

CRYPTOCURRENCIES AS INVESTMENT OPTIONS IN 401(k) PLANS

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On March 10, 2022, the U.S. Department of Labor (“DOL”) issued a Compliance Assistance Release¹ (the “Release”) addressing its views on the availability of cryptocurrencies on 401(k) investment platforms. This guidance comes as more 401(k) plan service providers have announced their intention to make digital currencies available on their platforms. While the DOL has not taken a definitive position, it has expressed concern with cryptocurrencies being made available to 401(k) plan participants. The DOL urges plan fiduciaries to proceed with “extreme care before they consider adding a cryptocurrency option to a 401(k) plan’s investment menu”²

In the Release, the DOL cautions that a plan fiduciary’s decision to make cryptocurrencies available to its participants will be subject to ERISA’s duties of prudence and

loyalty. These duties include ensuring that investment options made available to participants are prudent. Citing the Supreme Court’s decision in *Hughes v. Northwestern*, the DOL states that the prudence requirement also extends to a fiduciary’s failure to remove imprudent investment options. In other words, a fiduciary can be liable for breaching her fiduciary duties by selecting imprudent investment options or by allowing an investment option that has become imprudent to remain in a plan’s lineup. The DOL identified its main areas of concern with 401(k) participants investing in cryptocurrencies as: (1) price volatility; (2) the challenge for plan participants to make informed investment decisions; (3) custodial and recordkeeping concerns relating to holding digital currencies, including digital theft; (4) reliability and accuracy of cryptocurrency valuations; and (5) the evolving regulatory environment surrounding cryptocurrencies.

The DOL’s concern regarding the volatility of cryptocurrencies stems from the price fluctuation that some cryptocurrencies have experienced. For example, in 2021, Bitcoin traded near its year-low just five months before subsequently notching an all-time high. In June 2021, Bitcoin was trading around \$28,800³— a few hundred dollars above its year-low of \$28,610.⁴ Five months later, in November, Bitcoin skyrocketed to an all-time high of near \$69,000.⁵ Within this five-month span, Bitcoin’s price fluctuated roughly \$40,000. This fluctuation is not idiosyncratic to Bitcoin. Dogecoin, the cryptocur-

rency fueled by billionaire Elon Musk, rallied to a high of 75 cents in May 2021 and was a top 10 cryptocurrency by value, but has since fallen 80% from its high.⁶

Similarly, the DOL expressed concern about the evolving regulatory environment, which stems from, among other things, comments from the U.S. Securities and Exchange Commission (“SEC”) Chairman Gary Gensler, indicating his view that most cryptocurrencies, other than Bitcoin, are likely securities. In remarks delivered in August 2021, Gensler stated he agreed with former SEC Chairman Jay Clayton that “every [Initial Coin Offering] [we have] seen is a security” to which the “federal securities laws apply.”⁷ In remarks delivered in September 2021, Chairman Gensler reiterated that, in his view, “many [digital assets] are securities” and in our current crypto market “many tokens may be unregistered securities.”⁸ While the SEC has yet to offer definitive guidance on this issue, should the SEC declare a particular cryptocurrency to be a security issued in violation of the securities laws, this finding could also have a material impact on the value of the asset within a 401(k) portfolio.⁹ Fiduciaries should work closely with regulatory counsel to assist in assessing the securities risks of cryptocurrencies under consideration for inclusion in the investment lineup.

Traditionally, cryptocurrencies have not been commonly available as investment options for 401(k) plans.¹⁰ However, in this evolving space, there are at least two 401(k) service providers that have announced plans

to begin making cryptocurrencies available on their investment platforms. For example, Fidelity, the nation’s largest retirement service plan provider servicing over 25,000 companies with \$11.8 trillion assets under administration,¹¹ has announced that later this year it will make available a Digital Assets Account, a custom plan account that will provide 401(k) plan sponsors the ability to offer their participants exposure to Bitcoin, not to exceed 20% of contributions or exchanges.¹² Also, ForUsAll, a provider that services primarily small-to mid-sized businesses¹³ and manages over \$1.7 billion in assets,¹⁴ plans to make available to plan sponsors in the second quarter of 2022, a self-directed cryptocurrency window where participants will be able to select from a specified list of vetted cryptocurrencies.¹⁵ ForUsAll’s platform will set a 5% limit of the amount of their portfolio that a participant may allocate to cryptocurrencies.¹⁶ Plan sponsors electing to offer the cryptocurrency options may also establish their own limits for participant contributions and exchanges. These options will allow businesses of all sizes to make cryptocurrencies part of their 401(k) plan’s investment menu and may also signal an emerging industry trend.

Cryptocurrencies present fiduciaries an interesting opportunity to offer a diversified plan investment lineup and to respond to participant interest in such assets. However, when considering cryptocurrencies, fiduciaries will want to assess the risks accompanying these investments, including those identi-

[tps://www.wsj.com/articles/fidelity-to-allow-retirement-savers-to-put-Bitcoin-in-401-k-accounts-11650945661](https://www.wsj.com/articles/fidelity-to-allow-retirement-savers-to-put-Bitcoin-in-401-k-accounts-11650945661).

¹¹Workplace, FIDELITY, <https://www.fidelityworkplace.com/s/> (last visited May 1, 2022).

¹²Digital Assets Account, <https://www.fidelityworkplace.com/s/digitalassets> (last visited May 2, 2022); Tara Siegel Bernard, Fidelity's New 401(k) Offering Will Invest in Bitcoin, THE NEW YORK TIMES (Apr. 26, 2022), <https://www.nytimes.com/2022/04/26/business/crypto-401k-fidelity.html>.

¹³Jeanne Sahadi, Some 401(k)s Will Soon Let You Invest in Crypto, CNN (Apr. 1, 2022, 9:42 AM EDT), <https://www.cnn.com/2022/04/01/success/cryptocurrencies-401ks/index.html>.

¹⁴401(k) For Startups and Businesses, <https://www.forusall.com/for-employers> (last visited Apr. 28, 2022).

¹⁵Sahadi, *supra* note 13.

¹⁶Tanaya Macheel, This Small 401(k) Provider Wants to Bring Cryptocurrency to Americans' Retirement Funds, CNBC (June 10, 2021, 5:16 PM EDT), <https://www.cnbc.com/2021/06/10/this-small-401k-provider-wants-to-bring-cryptocurrency-to-americans-retirement-funds.html>.

¹⁷Release, *supra* note 1.

¹⁸Austin Ramsey, Fidelity's 401(k) Crypto Plan Sets Up Regulatory Guessing Game, BLOOMBERG LAW (Apr. 28, 2022, 5:30AM), <https://news.bloomberglaw.com/employee-benefits/fidelitys-new-401k-crypto-product-outside-federal-oversight>.

¹⁹ <https://www.tuberville.senate.gov/newroom/press-releases/new-tuberville-legislation-promotes-financial-freedom-for-401k-investors/>.