

# Cryptocurrency No Longer a Non-Starter for 401(k) Plans – Real World Implications



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On May 28, 2025, the U.S. Department of Labor Employee Benefits Security Administration (EBSA) released its first compliance assistance bulletin under the new presidential administration, Compliance Assistance Release No. 2025-01 (the “New Guidance”), announcing and memorializing EBSA’s revocation of its 2022 guidance cautioning against 401(k) plan investments in cryptocurrencies (Compliance Assistance Release No. 2022-01 (the “Prior Guidance”).

The Prior Guidance was issued by EBSA during the last presidential administration in response to a growing number of firms marketing cryptocurrencies as potential 401(k) plan investment options. Citing concerns that cryptocurrencies may have volatile returns, are subject to an evolving regulatory environment, present unique challenges for participants in making informed investment decisions, and have unique custodial, recordkeeping and valuation concerns, EBSA cautioned plan fiduciaries to exercise “extreme care” before considering adding a cryptocurrency to a 401(k) plan investment menu. Notably, in light of EBSA’s concerns, the Prior Guidance warned plan fiduciaries that EBSA expected to conduct an investigative program aimed at plans offering participant investments in cryptocurrencies and related products. More specifically, EBSA informed 401(k) plan investment fiduciaries permitting cryptocurrency investments that they “should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the [associated] risks . . .” This resulted in an immediate and significant chilling effect on pursuing cryptocurrency offerings in 401(k) Plans.

It comes as little surprise that the new presidential administration is a proponent of cryptocurrency, with Vice President Vance announcing the same day as the release of the New Guidance that “crypto finally has a champion and an ally in the White House... crypto and digital assets... are part of the mainstream economy, and are here to stay.” But what does the New Guidance mean for plan fiduciaries and the prudent analysis they must undertake in considering whether cryptocurrencies are an appropriate 401(k) plan investment options?

The New Guidance focuses on the reference to “extreme care” in the Prior Guidance as a rationale for its revocation, stating that “extreme care” is not a standard found in ERISA, and differs from ordinary fiduciary principles thereunder. Under ERISA, the fiduciary principles describing standards of care are the duties of loyalty and prudence. Specifically, ERISA’s duty of loyalty provides that fiduciaries must act solely in the interest of plan participants and beneficiaries with the exclusive purpose of providing benefits and defraying reasonable plan expenses, and the duty of prudence provides that fiduciaries are to carry out their duties with the care, skill, prudence, and diligence that a prudent person familiar with such matters would use (described by the courts as an expert standard).

The New Guidance emphasizes that the Prior Guidance deviated from EBSA's "historic neutral approach to investment types and strategies" (e.g., imposing a uniform standard of care for different investments), and that revocation of the Prior Guidance "restores [EBSA's] historical approach by neither endorsing, nor disapproving of, plan fiduciaries who conclude that the inclusion of cryptocurrency in a plan's investment menu is appropriate."

For a responsible 401(k) plan fiduciary, the revocation of the Prior Guidance does not give the green light to add cryptocurrency as an investment option; rather, it simply places cryptocurrency on a level playing field with any other potential investment option. In other words, it removes EBSA's prior heightened scrutiny of cryptocurrency as a 401(k) plan investment option. This means a potential cryptocurrency investment should be reviewed and vetted by plan fiduciaries in the same manner as any other investment, by conducting a prudent process and adhering to the duty of loyalty. Such process may include analyzing and documenting whether the investment option:

- *provides participants with diversified alternatives, expanding on risk and return characteristics;*
- *offers returns that can be effectively monitored (correlated to a benchmark);*
- *possesses reasonable expenses;*
- *provides adequate disclosure for participants to evaluate the investment; and*
- *is permitted under the plan's investment policy statement.*

In issuing the New Guidance, EBSA did not dismiss the concerns listed in the Prior Compliance release regarding returns, regulatory development, participant comprehension, and unique custodial, recordkeeping and valuation considerations, which will still present challenges when evaluating cryptocurrencies in the same way as other investment options. However, EBSA was clear that it no longer "disapproves" of cryptocurrency as an investment consideration, and a plan fiduciary's decision should consider all relevant facts and circumstances and will "necessarily be context specific" (referencing *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014)). In other words, the appropriateness of cryptocurrency as an investment should focus on the specific needs of the plan, the unique characteristics of the population, and the reasonableness of the fiduciaries' judgment.

In light of these changes, those in charge of plan administration must carefully review the applicable disclosure obligations and work closely with the plan actuary and legal counsel to ensure accurate and timely compliance. Plan fiduciaries that wish to consider cryptocurrency as a potential 401(k) plan investment option should work with their investment advisor to evaluate whether such an investment option is appropriate for their plan, taking into account the relevant facts and circumstances for their plan population, and analyzing the various considerations solely in the interest of plan participants in a prudent manner with a well-documented demonstration of their decision-making process. This should include a process to appropriately monitor the cryptocurrency investment, understand and evaluate the reasonableness of its fees, and assess whether sufficient education on the investment can be provided to the participant population.

If you have questions about the New Guidance, please contact us.

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