

## Department of Labor Guidance and Federal Initiatives Counsel a Wait-and-See Approach for 401(k) Plan Fiduciaries Interested in Cryptocurrency Options

by Suzanne E. Meeker on May 26, 2022

On March 10, 2022, the Department of Labor published [Compliance Assistance Release 2022-01, 401\(k\) Plan Investments in “Cryptocurrencies”](#). The Release strongly discourages the addition of cryptocurrency (and other digital asset) options to the investment menus in ERISA retirement plans at “this early stage in the history of cryptocurrencies.” The Release was not issued in isolation; it followed by one day President Biden signing [Executive Order 14067, Executive Order on Ensuring Responsible Development of Digital Assets](#). The Executive Order outlines a “whole-of-government” strategy to address the risks and reap the potential benefits of digital assets in the domestic and global financial system. Both documents are informative for plan fiduciaries who may be interested in considering cryptocurrency options for participant-directed account plans.

ERISA requires plan fiduciaries to manage plan investments for the exclusive benefit of participants and beneficiaries, and with the care, skill, prudence and diligence of a prudent expert. In the Release, the Department cautions fiduciaries “to exercise extreme care” before considering the addition of cryptocurrency options, expresses doubts that a decision to include such options currently would satisfy the fiduciary duty of prudence, and announces that the Employee Benefits Security Administration (EBSA) expects to investigate plans offering cryptocurrency investment options and to act to protect participants’ interests.

The Release details five reasons why the Department is concerned:

- Cryptocurrency investments are highly speculative and extremely volatile.
- It is extremely difficult even for experts to evaluate cryptocurrency assets, and plan participants are even less likely to have adequate knowledge or expertise to make informed investment decisions.
- Cryptocurrency investments may present unique custodial and recordkeeping issues.
- Appropriate models and methodologies for cryptocurrency valuations are unsettled.
- The regulatory environment is equally unsettled and evolving.

Discussing these concerns, the Release emphasizes the possibilities of fraud, theft and loss attributable to factors including aggressive promotion of cryptocurrency

investments to the general public, inconsistent accounting by market intermediaries, market participants operating outside or not complying with existing regulations, and the reported use of cryptocurrencies in illegal activities.

Finally, in announcing the anticipated program for investigating plan cryptocurrency options, the Department indicated that it would be examining both plans with such options on their investment menus and plans with brokerage windows allowing cryptocurrency investments. Responsible plan fiduciaries in both cases “should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks” enumerated in the Release.

The Department expressly ties its concerns to the current (uncertain) state of cryptocurrency regulation, as mentioned above “at this early stage.” The Release clearly is intended to discourage plan fiduciaries from considering the addition of cryptocurrency options to an investment menu unless or until the Department’s concerns are resolved by future developments.

The path toward developments that could affect the Department’s views in the future is signaled by the Executive Order. Among other initiatives, the order directs the Secretaries of Labor and Treasury and the heads of other relevant agencies to report to the President on the broader implications of digital assets and associated changes in financial markets and payment system infrastructures for US consumers, investors and businesses, with policy recommendations for protective regulation and/or legislation. The report is due by September 5<sup>th</sup> this year.

Since the issuance of the Executive Order and the Release, other events have maintained attention on cryptocurrency investments in 401(k) plans and generally. In late April, Fidelity announced a new offering for consideration by 401(k) plan fiduciaries, an exchange-traded fund (ETF) providing exposure to digital assets. It has been anticipated that several other financial services companies may announce their own offerings this year. At the same time, the volatility and risk of cryptocurrencies have been shown by dramatic market declines over the past weeks.

Many plan fiduciaries may not anticipate including cryptocurrency options in their participant-directed account plans now or in the future. For those fiduciaries who might consider them, however, in our view the Department of Labor Release combined with initiatives supported by the Executive Order strongly counsels a wait-and-see approach today.

Please contact a member of our [Employee Benefits & Executive Compensation Group](#) if you have any questions regarding the Department of Labor Release.

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