

Client Alert

Corporate

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U.S. Department of Labor Updates: Yes to Crypto and No to ESG?

On May 28, 2025, the U.S. Department of Labor (“DOL”) provided updated guidance on two employee benefit plan-related investment areas: (1) cryptocurrency and (2) environmental, social, and governance (“ESG”) investing.

Cryptocurrency: Biden Administration guidance “caution[ed] plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option” to the investment menu of a self-directed 401(k) plan. When that guidance was released, we commented that it was a significant departure for the DOL to indicate that it would view an entire asset class with skepticism.¹ Now, Compliance Assistance Release No. 2025-01 (“CAR 2025-01”) rescinds the Biden Administration’s guidance on the permissibility of 401(k) plans investing in cryptocurrencies because the standard of “extreme care” is not found in the Employee Retirement Income Security Act of 1974.

In CAR 2025-01, the DOL clarified that it was neither endorsing, nor disapproving of, investment in digital assets (e.g., tokens, coins, crypto assets and any derivatives). Rather, it would review the fiduciary consideration of and action with respect to such investments by an employee benefit plan as it would for any other investment class.

ESG Investing: During the first Trump Administration, the DOL finalized a rule requiring that fiduciaries evaluate and select investments based on pecuniary factors (i.e., factors that bear on the risk and/or return of an investment) and only consider non-pecuniary factors, such as ESG, in the very rare circumstance where all else is equal.

The Biden Administration revoked this rule and supplanted it with a rule that somewhat more readily allowed for the consideration of ESG factors, particularly as such factors relate to the risk and return of an investment. That rule has been controversial, requiring President Biden to veto joint

resolution by the House and Senate seeking to block the rule, but was upheld twice by a U.S. District Court in Texas.

In April, the U.S. Court of Appeals for the Fifth Circuit gave the DOL 30 days to decide whether to maintain the Biden-era rule or rescind it. On May 28, 2025, the DOL told the court it intends to engage in rulemaking relating to this regulation, which will appear on the DOL's spring regulatory agenda. The DOL's position reflects the fact that, unlike the cryptocurrency guidance, the Biden Administration ESG rule can only be rescinded through the rulemaking process. Time will tell, but that effort will likely result in more restrictions regarding the consideration of ESG factors in employee benefit plan investments.

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ⁱ Please find our Client Alert on that Compliance Assistance Release No. 2022-01 [here](#) .