

The DOL Warns Fiduciaries About Crypto

By **Sandra R. Mihok**

The current hype around cryptocurrencies and other “digital assets” has made its way to the retirement plan industry, with some firms starting to market cryptocurrencies, and other “digital assets” such as “tokens,” “coins,” “crypto assets,” to plan fiduciaries as potential investment options for employer-sponsored 401(k) plans.

In Compliance Assistance Release 2022-01 (“Release”) issued on March 10, 2022, the U.S. Department of Labor (DOL) took note of this recent development, and raised serious concerns over a plan fiduciary’s ability to include such investments in an ERISA- covered 401(k) plan.

In the Release, the DOL reminded plan fiduciaries of their obligation to ensure the prudence of all investment options by monitoring funds on an ongoing basis and removing imprudent ones. Along these lines, the DOL highlighted several characteristics of cryptocurrencies that are problematic from a fiduciary perspective, including:

- Digital assets are speculative and volatile. As such, the DOL warns that “extreme volatility can have a devastating impact on participants, especially those approaching retirement and those with substantial allocations to cryptocurrency”.
- It is difficult for participants to have sufficient knowledge of these investments to make informed decisions; their inclusion on a plan’s investment platform suggests to participants that an expert has evaluated the risk and determined them to be appropriate.
- Custodial and recordkeeping concerns, such as the difficulties with valuation, liquidity, theft, hacking and tracking assets.
- The reliability and accuracy of valuations given the lack of accepted standards.
- An evolving regulatory framework with some market participants operating outside of any regulatory guidelines.

The DOL announced it will begin a program to investigate plans that offer cryptocurrencies and take any appropriate steps to protect plan participants.

Plan fiduciaries may be considering whether cryptocurrencies can be made available to participants through a plan’s brokerage window. A brokerage window offers participants the ability to invest in a suite or even unlimited investments outside of the plan’s core options. In the Release, however, the DOL warned that fiduciaries who allow investments in cryptocurrencies 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.” The DOL has provided little guidance on the question of a fiduciary’s duty over a 401(k) plan’s brokerage window, and this statement from the DOL suggests that fiduciaries have responsibility for monitoring the types of options offered through the window.