



April 28, 2022 - Employee Benefits and Executive Compensation Group News: DOL Raises “Serious Concerns” About 401(k) Plan Investments in Cryptocurrencies

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On March 10, 2022, the U.S. Department of Labor (DOL) issued Compliance Assistance Release No. 2022-01 (the “Release”, available [here](#)) which cautions ERISA plan fiduciaries to exercise “extreme care” before they consider adding a cryptocurrency option to a 401(k) plan’s investment menu or allowing cryptocurrency investments through brokerage windows.

Although the Release specifically references “cryptocurrencies”, a footnote explains that the Release’s reasoning and principles also apply to a wide range of “digital assets”, including those marketed as “tokens”, “coins”, “crypto assets” and their derivatives.

The DOL noted in the Release that it has “serious concerns” about the prudence of an ERISA fiduciary’s decision to expose 401(k) plan participants to direct investments in cryptocurrencies or to other products whose value is tied to cryptocurrencies. The DOL further noted that cryptocurrency investments “present significant risks and challenges” to participants’ retirement accounts, “including risks of fraud, theft and loss”, for all of the following reasons:

- Speculative and Volatile Investments. Investments in cryptocurrencies are highly speculative and subject to extreme price volatility, which can have a “devastating impact” on participants, especially those approaching retirement and those with substantial allocations to cryptocurrency.
- Plan Participants Are Less Likely to Make Informed Investment Decisions. Cryptocurrencies are very different from typical retirement plan investments, and participants are less likely to have sufficient knowledge or the technical expertise necessary to make informed decisions about investing in them. In the Release, the DOL noted that, when plan fiduciaries, charged under ERISA with the duties of prudence and loyalty, choose to include a cryptocurrency option in a 401(k) plan’s investment menu, “they effectively tell the plan’s participants that knowledgeable investment experts have approved the cryptocurrency option as a prudent option for plan participants, which can easily lead plan participants astray and cause losses”.
- Custodial and Recordkeeping Concerns. Cryptocurrencies raise custodial and recordkeeping issues that may present additional difficulties for retirement plan fiduciaries. For example, cryptocurrencies generally exist as lines of computer code in a digital wallet, and are not held, like traditional plan assets, in trust or custodial accounts which are readily valued and available to pay plan benefits and expenses. With some cryptocurrencies, simply losing or forgetting a password can result in the loss of the asset forever. And, other methods of holding cryptocurrencies can be vulnerable to hackers and theft.
- Valuation Concerns. In the Release, the DOL expressed concerns about the reliability and accuracy of cryptocurrency valuations, noting that experts view cryptocurrency valuations as complex and challenging and have “fundamental disagreements” about important aspects of the cryptocurrency market, noting that none of the proposed models for valuing cryptocurrencies are as sound or academically defensible as traditional discounted cash flow analysis for equities or interest and credit models for debt.
- Evolving Regulatory Environment. The DOL noted in the Release that rules and regulations governing the cryptocurrency markets may be evolving, and some market participants may be operating outside of existing regulatory frameworks or not complying with them. The DOL cautioned that fiduciaries who are considering whether to include a cryptocurrency investment option in their 401(k) plans will have to include in their analysis how regulatory requirements may apply to issuance, investments, trading or other activities and how those requirements might affect investments by plan participants, noting that, for example, the sale of some cryptocurrencies could constitute the unlawful sale of securities in unregistered transactions. The DOL further cautioned that plan fiduciaries must take care to avoid participating in unlawful transactions, exposing themselves to liability and plan participants to the risks of inadequate disclosures and the loss of investor protections that are guaranteed under the securities laws.

Based on these and other concerns, the DOL stated in the Release that it expects to conduct an “investigative program” aimed at plans that offer participant investments in cryptocurrencies and related products, and to take “appropriate action” to protect the interests of plan participants and beneficiaries with respect to such investments. The DOL warned that plan fiduciaries who are responsible for overseeing cryptocurrency investment options or allowing cryptocurrency investments through brokerage windows “should expect to be questioned about how they can square their actions with their duties of prudence and loyalty” in light of the above-described risks.

The Release might signal the DOL’s renewed interest in regulating brokerage windows. Although brokerage windows have existed since the 1980s, the DOL’s first guidance on what constituted a brokerage window was not issued until 2010. In 2010, the DOL issued participant disclosure regulations (sometimes referred to as the “404a-5 Rules”) under ERISA Section 404(a), which defined a “designated investment alternative” (DIA), and then in turn, defined a brokerage window by excluding it from the definition of a DIA, and stating that a brokerage window “enables participants and beneficiaries to select investments beyond those designated by the plan” [29 C.F.R. § 2550.404a-5(h)(4)]. The 404a-5 Rules require administrators of participant-directed, individual account retirement plans to provide participants both initial and ongoing disclosures that explain fees and expenses, DIAs, and other information.

In response to questions the benefits community asked about the 404a-5 Rules, the DOL issued Field Assistance Bulletin (FAB) 2012-02 on May 7, 2012. In FAB 2012-02, the DOL explained how the 404a-5 Rules’ participant disclosure requirements apply to investments that are made available through an investment platform but are not specifically designated as DIAs under the plan, such as a brokerage window or similar arrangement. In Q&A 30 of FAB 2012-02, the DOL controversially stated that if a certain number of plan participants select an investment that is not a DIA, including through a brokerage window, then an affirmative obligation could arise to determine whether that investment should be treated as a DIA and thus be subject to fiduciary oversight and participant disclosure requirements.

In response to concerns raised by the benefits community about FAB 2012-02, on July 30, 2012, the DOL issued FAB 2012-02R (available [here](#)), whose Q&A 39 replaced the controversial guidance that had been included in Q&A 30 of FAB 2012-12. In FAB 2012-02R’s Q&A 39, the DOL stated that a brokerage window was not a DIA for purposes of the 404a-5 Rules, but noted that fiduciaries of plans with brokerage windows that enable participants and beneficiaries to select investments beyond those designated by the plan as DIAs are still bound by ERISA Section 404(a)’s statutory duties of prudence and loyalty to participants and beneficiaries who use the brokerage window, including taking into account the nature and quality of services provided in connection with the brokerage window.

On August 21, 2014, the DOL issued a Request for Information (RFI), 79 Fed. Reg. 49469 (available [here](#)), on the usage of brokerage windows in retirement plans, but ultimately, the DOL did not issue any additional guidance on brokerage windows.

Now, years later, the DOL has issued Compliance Assistance Release No. 2022-01, which might signal the DOL’s reawakened interest in subjecting brokerage window investments—at least, cryptocurrency investments—to fiduciary oversight and participant disclosure requirements. The Release could prompt pushback from plan sponsors and other members of the regulated community, so stay tuned. In the meantime, plan sponsors should determine whether plan participants and beneficiaries are investing in cryptocurrencies, and if they are, to prepare themselves for possible DOL investigations that ask them to “square their actions” with their ERISA fiduciary duties of prudence and loyalty.

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