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DOL Warns Sponsors against Permitting Cryptocurrency-Related Investments on 401(k) Plan Investment Menus



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The U.S. Department of Labor (“DOL”) last month issued Compliance Assistance Release No. 2022-1 - *401(k) Plan Investments in “Cryptocurrencies”* (the “Release”) in which it strongly cautions ERISA plan fiduciaries to use “extreme care” before considering the inclusion of a cryptocurrency or other related option as a choice on a self-directed 401(k) plan’s menu of investment choices. In the Release, the Department noted that it had become aware that certain firms were marketing cryptocurrency-type investments as potential options for 401(k) plans.

The DOL reiterated that under ERISA, plan fiduciaries must act solely in the financial interests of plan participants and comply with ERISA’s demanding standard of care, and that a breach of these standards could result in personal liability for plan losses. Regarding participant-directed 401(k) plans, the DOL further noted that fiduciaries responsible for the investment options have an ongoing duty to ensure the prudence of such options.

The DOL indicated that, at this current stage in the history of digital assets, it has serious reservations regarding the prudence of exposing 401(k) plan participants to cryptocurrencies or products whose value is tied to cryptocurrencies. According to the DOL, these investment options can pose significant risks (including those associated with fraud, theft and loss) and challenges for participant-directed retirement plans for the following reasons:

- Cryptocurrencies are speculative and volatile investments;
- There are meaningful challenges regarding the ability of plan participants to make informed investment decisions;
- There are custody-related concerns (including vulnerability to hacking and theft), given that cryptocurrency is not held, like more traditional assets, in trust or custodial accounts, and related concerns pertaining to recordkeeping

regarding such assets;

- There are concerns around the reliability and accuracy of cryptocurrency valuations; and
- The regulatory environment pertaining to cryptocurrencies is actively evolving, and some market participants may be acting outside of or not otherwise complying with the current regulatory frameworks.

Importantly, the DOL not only sets forth the foregoing concerns, but goes on to provide that, based on these and related considerations, it expects to engage in an investigative program focusing on participant-directed plans that offer on their investment menus cryptocurrency and related products, and “to take appropriate action to protect the interests of plan participants and beneficiaries with respect to these investments.”
