



THIS MONTH'S HOT TOPIC

Plan Investments and the Invasion of Ukraine



by **Kelsey Mayo,**
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Kelsey's practice is focused in the areas of Employee Benefits and Executive Compensation. She works with business owners and HR executives to understand and manage employee benefits and executive compensation arrangements. She routinely represents clients before the Internal Revenue Service, Department of Labor, and Pension Benefit Guarantee Corporation and has extensive experience in virtually all aspects of employee benefit plans and executive compensation arrangements.

On February 24, 2022, military forces of the Russian Federation launched an invasion of Ukraine. The United States, the European Union, and many other countries and organizations have responded with a rapidly evolving series of economic sanctions and other restrictive measures.

How might this affect ERISA plans? The wide-ranging economic effects of war and related sanctions can be expected to impact the performance of plan investments. Already, the war and sanctions have significantly impacted Russian and Ukrainian equities, debt, and currencies, as well as those of their trading partners. Oil and other commodity prices have risen as a result of the conflict and in anticipation of possible restrictions on supplies from Russia and Ukraine. These and other changes resulting from the war can be expected to flow through to plan asset values.

What should plans do now? Plan fiduciaries have a duty to manage plan assets as a prudent person familiar with such matters would *under the circumstances then prevailing*.

When circumstances change materially, fiduciaries should consider reevaluating their plan investment decisions to ensure they continue to be prudent. For example, fiduciaries could seek to answer questions such as the following:

- If a portion of the plan's assets is invested in an international stock or bond fund, to what extent is the fund exposed to Russian or Ukrainian equities, debt, or currencies?
- Are there aspects of the changed economic environment (e.g., the expected impact of sanctions or changes in energy or other commodity prices) that could impact plan investments?
- Are all of the plan's investments still prudent in light of the changed circumstances?

Importantly, plan fiduciaries should not make investment decisions for principle-based reasons, such as a desire to avoid Russian investments or to support Ukrainian investments. Plan investments must be evaluated with the sole purpose of providing benefits to participants and beneficiaries.

For plans that delegate the management of plan investments to an outside investment manager, responding to the current situation may be as simple as sending an email to the investment manager to ensure it is monitoring the unfolding situation and taking any necessary steps to align plan investments with changing circumstances.

Plan Sponsors that retain fiduciary responsibility over plan assets may need to do more, including staying informed about the changing economic environment caused by the war and evaluating the impact of any new developments on plan investments.

Reach out to your plan advisor today to discuss the impact of the invasion and accompanying sanctions on your plan's investments. Your TPA partner is also available to answer questions related to the plan.

WHAT'S NEW IN WASHINGTON, D.C.

DOL Chimes in on Cryptocurrency

by Kelsey Mayo,
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On March 10, the DOL issued **Compliance Assistance Release No. 2022-01** expressing skepticism about the prudence of offering cryptocurrency investment options within ERISA plans. So, can plan fiduciaries include cryptocurrencies without violating their fiduciary duties? The DOL didn't foreclose the possibility, but has its doubts.

The release advises plan fiduciaries to approach decisions about adding cryptocurrency options with tremendous caution and notes that DOL has "serious concerns" about plans providing such investment options to plan participants. Referencing the recent **Hughes v. Northwestern University** Supreme Court case, the DOL notes that plan fiduciaries may not simply delegate responsibility to plan participants to select prudent investments among the plan's options—rather plan fiduciaries must ensure that *all* plan investment options are prudent and appropriately selected and monitored, including cryptocurrency options.

The DOL then takes the position that cryptocurrency investments (whether directly invested or more indirectly invested in products whose value is linked to cryptocurrencies) present significant risks to participant retirement accounts for the following reasons:

- 1. Speculative and Volatile:** The release casts cryptocurrencies as volatile investments and notes that the SEC has described cryptocurrency investments as "highly speculative."
- 2. Challenge for Plan Participants to Make Informed Investment Decisions:** Because of the unique nature of cryptocurrencies, it can be extremely difficult to measure value and evaluate risk. Adding cryptocurrencies to a plan's investment menu may be seen as tacit endorsement—"that knowledgeable investment experts have approved the cryptocurrency option as a prudent option for plan participants."

- 3. Custodial and Recordkeeping Concerns:** Cryptocurrency access and management can present new challenges — methods of "holding" an investment differ here from more traditional retirement assets, making recordkeeping (and even proof of ownership) more difficult to maintain.

- 4. Valuation Concerns:** Valuation of cryptocurrencies is often difficult and variable.

- 5. Evolving Regulatory Environment:** Cryptocurrencies are more likely to be unregulated and some have been used in illegal activity, which can potentially widen the scope of liability.

Finally, the DOL concludes by saying that plan fiduciaries who offer cryptocurrency investment options (including through brokerage windows) should expect to be questioned on how the fiduciary determined the investment was prudent and in the best interests of participants and beneficiaries in light of the risks identified above. An ominous warning, for sure.

Thus, while the DOL did not outright prohibit cryptocurrency investments, plan fiduciaries who offer cryptocurrency investment options (even if only through brokerage windows) may want to perform additional analysis and carefully document that decision, specifically addressing and documenting an analysis of the risks identified above. Reach out to your TPA and plan advisor to learn more.

BEST PRACTICES FOR PLAN SPONSORS

Lifetime Income Illustrations

by Kelsey Mayo,
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SECURE Act plan amendments aren't the only SECURE Act action item this year! Most defined contribution plans must also begin providing lifetime income illustrations (LII) this year.

Which plans must now provide LII disclosures? All defined contribution plans governed by ERISA must provide LII disclosures. The LII disclosure must be provided even if the plan does not offer an annuity or lifetime income investment option. These must be provided annually.

What is a LII disclosure? A notice that shows a participant's account balance translated into two equivalent lifetime income streams—one showing a single life annuity equivalent and another showing a qualified joint and 100% survivor annuity equivalent.

What assumptions should be used in LII disclosures? Plans that use the assumptions and model language provided in the DOL's *interim final rule* are entitled to important protections from liability. The prescribed assumptions include:

- (1) An *assumed commencement date* equal to the last day of the benefit statement *period*;
- (2) An *assumed participant age* of 67 (or the participant's actual age, if older than 67);
- (3) An *assumed interest rate* taken from the 10-year constant maturity Treasury rate as of the first business day of the last month of the benefit statement *period*; and
- (4) An *assumed mortality rate* taken from the gender neutral mortality table under Internal Revenue Code Section 417(e)(3)(B).

When is the deadline for providing the first LII disclosure?

Participant-directed plans that provide quarterly benefit statements must provide the first LII disclosure for a statement period ending on or before September 18, 2022 — which generally means they must be included no later than the second quarterly statement for 2022 (i.e., for calendar year plans, the statement for the period ending June 30, 2022). Non-participant-directed plans must provide the first LII disclosure with the benefit statement for the first plan year ending after September 18, 2021 (i.e., for calendar year plans, the 2021 plan year statement that must be sent by October 15, 2022).

Now is a great time to make sure you're ready to begin providing LII disclosures this year and that your service providers will be using the model language that provides the most protection. If you do offer lifetime income options, you may want to consider how to coordinate explanations and descriptions of those options with the LII disclosures. Your plan advisor and TPA partner can help explain the process on a more targeted basis.