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If you thought the "Matrix" and "Spider-Man" sequels were impressive, you will be delighted to know that in a matter of weeks after revisiting its guidance on ESG retirement plan investments, the Department of Labor also issued a sequel to its 2020 information letter about the use of private equity (PE) investments in retirement plans.

In this 2021 supplementary statement, the DOL clarifies that its 2020 letter provides that 401(k) plan fiduciaries can permit investment in PE funds without automatically violating fiduciary duties to provide proper investment opportunities to participants, without saying that such fiduciaries should permit PE investment. The 2021 supplement, issued December 21, highlights that the 2020 letter considered 401(k) plan fiduciaries with experience analyzing PE investments from also serving as fiduciaries over defined-benefit plans already using PE investment. These experienced fiduciaries may be able to prudently analyze the relevant PE investment issues while, according to the sequel, "plan-level fiduciaries of small, individual account plans are not likely suited to evaluate the use of PE investments." This prompts our recollection of ERISA section 404(a)(1)(B), requiring judgments that would be considered reasonable by those familiar with the subject matter.

The DOL's holiday season sequel also noted that its 2020 letter may have assumed unrealistically favorable facts that were provided by the requester of that letter. Still, the 2020 letter outlined myriad issues to be addressed with PE investment, which are still relevant and important. For more information, including a summary of 13 considerations for fiduciaries considering PE investment, see our previous article "DOL Warms Up to Private Equity in 401(k) Plans," *Expect Focus – Life, Annuity, and Retirement Solutions* (September 2020).

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