

DOL Clarifies its Prior Guidance on Private Equity Investments in 401(k) Plans

December 22, 2021

On December 21, 2021, the U.S. Department of Labor (“DOL”) published a [Supplemental Statement](#) in clarification of the DOL’s June 2020 Information Letter, which had concluded that private equity (“PE”) investments could be included in designated investment options in 401(k) plans in compliance with the requirements of Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). The DOL’s [June 2020 Information Letter](#) provided concrete guidance for 401(k) plan fiduciaries on how to conduct an objective, thorough and analytical process to evaluate whether to include such PE investments as components of a plan investment alternative. Our firm’s summary of the June 2020 Information Letter may be found [here](#).

The DOL issued the Supplementary Statement in response to concerns from unidentified stakeholders that the Information Letter could be viewed – particularly by sponsoring employers and other plan-level fiduciaries in typical 401(k)-type plans – as endorsing or recommending PE investments and not sufficiently emphasizing the risks that accompany such investments. The DOL clarifies in the Supplemental Statement that the Information Letter should not be read to broadly endorse PE investments or to conclude that PE as a component of an investment option is generally appropriate for smaller 401(k) plans, or plans administered by fiduciaries who are not able to employ the appropriate level of analysis.

The DOL observes that the Information Letter was issued in the context of plan fiduciaries who offer both defined benefit pension plans and 401(k) plans. The DOL explained that these types of fiduciaries are more likely to have (from their defined benefit plan experience) the expertise and experience in evaluating PE investments for 401(k) plans, particularly with the assistance of a qualified fiduciary investment advisor. The DOL expresses the view that plan fiduciaries of small 401(k) plans are likely not suited to evaluate the use of PE investments in investment options and for the most part should not rely on the Information Letter. We surmise that it is these plan fiduciaries to whom the letter is primarily directed. In all other material respects, the Supplemental Statement reiterates the conclusions set forth in the Information Letter and the conditions under which a sufficiently sophisticated fiduciary can offer PE investments as components of investment alternatives in 401(k) plans.

We encourage plan sponsors who are considering adding private equity as an investment opportunity for participants in their 401(k) plans neither to consider the June 2020 Information Letter as a blanket endorsement of such investments nor to interpret the Supplement Statement as a retreat from the thoughtful prior guidance. The June 2020 Information Letter confirmed that a plan fiduciary could, consistent with the requirements of ERISA, offer an investment choice that included private equity investments as a component of a multi-asset class investment vehicle. Contrary to the concerns noted in the Supplemental Statement, the June 2020 Information Letter expressly stated that “in evaluating whether to include a particular investment vehicle with an allocation of private equity as a designated investment alternative, the responsible plan fiduciary must evaluate the risks and benefits associated with the investment alternative.” Thus, the June 2020 Information Letter correctly advised plan fiduciaries that, as with any investment alternative, an investment alternative inclusive of private equity investments could be offered in a 401(k) plan if, after an objective, thorough and analytical evaluation performed by capable fiduciaries, the fiduciaries conclude that offering such investment alternative would be in the best interests of participants. The Supplemental Statement should therefore be read as a reminder of both the need for such a process and the requirement that the fiduciaries conducting the process (or their professional advisors) must have the necessary skills to effect such a process. Indeed, in this regard, the Supplemental Statement reaffirms the guidance in the June 2020 Information Letter.

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Please do not hesitate to contact us with any questions.



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