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401(k) Plan Investments in "Cryptocurrencies"

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In recent months, the Department of Labor has become aware of firms marketing investments in cryptocurrencies to 401(k) plans as potential investment options for plan participants.[1] The Department cautions plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan's investment menu for plan participants.

Under ERISA, fiduciaries must act solely in the financial interests of plan participants and adhere to an exacting standard of professional care. Courts have commonly referred to these prudence and loyalty obligations as the "highest known to the law." Fiduciaries who breach those duties are personally liable for any losses to the plan resulting from that breach. A fiduciary's consideration of whether to include an option for participants to invest in cryptocurrencies is subject to these exacting responsibilities.

In a defined contribution plan, such as a 401(k) plan, the value of a participant's retirement account depends on the investment performance of the employee's and employer's contributions. When defined contribution plans offer a menu of investment options to plan participants, the responsible fiduciaries have an obligation to ensure the prudence of the options on an ongoing basis. Fiduciaries may not shift responsibility to plan participants to identify and avoid imprudent investment options, but rather must evaluate the designated investment alternatives made available to participants and take appropriate measures to ensure that they are prudent. As the Supreme Court recently explained, "even in a defined-contribution plan where participants choose their investments, plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options."[2] The failure to remove imprudent investment options is a breach of duty.

At this early stage in the history of cryptocurrencies, the Department has serious concerns about the prudence of a fiduciary's decision to expose a 401(k) plan's participants to direct investments in cryptocurrencies, or other products whose value is tied to cryptocurrencies. These investments present significant risks and challenges to participants' retirement accounts, including significant risks of fraud, theft, and loss, for all the following reasons:

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[1] Although this release specifically references "cryptocurrencies," the same reasoning and principles also apply to a wide range of "digital assets" including those marketed as "tokens," "coins," "crypto assets," and any derivatives thereof.

[2] *Hughes v. Northwestern University*, 142 S.Ct. 737, 742 (2022).

- **Speculative and Volatile Investments**: The Securities and Exchange Commission (SEC) staff has cautioned that investment in a cryptocurrency is highly speculative.[3] At this stage in their development, cryptocurrencies have been subject to extreme price volatility, which may be due to the many uncertainties associated with valuing these assets, speculative conduct, the amount of fictitious trading reported, widely published incidents of theft and fraud, and other factors. Extreme volatility can have a devastating impact on participants, especially those approaching retirement and those with substantial allocations to cryptocurrency.

- **The Challenge for Plan Participants to Make Informed Investment Decisions**: Cryptocurrencies are often promoted as innovative investments that offer investors unique potential for outsized profits. These investments can all too easily attract investments from inexpert plan participants with great expectations of high returns and little appreciation of the risks the investments pose to their retirement investments. Cryptocurrencies are very different from typical retirement plan investments, and it can be extraordinarily difficult, even for expert investors, to evaluate these assets and separate the facts from the hype. Participants are less likely to have sufficient knowledge about these investments, as compared to traditional investments, or to have the technical expertise necessary to make informed decisions about investing in them. When plan fiduciaries, charged with the duties of prudence and loyalty, choose to include a cryptocurrency option on a 401(k) plan's menu, they effectively tell the plan's participants that knowledgeable investment experts have approved the cryptocurrency option as a prudent option for plan participants. This can easily lead plan participants astray and cause losses.

- **Custodial and Recordkeeping Concerns:** Cryptocurrencies are not held like traditional plan assets in trust or custodial accounts, readily valued and available to pay benefits and plan expenses. Instead, they generally exist as lines of computer code in a digital wallet. With some cryptocurrencies, simply losing or forgetting a password can result in the loss of the asset forever. Other methods of holding cryptocurrencies can be vulnerable to hackers and theft. These are just a few examples of the custodial and recordkeeping issues that may present additional difficulties for fiduciaries of retirement plans.

- **Valuation Concerns:** The Department is concerned about the reliability and accuracy of cryptocurrency valuations. Experts have described the question of how to appropriately value cryptocurrencies as complex and challenging. Experts have fundamental disagreements about important aspects of the cryptocurrency market, noting that none of the proposed models for valuing cryptocurrencies are as sound or academically defensible as traditional discounted cash flow analysis for equities or interest and credit models for debt. Compounding these concerns, cryptocurrency market intermediaries may not adopt consistent accounting treatment and may not be subject to the same reporting and data integrity requirements with respect to pricing as other intermediaries working with more traditional investment products.

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[3] The SEC staff provides valuable information to investors on digital assets at *Spotlight on Initial Coin Offerings and Digital Assets | Investor.gov.*

- **Evolving Regulatory Environment**: Rules and regulations governing the cryptocurrency markets may be evolving, and some market participants may be operating outside of existing regulatory frameworks or not complying with them. Fiduciaries who are considering whether to include a cryptocurrency investment option will have to include in their analysis how regulatory requirements may apply to issuance, investments, trading, or other activities and how those regulatory requirements might affect investments by participants in 401(k) plans. For example, the sale of some cryptocurrencies could constitute the unlawful sale of securities in unregistered transactions. Plan fiduciaries must take care to avoid participating in unlawful transactions, exposing themselves to liability and plan participants to the risks of inadequate disclosures and the loss of investor protections that are guaranteed under the securities laws. In addition, as the Financial Industry Regulatory Authority (FINRA) has cautioned, Bitcoin and impliedly other cryptocurrencies have "… been used in illegal activity, including drug dealing, money laundering, and other forms of illegal commerce. Abuses could impact consumers and speculators; for instance, law enforcement agencies could shut down or restrict the use of platforms and exchanges, limiting or shutting off the ability to use or trade bitcoins."[4]

Based on these and other concerns, EBSA 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.

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[4] *See* https://www.finra.org/investors/alerts/bitcoin-more-bit-risky. Similarly, the Financial Crimes Enforcement Network (FinCEN) has expressed concern about the use of cryptocurrencies in connection with illicit activity, and recently noted that the majority of ransomware-related payments were made in bitcoin (*Financial Trend Analysis (fincen.gov)*). The Department of Treasury's Office of Foreign Assets Control has also observed that OFAC sanctions have increasingly targeted individuals and entities using virtual currency in connection with malign activity (*virtual_currency_guidance_brochure.pdf (treasury.gov)*).