

MEMO# 33987

January 10, 2022

DOL Issues Supplemental Statement on Private Equity Investments Within 401(k) and Other Defined Contribution Plans

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Issues Supplemental Statement on Private Equity Investments Within 401(k) and Other Defined Contribution Plans

In late December, the Department of Labor (DOL) released a Supplemental Statement ("Statement")[\[1\]](#) intended to clarify its June 2020 Information Letter providing DOL's views on the use of private equity investments within 401(k) and other defined contribution (DC) plans.[\[2\]](#)

The 2020 Information Letter, issued under the Trump Administration, was intended to clarify that 401(k) plan fiduciaries can prudently include private equity as a component of an ERISA plan's diversified investment option, such as a target date fund. In doing so, the letter provided a framework of relevant factors for plan fiduciaries to consider if they choose to explore private equity as a component of a larger diversified, managed fund.

Basis for Issuing Statement

DOL cites as reasons for issuing the Statement the questions and reactions DOL received from stakeholders[\[3\]](#) regarding the Information Letter and the June 2020 "Risk Alert" issued by the SEC's Office of Compliance Inspections and Examinations, which highlighted compliance issues in examinations of registered investment advisers that manage private equity funds or hedge funds.[\[4\]](#) DOL explains that, after considering the stakeholder input and the Risk Alert, it decided to supplement the Information Letter "to ensure that plan fiduciaries do not expose plan participants and beneficiaries to unwarranted risks by misreading the letter as saying that [private equity]—as a component of a designated investment alternative—is generally appropriate for a typical 401(k) plan."

Guidance Provided in Statement

DOL makes two primary points in the Statement.

First, DOL explains that the recitations in the Information Letter describing the benefits of private equity investments^[5] reflected the views of the requestor and of the private equity industry and were not balanced with counterarguments and research data from independent sources. DOL describes specific stakeholder concerns associated with such investments, including the lack of standardization of performance calculations, the adequacy of investment disclosures, the fact that many participants may not have specialized investment education and experience, and the lack of liquidity, which is a particular problem for workers that frequently change jobs.^[6]

Second, citing stakeholder concerns about whether the fiduciaries of a typical 401(k) plan possess the necessary expertise, DOL emphasizes the points made in the Information Letter regarding the level of expertise plan fiduciaries should possess to be able to satisfy their duty under ERISA to prudently select and monitor private equity as a component of a designated investment alternative. DOL reiterates that the Information Letter addressed the situation in which a plan fiduciary offered both defined benefit (DB) and DC plans and where the plan fiduciary already has experience evaluating private equity investments in the DB plan. DOL then provides a caution against applying the guidance outside of that context. DOL warns that "[e]xcept in this minority of situations, plan-level fiduciaries of small, individual account plans are not likely suited to evaluate the use of [private equity] investments in designated investment alternatives in individual account plans."

Shannon Salinas
Associate General Counsel - Retirement Policy

endnotes

^[1] The Supplemental Statement is *available at* <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020-supplemental-statement>. DOL's News Release regarding the Supplemental Statement, dated December 21, 2021, is *available at* <https://www.dol.gov/newsroom/releases/ebsa/ebsa20211221>.

^[2] For a summary of the Information Letter, see ICI Memorandum No. 32506, dated June 3, 2020, *available at* <https://www.ici.org/memo32506>.

^[3] For example, on June 12, 2020, a group of Senators, led by Sen. Sherrod Brown (OH-D), submitted a letter to Labor Secretary Scalia, expressing their concerns with DOL's guidance, *available at* <https://www.brown.senate.gov/download/pe-letter-to-dol>.

^[4] Risk Alert, Observations from Examinations of Investment Advisers Managing Private Funds, SEC Office of Compliance Inspections and Examinations (June 23, 2020), *available at* https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf.

^[5] DOL explains that stakeholders challenged the statement in the 2020 Information Letter that designated investment alternatives with a private equity component "offer plan

participants who have longer investment horizons an equities-based investment choice that may enhance retirement outcomes when compared to investment choices containing only publicly traded securities."

[6] Note that the 2020 Information Letter explained that a fiduciary should consider whether the fund has adopted features related to liquidity and valuation to permit liquidity for participant withdrawals and exchanges. The Information Letter also emphasized that the fiduciary must "determine whether plan participants will be furnished adequate information regarding the character and risks of the investment alternative to enable them to make an informed assessment regarding making or continuing an investment in the fund."

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