BETTER MARKETS

SEC REPORT

There's No Such Thing as Private Market Assets in the Hands of the General Public

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September 10, 2025

Introduction

On August 7, President Trump signed an executive order directing the Treasury Department, the Department of Labor, and the Securities and Exchange Commission to make it easier to include private market assets in the 401(k)s of ordinary American investors.[1] Although there are numerous problems with opening up retail investors' 401(k)s to private market assets,[2] the most fundamental is that these assets should no longer be considered private if they are held by the general public. Securities sold to the general public are, almost by definition, part of a public offering.

That point seems to have gotten lost in the discussion about bringing private market assets "to the masses."[3] The debate about how to get private market assets into the hands of ordinary investors overlooks the fact that, once this is accomplished, the assets are no longer private. Assets are not private simply because they have been subject to the regulatory regime for private market assets. That regulatory regime presupposes that private market assets will not be marketed to the public. Assets that are marketed to the public, whatever their name, are not part of the private markets.

This understanding is crucial to the debate about opening up the private markets to retail investors. The private funds industry wants its assets to be sold to the public but still considered "private." This simply cannot be the case.

Why does this matter? Because investors in "private" securities offerings do not receive all material information about the investment. This means that retail investors would be unable to make informed investment decisions. This could lead retail investors to suffer large losses, as even the "accredited investors" who traditionally invest in the private markets struggle with the lack of transparency in private assets.[4] Without the information that accompanies a public offering, retail investors would be unable to distinguish between meritorious and non-meritorious investments.

This is good for the private funds industry, which can extract fees from selling their products regardless of whether retail investors make money on those products. But it is bad for retail investors. Securities sales to the general public should not leave retail investors unprotected.

The point isn't that retail investors should be excluded from what we now call the private markets. All Americans should be able to access investments that could help them buy a home or save for college and retirement. The point is that if the private funds industry wants to sell to retail investors, it should do so in the same way that all sales of securities to the general public must be conducted. Wall Street cannot call assets "private" and escape its obligations when conducting a public offering. Those

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[1] Laurel Wamsley, *Private equity and crypto could be heading for your 401(k). Here's what to know,* NPR (Aug. 16, 2025), https://www.npr.org/2025/08/16/nx-s1-5504096/401k-private-equity-crypto-executive-order.

[2] *See* Benjamin Schiffrin, *Private Market Assets Do Not Belong in 401(k)s,* BETTER MARKETS *(June 4, 2025),* https://bettermarkets.org/wp-content/uploads/2025/06/Better-Markets-Fact-Sheet-Private-Markets-in-401ks-6.4.2025.pdf; *see also* Press Release, *Trump's EO on Private Market Investments in 401(k)s Puts Wall Street Over Main Street,* BETTER MARKETS (Aug. 7, 2025), https://bettermarkets.org/newsroom/trumps-eo-on-private-market-investments-in-401ks-puts-wall-street-over-main-street/; Benjamin Schiffrin, *Private Securities Offerings Should Be the Exception, Not the Rule,* BETTER MARKETS *(May 19, 2025),* https://bettermarkets.org/wp-content/uploads/2025/05/BetterMarkets_Private_Markets_Report_05-19-2025.pdf.

[3] Amy C. Arnott, CPA, *The Gilded Age of Private Equity for the Masses,* MORNINGSTAR *(July 29, 2025),* https://www.morningstar.com/alternative-investments/gilded-age-private-equity-masses.

[4] *See*, *e.g.*, *Investor losses underscore need for private equity regulations, U-M researchers find*, UNIVERSITY OF MICHIGAN (Aug. 28, 2025), https://news.umich.edu/investor-losses-underscore-need-for-private-equity-regulations-u-m-researchers-find/ (finding that investors in certain private market assets lost "about 45% of their investment within two years of the transactions and concluding that in the absence of full and fair disclosure "private investments are not suitable for small retail investors or even many accredited investors").

obligations—to provide retail investors with the information they need to make an informed investment decision—are the bedrock of investor protection. In other words, assets cannot remain subject to the regulatory regime for the private markets if they are sold to the public.

Assets Held by the General Public are not Private Market Assets

The idea that "private" assets can be sold to the public is contrary to our system of securities regulation. Our securities laws exist to protect investors in a public offering of securities.[5] And a "public offering" is an offering "made to the general public."[6] A "private offering" is an offering "made only to a small group of interested buyers."[7] This makes sense. What does not make sense is the notion of a private offering that is made to the general public.[8] Yet that is what is now being proposed, as the financial industry says it wants to give the public "real access to private markets."[9]

This is inconsistent with the framework Congress established. The purpose of the Securities Act of 1933 was to "require that investors receive financial and other significant information concerning securities being offered for public sale."[10] It accomplishes this by requiring that public offerings be registered, which means the issuing company must "file a registration statement that includes all material information regarding the company and the securities being offered."[11] The act "presumes that registration is required and then places the burden on the person offering or selling securities to establish an exemption from registration."[12] The reason for the presumption is that issuers are more informed about their risks and rewards than investors.[13] So the disclosures that accompany a registered offering protect investors when issuers seek to sell their securities to the public.[14]

This means issuers should be exempted from the registration requirements only when it would be consistent with Congress's recognition that some investors do not need the statute's protections.[15] The most prominent exemption is for private securities offerings, which are offerings that are not marketed

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[5] Patrick M. Corrigan, *Do the Securities Laws Actually Protect Investors (and How)? Lessons from SPACs, 101* WASH. U. L. REV. 1123, 1125 (2024); accord Jerry W. Markham, *U.S. Securities and Exchange Commission and the "Deep Administrative State": A Case Study of Its ESG Rules*, 14 Am. U. BUS. L. REV. 151, 250 (2024).

[6] Black's Law Dictionary 888 (Abridged 7th ed. 2000).

[7] *Id.*

[8] *See* Jonathan D. Glater, *Private Offerings and Public Ends: Reconsidering the Regime for Classification of Investors under the Securities Act of 1933*, 48 CONN. L. REV. 355, 379 (2015) ("Private offerings by definition do not face the same disclosure requirements as public offerings, thereby limiting the SEC's ability to monitor.").

[9] Loukia Gyftopoulou, *Private Markets Hog the Spotlight as Asset Managers Gather in DC,* BLOOMBERG *(May 2, 2025),* https://www.bloomberg.com/news/articles/2025-05-02/private-markets-hog-the-spotlight-as-asset-managers-gather-in-dc?sref=mQvUqJZj; *see also, e.g.,* Arnott, supra note 3.

[10] U.S. Sec. & Exchange Comm'n, *The Laws That Govern the Securities Industry,* https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry.

[11] Ethan McCarthy, *Agents as Underwriters: Incorporating Agency Law to Make Section 11 of the Securities Act Better Applicable to Non-Traditional IPOs*, 19 J.L. ECON. & POL'Y 116, 118 (2024).

[12] Thomas Lee Hazen, *Administrative Law Controls on Attorney Practice—A Look at the Securities and Exchange Commission's Lawyer Conduct Rules*, 55 Admin. L. Rev. 323, 343 (2003); *see also* Donald C. Langevoort and Robert B. Thompson, *IPOs and the Slow Death of Section 5*, 102 KY. L. J. 891, 891 (2013-2014) (stating that the Securities Act of 1933 "creates a presumption that offerings of securities using the facilities of interstate commerce have to be registered with the Securities and Exchange Commission ('SEC')").

[13] John L. Orcutt, *Amending Regulation D's Accredited-Investor Definition to Allow Natural Persons to Opt Out of Unwanted Regulatory Protections*, 30 FORDHAM J. CORP. & FIN. L. 47, 48 (2025).

[14] *Id. at 48-49.*

[15] Christina Parajon Skinner, *Private Equity for the People,* 171 U. PA. L. REV. 2059, 2073 (2023).

to the general public.[16] The required disclosures in public offerings need not be provided to investors in private offerings because these investors can supposedly fend for themselves.[17]

Congress included the private offering exemption that is the basis for the private markets "to avoid SEC registration requirements in situations involving isolated sales of securities or sales where there was no practical need for the Act's application."[18] The idea is that the "accredited investors" to whom private securities offerings are marketed "do not need the full protection of the federal securities laws because they have either the sophistication or the resources to obtain disclosure and evaluate" an offering's merits.[19] However, retail investors are unable to conduct this level of due diligence to identify the most worthy private market assets. That is why the private markets do not have access to retail investors. They do not include the disclosures that protect investors from issuers with an informational advantage. This means that retail investors would be unlikely to end up investing in the same investments as the accredited investors who access the private markets now. Rather, they would likely end up investing in the private securities offerings that accredited investors reject.[20] So private fund sales to accredited investors may be isolated sales that obviate the need for the Securities Act's registration requirements, but allowing sales of supposedly private assets to retail investors cannot be considered isolated or consistent with the view that the registration requirements should not apply only where there is no need for their protection.

All this means that what is at stake in the debate about opening up the private markets is not simply whether private funds get to sell their assets to retail investors but whether the regulatory regime that Congress envisioned when it enacted the foundational securities laws in the 1930s persists. A world in which private market assets are not subject to the disclosure requirements that exist in the public markets yet are sold to the general public is not what Congress intended.

> Under the Securities Act, any transaction not involving a public offering is exempt from the Act's registration requirements. This exclusion is supported by the concept that private transactions do not affect the national economy because they are limited in scope and effect. For this reason, private offerings are not subject to the same disclosure requirements and trading restrictions as offerings that are considered public.[21]

Congress foresaw public markets characterized by "larger companies with dispersed, passive investors and exchange-traded stock" and private markets characterized "mostly by small, owner-managed

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[16] William K. Sjostrom, Jr., *Rebalancing Private Placement Regulation,* 36 SEATTLE U. L. REV. 1143, 1146 (2013).

[17] Matthew Wansley, *Taming Unicorns,* 97 IND. L.J. 1203, 1207 (2022).

[18] Roberta S. Karmel, *Regulation by Exemption: The Changing Definition of an Accredited Investor,* 39 RUTGERS L.J. 681, 686 (2008); *see also* Cary Martin Shelby, *Are Hedge Funds Still Private? Exploring Publicness in the Face of Incoherency*, 69 SMU L. REV. 405, 424 (2016) (stating that Congress "carved out" the exemption based on "the notion that regulators should not oversee activities that would not have an adverse impact on the public").

[19] Jennifer J. Johnson, *Private Placements: A Regulatory Black Hole*, 35 DEL. J. CORP. L. 151, 153 (2010). Accredited investors include individuals with a net worth exceeding $1 million, either alone or with their spouse, and individuals with net income exceeding $200,000 in each of the last two years, or joint income with a spouse exceeding $300,000 in each of those years, and who reasonably expect to reach the same income level in the coming year. 17 C.F.R. § 230.501(a)(5)-(6). The fact that these figures have never been adjusted for inflation has "created a steady increase in the number of households that qualify as accredited investors." Neal F. Newman, Lawrence J. Trautman, and Brian Elzweig, *Capital Formation, the SEC, and Accredited Investors*, 27 U. PA. J. BUS. L. 130, 161 (2025); *accord* Orcutt, 30 FORDHAM J. CORP. & FIN. L. at 75-76.

[20] Schiffrin, supra note 2, at 7.

[21] Cary Martin, *Private Investment Companies in the Wake of the Financial Crisis: Rethinking the Effectiveness of the Sophisticated Investor Exemption*, 37 DEL. J. CORP. L. 49, 65-66 (2012).

companies and illiquid equity."[22] As the exemption for private offerings has expanded, the private markets have grown in size, but they have retained their private character because private market assets are still not held by the general public and are still relatively limited in scope and effect. If the private funds industry achieves its goal of selling "to the masses,"[23] however, there will no longer be anything private about supposedly "private" markets. Instead, there will be "private markets" characterized by sales to the general public and a lack of disclosure to these retail investors. This is the opposite of the system of securities regulation Congress enacted in the 1930s.

Allowing private funds to sell to retail investors would essentially eliminate the fundamental distinction between public and private markets. Up to now, public markets "encompass securities transactions that are available to the general public and exclude private offerings."[24]

> From their inception, the federal securities laws proposed a simple bargain to U.S. companies: disclosure in exchange for investors. Companies that went public took on the obligation of publicly disclosing substantial amounts of information and, in return, were permitted to solicit the largest (and therefore cheapest) source of capital: the general public. Conversely, private companies were restricted to raising capital primarily from insiders and financial institutions, without publicity and subject to severe limitations on subsequent transfers of their securities—effectively precluding any sort of market for private company equity.[25]

Allowing private funds to sell to retail investors would essentially eliminate the fundamental distinction between public and private markets.

Although the subsequent expansion of the private offering exemption means that private companies and private funds can now "raise ample, cheap capital with relative ease,"[26] these offerings are still ostensibly private because for the most part they are still limited to accredited investors.[27] If private offerings are made to the general public, however, they could no longer be private offerings that are part of the private markets but would have to be considered public offerings that are now part of the public markets. In other words, absent a prohibition on selling to the general public, there is no basis for exempting offerings from the disclosure requirements of the securities laws and no basis for calling these offerings private. Assets that are held by the general public, even if issued without the disclosure requirements that epitomize the public markets, are not private market assets. Assets held by the public must be considered part of the public markets.

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[22] Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company,* 68 HASTINGS L.J. 445, 448 (2017); *see also* Verity Winship, *Private Company Fraud*, 54 U.C. DAVIS L. REV. 663, 670 (2020) ("In fact, historically, participation in the public markets was a necessary step in growth. The public-private divide sorted companies so . . . smaller companies stayed private while large corporations were on the public side.").

[23] *See, e.g.,* Miriam Rozen, *Apollo CEO Defends Push to Bring Private Markets to the Masses,* ADVISORHUB (July 11, 2025), https://www.advisorhub.com/apollo-ceo-defends-push-to-bring-private-markets-to-the-masses/.

[24] Martin, 37 DEL. J. CORP. L. at 58.

[25] de Fontenay, 68 HASTING L.J. at 448.

[26] *Id.*

[27] *Id.* at 467.

The Private Funds Industry Must Register Its Offerings If It Wants to Sell Supposedly Private Market Assets to Retail Investors

The understanding that there is really no such thing as private assets in the hands of the public reveals the problem with the narrative that proponents of exposing retail investors to the private markets advance. They say the private markets should be open to retail investors to "democratize" the private markets.[28] The problem is there is no way to democratize the private markets and still have them be private. There's nothing wrong with saying that retail investors should have the same opportunities as accredited investors. But the answer isn't to sell private market assets to retail investors as if they are just another type of investor to whom investments can be sold pursuant to the regulatory regime for private offerings. If the financial industry wants to reach retail investors, they should register their offerings and provide investors with the information they deserve.

The view of proponents of enabling private funds to sell to retail investors is perhaps best summarized by a question SEC Commissioner Hester Peirce asked the last time the SEC amended the definition of an accredited investor. At the time, she asked: "Why shouldn't mom and pop retail investors be allowed to invest in the private markets?"[29] The answer is not that they shouldn't be allowed to invest in the private markets, but that once mom and pop investors enter the private markets those markets are no longer private. This means that sales of supposedly "private" assets to mom and pop investors should not be subject to the regulatory regime for private offerings. So mom and pop investors should be able to invest in assets normally sold to accredited investors, they should just be able to do so with the disclosures that have long been considered necessary to protect the general public, since sales of such assets to such investors would be a public offering.

If investors in the supposedly private markets include both accredited investors and retail investors, what makes the "private market" something other than just the market as a whole?

Another way to think about it is to reframe Commissioner Peirce's question. The question isn't really why mom and pop retail investors shouldn't be allowed to invest in the private markets but why the private funds industry shouldn't be allowed to sell to retail investors in the same way that the industry has traditionally sold to accredited investors. And the answer is our system of securities regulation. The barrier between private funds and retail investors isn't some minor inconvenience that needs to be alleviated; it's the law. The basic bargain of the securities laws is that to sell securities to the public one must provide investors with disclosures of all material information. The private funds industry can't say that it has been allowed to sell to accredited investors without these disclosures to such an extent that it seems unfair to not also be able to sell to retail investors. It's understandable that the industry would want to be able to sell to retail investors without the disclosure obligations and resulting potential legal liability that accompany public offerings, but it shouldn't get the benefits of a public offering without the associated obligations. After all, if investors in the supposedly private markets include both accredited investors and retail investors, what makes the "private market" different from the public market or from the market as a whole?

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[28] Douglas Appell, *BlackRock's Fink sees democratizing private markets, weaker U.S. dollar in the future,* PENSIONS & INVESTMENTS (Mar. 31, 2025), https://www.pionline.com/money-management/blackrocks-larry-fink-democratization-private-markets-tokenization-weaker-us/. *See generally* Ludovic Phalippou, *Private Markets for the People? Or Just More People for Private Markets?*, INVESTMENTS & WEALTH REVIEW (July 31, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5346980.

[29] Commissioner Hester M. Peirce, *Statement on Amending the "Accredited Investor" Definition* (Aug. 26, 2020), https://www.sec.gov/newsroom/speeches-statements/peirce-accredited-investor-2020-08-26.

The private markets are already bigger than Congress could have envisioned when it created the private offering exemption as an exception to the rule that most securities offerings must be registered, but the private funds industry and its champions should not be allowed to use the size of the private markets as a reason for reaching retail investors without proper disclosure. SEC Chair Paul Atkins, one such champion, said recently that the private markets have tripled in size in the last ten years to $30 trillion, that retail investors "have missed out" on the opportunities in the private markets, and that allowing retail investors to enter the private markets could be a way for them "to diversify their investment allocation."[30] But the only reason the private markets have become so big is that the exemption from the registration requirement for sales that do not involve a public offering has expanded over time.[31] And although Congress and the SEC have continually expanded the conception of what is a private offering, they have done so under the theory that the exemption remains limited to accredited investors who can fend for themselves.[32] Once supposedly private market assets are sold to investors who cannot fend for themselves, there is no basis for allowing them to be sold pursuant to the regulatory regime for private market assets. The size of the private markets provides no basis for saying that retail investors can fend for themselves, that retail investors don't need disclosure, or that sales to retail investors do not involve a public offering.

So the fact that the private markets have gotten so big that proponents say retail investors need access to them is not a reason to open up the private markets to retail investors; rather, it is a reason to recognize how far securities regulation has strayed from its foundational principles. "The very bedrock foundation of the Securities Act regime is that investors should not be permitted to speculate on the value of new securities issued by companies without the time and information necessary to make an informed investment decision."[33] The exception to this rule is that investors in a private offering do not need these disclosures because they can fend for themselves.[34] But the exemption is premised on the notion that private offerings will be limited in scope because they will not reach the general public and those investors who cannot fend for themselves.[35] Whatever one thinks of the expansion of the private markets to this point, private fund sales to retail investors who cannot fend for themselves would be untethered from the original exemption for a private offering.

The idea that the private markets have gotten so big that ordinary investors need them to participate meaningfully in our capital markets is antithetical to securities regulation. The key goal of the securities laws that Congress passed in the 1930s was "to encourage retail investors to place their trust in public

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[30] Paul S. Atkins, Chairman, *Prepared Remarks Before SEC Speaks* (May 19, 2025), https://www.sec.gov/newsroom/speeches-statements/atkins-prepared-remarks-sec-speaks-051925.

[31] *See* Andrew F. Tuch and Joel Seligman, *The Further Erosion of Investor Protection: Expanded Exemptions, SPAC Mergers, and Direct Listings*, 108 Iowa L. Rev. 303, 318 (2022).

[32] *See* Troy A. Parades, *On the Decision to Regulate Hedge Funds: The SEC's Regulatory Philosophy, Style, and Mission,* 2006 U. Ill. L. Rev. 975, 991 (2006) (noting that "the notion that investors who can 'fend for themselves' do not need SEC protection is an animating principle of securities regulation that helps demarcate the appropriate boundary of SEC regulation across the federal securities laws").

[33] Corrigan, 101 Wash. U. L. Rev. at 1155.

[34] Rutheford B. Campbell, Jr., *The Overwhelming Case for Elimination of the Integration Doctrine Under the Securities Act of 1933*, 89 Ky. L.J. 289, 321 (2000-2001); *see also* Darian M. Ibrahim, *Public or Private Venture Capital*, 94 Wash. L. Rev. 1137, 1162 (2019) (stating that the theory behind the private offering exemption is that accredited investors require no specific disclosures because they have the ability to fend for themselves).

[35] Amy Deen Westbrook, *We('re) Working on Corporate Governance: Stakeholder Vulnerability in Unicorn Companies*, 23 U. Pa. J. Bus. L. 505, 537 & n.168 (2021); *see also* Usha Rodrigues, *Securities Law's Dirty Little Secret*, 81 Fordham L. Rev. 3389, 3427-28 (2013) ("Limiting the general public from investing in risky private offerings may well serve the ends of both capital formation and investor protection.").

markets after the stock market crash of 1929."[36] So retail investors are supposed to be able to invest in public markets that have disclosure requirements to protect them. If the private markets have gotten so big that retail investors cannot invest meaningfully in the public markets, we need to revitalize the public markets rather than push the general public into the private markets. Indeed, it would make no sense to describe private market investors as the general public, and it would be inconsistent with the regulatory regime that Congress devised for securities regulation.

What This Means for Private Equity and Private Credit

All this means that private market investments such as private equity and private credit are not private if they are held publicly. Normally, private equity and private credit do not involve the general public. Private equity and private credit involve private companies—companies that are not publicly owned and are not traded on a stock exchange. Private equity funds invest in these private companies, and private credit funds make loans to these private companies. Investors in private equity and private credit are typically the accredited investors who are deemed to have the sophistication and resources to fend for themselves.[37] Indeed, sales to accredited investors are the foundation of the private markets "because it is the pathway to private funds' exemption from the registration requirements of the Securities Act."[38] If private equity and private credit are instead sold to ordinary retail investors, there is no reason to think of them as private market assets.

> *Funds that sell shares to the general public and ordinary retail investors should be subject to the same disclosure obligations as any other public offering...*

Nor is there any reason that private equity funds and private credit funds should be exempt from the disclosure requirements of the securities laws if they are held by the public. The exemption for private offerings "permits private equity to sell shares in their funds without any mandatory disclosures provided that their potential investors are limited to 'accredited investors.'"[39] Funds that sell shares to the general public and ordinary retail investors should be subject to the same disclosure obligations as any other public offering; otherwise, these funds are availing themselves of the regulatory regime for private offerings while conducting a public offering.

Indeed, the idea that "private" assets can be sold to the public while remaining subject to the regulatory regime for private offerings is contrary to Congress's intent. Congress's intent in passing the securities laws was to exclude from the disclosure requirements an offering that "solely affects a finite number of investors," because the securities laws "should only apply to activities that have a significant impact on the collective public" and not "'where the public benefits are too remote.'"[40] Funds that are no longer sold to a finite number of investors but are instead sold to essentially all investors should be subject to the disclosure requirements that exist to protect the public.

This is why the various proposals currently under consideration to allow the financial industry to sell supposedly private market assets to retail investors under the regulatory regime for private offerings do not make sense. These proposals include expanding the definition of an accredited investor

[36] Andrew Verstein, *Mixed Motives Insider Trading,* 106 IOWA L. REV. 1253, 1277 (2021) (emphasis added).

[37] Michael Bromberg, *Private Credit vs. Private Equity: What's the Difference?,* INVESTOPEDIA (Jan. 29, 2025), https://www.investopedia.com/private-credit-vs-private-equity-7565530.

[38] Skinner, 171 U. PA. L. REV. at 2073.

[39] Abbye Atkinson, *Commodifying Marginalization,* 71 DUKE L.J. 773, 836 (2022).

[40] Shelby, 69 SMU L. REV. at 424 (quoting H.R. Rep. No. 73-85, at 5 (1933)).

so that anyone can qualify,[41] eliminating the restriction on selling funds that invest 15% or more of their assets in the private markets to non-accredited investors,[42] and insulating fiduciaries from legal liability for including private equity and private credit in retail investors' 401(k) plans.[43] Proposals that allow the general public to invest in supposedly private offerings without increasing the disclosures accompanying those offerings essentially render the securities laws meaningless.

Securities offered to the public must be subject to the regulatory regime for public offerings.

Conclusion

There are many reasons to not expose retail investors to the private markets. Those reasons include the fact that private market assets are opaque, illiquid, hard to value, and more expensive than public market assets.[44] And despite the assertions of the private funds industry, the evidence that the private markets provide greater returns than the public markets is inconclusive at best.[45] But these reasons, as important as they are, focus on why exposing retail investors to the private markets is not a good idea. The more fundamental problem with exposing retail investors to the private markets is that there is really no such thing as private markets that include retail investors.

Assets held by the public, even if called private market assets because they have traditionally been held by accredited investors, are not held privately but publicly. Such assets should not be considered part of the private markets and should not be subject to the regulatory regime for private market assets. Securities sold to the general public must be considered part of a public offering.

What dictates whether a securities offering is part of the private markets or the public markets isn't how the offering is conducted, it's to whom the securities are sold. That, in turn, is what dictates how the offering is conducted. The private funds industry can't say that it sells "private" assets and so should be able to use the regulatory regime for private offerings to sell to retail investors. Once it sells to the public, it is conducting a public offering. In other words, sales of securities to the general public are by definition not private securities transactions but part of the public markets. That is why there is no such thing as private market assets in the hands of the general public.

[41] Jasmin Sethi, *3 Levers the SEC Can Pull to Democratize Access to Private Markets,* MORNINGSTAR (July 29, 2025), https://www.morningstar.com/alternative-investments/3-levers-sec-can-pull-democratize-access-private-markets (discussing the SEC amending the definition); Stephanie Dhue, *House bill would expand the pool of people who can buy certain investments—if they can pass an SEC test,* CNBC (July 23, 2025), https://www.cnbc.com/2025/07/23/house-bill-accredited-investor-sec-test.html (discussing legislation).

[42] Sethi, supra note 41.

[43] Daines, Colleagues Urge DOL to Support American Workers & Retirees (Aug. 23, 2025), https://www.daines.senate.gov/2025/08/23/daines-colleagues-urge-dol-to-support-american-workers-retirees/; *see also* Letter to Dep't of Labor, https://www.daines.senate.gov/wp-content/uploads/2025/08/DOL-Expanding-Access-to-Alternative-Assets-for-401k-Plans-v3-FINAL-2025.08.15.pdf.

[44] *See, e.g.,* Schiffrin, *Private Market Assets Do Not Belong in 401(k)s,* supra note 2.

[45] *See, e.g.,* Arnott, supra note 3.

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