

MEMO# 34072

March 10, 2022

DOL Cautions Against 401(k) Plan Investments in Cryptocurrencies and Announces Expected Investigative Initiative

[34072]

March 18, 2022

TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Cautions Against 401(k) Plan Investments in Cryptocurrencies and Announces Expected Investigative Initiative

On March 10, the Department of Labor (DOL) issued Compliance Assistance Release No. 2022-01, providing guidance for 401(k) plan fiduciaries regarding plan investments in cryptocurrencies and similar types of digital assets.[\[1\]](#) The release appears to be coordinated with an Executive Order issued the day before DOL's guidance.[\[2\]](#) While declining to assert that adding such an option to a plan's investment menu would constitute a breach of fiduciary duty, DOL expresses its "serious concerns" and cautions fiduciaries to "exercise extreme care" before considering making such investments available to participants. Citing the recent Supreme Court decision in *Hughes v. Northwestern*,[\[3\]](#) DOL reminds plan fiduciaries that they are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options and that the failure to remove imprudent investment options is a breach of duty.

DOL announces 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 these investments." Significantly, DOL specifies that the investigation will extend to plans that make such investments available through brokerage windows, considering whether the fiduciaries who oversee the brokerage window have met their fiduciary duties of prudence and loyalty.[\[4\]](#)

DOL explains its concerns regarding the significant risks associated with investments in cryptocurrencies, including risks of fraud, theft, and loss. More specifically, DOL identifies the following reasons for concern.

- Investments in cryptocurrency are speculative^[5] and subject to extreme price volatility.
- It is difficult for plan participants to evaluate such investments (to "separate the facts from the hype") and they are unlikely to have the sufficient knowledge and technical expertise to make informed decisions on these investments.
- The fact that cryptocurrencies are not held like traditional plan assets in trust or custodial accounts may present additional difficulties for plan fiduciaries.
- DOL is concerned about the reliability and accuracy of cryptocurrency valuations.
- 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.^[6]

Shannon Salinas
Associate General Counsel - Retirement Policy

endnotes

^[1] The guidance is available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01>. DOL's press release on the guidance is available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20220310>. DOL explains that the reasoning and principles described in the guidance also apply to a wide range of "digital assets" including those marketed as "tokens," "coins," "crypto assets," and any derivatives thereof.

^[2] The Executive Order (EO) on Ensuring Responsible Development of Digital Assets, issued March 9, 2022, is available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/>. The EO does not specifically mention ERISA or 401(k) plans; however, it does direct that DOL will be involved in the interagency process to implement the EO and will contribute to a report to the President "on the implications of developments and adoption of digital assets and changes in financial market and payment system infrastructures for United States consumers, investors, businesses, and for equitable economic growth."

^[3] See ICI Memorandum No. 34008, dated January 25, 2022, available at <https://www.ici.org/memo34008>.

^[4] The ERISA Advisory Council recently issued its 2021 report on "Understanding Brokerage Windows in Self-Directed Retirement Plans," available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-understanding-brokerage-windows-in-self-directed-retirement-plans.pdf>. While the Council did not address cryptocurrency investment in its recommendations to DOL, two witnesses did raise the topic of such investments being made through brokerage windows.

^[5] DOL notes that SEC staff has cautioned that investment in a cryptocurrency is highly speculative, and refers to the SEC's resource page at <https://www.investor.gov/additional-resources/spotlight/spotlight-initial-coin-offerings-and-digital-assets>.

^[6] DOL cites to cautions from an Investor Alert from the Financial Industry Regulatory

Authority (FINRA) regarding Bitcoin, available at <https://www.finra.org/investors/alerts/bitcoin-more-bit-risky>. DOL also refers to concerns from the Financial Crimes Enforcement Network (FinCEN) and the Department of Treasury's Office of Foreign Assets Control (OFAC).

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