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What to Expect When You’re Expecting New Investors — Practical Steps Fund Managers Can Take to Prepare for Investments from Registered Funds and Defined Contribution Retirement Plans

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Historically, investments in private funds have been reserved for large institutions, defined benefit pension plans, sovereign wealth funds and very wealthy individuals. In recent years, though, the notable difference in returns between private investments and those available in the public markets has increased pressure to expand access to private-market investments for “Main Street” investors. Partially in response to this pressure, in recent months, both the Securities and Exchange Commission (“SEC”) and the Department of Labor (“DOL”) have undertaken initiatives to expand access to these funds. At the SEC, these initiatives include abandoning a longstanding informal position that had significantly limited registered funds’ ability to invest in private funds, while a recent executive order has directed the DOL to issue guidance that would facilitate greater access to positions in private funds and other alternative assets for participants in defined contribution plans (e.g., 401(k) plans).

Over time, many in the private fund industry expect these and similar initiatives to draw additional capital into the private fund industry. This increased demand may take some time to materialize and will depend in part on whether underlying investors actually allocate capital to strategies including private funds (any such fund an “Underlying Fund”), but this provides lead time for managers of Underlying Funds to review their documents for changes that could make their funds more attractive to this new type of investor.

The steps appropriate for each Underlying Fund manager will vary depending on the manager's appetite for this capital, the nature of the Underlying Fund's investment strategy and organizational capacity to accommodate the expected increased demand (among numerous other factors). Below, we summarize the regulatory changes that have led to this moment and propose a series of steps for Underlying Fund managers to consider depending on their particular circumstances.

Outline of the Changes

At the SEC, the staff of the Division of Investment Management recently abandoned an informal, though longstanding, position that had prevented registered funds from investing more than 15% of their assets in private funds unless they limited their own investor base to accredited investors with a minimum investment size of $25,000.

Similarly, an executive order (the "Executive Order") signed by President Trump on August 7, 2025 (discussed in further detail in an earlier post), directed the DOL and the SEC to relieve regulatory burdens and litigation risk that impede investments in alternative assets (including crypto, private equity, private credit and real estate) by 401(k) plan participants. The Executive Order does not by itself change any existing rules or guidance, and it remains to be seen whether the DOL, SEC or any other Federal regulators will issue new guidance and what such guidance will say. Also, while DOL and SEC guidance is relevant for interpreting statutory requirements, such guidance generally is not binding on courts.

In both cases, the changes to date generally are expected to facilitate investment in private funds or alternative assets *indirectly*; for example, through a registered fund of private funds ("RFOPF") or a diversified asset allocation fund (such as a target date fund ("TDF")[1] available under a 401(k) plan). It is *not* expected at this stage that funds will be permitted to accept individual investors who do not currently meet investor qualification requirements, which would require additional changes to the definitions of "accredited investor" and "qualified purchaser" (meaning Underlying Funds are not currently expected to be included as direct investment options under a 401(k) plan).[2] Some of the investment strategies and liquidity profiles of these structures will likely mirror those of existing RFOPFs that have been marketed through private wealth channels in recent years, including traditional "fund of funds" strategies focused on making direct investments in Underlying Funds as well as secondaries strategies focused on making secondary purchases of previously issued interests in in Underlying Funds. Other investment strategies and liquidity profiles can be expected as well, including those focused on Underlying Funds with greater cash flows, such as private credit funds, or with inherently more liquid portfolios, such as hedge funds or other funds investing predominantly in publicly-traded assets.

Though the industry changes are expected to be substantial, they generally will not be immediate. The changes facilitating RFOPFs did not require formal action by the SEC because they involved a staff legal interpretation. Changes at the DOL, on the other hand, could require engaging in a formal rulemaking process that, even on a very accelerated timeframe, could take several months just to reach proposal stage. The requirement to solicit and consider comments, then to draft a final rule taking those comments into account could stretch another year, which would mean that formal regulatory action may not occur before early 2027 at the earliest. While some in the industry may be comfortable proceeding in advance of a final rulemaking, others may prefer to wait for a market practice to develop, which will take time. In short, a new cohort of investors is set to emerge, bringing new sources of capital. While much remains uncertain in these early stages, there are many steps that Underlying Fund managers can take now to prepare.

Fund Documents

1. **Add Defined Investor Categories to the LPA.** Create a "Registered Fund Investor" defined term in Underlying Fund LPAs or other agreements for RFOPFs

describing any special rights or obligations that will apply to them. This framework could be similar to existing accommodations for ERISA and BHCA investors and could seek to address many of the demands that are likely to be common across most or all RFOPFs as a result of their common regulatory and operational needs (some of which are discussed below in more detail). For example, Underlying Fund managers may wish to consider including LPA provisions that would hardwire requirements for the manager to cooperate with these investors on valuation and reporting, set standards for portfolio transparency, permit certain transfers with streamlined approval requirements and provide for any necessary accommodations relating to cashflows and voting rights. Setting reasonable terms in the LPA that will apply to all RFOPF investors on an equal basis can limit side letter requests for bespoke terms that may be difficult to accommodate. Underlying Fund managers should also consider whether any changes to their LPAs would be feasible or desirable to address the liquidity and valuation needs of typical TDFs. While many LPAs already contain special accommodations for ERISA investors, it might be helpful to create a separate "401(k) Plan Investor" defined term that applies only to ERISA investors that are TDFs, which would help managers avoid extending these accommodations more broadly than is necessary. In this respect, note that, although TDFs offered under the typical 401(k) plan generally require daily liquidity and valuations, that may not necessarily be possible for the Underlying Funds that make up a portion of any such TDF.

2. **Modify Subscription Agreement**. Most Underlying Funds' subscription agreements are general-purpose documents that were developed when RFOPFs were not a material part of the market. Consequently, there may be parts of an Underlying Fund's subscription agreement for which many RFOPF investors are likely to request accommodations or modified representations. For example, certain Investment Company Act "lookthrough" representations were not drafted with RFOPFs in mind and require investors that are not able to make the representations as drafted to complete a supplemental representation letter. Instead of requiring a new representation letter for each RFOPF investor, which could be a labor-intensive process, consider creating a subscription booklet supplement that applies only to RFOPFs and makes different or supplemental representations that are tailored to RFOPFs' particular circumstances.

3. **Tailor Confidentiality Provisions.** It is likely that private fund managers' standard confidentiality provisions in LPAs, subscription agreements and related agreements will need to be updated to accommodate these new types of investors, for example to permit necessary sharing with RFOPF boards, 401(k) plan sponsors/administrators and their respective advisors or service providers, as well as to accommodate disclosure in public filings, shareholder reports (when

required) and ERISA-required communications for plan participants. This can be accomplished via a special confidentiality provision that applies only to "Registered Fund Investors" or "401(k) Plan Investors" (as described above) or through updates to the confidentiality provisions generally. In any event, the provisions should provide that the general expectation is that any public disclosure should be on a substantial lag, except to the extent more contemporaneous information is legally required.

4. **Address 1940 Act Affiliation Considerations Relating to RFOPFs.** Similar to BHCA investors, each RFPOF faces certain regulatory restrictions under Section 17 of the 1940 Act around transactions involving "affiliated persons" of the RFOPF, as such term is broadly defined in Section 2(a)(3) of the 1940 Act, as well as affiliated persons of such affiliated persons (*e.g.*, so-called "second tier affiliates"). As a result, most RFOPFs will seek to take steps to avoid becoming affiliated with an Underlying Fund, which would typically occur if an RFOPF holds greater than 5% of the outstanding voting securities of an Underlying Fund. Most RFOPF managers will also test the percentage of voting securities of an Underlying Fund held in the aggregate by the RFOPF and each of its affiliated funds, in view of the applicability of the Section 17 affiliate transaction restrictions to second tier affiliates of an RFOPF. Accordingly, having a class of equity interests designated for "Registered Fund Investors" that by its terms removes voting rights that would cause such interests to be deemed "voting securities" for 1940 Act purposes can help streamline the process of managing and avoiding affiliate concerns for new RFOPF investors. Similarly, holding in excess of 25% of an Underlying Fund's total equity interests could, even in the absence of voting rights, potentially cause one to be viewed as an affiliate of that Underlying Fund by virtue of the outsized economic interest one could arguably assert over that Underlying Fund. As a result, some RFOPF investors may seek assurances that they will ultimately hold less than 25% of an Underlying Fund's equity interests. Managers of Underlying Funds may wish to consider adopting preferred side letter language around such confirmations, particularly in cases where RFOPF investors may be near that 25% threshold at the time of their initial subscription.

Investor Relations and Reporting

5. **Prepare for RFOPF Board Governance** Just like managers owe fiduciary duties to Underlying Funds, boards of RFOPFs have their own fiduciary duties. Their ongoing oversight responsibilities may result in regular requests for meetings with staff of Underlying Fund managers and information about operations. Underlying Fund managers may wish to anticipate likely diligence questions and make any changes necessary to get through the investment due diligence process successfully. Expect recurring requests for certain information, especially relating

to valuations, conflicts and internal controls. This may also require increased staffing in investor relations roles. If numerous managers are seeking to hire simultaneously, this could result in difficulty finding talented candidates, especially for smaller managers, and Underlying Fund managers may wish to begin locating candidates now.

6. **Revise Marketing Materials, Anticipating Downstream Use**. Disclosure to RFOPF investors will ultimately be the responsibility of the RFOPF, but by creating materials that can be used as first drafts, Underlying Funds may be able to influence the manner in which they are described. Materials for RFOPF investors could include a one-pager or fact sheet describing the Underlying Fund's strategy that is suitable for copying into a RFOPF's disclosure documents. Managers of Underlying Funds may also wish to consider whether there are any risk factors or conflicts of interest that are particular to that fund; the RFOPF will be required to make such disclosure regardless of whether the Underlying Fund is involved in its drafting, but an Underlying Fund has more opportunity to shape the final result if it initially flagged the potential disclosure item for the RFOPF. Similarly, although disclosure to 401(k) plan participants is ultimately the responsibility of the plan sponsor/administrator and/or the manager of the applicable TDF, any steps an Underlying Fund manager takes to assist with such disclosure obligations may help to make such investments more attractive to 401(k) plans.

7. **Develop a Reporting Playbook**. Review existing reporting provided to limited partners and consider what RFOPFs and TDFs will require of Underlying Funds. Managers accustomed to providing quarterly reporting on a reasonable efforts basis may find that RFOPFs and TDFs, with reporting obligations of their own, need information on a more predictable and accelerated cadence. In addition, reported data may need to be more granular in order to support RFOPFs' AFFE disclosure (as described below), valuations, and tax issues, as well as any customized reporting that may be required by RFOPF boards to accommodate issues specific to that RFOPF. Establish in advance which personnel at the manager will be responsible for compiling, reviewing and approving the data. Develop a strategy for when an input for an underlying reporting obligation is delayed and consider a policy for how to proceed if inputs arrive late, such as using estimates with appropriate disclosure, which can mitigate the regulatory risk associated with *ad hoc* responses to challenges.

8. **Prepare for Enhanced Fee and Expense Transparency**. RFOPFs are subject to enhanced fee and expense disclosure. In addition to any management fee charged at the level of the fund itself, RFOPFs are required to report their Acquired Fund Fees and Expenses (or "AFFE"). In short, as a result of this requirement, an RFOPF will need to report a pro rata share of the indirect

expenses it incurs as a result of its investment in each Underlying Fund in its portfolio. This requires more granular information about operating expenses and investment-related expenses than an Underlying Fund may otherwise wish to report and, due to RFOPFs' own reporting schedule, requires such information to be updated regularly. Underlying Fund managers will need to ensure they are able to calculate the information on the required timeframe, and should assess whether there are any competitively sensitive details that would be revealed as a result of disclosure.

9. **Special Considerations for Investments by Affiliated Funds**. Consider whether any accommodations will be made for investments by multiple affiliated RFOPFs. For example, if several affiliated RFOPFs invest in the same Underlying Fund, should they benefit from any fee breakpoints? Likewise, if one RFOPF invests in multiple Underlying Funds managed by the same manager, should it benefit from a breakpoint even though its investment in any individual fund may not meet the threshold? If necessary, update LPA provisions and related disclosure to clearly provide for the discretion to make any accommodation that may be necessary.

Operations

10. **Assess RFOPF Sensitivities to Underlying Fund Cashflows**. Consider any particular cashflow considerations that may be relevant to RFOPF investors and determine whether any additional flexibility is necessary for Registered Fund Investors, as described above. For example, some RFOPFs may receive inflows from their underlying investors on only a quarterly basis. Rather than change the capital call schedule applicable to all investors just to accommodate the needs of a subset of limited partners, consider whether it is possible to create a special arrangement applicable to RFOPFs. For example, the due date for capital call issued to RFOPFs could be delayed until after quarter-end and amounts needed in the interim could be funded via a subscription facility (with interest allocated solely to those RFOPF investors). Alternatively, other limited partners may be willing to fund capital calls on an interim basis on RFOPFs' behalf in exchange for an interest payment made directly to such limited partner. Delaying capital calls to RFOPF investors may also moderately increase the returns reported to RFOPF investors (though, to avoid issues under the SEC Marketing Rule, the returns the Underlying Fund uses in its own marketing materials generally should not include this adjustment). The same dynamic may also be present in reverse: if RFOPFs will distribute capital to their underlying investors on a quarterly basis, consider whether there are ways to put intra-quarter distributions to use for the benefit of the Underlying Fund until the RFOPF has a use for them. If an RFOPF invests in several Underlying Funds managed by the same manager, it may be desirable to

agree via side letter to net the capital activity of the various Underlying Funds.

11. **Streamline Secondary Sales and Transfers.** If a RFOPF needs to trim exposure to manage its own liquidity or rebalance its portfolio, a slow or uncertain transfer process could create an investor relations issue (or worse). In addition, Underlying Fund managers may determine that transfers among various affiliated RFOPF do not present the same risks that transfers may otherwise pose to an Underlying Fund and may want to avoid the extra work involved with approving every transfer. Creating a streamlined pathway for RFOPFs to transfer to affiliates can simultaneously head off potential investor relations challenges and reduce the burden on internal staff at the Underlying Fund manager.

13. **Re-evaluate ERISA Plan-Assets Strategy.** Generally speaking, in order for an Underlying Fund to avoid being subject to ERISA as a result of an investment in the fund by an ERISA-covered plan (such as a TDF that is structured as a collective investment trust under a 401(k) plan), the fund would need to comply with an ERISA "plan assets" exception, the most common being keeping ERISA investment below 25% of the value of each class of equity of the fund (excluding certain investments of the fund manager and its affiliates). To the extent the Executive Order results in an increase in the amount of ERISA plan participation in Underlying Funds, managers will want to consider whether they can stay under the ERISA 25% limit (if that is their desired strategy). Alternatively, they would need to operate their funds in compliance with another "plan assets" exception, such as by requiring investment through a qualifying RFOPF. These alternatives may or may not be available, depending on the type of fund and its investment strategy.

14. **Engage Early with 401(k) Plan TDF Providers.** Managers of Underlying Funds that wish to capture increased investment opportunities from TDFs offered under 401(k) plans as a result of the Executive Order should consider developing and/or exploring relationships with providers of TDFs that may be offered under a 401(k) plan. Although these investments are already included within some 401(k) plans, any forthcoming guidance may increase such investments in the future.

Expectations are running high among Underlying Fund managers for inflows from this new cohort. Those inflows will take time to materialize broadly, but that time can be used wisely. Managers who prepare now will be best positioned when those inflows arrive.

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[1] In practice, not all funds investing in Underlying Funds will be target date funds. For the purposes of this piece, however, we use “TDF” generically to refer to any diversified asset allocation fund available as an investment option under a 401(k) plan and that includes an allocation to alternative assets (including Underlying Funds). Also, investment funds for 401(k) plans may be structured as collective investment trusts, which bear many similarities to registered funds but instead are established by banks or trust companies and generally are not subject to the same disclosure and other requirements as registered funds. The ultimate legal structure through which 401(k) plans invest will depend on the regulations that are adopted as well as considerations of the specific investor, such as quality of disclosures for the particular structure.

[2] In order to facilitate direct participation by plan participants, additional changes would be necessary to the definitions of “accredited investor” and “qualified purchaser” (which are currently hurdles to direct investments in alternative assets under 401(k) plans). Though the Executive Order directed the SEC to consider ways to facilitate 401(k) plan access to alternative investments, including potential revisions to existing rules relating to such definitions, any such changes are likely to be farther in the future than the changes discussed in this piece. If changes materialize, Underlying Funds should be prepared to make additional adjustments (as necessary) to their corresponding subscription agreement representations and warranties.

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