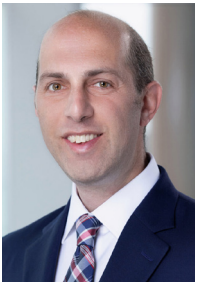


401(k) investing: ESG, crypto and fiduciary risks

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For many Americans, the world of investing is challenging – there is a seemingly endless list of possible investments with a language that is unfamiliar to many and with very few guardrails. Accordingly, many Americans are not managing a diversified portfolio on their own. At the same time, however, more and more Americans are participating in retirement plans that allow participants to invest in a select list of investments. Traditionally, self-directed 401(k) plans offer a smorgasbord of different investment choices, and for many Americans, their self-directed 401(k) is one of their few (if not only) forays into investing. In contrast to individual investing, plan fiduciaries are often tasked with selecting 401(k) investment choices, and as such are responsible for:

- Acting solely in the interest of the participants (and beneficiaries, if applicable).
- Carrying out their duties with the care, skill, prudence and diligence of a prudent per-

son familiar with the matters – this includes ensuring the prudence of investment options on an ongoing basis.

- Following the plan documents.
- Diversifying plan investments, so the investment choices are usually “safe” mutual funds and similar types of investment classes; riskier investments (for example futures contracts or foreign currency trading) tend to be either disallowed outright or strongly disfavored.

Plan participants will often choose a few of the investment choices and hope that those investments will grow over the course of their careers so they have more money when they retire.

Over the past several years, and particularly in 2025, two issues that reflect political trends have migrated into the 401(k) investing space: environmental, social and governance (ESG) and cryptocurrency.

ESG investing allows for considering the sustainability and ethical factors of an investment. In other words, investing in Greenpeace versus investing in an industry such as oil or alcohol. Pro-

ponents of ESG investing believe that an investment’s impact on people and the world around us is an important value that should be considered. Opponents, on the other hand, think that an investment is designed to make money, as the basic corporate purpose is to return profit to shareholders, and therefore, considering any non-economic factor is inappropriate. Crypto is a digital currency that is not linked to any central bank; its value is largely determined by supply and demand as opposed to factors that impact traditional currency. Crypto is considered by many to be a complex and volatile investment, as indicated by wild swings in some of the various cryptocurrencies.

With respect to ESG 401(k) investments, the first Trump administration strongly disfavored these investments and placed onerous reporting requirements on plan sponsors who utilized ESG factors in 401(k) investments. By contrast, ESG investments were strongly favored as a general policy matter during the Biden administration, and ESG considerations were permitted as a way to evaluate 401(k) investments, especially as a tiebreaker when all

other factors were roughly equal. Unsurprisingly, the current Trump administration is seeking to revert back to not allowing ESG considerations in 401(k) investments.

Similarly, in 2022, during the Biden administration, the U.S. Department of Labor urged plan fiduciaries to exercise “extreme care” before inserting crypto investments into the menu of 401(k) investment choices. The Department of Labor recently rescinded that guidance and now takes a neutral approach to inserting crypto investment into the menu of 401(k) investment options, essentially leaving the decision to plan fiduciaries. The current Trump administration tends to favor crypto in general. It is worth noting that the Department of Labor is also considering allowing private equity investments for 401(k) participants, but that discussion is beyond the scope of this article.

Both ESG and crypto have appealing aspects for an investor — in terms of ESG, everyone would agree that protecting the environment is a laudable goal; in terms of crypto, everyone would agree that holding an asset that appreciates many times over is positive. However, in the 401(k) space, there is an added wrinkle to consider: the recent slew of 401(k) litigation. A key topic in many of these cases is the management (or mismanagement) of investment funds. Unlike the general corporate “business judgment rule” (basically respecting

a business decision even though it turned out poorly), which can provide some level of protection to corporate decision makers, 401(k) investment choices are subject to what might be considered a higher standard. Indeed, some plaintiffs have been successful in alleging that plan fiduciaries made imprudent investment decisions that depleted participants’ accounts, and some of these lawsuits have settled for tens of millions of dollars. These lawsuits obviously loom large in plan fiduciaries’ minds, as it is relatively easy to see how plaintiffs could plausibly claim that an ESG investment underperformed or that a particular crypto investment tanked.

Today’s highly politicized landscape has created an unpleasant situation in which relevant 401(k) investment guidance seems to change every time a new party comes into office, a situation that adds a fair amount of uncertainty and an expensive administrative burden for plan sponsors and fiduciaries to try to stay as compliant as possible with current guidance. Banning all ESG-focused investments and all crypto investments seems unduly harsh and goes against the strong undercurrent of participant choice. On the other hand, letting in all ESG-focused investments and all crypto investments may create a situation with too much volatility in participants’ accounts. Furthermore, even where the participants have significant control over their

401(k) accounts, fiduciaries retain some duties and cannot shift of all those duties to participants.

So where does this leave us? Plan sponsors have several ways to address these issues. The best course of action for plan sponsors appears to be a framework that:

- Includes a limited number of ESG-focused investments and crypto investments, but only after an extra careful vetting process.
- Provides very clear disclosures indicating that ESG investments and crypto investments carry an inherent amount of economic and/or political risk.
- Limits the percentages of accounts that can be invested in ESG-focused investments and crypto investments.
- Allows the fiduciaries the ability to rapidly switch allocations of ESG-focused investments and crypto investments as the circumstances warrant it.

This approach strikes a balance between countervailing interests. Most importantly, it protects participants, which is the primary economic and social goal of qualified retirement plans.

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