

New DOL Guidance for Retirement Plans on Cryptocurrency and ESG Investments

The new administration has recently taken steps to revise guidance with respect to two retirement plan investment options: cryptocurrency, and funds focusing on environmental, social, and governance (“ESG”) factors. These two topics have been hotly debated over the past few years, and it is not surprising that the new administration would choose to address them early in its term. The recent changes are highlighted below.

Background

Cryptocurrency

In March of 2022, the Department of Labor (the “DOL”) released [Compliance Assistance Release No. 2022-01](#) (the “2022 Release”). The 2022 Release specifically cautioned plan fiduciaries to “exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan’s investment menu for plan participants” and cited, among other issues, concern regarding the prudence of permitting direct investment in cryptocurrencies due to significant risk of fraud, theft, and loss.

ESG Investments

Over time, administrations have taken markedly different positions with respect to the permissibility of including investments with ESG factors as options in retirement plans. In late 2022, the prior administration released amended regulations (the “2022 Regulations”) rolling back regulations issued in 2020 which discouraged the use of ESG-focused funds as plan investments (the “2020 Regulations”). The 2022 Regulations generally clarified that decisions regarding retirement plan investments must be based on factors that a fiduciary reasonably determines are relevant to a risk and return analysis, and that this analysis may include ESG factors, provided that the weight given to any factor, including ESG factors, should appropriately reflect a reasonable assessment of its impact on the risk-return analysis. (The 2022 Regulations are summarized in greater detail in our [prior alert](#).) In response, several oil and gas related parties as well as 26 states sued the DOL to vacate the 2022 Regulations (*Utah v. Chavez-DeRemer*, 5th Cir., No. 23-11097). In late April 2025, the Fifth Circuit was informed that the DOL intended to reconsider the 2022 Regulations and the possibility of rescission of those regulations was specifically mentioned.

Updates

New Guidance on Cryptocurrency Investments in 401(k) Plans

Late last month, the DOL issued [Compliance Assistance Release No. 2025-01](#) (the “2025 Release”). The 2025 Release indicates that the standard of “extreme care” directed under the 2022 Release was not included in the Employee Retirement Income Security Act (“ERISA”) and differed from ordinary fiduciary principles established under ERISA.

The 2025 Release posits that, prior to the 2022 Release, the DOL’s position on types of investments or investment strategies had usually been neutral. The 2025 Release purports

to return to this neutrality, “neither endorsing, nor disapproving of, plan fiduciaries who conclude that the inclusion of cryptocurrency in a plan’s investment menu is appropriate.” The 2025 Release cites *Fifth Third Bancorp v. Dudenhoeffer* when reiterating that plan fiduciaries’ investment menu decisions should include consideration of “all relevant facts and circumstances” and will be “context specific”.¹

DOL’s Plans to Engage in Rulemaking on the ESG Rule

On the same day, the Department of Justice (DOJ) provided a letter to the *Utah v Chavez-DeRemer* court indicating that the DOJ intends to engage in new rulemaking on the subject of the challenged regulations. This rulemaking is expected to be included in the DOJ’s Spring Regulatory Agenda, and the DOJ indicated in its update that it will move through the process “as expeditiously as possible”. This update signals that the 2022 Regulations are likely to be modified or rescinded through the formal rulemaking process.

Takeaways

Cryptocurrency

Although the 2025 Release is a significant departure from the previous guidance, it explicitly stops short of endorsing the inclusion of cryptocurrency in 401(k) plan investment menus. Therefore, under current guidance, plan fiduciaries will be required to make their own judgment regarding the prudence of including such an investment option. As with any other fiduciary decision, the fiduciary should be sure to act solely in the interest of plan participants and beneficiaries, and with the care, skill, prudence and diligence that a prudent person familiar with such matters would use under similar circumstances. Furthermore, any decisions regarding plan investment options should be made by the appropriately authorized parties, and carefully documented.

ESG Rule

The DOJ’s notice to the Fifth Circuit did not indicate what would be included in the new regulations, simply that it would engage in the rulemaking process this spring. Given the history of these regulations, it appears likely that the new regulations will be more closely aligned with the 2020 Regulations. More information is expected to become available in the near future.

¹ *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014).

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

Douglas L. Tang
Jessica S. Carter
JoAnn Kim

212.336.2844
212.336.2885
212.336.2221

dtang@pbwt.com
jcarter@pbwt.com
jokim@pbwt.com

To subscribe to any of our publications, call us at 212.336.2000, email mktg@pbwt.com or sign up on our website, <https://www.pbwt.com/subscribe/>.

This publication may constitute attorney advertising in some jurisdictions.
© 2025 Patterson Belknap Webb & Tyler LLP

Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036-6710
212.336.2000
www.pbwt.com