Crypto
Council for
Innovation

June 14, 2022

Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration
200 Constitution Ave NW
Suite N-5677
Washington, DC 20210

Re: Compliance Assistance Release No. 2022-01, 401(k) Plan Investments in "Cryptocurrencies"

Dear Mr. Khawar:

The Crypto Council for Innovation ("CCI") submits this letter to the Department of Labor in response to the Department's "Compliance Assistance Release No. 2022-01, 401(k) Plan Investments in 'Cryptocurrencies'" ("Release").[1] CCI is deeply concerned that the Release in effect categorically precludes 401(k) administrators from including crypto investment options in their plans, based on a factually and legally flawed analysis. Therefore, we urge the Department to rescind the Release and clarify that retirement plan administrators may offer crypto investment options consistent with their ordinary fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA"). We also urge the Department to commence a more open, inclusive, and deliberative process to develop guidance for the inclusion of crypto assets on 401(k) investment menus, consistent with the President's "Executive Order on Ensuring Responsible Development of Digital Assets."[2] Finally, we request that the Department consider the information in this letter as it participates in the interagency process prescribed by the Executive Order and develops appropriate guidance regarding crypto assets.

CCI shares the Department's commitment to "ensur[ing] the security of the retirement, health, and other workplace-related benefits of America's workers and their families" and supports the Department's effort to do so "by developing effective regulations; assisting and educating workers, plan sponsors, fiduciaries and service providers; and vigorously enforcing the law."[3] However, we respectfully submit that the position reflected in the Release (as well as in recent public statements by senior Department officials) is not fully aligned with this commitment or the Administration's approach to cryptocurrencies embodied in the Executive Order or established legal standards because it:

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[1] Dep't of Labor, Compliance Assistance Release No. 2022-01, 401(k) Plan Investments in "Cryptocurrencies" (Mar. 10, 2022), https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01.

[2] Executive Order, Executive Order on Ensuring Responsible Development of Digital Assets (Mar. 9, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/.

[3] Dep't of Labor, Employee Benefits Security Administration, About Us, "Our Mission," https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/mission-statement (last accessed June 13, 2022).

- Departs from the text of ERISA and judicial precedents and Department regulations interpreting that text by replacing the ordinary fiduciary duty of prudence with a new standard of "extreme care."
- Narrowly considers only the risks of cryptocurrencies while disregarding their potential benefits, including growth and portfolio diversification. As with any other type of investment option, plan fiduciaries must consider both the risks *and* the potential benefits of cryptocurrencies.
- Invents an approach that, because of its exclusive consideration of risks, would deter plan fiduciaries from including myriad other types of investment options in their plans—because all investment options have risks—even though such options have long been appropriately included in plans and have generated significant returns for many plan participants.
- Ignores interest from investors, including plan participants, for assets with features offered by cryptocurrencies, such as assets that are supply inelastic or that are tied to the performance of one or more currencies; and
- Is inconsistent with the Executive Order's directive to conduct an interagency process to support the responsible development of digital assets.

We provide more detail on each of these points below.

ABOUT CCI

CCI is an alliance of crypto industry leaders with a mission to communicate the benefits of crypto and demonstrate its transformational promise. CCI members include some of the leading global companies and investors operating in the crypto industry, including Andreesen Horowitz, Block (formerly Square), Coinbase, Electric Capital, Fidelity Digital Assets, Gemini, Paradigm, and Ribbit Capital. CCI members span the crypto ecosystem and share the goal of encouraging the responsible global regulation of crypto to unlock economic potential, improve lives, foster financial inclusion, protect national security, and disrupt illicit activity. CCI and its members stand ready and willing to work with the Department and the Administration to accomplish these goals and ensure that the most transformative innovations of this generation and the next are anchored in the United States.

INTRODUCTION

The Release takes a one-sided, highly negative view of crypto assets, seeing (and amplifying) only their risks without acknowledging the opportunities they offer or placing them in context with other investment options, which pose their own risks.[4] Accordingly, the Release admonishes fiduciaries to exercise "extreme care" with respect to such crypto investment options. Unfortunately, the Release is silent on how to properly manage these potential issues and how they compare to those associated with other potential classes of investment. Rather, the Release threatens enforcement for any deployment of assets into cryptocurrencies (or into assets

[4] Although the Release's title refers to "cryptocurrencies," the Release states that "the same reasoning and principles also apply to a wide range of 'digital assets' including those marketed as 'tokens,' 'coins,' 'crypto assets,' and any derivatives thereof." Release at n. 1.

whose value is tied to them), stating that the Department "expects to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies and related products."[5] And its condemnation of crypto will lay a foundation for plan participants to hold fiduciaries personally liable for any losses resulting from crypto investments.[6]

Few, if any, fiduciaries will be willing to assume the risk of public and private enforcement and personal liability, and therefore the Release as a practical matter bans crypto investment options categorically from use in 401(k) plans—even where a fiduciary might conclude that it would be appropriate to include a crypto-related investment option consistent with ordinary fiduciary duties after taking into consideration not only the risks of crypto but also the opportunity for gain and the options for risk diversification crypto may afford. Moreover, the Release gives this effective ban a sweeping scope by applying its position not only to "cryptocurrencies" but also to "related products" and "other products whose value is tied to cryptocurrencies"[7]—vague and undefined terms that could cover a wide range of investment options, given some companies' deployment of assets into cryptocurrencies or related products or businesses. Consequently, the Release could broadly chill cryptocurrency investments by a significant proportion of American investors.

The Release's posture toward crypto is at odds with many of the Biden Administration's policy priorities, including reinforcing the country's leadership in the development of digital assets, facilitating increased retirement planning, and expanding access to financial services for underbanked and underserved people. The Release is also at odds with the interests of plan participants, who would be unable to take advantage of benefits provided by cryptocurrencies, and correspondingly with fiduciaries' overarching ERISA duty to serve plan participants' interests by offering a diverse and balanced array of investment options after careful consideration of both their risks and their potential benefits.

The Release's many weaknesses presumably reflect its hasty development and adoption. On March 9, 2022, President Biden directed the Department (and other agencies) to study various issues relating to cryptocurrency and to prepare a report with policy recommendations, including actions to "support expanding access to safe and affordable financial services" within 180 days.[8] Yet, the very next day the Department issued the Release. Further, the Department sought no public comment on the Release, despite the benefits of, and norms supporting the solicitation of, public comment on significant administrative policymaking.[9] Indeed, the

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[5] Release ¶5.
[6] 29 U.S.C. §1109(a); *see* Release ¶2.
[7] Release ¶4.
[8] Executive Order §5(b)(i).
[9] *See, e.g.*, Cass Sunstein, *"Practically Binding": General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491, 500 (2016) ("notice-and-comment … promotes legitimacy …: Policymakers might find out that their plan is in one or another respect misdirected"); Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. 127, 129 (1994) ("rulemaking procedures are refreshingly democratic: people who care about legislative outcomes produced by agencies have a structured opportunity to provide input into the decisionmaking process"); Mark Seidenfeld, *A Civil Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1515 (1992) ("having administrative agencies set government policy provides the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity").

Department's procedural shortcut has already prompted a lawsuit to invalidate the Release.[10] Recent statements by senior Department officials to the media and at industry conferences have compounded the Release's problems by reinforcing the threat of enforcement for offering crypto investment options while further clouding the precise standards and expectations to which plan fiduciaries will be subject.[11] The regulatory climate created by the Release and the Department's recent accompanying public statements harms both plan fiduciaries and plan participants.

Given the Release's potentially far-reaching consequences, the Department should rescind the Release, clarify that retirement plan administrators could include cryptocurrency investment options consistent with their fiduciary duties, and commence a more open, inclusive, and deliberative process to develop guidance for the inclusion of cryptocurrency on 401(k) investment menus.

The Release Impermissibly Changes the Fiduciary Duties of Plan Administrators in the Cryptocurrency Context

The Labor Department's Release is at odds with the duties of 401(k) plan fiduciaries under ERISA—as stated in the statute and as interpreted by both the courts and the Department's own regulations—in a number of ways. In fact, by strongly discouraging plan fiduciaries from offering crypto investment options, based on a purely negative view of their potential, the Release will pressure fiduciaries to act contrary to the interests of plan participants and their ERISA duties.

First, the Release indicates that the Department intends to require greater caution with respect to cryptocurrencies than ERISA requires. Under ERISA, retirement plan fiduciaries owe participants a duty to act 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 in the conduct of an enterprise of a like character and with like aims."[12] The courts have generally recognized that this means that an ERISA plan fiduciary must act as an ordinary prudent trustee.[13] Similarly, the Department's regulations recognize that ERISA requires "reasonable" prudence.[14]

Yet, the Release "cautions plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option."[15] ERISA does not require "extreme care," and the Department

[10] Complaint, *ForUsAll, Inc. v. Dep't of Labor*, 1:22-cv-01551 (D.D.C. June 2, 2022), ECF No. 1.
[11] *See, e.g.*, Sam Sutton, *Bitcoin's crashing. The Biden administration wants to keep it out of your 401(k)*, Politico (May 13, 2022), https://www.politico.com/news/2022/05/13/bitcoin-crashing-fidelity-401k-00031241.
[12] 29 U.S.C. §1104(a)(1)(B).
[13] *See, e.g.*, *Skelton v. Radisson Hotel Bloomington*, 33 F.4th 968, 976 (8th Cir. 2022) ("ERISA fiduciaries have a duty of prudence—to exercise care and skill as a man of ordinary prudence would."); *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 242 F.3d 497, 509 (3d Cir. 2001), *as amended* (Mar. 20, 2001) ("The law requires only that a fiduciary deal fairly with his beneficiaries and, in doing so, that it exercise such care and skill as a man of ordinary prudence would exercise in his own affairs."); *Teamsters Loc. 282 Pension Tr. Fund v. Angelos*, 839 F.2d 366, 372 (7th Cir. 1988) (ERISA requires "ordinary prudence"); *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984) (ERISA imposes "a duty to exercise such care and skill as a person of ordinary prudence would exercise in dealing with his own property"); 29 C.F.R. §2550.404a-1(b)(2).
[14] 29 C.F.R. §2550.404a-1(b)(2).
[15] Release ¶1.

cannot impose a higher standard of care on fiduciaries generally or with respect to a specific asset class than ERISA sets.[16]

Second, the Release suggests that, with respect to cryptocurrencies, the Department intends to impose a duty that is different in kind from ERISA's duty of prudence. Under ERISA, the duty "focuses on a fiduciary's conduct in arriving at an investment decision, not on its results, and asks whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment."[17] Correspondingly, Department regulations state that in selecting investment options, plan fiduciaries fulfill their fiduciary duty under ERISA by "giv[ing] appropriate consideration to [the relevant] facts and circumstances" and "act[ing] accordingly."[18]

The Release, however, threatens enforcement action against plan fiduciaries based on the *substance* of particular investment decisions—to offer crypto investment options—rather than the process used by fiduciaries to select and offer such assets. The Department cannot alter the fundamental nature of the duty imposed by ERISA or impose an additional duty beyond those defined by ERISA.[19]

Third, the Release would interfere with plan fiduciaries' performance of their ERISA duty to make investment decisions based on a holistic analysis of each investment option. Under ERISA, "the prudence of each investment is not assessed in isolation but, rather, as the investment relates to the portfolio as a whole."[20] Thus, Department regulations mandates that plan fiduciaries "give[] appropriate consideration to … the role the investment or investment course of action plays in … the plan's investment portfolio."[21] That includes considering whether the investment option is "reasonably designed … to further the purposes of the plan, taking into consideration" both the investment option's "risk of loss" and its "opportunity for gain" "compared to" to the alternative options' potential for loss or gain.[22]

By threatening enforcement action based on the inclusion of digital asset options in a plan, however, the Release strongly deters plan fiduciaries from giving crypto investment options the holistic consideration required by ERISA. Fiduciaries could face enforcement liability—or at a minimum, the burden and expense of defending against an enforcement action—for including digital asset options in their plans, even if they had determined that such options were appropriate. Conversely, fiduciaries apparently could safeguard themselves against Department enforcement action by categorically excluding digital asset options, again even if they

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[16] *See, e.g.*, *Chamber of Com. of U.S. of Am. v. United States Dep't of Labor*, 885 F.3d 360, 368 (5th Cir. 2018) (invalidating Labor Department regulation because it "expanded the statutory term 'fiduciary'"); *National Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").
[17] *Pension Ben. Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc. ("PBGC")*, 712 F.3d 705, 716 (2d Cir. 2013); *see also, e.g.*, *Stegemann v. Gannett Co.*, 970 F.3d 465, 474 (4th Cir. 2020); *Sweda v. Univ. of Penn.*, 923 F.3d 320, 329 (3d Cir. 2019); *Fink v. Nat'l Sav. & Tr. Co.*, 772 F.2d 951, 955 (D.C. Cir. 1985).
[18] 29 C.F.R. §2550.404a-1(b)(1).
[19] *See supra* note 16.
[20] *PBGC*, 712 F.3d at 717.
[21] 29 C.F.R. §2550.404a-1(b)(1)(i).
[22] 29 C.F.R. §2550.404a-1(b)(2)(i).

determined that such assets were appropriate and superior to the alternatives in specific circumstances. Put another way, the Release discourages plan fiduciaries from exercising their best judgment in selecting investment options—when the Department should be *encouraging* fiduciaries to exercise such judgment.

Moreover, the analysis of cryptocurrencies on which the Release bases its threat of enforcement action does not reflect the type of rational, holistic assessment required by ERISA. The Release treats cryptocurrencies as categorically dangerous investments, exclusively and repeatedly discussing their risk of loss without ever mentioning their opportunities for gain. Like plan fiduciaries in making investment decisions, the Department cannot blind itself to the opportunity cost of risk aversion to plan participants in providing guidance or making enforcement decisions.

Relatedly, fiduciaries must "diversify[] the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so."[23] Diversification itself is a sensitive and multi-factor analysis regarding the plan, the portfolio, and the investment options.[24] In contrast, the Release focuses on *one* consideration: whether a fiduciary includes crypto investments. Under some circumstances, digital asset options could enhance a plan's diversification, enabling participants to protect against some risks, or to balance a generally lower-risk portfolio. By categorically condemning crypto investment options and threatening enforcement action for including them in retirement plans, however, the Release will prevent fiduciaries from taking advantage of crypto investment options to diversify their plans' offerings.

The Department Should Not Disregard the Administration's More Balanced Approach to Cryptocurrencies

In contrast to the approach reflected in the Release, the Executive Order and subsequent statements about its implementation by the Secretary of the Treasury reflect a view of cryptocurrency that focuses not on the risks involved in the asset class, but rather on getting the cryptocurrency regulatory framework right in light of a full appreciation of both risk and potential benefits. The Department should embrace this holistic and balanced approach so it does not lose sight of the potential benefits of cryptocurrency as it continues to develop its position on digital assets.

The day before the Department issued its Release, the President issued the Executive Order charting a whole-of-government effort to ensure that all Americans have "expand[ed] access to safe and affordable financial services."[25] The Executive Order embodies an "approach to digital assets … that encourages innovation but mitigates the risks."[26] The Executive Order

[23] 29 U.S.C. §1104(a)(1)(C).
[24] *PBGC*, 712 F.3d at 717.
[25] Executive Order §1(e).
[26] Executive Office of the President, Statement by NEC Director Brian Deese and National Security Advisor Jake Sullivan on New Digital Assets Executive Order ¶2 (Mar. 9, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/statement-by-nec-director-brian-deese-and-national-security-advisor-jake-sullivan-on-new-digital assets -executive-order/.

promotes "United States leadership in the global financial system [that] will sustain United States financial power and promote United States economic interests."[27] It also expresses hope that digital assets can assist "those Americans underserved by the traditional banking system" and that they can help "ensur[e] that the benefits of financial innovation are enjoyed equitably by all."[28] Through the Executive Order, the President specifically directed the Department to work with the Secretary of the Treasury and other agencies to develop recommendations to expand access to safe and affordable financial services.[29] To do so, the President declared, the Department must consider "the risks *and opportunities*" that wide adoption of different types of digital assets "might present to United States consumers, investors, and businesses."[30]

In a recent speech, the Secretary of the Treasury, Janet Yellen, articulated her approach to digital assets and implementing the Executive Order, which mirrors the President's and is focused on "responsible innovation."[31] This includes evaluation of both the downside and upside potential of digital assets. Like the Department of Labor, Secretary Yellen recognized that crypto assets can be used for fraudulent ends, just as traditional financial products can be, and agrees that the government should guard against such misuse.[32] She ended her statement, however, with optimism about the future predicated on the benefits of crypto assets: "Think of the development of the national highway system, the space race, the creation of the internet, or the ongoing revolution in biotechnology. All of these innovations have transformed the way we live our lives."[33] So too, she said, could digital assets, which have already "opened a world of possibilities and risks that would have seemed fantastical only a few decades ago."[34]

THE MANY BENEFITS OF INCLUDING CRYPTOCURRENCIES IN RETIREMENT PLANS

Instead of taking the approach embodied in the Release, the Department should consider some of the many benefits of cryptocurrency *alongside the risks* as it crafts its response to the Executive Order and its policies with respect to cryptocurrency more broadly. The Department's position should recognize the significant growth that crypto assets can experience despite their volatility and risk. Long-term retirement investors in particular could benefit from this growth potential. Crypto assets also hold significant appeal to categories of investors who have historically been marginalized from or reluctant to use traditional retirement planning options. These potential benefits dovetail for younger workers, who have tended to avoid retirement planning but who have shown a strong interest in crypto assets and have a long investment horizon. Retirement plan administrators, therefore, could include cryptocurrencies in a risk-appropriate manner to help encourage younger and underserved investors to participate in the retirement savings system.

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[27] Executive Order §2(d).
[28] *Id.* §2(e).
[29] *Id.* §3.
[30] *Id.* §5(b)(i) (emphasis added).
[31] Dep't of the Treasury, Remarks from Secretary of the Treasury Janet L. Yellen on Digital Assets at American University's Kogod School of Business Center for Innovation §I (Apr. 7, 2022), https://home.treasury.gov/news/press-releases/jy0706.
[32] *Id.* §III ¶2 ("For example, consumers, investors, and businesses should be protected from fraud and misleading statements regardless of whether assets are stored on a balance sheet or distributed ledger.").
[33] *Id.* §V ¶1.
[34] *Id.* ¶4.

The Volatility of Crypto Assets Can Provide Long-Term Opportunities for Growth

To provide enough money for retirement, a portfolio must increase in value. The longer the investment term, the less sensitive investors can be to short-term volatility and the more they can benefit from compounding growth. Thus, a common retirement strategy is to change the portfolio's mix of asset types over time, starting with higher-reward investments—even if riskier or more volatile—and later transitioning into lower-risk and lower-volatility investments to capitalize on the opportunity for large growth early on and to protect the gains as the investor approaches the time for withdrawing funds.[35] The Release acknowledges this venerable wisdom,[36] yet charts a regulatory position that disregards it.

Crypto investments could easily fit this paradigm as a growth asset, especially for long-term investors. For example, a fiduciary could compare the opportunity for growth from a given crypto investment to available equities, which are the traditional high-growth asset.[37] In one scenario, incorporating cryptocurrencies as a small part of a moderately aggressive long-term portfolio of 70% stocks and 30% bonds from 2017 to 2021 would have led to 42 percent higher investment returns over the period.[38]

The Department expressed concern about the volatility of crypto assets. However, even accounting for volatility, crypto assets may continue to grow over the medium- to long-term. For example, as of June 13, 2022, BTC's price has increased by about 4,600 percent since May 2016 (from $500 to more $23,000).[39] Similarly, ETH's price has increased about 11,000 percent since April 2016 (from $11 to more $1,200).[40] These growth figures are net of the recent market decline (which many other asset classes also experienced), and thus illustrate the potential for cryptocurrencies' growth over the long time horizons retirement planning contemplates. These are the kinds of data and analysis that a fiduciary exercising reasonable prudence ordinarily would consider when evaluating whether an investment option is an appropriate addition to a retirement plan—and here, these data suggest that cryptocurrencies may well be appropriate options. Categorically excluding crypto assets, by contrast, could deny retirement savers the opportunity to reap the potential rewards of crypto investments and leave them worse off.

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[35] Javier Simon, *How to Manage Your Portfolio's Asset Allocation at Any Age* ¶1, Smart Asset (May 11, 2022), https://smartasset.com/investing/asset-allocation-by-age.

[36] Release ¶4 (noting that "those approaching retirement" may be more sensitive to asset volatility).

[37] Simon ¶5, *supra* note 35 ("One common asset allocation rule of thumb has been dubbed "The 100 Rule." It simply states that you should take the number 100 and subtract your age. The result should be the percentage of your portfolio that you devote to equities like stocks.").

[38] Geoff Williams, *Should You Invest in Cryptocurrencies or the Stock Market?* ¶3, moneygeek (April 15, 2022), https://www.moneygeek.com/investing/crypto/cryptocurrency-or-stocks/ (analyzing the performance of a market-cap weighted index of crypto assets, the S&P 500 stock, and the S&P US Aggregate Bond Index).

[39] Kat Tretina, *10 Best Cryptocurrencies of June 2022*, Forbes Advisor (June 6, 2022), https://www.forbes.com/advisor/investing/cryptocurrency/top-10-cryptocurrencies/.

[40] *Id.*

Crypto Could Usefully Diversify Retirement Portfolios

Crypto assets could also be a useful addition to some portfolios by diversifying their assets. All markets and all investment options have risks, including traditional assets,[41] and diversifying the mix of assets in a portfolio is important to achieving stable long-term growth. The equities market is famously volatile. Speculation and over-investment in internet companies created the "dotcom bubble" of the late 1990s.[42] The NASDAQ Composite Index vaulted from 751 in January 1995 to 5,048.62 in March 2000.[43] The bubble then burst, and the NASDAQ lost $5 trillion in market value as a result.[44]

Commodities markets are similarly not safe from turmoil and are based on the availability of physical resources or natural events. Crop prices are a good example. Over multiple periods in recent decades, crop prices spiked and plummeted repeatedly due to changes in overseas demand, domestic supply, weather, and the prices of other commodities, among other factors.[45] During one saga in the 1970s, the prices for grains and oilseeds shot up and then remained volatile for an extended period.[46] Increased global demand for imports from countries with a large volume of petrodollars to spend coupled with poor crop yields globally due to poor weather conditions put pressure on prices to increase.[47] Prices of wheat, corn, and soybeans doubled or tripled during this period before declining sharply.[48] The prices rose substantially again, as governments, farmers, and consumers responded with export restrictions, ramped-up production, and lower consumption, respectively.[49] The cycle of price volatility continued throughout the decade before prices finally settled into a new equilibrium.[50]

Neither are gold and currencies safe from risk and volatility. Gold markets are often viewed as a haven in times of instability and a stable store of value.[51] But gold prices fluctuate

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[41] *See, e.g.*, Kate Davidson & Aubree Eliza Weaver, *'Talk about clueless': Calabria unloads on Washington* ¶7, POLITICO (May 17, 2022) (quoting a former FHFA director that currently "the risk in the mortgage market is of magnitudes far greater than anything we're seeing in crypto or stablecoins"), https://www.politico.com/newsletters/morning-money/2022/05/17/talk-about-clueless-calabria-unloads-on-washington-00032946.
[42] *See* Int'l Banker, History of Financial Crises, *The Dotcom Bubble Burst (2000)* ¶1 (Sept. 29, 2021), https://internationalbanker.com/history-of-financial-crises/the-dotcom-bubble-burst-2000/.
[43] *Id.* ¶2.
[44] *Id.*
[45] May Peters et al., Feature: Crops, *Agricultural Commodity Price Spikes in the 1970s and 1990s: Valuable Lessons for Today*, USDA ECON. RSCH. SERV. (Mar. 1, 2009), https://www.ers.usda.gov/amber-waves/2009/march/agricultural-commodity-price-spikes-in-the-1970s-and-1990s-valuable-lessons-for-today/.
[46] *Id.* ¶7 ("National Agricultural Statistics Service and World Agricultural Supply and Demand Estimates, 2008.").
[47] *Id.* ¶¶7-12.
[48] *Id.* ¶7 ("National Agricultural Statistics Service and World Agricultural Supply and Demand Estimates, 2008."), ¶22.
[49] *Id.*
[50] *Id.* ¶¶7, 21.
[51] *See, e.g.*, Vicky McKeever, *Why People Consider Fold to be a 'Safe Haven' in Crises Like the Coronavirus* ¶4, CNBC (Apr. 20, 2020) ("It is in such times of uncertainty that gold is touted as a "safe haven" for those looking for shelter from more traditionally volatile investments, like stocks."), https://www.cnbc.com/2020/04/20/coronavirus-why-gold-is-seen-as-a-safe-haven-investment-in-a-crisis.html.

significantly in response to fears and panic—rational or irrational.[52] Fear and uncertainty can drive the price of gold up as some investors attempt a flight to safety; gold prices can then plummet when the panic evaporates. A strong dollar and other countervailing pressures can also lower the price of gold even when it might otherwise rise, such as during periods of inflation or uncertainty.[53] Currencies—even those of highly stable countries—also fluctuate, sometimes due to inflation, and occasionally they crash, as the British Pound Sterling notoriously did in the early 1990s.[54] The UK had entered into a common exchange rate agreement with other European countries that linked the values of their respective currencies.[55] However, the link between the currencies was frustrated by the differences in the countries' individual economies.[56] As a result of the differences, the UK withdrew from the agreement, which was viewed as a sign of further inflation, and the Pound lost about a sixth of its value against the German Mark overnight.[57]

Volatility in assets is therefore hardly unique to crypto, and volatility alone should not be—and, indeed, has not been—cause to exclude those assets from a well-balanced portfolio. Rather, the appropriate response, as ERISA itself recognizes, is diversification, so that the risks posed by some asset classes are mitigated by the benefits of other classes, and vice versa. Crypto assets provide another opportunity to diversify the risks inherent in other types of investment options, just as other types of investment options can provide a mechanism to mitigate risks posed by crypto assets.

Including Cryptocurrency in Retirement Plan Options May Make Saving for Retirement More Attractive to Younger Americans

Having access to retirement plan options that include cryptocurrency is particularly important for younger Americans, who have the most to gain from potentially high-growth assets like crypto and who tend to have a stronger interest in crypto than some traditional options. An advantage of investing at a young age is that there are more years of compounding returns. Yet, until at least quite recently, a significant portion of younger generations have shown little interest in saving for retirement.[58] Younger workers who fail to save appropriately for retirement permanently forgo the significant opportunity of compounding returns, potentially necessitating that they continue to work past retirement age, put a greater proportion of their earnings into investments in hopes of compensating for the lost compounding later in life, or experience greater precarity in old age.

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[52] CME Grp., *Introduction to Gold Volatility Trading* ¶7 (Mar. 15, 2018), https://www.cmegroup.com/education/articles-and-reports/introduction-to-gold-volatility-trading.html.
[53] Arundhati Sarkar, *Gold Pressured by Stronger Dollar, Faster Fed Taper Bets* ¶¶1-2, Reuters (Nov. 22, 2021), https://www.reuters.com/markets/europe/gold-pressured-by-stronger-dollar-faster-fed-taper-bets-2021-11-22/.
[54] *See generally* Larry Elliott et al., *September 17 1992: Pound drops out of ERM*, The Guardian (Sept. 16, 1992), https://www.theguardian.com/business/1992/sep/17/emu.theeuro.
[55] *Id.*
[56] Craig R. Whitney, *Blaming the Bundesbank* ¶4, N.Y. Times Magazine (Oct. 17, 1993), https://www.nytimes.com/1993/10/17/magazine/blaming-the-bundesbank.html.
[57] *Id.* ¶4.
[58] Suzanne Woolley, *Plan for Retirement? Millennials Don't See the Point*, Bloomberg (Mar. 18, 2022), https://www.bloomberg.com/news/articles/2022-03-18/retirement-planning-45-of-millennials-gen-z-don-t-see-the-point#:~:text=Not%20only%20have%20many%20Americans,according%20to%20a%20new%20survey.

In contrast to this bleak picture, a sizable portion of younger workers today have shown interest in crypto and are already including crypto investments in their financial planning. Thirty-one percent of Americans ages 18-29 and twenty-one percent of Americans ages 30-49 have invested in, traded, or used a cryptocurrency compared to eight percent of Americans ages 50-64 and three percent of Americans over 65.[59] Thus, locking crypto investments out of retirement plans not only could deny workers the opportunity to choose an investment option they want but also could perniciously discourage younger Americans from saving as much as prudence counsels.

Crypto Assets Could be a Tool for Expanding Financial Inclusion and a Path to Building Wealth for Those Historically Excluded From the Traditional Financial System

Crypto investments have also proven attractive to communities of color and other communities that have historically been locked out of the traditional financial sector.

People of color have historically faced significant roadblocks to accessing means to accumulate wealth that were available to White Americans. Government policies and private actors long excluded people of color not only from home ownership,[60] but also from avenues to save for retirement on par with White Americans. For example, communities of color have faced discrimination in the ability to secure employment that provides access to stable retirement plans. As the Department recently highlighted, Black employees are 15 percent less likely than their White counterparts to have access to a job-based retirement plan.[61] In addition, 62 percent of Black working-age households lack assets in a retirement account, in contrast with 37 percent of White households in the same situation.[62] Even when workers of color can access a retirement plan or otherwise save for retirement, the wealth gap persists. Three-quarters of Black households ages 25-64 have less than $10,000 in retirement savings, compared to only half of White households, and among those close to retirement, households of color have one-fourth the average retirement savings ($30,000) of White households ($120,000).[63]

In contrast, communities of color and those who have been historically excluded from full access to the traditional financial system have not faced the same obstacles to owning crypto assets. Indeed, such groups have shown great enthusiasm for purchasing cryptocurrencies. As the Acting Comptroller of the Currency, Michael Hsu, recently noted, people of color own crypto

[59] Andrew Perrin, *16% of Americans say they have ever invested in, traded or used cryptocurrency* ¶3, Pew Rsch. Ctr. (Nov. 11, 2021), https://www.pewresearch.org/fact-tank/2021/11/11/16-of-americans-say-they-have-ever-invested-in-traded-or-used-cryptocurrency/.

[60] Sylvia Foster-Frau, *Locked Out of Traditional Financial Industry, More People of Color are Turning to Cryptocurrency* ¶16, Wash. Post (Dec. 1, 2021), 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.

[61] Dep't of Labor Advisory Council on Employee Welfare & Pension Benefit Plans, Report to the Honorable Martin Walsh, U.S. Sec'y of Labor, Gaps in Retirement Savings Based on Race, Ethnicity and Gender 28-29 (Dec. 2021), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-gaps-in-retirement-savings-based-on-race-ethnicity-and-gender.pdf.

[62] *Id.*

[63] *Id.*

assets at rates comparable to, and sometimes higher than, White Americans.[64] Eighteen percent of Black Americans and twenty percent of Hispanic Americans own crypto, in comparison to eleven percent of White Americans.[65] In addition, the underbanked own crypto at a higher rate (thirty-seven percent) than the fully banked (ten percent).[66] Some people of color report their experience with crypto as a "unique opportunity to even the playing field" and to get in on the ground floor of a growing sector.[67] Because crypto is a new sector, it affords the opportunity to guard against the bias and discrimination in the traditional financial system.[68] As one policy leader put it, speaking of people of color, crypto offers opportunities long denied to build wealth "for your community[and] … for the next generation."[69]

The ability to choose crypto assets in a retirement plan could be particularly important for groups that have for too long faced discrimination, including in financial services, and have been unable to build wealth as a result. Excluding crypto assets could be particularly pernicious given the tax benefits and opportunities for financial planning associated with retirement plans. For example, in the case of pre-tax contributions from both the employee and employer, these benefits help savers grow the value of their portfolio, take advantage of compounding returns, and reduce taxable income until funds are withdrawn. In a Roth IRA, the employee would receive the tax benefits on the back end, when the funds are withdrawn. These are the types of strategies that build wealth, and categorically excluding cryptocurrency from those plans could discourage historically underserved communities from participating in them.

Plan Fiduciaries and Other Experts Can Help Retirement Savers Understand and Manage Risks Associated With Crypto Investment Options

Although certain methods of holding crypto investments may be difficult for some investors, and some investors may benefit from additional education about the nature of crypto investments,[70] the Department fundamentally misunderstands the role retirement plan administrators can play in the cryptocurrency ecosystem. Just as plan administrators have helped participants understand and account for the risks inherent in other types of investment options, administrators can also help with respect to crypto risks, such as by providing a safe place to store crypto assets and a structured channel to communicate risk considerations to investors that will allow them to make informed choices about how to allocate their assets. For many investors today, the alternative is increasingly to invest in crypto directly, *without* the structure afforded by regulated 401(k) plans and administrators subject to strong fiduciary duties. For these reasons, the Department should *encourage* rather than *discourage* plan administrators to include cryptocurrencies in their retirement plans when they deem it appropriate.

In the last few years, retirement funds, insurers, and others in the retirement sector have begun incorporating crypto into the retirement landscape and building additional infrastructure to

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[64] Michael J. Hsu, Comptroller, OCC, Remarks before the British American Business Transatlantic Finance Forum 1-2 (Jan. 13, 2022), https://www.occ.treas.gov/news-issuances/speeches/2022/pub-speech-2022-2.pdf.
[65] *Id.*; Nasdaq, *The Importance of Women in Crypto Leadership Positions* ¶5 (Apr. 29, 2022), https://www.nasdaq.com/articles/the-importance-of-women-in-crypto-leadership-positions.
[66] Hsu, *supra* note 64.
[67] Foster-Frau ¶34, *supra* note 60.
[68] *Id.* ¶12.
[69] *Id.* ¶6.
[70] Release ¶4.

support crypto-investing for retirement. For example, CalPERS, Pimco, the Houston Firefighters' Relief and Retirement Fund, and the Fairfax County (Virginia) Police Officers Retirement System have all begun investing directly in crypto assets like Bitcoin or in crypto-related companies or investment funds.[71] In addition, MassMutual is in the process of offering new technology platform to help registered investment advisors provide advice and support for digital asset investments, and is developing solutions to simplify billing.[72]

It is easy to see why retirement plans are entering the cryptocurrency market. Retirement plan administrators can help participants by selecting appropriate crypto investments as options and are likely better positioned than an average plan participant to assess individual investment options and to diversify risk.[73] This is as true of cryptocurrency investments as it is of equity, debt, and other traditional investments. Retirement plan administrators may also have the benefit of economies of scale to secure expert advice and institutional infrastructure.[74]

Plan administrators also have the resources to invest in cryptocurrencies through institutional-grade platforms like custodians, which can provide a safer option for people who want to make cryptocurrency a part of their saving and investment strategy than would be available to individual retail cryptocurrency holders. Indeed, while individual retail investors may have to store cryptocurrency as "lines of computer code" in individual self-housed wallets,[75] retirement plan administrators are likely to choose professional custodians.

With all these resources, administrators can ensure that participant funds are well safeguarded.

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The Department's Release appears to have considered none of these important advantages to crypto or their implications for the proper discharge of plan administrators' fiduciary duties. The Release contains no discussion of the opportunity for gain, just the risk of loss; no discussion of the distributional consequences of a practical bar on crypto investments by retirement plans; and no discussion of whether retirement plans may be *superior* vehicles for Americans to gain exposure to cryptocurrency investments as opposed to the alternatives. Instead, the Department offers an ill-considered promise of enforcement against plan administrators who seek to help their participants gain exposure to an asset class from which

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[71] Lawrence Wintermeyer, *Pension And Sovereign Wealth Funds Eye Crypto As Regulators Focus On A Global Crypto Framework*, FORBES (Dec. 30, 2021), https://www.forbes.com/sites/lawrencewintermeyer/2021/12/30/pension-and-sovereign-wealth-funds-eye-crypto-as-regulators-focus-on-a-global-crypto-framework/?sh=330216cc7399.

[72] Samuel Steinberger, *MassMutual Launches Crypto Subsidiary for RIAs* ¶1, WEALTHMANAGEMENT.COM (Sept. 30, 2021), https://www.wealthmanagement.com/technology/massmutual-launches-crypto-subsidiary-rias.

[73] Dep't of Labor, *Meeting your Fiduciary Responsibilities* 2 (Sept. 2021) ("The duty to act prudently is one of a fiduciary's central responsibilities under ERISA. It requires expertise in a variety of areas, such as investments."), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf.

[74] *Id.* ("Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions.").

[75] Release ¶4.

they may benefit. That threat is neither supported by the facts nor consonant with the Administration's priorities.

For all the foregoing reasons, we urge the Department to rescind the Release, clarify that retirement plan administrators may offer crypto investment options consistent with their ordinary fiduciary duties under ERISA, and commence a more open, inclusive, and deliberative process to develop guidance for the inclusion of cryptocurrency on 401(k) investment menus.

Sincerely,

Sheila Warren, Esq.
Chief Executive Officer
Crypto Council for Innovation

cc: Timothy Hauser, Deputy Assistant Secretary for Program Operations, Employee Benefits Security Administration