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## Cryptocurrency and Other Digital Asset Investments in ERISA Plans

Shortly after taking office on January 20, 2025, President Trump issued an executive order (“EO”) outlining his Administration’s intent to “support the responsible growth and use of digital assets, blockchain technology, non-fungible tokens, and related technologies across all sectors of the economy” and “secure America’s position as the world’s leader in the digital asset economy”<sup>1</sup>—a sharp contrast to the Biden Administration’s more cautious approach. Cryptocurrency has remained a major focus for the Trump Administration in its first year, with President Trump signing the “GENIUS Act”<sup>2</sup> into law (regulating “stablecoins”) and issuing additional EOs directing the creation of a “United States Digital Asset Stockpile”<sup>3</sup> and “democratizing access” to alternative and digital assets in 401(k) plans.<sup>4</sup>

Despite the Administration’s general enthusiasm for digital assets, uncertainty among retirement plan sponsors remains. This article focuses on describing the Administration’s position on digital assets, explaining how plan sponsors should approach the topic from a compliance perspective, and predicting what comes next. In general, we expect interest in digital assets to increase and recommend that sponsors exercise the same prudence and thoughtful process when considering digital asset investment vehicles as they would in evaluating any potential investment, while also considering the aspects of digital assets that make them unique in the investment space.

### Digital Assets in the Trump Administration

The U.S. Department of Labor (“DOL”) has historically articulated a neutral, context-specific approach to evaluating investment types and strategies. The Biden Administration’s DOL modified this neutral approach in 2022 and cautioned plan fiduciaries to exercise “extreme care” before adding a cryptocurrency option to a 401(k) plan’s investment menu.<sup>5</sup> On May 28, 2025, in response to President Trump’s January 23 EO, the DOL rescinded the Biden-era Release and reverted to the DOL’s neutral approach, which neither endorses nor disapproves the inclusion of cryptocurrency in plan menus.<sup>6</sup>

President Trump’s August 7, 2025 EO, “Democratizing Access to Alternative Assets for 401(k) Investors,” went further, directing the DOL to clarify its position on alternative assets, including “holdings in actively managed investment vehicles that are investing in digital assets,” and the appropriate fiduciary process for evaluating such investments via proposed rules, regulations, safe harbors, or other guidance. The DOL has noted that it is working toward issuing proposed regulations<sup>7</sup> but specific guidance on digital asset investments remains pending as of the date of this article.

<sup>1</sup> See Executive Order #14178 dated January 23, 2025 (“Strengthening American Leadership in Digital Financial Technology”), available [here](#), and associated Fact Sheet, available [here](#).

<sup>2</sup> GENIUS Act, Public Law 119-27 (July 18, 2025).

<sup>3</sup> Executive Order #14233 dated March 6, 2025 (“Establishment of the Strategic Bitcoin Reserve and United States Digital Asset Stockpile”), available [here](#).

<sup>4</sup> Executive Order #14330 dated August 7, 2025 (“Democratizing Access to Alternative Assets for 401(k) Investors”), available [here](#), and associated Fact Sheet, available [here](#).

<sup>5</sup> DOL Compliance Assistance Release No. 2022-01 (March 10, 2022), available [here](#).

<sup>6</sup> DOL Compliance Assistance Release No. 2025-01 (May 28, 2025), available [here](#).

<sup>7</sup> DOL Advisory Opinion 2025-04A (September 23, 2025), available [here](#); news release available [here](#).

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## Plan Sponsor Considerations

A return to a neutral, context-specific approach to investment evaluations means that plan fiduciaries must act as “prudent experts” and give “appropriate consideration” to the facts and circumstances relevant to the investment. Notably, neither the EO nor the DOL’s subsequent actions purport to alter the substantive requirements under ERISA, and in fact reaffirmed that retirement plan fiduciaries are held to high standards. “Appropriate consideration” of a given investment strategy generally includes a determination that the particular investment is reasonably designed to further the purposes of the plan, after evaluating factors such as the risks of loss and opportunities for gain, portfolio composition, liquidity, diversification, valuation, projected returns, manager capabilities, and indicia of ownership.

Although all of the above factors should be evaluated, digital asset investments have unique elements and considerations. For example, the liquidity of the digital assets in the portfolio will depend on what kind of digital asset is being purchased (cryptocurrency versus a non-fungible token, or “NFT”) and its related exchange platforms. The relative security or availability of the trading platforms may vary, as may the platforms’ custodial location or indicia of ownership. Information about the volatility and risk/return profiles of popular cryptocurrency (like Bitcoin-BTC or Ethereum-ETH) may be readily available, while newer coins may have little to no information at hand.

Defined benefit plan fiduciaries may have different considerations (or give different weights) than defined contribution plan fiduciaries. For example, fiduciaries of a defined benefit plan could reasonably determine to limit the size of the plan’s digital asset investment based on their evaluation of the liquidity, volatility, and platform security considerations. In contrast, a defined contribution plan fiduciary will need to determine whether the available information about the digital asset investment is enough to comply with the ERISA 404(c) safe harbor, which shields plan fiduciaries from liability for losses caused by participants’ investment choices, provided the participants receive sufficient information to make informed investment decisions (among other things).

Ultimately, plan fiduciaries must understand what form the asset takes, the methods of exchange or transfer, and how the asset is valued in determining whether the digital asset investment is appropriate to add or retain in an investment lineup. Irrespective of plan or asset type, plan fiduciaries unfamiliar with the nuances of digital asset investments should consider retaining an investment advisor with knowledge of and experience with digital asset investments and investing ERISA-covered plan assets before adding digital assets as a designated investment option.

## Future Expectations

Although we do not expect digital assets to become a common designated investment option, digital asset investments are already here. Fidelity offers direct cryptocurrency investments in its IRA accounts, while Charles Schwab offers IRA access to crypto ETFs, and most self-directed brokerage accounts allow investments in digital assets. According to a recent survey, 10% of U.S. adults with retirement accounts say they hold at least some cryptocurrency assets, with 18% of millennials and 14% of Gen Zers reporting a crypto retirement holding. We expect that offerings of digital asset investment options in retirement plans will continue to increase, both as designated investment options and as components of other investments. Whether digital assets investments or investments with digital asset components are appropriate additions to a retirement plan involves application of a prudent evaluation process and appropriate consideration of the facts and circumstances. For plan fiduciaries, that means consideration of factors relevant to any investment, as well as the aspects that make digital assets unique.

For more information about the fiduciary standards relating to selecting and monitoring designated investment options and other plan investments, or assistance with the associated fiduciary risks of adding or permitting digital assets in your plan or plan investment options, please contact a member of the Kutak Rock Employee Benefits practice group.

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