

INSIGHTS

DOL Stance on Cryptocurrency in 401(k) Plans Becomes a Political Football

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A recent release by the DOL raising concerns about plan sponsors allowing cryptocurrency investments in 401(k) plans has gotten the attention of both sides of the Congressional aisle as well as industry groups. Some of the reactions to the release have sought to convince the DOL to take a step back, but the DOL has indicated on several occasions that it has no intention of doing so.

On March 10, 2022, the DOL issued Compliance Assistance Release No. 2022-21 (the “Release”), which laid out the DOL’s skepticism on the prudence of cryptocurrency investments in 401(k) plans, including through brokerage windows that permit participants to place 401(k) assets in investments other than those included in the plan’s core menu affirmatively selected by plan fiduciaries.

The Release sets forth the following five concerns the DOL has regarding risks associated with such investments in 401(k) plans:

- Cryptocurrency is highly speculative and subject to extreme price volatility;
- Difficulty for participants in accurately evaluating the investment and making informed investment decisions;
- Lack of readily available assets held in trust for payment of benefits since cryptocurrency exists as lines of computer code in a digital wallet, which may make it more vulnerable to theft and loss;
- Uncertainty surrounding the reliability and accuracy of cryptocurrency valuations; and
- The continually-evolving regulatory framework.

The Release goes on to state that the DOL expects to begin a program to investigate plan sponsors that permit cryptocurrency investments in 401(k) plans and to question plan fiduciaries as to how they were able to reconcile the decision to permit such investments with

their duties of prudence and loyalty under ERISA. Violations of these duties expose plan fiduciaries to personal liability with respect to associated investment losses.

Industry and Congressional Response

In April, the U.S. Chamber of Commerce sent a letter to Ali Khawar, the acting assistant secretary of the Employee Benefits Security Administration, the segment of the DOL that oversees employee benefit plans, stating that the DOL should seek to engage industry members to gather more facts and collaborate on possible solutions to cryptocurrency investments, rather than the DOL taking unilateral action. Mr. Khawar indicated in a subsequent interview with *Law360* that the DOL has no intention of revoking its recent guidance regarding cryptocurrency investments in 401(k) plans.

In Congress, U.S. Senator Tommy Tuberville (R-AL) sent a letter to the DOL on March 29, 2022, also criticizing the Release. In an April 20, 2022 response to the Senator's letter, Mr. Khawar reiterated the key points of the Release and provided no indication that the DOL would not stand behind it. Shortly after Mr. Khawar's response, Senator Tuberville introduced the Financial Freedom Act of 2022 (S. 1447), which, if passed in its current form, would, among other things, (i) provide that plan fiduciaries do not breach the ERISA duty of prudence by selecting a brokerage window or as a result of participant investment selections through that brokerage window, (ii) make available to fiduciaries ERISA section 404(c) protections with respect to brokerage windows (section 404(c) generally provides that fiduciaries are not responsible for investment losses if participants select investments from a menu made available by the fiduciaries), and (iii) bar the DOL from issuing regulations or other guidance restricting the types of investments available through a 401(k) plan brokerage window.

On the other side of the Congressional aisle, Senators Elizabeth Warren (D-MA) and Tina Smith (D-MN) sent a letter in early May to one retirement plan provider that recently announced that it will begin offering Bitcoin as an investment option that 401(k) plan fiduciaries may choose to include as part of the core menu of plan investment options. The letter questioned the appropriateness of the announcement in light of the Release and listed questions for the provider's response to the Senators. The letter follows Mr Khawar stating in an interview with *The Wall Street Journal* that the DOL has "grave concerns" regarding the provider's announcement.

While the landscape of cryptocurrency investments in 401(k) plans may change in the future, the Release remains outstanding and the DOL has given every indication that it intends to follow through with the actions laid out in it. Given that, plan fiduciaries that permit cryptocurrency investments in their plans, whether as part of the core investment menu or through a brokerage window, should consider, at a minimum, how they would address each of the five areas of concern the DOL raises in the Release.