

**MEMO# 34111**

April 13, 2022

# **ICI and Other Organizations Request Withdrawal of DOL Guidance on 401(k) Plan Investments in Cryptocurrencies**

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: ICI and Other Organizations Request Withdrawal of DOL Guidance on 401(k) Plan Investments in Cryptocurrencies

As we previously reported, the Department of Labor (DOL) recently issued Compliance Assistance Release No. 2022-01 (the "Release"), providing guidance for 401(k) plan fiduciaries regarding plan investments in cryptocurrencies and similar types of digital assets.[\[1\]](#) In the attached letter, ICI joined several other trade organizations[\[2\]](#) in requesting that DOL withdraw the Release and instead develop guidance in this area through notice-and-comment rulemaking.

In the Release, DOL expresses its "serious concerns" and cautions fiduciaries to "exercise extreme care" before considering making investments in cryptocurrencies available to participants. DOL also 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.

The letter from the trade organizations does not express any view on the appropriateness of retirement plan investments in cryptocurrency. Rather, it conveys concern that recent sub-regulatory guidance has been more in the nature of rulemaking in need of notice and comment and Office of Information and Regulatory Affairs review. The letter specifically identifies concern with DOL's statement regarding its plan to include brokerage windows in the investigations, reminding DOL that plan sponsors have not previously been held to have fiduciary responsibility for investments made through brokerage windows. The letter also objects to DOL issuing guidance identifying specific investments as inherently appropriate or inappropriate. Finally, the letter expresses concern with DOL's statement that fiduciaries

should use "extreme care" when considering adding a cryptocurrency investment to the plan, because it may create confusion by suggesting a standard other than the legal standard applicable to fiduciaries under ERISA.

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Associate General Counsel - Retirement Policy

#### **endnotes**

[1] For a summary of the guidance, see ICI Memorandum No. 34072, dated March 18, 2022, available at <https://www.ici.org/memo34072>.

[2] In addition to ICI, the signatories include: American Bankers Association, American Benefits Council, American Council of Life Insurers, The Defined Contribution Alternatives Association, The ERISA Industry Committee, Insured Retirement Institute, Securities Industry and Financial Markets Association, The Small Business Council of America, The SPARK Institute and United States Chamber of Commerce.

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