

DOL Warns Against Plan Investments in Cryptocurrency

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Given the current market volatility, the U.S. Department of Labor's (DOL) concerns related to the addition of cryptocurrencies in qualified retirement plans seems prescient. In **Compliance Assistance Release No. 2022-01**, the DOL cautioned plan sponsors and fiduciaries that they should exercise "extreme care" in considering to offer cryptocurrency as an investment option to participants under a qualified defined contribution plan (such as a 401(k) plan). Looking to ERISA's exacting fiduciary obligation of prudence and the requirement that fiduciaries act solely in the interest of participants, the DOL reminded plan fiduciaries that such standards are the "highest known to law."

In light of those standards, the DOL explained that it would have "serious concerns" about the prudence of a fiduciary's decision to expose participants or direct investments to cryptocurrencies, or other investment products tied to cryptocurrency for the following reasons:

- Investment in cryptocurrency is highly speculative and volatile;
- It is difficult for plan participants to make informed investment decisions, or separate fact from hype, with respect to cryptocurrency;
- Cryptocurrency brings with it custodial and recordkeeping issues (e.g., it is not readily valued or available to pay benefits or plan expenses);
- Cryptocurrency valuations are not reliable or accurate due to the fact that experts disagree as to how it is to be valued; and

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- Cryptocurrency regulations are evolving and some cryptocurrency continues to live outside of any regulatory framework.

As a result of these concerns, the DOL explained that the Employee Benefits Security Administration (EBSA) expects to conduct investigations aimed at plans offering participant investments in cryptocurrency and similar products and take any action that it deems appropriate to protect the interests of participants in such plans.

While the DOL's guidance was aimed at fiduciaries of defined contribution plans, defined benefit plan fiduciaries and investment consultants should heed the guidance as well in directing the investment of defined benefit plan assets that are subject to ERISA. In addition, while ERISA does not apply to governmental plans, and certain opting out church plans, fiduciaries of such plans should consider this guidance as well in making their investment choices.

If you have any questions regarding the investment of plan assets in cryptocurrency or holding cryptocurrency as a plan asset, please contact any of our employee benefits professionals.