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## Alternative Investments: Approach With Caution, For Now...

Few topics in the ERISA realm have received more press over the last few months than alternative investments in retirement plans. With the change in the Trump Administration, a change in tone from regulators is not unexpected; however, a recent case dismissal and industry product developments are adding to the hype. While alternative investments may provide additional diversification opportunities, the guidance surrounding alternative investments, particularly cryptocurrency and private equity, remains sparse. Below we highlight important developments surrounding alternative investments and how a fiduciary should address alternative investments.

### 2019 Intel case dismissal

After nearly six years of litigation, on May 22, 2025 the Ninth Circuit Court of Appeals affirmed the dismissal of plaintiffs' claims in *Anderson v. Intel Corp. Investment Policy Committee* that Intel's inclusion of private equity and hedge funds in its 401(k) defined contribution plans was a breach of the fiduciary duty of prudence.

In response to the 2008 financial crisis, Intel's Investment Policy Committee sought to increase diversification and strengthen the plans' overall performance through the addition of alternative investments (i.e., hedge funds and private equity) in its custom target date fund suite and by adding global diversified collective investment trust options. Prior to implementing the changes, Intel informed participants of the upcoming changes and the potential impacts they could have on their retirement savings.

The Ninth Circuit noted the prudent process followed by Intel plan fiduciaries in selecting such investments for the plans. In affirming the dismissal, the Ninth Circuit held that merely identifying a fund as holding private equity investments was insufficient to find a breach of prudence. The court acknowledged that investments in private equity involve some unique risks, such as liquidity restrictions. It noted that a successful claim would need to show that the inclusion of alternative investments did not decrease the fund's risk profile through diversification.

Plan sponsors considering private equity investments for their plans should confirm the investments would further the objective of developing well-diversified plans and focus on serving the best interests of participants through a rigorous, well-documented process.

### Empower's back-and-forth with ranking member of Senate Banking Committee

On May 14, 2025, Empower announced that it would "pave the way" for private market investments to be included in defined contribution retirement plans by offering such investments through a managed account product. Empower introduced this product as providing an opportunity for participants to further diversify their portfolios, and because the product involves advice from an Empower advisor, it has the guardrails necessary to ensure a participant's investment in private markets fits their long-term financial goals.

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In response to Empower's May announcement, Senator Elizabeth Warren issued a letter to Empower questioning whether the move was truly in the best interests of the participants. Among her concerns are the lack of regulatory oversight, higher fees, and several instances of regulatory violations by private market fund managers. Senator Warren's response concluded with 18 detailed questions aimed at obtaining additional information on how Empower will ensure that participants' retirement savings are adequately protected when investing in private markets. Though Empower did respond to Senator Warren's letter, it was not to a level satisfactory to her, and Senator Warren's questions largely remain unresolved.

The controversy between Senator Warren and Empower puts fiduciaries on notice that managed account products are subject to fiduciary scrutiny and remain a focal point of regulators.

### DOL rescinded 2022 compliance release

The U.S. Department of Labor ("DOL") issued compliance release 2025-01, which rescinded its 2022 compliance release directing fiduciaries to exercise "extreme care" before adding cryptocurrency to investment menus. The DOL noted that its previously iterated standard of extreme care is not a standard found under ERISA and that it is restoring its neutral stance on investment type and strategy.

### President Trump's August 7, 2025 Executive Order

On August 7, 2025, President Trump signed an executive order ("EO") directing the DOL to review in the next 180 days its position on alternative assets in retirement plans. The EO explained that Americans preparing for retirement should have access to alternative assets when a plan fiduciary determines that such access is appropriate as it provides opportunity for increased investment returns. The EO included private market investments, real estate and digital assets (i.e., cryptocurrency) in its definition of alternative assets. Among other directives, the DOL is to clarify, on or before February 3, 2026, the appropriate fiduciary processes associated with offering funds with underlying holdings in alternative assets.

Although alternative assets in retirement plans is not a new concept, fiduciaries are likely to be confronted with opportunities to offer alternative assets in plan menus due to recent attention. Such opportunities could be bolstered by participant interest, or even demand. As seen in the Intel case, and Empower's recently announced managed account product, expect alternative assets to first be available as part of a target date fund product or through a managed account. Fiduciaries should continue to follow a prudent evaluation process understanding that factors reviewed may need to change as new investments and products emerge. As regulatory enforcement priorities fluctuate, documenting a fiduciary's rationale for including and monitoring each investment type remains important. Further, fiduciaries considering adding exposure to alternative assets must identify and incorporate in their processes the relevant features/risks of these investments.

If you have questions regarding your fiduciary responsibilities and/or alternative assets, please reach out to a member of our Employee Benefits and Executive Compensation practice group.

