The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

OCTOBER 2022

LexisNexis

THE BANKING LAW JOURNAL

VOLUME 139 NUMBER 9 October 2022

LexisNexis®

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ISBN: 978-0-7698-7878-2 (print)
ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

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MATTHEW BENDER

(2022–Pub.4815)

Editor-in-Chief, Editor & Board of Editors

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

Department of Labor Sued in Crypto 401(k) Guidance Lawsuit

By Phillip C. Bauknight and Ron M. Pierce*

The authors of this article discuss a lawsuit against the U.S. Department of Labor alleging that federal officials are improperly restricting investment options by warning fiduciaries against including cryptocurrency in their 401(k) plans.

The battle over crypto 401(k)s reached a fever pitch when 401(k) provider ForUsAll Inc. filed a lawsuit against the U.S. Department of Labor ("DOL") in a Washington, D.C., federal court, alleging that federal officials are improperly restricting investment options. ForUsAll, which claims to be the first 401(k) platform to provide employees access to cryptocurrency, alleges that the DOL violated the Administrative Procedure Act ("APA") by issuing guidance in March ("Guidance") that warned fiduciaries against including cryptocurrency in their 401(k) plans. This article discussed what companies need to know about this latest salvo in the ongoing conflict.

HOW DID WE GET HERE?

In March, the DOL's Employee Benefits Security Administration ("EBSA") issued a strong and direct warning that including cryptocurrency in a 401(k) plan might run afoul of existing standards. The agency noted that "extreme care" should be exercised before adding such an option to a 401(k) plan's investment menu for plan participants. The Guidance applies to both plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows.

While the Guidance did not amount to an explicit ban, it made clear that fiduciaries who are considering including cryptocurrencies within 401(k) menu options would need to conduct a thorough evaluation before offering crypto—and should expect an EBSA investigation if they decide to include such an offer.

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THE LAWSUIT AGAINST THE DOL

The lawsuit alleges that the DOL's March Guidance is an "arbitrary and capricious" attempt to restrict the use of cryptocurrency in retirement plans. ForUsAll argues that the DOL violated the APA by issuing guidance without following the correct notice and comment procedures under the APA. Those procedures, argued ForUsAll, would have required the Guidance to go through a time-consuming rulemaking process, which could have taken months, if not years. By that time, of course, the regulatory landscape of crypto would be significantly different as there is a frequent meme in the crypto world that one week in crypto can feel like the equivalent of a year, if not more.

In response, multiple industry groups objected to the Guidance and requested that it be withdrawn. In addition, a new proposal called the Financial Freedom Act, (S. 4147), was introduced on May 5 by Senator Tommy Tuberville (R-AL). It would prohibit the DOL from restricting the types of investments that workers can invest in through their self-directed brokerage accounts like 401(k)s—in turn clearing the path for employees to include cryptocurrency in their retirement savings.

Key allegations from the Complaint include:

- The DOL rushed out the Guidance and deliberately circumvented the APA's rulemaking process because it feared that the bevy of crypto Super Bowl commercials would encourage employees to put their retirement savings in crypto. ForUsAll alleges that the rushed Guidance was the DOL's attempt to get ahead of this potential influx of new crypto investors supposedly wanting to put their taxed advantaged retirement dollars into crypto.
- The DOL's Guidance is in direct contradiction to President Biden's Executive Order, which directed several federal agencies, including the DOL and Treasury Department, to begin focusing their efforts on the growing cryptocurrency field and evaluate how to move crypto forward through appropriate regulation. The Complaint alleges that no other agency responded to the Executive Order in the same manner as the DOL.
- Neither the Guidance nor statements by DOL officials offer any coherent rationale for how a duty would exist to select and monitor investments in a brokerage window if those investments are cryptocurrency, but not if they are any other type of investment.
- There was a strong demand to add cryptocurrency to retirement plans through ForUsAll's program prior to the release of the Guidance, with

many plans still having interest. Since the release of the Guidance, however, approximately one-third of the plans ForUsAll has discussed the matter with have indicated that they do not intend to proceed further at this time given the position taken by the DOL.

- ForUsAll wants the court, among other relief, to vacate and set aside the DOL's crypto Guidance, prevent the DOL from acting to implement the Guidance, and prohibit investigations outside the scope allowed by the Employee Retirement Income Security Act.

WHAT SHOULD COMPANIES DO?

At this time, companies that choose to include cryptocurrencies or other digital assets in their 401(k) investment menu should keep EBSA's scrutiny in mind. Employer plan sponsors and other plan fiduciaries have a duty to monitor plan investments and remove from its menu any investment options that are imprudent. Companies that include Bitcoin (or any other digital assets in their 401(k) menu) should ensure that they have a robust monitoring process in place because they may end up being audited by EBSA.

Nonetheless, this development serves as more direct evidence that there is an increasing demand from the workforce to have access to crypto products. While several financial experts expect that crypto may eventually have a place in 401(k) offerings, the time period for this adoption, and the parameters for such inclusion, remain to be seen. We expect this debate to continue. In the meantime, companies and fiduciaries should continue to monitor these developments, as well as guidance from the EBSA, in order to determine what makes the most sense for their business and their workforce.