset investment managers recognize the tremendous opportunity in newfound access to nearly \$13 trillion in investment potential represented by the DC plan market and are moving quickly to start marketing products and platforms to investment advisors, managers, and plan fiduciaries. Plan fiduciaries should respond deliberately to the opportunity, not reactively. Action steps should include:

- seeking education opportunities to better understand these investments;
- monitoring forthcoming guidance and evaluating whether any safe harbors emerge;
- carrying out robust due-diligence to better understand the prudence of any potential alternative asset investment option;
- developing frameworks to monitor managers and evaluate strategies, fee levels, and liquidity terms (including potential investment policy statement updates);
- providing detailed participant education to explain the risks, fees, liquidity constraints, and expected outcomes of investment alternatives; and
- retaining advisors with expertise in alternative asset investments.

While the Executive Order promises expanded access, plan fiduciaries should continue to apply ERISA's existing standards of prudence and loyalty. A measured approach, emphasizing education, monitoring, and governance, will be critical as the regulatory landscape evolves. Ultimately, plan fiduciaries will benefit from embracing a cautious but forward-looking mindset, recognizing both the opportunities presented by

alternative asset investments and the additional fiduciary burdens they bring, which could be eased by the issuance of safe harbor guidance. By taking this approach, plan fiduciaries can help plan participants benefit from expanded access to investment options, while maintaining compliance and properly managing risk.

Pursuant to the 180-day deadline imposed under the Order, the DOL is anticipated to release additional guidance on or before February 3, 2026. If you have any questions regarding how the Order impacts your DC plans, please contact us.

DOL Rescinds Advisory Opinion on Racial Equity Asset Manager Program



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As the United States federal government undergoes a tangible political shift, a wide net of executive branch policy changes are reinterpreting federal law, not the least of which is fiduciary responsibility under ERISA. A recent example of this is Department of Labor (DOL) Advisory Opinion 2025-01A, which serves as a reminder to plan fiduciaries that they need to remain apprised of the continued and varied impacts of shifting political landscapes on interpretation and enforcement of their responsibilities.

Incumbent in ERISA's fiduciary responsibilities is the *exclusive benefit rule*, requiring that Plan fiduciaries act solely in the interest of participants and beneficiaries. (ERISA section 404(a)(1)(A).) In line with the exclusive benefit rule, ERISA's prohibited transaction rules prohibit plan fiduciaries from dealing with the assets of the plan for their own interest or account. (ERISA section 406(b).) The exclusive benefit rule and related prohibited transaction rules have long been a topic of executive branch interpretation, with presidential administrations issuing varied regulatory and sub-regulatory guidance to establish policy positions for enforcement of law. On July 21, 2025, the DOL issued its first Advisory Opinion under the Trump administration, [Advisory Opinion 2025-01A](https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2025-01a) (<https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2025-01a>) (the "2025 Opinion"), rescinding [Advisory Opinion 2023-01A](https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2023-01a) (<https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2023-01a>) (the "2023 Opinion"), impacting interpretation of the exclusive benefit rule and its bearing on ERISA's prohibited transaction rules.

The 2023 Opinion addressed the application of ERISA's fiduciary responsibilities to consideration of a plan sponsor's Racial Equity Asset Manager Program (Racial Equity Program) in making investment decisions. The Racial Equity Program was implemented by the plan sponsor to promote utilization of diverse investment managers (i.e., those 50 percent or more minority or women owned) through a financial incentive whereby the plan sponsor would cover a portion of fees paid to such investment managers. This effectively lowered participant and plan expenses for investing in diversely managed funds. The 2023 Opinion tackled two important questions head-on:

- Would the retirement plan fiduciary investment committee be deemed to have violated ERISA's exclusive benefit rule by reason of taking the sponsor's fee payment commitment into account in decisions regarding

the selection of or allocation of investment assets to a diverse manager?

- Would the retirement plan fiduciary investment committee be deemed to have engaged in a self-dealing prohibited transaction by taking the sponsor's promotion of diverse managers into account in decisions regarding the selection of or allocation of investment assets to a diverse manager?

In the 2023 Opinion, the DOL found that the retirement plan fiduciary investment committee would not violate the exclusive benefit rule or be deemed to have engaged in a self-dealing prohibited transaction, because the plan sponsor's fee commitment would be an appropriate financial factor for the committee to evaluate when selecting investment managers. This finding served as the first time the DOL opined on the fiduciary implications in considering a corporate policy program in retirement plan investments and provided a blueprint for other companies to establish similar programs.

Fast forward to less than two years later, on July 21, 2025, the DOL issued the 2025 Opinion, stating that the 2023 Opinion was based on the false assumption that the Racial Equity Program was lawful. The 2025 Opinion argued that the Racial Equity Program violates civil rights laws that prohibit discrimination based on race and ordered the plan sponsor to "end all illegal activity within its Racial Equity Program and any other initiative, plan, program, or scheme it operates under the banner of diversity equity and inclusion." Following this position, the DOL repealed the 2023 Opinion in its entirety without any further insight into administration's interpretation of the exclusive benefit or prohibited transaction rules with respect to the selection of investment managers.

From a practical perspective, the rescission of the 2023 Opinion highlights a need for any plan fiduciaries who relied on the 2023 Opinion to make investment management decisions to review such decisions to determine whether they were made pursuant to a program that may be deemed by the new administration to violate civil rights laws. Given that the 2025 Opinion cites Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit Based Opportunity*, plan fiduciaries should assess the potential implications on other major focus areas of the new administration, including environmental, social, and governance initiatives that may have been taken into account by plan fiduciaries in making investment decisions.

Equally, if not more importantly, the 2025 Opinion highlights how quickly and significantly fiduciary responsibility policy can change based on ancillary factors. These changes happen most rapidly where interpretation of law has been established through sub-regulatory guidance, which can be issued, modified, and repealed without a robust regulated process. With a large body of sub-regulatory guidance establishing interpretation and policy under ERISA, additional and impactful changes are likely to arise as the new administration continues broad policy development and implementation. This is especially true given the Supreme Court's reversal of the *Chevron* deference doctrine in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which gives courts more authority in interpreting statutes and less deference to agency expertise. (The *Chevron* deference doctrine was established in the 1984 Supreme Court ruling in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, and required courts to defer to federal agencies' reasonable interpretations of ambiguous federal statutes.)

If you have questions about the impact of the 2025 Advisory Opinion and/or ERISA fiduciary duties, please contact us.

DOL Weighs in on Retirement Plan Forfeitures Litigation



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In our [December 2024 article for the Benefits Report \(https://www.truckerhuss.com/newsletter/benefits-report-december-2024-2/\)](https://www.truckerhuss.com/newsletter/benefits-report-december-2024-2/), we discussed the emergence of a wave of fiduciary breach class action litigation against retirement plan fiduciaries alleging misuse of plan forfeitures. These lawsuits (of which there are now over fifty pending nationwide) generally allege that retirement plan fiduciaries breach their fiduciary duties, violate ERISA's anti-inurement rule, or engage in prohibited transactions when they use plan forfeitures to offset employer matching contribution obligations instead of paying plan administrative costs otherwise payable by plan participants.

To recap the basics, forfeitures occur when an employee leaves his or her company before the employer's matching contribution fully vests. The non-vested balance of the matching contributions in the participant's account is forfeited and held in a separate plan forfeiture account. As has long been approved by the IRS, forfeitures may (at least as a tax qualification matter) be allocated to one of three uses: (1) offsetting matching contributions; (2) defraying plan expenses; or (3) providing additional benefits to participants. Notwithstanding the longstanding and widespread nature of this practice, plaintiffs contend that by failing to use forfeitures to pay plan expenses, fiduciaries cause administrative costs to increase—and ultimately to be charged to participant accounts—thereby harming participants.

The initial wave of decisions in these cases has been mixed, although the weight of authority remains in defendants' favor. For example, courts ruling in defendants' favor, such as those in the *Thermo Fisher*, *Clorox*, *BAE Systems*, *Booz Allen*, and *HP* cases, generally agree that plaintiffs' claims are implausible because they purport to create a new benefit in the form of payment of plan administrative expenses, which is not required under ERISA. By contrast, in the *Qualcomm*, *Intuit*, and *Salesforce* cases, courts found that the plaintiffs plausibly alleged that plan fiduciaries harmed participants by letting the administrative expense charge fall on participants rather than the employer, and allowed the cases to move forward.

The DOL's Amicus Brief in HP: Constrained Fiduciary Discretion

On July 9, 2025, the Department of Labor (DOL) filed an amicus ("friend of the court") [brief \(https://www.truckerhuss.com/wp-content/uploads/2025/08/FS_Hutchins-Amicus-Brief_7.9.2025-1.pdf\)](https://www.truckerhuss.com/wp-content/uploads/2025/08/FS_Hutchins-Amicus-Brief_7.9.2025-1.pdf) in the *Hutchins v. HP* (<https://www.truckerhuss.com/wp-content/uploads/2025/08/Dkt-71-Hutchins-v.-HP-02-05-2025.pdf>) lawsuit, which is currently on appeal before the Ninth Circuit Court of Appeals. This is a significant development because it marks the first time the DOL has taken a position with respect to these lawsuits.

In *HP*, which was an early case filed in the Northern District of California, the plaintiff alleged that, from 2019 until 2023, the HP plan committee violated ERISA by deciding to use forfeited funds to pay HP's "outstanding and unpaid matching contributions" for the prior year, rather than reducing participants' administrative expenses. Defendants moved to dismiss all claims and the district court granted the motion, with leave to amend. The court reasoned that although the HP plan committee was exercising a fiduciary function in making the decision to allocate forfeitures to offset employer matching contributions, plaintiffs' allegations were nevertheless implausible, as they would almost always require a fiduciary under similar circumstances to choose to reduce participant expenses rather than offset matching contributions, thereby creating a *de facto* duty to maximize plan benefits, which courts have repeatedly held is not required under ERISA. Plaintiff filed an

amended complaint, which emphasized HP's alleged conflict of interest in administering the plan's forfeiture provision. The district court again granted HP's motion to dismiss, without leave to amend. Plaintiff subsequently appealed to the Ninth Circuit.

Although its amicus brief is limited to the facts of the *HP* case, the DOL makes several arguments that could be applied to these cases more broadly. Specifically, the DOL acknowledges that the decision of how to allocate plan forfeitures is a fiduciary (rather than a settlor) function, given the discretionary language of the HP plan document at issue. (By contrast, some cases, such as *BAE Systems*, involve *mandatory* plan language that removes this discretion and makes forfeiture allocation a settlor (plan design) function.) Nevertheless, the DOL argued that this decision for *HP* "was tightly constrained by settlor decisions regarding (1) plan funding and design, and (2) the risks of a dispute with the plan sponsor, both of which weigh in favor of allocating forfeitures to fund matching contributions." The DOL went on to note that the lawsuit does not allege that participants and beneficiaries received less than the matching contribution they were guaranteed under the plan, or that the plan administrative fees were excessive. The DOL noted further that determinations regarding the amounts to be contributed to a plan, as well as the level of benefits to be provided, are settlor determinations and, therefore, "cannot be dictated by a fiduciary's decision."

The DOL also argued that if the HP plan committee did as plaintiff suggests—use forfeitures to reduce plan expenses rather than offset contributions—the plan sponsor would in turn need to contribute more funds to the plan to cover the matching contributions. This would place the plan administrator in the position of seeking to compel the plan sponsor to contribute additional funds to the plan (funds that would have previously been paid from the plan's forfeitures account). This could, according to the DOL, lead to "a potentially protracted legal dispute, using Plan Assets," that would deplete funds otherwise available to participants. Moreover, the DOL argued that the plan sponsor could very well determine to reduce its matching contributions prospectively (a settlor decision permissible under ERISA) and use the funds it would have otherwise used as matching contributions to offset losses from a forfeitures dispute. This risk, the DOL argued, is properly factored into a fiduciary's assessment of the best course of action in evaluating its fiduciary duties. The DOL also noted that the plan sponsor might amend the plan to reduce matching contributions, thereby harming participants.

Whether the DOL's hypothetical scenario would actually come to fruition—employers still need to attract and retain talent, and matching contributions are a key tool toward that effort—the import of the DOL's amicus brief is significant. While couched in case-specific facts, the agency's reasoning aligns with arguments advanced by plan sponsors and fiduciaries, and reinforces longstanding administrative practices, including decades of plan administration custom and IRS guidance. Time will tell whether courts view these cases similarly, but for the time being, momentum does appear to be on defendants' side.

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