On June 3, 2020, the US Department of Labor (DOL) issued an Information Letter reassuring plan fiduciaries that in appropriate circumstances, a professionally managed fund that contains a private equity component may be included as a designated investment alternative in a defined contribution plan consistent with their responsibilities under the Employee Retirement Income Security Act of 1974, as amended (ERISA).

The Information Letter specifically involves collective investment trusts that are part of a multi-asset class vehicle, structured as a target date, target risk, or balanced fund. In addition to private equity, the funds would hold additional diverse investments with readily ascertainable market values and sufficient liquidity for benefit responsiveness purposes. The Information Letter acknowledges that a plan fiduciary could offer such a fund consistent with its fiduciary duties and outlines specific factors that fiduciaries might weigh when considering a fund that includes private equity:

- **Diversification**: Whether the fund containing private equity offers participants an investment option with a greater diversification of risks and expected returns net of fees (including management fees and related costs) that is still within an appropriate range;

- **Professional Management**: Whether the fund is overseen by plan fiduciaries or investment professionals who have the requisite experience managing asset allocation funds that include private equity investments, and whether the fund limits the allocation of investments to private equity in a way that addresses the issues inherent in such investments—namely, "cost, complexity, disclosures, and liquidity"—and addresses liquidity and valuation issues so that participants can take distributions or transfer into the plan’s other investment options consistent with its terms;

- **Demographics**: Whether the fund is appropriate for the plan’s participant population in the context of the restrictions imposed by private equity investments; and

- **Communications**: Whether adequate information about the fund is available so that plan participants can make informed investment decisions. Plan fiduciaries might require additional disclosures, for example, to ascertain

---

**Contacts**

If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed or the Eversheds Sutherland attorney with whom you regularly work.

W. Mark Smith  
Partner  
marksmith@eversheds-sutherland.com  
+1.202.383.0221

Carol T. McClarnon  
Partner  
carolmcclarnon@eversheds-sutherland.com  
+1.202.383.0946

Susan S. Krawczyk  
Partner  
susankrawczyk@eversheds-sutherland.com  
+1.202.383.0197

Clifford E. Kirsch  
Partner  
cliffordkirsch@eversheds-sutherland.com  
+1.212.389.5052

Robert J. Neis  
Partner  
robertneis@eversheds-sutherland.com  
+1.202.383.0956

Caitlin G. Naylor  
Associate  
caitlinnaylor@eversheds-sutherland.com  
+1.212.287.7053

**Related People/Contributors**

- W. Mark Smith
- Carol T. McClarnon
- Susan S. Krawczyk
the value of the plan’s investments.

DOL was careful to be clear that the Information Letter is not addressing private equity investments as a direct investment by participants on a standalone basis. Private equity investments, as compared to the public market, involve “distinct legal and operations issues” including, according to DOL, issues surrounding complex organizational structures, illiquidity, fees, valuation, and regulatory and disclosure requirements.

Eversheds Sutherland Observations:

- According to the Information Letter, SEC Chair Clayton encouraged DOL to clarify ERISA uncertainties impeding plan investment in private equity as an opportunity to enhance retirement savings. The SEC has a longstanding no-action letter position approving certain structures, including private equity as an investment option under defined contribution plans, and recently has launched initiatives considering whether retail investors more generally should have broader access to private equity investments.
- The Letter is also consistent with recent Executive Orders that encourage the investment of private funds (including retirement savings) in infrastructure projects of various types. See, for example, Executive Order 13924, “Regulatory Relief to Support Economic Recovery” (May 19, 2020) and Executive Order 13868, “Promoting Energy Infrastructure and Economic Growth” (April 10, 2019).
- While we are not qualified to hazard a view on the broader effects of DOL’s position on the economy, including capital formation and infrastructure development, we do know that the number of US public companies has declined by almost 50% since that number peaked in 1996. Exposure to private equity through professionally managed funds may offer useful diversification for defined contribution plan participants, in light of this development in the public market.
- The scope for appropriate investments in ERISA plans is broader than some plan fiduciaries have feared. The SECURE Act fiduciary safe harbor for payout annuities, together with DOL’s 2014 and 2020 information letters on annuities and private equity as components of a professionally managed fund, respectively, all confirm that investments with different liquidity...
and/or cost features than a typical mutual fund may be included as plan options when supported by a considered but conventional fiduciary process.

- To generalize from the Information Letter, that process for evaluating such designated investment options might incrementally include, along with the usual factors common to all investment options, more specific consideration of:
  - Organizational structure and legal compliance;
  - Competence and experience of the fund manager to manage a designated investment option with its component assets;
  - Limitations on the allocation within the fund to component assets with unique characteristics;
  - Investment strategy and time horizon;
  - Fund liquidity, including its ability to respond to participant transfer, loan and withdrawal instructions;
  - Range of expected net returns, including fees and expenses affecting net return;
  - Alignment with participant demographics and retirement investment needs;
  - Opportunity for additional diversification of and enhanced investment returns to participant accounts, relative to other designated investment options;
  - Valuation process and reliability;
  - Scope and quality of fund disclosure relative to product complexity, including adequacy of disclosure available to participants of unique characteristics and risks;
  - Comparison to appropriate alternative funds that do not have component assets with unique characteristics; and
  - Ability of plan fiduciaries (with professional assistance, if needed) to monitor the designated investment option.

---

1 To address liquidity and valuation issues, the DOL noted with approval the US Securities and Exchange Commission (SEC) rule that limits investments on illiquid assets for registered open-end investment companies (e.g., mutual funds and exchange traded funds) to 15% as a standard basis and the private equity valuation procedures under Financial Accounting Standards Board Accounting Standards Codification (ASC) 820, “Fair Value Measurements and Disclosures.”

If you have any questions about this legal alert, please feel free to contact any of the attorneys listed under Related People/Contributors or the Eversheds Sutherland attorney with whom you regularly work.