

EMPLOYEE BENEFITS LAW

INFORMATION MEMO

JUNE 22, 2022

DOL Expresses Extreme Concern Over Prudence of Cryptocurrency Investments in 401(k) Plans

On March 10, 2022, the United States Department of Labor (DOL) published [Compliance Assistance Release No. 2022-01](#) (Release) addressing “cryptocurrency” investment in 401(k) retirement plans. In its Release, the DOL expressed significant caution to plan fiduciaries who are considering offering cryptocurrency investment options in their retirement plans, noting major concerns over whether offering such investments are prudent and in furtherance of their fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended (ERISA). The DOL further warns of future investigation of retirement plans that offer participant investments in cryptocurrencies – including permitting such investment through brokerage windows.

Under ERISA, retirement plan fiduciaries are required to act solely in the best interest of plan participants and beneficiaries. With respect to defined contribution retirement plans, such as a 401(k) plan, account value is largely dictated by employee contributions and the return on investment of those contributions. To that end, fiduciaries have an ongoing duty to ensure only prudent investment options are offered under the plan – requiring both initial and recurring independent evaluations of all plan investment options to determine if they are, and remain, prudent options. In the event of a breach of fiduciary duty, plan fiduciaries may find themselves personally liable for losses stemming from their imprudent conduct.

The DOL listed a number of concerns regarding the prudence of cryptocurrency investments in retirement plans, including their speculative and volatile nature, difficulties in valuation (even for expert investors), custodial and recordkeeping concerns (noting that cryptocurrency is not held in trust/custodial accounts, but are code held in a digital wallet, and as such, accounts can be completely vanish in the event of lost passwords or cyber-attacks), and a lack of a regulatory framework, potentially resulting in unlawful sales through unregistered transactions.

Although the Release focused on cryptocurrencies (or any other investment products tied to cryptocurrencies), the DOL noted that the same reasoning and principles would be applicable to a broad range of digital assets, including but not limited to tokens, coins, crypto assets, and any derivatives thereof.

The Release provided a number of substantial takeaways for plan fiduciaries.

First, the DOL implied that cryptocurrency will automatically be deemed as an imprudent plan investment, representing perhaps the first time the DOL has drawn such a broad conclusion on a specific form of plan investment. There is no statutory authority for the DOL to draw this conclusion, as ERISA does not specifically permit an asset class to be de facto imprudent.

Second, and perhaps most notably, the DOL further cautions that it will question plan fiduciaries about the prudence of permitting access to cryptocurrencies through brokerage windows. Traditionally, brokerage windows offer participants access to buy and sell securities through their 401(k) plan account via a brokerage platform – availing themselves to a much larger range of investments than offered through the plan’s core investment fund lineup. Historically, the DOL has not investigated brokerage

windows, seemingly allowing fiduciaries to avoid liability for poor investment decisions made by participants. However, the decision to offer a brokerage window is viewed as a fiduciary decision, and by requiring fiduciaries to consider cryptocurrency transactions executed through brokerage windows, the DOL has greatly expanded the scope of the duty to monitor.

Even though packaged as cryptocurrency guidance, the DOL's position in this matter may have far broader application – opening the door for review of all plan investments made through brokerage windows. As a result, plan fiduciaries need to question whether they are fiduciarily liable for any transaction made through a brokerage window, not just cryptocurrency transactions. Given the potentially significant number of investment transactions made via a brokerage window, it would be unreasonable to expect fiduciaries to monitor all of them. While it is not yet clear how this issue will play out in the future, plans currently offering brokerage windows, or those considering adding them to their accounts, should carefully evaluate the potential fiduciary implications associated with such arrangements.

The DOL has advised that it anticipates investigating plans offering cryptocurrency as an investment option in their retirement plan lineup, looking for the basis upon which plan fiduciaries determined such investments to be prudent. Given the DOL's strong stance against cryptocurrency investments, as well as this heightened level of scrutiny, plan fiduciaries should be careful when deciding whether to offer cryptocurrency as a plan investment option. If cryptocurrency is offered as an investment option, plan fiduciaries should document the reasons why the investment was considered an appropriate plan investment and be prepared to respond to the DOL's questions concerning its prudence.

Further, plan fiduciaries who offer access to a brokerage window (or are considering adding one) should monitor further updates from the DOL and reconsider whether the brokerage window remains a prudent decision, and if they need to rethink how they monitor transactions made through them.

If you have questions about the topics referenced in this article, please contact [Lawrence J. Finnell](#), any attorney in our [Employee Benefits and Executive Compensation practice](#) or the attorney at the firm with whom you are regularly in contact.

