

# IFS | Q3 2022

## Legislative & Regulatory Update

### CONTACT INFORMATION

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### CHALLENGES TO THE DOL'S STANCE ON CRYPTOCURRENCY IN 401(K)S<sup>1,2,3,4</sup>

On March 10, the DOL's Employee Benefits Security Administration urged 401(k) plan fiduciaries with a compliance bulletin to practice "extreme care" in providing cryptocurrency as a potential investment option. They outlined a list of the investment risks surrounding cryptocurrency including cybersecurity dangers, cryptocurrency's speculative nature, and the difficulty of determining its true value. Citing the Supreme Court case *Hughes v. Northwestern University*, the DOL asserted that fiduciaries are still responsible under ERISA to "ensure [their investment options] are prudent."

Notwithstanding the DOL's compliance bulletin, Fidelity will allow Bitcoin and potentially other cryptocurrencies in a new account set to open this summer. Legal experts are in conflict over if this constitutes a fiduciary breach, or not, depending on how much control a participant has over their portion of plan assets.

Notably, retirement investment platform ForUsAll is suing the DOL for their March cryptocurrency compliance bulletin. They argue that "no asset class is presumptively imprudent under ERISA" and that the DOL has "overstepped its authority under the Employee Retirement Income Security Act." Winning this lawsuit may prove to be difficult, as the DOL has precedence with the aforementioned Supreme Court case.

<sup>1</sup><https://www.hrdiver.com/news/suit-dol-overstepped-its-authority-in-warning-against-cryptocurrency-in-40/624873/>

<sup>2</sup><https://www.plansponsor.com/retirement-plan-provider-sues-dol-401k-cryptocurrency-row/>

<sup>3</sup><https://www.wagnerlawgroup.com/wp-content/uploads/sites/1101401/2022/06/A0702999.pdf>

<sup>4</sup><https://www.hrdiver.com/news/dol-warns-401k-plan-fiduciaries-about-offering-cryptocurrency-investments/620428/>

### RISE & SHINE ACT DRAFT BILL INTRODUCED<sup>5</sup>

Due to the financial strain imposed by the COVID-19 pandemic, legislation pertaining to retirement and savings has become increasingly commonplace. On May 26, Senators released a draft of the RISE & SHINE Act, which has bipartisan support and aims to bolster Americans' "emergency savings and retirement security."

Several of the provisions are as follows:

1. Permitting employers to offer emergency savings accounts.
2. Expanding access to retirement plans through MEPS and increasing access for part-time workers.
3. Fostering communication for retirement plan participants and Increasing transparency for pension plan participants when it comes to lump-sum buyout offers.

<sup>5</sup><https://401kspecialistmag.com/draft-legislation-to-strengthen-retirement-and-emergency-savings-introduced/>

## WELLS FARGO SETTLES ERISA CLASS SUIT<sup>6,7</sup>

A lawsuit filed against Wells Fargo in March 2020 has finally been settled for \$32.5 million. The lawsuit alleged that Wells Fargo violated ERISA by engaging in a prohibited transaction, acting imprudently and without loyalty to the Plan client, by adding untested proprietary Wells Fargo Target Date CITs into a 401(k) plan, and for utilizing nonproprietary funds, each of which caused plan participants to pay an unnecessarily high expense ratio for plan investments.

Workers represented in the lawsuit argued that Wells Fargo breached its fiduciary obligation under ERISA by providing investment options that were more expensive than comparable, and better performing, investment options. Moreover, it was alleged that Wells Fargo failed to utilize its scale to negotiate lower fees for both proprietary and non-proprietary investment options included in the plan. Wells Fargo admitted no wrongdoing, but did disclose that the \$32.5 million settlement is equivalent to damages equaling 40% of Wells Fargo advisory fees for the period in question.

<sup>6</sup><https://www.planadviser.com/wells-fargo-agrees-pay-32-5-million-settle-erisa-suit/>

<sup>7</sup><https://hallbenefitslaw.com/wells-fargo-settles-erisa-breach-of-fiduciary-duty-suit-for-32-5m/>

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