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Digital Assets in ERISA Plans and IRAs: It's a Brave New World

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Digital assets in retirement accounts covered by the Employee Retirement Income Security Act of 1974, as amended (ERISA) and individual retirement accounts (IRAs) established under Section 408(a) of the Internal Revenue Code of 1986, as amended (Code) pose compliance challenges. However, given the recent change in Presidential Administration and its views about investing in digital assets such as cryptocurrency and non-fungible tokens, legal counsel and compliance professionals should expect increased interest in and openness to using ERISA-covered accounts and IRAs to invest in digital assets and to otherwise take advantage of related technologies.[1]

This article sets forth some of the key compliance issues that financial services firms, plan fiduciaries and their advisers should consider when considering making digital assets available to ERISA-covered plans and IRAs and related technologies such as blockchain. These compliance issues include the following: (1) ERISA's fiduciary duty requirements; (2) ERISA's trust and indicia of ownership requirements; (3) ERISA's valuation and reporting requirements; (4) the Code's IRA custodian requirements, and (5) the Code's IRA reporting and valuation requirements. In addition to providing guidance on the current state of the law, we hope it will serve as a roadmap to regulators such as the Department of Labor (DOL or Department), Internal Revenue Service (IRS), and the Department of the Treasury (Treasury) to issue regulations and guidance that could make digital assets a more attractive investment option and to encourage the use of technologies such as blockchain, while protecting the interests of ERISA plan participants and beneficiaries and IRA owners.

Brief Overview of Digital Assets and Blockchain Technologies

Most people think of bitcoin, a form of cryptocurrency, when they hear the term "digital asset" However, the term "digital assets" is much broader and can encompass many types of cryptocurrency and other assets, particularly through the use of non-fungible tokens (NFTs). Furthermore, at the core of "digital assets" transactions is the use of blockchain technology, which potentially has much broader applications for transactions involving ERISA-covered plans and IRAs.

Bitcoin

To be sure, Bitcoin, a type of cryptocurrency, is the most common digital asset that comes to an investor's mind when making investment of ERISA-covered accounts or IRAs. The creators of Bitcoin intended that it be used as a peer-to-peer payment system, which did not require an intermediary such as a bank to enable payments.[2] Participants in the network exchange a "coin" or a fraction of a "coin" (Coin).[3] A coin is a digital file stored on a device such as a smart phone or laptop. The Coin has value because participants in the network perceive it to have value. This is different from hard currency issued by the United States or another government because the value of such currency is largely based on the perceived strength of the government issuing the currency.[4] A coin is more commonly referred to as a "token" when dealing with other digital assets (for example, NFTs). The terms are synonymous.

A network participant may use Coins to purchase goods and services from other participants willing to accept such form of payment. A Coin also may be converted to hard currency such as US dollars. Network participants engage in such transactions through platforms such as Coinbase and Gemini that offer applications through which the transactions can be conducted. Coins are stored in a "wallet," which is an encrypted computer file, on the Coin owner's phone, laptop or other device. In the event that a Coin holder wishes to transfer a Coin to another party, the transferor's wallet sends a combination of public and private keys to the transferee's wallet. Each wallet is identified by a public key.[5] Each party uses the private key to effect the transaction. This transfer has been described as a "…way to send someone a padlock with which to lock the item before it's sent while keeping the key to unlock the padlock…"[6]

The transaction is recorded on the "blockchain," an open, distributed ledger technology, effectively a database, where all transactions involving a Coin are recorded in a "verifiable and permanent way."[7] Each party in the network has access to the database and can view the transaction history of a Coin without the help of an intermediary. Each party on the network, also called a "node," has an alpha-numeric address, also called a "key." The party can choose to remain anonymous. The transactions occur between the transferor and transferee addresses and are recorded by the parties on the database. The transaction is called a "block." The other nodes in the network verify the transaction as being genuine. For example, they verify whether the transferor did in fact own the Coin and thus had the right to transfer it to the transferee. Each and every transaction will be recorded on the databased thus forming a "chain" of transactions. Once a transaction is entered on the database, it cannot be changed by any user of the database. In other words, the chain is unalterable except for the addition of transactions to the chain.[8] Additionally, a new Coin cannot be easily created by a node due to the computing power required to generate the new Coin. Therefore, the financial cost of generating the Coin would be more than the value of the Coin.[9]

As discussed, the intent of Bitcoin is to allow for financial transactions between users without the need for an intermediary such as a bank. Proponents of Bitcoin and other cryptocurrencies are of the view that the use of blockchain technology provides the same protections that would be available using an intermediary between the transferor and transferee. Blockchain does so by regulating the issuance of Coins, limiting the ability counterfeit, preventing double-spending, and otherwise ensuring safe transactions.[10]

Other Digital Assets

Since the conceptualization of Bitcoin in 2008, the cryptocurrency market has evolved and "cryptocurrency" as we have come to understand it is not just a payment transaction mechanism. Indeed, they do not function as "currency" as we normally think of it. In this regard, crypto products often are discussed in terms of a "token" rather than a "coin." We generally tend to more broadly classify them as "digital assets." For example, there are "distribution computation tokens," which often are referred to as a smart contract.[11] The tokens are self-executing contracts that "automate payments and the transfer of currency or other assets as negotiated conditions are met." There also is a "security token," which is "a token that represents stocks, bonds, derivatives, and other financial assets." More recently, "stable coins," which are cryptocurrency the value of which is pegged to other assets and collateralized with such other assets. Such assets may be a fiat currency (for example, US dollars), real assets (for example, gold) and other cryptocurrency. There also are stable coins that are not collateralized.[12]

There also are "fungible tokens" and "NFTs." Fungible tokens are interchangeable. For example, there is no difference between one Coin of Bitcoin and another. On the other hand, a "non-fungible token" or "NFT" is "unique and not interchangeable with another."[13] One example of a NFT is a digital work of art called "Everydays: The First 5000 Days."[14] The NFT served as an "electronic record corresponding to an image that lives entirely in the digital world." The NFT in 2021 sold for almost $70 million at a Christie's auction. An NFT in this example is a method for establishing ownership of a digital asset, distinguishing it from a digital image that was merely downloaded from the internet.[15] In addition to art, NFTs have been used to created NFT collectibles.[16] Furthermore, because NFTs are programmable, they can be used to effect a broad range of transactions. For example, an NFT can be used to provide access to a sporting event or serve as proof of purchase that triggers the delivery of a non-digital product.[17] The possibilities appear to be endless.

At the core of transactions involving the above-described assets, just like transactions involving Bitcoin, is the use of the blockchain as the means for effecting transactions. Blockchain proponents point to transaction efficiency, recordkeeping and security as they key attributes of using blockchain as a means of transacting digital assets. Additionally, it is easy to see how blockchain could be used to transact non-digital assets like hard currency, real assets and securities. All of this appears to be possible without a financial institution or other type of intermediary, assuming that applicable law would otherwise permit this. That, of course, is "the rub" because the law in most cases does not keep pace with developments in technology. Therefore, market participants will have to adjust their approach to digital assets to conform to applicable law or they will have to convince policymakers and regulators that the law should be changed to accommodate digital assets.

ERISA Fiduciary Standards and Digital Assets

ERISA's Duty of Prudence

Section 404(a) of ERISA sets forth ERISA's general fiduciary duty provisions. The fiduciary duty established under ERISA is recognized as the "highest known to the law."[18] ERISA provides that, among other things, a person acting as a fiduciary with respect to a plan must comply with ERISA's duty of prudence. The duty of prudence requires that a fiduciary discharge his duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man 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."[19] Practitioners often refer to this standard of conduct is a "prudent expert" standard. ERISA further establishes that a fiduciary is personally liable for any losses incurred by a plan by reason of a breach of fiduciary duty.[20] The plan participants, DOL and other plan fiduciaries can bring actions against a plan fiduciary to recover investment losses.[21]

The DOL, by regulation, explains how the general fiduciary duties apply in the context of making investment decisions with respect to plan assets.[22] A fiduciary must give "appropriate consideration" to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties.[23] "Appropriate consideration" includes (1) making a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return); and (2) considering factors such as the composition of the portfolio with regard to diversification, the liquidity needs of the portfolio, and the projected return of the portfolio relative to the funding objectives of the plan.[24]

With respect to defined contribution plans (for example, 401(k) plans), ERISA provides a safe harbor under Section 404(c) that is applicable to a plan under which a participant may direct the investment of assets held in his or her plan account, that is, a participant-directed plan.[25] If the Investment Fiduciary to the plan meets the requirements of the "safe harbor," as set forth in the statute and a DOL regulation promulgated under Section 404(c), the Investment Fiduciary and other plan fiduciaries are not held liable for losses incurred by the participant resulting from his or her investment direction.[26] Additionally, when directing the investment of his or her account assets, the participant will not be deemed as a "fiduciary" for purposes of ERISA when doing so.[27] The DOL states in its regulation that the Investment Fiduciary must comply with the duty of prudence and other fiduciary duty provisions in selecting and retaining the investment options to which the participant may direct the investment of assets credited to his or her account in order for the safe harbor to be available.[28] Such investment options are defined as "designated investment alternatives" under the regulation. As such, the Section 404(c) safe harbor does not apply to the selection and retention of investment options available under the plan.

Self-Directed Brokerage Accounts in Self-Directed Plans

Participant-directed defined contribution plans at times include a self-directed brokerage account (SDBA) or similar mechanism that allows plan participants in a participant-directed plan to invest in securities and other investment property that are not designated as investment options by the Investment Fiduciary. The decision to add a SDBA is, at least arguably, a settlor (that is, non-fiduciary) decision by the plan sponsor. However, the law is not clear on this point. Even so, the implementation of the decision (for example, the selection of the SDBA provider, features available under the SDBA, fees associated with the SDBA) likely is a fiduciary decision.[29]

On the other hand, most advisers to plan fiduciaries take the position that the Investment Fiduciary is not responsible for the selection and monitoring of the securities and other investment options available through the SDBA. Indeed, if this were not the case, the Investment Fiduciary would be responsible for selecting and monitoring all of the investment options available through the SDBA, which could number in the hundreds or even thousands.

Fiduciary Duties with Regard to Plan Investments in Digital Assets

The DOL has not issued guidance or regulations addressing the Investment Fiduciary's obligations (or lack thereof) with regard to the investment options available through the SDBA. However, the DOL issued guidance in which it suggests that there is no fiduciary obligation in this regard. For example, the Department, in its regulation requiring disclosure of fees and other information with regard to a plan's investment option to a plan participant, states that a "designated investment alternative" does not include "'brokerage windows,' 'self-directed brokerage accounts,' or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan."[30] The exclusion of SDBAs from the term "designated investment alternative" strongly suggests that the Investment Fiduciary does not have a fiduciary duty with regard to the investment options made available under the SDBA.

Compliance Assistance Release No. 2022-01

The Department has issued one piece of guidance related to ERISA-covered plans and digital assets, which is called *Compliance Assistance Release No. 2022-01 401(k) Plan Investments in "Cryptocurrencies."*[31] The agency expressed its concerns with the "significant risks and challenges" associated with making available "direct investments in cryptocurrencies" or "other products whose value is tied to cryptocurrencies." Therefore, the DOL warned that its Office of Enforcement would investigate plans that included such investment options.

The DOL pointed to "significant risks of fraud, theft and loss" and pointed to certain aspects of these products that raised concerns. The DOL expressly stated that such investments are "speculative and volatile" and that it is challenging to provide sufficient information to plan participants regarding such products so that they can make "informed investment decisions." It also noted that cryptocurrencies are not held "like traditional plan assets in trust or custodial accounts." The DOL expressed its view that the valuation of cryptocurrencies is "challenging" and that "cryptocurrency market intermediaries may not adopt consistent accounting treatment and may not be subject to the same reporting and data integrity requirements with respect to pricing as other intermediaries working with more traditional investment products." The DOL also noted that the regulatory environment was evolving and that it would be incumbent on plan fiduciaries, among other things, "include in their analysis how regulatory requirements may apply to issuance, investments, trading, or other activities and how those regulatory requirements might affect investments by participants in 401(k) plans."[32]

The DOL concluded the Release by warning plan fiduciaries that "EBSA expects to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies and related products, and to take appropriate action to protect the interests of plan participants and beneficiaries with respect to these investments." Additionally, the DOL stated that "plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described above."

Compliance with ERISA Fiduciary Duty of Prudence and Investing in Digital Assets

Plan fiduciaries must consider their fiduciary responsibilities, particularly their fiduciary duty of prudence, when investing plan assets including when investing in digital assets. Currently the digital asset in which a plan is most likely to invest is a cryptocurrency such as Bitcoin. However, as this asset class evolves, an investment in digital assets may be something other than cryptocurrency, for example, an NFT representing digital art.

The long-standing general fiduciary duty provisions, including the duty of prudence, can be applied with regard to investments in cryptocurrency and other digital assets. The fiduciary must make investment decisions as a prudent expert would under the same circumstances. Notably, if the fiduciary does not have the requisite expertise to make investment decisions on behalf of the plan, the fiduciary may hire an expert with that requisite expertise to advise them on evaluating and investment or investment course of action, including investments in digital assets.[33] However, in this circumstance, the adviser should have expertise in investing ERISA-covered plan assets and expertise in evaluating digital assets. For example, there are several types of cryptocurrency and other digital assets. The adviser should have knowledge of how each works and the differences.

In any case, the fiduciary should appropriately consider that the investment in the digital asset "…is reasonably designed, as part of the portfolio to further the purposes of the plan…" In doing so, the fiduciary must take into consideration "the risk of loss and the opportunity for gain" while weighing that the need for diversification. The fiduciary's analysis in this regard will vary by the digital asset at issue. For example, the fiduciary's analysis of whether the plan should include as an investment cryptocurrency would likely be different than if the investment was an NFT that represented digital art. Additionally, as digital assets evolve, the NFT may be a means of digitally representing an interest in a traditional asset class like title to real property or a share of stock in a corporation. In other words, the plan would invest in real estate or equity just as they have done since the enactment of ERISA and the NFT is simply a means for effecting the transaction, possibly without the means of a financial intermediary like a bank or clearing firm.

Fiduciary Considerations and Defined Benefit Plans

In the case of a defined benefit plan, the fiduciary also should consider an investment in digital assets in light of the liquidity needs of the portfolio and "the projected return of the portfolio relative to the funding objectives of the plan."[34] As such, in the event that the plan fiduciary determined that the inclusion of cryptocurrency was an appropriate asset in which the plan should invest because of the upside potential, the fiduciary also would have to determine that the upside potential outweighed the possible price volatility and the liquidity needs of the plan. As such, the plan fiduciary might consider limiting the size of the plan's investment. Additionally, the fiduciary should consider in which cryptocurrency to invest (for example, Bitcoin versus Ethereum versus Binance Coin) and why. In addition to price, fiduciary considerations likely would include security of the transactions and the platforms through which the asset is bought and sold.

Fiduciary Considerations and Defined Contribution Plans

In the case of a defined contribution plan such as a 401(k) plan, there will be other considerations, particularly if the plan is a participant-directed plan that intends to comply with the above-discussed Section 404(c) safe harbor. For example, in order to get the benefits of the safe harbor, the plan administrator must provide sufficient information to the participant so that he or she can "…make informed investment decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments."[35]

Therefore, if a plan were to include cryptocurrency or a cryptocurrency based mutual fund or exchange-traded fund as investment option, the disclosures that would have to be provided to participants for Section 404(c) purposes must include language that specifically addresses the unique nature and risks associated with such an option. Furthermore, the plan fiduciary that makes the decision to include a cryptocurrency investment option in the plan is not protected by the safe harbor unless the decision to include the option is made prudently and in accordance with the other fiduciary duty provisions. Therefore, the fiduciary should substantiate why the inclusion of the digital asset investment option was appropriate and substantiate why the fiduciary decided to include a particular digital asset as an investment option over another (for example. Bitcoin versus Ethereum or ABC Crypto ETF versus XYZ Crypto ETF).

Risk Paradigm—Defined Benefit Plans versus Defined Contribution Plans

The litigation and compliance risks associated with digital asset and other investments are different between defined benefit plans and defined contributions plans. As discussed, ERISA provides that a participant, the DOL or another fiduciary may bring a lawsuit in federal court against a plan fiduciary who breaches its fiduciary duty and the fiduciary will be personally liable to the plan for any losses. However, the litigation risk associated with defined benefit plans is lower because the Supreme Court and other federal courts have held that a participant does not have standing to bring a lawsuit if he or she receives the benefits to which he or she is entitled under the plan.[36] This is not the case with regard to defined contribution plans where the participant's benefit is the amount credited to his or her account balance. Poor investment performance or failures of the platforms through which assets are traded may very well lead to ERISA breach of fiduciary duty suits. Indeed, defined contribution plans, particularly large 401(k) plans, have been the subject of a multitude of class action lawsuits in the last 20 years.

The Department did not in its *Compliance Assistance Release* reference concerns with defined benefit plan investments in cryptocurrency. However, it does have investigative authority over such plans and we, anecdotally, are aware of the DOL investigating pension plans that hold cryptocurrency. The DOL can identify such investments through Form 5500 filings and other means. The Department made it clear in its *Release* that it had significant concerns with fiduciaries directly investing in cryptocurrency and investing in crypto-related products in defined contribution plans. The agency has investigated defined contribution plans that include these kinds of investments.

Undoubtedly, the Release had a chilling effect on plans adding these investment options to both defined benefit and defined contribution plans. However, under the current Administration, the Department may be willing to soften its aggressive stance. Of course, even if this were to occur, the threat of litigation by participants represented by a historically aggressive plaintiffs' class action bar still exists.

Self-Directed Brokerage Accounts and Digital Assets

The most obvious way to make available investments in cryptocurrency and other digital assets through a 401(k) plan or other defined contribution plans is through a SDBA. As discussed, a possible interpretation of ERISA, which is consistent with some DOL guidance, is that a plan fiduciary is not responsible for the investment options made available through the SDBA. However, the DOL's *Release* appears to turn this position on its head as the DOL stated that it would investigate plans that allowed for investments in cryptocurrency and related products through a SDBA. The implication is that either the plan fiduciaries are responsible for investments through the window or, possibly, are responsible only for those investments available through the window about which the DOL has particular concerns.

The Department's position not only gives pause to any plan fiduciary considering making available cryptocurrency through the SDBA, but it unnecessarily raises the question whether a fiduciary's duties extend to all other investments available through the SDBA and thus questioning whether a SDBA should ever be made available under a plan. Hopefully, the DOL will reconsider its position, withdraw its *Release* and, most helpfully, issue a regulation affirmatively stating that the plan fiduciaries have no fiduciary obligations with regard to the selection and monitoring of investments available to participants through a SDBA.

Compliance with ERISA Fiduciary Duty and Utilization of Digital Assets Technology

Another important issue that ERISA fiduciaries will need to consider is whether it is prudent and otherwise compliant with ERISA's other fiduciary duties to adopt (or to employ service providers that adopt) technologies associated with or derived from the digital assets marketplace. That is, ERISA will not only apply to a plan investing in digital assets, but also the use of tokens such as NFTs and the technologies associated with digital assets to effect common transactions involving the plan. For example, NFTs and other tokens may allow for the conduct of transactions involving plan assets in a way that is more efficient and cost effective because financial intermediaries such as banks and brokers may no longer be needed to clear securities transactions. Additionally, the transfer of plan contributions to the trustee and distributions from the trust to plan participants and beneficiaries could be effected through the use of NFTs or other tokens in a manner that utilizes both public and private keys, thus offering a more secure way to transfer plan assets. It may even be possible for plan recordkeepers to utilizes tokens to perform the data acceptance and reconciliation transactions necessary to properly run 401(k) plans.

The use of the blockchain or other ledger technology could allow for the creation of a permanent and inalterable record of plan-related technologies. Indeed, the possibilities appear endless. However, when new technologies are employed, plan fiduciaries will have to determine whether adoption is appropriate in light of the potential for fiduciary liability and related lawsuits. Plan fiduciaries likely will be more inclined to accept the utilization of such technologies sooner if the DOL releases guidance and regulations recognizing how such technologies will be in the interests of plan participants and beneficiaries. Additionally, coordination on a large scale among the retirement plan marketplace participants (for example, plan sponsors, recordkeepers, and trustees) will likely lead to increased adoption of these technologies.

ERISA Trust and Indicia of Ownership Requirements

Another legal question that arises in connection with a plan investing in or otherwise holding digital assets is how to meet ERISA's trust and indicia of ownership requirements. Neither the statute, regulations, nor sub-regulatory guidance specifically address how these provisions apply to digital assets. Thus, practitioners and market participants will in the meantime have to work within the current statutory provisions and DOL guidance applicable to more "traditional" assets.

Overview of Law Governing the Trust and Indicia Requirements

ERISA requires that "all assets of an employee benefit plan shall be held in trust by one or more trustees."[37] ERISA only excepts from the trust requirement certain insurance contracts and policies and certain insurance company assets underlying those contracts and policies.[38] Trustees "shall have exclusive authority and discretion to manage and control the assets of the plan" except in limited circumstances including (1) the trustee is a "directed trustee" (that is, the trustee may only act in accordance with the direction of the plan's named fiduciary); and (2) the authority to manage plan assets has been delegated to an investment manager (generally, a bank, insurance company or investment adviser that meets certain requirements).[39]

ERISA does not require that a trustee be a bank, trust company or other financial institution. Indeed, in the smaller end of the market, it is fairly common for one or more individuals (for example, owners of the plan sponsor) to be trustees. Such plans typically will have financial institutions (for example, a bank, trust company or broker-dealer) act as custodian of the plan assets. The DOL states in its regulation implementing the trust requirements of ERISA that a plan will not fail to meet ERISA's trust requirements "…merely because securities of a plan are held in the name of a nominee or in street name…" so long as the securities are held on behalf of the plan by (1) a US regulated bank or trust company or its nominee, (2) a SEC-registered broker dealer or its nominee, or (3) a "clearing agency," as defined in Section 3(a)(23)(A) of the Securities Exchange Act of 1934, or its nominee.[40] The preamble to the trust regulation states that the DOL agreed to a plan holding securities in the name of a nominee or in street name (rather than the trustee actually holding the indicia of ownership, for example, stock certificates) because the securities and other applicable laws that protect investors and that the plan enjoyed the benefits of ownership.[41] However, the trustee could, conceivably, hold the plan assets or the indicia of ownership of the assets in a drawer at the office and meet the trust requirements so long as they held in trust pursuant to a "written trust instrument" and so long as doing so would meet the fiduciary duty requirements.[42]

The ERISA statute does not define what the "assets of an employee benefit plan" are. The DOL has issued regulations defining "plan assets" in connection with contributions made to a plan and when the assets of certain entities are deemed to be "plan assets" for purposes of ERISA. In other situations, it stated that "plan asset" status depends on whether the plan has a beneficial ownership in the property at issue according to "ordinary notions of property rights under non-ERISA law."[43] This approach requires "consideration of any contract or other legal instrument involving the plan . . . [and] of the actions and representations of the parties involved."[44] For example, when a plan trust invests in the equity of the company, the equity is the plan asset. Similarly, when a trust is a limited partner in a partnership, the limited partnership interest is the plan asset.

A key question for determining whether a plan meets the trust requirements is the meaning of the term "indicia of ownership." The DOL has stated that "indicia of ownership" is the same as "evidence of ownership" and that where securities are issued in physical form, the bonds or stock certificate would constitute the indicia of ownership.[45] However, the DOL has not provided any guidance as to what constitutes the indicia of ownership of securities issued in book-entry form. Plan fiduciaries and their advisers generally view the ownership records on the books of the bank, trust company, broker-dealer, clearing agency or their respective nominees as the indicia of ownership. Similarly, in the absence of DOL guidance, fiduciaries and their advisers typically treat the subscription agreement and partnership agreement as the indicia of ownership of a partnership.

ERISA also states that "Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States."[46] The purpose of this provision is "to prevent 'runaway assets.'"[47] That is, Congress intended "to preclude frustration of adequate fiduciary supervision and remedies for breach of trust in the US federal courts. However, Congress believed that

> the risk of misappropriation of plan assets or their removal beyond the effective process of an American court is minimal where the assets are under the management or control of a bank, trust company or similar institution which is subject to adequate regulation and examination by State or Federal supervisory agencies. Such an institution would be responsive to legal process and to the traditional principles of fiduciary responsibility under trust law.[48]

Subsequently, the DOL issued regulations (the Indicia of Ownership Regulations), which permit fiduciaries to maintain the indicia of ownership of certain types of plan assets outside the jurisdiction of the US district courts.[49] The types of plan assets covered by the regulations include (1) securities issued by an issuer that is not organized under the laws of the United States or a State and does not have its principal place of business within the United States; and (2) securities whose principal trading market is outside the jurisdiction of the US district courts (collectively, Foreign Securities).[50] For these purposes, the term "security" has the meaning set forth in Section 2(1) of the Securities Act of 1933, as amended (the Securities Act).[51] As defined in Section 2(1) of the Securities Act, the term "security" includes stock, transferable shares and "any interest or instrument commonly known as a 'security.'"

The regulation requires that the indicia of ownership of Foreign Securities to be maintained outside the jurisdiction of the US courts must be under the management and control of a fiduciary that (1) is a corporation or partnership organized under the laws of the United States or a State, (2) has its principal place of business within the United States, (3) is a bank as defined in Section 202(a)(3) of the Advisers

Act, and (4) as of the last day of its most recent fiscal year, has equity capital in excess of $1 million.[52] The Department provided in an Advisory Opinion some guidance on how the Indicia of Ownership Regulation could be applied when a US Bank used multiple US and non-US affiliates to hold and transfer securities.

Application of Trustee and Indicia Provisions to Digital Assets

ERISA and the DOL regulations do not contemplate an ERISA-covered account holding digital assets. Therefore, in the absence of specific regulations applying the trust and indicia of ownership requirements to digital assets, plan fiduciaries and their advisers need to try to fit digital assets within the current statutory and regulatory requirements. This can be challenging.

As discussed, ERISA requires that "plan assets" be held in trust pursuant to a written trust instrument. The trustee has responsibility for the safekeeping of such assets. In the case of a "digital asset," the question is what is the "plan asset" (that is, the thing the plan owns). In the case of cryptocurrency, perhaps the Coin or token is the plan asset, while the "indicia of ownership" is the private key because the Coin may not be transferred without the private key. In such circumstances, at least the Coin or token must be held in trust, but logically the plan fiduciary may want the private key to also be held in trust given that the Coin is effectively worthless without the key because it cannot be transferred to another party without it. On the other hand, a possible argument is that the Coin or token and the private key are the indicia of ownership that are attributable to an interest in underlying assets. This might be the case when an NFT is used as a means to effect the transfer of real estate or equity in an entity.

As discussed above, the Coin would normally be held in a "wallet" available through an application or program on a device like a smart phone or tablet. If that app is on the trustee's device, the trustee could argue that it holds the Coin and private key in trust. Of course, the trustee would have to put in place safeguards to prevent cyber-theft or other loss. Additionally, the device (or, possibly, the server or cloud to which the information is saved if not actually on the devices) would have to be maintained in the jurisdiction of the United States federal courts. This could work in a peer-to-peer transaction.

However, as the crypto market has evolved, the trading of Coins and other tokens is often completed through intermediary platforms rather than through direct peer-to-peer transactions. Such platforms allow for the faster trading of crypto and other digital assets. They also often offer wallets where Coins may be stored. Notably, these platforms are not financial institutions subject to US banking laws or a broker-dealer subject. Therefore, they would likely not fit into the scheme contemplated under the DOL regulation when securities are held in street name or in nominee form on behalf of the plan's trust because they are not held by an appropriately regulated entity (for example, a bank or broker-dealer).

Also, some of these platforms are based outside of the United States and thus their holding Coins or other tokens would be problematic under ERISA's indicia of ownership requirements because as described above the DOL regulation requires a bank to hold the Coins. Additionally, the regulation only applies to "securities" as defined under US securities law. The SEC has ruled in some cases that Coins or tokens are securities, while others are not. However, generally, market participants do not want them to be securities, thus subjecting them and the platforms to registration. Ironically, in this case, the fact that the plan assets are not securities make compliance more difficult.

In practice, a great number of plans utilize banks and trust companies as custodians or directed trustees in order to effect the efficient transfer and holding of securities and other investment property. Perhaps the trustees or named fiduciaries can utilize these relationships to meet the trust and indicia of ownership requirements. For example, the custodian or directed trustee could maintain a "wallet" for purposes of holding the Coins or tokens. The trustees or named fiduciary could then hold the private key in trust or at least assure its safe keeping. The bank or trust company custodian or directed trustee also may be willing to hold the private key, though doing so may defeat the purpose of a private key (that is, limit the person or persons who know the private key for security purposes).

Clearly, the financial services firms, plan fiduciaries, and retirement investors would benefit from the DOL issuing regulations that accommodate the transfer and holding of digital assets and provide sufficient flexibility to accommodate different types of digital assets. In the meantime, they will have to work within the current statutory and regulatory framework. Alternatively, managers are establishing mutual funds, ETFs and other investment funds, and products that may allow for the indirect investment in digital assets or gaining exposure to digital assets.

ERISA Fair Market Value and Reporting Requirements

The fair market value (FMV) of an asset is important under a number of reporting and other provisions under ERISA. However, the DOL has not issued current guidance on how to determine FMV in respect of assets held by the plan or transactions involving the plan including digital assets.

A plan that is subject to the Form 5500 filing requirements must file a statement of the plan's assets and liabilities. The plan administrator or other fiduciary filing the form must report the assets at their FMV.[53] Additionally, ERISA requires the provision to plan participants an annual disclosure notice that among other things provides a statement of the plan's assets at FMV.[54] The ERISA statute does not define the term "fair market value."[55] However, ERISA defines "adequate consideration," which suggests FMV is the value at which a security or other property is traded in public markets either through an exchange or other markets where third parties establish the price of the asset.[56] The FMV for other assets "…must be determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan…and in accordance with regulations promulgated by the Secretary."[57] The DOL proposed a regulation in 1988 that has never been finalized, but plan fiduciaries and services typically rely upon it. The proposed regulation provides that FMV "…means the price at which an asset would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, and both parties are able, as well as willing, to trade and are well informed about the asset and the market for such asset."[58] The fiduciary may rely on a third party appraiser or other third party, independent sources to determine FMV.[59]

Application of Reporting and Valuation Requirements to Digital Assets

The difficulty with meeting ERISA's reporting and valuation requirements when a plan invests in digital assets is how to value digital assets. This has long been an issue with regard to certain "hard-to-value" assets such as real estate, private equity and debt, warrants and other assets. With respect to digital assets, the valuation will likely depend on the type of digital assets. Certain types of Coins, such as Bitcoin, readily change hands among buyers and sellers such that the price reported by the platform through which the Coins can be converted to cash likely is a fair measure of their value for ERISA reporting purposes. That price is the number that a willing buyer and willing seller not under the compulsion to buy or see would pay. On the other hand, many other Coins, NFTs and other tokens are so thinly traded that no such pricing mechanism exists. For example, stable coins the value of which is pegged to another asset would be valued differently from an NFT that represents or effects the transfer of ownership of another asset, the latter of which may be digital or a traditional asset (for example, real property). The valuation for these two types of digital assets would be very different.

In respect of traditional hard-to-value assets, the trustee or another plan fiduciary will hire a third party with appropriate expertise related to the asset issue to value the asset for ERISA purposes. There is no reason to think this approach will not work with digital assets. However, the number of valuation firms with the expertise are limited at this time. Additionally, because digital assets are a new asset class and the types of digital assets are so varied and quickly evolving, valuation firms will have to continually approve its valuation process.

IRAs Holding Digital Assets

IRAs are another type of tax-favored account that can hold digital assets. One benefit of such accounts is that they are not subject to ERISA's fiduciary duty provisions or ERISA's liability and enforcement provisions. However, IRAs pose their own compliance challenges to advisers and financial services companies. These include, among others, (1) the need to meet the Code's custodian requirements, and (2) the limits on the types of investments these accounts can hold.

Code's Custodian Requirements

In order for an account to be an "individual retirement account," which for this purpose includes both traditional IRAs and Roth IRAs, the IRA must be a trust and the trustee must be a "bank."[60] A "bank" includes (1) "a bank or trust company incorporated and doing business under the laws of the United States (including laws relating to the District of Columbia) or of any State, a substantial part of the business of which consists of receiving deposits and making loans and discounts, or of exercising fiduciary powers similar to those permitted to national banks under authority of the Comptroller of the Currency, and which is subject by law to supervision and examination by State or Federal authority having supervision over banking institutions. Such term also means a domestic building and loan association," (2) an insured credit union, and (3) "a corporation which, under the laws of the State of its incorporation, is subject to supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State."[61]

The trust must be "created or organized in the United States" and "maintained at all times as a domestic trust in the United States" pursuant to a written trust instrument.[62] The Treasury Regulations further provide that the investments of each account will not be commingled with any other property except in one limited circumstance not applicable here.[63]

A custodial account is treated as a trust for purposes of the Code. The assets of such account must be held by a "bank" as defined above. The custodial account also must meet the requirements described above in respect to a trust account other than being a trust. [64] The Code and the Treasury Regulations allow for a process whereby another kind of entity may apply for and be approved to be a custodian by establishing that the entity is in a position to properly safeguard the assets of the IRA.[65] The process is demanding and most often utilized by registered broker-dealers that want to be IRA custodians.

Application of Trust and Custody Requirements to Digital Assets

The statutory requirements that IRA assets be held by a United States bank or trust company as trustee or custodian might defeat Bitcoin's founder's conceptualization of a pure peer-to-peer, without borders payment system in which there are no intermediaries as a bank or other financial services company. However, this does not necessarily preclude an IRA from holding at least certain kinds of digital assets.

A taxpayer that intends to invest in or otherwise hold digital assets through his or her IRA must find a United States bank, trust company, IRS-approved broker-dealer custodian or another IRS-approved custodian who is willing to act as trustee or custodian to an IRA that includes such assets. In practice, most will act as a custodian only rather than a trustee. Similar to a trustee of an ERISA-covered plan, the custodian will have to determine how it must hold the digital asset in order to meet the Code's custody requirements. There is very little guidance on this in respect to traditional assets, much less digital assets.

With regard to an asset such as an equity security, the custodian holds the asset on its books, either in street name or as nominee. In the case of a partnership interest, the custodian may hold the asset as nominee or take possession of the indicia of ownership (that is, the signed subscription agreement and partnership agreement), or an IRA custodian will hold the physical asset in some cases (for example, gold bullion). These concepts may be applied by analogy to digital assets in the absence of specific IRS guidance or Treasury regulations. Presumably, the custodian, in the case of cryptocurrency, holding the Coin or token would be sufficient to meet the Code requirements. Either the IRA owner would retain the private key or transfer the private key to the custodian, although the latter would seem to defeat the purpose of the unique security feature of digital assets, which is that the key is private and not known to any other party. The custodian would also have to be in a position to store the Coin or token (for example, maintaining a wallet). Possibly, other arrangements can be made between the custodian and platform providers through which digital assets are transacted and the assets are held in wallets. However, any such arrangement should account for the requirement of the Code that the IRA custody hold the assets. Given some of the legal uncertainties with regard to being a custodian of digital assets, some banks, trust companies, broker-dealers and others may not be willing to serve as an IRA custodian to these assets, at least in the near term. The promulgation of regulations by the Treasury in this regard likely would allow for more financial services companies to act as custodians.

IRA Reporting Requirements and FMC Determinations

The IRA reporting and valuation requirements may also pose compliance challenges, particularly for IRA custodians. The IRA trustee or custodian, as applicable, must annually send to the IRA owner and the IRS a report, which is Internal Revenue Service Form 5948. That form must include certain information including the FMV of the account as of the end of the calendar year. The instructions to the form provide that "Trustees and custodians are responsible for ensuring that all IRA assets (including those not traded on established markets or not having a readily determinable market value) are valued annually at their FMV."[66] There are similar requirements with regard to Form 1099-R, which is used to report IRA distributions.[67]

Nether Section 408 of the Code nor the regulations promulgated thereunder define the term "fair market value." However, in other contexts, the IRS defines the term similarly to the DOL, "FMV is the price that property would sell for on the open market. It is the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both having reasonable knowledge of the relevant facts."[68]

Historically, IRA custodians have differed in their approach regarding the valuation of IRA assets, particularly "hard to value" assets. The latter includes assets that are not traded in a public market where prices are published by third-party exchanges or some other third party determining prices. Traditionally, these include real estate, interests in limited partnerships, warrants, equity and debt interests in non-public corporations, and similar assets. Very few, if any, trustees and custodians perform a valuation of their own. Rather, pursuant to its agreement with the IRA owner, they accept valuations from parties designated by the IRA owner (for example, the general partner of a limited partnership) or even from the IRA owner. The question for custodians, who ultimately are responsible under Section 408 for the proper reporting of FMV on certain forms, is whether they can merely accept the valuation number or do they have some obligation to verify that number. More risk averse trustees and custodians either will at least to some degree verify that the valuation on its face is reasonable or simply will not act as custodian with regard to such assets.[69]

IRA Custody and Valuation Issues Related to Digital Assets

The IRA custodian would be responsible for the production of Form 5948 and other tax reporting, which requires the reporting of the FMV of IRA assets to the IRA owner and the IRS. The IRS guidance ultimately appears to place the burden of getting the FMV on the custodian, however in practice custodians do not always interpret the Code that way because neither the Code nor regulations provide specific guidance in this regard will often by contract or otherwise place that responsibility on the IRA owner. In any event, whichever party is responsible for obtaining the FMV, such party will face many of the same above-discussed challenges in getting the FMVs for such assets. For this reason, some IRA custodians may not be comfortable being the custodian of digital assets, just as they are not comfortable being the custodian for traditional "hard-to-value" assets.

IRA Limitations on IRA Investments

While an IRA can hold a panoply of assets, there are some limitations. Some are outright exclusions, while others involve tax consequences that would make such investments unreasonable. Notably, this is an area where the IRS has provided guidance with respect to digital assets.

An IRA may not invest in life insurance contracts.[70] Furthermore, while an IRA can invest in collectibles, the result of doing so is that the cost of the collectible to the IRA "…shall be treated… as a distribution from such account in an amount equal to the cost to such account of such collectible."[71] A "collectible" includes: (1) "any work of art;" (2) "any rug or antique;" (3) "any metal or gem;" (4) "any stamp or coin;" (5) "any alcoholic beverage;" or (6) "any other tangible personal property specified by the Secretary for purposes of this subsection."[72] There is an exception to this general rule for certain kinds of US precious metal coins and certain precious metal bullion.

The IRS issued a Notice in 2023 designed to provide IRA custodians and others on how NFTs should be treated for purposes of the above-discussed collectibles provision. In the Notice, the IRS defined an NFT as "…a unique digital identifier that is recorded using distributed ledger technology and may be used to certify authenticity and ownership of an associated right or asset."[73] In connection with holding an NFT, the holder has "…a right with respect to a digital file (such as a digital image, digital music, a digital trading card, or a digital sports moment) that typically is separate from the NFT." In other situations, the holder has "…a right with respect to an asset that is not a digital file, such as a right to attend a ticketed event, or certify ownership of a physical item."[74] The IRS stated that "Pending the issuance of that guidance, the IRS intends to determine whether an NFT constitutes a Section 408(m) collectible by analyzing whether the NFT's associated right or asset is a Section 408(m) collectible (referred to in this notice as the "look-through analysis")." The IRS also provided that "an NFT constitutes a Section 408(m) collectible if the NFT's associated right or asset is a Section 408(m) collectible." Note that an NFT in this regard is not "cryptocurrency," which generally is fungible and there is no need to apply a look-through analysis because the Coin is the thing of value held by the IRA.[75]

Application of the IRA Investment Provisions to Digital Assets

At some point in the not-too-distant future, a digital asset such as an NFT may be a life insurance contract, act as a mechanism for the execution of a traditional life insurance contract or represent a traditional life insurance contract. If this were the case, the IRA likely could not hold the NFT due to the Code's prohibition on IRAs investing in life insurance. The IRS presumably would require the IRA owner to apply a "look-through analysis" for purposes of applying the life insurance exclusion, just as the IRS applied the look-through analysis to determining whether an NFT is a collectible. However, given the number of different digital assets being created, it would be helpful for the IRS and Treasury to issue regulations further clarifying the status of digital assets for purposes of the above-discussed IRA provisions and others. For example, an NFT is not always "used to certify authenticity and ownership of an associated right or asset." The NFT may itself be the asset. Additionally, the NFT may merely be a means of executing a transaction involving another asset.

Summary and Conclusion

In summary, ERISA, the Code, and the DOL and Treasury regulations promulgated thereunder may be interpreted in ways that will allow ERISA-covered accounts and IRAs to invest in digital assets, at least in some circumstances. However, their application in certain circumstances is not particularly clear and they do not afford the flexibility that participants in the digital asset marketplace demand due to the varied nature of such assets and the speed at which new and different digital assets come into existence. ERISA fiduciaries, particularly those of ERISA-covered defined contribution plans, may be concerned about the threat of fiduciary litigation in the event that the value of the digital assets significantly declines or the participants are unable to gain access to such assets for a long period of time (for example, in the case of the criminal conduct or bankruptcy of a platform provider).

In light of the compliance and legal risks described in this article, ERISA plan fiduciaries and IRA owners may be less inclined to invest in digital assets or use technologies derived from the digital asset marketplace such as the blockchain. However, in light of the current Presidential Administration's stated interest in promoting the development of and investments in crypto and other digital assets, we may see the necessary changes to the law. Hopefully, Congress and all of the regulators who may touch on the regulation of digital assets (for example, Treasury, IRS, DOL, SEC, CFTC, and OCC) will coordinate their efforts so that digital assets and related technologies may be more widely available to tax-favored retirement accounts as well as other investors.

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NOTES

1 "Strengthening American Leadership in Digital Financial Technology," Executive Order, Jan. 23, 2025.

2 Nakamoto, Satoshi, "Bitcoin: A Peer-to-Peer Electronic Cash System," *www.bitcoin.com* (Oct. 31, 2008).

3 Velde, Francois R., "Bitcoin: A Primer," *Chicago Fed Letter* (Dec. 2013).

4 *Id*. at 1.

5 *Id*. at 2.

6 *Id*.

7 Insanti, Marco & Karim R. Lakhani, "The Truth About Blockchain," *Harvard Business Review*, Jan-Feb 2017, p.4.

8 *Id*. at 9.

9 Nakamoto, *supra* n.2 at 4.

10 Velde, *supra* n.3 at 2.

11 Hardle, Wolfgang Karl, "Understanding Cryptocurrencies," *Journal of Financial Econometrics*, 202, Vol. 18, no.2, 187.

12 *Id*. at 187-188.

13 *Id*.

14 Kaczynski, Steve & Scott Duke Kominers, "How NFTs Create Value," *Harvard Business Review*, Digital Edition, pp. 1-2.

15 *Id*.

16 *Id*. 4-5.

17 *Id*.

18 Donovan v. Bierwith, 680 F.2d 263, 272 n. 8 (2d Cir. 1985).

19 ERISA § 404(a)(1)(B).

20 ERISA § 409(a).

21 ERISA § 502(a)(2).

22 29 CFR § 2550.404a-1(b).

23 *Id*.

24 *Id*.

25 ERISA § 404(c).

26 ERISA § 404(c)(1)-(4); 29 C.F.R. § 2550.404c–1.

27 29 C.F.R. § 2550.404c–1(a)(1).

28 29 C.F.R. § 2550.404c–1(d)(2)(iv); Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed. Reg. 46,906, 46,924 n.27 (Oct. 13, 1992).

29 *See* ERISA § 3(21)(A)(i) ("…a person is a fiduciary with respect to a plan to the extent…he exercises any discretionary authority or discretionary control respecting management of such plan…").

30 29 CFR § 2550.404a–5(h)(4); *see also* 29 CFR § 2550.408g-1(c)(1) (An "investment option" under the ERISA Section 408(g) exemption has the same meaning as "designated investment alternative" under 29 CFR § 2550.404a–5(h)(4) including the exclusion of 'self-directed brokerage accounts' and similar).

31 DOL Release No. 2022-01, p.1.

32 *Id*. at 2-3.

33 *See* Gregg v. Transp. Workers of Am. Int'l, 343 F.3d 833, 841 (6th Cir. 2003) ("A fiduciary's effort to obtain an independent assessment serves as evidence that the fiduciary undertook a thorough investigation."); Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 300 (5th Cir. 2000) ("Engaging the services of an independent, outside advisor may serve the … purposes of increasing the thoroughness and impartiality of the relevant investigation ….").

34 *Id*.

35 29 C.F.R. § 2550.404c–1(b)(2)(B).

36 Thole v. U.S. Bank, 140 S. Ct. 1615 (June 1, 2020).

37 ERISA § 403(a).

38 ERISA § 403(b).

39 ERISA § 403(a).

40 29 C.F.R. § 2550.403a-1.

41 *See* Preamble to 29 C.F.R. § 2550.403b-1, 47 Fed. Reg. 21241, 21245 (May 18, 1982).

42 *See* Note 47.

43 *See*, *e.g*., Adv. Op. 2001-04A (March 22, 2001) (dealing with demutualization proceeds); 99-08A (May 20, 1999) (regarding assets contributed to a grantor trust: "The identification of plan assets therefore requires consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved."), citing Adv. Op. 94-31A (September 9, 1994).

44 DOL Adv. Op. 92-02A (Jan. 17, 1992).

45 ERISA Opinion Letter 75-80 (Feb. 13, 1975).

46 ERISA § 404(b).

47 ERISA Conference Report 93-1280 (1974), p. 8.

48 *Id*. at 8-9.

49 29 C.F.R. § 2550.404b-1.

50 *See* 29 C.F.R. § 2550.404b-1(a)(1)(i), (iii).

51 ERISA § 3(20).

52 *See* 29 C.F.R. § 2550.404b-1(a)(2)(i).

53 29 C.F.R. § 2520.101–5(b)(3).

54 *Id*.

55 *See* ERISA § 3.

56 ERISA § 3(18).

57 *Id*.; *See also* 2023 Instructions for Form 5500, pages 35, 43, 50, 55, & 59.

58 DOL Prop. Reg. § 2510.3-18 (b)(2).

59 DOL Prop. Reg. § 2510.3-18 (b)(3).

60 Code § 408(a).

61 Code § 408(n); Code § 581.

62 26 C.F.R. § 1.408-2(b).

63 26 C.F.R. § 1.408-2(b)(v).

64 Code § 408(h).

65 *Id*.; 26 C.F.R. § 1.408-2(e).

66 *See* 2024 Instructions for Forms 1099-R and 5498, p. 22.

67 *Id*. at p. 7.

68 IRS Publication 561 Determining the Value of Donated Property (12/2024).

69 Letter from Tom Brisendine, Chief, Branch 1 Employee Benefits and Exempt Organizations) to

the Retirement Industry Trust Association (Aug. 6, 1993) ("…so long as the trustee reports the information that it receives from the partners [as to what the FMV of the assets is] it is under no obligation to appraise the investment independently. However, if this information is unreasonable on its face, a trustee may want to re-evaluate whether to continue in a fiduciary relationship with the partnership….").

70 IRC § 408(a)(3).

71 *See* IRC § 408(m).

72 *Id.*; note that the tax consequences are the same if a collectible is held in a tax-qualified defined contribution plan where participants direct the investment of the assets held in their accounts (for example, a 401(k) plan).

73 IRS Notice 2023-27, 2023-15 IRB 634 (March21, 2023).

74 *Id.*; *see also* Code 6045(g)(3)(D) (A "digital asset" is "…any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary."); 26 C.F.R § 1.6045-1(a)(19) (A "digital asset" is "any digital representation of value that is recorded on a cryptographically secured distributed ledger (or any similar technology), without regard to whether each individual transaction involving that digital asset is actually recorded on that ledger, and that is not cash…").

75 IRS Rev. Rul. 2019-24, 2019-44 IRB 1004 (October 9, 2019) (The IRS defines "cryptocurrency" as "…a type of virtual currency that utilizes cryptography to secure transactions that are digitally recorded on a distributed ledger, such as a blockchain.").