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401(k)s with Bitcoin Should Expect Lawsuits: Lawyers

Bitcoin in 401(k)s would test the prudence standard of the Employee Retirement Income Security Act, a lawyer said.

By [Joe Morris](#) | June 2, 2022

Plan sponsors that allow cryptocurrency in their 401(k)s could be exposing themselves to a “very serious risk of a fiduciary breach,” one lawyer said.

A new account from Fidelity, [due to launch](#) this summer, would allow participants in workplace plans to allocate up to 20% of their balances to Bitcoin and eventually other cryptocurrencies, as long as their plan sponsor allows it.

The **Labor Department** has [raised](#) “grave concerns” over the new account, but Fidelity is undeterred.

“We are proud of our Digital Asset Account offering,” a spokesperson said, calling it “a responsible solution that allows plan sponsors to decide how to meet the demands of mainstream interest in crypto and provide their employees with exposure to digital assets within their 401(k).”

Even if Fidelity finds a way to appease the DOL, however, the plaintiffs bar will be waiting.

“Any employer who would follow the Fidelity lead by offering cryptocurrency and 401(k) plan is exposing itself to very serious risk of a fiduciary breach,” said **Jerry Schlichter**, whose firm, **Schlichter Bogard & Denton**, has won more than \$1.5 billion for clients in retirement plan litigation.

No other major recordkeeper has indicated plans to allow Bitcoin in the 401(k)s they administer.

As an unproven, highly volatile investment, Bitcoin would test the prudence standard under the Employee Retirement Income Security Act, Schlichter said.

The account will carry a fee of up to 90 basis points, plus undisclosed commission fees, which would be 20 times as much as a simple index fund, he said.

“Cryptocurrency is not a proven long-term investment vehicle,” he said.

But allowing allocations to an imprudent and excessively expensive investment would not necessarily open plan sponsors to a claim of fiduciary breach, said **Mark Greenstein**, a lawyer with **The Wagner Law Group**.

“There’s some debate, but I personally believe that the only way you get out from under it is by 404(c),” said Greenstein, who helped draft the Erisa section during his time as a lawyer in the DOL’s Employee Benefits Security Administration.

Section 404(c) of Erisa releases plan sponsors from liability for participants’ investment decisions when they cede full control of investing decisions to the participants.

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A series of conditions apply, chief among them being that the participants must have access to a “broad range of investment alternatives.”

To accommodate an investment as volatile as Bitcoin, plan sponsors would likely need to offer an effectively unlimited universe of investments, Greenstein said, including any domestic security and possibly even foreign ones as well as other cryptocurrencies, via a brokerage window.

“If you did something like that, I think there’s a decent argument that you’re absolved,” he said. “Because then everything is a direct and necessary consequence of the person’s exercise of control.”

Another route that could shield plan sponsors with Bitcoin in their plans from litigation would be to let participants roll their plan assets into an IRA for the purposes of investing in digital assets, Greenstein said. The plan sponsor

could leave the door open for participants to roll their assets back into the plan later, he said.

Fidelity's spokesperson declined to say whether the firm would structure the digital accounts to qualify for 404(c) protections.

Fidelity's [announcement](#) of the account implies the Bitcoin exposure would not be achieved by way of a brokerage window. Instead, Bitcoin will be available "through the core 401(k) plan investment lineup," it says.

The spokesperson also said that the plan participants would not receive their exposure to Bitcoin through the firm's Wise Origin Bitcoin Index Fund.

Schlichter, however, said that 404(c) protections would not provide a safe harbor anyway.

He pointed to a Supreme Court [decision](#) handed down in January that found that plan sponsors could not escape their responsibility for allowing imprudent investments in their plans even if they feature them alongside prudent ones. Schlichter represents the plaintiffs in that case, participants in **Northwestern University's** 403(b) plan.

"They said, 'No, the employer plan sponsor has the duty to furnish only prudent options,' and the same applies here," he said.

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