

CLIENT ALERT

DOL Urges ERISA 401(k) Plan Fiduciaries to Exercise “Extreme Care” Regarding Cryptocurrency Investments

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Introduction

The U.S. Department of Labor (the “DOL”) issued its first guidance regarding cryptocurrency investments by ERISA plans on March 10, 2022. The guidance – a Compliance Assistance Release regarding “401(k) Plan Investments in Cryptocurrencies” (the “[Compliance Bulletin](#)”)¹ – was released one day after the White House issued its Executive Order on Ensuring Responsible Development of Digital Assets. The Compliance Bulletin sets forth the DOL’s views regarding ERISA-governed 401(k) plans’ investments in cryptocurrency assets.

Summary

The Compliance Bulletin is succinct. In it, the DOL provides a brief reminder that fiduciaries must act prudently or risk liability, including personal liability for losses related to a fiduciary breach. The remainder of the three-page notice is a caution to plan fiduciaries to “exercise extreme care” before adding cryptocurrency options to 401(k) plan investment menus. In so doing, the DOL notes that it has “serious concerns about the prudence of a fiduciary’s decision to expose a 401(k) plan’s participants to direct investments in cryptocurrencies, or other products whose value is tied to cryptocurrencies.”

¹ Compliance Assistance Release No. 2022-01 (March 10, 2022).

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The DOL asserts that cryptocurrency investments present “significant risks and challenges” to 401(k) plan participants’ retirement accounts, including risks of fraud, theft, and loss, due to DOL’s concerns about: (i) the speculative nature of cryptocurrencies and price volatility associated with such assets; (ii) a perceived lack of adequate information for plan participants to make informed decisions regarding such investments; (iii) inadequate custodial and recordkeeping controls and the risk that participants may lose cryptocurrency passwords; (iv) the reliability and accuracy of cryptocurrency valuations; and (v) the unsettled nature of the wider regulatory landscape concerning cryptocurrencies.

In addition to expressing the DOL’s general misgivings regarding cryptocurrency investments by ERISA 401(k) plans, the Compliance Bulletin warns plan fiduciaries that the DOL intends to use its investigative powers to enforce its concerns. Specifically, the Compliance Bulletin states that the DOL expects to conduct an investigative program aimed at 401(k) plans that offer their participants investments in cryptocurrencies and related products. As part of these investigations, the DOL notes that plan fiduciaries responsible for overseeing or allowing cryptocurrency investment options, either directly on a plan’s investment menu or indirectly through a plan’s brokerage window, should expect to be questioned regarding those fiduciaries’ compliance with ERISA’s prudence and loyalty requirements.

Impressions

The Compliance Bulletin leaves no doubt about the DOL’s position regarding cryptocurrency investments by ERISA 401(k) plans, at least in the current environment. The Compliance Bulletin is notable in that the DOL specifically questions the prudence of a particular asset class – cryptocurrencies – unlike the DOL’s typical approach to plan investments, where it characteristically uses “facts-and-circumstances” in evaluating prudence under ERISA. Also noteworthy is the fact that the DOL expressly calls out the use of brokerage windows, and in particular, a fiduciary’s apparent responsibility for overseeing the investment options offered through a brokerage window. Historically, the DOL has taken a “light touch” with respect to in-plan brokerage windows; this guidance may signal a shift in that approach.

Notwithstanding these constraints, the Compliance Bulletin may leave open the possibility that ERISA fiduciaries could prudently conclude that a cryptocurrency component is appropriate in a professionally managed and diversified asset allocation investment option offered to 401(k) plan participants. Fiduciaries who do so, however, should be prepared for the possibility of DOL scrutiny. Further, the Compliance Bulletin does not expressly restrict or prohibit cryptocurrency investments in ERISA-governed defined benefit pension plans or in individual retirement accounts.

The cryptocurrency landscape continues to evolve, and the DOL’s views may evolve accordingly. We are following developments in this area closely.

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