



LEGAL UPDATES

Cryptocurrency as a 401(K) Plan Investment Option

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Fidelity Investments recently announced it is making a Bitcoin account available as an investment option for 401(k) plans, fueling a debate about cryptocurrencies and fiduciary responsibilities under ERISA.

In what might have been a preemptive strike, the Employee Benefit Security Administration (EBSA) of the Department of Labor — the agency charged with enforcement for Title I of ERISA — weighed in with its analysis on the issue shortly before the Fidelity announcement. EBSA Compliance Assistance Release No. 2022-1, March 10, 2022. EBSA is, at best, skeptical about cryptocurrency as a 401(k) plan investment option, citing among other concerns cryptocurrency's volatility and what EBSA says is cryptocurrency's vulnerability to fraud and theft. Perhaps more relevant to plan fiduciaries than what the Release says about possible fiduciary considerations is what EBSA had to say about EBSA's enforcement position. Presumably in an effort to chill enthusiasm for cryptocurrency as a 401(k) option, EBSA warns that "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."

Fidelity has been vocal in defending its decision to offer Bitcoin as a 401(k) investment option. The news media has reported that Fidelity has met with EBSA officials in order to address EBSA's concerns but, according to the media reports, EBSA remains unconvinced.

The subject is a complicated one. The landscape for measuring fiduciary conduct when selecting investment offerings in a 401(k) plan changed in an important way with the Supreme Court's January 2022 decision in *Hughes v. Northwestern University*. Other issues implicated in the cryptocurrency/401(k) debate include:

- Compliance with ERISA §404(c), which generally limits fiduciary exposure when a participant directs an investment, but subject to certain requirements that might be challenging for a cryptocurrency account to meet.

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- The management fees associated with a cryptocurrency account, and whether those fees may be considered excessive when compared to the investment management fees for other investments.
- Valuation issues, particularly for purposes of meeting the plan's Form 5500 annual reporting requirements.
- Whether having a cryptocurrency account might make the plan a more attractive target for plaintiff ERISA class action attorneys.
- Possible fiduciary liability insurance issues.
- The fiduciary implications of including a cryptocurrency option through a self-directed brokerage window rather than as a core fund offering.

There is no doubt that cryptocurrency has been a hot topic in recent years, and now that hot topic has moved into the 401(k) arena. The good news is that you do not have to navigate this complex area alone. We have an Employee Benefits Team at Lathrop GPM ready to help you. Please feel free to reach out to John Nichols, John.Nichols@lathropgpm.com; Ginny Schubert, Virginia.Schubert@lathropgpm.com; or Greg Kuhn, Gregory.Kuhn@lathropgpm.com.