

April 26, 2022

Acting Assistant Secretary Ali Khawar  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Suite N-5677  
Washington, DC 20210

Re: Compliance Assistance Release No. 2022-01  
401(k) Plan Investments in “Cryptocurrencies”

Dear Acting Assistant Secretary Khawar:

The undersigned organizations, representing investors and consumers, workers, and retirees, write in strong support for your recent Compliance Assistance Release, which cautions plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option or related product to a 401(k) plan’s investment menu for plan participants.<sup>1</sup>

The Release is entirely consistent with the Employee Retirement Income Security Act of 1974 (ERISA), which imposes strict fiduciary duties on plan fiduciaries.<sup>2</sup> In particular, the duty of prudence requires fiduciaries to discharge their responsibilities “with the care, skill, prudence, and diligence under the [prevailing] circumstances....that a prudent man...would use in the conduct of an enterprise of a like character and with like aims.”<sup>3</sup> The duty of loyalty requires fiduciaries to act “solely in the interest of plan participants and beneficiaries,” and “with the exclusive purpose” of providing them benefits and paying plan expenses.<sup>4</sup> These duties are applicable to all fiduciary acts, including selecting and monitoring a plan’s service providers and investments options.<sup>5</sup> Moreover, the Department previously has made clear that “fiduciaries of...plans with...brokerage windows...that enable participants and beneficiaries to select investments beyond those designated by the plan are still bound by ERISA section 404(a)’s statutory duties of prudence and loyalty...including taking into account the nature and quality of services provided....”<sup>6</sup>

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<sup>1</sup> Department of Labor, Employee Benefits Security Administration, Compliance Assistance Release No. 2022-01, 401(k) Plan Investments in “Cryptocurrencies,” March 10, 2022, <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01>

<sup>2</sup> 29 U.S.C. § 1104(a).

<sup>3</sup> 29 U.S.C. § 1104(a)(1)(B).

<sup>4</sup> 29 U.S.C. § 1104(a)(1).

<sup>5</sup> See *Hughes v. Northwestern University*, 142 S. Ct. 737, 742 (2022). See also *Mahoney v. J.J. Weiser & Co.*, 564 F. Supp. 2d 248, 255–56 (S.D.N.Y. 2008), aff’d sub nom. *Mahoney v. JJ Weiser & Co.*, 339 F. App’x 46 (2d Cir. 2009) (citing *Pineiro v. Pension Benefit Guar. Corp.*, 318 F. Supp. 2d 57, 93 (S.D.N.Y. 2003).

<sup>6</sup> Department of Labor, Employee Benefits Security Administration, Field Assistance Bulletin No. 2012-02R (1), July 30, 2012, <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2012-02r>

We share the Department's well-founded concern about instances where plan fiduciaries may be exposing participants to direct investments in cryptocurrencies, or other products whose value is tied to cryptocurrencies. As the Compliance Assistance Release correctly highlights, several aspects of cryptocurrencies raise serious questions about the prudence of exposing plan participants to these assets, including:

- They can exhibit extreme price volatility, which can be particularly devastating for participants who are approaching retirement;
- It can be extraordinarily difficult, even for expert investors, to evaluate these assets and separate the facts from the hype;
- Because cryptocurrencies are not held like traditional plan assets in trust or custodial accounts, they are at heightened risk of fraud, theft and loss;
- There are no consistent, reliable, and widely accepted standards for valuing cryptocurrencies; and
- Rules and regulations governing the cryptocurrency markets are evolving, and some market participants may be operating outside of existing regulatory frameworks or not complying with them at all.

Given these concerns, and the many uncertainties that currently pervade digital asset markets, we think it would be particularly challenging for plan fiduciaries to satisfy their prudence obligations when exposing plan participants to this category of assets. That is not to say that cryptocurrency markets, regulations, and industry practices won't evolve in a way that enables plan fiduciaries to satisfy their prudence obligations in the future. Nor does this guidance indicate that it is impossible for a plan fiduciary to be able to offer cryptocurrency assets. However, we all agree that it is entirely appropriate at this stage in the market's evolution that the Department caution plan fiduciaries to exercise extreme care when considering exposing plan participants to cryptocurrency assets.

We are particularly concerned that some plan fiduciaries may be providing exposure to cryptocurrency assets via brokerage windows without first undertaking a thorough and impartial investigation of the risks associated with offering these assets. While some plan fiduciaries may be under the impression that their fiduciary duties don't apply if the transaction is structured in this manner, this view is at odds with the objective of ERISA—to protect the retirement savings of plan participants from mismanagement and abuse, to hold those in charge of those savings to the highest legal standards, and to provide strong accountability mechanisms for failure to comply with those legal standards.<sup>7</sup>

In conclusion, we strongly support the publication of the recent Compliance Assistance Release and encourage the Department to continue to fulfill its mission to protect the interests of retirement plan participants and beneficiaries.

Sincerely,

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

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<sup>7</sup> See 29 U.S.C 1101(b).

Americans for Financial Reform Education Fund

Better Markets

Consumer Action

Consumer Federation of America

Economic Policy Institute

Institute for Agriculture and Trade Policy

National Association of Personal Financial Advisors

National Employment Law Project

Public Citizen

Public Investors Advocate Bar Association

Revolving Door Project

U.S. PIRG