401(k) Private Asset Freedom Creates CRE Finance Opportunity

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On August 7 2025, President Trump issued an executive order directing expanded access to alternative assets in 401(k) plans (the "Order")[1], expressly including "direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate". If effectively implemented, the Order could represent a transformational shift for commercial real estate finance, unlocking access to portions of the $13 trillion currently held in defined contribution retirement plans[2] for commercial real estate (CRE) investments.

The Shifting Legal Landscape

This is not the first development in recent years seeking to change the regulatory landscape surrounding retirement fund investments. The Department of Labor (DOL) published an Informational Letter in June 2020 which indicated that, under certain circumstances, professionally managed 401(k) funds could allocate funds to private equity investments without violating the fiduciary duties under Section 403 and 404 of ERISA.[3] However, this guidance was followed in 2021 by Biden administration guidance that cautioned against such investments for most plan sponsors.[4] The Order, and the subsequent releases from the Department of Labor, expressly rescinded the more restrictive guidance, effectively restoring the 2020 framework while directing the DOL to develop "appropriately calibrated safe harbors" for plan fiduciaries within 180 days.[5] It is not yet clear what forms those safe harbors would take. But, with approximately 3 years remaining under this administration, there is more time for implementation without an imminent risk of another administration again changing course.

Market Dynamics Favor Alternative CRE Strategies

The business cases for CRE inclusion in 401(k) plans are myriad. From the investors' and plan administrators' perspectives, commercial real estate historically demonstrates low correlation with traditional stock and bond markets, providing crucial diversification that can reduce portfolio volatility while potentially enhancing returns. Institutional investors typically allocate between 5-20% of their portfolios to real estate. Most 401(k) participants, however, have zero direct exposure to this asset class, although some have interests through mutual funds that hold stakes in REITs.

Recent surveys indicate that as many as 45% of investors participating in defined contribution retirement plans would invest in private equity and private debt if given the opportunity, and 77% would increase their contributions to those plans.[6] If defined contribution retirement plan investors' allocations followed institutional investors' allocations, that would unlock another $650 billion to $2.6 trillion in capital for CRE investment previously unavailable. For a sense of scale, the Mortgage Bankers Association (MBA) reports that as of the end of the second calendar quarter of 2025, an aggregate of $4.88 trillion in commercial and multifamily mortgage debt was outstanding.[7] Even on the conservative end of the estimates, the potential impact for CRE investment is apparent.

[1] Democratizing Access to Alternative Assets for 401(K) Investors – The White House

[2] US Retirement Assets Rise to $45.8T in Q2 | PLANADVISER

[3] Information Letter 06-03-2020 | U.S. Department of Labor

[4] U.S. Department of Labor Supplement Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives | U.S. Department of Labor

[5] US Department of Labor rescinds 2021 supplemental statement on alternative assets in 401(k) plans | U.S. Department of Labor

[6] Nearly half of retirement plan participants would invest in private assets, finds Schroders | News | Institutional Real Estate, Inc.

[7] Commercial and Multifamily Mortgage Debt Outstanding Increased in Second-Quarter 2025 | MBA

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From the perspective of CRE asset managers, the opening of 401(k) markets represents a generational opportunity to access stable, long-duration capital at an unprecedented scale. This retirement capital offers uniquely attractive characteristics, including predictable inflows from participant contributions, extended investment horizons aligned with 20–40-year retirement timelines, and reduced redemption volatility compared to institutional investors who face quarterly performance pressures. Further, the democratization of CRE investing would allow asset managers to dramatically expand their investor base from the relatively small pool of institutional investors to millions of individual retirement savers. The strategic imperative is clear: CRE managers who successfully adapt their capabilities for this new market would have access to a powerful capital generation engine.

Industry Stakeholders Cautiously Embrace Opportunities

While the Order has gotten the attention of many participants in the CRE market, there has been some skepticism that change will happen quickly due to legal obligations of plan fiduciaries, and the attendant risk associated with existing ERISA frameworks. The risk of litigation limits what plan fiduciaries are willing to do, and it is likely that major changes will not occur to the investment landscape until the DOL issues its official guidance in response to the Order.

Instructive here is one long-running lawsuit that may finally have been decided in favor of plan fiduciaries that offered alternative investments. In *Anderson v. Intel Corp. Inv. Policy Comm., 137 F.4th 1015 (9th Cir. 2025)*, plan investment fiduciaries of two defined contribution plans (including a 401(k) plan) offered exposure to hedge and private equity funds through the plans' target date and global diversified funds. When those investments failed to match stock market gains over a specific period, a class action lawsuit suit was filed against the committee for breach of fiduciary duties of prudence and loyalty under ERISA. In May of this year, the Ninth Circuit affirmed the district court's decision to dismiss the lawsuit, ruling that the duty of prudence is prospective, based on the fiduciary's evaluation of the investment opportunity and determined at the time of the decision to offer the option. The duty is not retrospective, determined based on performance after the option was made available. The court also held that the plaintiff failed to provide a meaningful benchmark fund for return and fee comparison purposes and that the plaintiff's generalized claims that exposure to hedge and private equity funds as being too risky and expensive is not enough to show lack of prudence.

While the *Intel* decision does not undermine the Order and supports increasing the availability of alternative assets to defined contribution plan participants, it also illuminates the chilling effect a lack of a regulatory safe harbor and settled case law has had on plan fiduciaries. Here, Intel ultimately won (barring a further appeal) but had to litigate the claims for years. Moreover, this case is only binding on courts within the Ninth Circuit, leaving open the possibility of splits in other Circuits and persistent risks to plan fiduciaries who offer alternative investments without a safe harbor.

Despite the risks outlined above, several large advisors, including BlackRock[8], have announced plans to develop products that incorporate alternative assets. Other major industry players have expressed enthusiasm at the new opportunities being afforded, while also cautioning that changes may not happen quickly.[9] Turning that enthusiasm into action, however, is another matter.

Open Questions and Next Steps

Although the Order is unambiguous evidence of the current administration's desire to move forward on this issue, a number of items will need to be resolved to truly facilitate sweeping changes to 401(k) plan investments. The complex regulatory environment surrounding such investments make it necessary for the Secretary of Labor to coordinate with other governmental bodies, including the Treasury and Securities and Exchange Commission (SEC), a concept that is expressly noted in the Order. The extent to which we will have clear cross-agency alignment is yet to be determined.

Assuming the agencies are ultimately aligned, perhaps the most crucial open questions are how far the agencies will go, and how fast they will get there. At this stage, we do not have clear expectations on what form any safe harbor guidance would take, which could have a significant impact on industry uptake. The DOL response could come in the form of additional guidance, which could be helpful but may not be sufficient to induce more risk adverse players to wholeheartedly embrace alternative investments. As we have already seen, guidance can quickly shift with changes in the political landscape, which could represent an unstable base to build on. Alternatively, and preferably for plan fiduciaries, the Department could engage in formal rulemaking procedures. Such formal rulemaking may also be subject to future changes, and is likely to be more time-consuming, but would likely prove easier to rely on than less rigorous methods.

[8] Trump 401(k) Order Opens Door for Crypto, Private Equity and Real Estate - The New York Times

[9] Apollo, Blackstone, Carlyle, KKR enthusiastic about 401(k) plan executive order | PE Hub

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It is also important to consider what parameters could be placed on alternative investments and to what extent they may require entirely new CRE investment vehicles to practically resolve. Merely stating that such alternative investments do not automatically violate fiduciary duties does not mean that every investment will be deemed appropriate. At the highest level, we may anticipate safe harbor guidance to place caps on alternative asset allocations in total, and it would not be surprising if those caps were lower than the percentage of investments typically allocated to real estate, given the context.

There are many open questions that will need to be explored, and addressed, for the CRE debt and equity markets to most efficiently utilize the possible new source of capital. For example:

- Should there be restrictions or guidance regarding what property types are appropriate for investment? Perhaps safe harbors would favor "core" assets like multifamily, industrial, and grocery- or big box-anchored retail while limiting more cyclical sectors or newer classes, such as hospitality and data centers, respectively.
- Should regulations permit investment only in stabilized assets? Or might they permit some degree of bridge and construction lending and development investments under certain conditions? The latter would align more closely with historic private equity funds' return expectations, while the former could require new private equity funds focused on generally safer investments with lower yields.
- Should leverage magnifiers, such as warehouse and repurchase facilities for CRE lenders, be permitted? While these facilities are commonplace in CRE finance and can boost returns, they also introduce the risk of losing performing assets through cross-collateralization.
- Will the new guidance favor CRE debt investments over equity? How much consideration should be given to an individual investment's place in the capital stack?
- What is the process for and how often will CRE investments be valued? Is daily valuation, similar to standard 401(k) investments, possible? Is there ability to structure CRE investments to maintain sufficient liquidity to satisfy plan distributions?

Depending on the answers to these questions, it may be necessary to go even further in depth, evaluating prudent investments standards with respect to loan-to-value ratios, debt service coverage ratios and other metrics CRE professionals are accustomed to using.

Each of these questions revolve around the central tension between risks and returns that plan fiduciaries must tackle. Fortunately, balancing risk and reward is not new for plan fiduciaries. One very popular 401(k) investment option is "target date" retirement funds, which seek to balance risk and return in order to maximize growth over an investment horizon that targets a certain retirement age. Target date funds typically start with allocations that support higher risk and higher returns, such as high growth stocks, while the investor has time to recover losses long before retirement age, shifting to safer investments, such as government bonds, as they approach the target retirement date. Target date fund managers could mirror that profile and initially skew CRE investments towards higher yield positions, such as CRE equity, preferred equity and mezzanine loan investments, and shifting to lower risk, lower yield positions with more predictable cash flows and lower volatility, such as senior mortgage debt instruments, as the fund approaches the target retirement date.

This tension between risk and reward will be key to determining which CRE sectors will most feel the impacts of the Order and any ensuing regulations. For example, in recent years there has been a significant shift in the Commercial Mortgage-Backed Securities (CMBS) market toward 5-year loan terms. Could an influx of capital, with different investment horizons and return targets shift the tide back to 10-year paper through increased demand?

The exact nature of any regulatory changes and safe harbors will have a significant impact on which portions of the risk-reward spectrum currently held in defined contribution plans will be supplemented with CRE investments. While funds seeking high returns may look to invest in riskier CRE spaces, such as construction and bridge loans or preferred equity investments, that will likely require regulatory support to gain significant traction and prevent the chilling effect of lawsuits like *Intel*.

Regardless of what property types and investments will be permitted, diversification will continue to be prudent, whether with respect to geographic markets, asset classes and other considerations aimed at preventing concentrated exposure that could jeopardize investment outcomes. Depending on the ultimate federal guidance, it is possible that existing institutional CRE funds cannot simply be repackaged for 401(k) inclusion but an entirely new generation of CRE investment fund will emerge. Some fiduciaries may await emergence of such "retirement-ready" CRE vehicles with features suitable for 401(k) investments before making these options available. Others are also likely to take a wait-and-see approach, taking time to observe the results of any initial fallout, including participant feedback, litigation outcomes, and regulatory enforcement patterns, before committing their own resources to implementation.

It may also be worth considering the extent to which existing investment fiduciaries (and their advisors) are well-situated to evaluate real estate investments, given the historical lack of inclusion of these assets. Fortunately, there already are sophisticated asset managers who

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understand CRE investment and can partner with plan fiduciaries, who understand the fiduciary standards. This will create an opportunity for enterprising advisors looking to leverage these changes into business opportunities. Other parties will have an opportunity to advise on participant communication strategies. This will include crafting adequate disclosures for complex alternative investments aimed at retail investors with varying financial sophistication. Still others can expect to advise on the evolving regulatory guidance and market best practices in this unprecedented transformation of retirement investing.

Conclusion

The Order signals a real opportunity but is not by itself a practical opening of the proverbial floodgates. Over the next several months, the pace and shape of change will hinge on the ultimate DOL safe harbor guidance alongside the industry's tolerance for fiduciary and litigation risk. Expect adoption to arrive in phases: first through tightly risk-bounded structures and conservative allocations, then, if the framework proves durable, broader participation. Those who prepare now have the chance to set the standards others follow and, given the magnitude of the opportunity, there should be no shortage of those willing to take the risks inherent with being an early mover.

As this is an emerging issue, be alert for future installments analyzing these issues as federal guidance begins taking shape.