Published on *The National Law Review* https://natlawreview.com

# Fiduciaries versus FOMO: Department of Labor Releases 401(k) Cryptocurrency Guidance

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> “Not very unlike the experience of the man that built himself a palace of moon-beams, and when the moon set was surprised that his palace vanished with it.”
> —Herman Melville, The Confidence-Man

Regulators may be nervous about workers staking their retirements on crypto. The United States Department Labor’s Employee Benefits Security Administration (the “DOL”) recently issued Compliance Assistance Release No. 2022-01 to provide official guidance on 401(k) plan investments in cryptocurrencies. Noting “serious concerns” with the growing number of firms marketing cryptocurrencies to participants as investment options for 401(k) plans, the DOL warns plan fiduciaries to proceed with extreme care and at their peril.

The DOL identifies what it considers several major risks:

- Digital asset investments remain highly speculative and subject to extreme price volatility
- Plan participants are ill-equipped to make informed investment decisions
- Custodial and recordkeeping concerns
- Valuation concerns
- The evolving regulatory environment

## A few quick thoughts and takeaways:

- What is covered? Per the DOL, its use of “cryptocurrency investments” covers a variety of digital assets including those marketed as tokens, coins, crypto assets, and others.

- Double (Fiduciary) Duty. The Release’s strongly worded warning specifically targets plan fiduciaries. The Employee Retirement Income Security Act (ERISA) sets an elevated standard of conduct and care for retirement plan administrators. How elevated? “The highest known to the law” says the DOL. Under ERISA and other law, fiduciaries must act solely in the financial interest of plan participants. Any breach of that duty and those fiduciaries may be personally liable for any related losses.

- Isn’t it the participants’ call? No. Simply put, fiduciaries cannot shift their responsibility to participants to identify and avoid impudent investment options. Retirement programs like 401(k) plans offer investment option menus that participants can choose based on their risk appetite, financial goals, and retirement timelines, but a plan fiduciary is duty-bound to take independent and ongoing actions to ensure the prudence of those options. Most plan participants are not equipped to make fully informed decisions on plan options. The DOL cautions that many may chase crypto options based on promises of high rewards without properly considering those options’ risks. As such, the DOL warns that fiduciaries carry significant risks in providing and responsibly monitoring crypto-related options given what the DOL highlights as their potential volatility, security concerns, and nascent regulatory environment.

- Are you a plan fiduciary? Do you employ a plan fiduciary? In the ERISA/retirement plan context, a fiduciary is anyone with discretion over the retirement plans an employer offers. This can be designated in-house administrators like human resources, outside service providers, or paid investment advisors. If you’re unsure, the IRS and DOL have some pointers.

- Who’s asking? To address these concerns, DOL is creating an “investigative program” to monitor plans that include crypto options. It warns plan fiduciaries with crypto on the menu to expect questions about whether they can reconcile offering these options with their duties of prudence and loyalty.

- Where do we go from here? Employers and plan administrators who currently offer crypto options in their retirement plans should promptly work with legal advisors to assess any possible compliance issues or potential regulatory scrutiny. Employers and administrators who have yet to provide these options may consider staying the course until the DOL is able to provide more clarity as it implements this new program.

Employers should separately assess other business considerations regarding compensation issues, workforce morale, and management training to properly manage any questions on this subject. Employers should conduct any such assessment with an understanding of employees’ variable comprehension of retirement plans’ complexities and appreciation for their possible risks.

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National Law Review, Volumess XII, Number 89

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