

MEMO# 35963

December 17, 2024

GAO Issues Report on Participant Investment in Crypto Through 401(k) Plans and the Data Available to DOL

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: GAO Issues Report on Participant Investment in Crypto Through 401(k) Plans and the Data Available to DOL

On December 4, 2024, the US Government Accountability Office (GAO) released a report entitled "401(k) Plans: Industry Data Show Low Participant Use of Crypto Assets Although DOL's Data Limitations Persist" ("Report").[\[1\]](#) The Report responds to a request from Representative Richard Neal (Ranking Member of the House Ways and Means Committee) that the GAO review crypto asset investment options in 401(k) plans.

According to the GAO, the Report addresses (1) the presence of crypto asset investment options in 401(k) plans, (2) the potential effects of crypto assets on participant savings, (3) how fiduciaries meet ERISA responsibilities when offering crypto assets in 401(k) plans, and (4) the extent of federal oversight of crypto asset investment options in 401(k) plans.

The Report does not include any new recommendations but does reference recommendations from prior GAO reports.

Crypto Assets Are a Small Part of the 401(k) Market

GAO cites the shortcomings of the Form 5500, noting that it could not systematically measure the prevalence of crypto assets in the 401(k) market. However, the industry data GAO reviewed (as well as corroborating comments from agency officials, industry representatives, and other stakeholders) showed that investment in crypto assets was minimal.

Respondents of a survey of plan recordkeepers[\[2\]](#) reported that none of the plans they served offered crypto investment options on their core investment lineups nor through crypto asset trading platforms. They reported minimal investment through self-directed brokerage windows, amounting to substantially less than one percent of the 401(k) market.[\[3\]](#) In describing the survey results, GAO characterizes the information as "not

generalizable" because not all of the recordkeepers surveyed submitted responses, and GAO did not determine how representative the responses were of all the recordkeepers serving the 401(k) market.

GAO also met with two providers of self-directed brokerage windows to 401(k) plans. One reported that combined investment in crypto investments through their platform represented less than 0.1 percent of total assets in the plans in which the investments were made. The other reported that investment in crypto investments totaled less than one percent of total retirement plan assets invested through their self-directed brokerage window.

GAO itself identified 69 crypto asset investment options available to 401(k) plans. The great majority of these (62 investment options providing indirect exposure to crypto assets) are available through self-directed brokerage windows.[\[4\]](#)

GAO also describes a window to a crypto asset trading platform, offered by a smaller 401(k) service provider. This window allows participants to invest directly in six different crypto assets, through access to spot markets in which participants invest directly in the crypto assets (rather than in units or shares of funds or trusts). Plan fiduciaries can set limits of up to five percent of investments made through the window.

Finally, GAO describes one option that is a unitized fund that primarily holds bitcoin and is available solely for use in 401(k) plans.[\[5\]](#) Plan fiduciaries who offer this option may set limits on the amount participants can allocate to this option, up to 20 percent of their account balance.

Future Crypto Asset Investment Returns are Highly Uncertain and Could Have Significant Wide-Ranging Effects on 401(k) Participant Savings

GAO analyzed the investment returns for crypto assets and performed a simulation analysis to estimate potential retirement savings. GAO acknowledged that the risk-adjusted returns for crypto assets from 2011 to 2023 were generally (in most years) higher than the S&P 500;[\[6\]](#) however, GAO expressed significant concerns regarding the risk and return trade-offs for these investments.

GAO expressed significant concerns regarding the risks of crypto assets, including:

- that crypto assets mainly derive their value from investor sentiment rather than through tangible company assets or cash flows;
- that crypto assets have uniquely high volatility (ranging from four times to 12 times greater than the volatility of the S&P 500;[\[7\]](#)) and
- that there is no standard approach for projecting potential future returns of crypto assets as long-term investments.

GAO used a simulation to estimate the potential effects of adding bitcoin (the crypto asset with the longest price history) to an illustrative 401(k) portfolio and found that "high portfolio allocations to bitcoin lead to lower projected risk-adjusted returns and potentially higher losses compared to little or no allocation to bitcoin"[\[8\]](#) and that large allocations of bitcoin lead to significant variability in risk and return.

Fiduciaries Must Meet ERISA Requirements When Making Crypto

Assets Available Through a Plan

GAO describes responsibilities of an ERISA fiduciary when offering crypto assets as an investment under a 401(k) plan—generally the same duties of prudence and loyalty as required when selecting any other investment option. GAO describes DOL's Compliance Assistance Release 2022-01 (which cautioned fiduciaries against 401(k) plan investments in cryptocurrencies)[\[9\]](#) and described the discussions it had with stakeholders about the guidance.

GAO also discusses the ERISA rules applicable to investment options outside of a plan's core lineup, since most of the current availability of crypto asset investment in 401(k) plans is through self-directed brokerage windows. DOL officials told GAO that "EBSA generally had not required fiduciaries to evaluate each investment option available to participants through self-directed brokerage windows" but GAO notes that Compliance Assistance Release 2022-01 cautioned that if plan fiduciaries allow crypto investment through brokerage windows, they "should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks." A 2023 court decision regarding the legality of this guidance found that the compliance release did not change fiduciaries' responsibilities under ERISA.

References to Prior GAO Recommendations

GAO notes in the Report the applicability of recommendations it previously made in two areas.

Improve investment reporting on the Form 5500

In 2014, GAO issued a report that recommended DOL consider revisions to the Form 5500 Series that would provide more transparency and detail into plan investments.[\[10\]](#) Schedule H (Financial Information) of the Form 5500 requires large plans to report on plan assets and attach a list of the investments,[\[11\]](#) and GAO had recommended that DOL revise the Schedule H plan asset categories to better match current investment vehicles or create a standard, searchable format for schedules of assets attached to filings. In this Report, GAO reviews the limitations of the Form 5500 that keep DOL from easily identifying plans that invest in crypto assets.

Limitations include:

- Plans with fewer than 100 participants are not required to file a Schedule H.
- The Schedule H does not require plans to identify investments in assets made through self-directed brokerage windows.
- The Schedule H captures limited data on plan assets, either by type or by investment, and the asset classes used are outdated and do not align with the way 401(k) plans invest, causing an overreliance on the "other" category.
- Data on plan investments reported on Schedule H are not captured in a searchable format.

In the Report, GAO claims that the emergence of crypto as a new asset category has amplified the need to improve the Form 5500 and recommends that DOL implement the recommendations GAO made in 2014 that would align asset classes on the Form 5500 with the way 401(k) plans invest and so provide regulators and researchers expanded detail on 401(k) plan investments.[\[12\]](#)

GAO notes that DOL currently has a project on its regulatory agenda to modernize the Form

5500.[13] GAO reports that DOL officials told GAO that they were considering the previous proposals regarding financial reporting that it made in 2016 and 2021, and considering the public comments received in response to the proposals.[14] DOL also said "that as of May 2024, a draft notice of forms revision was under development, but a final decision had not been made on what financial transparency and data usability elements would be included." [15] GAO opined that this project could result in addressing the limitations it sees, "such as exploring whether crypto asset investment options should be included in a list of investments that must be reported separately on attachments to Schedule H even if made through self-directed brokerage windows." [16]

GAO also reports on DOL's investigative efforts relating to crypto assets, noting that while crypto assets were included in an ongoing national enforcement project, none of the regional office plans reviewed by GAO list crypto assets as a priority for fiscal year 2024. DOL also intends to investigate and examine crypto assets in 401(k)s in the coming years, as announced in the 2022 compliance assistance release. According to the Report, as of last year, EBSA had initiated approximately eleven investigations into plans that had investments in crypto assets, which for most plans amounted to less than \$100,000, and DOL officials "observed that overall plan exposure to these investments had been minimal." [17] DOL officials also noted that these investigative efforts primarily covered investments made through plans' core investment lineups, as opposed to arrangements such as a self-directed brokerage window.

Consider legislation to fill regulatory gaps

The Report analyzes the status of crypto assets as securities, discussing the SEC's jurisdiction [18] and its enforcement efforts related to crypto assets. [19] In a 2023 GAO report, GAO reported that there is a federal regulatory gap in the oversight of spot markets for non-security crypto assets. [20] The 2023 report recommended that Congress consider legislation that (1) designates a federal regulator to provide comprehensive oversight of these spot markets and (2) provides consistent and comprehensive oversight of stablecoin arrangements. In the Report, GAO opines that the complex federal regulatory regime and the lack of comprehensive oversight adds to the challenges for 401(k) participants.

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Notes

[1] The Report is available at <https://www.gao.gov/assets/gao-25-106161.pdf>.

[2] According to the report, the SPARK Institute distributed GAO's survey to its record keeper members.

[3] See page 15 of Report.

[4] The Report discusses challenges fiduciaries would face, if they offer brokerage windows, in attempting to limit crypto assets from being available in a brokerage window. Restricting offerings to mutual funds would not eliminate the availability of crypto investments, because three of the crypto assets GAO identified were mutual funds. One of the brokerage window providers told GAO that it did not offer categorical restriction on crypto asset investment options available on their platform. However, plan fiduciaries could restrict any

specific investment options from a window. See page 22 of Report.

[5] GAO notes that the provider of this option told GAO that it no longer actively offered this option to its clients. See footnote 48 on page 18 of Report.

[6] GAO analyzed the historical returns of five crypto assets for the years 2011 to 2023, and found that "most of these crypto assets experienced much higher returns for most of their lifetime relative to the S&P 500, gold, Apple, Google (Alphabet), and Amazon," and that "the risk-adjusted returns have been negative in a few years, but have been generally higher than the S&P 500." (emphasis added). See pages 26-27 of Report.

[7] See page 24 of Report.

[8] Page 28 of Report.

[9] GAO noted DOL's Compliance Assistance Release 2022-01, which provided guidance for 401(k) plan fiduciaries regarding plan investments in cryptocurrencies and similar types of digital assets. See ICI Memorandum No. 34072, dated March 18, 2022, available at <https://www.ici.org/memo34072>.

[10] The report, "Private Pensions: Targeted Revisions Could Improve Usefulness of Form 5500 Information," June 2014, is available at <https://www.gao.gov/products/gao-14-441>.

[11] Plans with fewer than 100 participants are not required to identify investments, whether they file the Form 5500-SF or the Form 5500 with a Schedule I (Financial Information—Small Plan).

[12] See page 44 of Report.

[13] See ICI Memorandum No. 35774, dated July 18, 2024, available at <https://www.ici.org/memo35774>. The project is described as "part of a strategic project with the [IRS and PBGC] to improve the Form 5500 . . . [by] [m]odernizing the financial and other annual reporting requirements on the Form 5500, making the investment and other information on the Form 5500 more data mineable . . . [and] enhancing the agencies' ability to collect employee benefit plan data that best meets the needs of changing compliance projects, programs, and activities."

[14] In 2016, DOL, together with IRS and PBGC (the "Agencies"), issued a proposal to broadly revise and modernize Form 5500, which would have significantly increased plans' reporting burden. For a summary of the 2016 proposal, see ICI Memorandum No. 30071, dated July 25, 2016, available at <https://www.ici.org/memo30071>. In 2021, the Agencies proposed several changes to the Form 5500, including changes to the Schedule H intended to improve the usability of reported data for purposes of enforcement and analysis. While several changes associated with the SECURE Act were finalized, the Agencies deferred action on the proposed revisions to Form 5500 Schedule H that would (i) significantly expand the required information as to plan investments, and (ii) require standardized electronic submission of Schedule H information. For a summary of the 2021 proposal, see ICI Memorandum 33783, dated September 22, 2021, available at <https://www.ici.org/memo33783>. For a summary of the finalized changes to the Form 5500 (including the preamble language on the deferred action), see ICI Memorandum No. 35212, dated March 23, 2023, available at <https://www.ici.org/memo35212>.

[15] See page 43 of Report.

[16] See pages 43-44 of Report.

[17] See page 45 of Report.

[18] GAO explains, "if a crypto asset is offered and sold as a security under federal securities laws, SEC will have regulatory and enforcement authority over the transactions and entities or participants involved therein, consistent with those laws." Page 49 of Report.

[19] DOL commented on the issues an individual 401(k) plan would face if SEC or a court determined that a crypto asset available as part of a 401(k) plan was offered and sold in an unregistered security offering. See page 48 of Report.

[20] The report, "Blockchain in Finance: Legislative and Regulatory Actions Are Needed to Ensure Comprehensive Oversight of Crypto Assets," June 2023, is available at <https://www.gao.gov/products/gao-23-105346>.

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