University of Michigan Journal of Law Reform

Volume 57

2023

Did the Superbowl Ad Curse Heighten Defined Contribution Plan Fiduciary Duties?: Deciphering the Legal and Ethical Landscape of Cryptocurrency Options in 401(k)s

Lauren K. Valastro
University of Denver Sturm College of Law

Recommended Citation
Lauren K. Valastro, *Did the Superbowl Ad Curse Heighten Defined Contribution Plan Fiduciary Duties?: Deciphering the Legal and Ethical Landscape of Cryptocurrency Options in 401(k)s*, 57 U. MICH. J. L. REFORM 109 (2023).
Available at: https://repository.law.umich.edu/mjlr/vol57/iss1/4

https://doi.org/10.36646/mjlr.57.1.did

DID THE SUPERBOWL AD CURSE HEIGHTEN DEFINED CONTRIBUTION PLAN FIDUCIARY DUTIES?: DECIPHERING THE LEGAL AND ETHICAL LANDSCAPE OF CRYPTOCURRENCY OPTIONS IN 401(K)S

Lauren K. Valastro*

ABSTRACT

Regulating cryptocurrency's place in America's most popular retirement savings vehicle generates thorny legal, ethical, and social justice dilemmas. Too little regulation could hurt those at highest risk of underfunded retirement. Too much could exacerbate existing racial, ethnic, and gender inequities.

Though recent regulatory efforts suggest 401(k) administrators violate their fiduciary duty of care by offering cryptocurrency investment options to plan participants, the established fiduciary regime protects 401(k) plan participants from cryptocurrency risk while respecting their savings preferences. Yet, the current framework falls short of ethically and equitably serving all plan participants, particularly members of underserved communities—a problem largely unaddressed in academic, industry, or regulatory discourse.

This Article demonstrates how regulators' needlessly paternalistic approach toward cryptocurrency options could disproportionately impact minority retirement savings participation. Applying the existing fiduciary framework and practical mechanisms that plan fiduciaries currently use would minimize cryptocurrency risk to participants without rewriting the rules governing plan administration. This Article also proposes a novel, scientifically supported method by which fiduciaries should convey retirement planning information to improve retirement outcomes for all: via non-traditional media.

TABLE OF CONTENTS

* Visiting Assistant Professor of Law, University of Denver Sturm College of Law. The author gratefully acknowledges the ABLJ Business Ethics and the Future of Work Symposium, the Center for Ethics, Diversity, and Workplace Culture at Temple University, and the Center for Legal Studies and Business Ethics at Oklahoma State University. The author extends her thanks to Professor Carol Goforth for her thoughtful feedback and for generously sharing her expertise. The author also sincerely appreciates Professor Dana Muir for her mentorship and support.

INTRODUCTION

Impossible two decades ago and unfathomable until recently, investment in cryptocurrencies[1] is now "mainstream."[2] Workers increasingly want cryptocurrency options in their retirement plans,[3] and pensions around the world provide them.[4] Explosive growth in individual cryptocurrency investment is matched by institutional exposure to the new asset: the world's largest asset manager and major financial and academic institutions own substantial amounts of cryptocurrencies.[5] Nearly half of defined contribution plan[6] sponsors reportedly offered cryptocurrencies in 2022 while almost all state government pension plans report cryptocurrency exposure.[7]

Amid this groundswell of cryptocurrency investment, many express strong—and often well-reasoned—reservations concerning the asset's risks. Chief among them is the federal agency tasked with administering retirement plans, the Department of Labor's Employee Benefits Security Administration (EBSA).[8] After several advertisements promoting cryptocurrency investment aired during the 2022 Superbowl,[9] EBSA called into question whether cryptocurrency investments can ever be prudently included in Americans' self-directed retirement portfolios (namely, 401(k)s).[10] While the question is apropos, EBSA's means of

1. Definitions of "cryptocurrency" vary, and while the author acknowledges debate concerning its appropriate appellation, this Article employs the nomenclature used by the Compliance Release, defined below. At its most basic, cryptocurrency means "digital interests that operate like currency, are secured using cryptography, and operate on a peer-to-peer basis independent of any third-party intermediary, including any governmental authority." Carol Goforth, *The Lawyer's Cryptionary: A Resource for Talking to Clients about Crypto-Transactions*, 41 CAMPBELL L. REV. 47, 52 (2019).

2. *See infra* Subsections II.A.1–2.

3. *See infra* note 126 and accompanying text.

4. *Infra* Subsection II.A.1.

5. *See infra* notes 136–137 and accompanying text.

6. A defined contribution plan is a retirement plan in which an employee contributes untaxed earnings (or in the case of a Roth account, post-tax earnings) to the employee's individual account, which is then invested on behalf of the employee. Over time, the aim is for the investment to perform well so that the contributions' value increases and ultimately serves as an income source in retirement. Common defined contribution plans include 401(k) plans, 403(b) plans, employee stock ownership plans, and profit-sharing plans. JOHN J. TOPOLESKI & ELIZABETH A. MYERS, CONGR. RES. SERV. R47152, PRIVATE-SECTOR DEFINED CONTRIBUTION PENSION PLANS: AN INTRODUCTION 2 (2022).

7. *Infra* Subsection II.A.1.

8. EBSA's authority includes enforcing ERISA fiduciary obligations and investigating potential violations thereof. 29 U.S.C. § 1134 (delineating DOL's authority to investigate potential ERISA violations).

9. Lora Kelley, *Crypto Ads Are So Last Year*, N.Y. TIMES (Feb. 12, 2023) https://www.nytimes.com/2023/02/12/business/media/crypto-super-bowl-commercials-ads.html [https://perma.cc/A438-PU6W].

10. *See infra* Subsection II.A.4.b.

raising it was not. Eschewing Supreme Court precedent, the Administrative Procedure Act (APA) requirements for agency guidance, its own past application of the law, and a day-old executive order establishing American cryptocurrency policy, EBSA issued compliance assistance warning pension "plan fiduciaries to exercise *extreme care* before they consider adding a cryptocurrency option" to a 401(k) plan's menu.[11]

EBSA's novel "extreme care" standard ostensibly displaces the established prudent investor standard of care applicable to defined contribution plan offerings.[12] Coupled with EBSA's commitment to investigate all plans offering cryptocurrencies, EBSA's position on cryptocurrency approaches becoming a first-ever *sui generis* prohibition on an asset. It also reopens the seemingly settled discourse on whether fiduciary duties apply to brokerage windows[13] in which plan participants[14] select investments not offered through their employers' plan menus.

After briefly reviewing the nature of defined contribution plans, brokerage windows, and the long-accepted prudent investor fiduciary standard, Part I discusses how courts reject paternalistic prohibitions on specific assets. Courts instead favor diversifying modern portfolios. Part I further explains how fiduciary duties' relational nature turns in part on similarly situated prudent investors' conduct.

Part II then evaluates the present cryptocurrency investment climate, surveying cryptocurrency exposure in other developed nations' pension systems, U.S. public and private pensions, and major American institutions. It then outlines the federal government's cryptocurrency policies, including EBSA's position outlined in its Compliance Release.

---

11. U.S. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., COMPLIANCE ASSISTANCE RELEASE NO. 2022-01, 401(K) PLAN INVESTMENTS IN "CRYPTOCURRENCIES" 1 (Mar. 10, 2022), https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01 [https://perma.cc/U2M7-VWKM] (emphasis added) [hereinafter Compliance Release].

12. *See infra* Section I.C.

13. *See infra* note 42.

14. For ease of discussion, "participants" includes both plan participants and their beneficiaries who are or may become entitled to a benefit under a defined contribution plan. "The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. . . . The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002(7)–(8) (2018) [hereinafter ERISA].

Part III demonstrates how the Compliance Release's "extreme care" standard needlessly contradicts established fiduciary duty case law and EBSA guidance by attempting to heighten the already strict prudent investor standard. Part III then surveys the ethical issues arising from cryptocurrency offerings in pension plans, with the intent of serving as a springboard for future inquiry and discourse. It also evaluates the ethicality of singling out one asset class, particularly as it relates to underserved communities[15] who may have more interest in, and be more affected by, such an approach toward cryptocurrency exposure in their pensions. Lastly, Part III identifies the inherent tensions fiduciaries face in serving constituents of different demographics and highlights the need for focused research on how fiduciaries can better serve all plan participants.

Part IV outlines practical mechanisms plan sponsors and fiduciaries should implement to minimize cryptocurrency exposure risks. This discussion contemplates a hypothetical plan fiduciary who determines (through a fact-intensive analysis) that cryptocurrency is an appropriate offering—an assessment fiduciaries must undertake prudently and loyally—and one that many fiduciaries have already made in the defined contribution context. The risk-mitigation methods that fiduciaries implement, and scholars promote in other contexts, largely suffice. This Article also proposes one novel method by which fiduciaries should communicate aspects of retirement planning information. Specifically, fiduciaries should implement educational campaigns about retirement savings via non-traditional means, such as through social media, short videos, and workplace messengers.

This Article concludes that EBSA should retract its unlawful attempt to impose a new, higher standard on fiduciaries. It calls for courts to decline to apply an extreme care standard to fiduciary conduct in evaluating cryptocurrency options for plan menus and brokerage windows until Congress amends ERISA or EBSA adheres to the APA to promulgate valid regulations governing cryptocurrency offerings in pension plans.

At the outset, this Article notes its limitations. It does not attempt to address the viability of digital assets as an investment class or assert cryptocurrency allocations are appropriate for all, or even any singular

15. The terms "underserved communities" and "minorities" refer to "populations sharing a particular characteristic . . . that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life . . ." including persons with disabilities, women, African Americans, Hispanics and Latinos, Indigenous and Native Americans, Asian Americans and Pacific Islanders, and other people of color. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021). For further exposition on the importance of intersectionality in policy and academic discourse, see Lisa Bowleg, *The Problem with the Phrase* Women and Minorities*: Intersectionality—an Important Theoretical Framework for Public Health*, 102 AM. J. PUB. HEALTH 1267 (2012).

participant's portfolio. Rather, this Article's purpose is to evaluate whether EBSA's attempt to impose a new, heightened fiduciary duty is valid (it is not). Within this framework, the Article assesses how fiduciaries proceeding with cryptocurrency options might prudently do so—while balancing the need to protect and respect the views of plan participants—until valid regulation of cryptocurrency in pension plans occurs. Lastly, it identifies information needed for further discourse and future regulation, aiming to promote more equitable retirement outcomes for all.

I. HOW COURTS CONSTRUE FIDUCIARY DUTIES TO PLAN PARTICIPANTS AND HOW THOSE DUTIES DEVELOPED

This Part surveys fiduciary obligations pertaining to defined contribution plans and brokerage windows and how those fiduciary obligations evolved. It also examines the leeway that courts, the Department of Labor (DOL), and Congress have afforded to fiduciary decisions, including by rejecting paternalistic categorical prohibitions and declining to single out any specific asset class for heightened scrutiny.

A. *Defined Contribution Plans Place the Onus of Sufficient and Successful Investment on Plan Participants*

Various tax laws,[16] the Employee Retirement Income Security Act of 1974 (ERISA), and related DOL rules govern private-sector employee retirement plans, including defined contribution plans.[17] ERISA regulates nearly 750,000 retirement plans containing over $10 trillion in assets,[18] including $8.4 trillion in defined contribution plans.[19]

In defined contribution plans,[20] participating employees (and sometimes employers) regularly contribute a specified amount of pretax

16. *See, e.g.*, I.R.C. § 401 (2018).

17. *See, e.g.*, 29 U.S.C. § 1002(2)(A) ("[T]he terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program . . . established or maintained by an employer [. . . that . . .] (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods [beyond] termination of covered employment . . . .").

18. JENNIFER A. STAMAN, CONGR. RSCH. SERV., LSB10636, SUPREME COURT RULES ON RETIREMENT PLAN FIDUCIARY DUTY IN *HUGHES V. NORTHWESTERN UNIVERSITY* 1 (2022).

19. *See* U.S. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., PRIVATE PENSION PLAN BULLETIN, ABSTRACT OF 2020 FORM 5500 ANNUAL REPORTS, 2 (July 5, 2022) [hereinafter Pension Bulletin].

20. Defined contribution plans are "structured so that each employee-participant 'has an individual account and benefits are based on the amounts contributed to that participant's account.'

funds to the employees' retirement investment accounts.[21] Plan participants decide whether and how much, if any, to contribute to their retirement accounts and where to direct the funds.[22] Participants' discretion is not unlimited, however. Participants can choose from a confined menu of investment options, called "designated investment alternatives," selected by plan administrators.[23] A poll of plan administrators showed that about half of plans offer around ten core investment options.[24]

Plan sponsors often enjoy the protection of a safe harbor which shields them from some fiduciary liability if they satisfy several requirements, including providing three or more diversified investment options with different levels of risk and return.[25] ERISA section 404(c) insulates plan fiduciaries from liability for participants' investment decisions when certain factors, intended to equip participants with sufficient protections and information to make their own investment selections, are met.[26] But section 404(c) does not "relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan."[27]

During retirement, defined contribution plan participants draw down from the fund, which is comprised of their contributions, plus any returns earned thereon, minus associated fees.[28] If their investment choices and contributions do not generate sufficient returns, participants may not have enough for retirement. Sadly, more than forty percent of

---

'Plan participants decide how much to contribute to their accounts and how to allocate their assets among an array of investment options selected by [plan fiduciaries].' This array of investment options is often called a plan's 'menu.'" Stegemann v. Gannett Co., 970 F.3d 465, 469 (4th Cir. 2020) (internal citations omitted). Stocks, bonds, investment funds (*e.g.*, target date funds), and money market funds are among the most common offerings on plan menus. *See* Edward A. Zelinsky, *Is Bitcoin Prudent? Is Art Diversified? Offering Alternative Investments to 401(k) Participants*, 54 CONN. L. REV. 509, 513 (2022).

21. Hughes v. Nw. Univ., 142 S. Ct. 737, 740 (2022).

22. *See Stegemann*, 970 F.3d at 469.

23. 29 C.F.R. § 2550.404a-1(f)(5) (2022).

24. *The Retirement Landscape Has Changed—Are Plan Sponsors Ready?: 2019 Defined Contribution Benchmarking Survey Report*, DELOITTE 23 (2019), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/2019%20Defined%20Contribution%20Benchmarking%20Survey%20Report_Appendix.pdf [https://perma.cc/N96M-RNZK] [hereinafter Defined Contribution Report].

25. *See* 29 C.F.R. § 2550.404c-1(b)(3)(i)(B).

26. *See* 29 C.F.R. § 2550.404(b)(2)(i)(B). Among the safe harbor's requirements are offering at least three investment choices with different risks thresholds; enabling participants to regularly alter the investment allocations; ensuring participants are informed about their investment options; maintaining and making required disclosures accessible to participants. *Id.* § 2550.404(b).

27. 29 C.F.R. § 2550.404c-1(d)(2)(iv).

28. *See* Tibble v. Edison Int'l, 575 U. S. 523, 525 (2015).

American retirees will lack sufficient retirement funds.[29] Many members of underserved communities face more dire retirement outcomes.[30]

Participants bear the risks associated with their investments' performance in defined contribution plans. The converse is true of traditional pension plans (also known as defined benefit plans): the sponsor bears the portfolio performance risk and therefore must provide the designated benefits regardless of investment performance.[31] Largely due to administrative costs and higher liability risks to the sponsor, the past several decades witnessed a wholesale shift away from defined benefit plans to defined contribution plans,[32] the most common of which is the 401(k).[33]

B. *Self-Directed Brokerage Windows Appeal to Employers and Offer Increased Investment Options to Participants*

In addition to designated investment options offered in the plan menu, many plans also provide participants the opportunity to use self-directed brokerage accounts, often called "brokerage windows."[34]

29. *See* Jack VanDerhei, *Retirement Savings Shortfalls: Evidence from EBRI's 2019 Retirement Security Projection Model*, EMP. BENEFIT RSCH. INST. (Mar. 7, 2019), https://www.ebri.org/retirement/retirement-security-projection-model/content/retirement-savings-shortfalls-evidence-from-ebri-s-2019-retirement-security-projection-model [https://perma.cc/FD99-6GGT].

30. *See* Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF FED. RSRV. SYS.: FEDS NOTES (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html [https://perma.cc/3DYS-LWG5].

31. *See* 29 U.S.C. § 1002(35); Paul Rose, *Public Wealth Maximization: A New Framework for Fiduciary Duties in Public Funds*, 2018 U. ILL. L. REV. 891, 908 n.79 (2018).

32. *See* Rose *supra* note 31, at 908 n.79. When employers provide their employees with a menu of investment choices and the employees, not the employer, elect the amounts and investment strategies, the plans are characterized as self or participant-directed. Employers reduce their potential exposure to liability by providing participant-directed plans "because, so long as the employer complies with the requirements of § 404(c) of ERISA, the statute provides a safe harbor or liability shield from losses suffered . . . ." Jill E. Fisch et. al, *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741, 749 (2020); ERISA § 1104(c)(1). Among other reasons for the transition to defined contributions plans are that they provide more flexibility and reduced portability losses for participants' job changes. *See* Lori Verstegen Ryan & Bryan Dennis, *The Ethical Undercurrents of Pension Fund Management: Establishing a Research Agenda*, 13 BUS. ETHICS Q. 315, 328 (2003); Pension Bulletin, *supra* note 19, at 2.

33. *See* Pension Bulletin, *supra* note 19, at 2. The term "401(k)" refers to the tax code provision regarding cash or deferred arrangements for tax-qualified trusts, I.R.C. § 401(k). In a 401(k) plan, participants may elect to defer their receipt and the corresponding taxation of their income. Albert Feuer, *Ethics, Earnings, and ERISA: Ethical-Factor Investing of Savings and Retirement Benefits*, N.Y.U. REV. OF EMP. BENEFITS 6-1, 6-62 (2020).

34. *See, e.g.*, Defined Contribution Report, *supra* note 24, at 23. As of 2019, forty-four percent of plans offer brokerage windows. *Id.*

Brokerage windows provide participants with a more hands-on investment experience by enabling them to invest a portion of their retirement accounts across any number of thousands of investment options of their choosing. Many of these options are not included in their employer-sponsored plan's menu.[35] Most brokerage window users are relatively sophisticated investors with more investment experience than average plan participants.[36] As of the writing of this Article, 401(k) brokerage windows reportedly represent most defined contribution plan participants' exposure to cryptocurrency.[37]

Brokerage windows' popularity has increased in tandem with the rise in excessive fee litigation against plan fiduciaries.[38] Relatedly, brokerage windows have become a common component of resolving excessive fee litigation because they provide participants the opportunity to select their preferred investments (and corresponding fees).[39]

Plan fiduciaries have not historically monitored or maintained brokerage windows,[40] and no agency has explicitly defined the contours of fiduciaries' duties relating to brokerage windows. Regulatory guidance, however, strongly implied minimal fiduciary obligations

35. *See* U.S. DEP'T OF LAB., ADVISORY COUNCIL ON EMP. WELFARE & PENSION BENEFIT PLANS, UNDERSTANDING BROKERAGE WINDOWS IN SELF-DIRECTED RET. PLANS REP. 7 (Dec. 2021) https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-understanding-brokerage-windows-in-self-directed-retirement-plans.pdf [https://perma.cc/H5V9-AQPD] [hereinafter DOL Brokerage Window Report]. To state that the available options are nearly unlimited is no hyperbole. DOL describes the offerings available in many brokerage windows as the "full range of investment options available in the investment marketplace." Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans, 79 Fed. Reg. 49469 (Aug. 21, 2014) (to be codified as 29 C.F.R. pts. 2520, 2550).

36. *See* DOL BROKERAGE WINDOW REPORT, *supra* note 35, at 15, 47–48, 50, 52.

37. *A New Type of Quality Control – The Department of Labor Warns Fiduciaries Against Including Crypto Assets in Retirement Plans*, CLIFFORD CHANCE 3 (Apr. 2022) https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/04/A%20New%20Type%20Of%20Quality%20Control.pdf [https://perma.cc/CN6G-DJAA]. For example, 401(k) provider ForUsAll Inc. and cryptocurrency exchange platform Coinbase Global Inc. offer more than 50 different cryptocurrency options to plan brokerage windows. Austin R. Ramsey, *New Crypto Guidance Rewrites Rules on 401(k) Brokerage Windows*, BLOOMBERG L. NEWS: DAILY LAB. REP. (Apr. 11, 2022, 12:34 PM), https://news.bloomberglaw.com/daily-labor-report/new-crypto-guidance-rewrites-rules-on-401k-brokerage-windows [https://perma.cc/X7YC-4ZN4].

38. *See* Austin R. Ramsey, *Crypto 401(k) Warning Casts Shadow Over T. Rowe Price Settlement*, BLOOMBERG L. NEWS: DAILY LAB. REP. (Apr. 27, 2022, 2:40 PM), https://news.bloomberglaw.com/daily-labor-report/crypto-in-401ks-warning-frosts-t-rowe-brokerage-window-accord [https://perma.cc/8X2H-HDHH].

39. *See, e.g.*, Feinberg v. T. Rowe Price Grp. Inc., 610 F. Supp. 3d 758, 765 (D. Md. 2022) (discussing addition of a brokerage window as a part of a settlement resolving breach of fiduciary duty of loyalty claims); Hastings v. Principal Life Ins. Co., No. 4:21-cv-00047-JAJ-HCA, 2021 U.S. Dist. LEXIS 245180, at *4 (S.D. Iowa Jul. 28, 2021) (discussing a brokerage window included in a plan as a part of an ERISA settlement in 2015).

40. *See* CLIFFORD CHANCE, *supra* note 37, at 3.

existed, resulting in low perceived liability risk for brokerage windows.[41] Unsurprisingly, plan sponsors found the reduced liability risks associated with brokerage windows (as compared to plan menus) appealing.[42] But, the Compliance Release reignited debate about duties applicable to brokerage windows.[43]

C. *Plan Administrators' Fiduciary Duties to Defined Contribution Plan Participants under ERISA*

ERISA imposes fiduciary duties on and sets "standards of conduct" for retirement plan fiduciaries to protect plan participants' interests.[44] ERISA, based on the common law of trusts, is a heightened expression of trust law's fiduciary duties.[45] Some courts thus characterize plan fiduciaries' duties as among "the highest known to the law."[46]

---

41. *See* 29 C.F.R § 2550.404a-5(f) (2022) (noting that fiduciaries have a "duty to prudently select and monitor . . . designated investment alternatives offered under the plan"); *id.* at § 2550.404a-5(h)(4) ("The term 'designated investment alternative' shall not include 'brokerage windows,' 'self-directed brokerage accounts,' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan."). Indeed, DOL indicated a "brokerage window, self-directed brokerage account, or similar plan arrangement" is still not a "designated investment alternative" to which a monitoring obligation applies. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., FIELD ASSISTANCE BULLETIN NO. 2012-02R, Q30, Q39 (Jul. 30, 2012), https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2012-02r.pdf [https://perma.cc/WZM8-TBUM].

42. *See, e.g.*, Susan J. Stabile, *Freedom To Choose Unwisely: Congress' Misguided Decision to Leave 401(K) Plan Participants to Their Own Devices*, 11 CORNELL J.L. & PUB. POL'Y 361, 386 n.136 (2002) (discussing Morton A. Harris's *Working with Participant Directed Investment Options Under ERISA 404(c)*, SE02 ALI-ABA 893, 898 (July 5, 1999), a survey reporting that a "reason plans offer brokerage accounts is to avoid monitoring funds"); 401(K) ANSWER BOOK, Q6:78 (Wolters Kluwer 2023) ("An employer may choose to offer a self-directed brokerage option to a current plan . . . [t]o minimize fiduciary liability associated with the selection of plan investment alternatives."); STEPHEN M. SAXON & GEORGE M. SEPSAKOS, GROOM L. GRP., COMMON QUESTIONS: WHAT EVERY FIDUCIARY SHOULD KNOW ABOUT A SELF-DIRECTED BROKERAGE ACCOUNT, 2 ("plan fiduciaries often view [brokerage windows] as practical solutions that can accomplish the goal of providing greater choice and diversity in investment options without significantly increasing fiduciary risk.").

43. *See* Compliance Release, *supra* note 11; CLIFFORD CHANCE, *supra* note 37, at 3.

44. 29 U.S.C. § 1001(b).

45. Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 570–72 (1985); *see also* Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection . . . the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties.").

46. *See, e.g.*, Fuller v. Suntrust Banks, Inc., 744 F.3d 685, 695 (11th Cir. 2014) (noting "ERISA's fiduciary duties are the 'highest known to law.'"); *see also* William Sanders, *Resolving the Conflict between Fiduciary Duties and Socially Responsible Investing*, 35 PACE L. REV. 535, 564 (2014) (same).

Fiduciary duties arise from exercising "any discretionary authority or discretionary control respecting management of such plan . . . ."[47] Plan fiduciaries' duties include the duties of prudence and loyalty.[48] Fiduciaries must fulfill their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing" that a prudent person "acting in a like capacity and familiar with such matters would use . . . ."[49] This is known as the prudent investor standard.

Plan fiduciaries must also discharge their duties by making all appropriate disclosures;[50] acting only in the participants' interests and for their exclusive benefit; defraying plan expenses; adhering to plan documents; and diversifying plan investments.[51] The fiduciary must analyze all material facts about the investment comprehensively to select prudent investments for a plan menu.[52] Promoting asset security and balancing risk/returns also constitute prudent measures.[53] Prudence further entails fiduciaries' ongoing obligation to review existing investments' appropriateness in the plan and, if necessary, to regularly remove imprudent investments.[54]

D. *Fiduciary Duties Owed to Plan Participants Using Brokerage Windows*

Unlike the many cases interpreting fiduciary duties in the defined contribution plan menu context, neither courts nor DOL provide much guidance on duties owed to brokerage window users.

Only one court, in *Moitoso v. FMR LLC*, analyzed in detail which, if any, duties apply to brokerage windows.[55] But, noting the "significant lack of clarity" concerning brokerage window-related duties, *Moitoso* ultimately declined to "state unequivocally" whether a fiduciary must monitor brokerage windows.[56] Without substantive analysis, another

47. 29 U.S.C. § 1002(21)(A).

48. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 415–16 (2014).

49. 29 U.S.C. § 1104(a)(1)(B).

50. 29 C.F.R. § 2520.104b-1(a) (2022).

51. 29 U.S.C. § 1104(a)(1).

52. 29 C.F.R. § 2550.404a-1(b)(4) (2022); Letter from Louis J. Campagna, Chief, Div. of Fiduciary Interpretations, DOL Off. of Regul. and Interpretations, to Jon W. Breyfogle, Groom L. Grp., (June 3, 2020) [hereinafter Information Letter].

53. Russell Galer, *"Prudent Person Rule" Standard for Investment of Pension Fund Assets*, FIN. MKT. TRENDS 43 (Nov. 2002).

54. *See* Tibble v. Edison Int'l, 575 U.S. 523, 529–30 (2015) (noting that investments and strategies appropriate when first made do not enjoy a presumption of being indefinitely appropriate and instead must be regularly and reasonably reviewed for suitability).

55. Moitoso v. FMR LLC, 451 F. Supp. 3d 189, 206–08 (D. Mass. 2020).

56. *Id.* at 207–08.

court summarily indicated that nothing required fiduciaries to monitor brokerage window investments.[57] In 2021, the Tenth Circuit upheld the trial court's judgment against defendants without touching on the fiduciary duty issue.[58] Other court rulings suggest brokerage windows are subject to fewer fiduciary duties than plan menus because of the sheer number of options they provide.[59]

DOL scarcely offers more clarity. For a few months in 2012, DOL guidance indicated that when a significant number of participants invest in a specific investment in a brokerage window, the fiduciary must determine if that investment should be treated as a designated investment alternative.[60] But DOL withdrew that guidance[61] after public outcry. DOL later invited comment on brokerage windows in a way that implied, by its wording, that DOL contemplated scenarios in which fiduciaries did not monitor brokerage window services.[62] Recently, after an in-depth review and analysis of the issue, DOL's Advisory Council on brokerage windows did not recommend that DOL alter its approach to brokerage windows.[63]

---

57. Ramos v. Banner Health, 461 F. Supp. 3d 1067, 1083 (D. Colo. 2020), *aff'd* 1 F.4th 769 (10th Cir. 2021) ("Defendants did not monitor investments available in [the brokerage window], nor were they required to do so.").

58. Ramos v. Banner Health, 1 F.4th 769, 788 (10th Cir. 2021).

59. Larson v. Allina Health Sys., 350 F. Supp. 3d 780, 801 (D. Minn. 2018) (collecting cases dismissing allegations concerning breach of fiduciary duties when participants were presented with numerous investment options); *see also* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 596 n.6 (8th Cir. 2009) (discussing the dismissal in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009) for failure to state a claim for breach of fiduciary duty as to a brokerage window providing 2,500 fund options and noting "[t]he far narrower range of investment options available in this case makes more plausible the claim that this Plan was imprudently managed.").

60. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., FIELD ASSISTANCE BULLETIN NO. 2012-02, Q&A-30 at 18–19 (May 7, 2012) [hereinafter 2018 Field Assistance Bulletin] ("If, through a brokerage window . . . non-designated investment alternatives available under a plan are selected by significant numbers of participants and beneficiaries, an affirmative obligation arises on the part of the plan fiduciary to examine these alternatives and determine whether one or more such alternatives should be treated as designated for purposes of the regulation.").

61. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., FIELD ASSISTANCE BULLETIN NO. 2012-02R, at 1 n.1 (July 30, 2012) [hereinafter 2018 Revised Field Assistance Bulletin] (noting "Field Assistance Bulletin No. 2012-02R supersedes Field Assistance Bulletin No. 2012-02 (issued May 7, 2012) by modifying and replacing Question 30 with a new Question 39. . .").

62. Dep't of Labor, Request for Information Regarding Standards for Brokerage Windows in Participant-Directed Individual Account Plans, 79 FED. REG. 49469 (to be codified as 29 C.F.R. pts. 2520, 2550) (Aug. 21, 2014) (Q. 21: "What role, if any, do plan fiduciaries play in the selection of brokers, advisers, or other service providers to a brokerage window? How do plan fiduciaries monitor the performance of these service providers if at all?").

63. DOL Brokerage Window Report, *supra* note 35.

DOL regulations exclude brokerage windows from the definition of designated investment alternatives available on plan menus.[64] DOL also delineated fiduciaries duties concerning designated investment alternatives and omitted reference to any obligation applicable to brokerage windows investments, implying or allowing a reasonable plan fiduciary to infer—that none existed.[65] Though DOL regulations seem to clarify that the extensive fiduciary standards applicable to a plan's designated investment alternatives do not apply to investment options in brokerage windows,[66] ERISA does not "relieve a fiduciary from its duty to prudently select and monitor any *service provider* . . . offered under the plan."[67] Fiduciaries must thus evaluate and deem appropriate "the nature and quality of services provided" by brokerage windows as a plan feature, while not being responsible for the investments participants select through the brokerage window.[68] Aspects of the brokerage window that fiduciaries should prudently evaluate are its design, fees, and how its terms are communicated with participants.[69]

Contrasted with a fiduciary's limitation or designation of investment options on a plan menu, a "fiduciary function,"[70] fiduciaries do not choose options available through brokerage windows. Instead, participants themselves select their preferred investments. ERISA section 404(C)'s safe harbor therefore applies to participants' brokerage window investment decisions. Conversely, when fiduciaries modify brokerage window options, they arguably lose safe harbor protections and expose themselves to heightened liability risk, as they both exercise discretionary authority and control of options.[71]

---

64. 29 C.F.R. § 2550.404a-59(c)(F), (h)(4) (2022); *see* DOL Brokerage Window Report *supra* note 35, at 7; *see also* Moitoso v. FMR LLC, 451 F. Supp. 3d 189, 206 (D. Mass. 2020) (noting that brokerage windows and other common terms for them were excluded from designated investment alternatives' definition).

65. DOL Brokerage Window Report, *supra* note 35, at 9, 47 ("Investments accessible through a brokerage window are not routinely monitored by plan fiduciaries, and most experts conclude that, except perhaps in extraordinary circumstances, plan fiduciaries are not obligated to monitor"); 2018 Revised Field Assistance Bulletin, *supra* note 61, at Q&A-39.

66. 29 C.F.R. § 2550.404a-1(e)(4) (2022).

67. *Id.* at § 2550.404c-1(d)(2)(iv) (emphasis added).

68. 2018 Revised Field Assistance Bulletin, *supra* note 61, at 23, Q&A-39.

69. Peter Daines & R. Sterling Perkinson, *Brokerage Window Fiduciary Duties in Light of DOL Cryptocurrency Guidance*, JD SUPRA: LEGAL NEWS (May 2, 2022) https://www.jdsupra.com/legalnews/brokerage-window-fiduciary-duties-in-1598398/#:~:text=Brokerage%20Windows%20under%20Section%20404,available%20under%20a%20brokerage%20window [perma.cc/3VXV-8HBG].

70. *See* Final Regulation Regarding Participant Directed Individual Account Plans, 57 Fed. Reg. 46906, 46922 (Oct. 13, 1992).

71. *Id.*

1. The Prudent Investor Standard Evolved to Embrace Modern Portfolio Management Theory and Emphasize Diversification

Courts regularly look to trust law and the Uniform Prudent Investor Act (UPIA) when delineating an ERISA fiduciary's duty.[72] Consistent with the Restatement (Third) of Trusts, the UPIA adopted and elaborated on plan fiduciaries' duties, and it embraces Modern Portfolio Theory in reviewing their conduct.[73] The UPIA developed from the more conservative prudent man standard to provide greater flexibility to fiduciaries given constantly changing investment industry norms.[74] The UPIA evolved hand-in-hand with regulators' and courts' view of best practices for prudent investing amid advancements in investment options and approaches.[75] The prudent investor rule ameliorated problems associated with the prudent man standard's disproportionate aversion to risk and consequent preference for overly conservative investments that exposed participants to unanticipated risks such as inflation.[76]

Like tort law's "reasonable person" standard, the prudent investor standard is "essentially relational or comparative" because "[a] prudent trustee behaves as [do] other trustees similarly situated. . ."[77] Consequently, the process by which new investments become prudent poses a causality dilemma. Notably, Professor Zelinsky asserts that for

72. *See* Tibble v. Edison Int'l, 575 U.S. 523, 528–29 (2015).

73. *See* UNIF. PRUDENT INV. ACT § 2(b) (UNIF. L. COMM'N 1994) ("A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust."); RESTATEMENT (THIRD) OF TRS. § 90(a) (AM. L. INST. 2012) (same). In short, Modern Portfolio Theory is an investment approach prioritizing diversification of portfolios in order to maximize their returns without exposing investors to unacceptably high risk. *Modern Portfolio Theory: What MPT Is and How Investors Use It*, INVESTOPEDIA (Aug. 29, 2023) https://www.investopedia.com/terms/m/modernportfoliotheory.asp#:~:text=The%20modern%20portfolio%20theory%20(MPT)%20was%20a%20breakthrough%20in%20personal,entirely%20with%20low%2Drisk%20choices [https://perma.cc/2USW-VPW5].

74. RESTATEMENT (THIRD) OF TRS. pt. 6, ch. 17, intro. note (AM. L. INST. 2007); *see also* Dana M. Muir, *Sustainable Investing in Pension Funds: The Need for Sustainable Regulation*, 59 AM. BUS. L.J. 621, 633 (2022) (surveying scholars' acknowledgement that "the content of fiduciary obligations changes over time").

75. *See* Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 UNIV. COLO. L. REV. 731, 790, 800 (2019). Despite its commitment to risk aversion, the prudent man rule exposed portfolios to substantial inflation risk by overly-favoring bonds and other conservative investments and discouraging investments deemed risky, such as stocks. *Id. But see* Zelinsky, *supra* note 20, at 521 (asserting that conservatism is core to prudent investing and therefore "new and novel investments, whatever their attractiveness in other contexts, are not prudent for 401(k) investment menus.").

76. *See* Gary, *supra* note 75, at 800.

77. UNIF. PRUDENT INV. ACT § 1, cmt. Objective standard. (UNIF. L. COMM'N 1994).

an investment to be prudent, it must be both mainstream or widely "accepted by investors in general" and broadly accepted by defined benefit fiduciaries.[78]

The UPIA also clarifies that a fiduciary's primary concern is balancing an investment's risk with its potential return.[79] Further, under the UPIA the standard of prudence applies to the total portfolio—not to individual investments.[80] The prudent investor standard thus declines to categorically prohibit any investment class, focusing on an investment's place in a diversified portfolio and on "risk/return objectives."[81]

Rather than establishing a quantitative formula for diversification, fiduciaries assess allocations based on participants' objectives, plan assets, financial conditions, investment type, distribution among industries, and maturity dates.[82] This approach is consistent with economists' views that the overall portfolio asset allocation is more determinative of its ultimate performance than any specific investment.[83] Courts and DOL have long embraced this approach,[84] and DOL recently reiterated that:

> it remains the Department's view that (1) generally the relative riskiness of a specific investment or investment course of action does not render such investment or investment course of action either per se prudent or per se imprudent, and (2) the prudence

---

78. *See* Zelinsky, *supra* note 19, at 514; *see also id.* at 516 ("it is imprudent to offer a particular class of alternative investments to 401(k) participants until that class has first been widely accepted in the defined benefit universe by professional trustees as appropriate vehicles for retirement savings."). Of note, in April 2022, Professor Zelinsky asserted cryptocurrency investments were not widely accepted by defined benefit trustees. *See id.* at 514.

79. UNIF. PRUDENT INV. ACT § 2(b) (UNIF. L. COMM'N 1994).

80. *Id.* at Prefatory Note, Objectives of the Act (1); *id. at* § 2, cmt. Portfolio standard ("An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets. . . .").

81. *Id.* at §§ 2(b), (3), 2(e), § 2 cmt. Abrogating categoric restrictions ("The universe of investment products changes incessantly. Investments that were at one time thought too risky, such as equities, or more recently, futures, are now used in fiduciary portfolios. By contrast, the investment that was at one time thought ideal for trusts, the long-term bond, has been discovered to import a level of risk and volatility – in this case, inflation risk – that had not been anticipated. . . . trust beneficiaries are better protected by the Act's emphasis on close attention to risk/return objectives . . . than in attempts to identify categories of investment that are per se prudent or imprudent . . . The Act impliedly disavows the emphasis in older law on avoiding 'speculative' or 'risky' investments.").

82. UNIF. PRUDENT INV. ACT § 2 (UNIF. L. COMM'N 1994).

83. *See* Galer, *supra* note 53, at 2.

84. Birse v. Centurylink, Inc., No. 17-cv-02872-CMA-NYW, 2019 U.S. Dist. LEXIS 232483, at *14–15 (D. Colo. Oct. 23, 2019) (discussing application of Modern Portfolio Theory to fiduciary duties and noting "this formulation applies to ERISA fiduciaries through both court decisions and guidance from the Department of Labor.").

> of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio. *It also remains the Department's view that an investment reasonably designed—as part of the portfolio—to further the purposes of the plan, and that is made with appropriate consideration of the relevant facts and circumstances, should not be deemed to be imprudent merely because the investment, standing alone, would have a relatively high degree of risk*.[85]

Whether DOL has eschewed this view entirely or only with respect to cryptocurrency offerings in defined contribution plans remains to be seen. Either way, DOL's position set forth in the Compliance Release and corresponding litigation appears to mark the swing of the pendulum back toward the categorical investment prohibitions common before the advent of the prudent investor rule. DOL's position on applicable standards of care for brokerage windows is similarly unclear.[86] How courts will grapple with DOL's evolving stance toward high-risk investments is also unclear, as they had historically rejected overly paternalistic evaluations of fiduciary conduct and had been disinclined to limit asset types on plan menus when fiduciaries acted loyally and employed prudent processes for selecting and monitoring investments.[87]

E. *Congress, the Courts, and DOL Afford Leeway to Fiduciary Decisions and Eschew Paternalistic, Categorical Restrictions on Investment Categories*

From their earliest articulation in the seminal case *Harvard College v. Amory*, trust-related fiduciary duties have been process-oriented, rather than outcome-oriented.[88] They pertain to *how* a fiduciary selects, monitors, and maintains investment allocations but not the

85. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846, 72851 (Nov. 13, 2020) (to be codified at 29 C.F.R. pts. 2509 and 2550) (emphasis added).

86. Of note, EBSA Acting Assistant Secretary Khawar in an interview reportedly indicated the Compliance Release was not a "backdoor" effort by EBSA "to regulate brokerage windows in a whole new way." Ramsey, *supra* note 38. He further reportedly stated EBSA did not intend for the Compliance Release to require fiduciaries to review every option available in brokerage windows. *Id.*

87. *Infra* Section I.E.

88. Harvard Coll. v. Armory, 26 Mass. 446, 459–60 (1830) (setting forth an objective standard for investment practice emphasizing prudent and loyal conduct instead of prohibiting investment types). *See* Galer, *supra* note 53, at 6 ("The focus of the inquiry is how the fiduciary acted in his selection of the investment, and not whether his investments succeeded or failed.").

investment's ultimate performance.[89] Courts evaluating fiduciaries' conduct for prudence therefore must grapple with a context-dependent question "inherently factual" in nature.[90]

In the context of a specific investment offering, courts must assess the "merits" of the offering and how thoroughly the fiduciary investigated its merits.[91] Despite this stringent scrutiny, ERISA does not require fiduciaries "to scour the market" to identify and select the *best* performing fund.[92] Also illustrative is that fiduciaries are not charged with selecting the fund with the least amount of fees. Indeed, "[t]he existence of a cheaper fund does not mean that a particular fund is too expensive *in the market generally* or that it is an otherwise imprudent choice."[93] Similarly, the existence of a better performing fund does not mean that another fund was per se imprudent.

While a fiduciary must act as a prudent investor would under like circumstances,[94] prudent investing does not prescribe one particular course of conduct. Prudence instead involves selecting appropriate investments, monitoring those investments, and removing them if they become imprudent.[95] Selecting prudent investments entails considering present and anticipated economic conditions[96]; inflation's potential effects; associated tax consequences; and, in theory, the participant's other resources, though the practicality of such an undertaking is suspect for defined contribution plan fiduciaries.[97] Because of the process-based, not outcome-based nature of a fiduciary's duties, a plan's underperformance is not actionable if the fiduciaries acted prudently.[98]

While ERISA imposes fiduciary obligations for the selection and monitoring of investments on a plan's menu of investment options, ERISA arguably does not mandate the level of paternalism EBSA suggests in the

---

89. Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153, 204, 206 (2013); *see also* Divane v. Nw. Univ., 953 F.3d 980, 992 (7th Cir. 2020) (citing DeBruyne v. Equitable Life Assurance Soc'y, 920 F.2d 457, 465 (7th Cir. 1990) and noting "the ultimate outcome of an investment is not proof of imprudence.").

90. *See, e.g.*, Letter from Louis J. Campagna to Jon W. Breyfogle, *supra* note 52 ("Whether a particular fund or investment alternative satisfies the requirements set forth in sections 403 and 404 of ERISA is an inherently factual question . . . ."); U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Advisory Opinion 2013-03A 5 (July 3, 2013).

91. Moitoso v. FMR LLC, 451 F. Supp. 3d 189, 203–04 (D. Mass. 2020) (citing Bunch v. W.R. Grace & Co., 532 F. Supp. 2d 283, 288 (D. Mass. 2008)).

92. Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009).

93. Meiners v. Wells Fargo & Co., 898 F.3d 820, 823–24 (8th Cir. 2018) (emphasis original).

94. *See* Hecker, 556 F.3d at 586.

95. Tibble v. Edison Int'l, 575 U. S. 523, 529–30 (2015).

96. Akio Otsuka, *ESG Investment and Reforming the Fiduciary Duty*, 15 OHIO STATE BUS. L.J. 136, 147–48 (2021); UNIF. PRUDENT INV. ACT § 2(c)(1) (UNIF. L. COMM'N 1994).

97. UNIF. PRUDENT INV. ACT § 2(c) (UNIF. L. COMM'N 1994).

98. DeBruyne v. Equitable Life Assurance Soc'y, 920 F.2d 457, 465 (7th Cir. 1990).

Compliance Release. "ERISA does not impose that fiduciaries limit plan participants' investment options."[99] "Indeed, courts have bristled at paternalistic theories that suggest ERISA forbids plan sponsors to allow participants to make their own choices."[100] Federal circuit courts repeatedly caution against attempts at "us[ing] ERISA to paternalistically dictate what kinds of investments plan participants make where a range of investment options are on offer."[101] And for good reason:

> excessive judicial scrutiny of plan composition raises a competing set of issues. If the employer has an obligation to choose what is, in its view, the most appropriate investments for its employees, that role substantially erodes participant choice, which is the bedrock of the defined contribution model. Moreover, there are a variety of reasons to prefer a choice-preserving approach, including the inability of courts, regulators, and employers to determine accurately the best interests of plan participants.[102]

As such, the Supreme Court has acknowledged that "[a]t times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on [their] experience and expertise."[103] The Congressional Research Service construes this statement as a signal "that in the Court's view, lower courts should afford some leeway to plan fiduciaries in evaluating whether a fiduciary made a prudent investment decision."[104]

Congress likewise encourages respect for participant choice by retaining ERISA's safe harbor provision and declining to amend ERISA to add categorical or other restrictions on investment categories. Thus, it seems that Congress does not intend ERISA fiduciaries to disregard entirely participant's desires or views concerning their own best interests.[105]

---

99. Short v. Brown Univ., 320 F. Supp. 3d 363, 369 (D.R.I. 2018).

100. *Id.* (quoting Sacerdote v. N.Y.U, No. 16-cv-6284 (KBF), 2017 WL 3701482, at *11 (S.D.N.Y. Aug. 25, 2017)).

101. Martin v. CareerBuilder, LLC, No. 19-cv-6463, 2020 U.S. Dist. LEXIS 115002, at *10 (N.D. Ill. July 1, 2020) (internal citations omitted); *see* Loomis v. Exelon Corp., 658 F.3d 667, 671–73 (7th Cir. 2011) (rejecting the "paternalistic" theory that plans should never offer erratically performing options). *But see* S. Rep. No. 93-406, at 13 (1974), reprinted in 1974 U.S.C.C.A.N. 4338, 4849 (describing "paternalistic" aspects of ERISA).

102. *See* Jill E. Fisch et al., *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741, 772–73 (2020); *see also* Larson v. Allina Health Sys., 350 F. Supp. 3d 780, 802 (D. Minn. 2018) (noting ERISA "encourages sponsors to allow more choice to participants.").

103. Hughes v. Nw. Univ., 142 S. Ct. 737, 742 (2022).

104. Staman, *supra* note 18, at 3.

105. Scott Mayland, Note, *Ratcheting up the Duty: the Department of Labor's Misguided Attempt to Impose a Paternalistic Model upon Defined Contribution Plans Through ERISA*, 75 OHIO STATE L.J. 645, 647

II. CRYPTOCURRENCY'S EVOLVING INVESTMENT AND REGULATORY LANDSCAPE

This Part evaluates the cryptocurrency investment landscape from institutional to individual investors generally, as well as pension plans of all types in the U.S. and across developed nations. It also highlights data concerning members of underserved communities' disproportionate cryptocurrency investment, contrasting with their traditional conservative approach to investing. This Part then evaluates the competing American public policy approaches toward cryptocurrency investment in pension plans—with the greatest focus on the Department of Labor's Compliance Release. Finally, it concludes with a brief discussion on the immediate impact of the Compliance Release and the public reception thereto.

A. *What Differentiates Cryptocurrencies from Other Investments and Who Invests in Them?*

Cryptocurrencies are a relatively new asset class established in 2009,[106] defined by the executive branch as "digital asset[s], which may be a medium of exchange, for which generation or ownership records are supported through a distributed ledger technology that relies on cryptography, such as a blockchain."[107] Cryptocurrencies are widely characterized as high-risk investments with the potential for extremely high rewards.[108] They are also notably volatile.[109] Cryptocurrencies do not

---

(2014); *see also* Katherine Van Wezel Stone, *Legal Regulation of the Changing [Employment] Contract*, 13 CORNELL J.L. & PUB. POL'Y 563, 578 (2004) ("In keeping with the ethos of the new workplace, the new benefit plans embody a retreat from the principle of risk-sharing and an adoption of a principle of individual choice."). Professors Fisch, Lusardi, and Hasler further assert regulators, courts, and fiduciaries are not better situated to determine plan participants' best interests than plan participants. *See* Fisch et al., *supra* note 102, at 773.

106. Lawrence J. Trautman, *Bitcoin, Virtual Currencies, and the Struggle of Law and Regulation to Keep Peace*, 102 MARQ. L. REV. 447, 453–54 (2018). Although the initial concept of digital currencies arguably dates back around forty years, Bitcoin, created in 2009, is commonly accepted as the first cryptocurrency. *See id.* at 453; *see also* Goforth, *supra* note 1, at 70 ("Bitcoin was the first widely accepted and successful Cryptocurrency built on a decentralized peer-to-peer network, and it has become the de facto standard for Cryptocurrencies.").

107. Exec. Order No. 14067, 87 Fed. Reg. 14143 (Mar. 9, 2022) [hereinafter Executive Order on Digital Assets]; *see also* Goforth, *supra* note 1, at 50 (defining cryptocurrency similarly). For a comprehensive overview of cryptocurrencies' history, underlying technology, and regulation in the U.S. and globally, see Carol Goforth, REGULATION OF CRYPTOTRANSACTIONS (West Acad. 2020).

108. *See e.g.*, FIDELITY INVESTMENTS, THE INTERSECTION OF CRYPTOCURRENCY AND WEALTH MANAGEMENT, WHAT ADVISORS NEED TO KNOW NOW 3 (May 2022) https://institutional.fidelity.com/app/proxy/content?literatureURL=/9905434.PDF [perma.cc/K5V9-LYH8].

109. Khawar, *infra* note 134.

share the same profile as many asset types more commonly associated with 401(k)s. Scholars and cryptocurrency proponents identify several appealing characteristics to cryptocurrencies, including their potential to provide higher returns,[110] serve as an inflation hedge,[111] reduce tax liabilities (when in tax-exempt 401(k)s),[112] and diversify with an asset uncorrelated to traditional investments.[113]

The potential tax savings associated with holding cryptocurrency in a pension plan are of particular note. Because 401(k) accounts provide significant tax advantages for participants,[114] trading cryptocurrency within a 401(k) can potentially reduce tax liability. Many assert that participants who desire cryptocurrency exposure are free to act accordingly and obtain it, but that they should not use their retirement portfolios to invest in digital assets.[115] This argument is belied by the tax advantages obtainable only through holding investments in 401(k)s, an advantage unavailable to investments outside of the retirement portfolio context.

110. Marco Soland & Patrick Schueffel, *Cryptocurrencies as Pension Fund Components: Smart Move or Drinking the Kool-Aid?*, 1 J. FINTECH (2021) (describing a study investigating cryptocurrencies' viability for inclusion in standard Swiss pensions because of its "positive effects on the fund's risk and return figures" and indicating "empirical data supports the notion that cryptocurrency components may well increase the yield of a pension fund portfolio, yet this enhancement of yield comes at slightly higher risk levels. This increase in risk can be mitigated by adding an actively managed crypto-component to the portfolio rather than a passive investment product.").

111. Roman Matkovskyy & Akanksha Jalan, *Can Bitcoin Be an Inflation Hedge? Evidence from a Quantile-on-Quantile Model*, 72 REVUE ÉCONOMIQUE 785, 787 (2021) (discussing Bitcoin's ability to serve as a hedge).

112. Caroline S. Scala et al., *6 Things Employers Need to Know Before Offering Cryptocurrency in 401(k)s*, FISHERPHILLIPS: NEWS INSIGHTS (Sept. 22, 2021) https://www.fisherphillips.com/news-insights/6-things-employers-offering-cryptocurrency-401ks.html [perma.cc/B4UJ-QETQ] ("Utilizing a 401(k) to buy cryptocurrency allows employees to take advantage of 401(k) tax incentives, whether they use a tax-deferred 401(k) or Roth 401(k). Buying cryptocurrency in a traditional 401(k) o[r] Roth 401(k) means that employees could invest in cryptocurrencies without needing to worry about the complexity of tracking cryptocurrency trades to calculate any taxes they may owe resulting from buying or selling."). Cryptocurrencies are treated for tax purposes as property. I.R.S. Notice 2014-21, 2014-16 I.R.B. 938 (stating that property tax principles apply to cryptocurrency).

113. *See, e.g.*, *Crypto Still Has Diversification Benefits*, NASDAQ (Apr. 20, 2022, 9:31 AM), https://www.nasdaq.com/articles/crypto-still-has-diversification-benefits [https://perma.cc/XQK3-HVHS] ("[D]igital assets do in fact have low correlations to traditional asset classes, such as stocks and bonds. . . . [providing] potential advantages [with] even modest allocations.").

114. Anna-Marie Tabor, *Retirement Lost: Enhancing the Durability of the 401(k) Account*, 126 DICK. L. REV. 515, 529 (2022).

115. *See, e.g.*, *Crypto in Retirement Accounts? Are You Kidding?*, BLOOMBERG (May 26, 2022, 8:00 AM), https://www.bloomberg.com/opinion/articles/2022-05-26/bitcoin-in-your-401-k-better-retire-that-idea-now?leadSource=uverify%20wall [perma.cc/LA8T-SG62] (arguing that cryptocurrencies are too volatile and speculative for a retirement savings plan).

1. Pension Plan Investments in Cryptocurrency Continue to Grow Globally

While 2022 marked EBSA's foray into regulating cryptocurrency offerings, American and foreign pensions continue broadening their cryptocurrency exposure.

The CFA Institute reported that an astonishing ninety-four percent of state and government public pensions were invested in cryptocurrencies as of 2022.[116] Of the large American public pensions with cryptocurrency exposure, some have experienced the deleterious effects of the asset's volatility,[117] but that has not appeared to cause any notable divestments to date. Sixty-two percent of corporate defined benefit plan sponsors also reportedly invested in cryptocurrencies.[118] According to Professor Zelinsky's work, for a defined contribution plan to prudently offer an investment, that investment must meet the minimum threshold of general acceptance by defined benefit plan fiduciaries.[119] 2022 saw that threshold easily surpassed for cryptocurrency investment.

The CFA Institute Report also indicates that forty-eight percent of corporate defined contribution plan sponsors had cryptocurrency exposure in 2022.[120] Also in 2022, two prominent defined contribution plan providers began offering cryptocurrency investment options in their 401(k)s.[121] One of them, Fidelity, is among the largest American pension providers.[122] The other, ForUsAll, a primarily cryptocurrency-based pension provider has led the charge against EBSA by filing a lawsuit challenging the Compliance Release.[123] It is impossible to know how many other pension plan providers and sponsors may have

---

116. Rebecca Fender & Ryan Munson, *Enhancing Investors' Trust 2022 CFA Institute Investor Trust Study*, CFA INST. 18 (2022) https://trust.cfainstitute.org/wp-content/uploads/2022/04/Enhancing-Investors-Trust-Report_2022_Online.pdf.

117. Examples include Virginia's Fairfax County Police Officers Retirement System, Fairfax County Employees Retirement System, and the Houston Firefighters' Relief and Retirement Fund. Eleanor Laise, *Amid FTX Fallout, Public Pension Fund Defends its Big Bet on Crypto-Related Holdings*, MARKETWATCH (Nov. 29, 2022, 9:01 AM), https://www.marketwatch.com/story/amid-ftx-fallout-public-pension-fund-defends-its-big-bet-on-crypto-related-holdings-11669730515 [https://perma.cc/VL3A-F3ZN].

118. Fender & Munson, *supra* note 116.

119. Zelinsky, *supra* note 20, at 514.

120. Fender & Munson, *supra* note 116. No other data suggesting such high numbers of exposure has been identified, and notably no distinction was made in the report concerning whether the exposure was predominately through brokerage windows or plan menus.

121. Greg Iacurci, *Fidelity, ForUsAll Now Offering 401(k) Investors Access to Cryptocurrency*, CNBC (Nov. 4, 2022, 11:45 AM), https://www.cnbc.com/2022/11/04/fidelity-forusall-offering-401k-investors-access-to-cryptocurrency.html#:~:text=Fidelity's%20bitcoin%20account%20is%20one,to%20help%20facilitate%20daily%20transactions [perma.cc/4WR3-NQJT].

122. *Id.*

123. *See infra* text accompanying note 159.

expanded their plan menus to include cryptocurrency offerings but for the Compliance Release. But if the numbers of the CFA Institute Report are accurate, cryptocurrency investment in pensions of all types is now mainstream.[124] Further, despite the uncertainty caused by EBSA's position on cryptocurrency—and the various cryptocurrency platform crashes and bankruptcies of 2022[125]—some employers reportedly still feel pressure to maintain a competitive edge in the labor market by including cryptocurrency offerings in their retirement plans.[126]

In 2021, funds in Australia and New Zealand's pension systems enabled investments in cryptocurrency.[127] These moves preceded Germany's creation of "Spezialfonds" in which pensioners may invest up to twenty percent of their retirement funds in cryptocurrency.[128] One or more Swedish public pensions also reportedly invested substantially in cryptocurrencies in 2021.[129] In North America, various Canadian pensions have also invested in different cryptocurrency exchanges (some with unfortunate consequences due to different platforms' bankruptcies), while others continue to evaluate the prospect of such investments.[130] Other nations reportedly have indirect cryptocurrency exposure in their pension funds, as their portfolios contain underlying cryptocurrency allocations.[131] The extent of both public and private American pensions' indirect exposure to cryptocurrency merits investigation.

---

124. *See* Fender & Munson, *supra* note 116; *infra* note 134.

125. Laise, *supra* note 117.

126. Shawn Tully, *Workers Want Crypto 401(k) Options, But Companies That Offer Them Will Face a Wave of Lawsuits*, FORTUNE (May 9, 2022, 5:00 AM), https://fortune.com/2022/05/09/crypto-401k-fidelity-lawsuits-predictions/ [perma.cc/JKU8-T2T8]; *see* Scala et al., *supra* note 112; Dietrich Knauth, *Crypto Companies Crash Into Bankruptcy*, REUTERS (Dec. 1, 2022, 2:30 P.M.), https://www.reuters.com/technology/crypto-companies-crash-into-bankruptcy-2022-12-01/ [https://perma.cc/V58X-B4XN].

127. Brian Quarmby, *Australia's Rest Super Retirement Fund To Invest in Crypto For Its 1.8M Members*, COINTELEGRAPH (Nov. 24, 2021), https://cointelegraph.com/news/australia-s-rest-super-retirement-fund-to-invest-in-crypto-for-its-1-8m-members [perma.cc/Y3U5-VHSG]; Peter Chawaga, *New Zealand Retirement Fund Invests In Bitcoin*, BITCOIN MAG. (Mar. 26, 2021, 4:25 AM), https://www.nasdaq.com/articles/new-zealand-retirement-fund-invests-in-bitcoin-2021-03-26 [https://perma.cc/7J7F-J9SA].

128. Natalie Tuck, *New German Rules on Crypto Assets to 'Open the Gates' For Pension Funds*, EUR. PENSIONS (June 8, 2021), https://www.europeanpensions.net/ep/New-German-rules-on-crypto-assets-to-open-the-gates-for-pension-funds.php [perma.cc/3958-Q3G9].

129. *Swedish Pension Funds Invest in Cryptocurrency: Media*, XINHUA (Dec. 4, 2022, 6:06 AM), https://english.news.cn/europe/20221204/2cfaf4679e624591807cf7ac747af905/c.html [perma.cc/2WT9-MVGZ].

130. *Canadian Pension Fund Eyed Crypto and Said Never Mind*, PYMTS (Dec. 7, 2022), https://www.pymnts.com/cryptocurrency/2022/canadian-pension-fund-looked-at-crypto-but-didnt-invest/ [perma.cc/2M56-YMWQ].

131. *See* Billy Bambrough, *Norway's $1 Trillion Oil Fund, BlackRock's And Vanguard's Indirect Bitcoin Holdings Revealed*, FORBES (Sept. 24, 2020, 2:55 AM), https://www.forbes.com/sites/billybambrough/2020/09/24/norways-1-trillion-oil-fund-blackrock-and-vanguard-now-indirectly-hold-100-million-in-bitcoin/?sh=2741e52855b3 [perma.cc/R2MR-DXN2] (discussing Norway's indirect cryptocurrency investments).

2. From the Average American Worker to Major Institutions, Increasing Numbers of Investors Seek Cryptocurrency Exposure

In both 2021 and 2022, more than seventy percent of individual investors surveyed approved of cryptocurrency allocations in diversified portfolios.[132] Beyond expressing their thoughts concerning the appropriateness of cryptocurrency exposure, Americans are investing in cryptocurrency.[133] The extent of this commitment to cryptocurrency has led EBSA and commentators to label it as a "mainstream" investment.[134] While many individuals have been disappointed by their cryptocurrency investment outcomes, the same number of investors indicated that cryptocurrencies performed as expected or generated even higher returns than anticipated.[135] This data portends continued investment in cryptocurrencies by Americans despite their risks.

Individual investors and pension sponsors are not alone. The world's largest asset manager and other leading major financial and academic institutions are reported to have made substantial cryptocurrency investments (albeit in non-pension contexts).[136] Those institutions include MassMutual, Harvard, Yale, and Brown.[137] As many as seventy-three

---

132. *See* JACK NEUREUTER, FIDELITY DIGITAL ASSETS, INSTITUTIONAL INVESTOR DIGITAL ASSETS STUDY (Sept. 2021), https://www.fidelitydigitalassets.com/sites/default/files/documents/2021-digital-asset-study_0.pdf [perma.cc/A2Z6-L3C3]; FIDELITY DIGITAL ASSETS, INSTITUTIONAL INVESTOR DIGITAL ASSETS STUDY: KEY FINDINGS 17 (Oct. 2022), https://www.fidelitydigitalassets.com/sites/default/files/documents/2022_Institutional_Investor_Digital_Assets_Study.pdf [https://perma.cc/7X2S-3HN8].

133. Michelle Faverio & Navid Massarat, *46% of Americans Who Have Invested in Cryptocurrency Say It's Done Worse Than Expected*, PEW RES. CTR. (Aug. 23, 2022), https://pewrsr.ch/3pCQ3L5 [perma.cc/2ZYZ-MWQK] (noting "16% of Americans [] say they have [] invested in, traded or used a cryptocurrency").

134. *See* Ali Khawar, *Cryptocurrency Concerns: Why We're Working to Protect Retirement Savings from Volatile Digital Investments*, DEP'T OF LABOR BLOG (Mar. 10, 2022), https://blog.dol.gov/2022/03/10/cryptocurrency-concerns-why-were-working-to-protect-retirement-savings-from-volatile-digital-investments?_ga=2.83702422.143636089.1667830145- [perma.cc/EDB2-JRL4]; NASDAQ, *supra* note 113; Scott Reeves, *46 Million Americans Now Own Bitcoin, as Crypto Goes Mainstream*, NEWSWEEK (May 11, 2021, 4:40 PM), https://www.newsweek.com/46-million-americans-now-own-bitcoin-crypto-goes-mainstream-1590639 [perma.cc/8KAE-FE5F].

135. *See* Faverio & Massarat, *supra* note 133 (discussing that while forty-six percent of Americans who invested in cryptocurrency found their investments performed worse than anticipated, thirty-one percent performed as expected and fifteen percent performed better than expected).

136. *See* Kevin Stankiewicz, *BlackRock's Rick Rieder Says the World's Largest Asset Manager Has 'Started to Dabble' in Bitcoin*, CNBC (Feb. 17, 2021, 2:25 PM), https://www.cnbc.com/2021/02/17/blackrock-has-started-to-dabble-in-bitcoin-says-rick-rieder.html [perma.cc/WZC8-J4CE].

137. *Institutional Bitcoin Provider NYDIG Announces Minority Stake Purchase by MassMutual*, MASSMUTUAL (Dec. 10, 2020), https://www.massmutual.com/about-us/news-and-press-releases/press-releases/2020/12/institutional-bitcoin-provider-nydig-announces-minority-stake-purchase-by-massmutual [perma.cc/WWR5-BYET]; Joanna Ossinger, *Harvard and Yale Endowments Among Those Reportedly Buying Crypto*, BLOOMBERG (Jan. 25, 2021, 7:58 AM),

percent of insurance companies and fifty-five percent of endowments and foundations reportedly hold cryptocurrencies.[138]

This widespread exposure to cryptocurrencies across the spectrum of pension contexts and leading institutions is notable given the relational nature of fiduciaries' duties.[139] Arguably, cryptocurrency's status as a mainstream investment[140] and one selected by defined benefit plan fiduciaries and reputable institutional investors, among others,[141] positively affects the calculus of whether a fiduciary's selection of a cryptocurrency option may be prudent.

3. Minority Investors Lead the Way in Cryptocurrency Investment

Members of underserved communities are at the forefront of cryptocurrency investment. Despite their general under-participation in,[142] and inadequate funding of, retirement plans, underserved communities are disproportionately represented in the number of Americans invested in cryptocurrencies. Surveys found that minorities, who comprise only about twenty-five percent of the U.S.'s population,[143] comprised forty-four percent[144] of a nationally representative sample of the estimated forty-six million Americans invested in cryptocurrency.[145] Fifteen percent of white Americans hold cryptocurrency.[146] In 2023,

---

https://www.bloomberg.com/news/articles/2021-01-26/harvard-and-yale-endowments-among-those-reportedly-buying-crypto#xj4y7vzkg [perma.cc/7VSN-YG8P].

138. *See* Fender & Munson, *supra* note 116.

139. *See supra* Subsection I.D.1.

140. *See supra* note 134.

141. *See supra* Subsection II.A.1 and notes 136–137.

142. Sarah Lyons-Padilla et al., *Race Influences Professional Investors' Financial Judgments*, 116 PROC. NAT'L ACAD. SCI. 17225, 17225 (2019). Also of note are the shockingly low numbers of people of color and women who manage financial assets, a significant problem which has been attributed to leaving money on the metaphorical table and further contributing to the American wealth gap. *See id*. ("Of the $69.2 trillion global financial assets under management across mutual funds, hedge funds, real estate, and private equity, fewer than 1.3% are managed by women and people of color.").

143. *Quick Facts*, U.S. CENSUS BUREAU (July 1, 2021), https://www.census.gov/quickfacts/fact/table/US/PST045221 [perma.cc/8RZ8-GRDC].

144. *More Than One in Ten Americans Surveyed Invest in Cryptocurrencies*, U. Chic. NORC (July 22, 2021) https://www.norc.org/research/library/more-than-one-in-ten-americans-surveyed-invest-in-cryptocurrenci.html; Kori Hale, *Black Main Street Crypto Investors Want Their Wall Street Respect*, FORBES (Jan. 4, 2022, 8:31 AM), https://www.forbes.com/sites/korihale/2022/01/04/black-main-street-crypto-investors-want-their-wall-street-respect/?sh=60e156267138 [perma.cc/8NM7-U97C].

145. *See* Reeves, *supra* note 134 ("About 46 million Americans now own at least a share of Bitcoin [one of the most widely recognized cryptocurrencies]—that equals about 17% of the adult population.").

146. ARIEL INVS. & CHARLES SCHWAB, 2022 BLACK INVESTOR SURVEY REPORT OF FINDINGS 7 (Apr. 2022), https://content.schwab.com/web/retail/public/about-schwab/Ariel-Schwab_Black_Investor_Survey_2022_findings.pdf [perma.cc/L2D6-AE6N].

about twenty-one percent of African American and Hispanic Americans own cryptocurrency, while twenty-four percent of Asian Americans are invested in cryptocurrency.[147] For younger investors, those numbers dramatically increase. Thirty-eight percent of African American investors under forty and twenty-nine percent of white investors under forty own cryptocurrencies.[148]

These statistics starkly contrast with the general approach of members of underserved communities toward their pension investments. Underserved community members generally constitute the most conservative cohort of retirement investors.[149] Potentially important implications for this discrepancy in investment behavior warrant scholarly inquiry. One reason for their investment preferences may pertain to minority groups' mistrust of advising services for other asset classes that historically used discriminatory practices and employed disproportionately low numbers of advisors from underserved communities.[150] However, as underserved communities are not monolithic, numerous other reasons likely exist.

147. Michelle Faverio & Olivia Sidoti, *Majority of Americans Aren't Confident in the Safety and Reliability of Cryptocurrency*, PEW RESEARCH CENTER (Apr. 10, 2023) https://www.pewresearch.org/short-reads/2023/04/10/majority-of-americans-arent-confident-in-the-safety-and-reliability-of-cryptocurrency/ [https://perma.cc/6PDM-9X9H]. As of 2021, a similarly high twenty-five percent of the American LGBTQ+ community invested in cryptocurrency. Charisse Jones & Jessica Menton, *Black, Latino, LGBTQ Investors See Crypto Investments Like Bitcoin as 'A New Path' to Wealth and Equity*, USA TODAY (Aug. 15, 2021) https://www.usatoday.com/story/money/2021/08/13/crypto-seen-path-equity-black-latino-and-lgbtq-investors/5431122001/?gnt-cfr=1 [https://perma.cc/3D64-KG3U].

148. ARIEL INVESTS. & CHARLES SCHWAB, *supra* note 146, at 7. Fewer women were initially invested in cryptocurrencies, but that trend has seen a recent reversal, with surging numbers of women investing in cryptocurrencies. *See* Erin Prater, *More Women Investing in Crypto, New Report Says*, FORTUNE (Apr. 9, 2022, 6:09 PM), https://fortune.com/2022/04/09/more-women-investing-cryptocurrency/ [perma.cc/K6V3-BZPV].

149. Michelle Singletary, *Why the 401(k) Gap?*, GAINESVILLE SUN (July 23, 2009 12:01 AM) https://www.gainesville.com/story/news/2009/07/23/why-the-401k-gap/31714822007/ [https://perma.cc/DSK5-5W3Q]; Greg Goth, *Addressing Racial Inequities in Retirement Savings*, SHRM (Sept. 28, 2021), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/addressing-racial-inequities-in-retirement-savings.aspx [perma.cc/K6V3-BZPV]; Samantha Lamas & Michael Thompson, *How Are Hispanic Households Saving for the Future?*, MORNINGSTAR (Oct. 18, 2021) https://www.morningstar.com/retirement/how-are-hispanic-households-saving-future [https://perma.cc/MYX3-V5NJ].

150. Greg Iacurci, *Financial Advisory Industry Continues to Grapple with Lack of Diversity, Top Advisors* Say, CNBC (Oct. 7, 2021) https://www.cnbc.com/2021/10/07/financial-advisory-firms-struggle-with-lack-of-diversity-advisors-say.html [https://perma.cc/ER78-VFDH] ("Black and Hispanic certified financial planners represented just 4% of the 87,784 total CFPs in 2019 — despite being nearly 30% of the U.S. population. . . . Women have made up about 23% of CFPs for a decade, despite accounting for more than half the U.S. population . . ."); *see also* Lyons-Padilla et al., *supra* note 142; Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385, 404–05 (2007).

4. Cryptocurrency Investment Is Mainstream but Its Episodic Turbulence Concerns Policymakers

Federal agency, congressional, and state government positions on whether cryptocurrency belongs on defined contribution plan menus continue to evolve.

a. *The White House Recognizes Cryptocurrency is Here to Stay and Cautiously Aims to Minimize its Risks, Increase Regulation, and Expand Educational Efforts While Working to Include More Americans in the Financial System*

On March 9, 2022, President Biden issued an executive order articulating the nation's "strong interest in promoting responsible innovation" and "development of" digital assets.[151] Among the Executive Order on Digital Assets' objectives and priorities were the "expan[sion of] equitable access to financial services" including cryptocurrency markets and "making investments . . . cheaper, faster, and safer . . . by promoting greater and more cost-efficient access to financial products and services."[152] The Executive Order on Digital Assets, to an extent, followed the Office of the Comptroller of the Currency's 2020 decision indicating that U.S. banks may hold and manage cryptocurrencies in the way they manage other assets.[153] A September 2022 White House press release outlined executive branch progress made pursuant to the Executive Order on Digital Assets' directives.[154] It seemingly backtracked on promoting digital assets by focusing largely on the federal government's plan to police unlawful and deceptive conduct concerning

---

151. *See* Executive Order on Digital Assets, *supra* note 107.

152. *Id.* The federal government's approach to digital assets lags behind the European Union's more evolved stance concerning and, to a degree, embrasure of digital assets. For example, while present U.S. policy acknowledges the need for more regulation and research concerning effective digital asset use, in April 2021, the European Investment Bank used Ethereum, a cryptocurrency, to issue its inaugural digital bond on a public blockchain. *EIB Issues Its First Ever Digital Bond on a Public Blockchain*, EUR. INV. BANK 1 (Apr. 28, 2021), https://www.eib.org/en/press/all/2021-141-european-investment-bank-eib-issues-its-first-ever-digital-bond-on-a-public-blockchain [perma.cc/RW76-VF73].

153. *See* OFF. OF THE COMPTROLLER OF CURRENCY, INTERPRETIVE LETTER #1170, AUTHORITY OF A NATIONAL BANK TO PROVIDE CRYPTOCURRENCY CUSTODY SERVICES FOR CUSTOMERS (July 22, 2020).

154. *See* THE WHITE HOUSE, FACT SHEET: WHITE HOUSE RELEASES FIRST-EVER COMPREHENSIVE FRAMEWORK FOR RESPONSIBLE DEVELOPMENT OF DIGITAL ASSETS, (Sept. 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/16/fact-sheet-white-house-releases-first-ever-comprehensive-framework-for-responsible-development-of-digital-assets/ [perma.cc/E7MY-H8GM].

digital assets and to broadly expand public awareness and educational efforts regarding digital assets.[155]

b. *EBSA's Compliance Release: Did the Super Bowl Necessitate the Promulgation of a New Fiduciary Standard in Defined Contribution Plans?*

The day after President Biden issued the Executive Order on Digital Assets, EBSA promulgated the Compliance Release warning "plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan's investment menu for plan participants."[156] The Compliance Release also indicated EBSA's intent to investigate all employer-sponsored retirement plans offering cryptocurrency investment options and to take protective action concerning those investments.[157] The Department of Treasury later applauded the pronouncement.[158] This marked a notable departure from DOL's longstanding prior position that a fiduciary's duties applied consistently to all types of investments, with only limited exceptions for collectibles.[159]

In a companion blog discussing the Compliance Release, EBSA identified four "serious risks" associated with cryptocurrency offerings in pension plans: (1) the potential for changes to the regulatory

155. *See id.*

156. Compliance Release, *supra* note 11. In 2022, cryptocurrency pension provider ForUsAll, Inc. sued DOL seeking to vacate and set aside the Compliance Release and for injunctive relief prohibiting DOL from undertaking the sweeping investigation of plan fiduciaries offering cryptocurrency detailed therein. Complaint, ForUsAll, Inc. v. U.S. Dep't of Labor, No. 1:22-cv-01551-CRC (D.D.C. June 6, 2022).

157. *See* Compliance Release, *supra* note 11.

158. *See* U.S. DEP'T OF THE TREASURY, *Crypto-Assets: Implications for Consumers, Investors, and Businesses* 51 (Sept. 2022), https://home.treasury.gov/system/files/136/CryptoAsset_EO5.pdf [perma.cc/CEH7-KLGK] [hereinafter the Treasury Report] ("[T]o the extent that crypto-assets are marketed to retirement plans, the Department of Labor should conduct investigations to ensure proper fiduciary conduct, and to protect plans and plan participants from aggressive marketing, conflicts of interest, and imprudent and disloyal investments.").

159. *See, e.g.*, DEP'T OF LABOR, INFORMATION LETTER 03-21-1996 (Mar. 21, 1996) ("Investments in derivatives are subject to the fiduciary responsibility rules in the same manner as are any other plan investments. Thus, plan fiduciaries must determine that an investment in derivatives is, among other things, prudent and made solely in the interest of the plan's participants and beneficiaries."); Gary Blachman, *Is the Crypto Winter Finally Starting to Thaw?*, MONDAQ EMP. BENEFIT PLAN REV. (Sept. 30, 2022), https://www.mondaq.com/unitedstates/employee-benefits-compensation/1235128/employee-benefit-plan-review-is-the-crypto-winter-finally-starting-to-thaw [perma.cc/A6QA-5UWH] ("Historically, the DOL has communicated that the prudence of an investment option depends on the facts and circumstances and, except in a few very specific circumstances (e.g., artwork, antiques, gems and certain other collectibles), ERISA does not actually prohibit any particular types of investments.").

frameworks governing cryptocurrency; (2) the potential for volatility in cryptocurrency's valuation; (3) the perceived difficulty in accurately valuing cryptocurrency; and (4) the "[o]bstacles to making informed decisions" concerning cryptocurrency offerings.[160] EBSA articulates the final risk as follows:

> **Obstacles to making informed decisions**. These investments can easily attract investments from inexperienced plan participants with expectations of high returns and little appreciation of the risks the investments pose. It can be very hard for ordinary investors to separate fact from hype. When fiduciaries include a cryptocurrency option on a 401(k) plan menu, it signals to participants that knowledgeable investment experts have approved it as a prudent option. This can mislead participants about the risks and cause big losses.[161]

As further discussed in Part III, this language is puzzling and inconsistent with controlling law. The prudent investor standard requires fiduciaries who include a cryptocurrency option on a 401(k) plan menu to approve the option as a prudent one only *after* undertaking an intensive analysis of the investment's merits.[162]

Additionally, and as highlighted by concerned industry professionals, EBSA appears to have disregarded the Administrative Procedure Act's requirements when it issued the Compliance Release.[163] The APA regulates the process federal agencies must adhere to in promulgating regulations.[164] Distilled, the APA requires agencies to publish notices of proposed rules in the Federal Register and to provide the public with an opportunity to comment on the proposed rule.[165] The APA additionally requires the effective date of most rules to begin after thirty days from their final promulgation.[166]

In an interview, then Acting Assistant Secretary of the Department of Labor Ali Khawar reportedly referenced television commercials aired during the 2022 Superbowl promoting cryptocurrency investments (none of which referenced pension investments) as among the reasons

---

160. Khawar, *supra* note 134.

161. *Id.*

162. *See* Moitoso v. FMR LLC, 451 F. Supp. 3d 189, 203–04 (D. Mass. 2020) (citing Bunch v. W.R. Grace & Co., 532 F. Supp. 2d 283, 288 (D. Mass. 2008) quoting *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 420 (4th Cir. 2007)).

163. *Infra*, Subsection III.A.4.c.

164. *See* Administrative Procedure Act, 5 U.S.C. § 551 et seq. (2018).

165. *See id.*

166. 5 U.S.C. §553(d) (1966).

for the manner and timing of the Compliance Release.[167] Any sense of urgency EBSA felt arising from television ads[168] does not justify its bypassing the public notice and comment required by APA.[169]

c. *Negative Public, Professional, and Academic Reception of the Compliance Release Contrasts with Glowing Treasury View*

Though several commentators and industry professionals undoubtedly lauded EBSA's skepticism of cryptocurrency's appropriateness as an asset in pension plans,[170] the Compliance Release has drawn harsh criticism.[171] Industry analysts and commentators widely viewed the Compliance Release as EBSA's de facto prohibition of

167. *See, e.g.*, Kellie Mejdrich, *Under Fire From Biz Groups, DOL Stands By Crypto Guidance*, LAW360 (Apr. 22, 2022, 6:31 PM) ("Department of Labor has no plans to withdraw cryptocurrency guidance for retirement plan fiduciaries that business groups have criticized as an end-run around the formal rulemaking process, the acting head of the DOL's employee benefits arm told Law360 in an exclusive interview Friday. . . . Khawar said the agency was partially motivated to create the guidance based on what's happening in the cryptocurrency space. 'People are seeing Superbowl commercials . . . ."). From March 2021 to September 2022, Mr. Khawar served as the Principal Deputy Assistant Secretary of EBSA. Employee Benefits Security Administration Organization Chart, DEP'T OF LABOR, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/organization-chart [perma.cc/TL4G-KFW2].

168. For years, commentators observed the "Superbowl ad curse" and companies' poor performance after making large expenditures on Superbowl advertising. *See, e.g.*, Christina Cheddar Berk & Fred Imbert, *Think Twice Before Investing in Super Bowl Advertisers. Here's Why*, CNBC (Feb. 10, 2023 10:14 AM), https://www.cnbc.com/2023/02/10/the-stocks-of-these-super-bowl-advertisers-didnt-fare-so-well.html [perma.cc/RDJ2-3S2Z]. Though that concept has applied to company performance, the author, after a conversation with Professor Linda A. Christiansen to whom she is indebted for this observation, wonders whether the "curse" is entering a new phase involving heightened regulatory scrutiny. *Id.*

169. A more fulsome discussion about APA compliance and agency attempts to legislate falls outside of the scope of this Article but is warranted. A House Committee on Government Reform report recognized that agencies' issuance of guidance documents may enable them to circumvent established procedures that "protect citizens from arbitrary decisions and enable citizens to effectively participate in the process." H.R. REP. No. 106-1009, at 1 (2000); *see also* Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 785, 785 (discussing "concern that agencies frequently use guidance documents to avoid procedures intended both to facilitate public participation in the regulatory process and to enable the elected branches of government to monitor agencies more easily").

170. *See, e.g.*, Michelle Singletary, Opinion, *No, Cryptocurrencies Shouldn't Be Added to 401(k) Plans*, WASH. POST (Mar. 18, 2022, 7:00 AM), https://www.washingtonpost.com/business/2022/03/18/crypto-bitcoin-retirement-401k/ [perma.cc/22SV-6N9F]. This sentiment no doubt grew significantly after the collapse of cryptocurrency provider FTX. *See, e.g.*, Michael Hiltzik, Opinion, *Thinking of Putting Crypto in Your 401(k)? Think Twice*, L.A. TIMES (Nov. 23, 2022, 5:00 AM), https://www.latimes.com/business/story/2022-11-23/thinking-of-putting-crypto-in-your-401k-think-twice [https://perma.cc/F74Z-7DF9] (noting "crypto is a uniquely perilous investment for families struggling to husband their resources for retirement").

171. *See, e.g.*, Itami & Levine, *infra* note 172.

cryptocurrency investment in 401(k)s.[172] This set off an interesting legal battle when cryptocurrency pension provider ForUsAll, Inc. sued DOL in June 2022.[173]

Industry groups expressed their uneasiness about the Compliance Release without taking positions on cryptocurrency's appropriateness as an asset.[174] Among their primary concerns was the view that EBSA's position contradicted fiduciary law and bypassed the APA's requirements to implement a retroactive standard.[175]

An additional key concern was the Compliance Release's brokerage window position, which upended established guidance that had seemingly been reconfirmed only months before the Compliance Release's issuance.[176] Some viewed the Compliance Release as "the first time an additional duty of prudence has been imposed on a single asset type within a brokerage window."[177] The industry groups urged EBSA to withdraw the Compliance Release and to adhere to the APA's notice and comment rulemaking process in the future.[178] Others also questioned whether the Compliance Release obligated fiduciaries to review and screen every single investment option in a brokerage window and pondered the reverse implications of such a rule vis-à-vis other unscreened options in brokerage windows.[179]

In a seeming about-face from Treasury Secretary Yellen's remarks earlier in 2022 indicating that "[r]egulation should be based on risk and activities, not specific technologies,"[180] the Department of Treasury would later laud the Compliance Release as an exemplar of the federal government's approach to cryptocurrency-associated risks.[181]

---

172. *See* Singletary, *supra* note 170 ("The Labor Department essentially just warned the managers of workplace retirement plans: Don't you dare think about adding cryptocurrency—it's too risky."); Allison Itami & David Levine, *Cryptocurrency and Retirement Plans*, NAT'L ASS'N PLAN ADVISORS (Sept. 7, 2022), https://www.napa-net.org/news-info/daily-news/cryptocurrency-and-retirement-plans [perma.cc/2UNZ-FEE3] (stating "never has a particular investment been an automatic volunteering for an EBSA investigation, especially not one with prejudged outcomes."); *see also* CLIFFORD CHANCE, *supra* note 37 (noting the "considerable cost, both monetarily and reputationally" to fiduciaries who disagree with DOL's view that "crypto assets are [not] a sufficiently mature asset class to be prudently included as an option in 401(k) plans").

173. *See* Complaint, ForUsAll, Inc. v. U.S. Dep't of Labor, No. 1:22-cv-01551-CRC) (D.D.C. June 6, 2022).

174. *See, e.g.*, Letter from Am. Bankers Assoc., et al. to Ali Khawar, Acting Assistant Sec'y, Dep't of Labor (Apr. 12, 2022) https://www.aba.com/-/media/documents/comment-letter/jointltrdolcrypto20220412.pdf [perma.cc/P6GB-CKUF] [hereinafter Ltr. To Khawar].

175. *Id*.

176. *Id.* at 1–2.

177. *See* Itami & Levine, *supra* note 172.

178. *See* Ltr. To Khawar, *supra* note 174, at 1, 3.

179. Daines & Perkinson, *supra* note 69.

180. Janet L. Yellen, Sec'y of Treasury, *Remarks on Digital Assets*, (Apr. 7, 2022) (transcript available at https://home.treasury.gov/news/press-releases/jy0706) [perma.cc/U8JZ-6HWJ].

181. *See* Treasury Report, *supra* note 158, at 40–41.

III. EBSA's Novel Extreme Care Standard Contradicts Established Law and Regulation, Needlessly Casting Doubt on Fiduciary Standards and Highlighting the Need for Additional Research to Better Respect, Protect, and Serve All Plan Participants

No ERISA-related law or regulation applies an extreme care standard. Courts likewise have systematically declined to apply extreme care standards to ERISA fiduciary conduct as well as to trustee conduct,[182] which is notable as courts construing ERISA fiduciary duties regularly turn to trust common law.[183] Also telling is that since ERISA's enactment, courts have almost universally declined to apply extreme care standards to any fiduciaries (with three inapposite exceptions discussed below).[184] EBSA apparently disregarded these judicial interpretations of the fiduciary standard when promulgating the Compliance Release, thereby needlessly generating confusion on what standard actually governs fiduciary conduct.

Moreover, the Compliance Release's use of a heightened extreme care standard for only one asset class prompts inquiry into its ethicality and equity, particularly as it affects members of underserved communities. This Article thus outlines two significant gaps in the existing scholarship concerning the fiduciary framework and potential restrictions on cryptocurrency offerings in the defined contribution plan context. The need for thorough inquiry into regulatory restrictions on cryptocurrency offerings in pension plans is particularly important, as they may affect historically underserved communities. A broader, and equally necessary, evaluation concerns the extent to which fiduciaries equitably represent underserved communities—who are at the greatest risk of experiencing retirement underfunding.

A. *No Categorical Prohibition or "Extreme Care" Standard Applies to ERISA Fiduciary Duties*

ERISA does not contain the phrase "extreme care."[185] In passing and amending ERISA, Congress could have, but did not, impose a standard of extreme or heightened care beyond that of a prudent investor[186] (which is already arguably the highest duty known to law). Likewise, no

---

182. *See* discussion *infra* Subsection III.A.1.
183. Varity Corp. v. Howe, 516 U.S. 489, 496, 506 (1996) (quoting H.R. Rep. No. 93-533, at 302).
184. *See* discussion *infra* Subsection III.A.2.
185. *See generally* ERISA, 29 U.S.C. § 1001.
186. Mayland, *supra* note 105, at 647.

case law construing ERISA applies an extreme care standard.[187] The only case associating ERISA with extreme care in any way notes that Congress drafted ERISA with "extreme care," which suggests EBSA should not casually usurp Congress's role by rewriting ERISA without at a minimum adhering to APA notice and comment requirements.[188]

Further, no list of approved or prohibited investments for retirement plans exists in ERISA,[189] case law, or DOL-promulgated guidance. To date, the tax code provides the only categorical prohibition on retirement investments. Fiduciaries are prohibited from offering investment options in "collectibles" such as art, alcoholic beverages, and antiques.[190]

---

187. Of the 91 cases identified containing the phrase "extreme care" and "ERISA," the overwhelming majority discuss the extreme care required by courts in supervising default judgments, granting summary judgments, and making determinations concerning preemption of state laws by federal laws. *See, e.g.*, Finkel v. All Pro Elec. of NY II, Inc., No. 11 CV 4368 (ENV), 2012 U.S. Dist. LEXIS 116094, at *8 (E.D.N.Y. July 9, 2012) (citing case law requiring courts to "supervise default judgments with extreme care to avoid miscarriages of justice") (internal citation omitted); Moore v. Williams, 902 F. Supp. 957, 961 (N.D. Iowa 1995) (explaining "summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries") (internal citation omitted); *In re* Komet, 93 B.R. 498, 501 (Bankr. W.D. Tex. 1988) (noting "[p]reemption by ERISA of state law is a matter to be decided with extreme care."). None of these cases evaluated the contours of a fiduciary's responsibilities under ERISA.

188. *See* Simon v. Cyrus Amax Minerals Health Care Plan, 107 F. Supp. 2d 1263, 1265 (D. Colo. 2000) ("The United States Supreme Court has noted the extreme care Congress took in drafting ERISA . . . .").

189. Two bills introduced in 2022 would amend ERISA to either denominate digital assets as appropriately included in defined contribution plan menus or would bar DOL from categorically prohibiting any investment classes. The Financial Freedom Act of 2022 (reintroduced in 2023) does not identify cryptocurrencies as prudent investments but would amend ERISA to bar DOL from categorically prohibiting any investment classes. S. 4147, 117th Cong. (2022); S. 427, 118th Cong. (2023). The Retirement Savings Modernization Act would amend ERISA to enumerate investments, including digital assets, appropriately offered in a defined contribution menu. S. 4973, H.R. 9066 117th Cong. (2022). Both bills portend increasing congressional interest in the composition of defined contribution plans. Conversely, several senators have twice written to Fidelity urging it to reconsider its cryptocurrency offerings. *See* Letter from Senator Richard Durbin et al. to Abigail Johnson, Fidelity Investments CEO (July 26, 2022), https://www.durbin.senate.gov/imo/media/doc/durbin_bitcoin_72622.pdf [perma.cc/ESK2-KAN3]; Letter from Senator Richard Durbin et al., to Abigail Johnson, Fidelity Investments CEO (Nov. 21, 2022), https://www.durbin.senate.gov/imo/media/doc/letter_to_fidelity_investments_ceo.pdf [perma.cc/E54Z-ZPAJ]. No bill has yet been introduced to categorically prohibit cryptocurrency offerings in pension plans. New York Attorney General Leticia James has also opposed the inclusion of "unsuitable" digital assets in retirement plans, calling on Congress to reject the above bills. Press Release, N.Y. State Off. Of Att'y Gen., Attorney General James Urges Congress to Protect Workers by Prohibiting Retirement Investments in Cryptocurrencies, (Nov. 22, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-urges-congress-protect-workers-prohibiting-retirement [perma.cc/J8C9-ZPRM]; Letter from N.Y. State Atty' Gen. Leticia James to Senator Ron Wyden, et al., (Nov. 22, 2022) https://ag.ny.gov/sites/default/files/letter_to_congress_2022-11-22_1424.pdf [https://perma.cc/YV66-EG69].

190. I.R.C. § 408(m) (2018), *see also Issue Snapshot - Investments in Collectibles in Individually-Directed Qualified Plan Accounts*, IRS, https://www.irs.gov/retirement-plans/investments-in-collectibles-in-individually-directed-qualified-plan-

Though not a categorical ban, defined benefit plan fiduciaries are prohibited from holding more than ten percent of the total plan value of employer stock and employer real property.[191]

EBSA has not taken the position that cryptocurrencies are analogous to collectibles,[192] nor has any court or other government body to date. Rather, Part II's review of public policy articulated by the executive branch reveals the federal government's view that cryptocurrencies are digital assets akin to other currencies.[193]

1. EBSA Has Never Required "Extreme Care" By Fiduciaries or Established an Investigatory Plan for All Offerings of One Asset

EBSA has likewise never applied an extreme care standard to fiduciary conduct before the Compliance Release. Although in the ForUsAll litigation and in media interviews, EBSA asserts that the Compliance Release has no legal weight[194] and that it will not result in "legal consequences" for plan fiduciaries.[195] EBSA's position is contradicted by its own conduct, DOL's characterization of the import of its compliance releases, and DOL's past practice concerning compliance assistance.[196]

EBSA's position is also belied by its refusal to withdraw or amend the Compliance Release to remove the extreme care language. EBSA's position defies logic as investigative scrutiny to evaluate compliance with ERISA constitutes a significant legal consequence. Additionally, on its webpage, DOL indicates that its compliance releases are intended to inform the public "on how to comply with federal employment laws."[197]

---

accounts#:~:text=Consequence%20of%20investing%20in%20collectibles,the%20time%20it%20is%20acquired [https://perma.cc/E9GZ-FAYA] (last visited Sept. 23, 2023).

191. 29 U.S.C. § 1107.

192. A strong argument exists under Internal Revenue Code (I.R.C.) § 408(m) for precluding non-fungible tokens (NFTs) from 401(k) plan menus because NFTs are digital collectibles. *See* Rakesh Sharma, *Non-Fungible Token (NFT): What It Means and How It Works*, INVESTOPEDIA (Jan. 28, 2023), https://www.investopedia.com/non-fungible-tokens-nft-5115211 [perma.cc/W3QF-PUNY] (explaining NFTs).

193. *See discussion supra* Subsection II.A.4.

194. Memorandum In Support of Motion to Dismiss at 1, ForUsAll, Inc. v. U.S. Dep't of Labor, No. 1:22-cv-01551-CRC (D.D.C. Sept. 12, 2022) ("The Release itself does not have the force of law nor does it make new law.").

195. *Id.* at 2.

196. *See infra* text accompanying notes 201 & 202.

197. Wage & Hour Division Compliance Assistance, DEP'T OF LABOR, https://www.dol.gov/agencies/whd/compliance-assistance [perma.cc/RJ73-QXQZ] ("Department of Labor is committed to providing . . . clear and easy-to-access information on how to comply with federal employment laws. Such information and guidance are known as 'compliance assistance.'").

Aside from the Compliance Release at issue, EBSA has only issued one other compliance release, in 2021.[198] The 2021 compliance release concerned investigative policies and practices in audits concerning plan fiduciaries' compliance and ended with a clear disclaimer: "The contents of this document do not have the force and effect of law[] and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies."[199] Notably, the Compliance Release did not contain the same language disclaiming its legal effect that the 2021 release contained.[200]

EBSA is charged with enforcing ERISA, which it largely does through investigations. The fact that EBSA's primary enforcement mechanism is an investigation indicates, in contradiction to its position taken in the ForUsAll litigation, that investigations are indeed legal consequences. Further, EBSA's investigatory plan announced in the Compliance Release was novel for three primary reasons. Before the Compliance Release, EBSA had not announced a plan to investigate all offerings of a single asset class. Rather, EBSA had prioritized investigating issues that would either result in substantial potential recoveries or that would protect many plan participants.[201] The investigatory plan strayed far from EBSA's previous stance on fiduciaries' obligations concerning brokerage windows. EBSA's prior approach, discussed above, starkly contrasts with its plan to investigate brokerage windows allowing cryptocurrency allocations.[202]

2. The Aberrations: The Extreme Care Standard Applied in Fiduciary Cases

While cases construing the contours of fiduciary duties abound, few apply an extreme care standard—and none occur in the context of

---

198. *See* EMP. BENEFITS SEC. ADMIN., COMPLIANCE ASSISTANCE RELEASE NO. 2021-01 (Jan. 12, 2021).

199. *Id.* at 5.

200. *Compare* Compliance Assistance Release, *supra* note 200 *with* Compliance Release, *supra* note 11.

201. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-376, ENFORCEMENT EFFORTS TO PROTECT PARTICIPANTS' RIGHTS IN EMPLOYER SPONSORED RETIREMENT AND HEALTH BENEFIT PLANS REPORT 2 (2021) ("EBSA prioritizes investigating cases that may result in large recoveries or affect many participants . . . EBSA makes efforts to target investigations for greater impact, such as a 2013 change to prioritize cases with the potential to affect many participants and recover significant assets.").

202. *See* Compliance Release, *supra* note 11, at 3 ("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.").

employer-sponsored pensions. Since Congress enacted ERISA in 1974, only three courts have articulated fiduciaries duties of "extreme care." In a Washington state attorney disciplinary proceeding, the court applied an extreme care standard for an attorney representing a client with diminished mental capacity.[203] The other two cases concern securities disclosures. In those matters, the Ninth Circuit and a California federal court found fiduciaries to have a duty of extreme care in ensuring that disclosures about securities are comprehensive and accurate.[204]

Notably, many instances of courts applying extreme care standards exist outside the fiduciary context. The existence of those cases suggests that, if courts had deemed such a standard appropriate, they could have applied it as readily as they have in many other instances.[205]

B. *The Ethical Implications of Cryptocurrency Offerings in Pensions Necessitates Additional Research and Evaluation*

The Compliance Release did not only cause confusion as to appropriate legal standards for fiduciary conduct, but it also raised important ethical issues, which this Section addresses for the first time in academic discourse. To generate discussion and provide a springboard for future research efforts, this Section outlines some of the ethical arguments concerning cryptocurrency offerings in pension plans. In addition to surveying the discourse on the ethics of cryptocurrency investment, this Section also highlights the insufficient attention given to the impact on underserved communities of fiduciary investment approaches. This Section then turns to the need for research evaluating cryptocurrency's potential as an asset appropriate for defined contribution plans, with a focus on how allowing or limiting the asset would affect underserved communities.

---

203. *See, e.g.*, *In re* Disciplinary Proceeding Against McKean, 64 P.3d 1226, 1233 (Wash. 2003).

204. *See* White v. Abrams, 495 F.2d 724, 736 (9th Cir. 1974) (discussing Securities Act § 12 and explaining extreme care in accurately disclosing material information concerning securities is required of fiduciaries); Wright v. Schock, 571 F. Supp. 642, 659–60 (N.D. Cal. 1983) (citing *White*, 495 F.2d at 736 (explaining that when the defendant's relationship with plaintiff is one of "[w]here the defendant derives great benefit from a relationship of extreme trust and confidence with the plaintiff, the defendant knowing that plaintiff completely relies upon him for information to which he has ready access, but to which plaintiff has no access, the law imposes a duty upon the defendant to use extreme care in assuring that all material information is accurate and disclosed.")).

205. *See supra* note 192 (surveying cases applying extreme care standards outside of the ERISA fiduciary duty context).

1. Surveying the Ethical Discourse on Cryptocurrency Investment Reveals Polarized Discord

Limited academic discourse addresses the ethical implications of pension plans offering cryptocurrencies. More commentary concerning the ethics of cryptocurrency investments in general exists, and it covers a broad spectrum. Debates rage over its security,[206] uncertain "regulatory landscape,"[207] potential environmental impact,[208] and volatility.[209] Throughout the constantly expanding universe of commentary, for nearly every argument concerning the potential pitfalls of cryptocurrency, a counterargument seemingly exists. On balance, ethical arguments favoring cryptocurrency investments generally are less developed than those against it.

Scholastic, regulatory, and professional opposition to cryptocurrency investments abound. Opposition to cryptocurrency rose to a fever pitch after FTX's collapse in November 2022, with some almost gleefully heralding cryptocurrency's demise.[210] Though cryptocurrency investment continues, with Bitcoin rebounding significantly in the spring of 2023,[211] FTX's downfall bolsters arguments concerning

---

206. Dirk A. Zetzsche et al., *The Distributed Liability of Distributed Ledgers: Legal Risks of Blockchain*, 2018 U. ILL. L. REV. 1361, 1375–82, 1362 (2018) (detailing security risks inherent in digital assets but also acknowledging the widespread view that the distributed ledger technology underlying cryptocurrency is "unbreakable security, immutability, and unparalleled transparency").

207. *See* Khawar, *supra* note 134; *see also* Zetzsche et al., *supra* note 212, at 1363 (asserting cryptocurrency could be more heavily regulated than other assets because it is "subject to the law wherever there are system users").

208. *See* Claus Dirkksmeier & Peter Seele, *Blockchain and Business Ethics*, 29 BUS. ETHICS: A EUR. REV. 348, 348–59 (2022) (discussing some blockchains' ability to "reduce or prevent . . . or even make a net positive contribution to energy conservation"); *see also* WHITE HOUSE OFFICE OF SCIENCE & TECHNOLOGY POLICY, CLIMATE AND ENERGY IMPLICATIONS OF CRYPTO-ASSETS IN THE UNITED STATES 24 (Sept. 8, 2022) (indicating "[c]rypto-asset mining . . . us[ing] vented methane to generate electricity . . . is more likely to help rather than hinder U.S. climate objectives.").

209. *See* Khawar, *supra* note 134; *but see* Philippe Bagus & Luis de la Horra, *An Ethical Defense of Cryptocurrencies*, 30 BUS. ETHICS, ENV'T & RESPONSIBILITY 423, 425 n.6 (2021) ("Not all cryptocurrencies are highly volatile. So-called stablecoins are pegged to a reserve currency or a basket of assets or goods, thus reducing their volatility to a minimum.").

210. Chetan Bhagat, Opinion, *Crypto Is Now Dead: FTX, A Cryptocurrency Exchange, Collapsed Last Week, Proving A Lot of Cool Guys Horribly Wrong*, THE TIMES OF INDIA (Nov. 4, 2022, 8:27 PM), https://timesofindia.indiatimes.com/blogs/The-underage-optimist/crypto-is-now-dead-ftx-a-cryptocurrency-exchange-collapsed-last-week-proving-a-lot-of-cool-guys-horribly-wrong/ [perma.cc/CBX4-2S2M]; *see also* Chris Matthews, *'Crypto is Dead in America.' How FTX's Collapse Instigated a Biden Crackdown on the Digital-Asset Sector*, MARKETWATCH (Apr. 27, 2023, 10:42 AM), https://www.marketwatch.com/story/crypto-is-dead-in-america-how-ftxs-collapse-instigated-a-biden-crackdown-on-the-digital-asset-sector-e96dae7f [perma.cc/DR38-3HYS].

211. *See Bitcoin (BTC) Price Per Day from Apr 2013 - May 15, 2023*, STATISTA, https://www.statista.com/statistics/326707/bitcoin-price-index/ [perma.cc/QK79-HBX4] (last visited May 16, 2023).

cryptocurrency's potential to lose substantial value.[212] Herein lies a key downside: many cryptocurrencies fail, resulting in investors suffering steep (and at times total) losses to their investments.[213] Cryptocurrency investment's most significant pitfall is thus the inverse of its greatest upside: its potential for substantial returns.

The other primary argument against cryptocurrency concerns its volatility.[214] In addition to cryptocurrency's potential for "extreme volatility," EBSA also identifies the evolving regulatory landscape concerning challenges in valuing and "[o]bstacles to making informed decisions" about digital assets as their key downsides.[215] The uncertain regulatory landscape should, in the author's view, give even the most sophisticated investor pause, though not due to the oft-quipped and incorrect rationale that "cryptocurrency is . . . unregulated."[216] Rather, more appropriate concerns are *how* cryptocurrency is regulated, *by whom*, and *the way in which* the regulatory patchwork continues to evolve and overlap with potential conflict.[217]

Even considered in isolation, the sheer volume of executive branch resources dedicated to grappling with digital assets suggests their profound potential effects—whether detrimental or beneficial—on the American financial system. And, while cryptocurrencies are not the panacea some claim they could be,[218] they should not be disregarded.

212. A strong argument may be made that the fall of FTX stems more from senior executives' mismanagement and criminal conduct than as a result of any cryptocurrency-specific pitfall. *See* David Yaffe-Bellany & Matthew Goldstein, *Third Top FTX Executive Pleads Guilty in Fraud Investigation*, N.Y. TIMES (Feb. 28, 2023), https://www.nytimes.com/2023/02/28/technology/ftx-guilty-plea-fraud.html#:~:text=That%20night%2C%20federal%20prosecutors%20announced,had%20pleaded%20guilty%20to%20fraud [perma.cc/5VTW-GQ3X].

213. *See* Matthew Goldstein, *Ordinary Investors Who Jumped Into Crypto Are Saying: Now What?*, N.Y. TIMES (Dec. 5, 2022), https://www.nytimes.com/2022/12/05/business/cryptocurrency-investors-ftx-blockfi.html [perma.cc/43WN-T5KN]; *see also* Sirin Kale, *'They Couldn't Even Scream Any More. They Were Just Sobbing': The Amateur Investors Ruined By the Crypto Crash*, THE GUARDIAN (Jul. 12, 2022, 1:00 AM), https://www.theguardian.com/technology/2022/jul/12/they-couldnt-even-scream-any-more-they-were-just-sobbing-the-amateur-investors-ruined-by-the-crypto-crash [https://perma.cc/RME4-9V6S].

214. *See, e.g.*, Compliance Release, *supra* note 11, at 2.

215. *See* Khawar, *supra* note 134.

216. *See, e.g.*, Elizabeth Bowling, *Always Use Caution When Investing in Cryptocurrency*, TENN. DEP'T OF COMMERCE & INS.: BLOG (Jan. 30, 2023, 2:03 PM) ("[C]ryptocurrency is an unregulated, digital-only currency.") https://www.tn.gov/commerce/blog/2023/1/30/always-use-caution-when-investing-in-cryptocurrency.html [perma.cc/CJP3-93AC].

217. *See generally* Taylor Anne Moffett, Note, *CFTC & SEC: The Wild West of Cryptocurrency Regulation*, 57 U. RICH. L. REV. 713, 720–32 (2023) (discussing the "turf war" between the Commodity Futures Trading Commission and the Security and Exchange Commission and their corresponding approaches to regulating cryptocurrencies).

218. *See, e.g.*, Dirkksmeier & Seele, *supra* note 214, at 350–51 (discussing those who view "the advent of blockchain . . . as a chance to realize humanist visions of peaceful, collaborative forms of

Each year, cryptocurrencies' place in the American financial system cements itself more, a fact underscored by the substantial number of governmental, defined benefit, and defined contribution sponsors currently invested in them.[219] This trend remains even after the collapse of FTX[220]—and despite the deluge of commentators foretelling the end of cryptocurrency investment after FTX's downfall.[221] Thus, as cautiously acknowledged by President Biden in his Executive Order on Digital Assets, cryptocurrencies' potential to benefit Americans should be harnessed to the extent possible.[222]

A small number of scholars evaluating the potential of cryptocurrencies through the lens of different ethical frameworks identified myriad possibilities for the technology to improve people's lives. They point to pro-cryptocurrency arguments under the utilitarian, contractarian, and deontological ethical frameworks.[223] While none of the research focuses on the ramifications of cryptocurrency offerings specifically in pension plans, three of the most developed ethical arguments favoring cryptocurrency investment merit mention. Analysis of those ethical arguments as they may apply to pension plans would be informative.

Again, cryptocurrencies are asserted to have the potential to increase and preserve wealth.[224] They are also seen by some as a valuable diversification instrument, particularly because of their idiosyncratic nature (i.e., minimal correlation with other assets).[225] Cryptocurrencies may also be more financially inclusive to historically disenfranchised groups. In some instances, they may be fairer than the traditional financial system[226] with its barriers to access. Further, some claim

---

business by empowering individuals while undermining the privileges of the established and entrenched" and noting the existence of discussions concerning "blockchain for good").

219. Discussion *supra* Subsection II.A.1.

220. *See supra* notes 220, 221.

221. *See* Bhagat, *supra* note 216; *see also* Matthews, *supra* note 212; Yaffe-Bellany & Goldstein, *supra* note 214.

222. *See* Executive Order on Digital Assets, *supra* note 107.

223. *See* Dirkksmeier & Seele, *supra* note 214, at 350–353. This is not a comprehensive list. For example, Bagus and de la Horra assert the ethicality of cryptocurrency use "from a private property rights" perspective. *See* Bagus & de la Horra, *supra* note 215, at 424–427.

224. *See* Dirkksmeier & Seele, *supra* note 214.

225. *See* Bagus & de la Horra, *supra* note 215, at 425.

226. *See* George Calhoun, *The Ethics of Crypto: Good Intentions and Bad Actors*, FORBES (Oct. 11, 2022, 4:22 PM), https://www.forbes.com/sites/georgecalhoun/2022/10/11/the-ethics-of-crypto-sorting-out-good-intentions-and-bad-actors/?sh=9eb79665c494 [https://perma.cc/Y383-YNFF]. Commentators and scholars also point to cryptocurrency's "enhanced privacy," and its "inelastic supply" ensuring "massive redistributions through money production" cannot occur as other positive ethical aspects of the technology. *See id.*; *see also* Bagus & de la Horra, *supra* note 215, at 425.

cryptocurrencies empower individuals vis-à-vis those who already enjoy established privilege and may "mak[e] access to capital more egalitarian."[227]

A comprehensive evaluation of cryptocurrency offerings in pensions will likely assist regulators and Congress in understanding the technology's potential ethical ramifications, whether they be positive, negative, or (more likely) a combination of both attributes. However, research concerning cryptocurrency offerings in pensions is not enough, as targeted study concerning its potential effects on underserved communities is needed. In tandem with that issue are the ethical ramifications of regulators singling out only one specific asset class (that underserved communities favor more than their white counterparts) among many for increased scrutiny. Reevaluating the duties fiduciaries owe to plan participants also reveals the inherent tensions in serving a diverse constituency with varied backgrounds, needs, and retirement objectives. This Section now turns to that issue.

2. Tensions Inherent in Plan Administrators' Fiduciary Duties—Fiduciaries Focus on Diversification while Potentially Failing to Account for Diverse Constituents' Needs and Objectives

The leeway courts afford to prudently made fiduciary decisions, discussed in Section I.D, is not expressly, but could rightly be, based in part on the duality of serving as a fiduciary for multiple plan participants whose financial wherewithal and demographics often starkly contrast.

While serving numerous participants, fiduciaries must act impartially and account for all plan participants' differing interests.[228] This is no small feat. Accounting for such varied needs of both current participants of differing ages and financial wherewithal as well as "future beneficiaries" is a steep challenge given the conflicts of interest between participants near to and far from retirement.[229] Indeed, commentators decry the present state of fiduciaries' investment approaches asserting that they are biased, unlikely to be fair to all participants,[230] and that they have undermined intergenerational pension equity.[231] In short, they argue that

---

227. *See* Dirkksmeier & Seele, *supra* note 214, at 350.

228. UNIF. PRUDENT INV. ACT § 6 (UNIF. L. COMM'N 1994).

229. *See* Otsuka, *supra* note 96, at 148.

230. James Hawley et al., *Reclaiming Fiduciary Duty Balance*, 4 ROTMAN INT'L J. PENSION MGMT. 4, 11 (2011) ("Business as usual is not likely to result in pension management practices that are designed to be unbiased and aligned with the interests of participants and beneficiaries; nor is it likely to provide suitable pension benefits on a sustainable and impartial basis.").

231. *Id.* at 8.

with respect to intergenerational perspectives, fiduciaries unfairly manage pensions, with a greater focus being placed on the needs of older plan participants closer to retirement than other participants.[232]

While depictions of intergenerational conflicts of interest may be accurate, they are incomplete assessments. To date, insufficient information exists concerning how and if fiduciaries account for other critical demographic differences in participant cohorts, such as disparities in race and gender. Just as "[i]ntergenerational wealth maximization requires active consideration of a range of factors beyond narrow financial criteria,"[233] wealth optimization for underserved communities may require the fiduciary account for factors different from those of other plan participants. ERISA and DOL are silent on this.

Professors Fisch, Lusardi, and Hasler's discussion on default selections for entry-level employees is salient here because the issue they describe pervades beyond default settings. It likely applies to plan participants who are members of underserved communities:

> The problem that one size does not fit all with respect to retirement savings heightens this concern. Although it may be relatively straightforward to design a reasonable default strategy for entry-level employees, many of which are young, have limited savings, may carry student loans, and can be expected to work for thirty or forty years, the situations of plan participants become more varied as they age. Their health, financial status and debt obligations, sources of income, dependents, and other factors affect the appropriate savings rate and level of risk in their retirement accounts. Paternalism that defaults employees into a generic retirement plan without providing them with the tools to determine if adjustments to that default are appropriate may do little to help workers and may even hurt them . . . employers face today a heterogeneous population of employees.[234]

Professor Brown asserts that employer conduct must change for members of underserved communities to enjoy the full promise of a secure retirement.[235] A logical extension of this rationale suggests the same may be true for plan fiduciaries.

232. *See id.* ("For many plan participants, pension management results have become unfair, particularly from an intergenerational perspective.").

233. *Id.*

234. Fisch et. al, *supra* note 102, at 774.

235. *See* Brown, *supra* note 152, at 385–86.

Further evaluation of the ERISA fiduciary scheme's effectiveness in protecting members of underserved communities is needed to identify how to achieve more equitable outcomes for all retirees.

3. Additional Research is Needed on How the Regulation of Cryptocurrency Offerings Affects Underserved Communities

While most American workers will be underfunded at retirement,[236] the projections are substantially worse for members of underserved communities.[237] Over the past two decades, and despite Congressional and societal advances toward equity, the disparity in net wealth[238] between people of color and white people "widened significantly."[239] Data indicates this gap will continue to expand in the retirement savings context.[240]

Systematic and structural racism[241] and sexism[242] are key drivers of this disparity. Barriers have prevented people of color and women from "fully participat[ing] in and benefit[ing] from the nation's prosperity" and continue to "hamper economic growth" for many Americans.[243] A burgeoning body of research indicates that public policies are the

236. *See* VanDerhei, *supra* note 29.

237. A well-documented pension and retirement wealth gap exists between women and men. Caroline Lewis Bruckner & Jonathan Barry Forman, *Women, Retirement, and the Growing Gig Economy Workforce*, 38 GA. STATE U.L. REV. 259, 344 (2022). Women of color face a wider gap than white women and are almost twice as likely to experience poverty than white women. *Id.* at 349–50.

238. Angela Hanks et al., CTR. AM. PROGRESS, SYSTEMATIC INEQUALITY HOW AMERICA'S STRUCTURAL RACISM HELPED CREATE THE BLACK-WHITE WEALTH GAP (Feb. 21, 2018) https://www.americanprogress.org/article/systematic-inequality/ [perma.cc/6MWU-Q29E] ("Wealth—the measure of an individual's or family's financial net worth—provides all sorts of opportunities for American families. [Wealth] is the most complete measure of a family's future economic well-being.").

239. Janice Bowdler & Benjamin Harris, *Racial Inequality in the United States*, U.S. Dep't of Treas., (July 21, 2022), https://home.treasury.gov/news/featured-stories/racial-inequality-in-the-united-states [perma.cc/B3WS-8WL6].

240. *Id.*; Hanks et al., *supra* note 243, at Fig. 3.

241. Veasey v. Abbott, 830 F.3d 216, 231 (5th Cir. 2016) (acknowledging "we must . . . face the sad truth that racism continues to exist in our modern American society despite years of laws designed to eradicate it."); Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (noting "our country's long and brutal struggle to overcome racism and discrimination against African–Americans").

242. Commonwealth v. Paige, 177 N.E.3d 149, 157 (Mass. 2021) (Cypher, J., concurring) (acknowledging "the historical sexism of the common law" and discussing resulting effects on women's status in society vis-à-vis the law).

243. *See* Bowdler & Harris, *supra* note 244; Hanks et al., *supra* note 243.

primary cause of the racial wealth gap.[244] As pensions are often African Americans' first foray into investing,[245] this Article posits that the Compliance Release's unstudied potential effects may disproportionately harm underserved communities.

Whether members of underserved communities need greater exposure to high-risk, high-reward asset offerings is a question warranting further scrutiny. Members of underserved communities, who generally make less, typically invest less frequently and more conservatively than white male workers, and, when they do invest, they invest substantially lower amounts.[246] To, at least partially, make up the resulting shortfalls, some members of underserved communities may desire—and benefit from—increased exposure to higher-risk/higher-reward investments. This fact, coupled with minorities' demonstrated preference for cryptocurrency investments generally, suggests the Compliance Release may have unintended consequences.

Policies disproportionally burdening members of underserved communities or expanding existing inequities are ethically suspect.[247] Analyzing a policy's effect on underserved communities is thus critical. This is true particularly within the "political and socio-cultural context"[248] in which the policy is issued and concerning those who it will most affect. In addition to being ethically imperative, such an

---

244. *See, e.g.*, Thomas Shapiro et al., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, INST. ASSETS & SOC. POL'Y 1–2 (Feb. 2013) (testing numerous potential explanations for the wealth gap including "family, labor market, demographic, and wealth characteristics" and determining "that policy shaping opportunities and rewards where we live, where we learn, and where we work propels the large majority of the widening racial wealth gap").

245. ARIEL INVESTS. & CHARLES SCHWAB, *supra* note 146, at 13. The Author suspects pension savings constitute the first investment of many members of other minority groups but is unaware of data either confirming or disproving that theory.

246. *See* Ryan & Dennis, *supra* note 32, at 331 ("Compared to males, not only do females generally earn less, invest less when presented with defined-contribution funds, and choose less risky, lower return investment options, but they also live longer and tend to incur larger healthcare expenses after retirement . . . women are generally more risk averse with their financial holdings than men."); *see also* Brown, *supra* note 152, at 393; Goth, *supra* note 151 (explaining that members of underserved communities often opt for overly-conservative investments generating low yields).

247. Maxime Plante et al., *An Ethics Framework for Analyzing Paternalism in Public Health Policies and Interventions*, INSTITUT NAT'L SANTÉ PUBLIQUE QUÉBEC [NAT'L INST. PUB. HEALTH QUÉBEC] 5 (2020) https://numerique.banq.qc.ca/patrimoine/details/52327/4146871 [perma.cc/8N7K-GBEA].

248. *See id.* at 2, 6 (rightly noting that "we might also ask whether such an approach turns a blind eye to social inequalities . . . since it is often the most disadvantaged and marginalized who are most severely affected by such restrictive policies") (internal citations omitted). For a reasoned evaluation of what happens when courts refuse to evaluate issues within the historical and social-cultural context, *see, e.g.*, William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095 (2014) (discussing structural racism's prevalence and entrenchment in the American workplace and society and courts' refusal to dismantle it).

evaluation is now required by executive order.[249] No such evaluation of the Compliance Release occurred, but the data demonstrating minorities' disproportionate exposure to digital currencies coupled with their generally inadequate retirement funds suggests the Compliance Release may, for good or ill, affect minorities more than their white counterparts, both financially and from a social equity perspective. While factors outside of the financial properties of an investment may not be appropriate for fiduciaries to consider in every case,[250] EBSA faces no such restriction. On the contrary, public policy now mandates it.

Some view cryptocurrencies as offering the potential to leapfrog over traditional barriers to entry[251] associated with historically racist financial institutions to a more egalitarian financial model.[252] Some likewise express concerns that restricting cryptocurrency investment is the latest iteration of public policies disenfranchising members of underserved communities and further entrenching inequities.[253] A natural extension of that viewpoint would apply to restricting cryptocurrency offerings in pension plans. Conversely, at least two

---

249. Exec. Order No. 13895, 86 Fed. Reg. 7009, 7009–10 (Jan. 20, 2021) (mandating federal agencies to promote equity through identifying and working to break down barriers to opportunity).

250. *See generally* Otsuka, *supra* note 96, at 138–39; Sanders, *supra* note 46, at 569–70.

251. *See, e.g.*, Annie Nova, *Despite the Bitcoin Selloff, It's Still An Asset Class That Is Accessible to Anyone, Says Blockchain Educator*, CNBC (Jun. 13, 2022, 12:48 PM), https://www.cnbc.com/2022/06/13/crypto-is-first-asset-class-accessible-to-anyone-blockchain-educator.html [perma.cc/5R9P-XKEY] (explaining that an individual's perception of cryptocurrency is often affected by whether they are a member of an underserved community); Niquel T. Ellis, *Cryptocurrency Has Been Touted as The Key To Building Black Wealth. But Critics Are Skeptical*, CNN (Aug. 20, 2022, 8:45 AM), https://www.cnn.com/2022/08/20/us/cryptocurrency-black-investors-reaj/index.html [perma.cc/ME5A-HLGJ] (describing aspects of cryptocurrencies some African American investors find appealing, including the lower "barriers to entry because there are no credit checks or income requirements; the equal opportunity for success regardless of race or generational wealth" and merchants' willingness to accept cryptocurrency payments).

252. *See* Hale, *supra* note 144, at 2 ("[C]ryptocurrencies offer a new decentralized financial model allowing Black communities to grow their own wealth, after being ostracized for so long from traditional banking institutions."); Cleve Mesidor, Opinion, *Crypto Can Be A Driver For Racial Equity*, BOS. GLOBE (May 12, 2022, 2:16 PM), https://www.bostonglobe.com/2022/05/10/opinion/crypto-can-be-driver-racial-equity/ [https://perma.cc/ZP8A-PLES] (asserting cryptocurrency's attraction for underserved communities involves the chance "to explore a new class of financial assets without systemic barriers" hampering underserved communities' access to the financial system). *See* Yellen, *supra* note *183* ("'[F]inancial innovation' of the past has too often not benefited working families, and has sometimes exacerbated inequality, given rise to illicit finance risks, and increased systemic financial risk.").

253. Silvia Foster-Frau, *Locked Out of Traditional Financial Industry, More People of Color are Turning to Cryptocurrency*, THE WASHINGTON POST (Dec. 1, 2021, 2:53 PM), https://www.washingtonpost.com/national/locked-out-of-traditional-financial-industry-more-people-of-color-are-turning-to-cryptocurrency/2021/12/01/a21df3fa-37fe-11ec-9bc4-86107e7b0ab1_story.html.

scholarly evaluations determined cryptocurrency investments, in general, have the "potential to exacerbate unequal financial services to historically excluded groups . . . ."[254] In sum, research is needed on how EBSA's approach toward cryptocurrency offerings on plan menus could affect members of underserved communities.[255]

IV. RESPECTING PARTICIPANT DECISIONS WHILE BALANCING FIDUCIARY DUTIES: BEST PRACTICES FOR PRUDENT CRYPTOCURRENCY OFFERINGS

Even sound investments involve risk,[256] and cryptocurrency investments arguably entail higher than average risk. Yet the case law and interpretive guidance are clear: no asset should be denominated categorically impermissible—at least not without amendment of ERISA or properly-promulgated regulations. Until that occurs, the question of how to appropriately offer cryptocurrency options in 401(k)s, if any such options are determined prudent after fiduciaries undertake their fact-intensive analysis, remains for those fiduciaries willing to risk undergoing an EBSA investigation.[257] Because digital currency holdings should *not* be treated differently from any other asset class, the answer to that question lies in existing (if not always consistently applied) methods appropriate for many retirement investment plans. This Part also offers one novel approach consistent with established best practices, research on effective learning, and evolving societal norms.

But first, this Part briefly demonstrates that the established prudent investor standard and guidance in place already achieve ERISA's goal of protecting plan participants while respecting their choices about their

254. Tonantzin Carmona, *Debunking The Narratives About Cryptocurrency and Financial Inclusion*, BROOKINGS INST. (Oct. 26, 2022), https://www.brookings.edu/research/debunking-the-narratives-about-cryptocurrency-and-financial-inclusion/ [perma.cc/63D9-H7Z8]; *see also* Alex Fredman & Todd Phillips, *Claims That Crypto Bolsters Financial Inclusion Are Dubious*, CTR. FOR AM. PROGRESS (Mar. 25, 2022), https://www.americanprogress.org/article/claims-that-crypto-bolsters-financial-inclusion-are-dubious/ [perma.cc/3U2U-DM4D] (rebutting claims that cryptocurrency exposure bolsters financial inclusion, in part because its fees are often higher than traditional financial industry fees).

255. Because of these important equity issues, and particularly given historical discrimination in the American financial system, a corresponding question arises: how does underserved communities' exposure to cryptocurrencies based on racial and ethnic inclusion objectives fit into the overall ESG investment discourse?

256. *See* U.S. DEP'T OF LABOR, EMP. BENEFITS SEC. ADMIN., CHOOSING THE RIGHT PERSON TO GIVE YOU INVESTMENT ADVICE: INFORMATION FOR INVESTORS IN RETIREMENT PLANS AND INDIVIDUAL RETIREMENT ACCOUNTS, 1, 8 (Apr. 2021), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/choosing-the-right-person-to-give-you-investment-advice.pdf [perma.cc/7RBW-ZBP3] ("Even the best investments typically involve some risk of loss . . . .").

257. This question is predicated on data showing many plans do currently offer cryptocurrency options as of this Article's publication. *See supra* Subsection II.A.1.

savings. The complete curtailment of participant choice offsets any additional protection provided by the new "extreme care" standard because it essentially abrogates fiduciaries' ability to provide or enable participants to select cryptocurrency options.

A. *Adhering to Existing Law and Guidance Sufficiently Addresses Cryptocurrency Risk*

Before the Compliance Release, a broad body of established law and guidance regulated defined contribution plans and fiduciary conduct.[258] Applying those same standards to potential cryptocurrency offerings would achieve the result EBSA desires—protecting plan participants—without the Compliance Release's negative ramifications for both fiduciaries and plan participants.

For example, the way EBSA articulated its concerns about potential private equity offerings shortly before issuing the Compliance Release illustrates the prudent investor standard's capacity to regulate fiduciary conduct relating to new, risky investment alternatives. "Cryptocurrency" could well be substituted for the words "private equity" with the same protective effect EBSA sought through the Compliance Release, but without generating confusion and uncertainty or disregarding participant choice.

In a June 2020 Information Letter and a related December 2021 Supplemental Statement on private equity options as designated investment alternatives, EBSA reiterated that "as with any plan investment, plan fiduciaries must determine that an investment that includes [private equity] is, among other things, prudent and made solely in the interest of the plan's participants . . . ."[259] EBSA also noted fiduciaries must undertake an "objective, thorough, and analytical process that considers all relevant facts and circumstances and then act accordingly."[260] This process includes analyzing an asset's potential for both risk and returns as well as opportunities for it to serve as a diversification tool.[261] As a part of any comprehensive analysis, the Information Letter noted fiduciaries should compare funds containing private equity components with other funds that do not.[262] Other appropriate considerations included whether the assistance of third-party advisors was necessary.[263]

258. *See supra* Section I.C; *see also* Mayland, *supra* note 105, at 666–69 (discussing DOL's increasing efforts to paternalistically regulate defined contribution plans and fiduciary conduct).

259. U.S. DEP'T OF LABOR, SUPPLEMENTAL STATEMENT ON PRIVATE EQUITY IN DEFINED CONTRIBUTION PLAN DESIGNATED INVESTMENT ALTERNATIVES 1 (Dec. 21, 2021) [hereinafter Supplemental Statement on PE].

260. Information Letter, *supra* note 52, at 3.

261. Supplemental Statement on PE, *supra* note 265, at 1.

262. Information Letter, *supra* note 52, at 5; Supplemental Statement on PE, *supra* note 265, at 1.

263. Information Letter, *supra* note 52 at 4.

The Information Letter also identified as important considerations:

> whether the asset allocation fund has limited the allocation of investments to private equity in a way that is designed to address the unique characteristics associated with such an investment, including cost, complexity, disclosures, and liquidity, and has adopted features related to liquidity and valuation designed to permit the asset allocation fund to provide liquidity for participants to take benefits and direct exchanges among the plan's investment line-up consistent with the plan's terms.[264]

These manifold fiduciary obligations align with established prudent investor standard case law and regulations discussed in Section I.C. They apply to defined contribution fiduciaries contemplating cryptocurrency offerings on plan menus. Applying them to potential cryptocurrency offerings and fiduciaries' analysis thereof would address EBSA's concerns outlined in the Compliance Release and accompanying explanations.

Rather than straying from it in the Compliance Release, EBSA should have reiterated the prudent investor standard's applicability to cryptocurrency offerings. EBSA has not indicated why it moved away from established standards and practices for this one asset class. EBSA now risks playing a never-ending game of asset-policing whack-a-mole if it plans to promulgate asset-by-asset guidance for every new asset class developed over time. However, EBSA continues to defend the Compliance Release in both court and public discourse and declines to withdraw or amend it in compliance with the APA.

B. *Potential Methods for Prudent Cryptocurrency Investment Allocations*

Existing law and guidance adequately govern fiduciary conduct related to potential cryptocurrency offerings. Likewise, complying with the established best practices will help fiduciaries avoid many of the concerns EBSA espouses in the Compliance Release.

Risk mitigation methods that fiduciaries should consider implementing are not cryptocurrency-centric. Rather, they generally help mitigate risk arising from any asset type. The practices include establishing appropriate limitations on the amount of a single asset included in a portfolio; providing accessible, quality training and

264. Information Letter, *supra* note 52, at 4.

education so participants may fully appreciate the risks associated with all of their investment choices; expanding access to, and awareness of, participants' available financial wellness tools and advice, potentially via non-traditional means; and applying other established techniques such as systematically reevaluating and rebalancing portfolios to ensure their alignment with plan participants' objectives.

1. Express Quantitative Limits

By adopting express quantitative limits on the percentage of cryptocurrency investments an individual plan may hold, fiduciaries would limit exposure to the volatile asset while respecting participant choice for those who desire cryptocurrency exposure and its potential for high returns in their portfolios.[265] It would also at least partly address EBSA's concern regarding cryptocurrencies' volatility and potential for substantial losses. Precedent in ERISA for quantitative limits exists in section 1107 preventing defined benefit plans from investing in or maintaining more than ten percent of plan assets in employer real estate or securities.[266] Further, as with private equity investments, imposing quantitative limits may also mitigate risks associated with valuation and illiquidity of assets.[267]

2. Enhanced Educational Content

EBSA points to participants' financial illiteracy as part of its rationale for applying an extreme care standard to cryptocurrency offerings.[268] This approach inconsistently targets the effects of participant financial illiteracy, while not addressing the actual problem of financial illiteracy which affects a broader swathe of participant conduct than the desire for cryptocurrency options. Better educating participants would directly address EBSA's concern regarding cryptocurrency offerings and potentially improve overall participant financial literacy. The call for increased and refined educational content

265. *See* Galer, *supra* note 53, at 12–13 (discussing the application of quantitative limits of investments in plan sponsors); Scala et al., *supra* note 112 (recommending that employers "consider some type of limit on the amount an individual can commit to crypto to reduce potential risk associated with volatility"). A related question is: what quantitative limit? Some employers currently impose a "5% Crypto Cap." *50 Companies Live with ForUsAll's Retirement Platform that Delivers Crypto to the 401(k)*, BUSINESSWIRE (Nov. 3, 2022, 9:30 AM), https://www.businesswire.com/news/home/20221103005419/en/50-Companies-Live-with-ForUsAll%E2%80%99s-Retirement-Platform-that-Delivers-Crypto-to-the-401-k [https://perma.cc/M7GU-AXHL].

266. 29 U.S.C. § 1107(a)(2).

267. *See* Information Letter, *supra* note 52, at 4.

268. *See* Khawar, *supra* note 134.

and access is widespread and longstanding,[269] though the efficacy of educational efforts remains debatable. Still, data suggests that to a degree, plan sponsors' efforts at providing education and training have significantly impacted participants' retirement savings decisions.[270]

In theory, increased financial literacy enables plan participants to invest their contributions in such a way as to avoid insufficient or extreme exposure to risk.[271] Moreover, commentators, scholars, and even DOL's Advisory Council on Employee Welfare and Pension Benefit Plans have previously recommended DOL increase and enhance outreach and education to plan participants, with a particular focus on minority groups.[272] The White House and Treasury have also done so regarding cryptocurrency investments generally.[273] The Advisory Council has additionally recommended that DOL work to "address the shortfall issue" experienced by minorities through updating DOL "regulations, technical bulletins and rules."[274]

3. Expand Access to, and Awareness Regarding the Availability of, Financial Wellness Tools and Expert Advice

Obtaining professional advice could improve participants' financial outlook at retirement.[275] Fortunately, many defined contribution plans offer a variety of financial wellness tools and services to participants.[276]

---

269. *See, e.g.*, Fisch et al., *supra* note 32, at 780 (recommending DOL both mandate employer-provided financial education and issue guidelines governing what is an acceptable program similar to DOL's guidelines on acceptable investment options); Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 74–75 (2000) (calling for increased participant education).

270. Medill, *supra* note 275, at *17–18 (discussing studies demonstrating that more than forty percent of plan participants who receive employer-provided education or training increase their retirement savings contributions and alter their investment strategies).

271. *See* Fisch, et al., *supra* note 32, at 780–81.

272. *See* Mayland, *supra* note 105, at 668–70; DEP'T OF LABOR, ERISA ADVISORY COUNCIL, REPORT: GAPS IN RETIREMENT SAVINGS BASED ON RACE, ETHNICITY AND GENDER 6–7 (Dec. 2021) [hereinafter DOL RETIREMENT GAPS REPORT].

273. *See supra* Subsection II.A.4; *see* THE WHITE HOUSE, FACT SHEET: WHITE HOUSE RELEASES FIRST-EVER COMPREHENSIVE FRAMEWORK FOR RESPONSIBLE DEVELOPMENT OF DIGITAL ASSETS, *supra* note 156.

274. *See* DOL RETIREMENT GAPS REPORT, *supra* note 278, at 56. For fiduciaries concerned about crossing the line between appropriate educational activities and rendering individual advice to participants that could increase potential liability exposure, DOL guidance outlines appropriate educational activities, including providing information on the benefits of participating in plans and increasing plan contributions, the drawbacks of pre-retirement fund withdrawals, and general investment information including materials discussing diversification, risk and return, and assessing needs upon retirement, among other things. *See* U.S. Dep't of Labor, Pension and Welfare Benefits Administration, Interpretive Bulletin 96-1, 61 Fed. Reg. 29586 (June 11, 1996).

275. *See* Medill, *supra* note 275, at 16–18.

276. *See* Deloitte Defined Contribution Report, *supra* note 24, at 9, 35. Approximately nine out of ten plan participants also receive retirement income projections illustrating anticipated annual income in retirement either online or through hardcopy statements or communications. *Id.* at 36.

Those tools include financial market education, budgeting and expense projections, debt management assistance, education planning, benefit utilization and insurance planning, income planning and tax strategies, and retirement planning.[277] Such benefits also often include monitoring progress toward retirement savings, exploring additional savings opportunities, assistance integrating retirement savings with government benefits, and more.[278]

While information concerning the tools plans offer abounds, data also reveals that many participants do not use these tools.[279] Many are unaware of the tools available to them. Accordingly, efforts to better relay information on these benefits may increase participants' awareness and utilization of them.

4. Increased and More Effective Communication Via Non-Traditional Outlets

Perhaps partly due to their lack of awareness of employer-provided tools, as of 2022, almost one-third of workers relied on their own independent online research as their primary retirement planning information.[280] Another thirteen percent of workers relied on their employers as a source of information for their retirement planning.[281] Meanwhile, nearly one in ten workers relied on information they obtained from social media posts by financial institutions, a metric whose rapid growth and import is underscored by the fact that it had not even been evaluated before 2022.[282]

Researchers have shown that the method of conveying information to plan participants influences their decision-making.[283] Research on effective learning and retention strategies also demonstrates that multiple exposures to small amounts of information are more likely to result in familiarity with a concept than a single, in-depth exposure to a large volume of information.[284]

---

277. *Id.* at 41.

278. *See id.*

279. *See* EMP. BENEFIT RES. INST. & GREENWALD RES., 2022 RETIREMENT CONFIDENCE SURVEY, 28 Fig. 18. (2022), https://www.ebri.org/docs/default-source/rcs/2022-rcs/2022-rcs-summary-report.pdf?sfvrsn=a7cb3b2f_12 [perma.cc/3J9E-T3W2].

280. *Id.* More than one in three workers rely on family and friends for retirement planning advice. Almost the same rely on their own online research.

281. *Id.*

282. *Id.*

283. *See* Brown, *supra* note 152, at 402.

284. *See generally* R.C. Atkinson & R.M. Shiffrin, *Human Memory: A Proposed System and Its Control Processes*, 2 PSYCH. LEARNING & MOTIVATION 89 (1968); Mirko Thalmann et al., *How Does Chunking Help Working Memory?*, 45 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY & COGNITION 37 (2019).

Accounting for the many workers who rely on information from internet and social media sources, coupled with the numbers who rely on information from their employers, plan fiduciaries should weigh adding alternative means of communicating retirement planning information. Those methods may include utilizing internet, workplace messenger applications, and social media outlets. This is not to suggest dispensing with currently used methods, but rather supplementing them.

Though few would argue that any of these media are the optimal method of communicating voluminous amounts of retirement planning information, given their popularity with employees, plan sponsors and fiduciaries should consider whether informative social media and other campaigns could improve their employees' awareness of tools available to them and understanding of simple retirement savings principles. Particularly for younger workers, short videos (in the vein of YouTube, TikTok, or Instagram videos) may also spark participant interest in retirement savings. Regular exposure to digestible chunks of retirement planning information may have more impact than the status quo for many, and abundant sources show traditional education efforts have failed to produce the results desired. The power of a hook via social media or workplace messenger app followed by easily accessible online information may entice workers who are notoriously hesitant to spend much time on their retirement planning.[285]

5. Complying with other basic, fiduciary requirements and best practices including periodic reevaluation and rebalancing of portfolios, self-evaluation, and providing appropriate disclosures

Many other practices already required by law or regulation help protect plan participants from potentially imprudent investments.[286] Fiduciaries are obligated to continue to employ these practices and should thus apply them to any evaluation of cryptocurrency offerings.

To comply with established law, fiduciaries must consider whether they possess the skills, knowledge, and experience to make the necessary investment determinations.[287] They must also assess whether they should obtain assistance from qualified advisers or other

285. *See* Dana M. Muir, *Choice Architecture and the Locus of Fiduciary Obligation in Defined Contribution Plans*, 99 IOWA L. REV. 1, 55 (2013) (noting that many workers either do not open or only briefly review their 401(k) statement for fear of receiving bad news).

286. *Supra* Section IV.A.

287. Information Letter, *supra* note 266, at 5.

professionals.[288] Fiduciaries are also required to systematically reevaluate and rebalance portfolios to ensure their alignment with plan participants' objectives.[289] They must additionally ensure plan participants are provided with accurate, sufficient information concerning an investment's nature and risks so participants are able to make informed assessments concerning their portfolio allocations.[290] Fiduciaries further must periodically review and document their determinations concerning plans' appropriateness, any potential conflicts of interest, associated fees, and accuracy of disclosures.[291] The same applies to brokerage windows.[292]

Fiduciaries should also consider (or continue, as many already do) requiring plan participants electing to use brokerage windows to certify before obtaining access that they understand they are voluntarily assuming the risks associated with their investment selections.[293]

If not for the uncertainty raised by the Compliance Release, fiduciaries applying these measures to potential cryptocurrency options should face no greater liability exposure than they would for any other asset. These measures should similarly protect participants, while respecting their preferences concerning their money.

Conclusion

As the Executive Order on Digital Assets effectively concedes, digital technologies such as those underlying cryptocurrencies appear poised to continue their dramatic expansion into the American economy. Accordingly, the DOL and EBSA should act now, in compliance with the APA, to comprehensively evaluate the appropriateness, if any, of cryptocurrency offerings in defined contribution plan menus and brokerage windows and promulgate regulations accordingly. Meanwhile, EBSA should retract the Compliance Release's novel extreme care standard for plan fiduciaries that diverges from established case law. EBSA may do so safely, assured that the existing law and guidance sufficiently regulate fiduciary conduct and protect plan participants.

288. *Id.*

289. *See* Tibble v. Edison Int'l, 575 U. S. 523, 530 (2015).

290. Information Letter, *supra* note 266, at 5.

291. *Id.*

292. Daines & Perkinson, *supra* note 69.

293. *See, e.g.*, TEACHERS INS. & ANNUITY ASS'N., TIAA SELF-DIRECTED BROKERAGE OVERVIEW AND ACCOUNT SETUP 2 (2018), https://www.tiaa.org/public/pdf/Yale_Brokerage_Guide.pdf [perma.cc/4UUG-4CF6].

Unless EBSA or Congress take definitive action concerning cryptocurrency offerings in 401(k) plan menus, at least some plan fiduciaries are likely to continue to determine cryptocurrency options are appropriately offered, particularly via brokerage windows. Those fiduciaries should employ already utilized best practices of establishing appropriate quantitative limitations on a single asset's allocation in a portfolio, providing accessible education to participants, and expanding access to and awareness of participants' available financial wellness tools and advice, potentially via non-traditional means such as social media, short videos, and workplace messengers. In addition, fiduciaries should continue to adhere to the manifold legal requirements governing their conduct and apply other established best practices already in use.

Lastly, despite minorities' generally conservative approaches to retirement investing and overall reticence toward risks in other investment contexts, they are disproportionately exposed to digital assets. This deviation from past investment trends is notable. Research on how regulation of cryptocurrency—and any other asset—offerings in defined contribution plan menus affects members of underserved communities is both mandated by executive order and ethically warranted. Research into fiduciaries' servicing and balancing the interests of all their constituents, particularly underserved communities, is needed to promote more equitable retirement outcomes for all.