



April 12, 2022

The Honorable Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration
United States Department of Labor
200 Constitution Ave 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:

I am writing to you on behalf of Fidelity Investments¹ regarding Compliance Assistance Release No. 2022-01 – 401(k) Plan Investments in “Cryptocurrencies” (CAR). We believe that the role of cryptocurrency in 401(k) plans is an important issue and look forward to working with the Department as it develops guidance. We agree that plan fiduciaries should carefully evaluate the role cryptocurrencies and other digital assets could play in a plan’s designated investment lineup and that certain factors with respect to digital assets may warrant particular attention. As you know, we believe retirement investors increasingly view digital assets, and bitcoin in particular, as an investment worthy of consideration.

However, we have significant concerns with the overall approach to rulemaking that the CAR represents and are particularly concerned with two aspects of the CAR that have far-reaching implications beyond cryptocurrency investments. First, while the CAR does not explicitly state that cryptocurrency investments are prohibited from inclusion in 401(k) plans, it effectively deems the selection of cryptocurrencies for investment in a 401(k) plan to be imprudent. Second, the CAR strongly implies that ERISA’s fiduciary duties of prudence and loyalty extend to investments in self-directed brokerage windows that are not designated investment alternatives. Neither of these points is grounded in ERISA

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Fidelity was founded in 1946 and is one of the world’s largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage and custodial/trustee services to thousands of Code section 401(k), 403(b) and other retirement plans covering more than 25 million participants and beneficiaries. Fidelity is the nation’s largest provider of services to individual retirement accounts (“IRA”) with more than 7 million accounts under administration. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies and third-party administrators).

or related guidance today. Both would establish precedents that could be applied broadly to any investment that may be held in a 401(k) plan and/or a self-directed brokerage window.

We are also concerned that the CAR does not clearly define the investments to which it applies and conflates a number of potential investments with very different characteristics. Moreover, the CAR suggests that all of the identified risk factors apply to all “cryptocurrencies,” as broadly defined, regardless of individualized facts and circumstances. This is simply not accurate.

Finally, while the CAR raises several concerns the Department has identified with cryptocurrencies, it provides no guidance on how plan fiduciaries should address those concerns or fulfill their duties when considering plan investments in cryptocurrencies. There are in fact a number of potential steps plan fiduciaries might consider. We urge the Department to work with the industry to develop steps to assist plan fiduciaries in meeting their obligations.

For all these reasons, we respectfully request that the Department withdraw the CAR and/or publish further guidance to clarify that the selection of a cryptocurrency or other digital asset is not *per se* imprudent under ERISA and make clear that ERISA’s duties of prudence and loyalty do not apply to a cryptocurrency that is not a designated investment alternative. The Department should also clarify the cryptocurrency investments to which the CAR applies and whether and how identified risk factors apply to those investments based on differing facts and circumstances. Finally, the Department should work with the industry to identify steps plan fiduciaries can take to address the concerns identified in the CAR and meet their obligations in light of them.

The CAR Improperly Deems the Selection of Specific Investments to Be Imprudent

The CAR articulates several concerns that the Department believes plan fiduciaries should carefully consider when evaluating cryptocurrencies. But it does not stop there. It warns plan fiduciaries to exercise “extreme care” when considering these specific investments. It threatens plan fiduciaries that offer cryptocurrencies with investigatory action. And it effectively suggests that a plan fiduciary cannot “square [its] actions” in selecting a cryptocurrency “with their duties of prudence and loyalty in light of the risks” identified in the CAR. The message of the CAR is clear: the Department views cryptocurrencies as imprudent investments for a 401(k) plan.²

We are neither aware of any prior guidance issued by the Department that concludes in advance that a plan fiduciary will not meet the duty of prudence by selecting a specific investment nor does ERISA provide a basis for such a pronouncement.³ ERISA requires plan fiduciaries to engage in a prudent

² This message is reflected in press reports interpreting the CAR. See, e.g., <https://www.washingtonpost.com/business/2022/03/18/crypto-bitcoin-retirement-401k/> (“The Labor Department essentially just warned the managers of workplace retirement plans: Don’t you dare think about adding cryptocurrency — it’s too risky.”); <https://tax.thomsonreuters.com/blog/dol-to-investigate-401k-plans-offering-cryptocurrency-investments/> (“By highlighting the various, and possibly insuperable, obstacles and risks inherent in these investments, emphasizing fiduciaries’ potential personal liability, and threatening enforcement action, the release expresses strong skepticism that cryptocurrency investments in a 401(k) plan can be prudent.”).

³ To the contrary, the Department has often noted in prior Advisory Opinions that it does not generally rule on application of the fiduciary rules to specific actions. See, e.g., Advisory Opinion 2013-03A (July 3, 2013); Advisory Opinion 2001-04A (March 22, 2001): “Whether the actions of plan fiduciaries satisfy these general fiduciary standard requirements is an inherently factual question, and the Department generally will not issue advisory

process with respect to the selection and monitoring of any investment designated for inclusion in a 401(k) plan. ERISA does not create a presumption of imprudence for any specific plan investment or authorize the Department to declare specific investment options – whether cryptocurrencies or any other investment option – to be imprudent based on its own assessments and concerns.

The CAR Improperly Implies that Fiduciary Duties Apply to Investments in a Brokerage Window

Much of the CAR is framed in the context of a plan fiduciary’s selection of designated investment alternatives for the plan’s investment lineup. We agree that ERISA’s fiduciary duties apply where a plan fiduciary is designating investment alternatives for inclusion in a plan. However, the CAR concludes by stating: “The plan fiduciaries responsible for overseeing such investment options *or allowing such investments through brokerage windows* should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described above.” (Emphasis supplied).

This statement strongly implies that plan fiduciaries have a duty to assess the prudence of cryptocurrencies even if they are not designated investment alternatives and are instead available through a brokerage window. Moreover, by implying that plan fiduciaries have a duty to assess one type of investment made available in a brokerage window, the CAR implies that plan fiduciaries have a duty to assess every investment available in the brokerage window.

However, current guidance clearly provides that no such duty exists, either with respect to cryptocurrencies or any other investment option that is not a designated investment alternative. Indeed, this issue was actively debated and resolved in 2012. At that time, the Department clarified that plan fiduciaries have no obligation under ERISA to monitor investments available through a brokerage window.⁴ Moreover, in the decade since, the Department has issued no further guidance suggesting that either brokerage windows constitute designated investment alternatives or that plan fiduciaries have any duty to monitor investments made available through a brokerage window.⁵ To the extent the CAR implies such a duty, it is inconsistent with current guidance and would therefore constitute a change in the law without notice and an opportunity to comment.

The CAR Ambiguously Defines and Improperly Conflates Cryptocurrency Investments

The CAR variously refers to “cryptocurrencies,” “a wide range of digital assets ... and any derivatives thereof,” “products whose value is tied to cryptocurrencies,” and “cryptocurrencies and related

opinions on such questions. The appropriate plan fiduciaries must make such determinations based on all the facts and circumstances of the individual situation.”

⁴ Field Assistance Bulletin 2012-02R. The FAB also provided that, in connection with brokerage window arrangements, plan fiduciaries have a duty to consider “the nature and quality of services provided in connection with” the brokerage window, and that a plan fiduciary’s use of a brokerage window to avoid designating investments and thus avoid required disclosures would raise questions under the duties of prudence and loyalty.

⁵ Indeed, the ERISA Advisory Council recently conducted an extensive study of self-directed brokerage windows and concluded that it is well-understood in the retirement plan community that brokerage windows are not designated investment alternatives and that it was not necessary for the Department to engage in further fact-finding, other than in the case of “brokerage window only” plans, i.e., plans that have no designated investment alternatives.

products.” And it further concludes that all these investments suffer from the five identified risks set forth in the CAR.

The various open-ended terms used to define the scope of investments at issue in the CAR should be clarified. Those terms appear to encompass not only all cryptocurrencies, such as bitcoin, but collective investments that include cryptocurrency exposure (in various proportions), investments in companies that service cryptocurrencies or derive revenue from the cryptocurrency industry, and even individual equity securities of companies that have significant balance sheet exposure to cryptocurrencies. Some of those investments are more commonly included in 401(k) plan investment lineups, not to mention brokerage windows, than others. Clarity is needed to understand which investments will come under the intense scrutiny described in the CAR and which, if any, will not.

More importantly, in our view, it is not accurate to suggest that all the identified risks in the CAR apply equally to all the types of investments potentially covered by the CAR. For example, each type of investment is likely to have a different volatility profile, be understood by investors in different degrees, and present different custody and valuation issues. However, the CAR simply states that all are subject to these risks to a degree that renders all of them effectively imprudent in the Department’s view.

We respectfully request that the Department more specifically and clearly describe the scope of the investments that are the subject of its concern and then make clear how the risks it has identified may differ as applied to different covered investments.

The CAR Fails to Offer Plan Fiduciaries Constructive Guidance

While styled as compliance assistance, the CAR does not provide any constructive guidance on how plan fiduciaries can address the issues identified by the Department and fulfill their fiduciary duties in assessing cryptocurrencies. However, there are many potential approaches plan fiduciaries could take to address the risks the Department notes in the CAR. For example, custody solutions are available in the market that are designed to safeguard cryptocurrency without plan participants or plan fiduciaries risking lost passwords by holding private keys. Further, plans can limit the amount a participant may invest in cryptocurrency to promote diversification and minimize the risk of significant losses. Plans can also provide education to participants that explains the unique characteristics of cryptocurrency investments, including the risks. We respectfully request the Department to work with the industry to develop guidance on steps plan fiduciaries may take to demonstrate that they have met their obligations under ERISA when considering cryptocurrencies for inclusion in a 401(k) plan.

The CAR Should Be Withdrawn And/Or Clarified

We support the Department’s efforts to inform plan fiduciaries of important factors that they should consider before designating cryptocurrency as an investment option under a 401(k) plan. However, the CAR goes beyond that to deem the selection of cryptocurrencies imprudent and to imply that fiduciary obligations apply with respect to cryptocurrencies (and thus other investments) that are not designated investment alternatives. It also conflates a wide range of potentially very different investments and suggests that they are all equally susceptible to various identified risks. And, importantly, the CAR omits any constructive fiduciary guidance regarding how to address the Department’s identified concerns or meet fiduciary duties in light of them.



We respectfully request that the Department withdraw the CAR and/or issue further guidance clarifying that it is not *per se* imprudent for a plan fiduciary to designate a cryptocurrency (or any other investment option) for inclusion in a 401(k) plan, that ERISA's duties of prudence and loyalty do not apply to cryptocurrencies (or any other investment options) that are not designated investment alternatives and instead are made available through brokerage windows, and to clarify the investments to which the CAR applies and how the risks it has identified vary among the various types of cryptocurrency investments. We further urge the Department to work with the industry to develop guidance on addressing the Department's concerns and fulfilling fiduciary obligations when including cryptocurrencies in their plan investment lineups.

We look forward to continuing to work with the Department to ensure that plan fiduciaries faithfully carry out their obligations under ERISA, and we are available to discuss any questions you may have at your convenience.

Sincerely,

Dave Gray

Dave Gray

Head of Workplace Products and Platforms, Fidelity Investments

cc: Deputy Assistant Secretary Timothy D. Hauser
Mary Beech, Chief of Staff

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