

DOL Threatens to Investigate Fiduciaries Over Cryptocurrency in 401(k)s

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One day after President Biden's [*Executive Order on Ensuring Responsible Development of Digital Assets*](#), the Department of Labor's Employee Benefits Security Administration ("DOL") issued Compliance Assistance Release No. 2022-01, [*401\(k\) Plan Investments in Cryptocurrencies*](#) (the "Release"). Unlike the Executive Order, the Release sends a clear signal that DOL largely opposes benefit plans' investment in cryptocurrencies. Although the Release does not have the force and effect of law, it is notable as it signals a material break by DOL with regulatory norms and includes an explicit threat to investigate fiduciaries who make cryptocurrency available to participants, either as a standalone investment or through a brokerage window.

The Release

The Release first explains that fiduciaries have a duty to prudently select and monitor plan investments. It cites the recent Supreme Court decision in [*Hughes v. Northwestern University*](#) for the proposition that fiduciaries must evaluate the prudence of all designated investment alternatives made available to participants.

The Release then summarizes a number of concerns that may be relevant to a plan fiduciary's decision to include cryptocurrencies, including issues related to volatility, administration, valuation, and the regulatory environment. The discussion is not intended to be a balanced portrayal of the benefits and risks associated with an investment in cryptocurrencies. Instead, the agency expresses "serious concern" with investment of plan assets in cryptocurrency.

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

Allison Itami

aitami@groom.com

(202) 861-0159

Michael Kreps

mkreps@groom.com

(202) 861-5415

Samuel Levin

slevin@groom.com

(202) 861-6648

David Levine

dlevine@groom.com

(202) 861-5436

Thomas Roberts

troberts@groom.com

(202) 861-6616

George Sepsakos

gsepsakos@groom.com

(202) 861-0182

Kevin Walsh

kwalsh@groom.com

(202) 861-6645

Importantly, the Release takes the unprecedented step of threatening to investigate fiduciaries that make cryptocurrencies and related products available. Specifically, DOL states –

“[DOL] 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. The plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described above.”

This is a meaningful threat as sponsors and service providers often expend considerable resources over the course of DOL investigations, which typically last for multiple years.

Observations

The Release is a significant departure from DOL’s established regulatory norms. We are not aware of any other instance in which DOL has made such sweeping statements about the potential prudence of an entire asset class. In fact, DOL has recently elected to back away from proposals to create special standards for specific asset classes.^[1] However, in the Release, DOL implies that the agency will presume that fiduciaries making cryptocurrencies available have acted imprudently. Of course, ERISA itself does not create such a presumption of imprudence for any asset or asset class, and DOL has not conducted any formal study that would justify the position.

We also are not aware of any other example of DOL so explicitly threatening to subject fiduciaries to the costs of an investigation merely because the fiduciary decided to make a particular asset class available, directly or indirectly. DOL often announces (officially or unofficially) targeted compliance campaigns focused on specific issues (*e.g.*, ESOP valuation, missing participants, delinquent contributions). However, we were not able to identify another instance in which DOL has announced an investigatory campaign targeted at a specific asset class.

The Release also appears to shift DOL’s position with respect to the fiduciary implications of offering brokerage windows. DOL seems to indicate that fiduciaries may have an obligation to prudently select and monitor cryptocurrencies offered through a bona fide brokerage window. This is important as the implications of DOL’s position may extend beyond cryptocurrencies. It is similar to DOL’s previous attempt to expand the scope of brokerage window-related fiduciary duties through informal fee disclosure guidance. After significant pushback, DOL backtracked on its position.

The Release is not a regulation and, therefore, does not have the force and effect of law. However, DOL has arguably used the Release to circumvent the notice and comment process by attempting to create new substantive requirements for fiduciaries and a particular asset class. This is notable given that DOL is currently in litigation over a similar use of subregulatory guidance to take novel legal positions.

[1] For example, DOL opted not to exclude certain asset classes from the relief provided by Prohibited Transaction Exemption 2016-01 (subsequently vacated). Similarly, DOL backed away from “heightened” standards for ESG investments.