The Securities and Exchange Commission (the "**SEC**" or "**Commission**") and other regulators continue to be active in rulemaking and enforcement activity that impacts private fund advisers. This publication summarizes recent activity, including: (i) the U.S. Department of Labor's (the "**DOL**") proposed regulation concerning alternative assets and 401(k) plan fiduciaries; (ii) the SEC's clarification of the application of federal securities laws to crypto assets; (iii) the appointment of David Woodcock as Director of the Division of Enforcement ("**Enforcement**"); and (iv) the appointment of Keith E. Cassidy as Director of the SEC's Division of Examinations ("**Exams**").

In addition, this publication discusses the SEC's settlement of charges against (i): a formerly registered investment adviser for breaching its fiduciary duty and contravening its disclosures to investors; and (ii) a registered investment adviser for failing to fully and fairly disclose certain conflicts of interest related to its "robo-advisor" accounts.

As a reminder, the SEC adopted cybersecurity amendments to Regulation S-P in 2024 that require significant changes to investment adviser policies and procedures to, among other things, require an incident response program, a client notification program, increased oversight of service providers and additional recordkeeping. The effective date of these amendments was December 3, 2025, for registered investment advisers with $1.5 billion or more in assets under management. For registered investment advisers with assets under management below $1.5 billion, the amendments are effective June 3, 2026. Please reach out to the Weil Private Funds Group and Privacy and Cybersecurity Group for assistance in updating your policies, procedures and processes.

REGULATORY ROUND-UP

DOL PROPOSES REGULATION REGARDING FIDUCIARY DUTIES GOVERNING SELECTION OF ALTERNATIVE INVESTMENTS IN 401(K) PLANS

On March 30, 2026, the DOL issued a proposed regulation explaining the steps that managers of 401(k) plans should take when considering alternative assets (such as private equity products) as a component in their investment lineups and establishing a set of safe harbors for plan fiduciaries to use when selecting such alternatives.[1] This proposal follows President Trump's August 2025 Executive Order (the "**Executive Order**"), which directed the DOL to reevaluate guidance on fiduciary duties regarding alternative investments in 401(k) plans.[2]

The proposal contains three key principles: affirming ERISA as a process-based law; recognizing maximum fiduciary discretion in selecting investments (including alternative assets described in the Executive Order); and establishing that plan fiduciary decisions following a prudent process should receive significant deference.

The proposed rule introduces a process-based safe harbor for plan fiduciaries, which sets out six non-exhaustive factors that plan fiduciaries should consider when selecting designated investment alternatives: (i) performance; (ii) fees; (iii) liquidity; (iv) valuation; (v) performance benchmarking; and (vi) complexity. The proposed rule reaffirms that plan fiduciaries have broad discretion in designing investment strategies, and sets forth that where a plan fiduciary follows the described process, its judgment regarding the relevant factors is presumed reasonable and entitled to significant deference.

This proposed rule was motivated by the concern that escalating class-action litigation has constrained plan fiduciaries and deterred them from offering innovative or alternative investment options that could improve retirement outcomes. The proposed rule is asset-neutral and confirms that ERISA does not require or restrict any specific type of investment, including alternative assets such as private equity, so long as the fiduciary's selection process adheres to the statutory standard of care.

SEC ISSUES INTERPRETATION REGARDING THE APPLICATION OF FEDERAL SECURITIES LAWS TO CRYPTO ASSETS

On March 17, 2026, the SEC issued an interpretation clarifying how the federal securities laws apply to certain crypto assets and transactions involving crypto assets.[3]

The SEC, which has engaged with crypto assets for over a decade, has relied on the *Howey* test to determine whether crypto assets fell within the purview of federal securities laws. Prior to 2025, the Commission had not developed a formal regulatory framework for crypto assets and instead focused on bringing enforcement actions—an approach criticized as "regulating by enforcement." In response to these concerns and public input provided to the SEC's Crypto Task Force, the Commission issued a new interpretation to provide greater clarity and complement Congressional efforts to establish a comprehensive crypto market structure framework.

The interpretation establishes a "token taxonomy" by classifying crypto assets into five distinct categories based on their characteristics, uses, and functions. Those categories include:

- "Digital Commodities" (e.g., Bitcoin, Ether, Solana), which derive value from the programmatic operation of a functional crypto system, are not considered securities;
- "Digital Collectibles" (e.g., meme coins), which represent or convey rights to artwork, music, videos, trading cards, and similar items, are not considered securities;
- "Digital Tools" (e.g., ENS domain names), which perform practical functions such as memberships, tickets, or credentials, are not considered securities;
- "Stablecoins," which may or may not be considered securities depending on their structure—with "payment stablecoins" under the GENIUS Act and "Covered Stablecoins" expressly excluded; and
- "Digital Securities" (or "tokenized securities"), which are tokenized forms of traditional financial instruments and are considered securities regardless of their digital format.

The Commodity Futures Trading Commission ("**CFTC**") joined the interpretation, providing guidance that it will administer the Commodity Exchange Act consistently with

[1] A press release announcing the proposed rule can be found here. A link to the proposed rule can be found here.

[2] A link to a Weil alert regarding the proposed regulation can be found here. A previous Weil alert discussing the Executive Order, along with a link to a White House fact sheet on the Executive Order, can be found here and here, respectively.

[3] A press release announcing the interpretive release can be found here. A link to the interpretive release and a related fact sheet can be found here and here, respectively.

the SEC's framework. The CFTC's participation signals that certain "non-security crypto assets" could meet the definition of "commodity" under the Commodity Exchange Act, establishing a coordinated regulatory approach between the two agencies.

The interpretation also addresses how a non-security crypto asset may become subject to an investment contract (and therefore become a security)—specifically, when an issuer offers the non-security crypto asset by inducing an investment of money in a common enterprise with representations or promises to undertake essential managerial efforts from which a purchaser would reasonably expect to derive profits. Importantly, the Commission explained that such an investment contract terminates when the issuer has either fulfilled or failed to satisfy its representations or promises, at which point the crypto asset "separates" from the investment contract and is no longer subject to the federal securities laws.

Finally, the Commission clarified that certain common crypto activities do not involve the offer and sale of a security. Specifically, "protocol mining," "protocol staking," and the "wrapping" of a non-security crypto asset do not constitute securities transactions. Additionally, certain crypto asset disseminations known as "airdrops" do not involve an "investment of money" under the *Howey* test and therefore fall outside the scope of federal securities laws.

The SEC noted that this interpretation is its "first step" toward a clearer regulatory framework and solicited public comment to potentially refine or expand upon its views. The Weil Private Funds Team will continue to monitor the SEC's interpretation of crypto assets and will communicate updates moving forward.

DAVID WOODCOCK NAMED DIRECTOR OF ENFORCEMENT

On April 8, 2026, the SEC announced that David Woodcock has been appointed Director of Enforcement, effective May 4, 2026. This announcement comes on the heels of the resignation of Judge Margaret A. Ryan on March 16, 2026. Mr. Woodcock is currently a partner in the Dallas and Washington, D.C. offices of Gibson, Dunn & Crutcher LLP, where he serves as chair of the firm's Securities Enforcement Practice Group. He returns to the Commission after previously serving as Director of the SEC's Fort Worth Regional Office from 2011 to 2015. Since returning to private practice, Mr. Woodcock has focused on regulatory enforcement, internal investigations, and corporate governance. He also serves as an Adjunct Professor of Law at Texas A&M University School of Law, where he spent more than a decade teaching securities, ethics, and compliance.

Sam Waldon will continue to serve as Acting Director of Enforcement until the appointment becomes effective on May 4, 2026.

KEITH E. CASSIDY NAMED DIRECTOR OF EXAMS

On January 20, 2026, the SEC announced that Keith E. Cassidy was appointed Director of Exams. Mr. Cassidy had served as Acting Director since May 2024 and was previously the division's Deputy Director, Acting Co-Director, and National Associate Director of the Technology Controls Program.

Mr. Cassidy stated that his priority as Director of Exams will be "to continue refining the processes that strengthen the intra-Commission coordination and ensure alignment across the national examinations program."

NOTABLE ENFORCEMENT ACTIVITY

PRIVATE FUND ADVISER ENFORCEMENT ACTION RELATED TO VALUATION AND PRINCIPAL TRANSACTIONS AFTER VOLUNTARY REMEDIATION DURING EXAM

On February 25, 2026, the SEC announced that it settled charges against a formerly registered investment adviser for breaching its fiduciary duty and contravening its disclosures to investors.[4]

According to the Order, between March 2020 and May 2020, during which time the adviser was registered as an investment adviser with the SEC, the adviser, using funds from its parent company, offered loans to companies being acquired by private equity firms in order to facilitate buyouts. The adviser also sold portions of the loans it originated to its private fund clients after holding the loans on its books for 30-60 days (in order to comply with tax regulations for offshore investors or because the funds did not have enough liquidity at the time to purchase the loans), with the adviser itself retaining approximately 40-50% of the loan.

The adviser's advisory agreements with its private fund clients required that all transactions between the adviser

[4] A press release related to the settlement can be found here. A link to the full SEC Order can be found here. A link to a Weil alert related to the settlement can be found here.

and the fund clients be on arm's length terms, and that the adviser would make principal transactions[5] at fair value, as reasonably determined by the adviser. The private placement memoranda for the fund clients provided disclosure to the same effect.

In practice, the adviser used the par value of the loan less the unamortized loan fee as the fair market value and sale price, under the belief that the closing price of the loan generally represented the fair market value given the limited time period between origination and sale to the fund clients. However, the Order alleges that after the onset of the COVID-19 pandemic, the adviser continued selling loans it originated prior to the beginning of the pandemic without determining the effect of the pandemic on the fair market value of these loans. In May 2021, in response to an SEC examination deficiency letter concerning the above, the adviser voluntarily returned to affected clients $5,010,854.90, plus $203,819.69 in interest, as compensation for the sale of loans to clients at purchase price less the unamortized loan fee.

As a result of the foregoing conduct, the Order found that the adviser breached its fiduciary duty and violated Sections 206(2) and 206(4) of the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"). The adviser paid a $900,000 monetary penalty in connection with the settlement. In response to this settlement, advisers should be sure that they are following the terms of their advisory agreements with fund clients and closely abiding by disclosures made to investors, particularly in the context of principal transactions.

ENFORCEMENT ACTION RELATED TO FAILURE TO DISCLOSE CONFLICTS OF INTEREST

On March 23, 2026, the SEC announced that it settled charges against a registered investment adviser for failing to fully and fairly disclose certain material facts and conflicts of interest related to its "robo-advisor" accounts.[6]

The Order alleged that from September 2019 until August 2025, the adviser allocated thirty percent of client assets in its no-fee cash-enhanced "robo-advisor" accounts (the "**Cash-Enhanced Accounts**") to cash, but the adviser failed to disclose that this allocation was selected, in part, to generate revenue for its affiliated broker-dealer and affiliated bank, thereby offsetting the advisory fee revenue the adviser forfeited by not charging fees on the Cash-Enhanced Accounts.

According to the Order, the adviser's affiliated broker-dealer received a rebate from a non-affiliated clearing broker representing a portion of the interest earned on the money deposited in the Cash-Enhanced Accounts, creating a conflict of interest that the adviser did not fully disclose.

In addition, the Order alleged that the adviser misleadingly stated that its portfolio management services were "based on Modern Portfolio Theory," when in fact the Modern Portfolio Theory was applied only to the seventy percent of account assets allocated to securities—not to the cash portion, which the Order states was driven in part by the adviser's own revenue considerations.

In connection with the settlement, the Order found that the adviser violated Section 206(2) of the Advisers Act, and the adviser paid a civil monetary penalty of $500,000. In response to this settlement, advisers should ensure that they have made full and fair disclosure of all material conflicts of interest related to their advisory business.

[5] Section 206(3) of the Advisers Act requires, among other things, that an adviser acting as principal in a transaction with a client disclose to such client in writing before the completion of such transaction the capacity in which the adviser is acting, and to obtain the consent of the client.

[6] A press release related to the settlement can be found here. A link to the full SEC Order can be found here.

Weil's Private Funds Group is available to help.

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