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# Cryptocurrency in 401(k) Plans? Might be More Like “Crypto-nite,” Says the DOL in Its Latest Release

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UPDATE: The Department of Labor rescinded Compliance Assistance Release 2022-01 on May 28, 2025 (discussed in more detail here).

Kryptonite is a fictional substance that causes the mighty Superman to lose all his strength. According to a recent release from the U.S. Department of Labor Employee Benefits Security Administration (“DOL”), cryptocurrency might carry similar dangers for otherwise strong and healthy 401(k) plan accounts. That is, in DOL’s view, the benefits of cryptocurrency in 401(k) plans may prove to be just as fictional as kryptonite, thereby causing significant risks of losses for retirement security.

On March 10, 2022, DOL issued Compliance Assistance Release No. 2022-01 (the “Release”) to caution plan fiduciaries to exercise extreme care before considering whether to include investment options like cryptocurrency as part of a 401(k) plan’s investment menu. In so doing, DOL raised five key concerns associated with offering these types of investment options.

**DOL’s 5 Reasons Why Cryptocurrencies Might be Like “Crypto-nite” to Participant Retirement Accounts:**

1. **Digital Assets Are Highly Speculative and Volatile**

After noting that the SEC has also warned of the highly speculative nature of cryptocurrency, DOL cautioned that the extreme price volatility of cryptocurrency investments can have a devastating impact on participants with significant allocations to cryptocurrency. According to DOL, this volatility might be attributable to the many uncertainties surrounding the valuation process, fictitious trading practices, and widely published reports of theft and fraud, among other factors.

2. **Obstacles Inhibit Participants From Making Informed Decisions**

The Release noted that cryptocurrencies are often presented to investors as “innovative investments” that provide “unique potential for outsized profits;” resulting in participants having high return expectations with little appreciation for the unique risks and volatility associated with cryptocurrencies. DOL also pointed out that these investments do not have the types of traditional data that novice and expert investors alike rely on to adequately evaluate future potential investment options.

Moreover, the Release asserted that the recent rise of social media and celebrity attention received by digital assets poses additional challenges for investors and plan participants to separate the facts from the hype. When combined with a plan fiduciary’s decision to include cryptocurrency options on a 401(k) plan menu, according to the Release, the message effectively conveyed to plan participants is that “knowledgeable investment experts have approved the cryptocurrency option as a prudent option . . . [which can] easily lead plan participants astray and cause losses.”

3. **Fiduciaries Face Non-Traditional Custodial and Recordkeeping Challenges**

Unlike traditional plan assets that are held in trust or custodial accounts, DOL notes that cryptocurrencies generally exist as lines of computer code in a digital wallet. In addition to valuation and liquidity issues, cryptocurrencies “can be vulnerable to hackers and theft,” as well as loss from losing or forgetting a password. DOL contends these differences pose unprecedented challenges for fiduciaries charged with highly regulated custodial and recordkeeping requirements.

In a DOL blog post issued on the same day as the Release, blog author, Acting Assistant Secretary, Ali Khawar, provided further insight into why DOL considers these challenges so significant:

“The assets held in retirement plans, such as 401(k) plans, are essential to financial security in old age – covering living expenses, medical bills and so much more – and must be carefully protected.”

4. **Experts Lack Industry Standard Valuation Models or Accounting Requirements**

The Release expressed concerns about the reliability and accuracy of cryptocurrency valuations. Experts are still grappling with the complex and challenging task of solving *how* to value digital assets, and also admit that none of the existing proposed valuation models are as sound or academically defensible as the discounted cash flow analysis or interest and credit models that are traditionally used.

5. **Regulatory Landscape is Unstable and Swiftly Evolving**

Last, the Release warned that, as the rules and regulations governing cryptocurrency markets continue to evolve, some market participants could find themselves operating outside of existing regulatory frameworks or not complying with them. Fiduciaries who are considering whether to include cryptocurrency investment options, according to the Release, must include in their analysis an explanation of the possible application of regulatory requirements on issuance, investments, trading, or other activities, and the possible effects those requirements may have on participant investments in 401(k) plans. An example that is very similar to this highly talked about pending litigation was provided in the Release to illustrate possible risks in this area.

**A Word to Fiduciaries Who Have Already Allowed Cryptocurrency on the Investment Menu, Including Through Brokerage Windows**

In addition to outlining specific risks raised by cryptocurrency investments in 401(k) plans, the Release announced that DOL expects to conduct investigations specifically targeting plans that offer participant investments in cryptocurrencies and "*related products*." Plan fiduciaries should expect to be questioned over how their actions aligned with their fiduciary duties of prudence and loyalty in light of the risks addressed in the Release.

These investigatory warnings also extend to plans and plan fiduciaries responsible for allowing cryptocurrency investments through 401(k) plan brokerage windows. This is concerning and may have broader implications because, as explained in a recently released report by the ERISA Advisory Council, most experts believe that plan fiduciaries do not have an obligation to monitor the underlying investments in a brokerage window, absent "extraordinary circumstances." The Release's reference suggests that DOL believes cryptocurrency investment options in brokerage windows may be the type of extraordinary circumstance that warrants a closer look at brokerage windows.

**Unanswered Questions**

After reading the Release, fiduciaries should also consider many unanswered questions in addition to the specific risks raised.

1. **Can a "Sophisticated Fiduciary" Approve an Investment Option That Has a Small Allocation to Cryptocurrency?**

In prior guidance involving private equity investments in 401(k) plans, DOL noted the investment risks but offered a path for fiduciaries to manage the risks. In that context, (see the June 2020 Information Letter and Supplemental Statement issued in January 2022), although DOL expressed the need to exercise caution, DOL also stated that such potentially risky investment options could be included within a diversified investment option if approved by a "sophisticated fiduciary." The Release raises "serious concerns" with "direct investments in cryptocurrencies," as well as "other products whose value is tied to cryptocurrencies," but it leaves open the question of whether, and to what extent, "sophisticated fiduciaries" could approve funds that include small allocations to cryptocurrency.

2. **How Much Indirect Exposure to Cryptocurrency is Too Much?**

As noted above, the Release targets not only "cryptocurrencies" but also "other products whose value is tied to cryptocurrencies." Left unanswered is whether "other products" would include funds that have *any* exposure to cryptocurrency as opposed to exposure above a particular threshold.

For example, the June 2020 Information Letter provided that private equity must be a small component – perhaps not more than 15 percent – of a designated investment alternative to potentially be permissible in 401(k) plans. Is it possible, then, for a target date fund that invests in collective investment funds, one of which contains a very small percentage (less than 15 percent) of its assets in cryptocurrency, to be an acceptable "other product"? If not, it is possible that a number of diversified investment options could be swept into the broader "other" category. Fiduciaries should review whether any funds in their plans' lineups have exposure to cryptocurrencies.

3. **What About Defined Benefit Plans and Other Fund Types?**

Finally, the Release specifically focuses solely on 401(k) plan investments in cryptocurrencies and related products. What about defined benefit plan investment funds? What about investments held by welfare benefit funds (VEBAs)? A number, albeit not all, of the five DOL concerns expressed in the Release apply similarly to these other types of plans; but the Release did not focus on those types of plans.

For now, plan sponsors and fiduciaries should keep an eye on new developments. If DOL does launch an investigatory program for cryptocurrency investments, it is possible that this guidance might take the form of audit questions for plan fiduciaries. Regardless, fiduciaries need to be ever vigilant in monitoring plan investments and making investment decisions.

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