

CLIENT ALERT

# Department of Labor Clarifies Position Regarding Private Equity Investments by ERISA 401(k) Plans

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## AUTHORS

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On December 21, 2021, the Department of Labor (the “[DOL](#)”) published a letter (the “[2021 PE Letter](#)”)<sup>1</sup> clarifying its current views regarding investments in private equity by ERISA-covered individual account plans’ (such as 401(k) plans). Broadly speaking, the 2021 PE Letter cautions fiduciaries of small individual account plans against private equity investing except under certain circumstances. However, the 2021 PE Letter appears to permit large, sophisticated individual account plans, and traditional defined benefit plans, to continue investing in private equity where doing so is prudent for such plans.

The 2021 PE Letter supplements a previous DOL letter, issued in June 2020 (the “[2020 PE Letter](#)”),<sup>2</sup> under the prior presidential administration, that addressed the same topic. The 2020 PE Letter was issued at the request of certain private equity fund sponsors and reflected the DOL’s then-current position that individual account plans may invest in professionally managed, diversified asset allocation funds (such as target date funds) with private equity components, if certain conditions are satisfied. The DOL points to its conversations with unidentified “stakeholders” and to a 2020 Securities and Exchange Commission “Risk Alert” regarding private equity fund compliance, following the issuance of the 2020 PE Letter, as precipitating factors in issuing the 2021 PE Letter.

<sup>1</sup> December 21, 2021 “U.S. Department of Labor Supplemental Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives.”

<sup>2</sup> June 3, 2020 “Information Letter.”

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Notably, the 2021 PE Letter does not prohibit outright private equity investments by small individual account plans. However, the 2021 PE Letter cautions against such investments unless fiduciaries of small plans have the requisite experience with private equity and an understanding of the nuances of such investments. In support of its position, the DOL points to perceived complexities of private equity investments, fee structures associated with such investments, and considerations related to private equity valuation, returns, and disclosures. The DOL's primary concern appears to be that fiduciaries of small individual account plans (unlike, according to the DOL, fiduciaries of larger individual account plans and fiduciaries of defined benefit plans) may lack the experience and sophistication needed to prudently analyze and make private equity investments on behalf of such plans.

Importantly, the 2021 PE Letter does not impose any express restraints on fiduciaries of ERISA-covered defined benefit plans with respect to private equity investments beyond their existing ERISA fiduciary duties. Nor does the 2021 PE Letter prohibit private equity investments by large individual account plans whose fiduciaries have experience with private equity investments. Thus, the 2021 PE Letter appears to be targeted primarily to fiduciaries of small individual account plans, and the DOL's current position may not have a significant market impact due to its narrow focus.

We are monitoring developments in this area.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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