K&L GATES

September 2025

Alternative Assets in 401(k) Plans

Robert Sichel, *K&L Gates*
Ruth Delaney, *K&L Gates*
Dale Baker, *American Bankers Association*

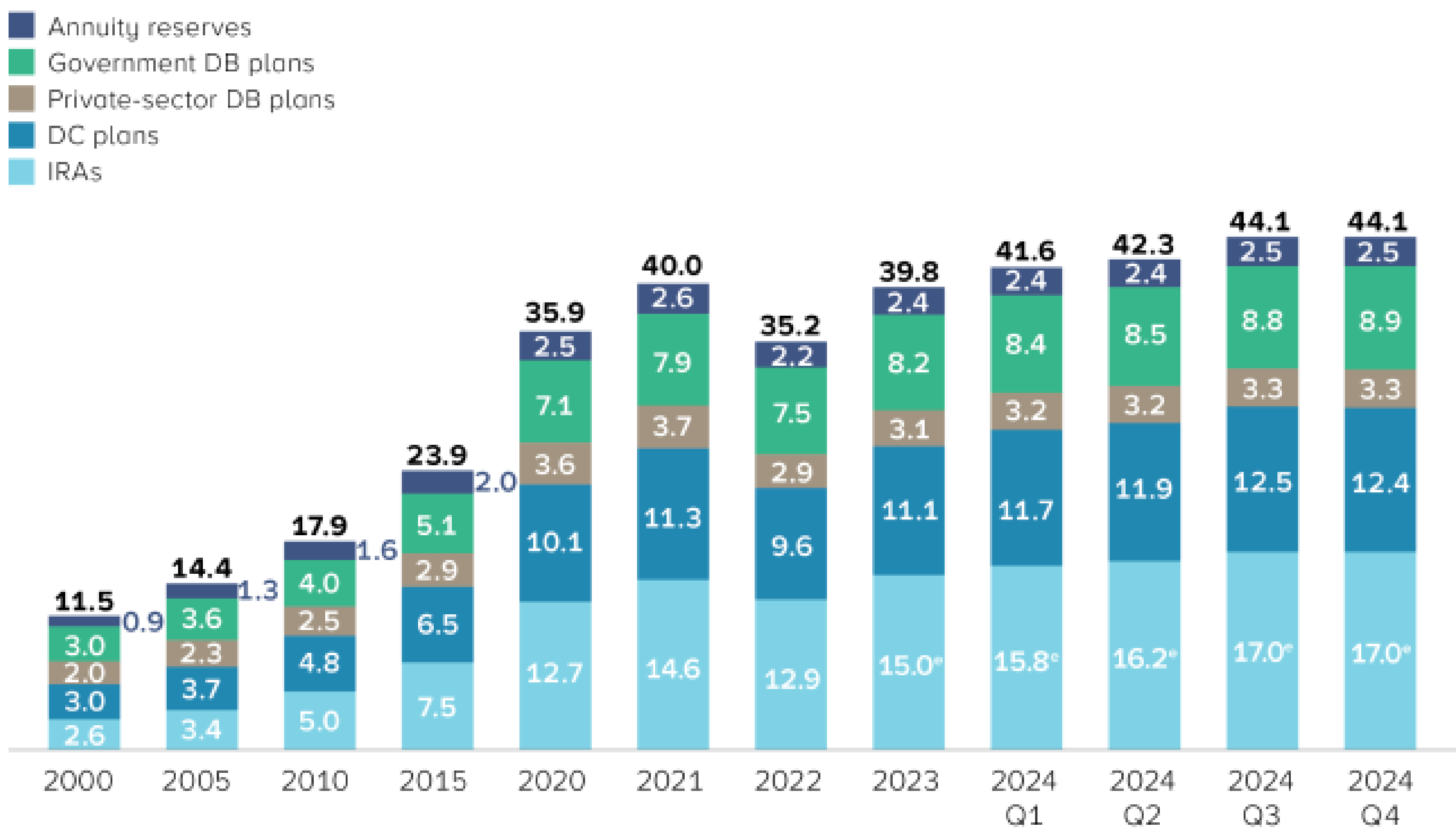
TOPICS

- Background
- Department of Labor's 2020 Guidance
- Executive Order
- Considerations for Stakeholders

BACKGROUND

K&L GATES

RETIREMENT ASSETS ($ TRILLIONS)



Source: Investment Company Institute, “Retirement Assets Total $44.1 Trillion in Fourth Quarter 2024”. https://www.ici.org/statistical-report/ret_24_q4

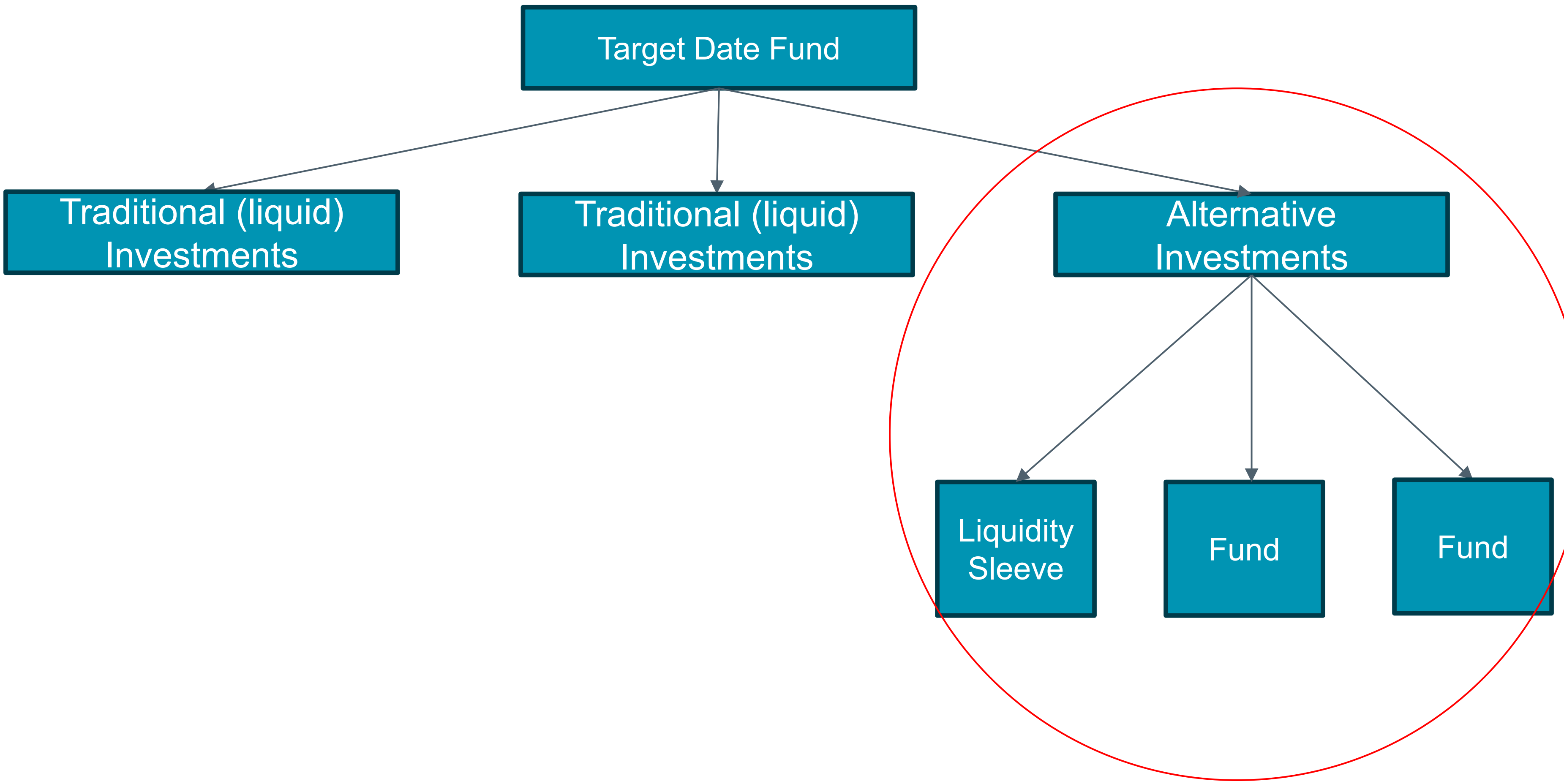
401(K) PLANS

- Provide employees with a retirement account funded with employer contributions, employee contributions, or both, plus investment earnings on those contributions
- Typically require employees to choose how to invest their retirement account among an investment lineup selected by the plan sponsor
- Investment lineups typically consistent of 10 – 30 investment funds, such as mutual funds, ETFs, and collective investment trusts

TARGET DATE FUNDS

- Immensely popular investment choice in 401(k) plans
- Follow a predetermined reallocation of assets over time based on a specified target retirement date
- Rebalance to become less focused on growth and more focused on income as the fund approaches and passes its target date, which is usually indicated in the fund’s name
- Typically established as mutual funds or bank-sponsored collective investment trusts operated in a fund of funds structure
- For many plans, TDFs serve as the default investment option when employees are automatically enrolled in a retirement plan

FUND OF FUNDS STRUCTURE



ALTERNATIVE ASSETS

- Different definitions, but generally includes private equity (i.e., equity that is not traded on a public exchange), real estate, infrastructure, commodities, and even cryptocurrency
- Compared to investments typically available in 401(k) plans, tend to involve more complex organizational structures, investment strategies, longer time horizons, and higher fees
- Valuation may be more complex because alternative assets may have no easily observable market value

ALTERNATIVE ASSETS IN 401(K) PLANS

- Few 401(k) plans currently offer alternative assets due to liability concerns and distinct legal and operational issues
- In June 2020, the Department of Labor issued an information letter that provided a framework for the expanded use of private investments in asset allocation funds, such as TDFs
- In August 2025, the Trump Administration issued an Executive Order with the stated purpose to relieve the regulatory burdens and litigation risks that impede retirement accounts from accessing funds that include investments in “alternative assets”

DEPARTMENT OF LABOR’S 2020 GUIDANCE

INFORMATION LETTER

- Confirmed a plan fiduciary may offer managed asset allocation funds, including target date funds, that include an allocation to private equity while meeting their fiduciary responsibilities
- Does *not* address
  - Whether or how a plan fiduciary can offer direct investment into private market investments
  - The complex ERISA and other legal considerations for sponsoring and operating a TDF that includes an allocation to private investments when the TDF itself is subject to ERISA (which is the case for TDFs established as collective investment trusts)
- Specifically addresses private equity, but the regulator's reasoning should apply to other types of private market investments (e.g., real estate, infrastructure, credit)

ANALYTICAL FRAMEWORK

Provides an analytical framework for fiduciaries to assess the prudence of offering a TDF (or other asset allocation fund) that includes private investments. According to the DOL, a fiduciary should consider certain matters including the following:

- Whether the fund is overseen by professionals that have the capabilities, experience, and stability to effectively manage an asset allocation fund that includes private investments given the nature, size, and complexity of the private investment activity
- Whether the fund has limited the allocation to private investments in a way that is designed to address the unique characteristics associated with such a fund, including cost, complexity, disclosures, and liquidity and has adopted features related to liquidity and valuation designed to permit the fund to provide liquidity for participants to take benefits and direct exchanges among the plan's investment line-up consistent with the plan's terms

EXECUTIVE ORDER

PURPOSE AND POLICY

- Promote employer sponsored defined contribution plan access to the potential growth and diversification opportunities associated with alternative investments
- Relieve the regulatory burdens and litigation risk that impedes such access
- "It is the policy of the United States that every American preparing for retirement should have access to funds that include investments in alternative assets when the relevant plan fiduciary determines that such access provides an appropriate opportunity for plan participants and beneficiaries to enhance the net risk-adjusted returns on their retirement assets

DIRECTIONS

- Within 180 days of the order, the Secretary of Labor shall reexamine the DOL's past and present guidance regarding a fiduciary's duties under ERISA in connection with making asset allocation funds that include alternative investments available to plan participants
- Within 180 days of the order, the Secretary of Labor shall seek to clarify the DOL's position on alternative assets and the appropriate fiduciary process associated with offering asset allocation funds that include alternative investments
- The Secretary of Labor shall consult with the Secretary of the Treasury, the SEC, and other Federal regulators, including as to parallel regulatory changes that may be incorporated by the other regulators
- The SEC shall, in consultation with the Secretary of Labor, consider ways to facilitate access to investments in alternative assets by participants in defined contribution plans, including revisions to existing SEC regulations and guidance related to accredited investor and qualified purchaser status

DOL'S DIRECTION

- Identify the criteria that fiduciaries should use to prudently balance potentially higher expenses against the objectives of seeking greater long-term net returns and broader diversification
- Clarify the duties that a fiduciary owes to plan participants when deciding whether to make as asset allocation that the includes investments in alternative assets available to plan participants
- Safe harbor?
- Roadmap?
- Regulations or sub-regulatory guidance?

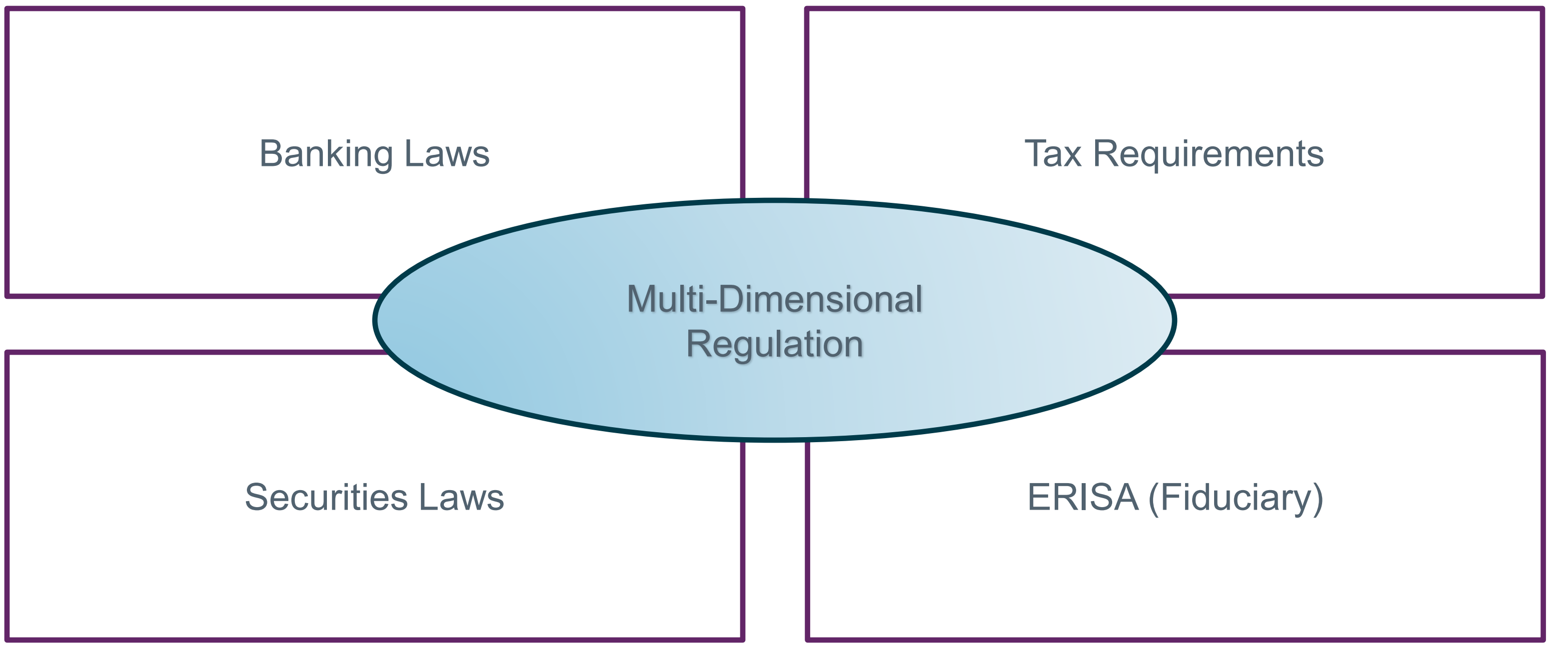
CONSIDERATIONS FOR STAKEHOLDERS

STAKEHOLDERS

In addition to plan participants, stakeholders include:

- Product manufacturers
- Alternative investment managers
- Recordkeepers
- Plan consultants
- Plan fiduciaries, e.g., investment committees and plan sponsors

COLLECTIVE TRUST FUNDS: REGULATION



MATTERS TO CONSIDER

- Valuation
- Liquidity
- Fees
- Conflicts of Interest
- Transparency/Disclosures
- "ERISA Capacity"

VALUATION CONSIDERATIONS

- 401(k) plans require daily valuation of plan investments
- Alternative investments are often valued on a monthly, quarterly, or even yearly basis

LIQUIDITY CONSIDERATIONS

- Investment options available in 401(k) plans need to support daily contributions and withdrawals at the plan participant level
  - Cash buffer, liquidity sleeve, credit facilities
- Liquidity constraints imposed by banking regulators (e.g. Regulation 9 requirements)

FEES

- 401(k) plans are required to consider the total fees charged by an asset allocation fund, including the fees paid to managers of the underlying funds
  - Fees must be no more than reasonable
- Proprietary versus third-party funds

K&L GATES

CONFLICTS OF INTEREST

- ERISA contains strict conflicts of interest rules
- Investments in proprietary funds
- Allocation considerations

TRANSPARENCY/DISCLOSURES

- 401(k) plan fiduciaries must obtain sufficient information to assess the prudence of offering a fund that includes private market investments
- Plan participants should be furnished adequate information to be able to make an informed assessment regarding available investment options
- Alternative investments not subject to 1940 Act standard disclosure requirements
- ERISA-mandated disclosures
  - ERISA 408(b)(2) and 404(a)(5)

ERISA CAPACITY

- Whether the manager has funds with “ERISA capacity” (i.e., whether (a) a fund can have ERISA investors without causing the fund itself to be subject to ERISA or (b) a fund can be operated as an ERISA “plan asset” fund)
  - Registered funds
  - VCOC/REOC
  - 25% limitation

Ruth E. Delaney
Partner
Los Angeles
+1.310.552.5068
ruth.delaney@klgates.com

Ruth Delaney is a partner in the Asset Management and Investment Funds practice, concentrating in the ERISA fiduciary and investment management, hedge funds, and alternative investments practice areas. Ruth focuses her practice on advising clients regarding fiduciary responsibility matters under ERISA, bank collective fund matters and private fund structuring, regulatory, and compliance issues.

Robert L. Sichel
Partner
New York
+1.212.536.3913
robert.sichel@klgates.com

Robert Sichel is a partner in the the Asset Management and Investment Funds practice and oversees the ERISA Fiduciary practice. He has extensive experience helping financial institutions and corporate retirement plans navigate the complexities of ERISA.

Prior to joining K&L Gates, Robert was general counsel of a $20 billion registered investment adviser that provided OCIO consulting and investment management services to large institutional investors, where he led a team of legal, compliance and risk professionals. Robert has also served as internal ERISA counsel for JPMorgan and Bear Stearns where he advised a variety of businesses, including retail, institutional asset management, derivatives, and prime brokerage.

K&L GATES

Dale Baker
Vice President, Trust Policy
American Bankers Association
dbaker@aba.com

Dale Baker is the Vice President of Trust Policy at American Bankers Association (ABA) and is primarily responsible for leading ABA's advocacy strategy with respect to both corporate trust and collective investment fund issues. Prior to joining ABA, he worked for a national credit union trade and TIAA.