



Five Reasons DOL (Almost) Prohibits 401(k) Cryptocurrency Investments | Fiduciary Focus Series

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The Department of Labor's Employee Benefits Security Administration (DOL) issued Compliance Assistance Release No. 2022-01 (the "Release") on March 10. The Release warns 401(k) plan fiduciaries to "exercise extreme care" before including cryptocurrency options on a 401(k) plan's investment menu. It follows the DOL's Supplemental Statement issued in late 2021 narrowing the circumstances under which 401(k) plan fiduciaries might prudently include investment options with private equity exposure in their plans' investment lineup. See more in our article [DOL Refines Its Position Regarding Private Equity in 401\(k\) Plans](#).

The DOL Release sets the stage for discussing cryptocurrency options by emphasizing the gravity of the ERISA fiduciary role, including the exacting standards that apply to fiduciary conduct and the personal liability that can attach when those standards are breached. Plan fiduciaries must prudently select and regularly monitor the prudence of investment options offered to participants in a 401(k) plan.

Citing the recent *Hughes v. Northwestern University* Supreme Court decision for the proposition that defined contribution plan fiduciaries can't hide behind a plan design that allows participants to direct their own accounts, the DOL emphasizes that plan fiduciaries must conduct their own independent evaluation of each investment option included in an investment lineup and remove any imprudent investment options. The failure to remove an imprudent investment option is a fiduciary breach.

In light of these obligations, the agency expresses "serious concerns" about a 401(k) plan fiduciary's decision to expose participants to investments in cryptocurrency and related investments. The DOL identifies numerous issues with the kinds of risks that accompany investments in cryptocurrencies and takes the extraordinary measure of threatening to investigate plans and

plan fiduciaries that allow participants to invest in cryptocurrency and related products.

The agency outlines five reasons in support of its cautionary stance:

Speculative and volatile investments

The Securities and Exchange Commission (SEC) has warned against the highly speculative nature of investing in cryptocurrency, as it is prone to extreme price volatility due to factors including uncertainties in valuation and reporting, speculative conduct, and incidence of theft and fraud.

Challenges for 401(k) participants to make informed decisions

Cryptocurrencies are often pitched as unique investments with potentially high returns, but even sophisticated investors find it extraordinarily difficult to evaluate fact from fiction in relation to these assets. Plan participants, who are less likely to have sufficient knowledge to deal with these investments, risk experiencing great losses in their retirement accounts by selecting a cryptocurrency option ostensibly “approved” by their plan’s fiduciaries.

Custodial and recordkeeping concerns

Unlike traditional plan assets held in trust or custodial accounts, cryptocurrencies are stored in digital wallets with unique electronic addresses. Losing a password can result in losing the related asset forever. How ERISA’s indicia of ownership and trust requirements would apply to these assets is uncertain.

Valuation concerns

The experts who fundamentally disagree on the appropriate methodology for valuing cryptocurrencies nevertheless agree that how to value cryptocurrency presents a complex and challenging question. Moreover, the DOL is concerned that inconsistent treatment in reporting and accounting by cryptocurrency financial intermediaries may exacerbate these valuation issues, especially when compared to more traditional investment products.

Evolving regulatory environment

Here, the DOL basically likens the cryptocurrency markets to the Wild West. Plan fiduciaries considering cryptocurrency investment options must analyze how evolving regulatory requirements may apply to issuance, trading or other investment-related activities and, ultimately, impact investments by plan participants.

The DOL's strongly worded warning against including cryptocurrencies on the menu of investment options for plan participants should put employers and plan fiduciaries on notice of the seriousness with which the agency regards these kinds of assets. Particularly concerning is that the DOL's warning extends to cryptocurrency-related investments available through 401(k) brokerage windows.

If you have questions about the implications of the DOL's guidance, please contact [Sarah Lowe](#), [Kaitlin Hizny](#), or any attorney with Frost Brown Todd's [Employee Benefits & ERISA](#) practice group.

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