

FEDERAL EMPLOYEE BENEFITS INVESTIGATORS ANNOUNCE PLAN TO SCRUTINIZE 401(K) CRYPTOCURRENCY INVESTMENTS

Insights
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While some employees and retirees have been [asking to have cryptocurrencies included](#) in their 401(k) retirement plans, federal authorities recently issued a strong and direct warning that such a plan might run afoul of existing standards and that “extreme care” should be exercised before adding a cryptocurrency option to a 401(k) plan’s investment menu for plan participants. While the Employee Benefit Security Administration’s (EBSA) guidance is not an explicit ban, the agency makes clear that fiduciaries who are considering including cryptocurrencies within 401(k) menu options will need to conduct a thorough evaluation before offering crypto – and should expect an EBSA investigation if they decide to include such an offer. What do employers need to know about the March 10 guidance and what should you do if you are considering – or have already set up – a cryptocurrency-based 401(k) program?

Quick Background and Update

As we [previously covered](#), President Biden recently issued an Executive Order laying out a national policy for digital assets, including a direction to federal regulatory agencies to prioritize consumer and investor protection in the cryptocurrency space. Almost immediately, the EBSA issued [Compliance Assistance Release No. 2022-01](#), reminding fiduciaries of their professional responsibility to act solely in the financial interests of their participants. The agency referred to this standard of professional care as the “highest known to the law.” The guidance included a stark warning that it “expects to conduct an investigative program aimed at

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plans that offer participant investments in cryptocurrencies and related products, and to take appropriate action to protect the interests of plan participants and beneficiaries.”

Service Focus

Employee Benefits and Tax

What is EBSA's Authority?

Pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), EBSA has the authority to investigate employee benefit plans in order to protect the interests of the participants and beneficiaries of those plans. As part of its investigative authority, EBSA has the power to subpoena documents and to compel the attendance and testimony of witnesses. If EBSA believes that plan fiduciaries have violated their fiduciary duties or engaged in prohibited transactions, the Department of Labor's Solicitor's Office has authority to file a civil action in federal court seeking monetary and injunctive relief. EBSA also conducts investigations of potential criminal violations of ERISA, which it refers to the Department of Justice for prosecution.

ERISA plan fiduciaries owe the duties of skill, prudence, and diligence to plan participants and beneficiaries. For 401(k) plans, fiduciaries have an obligation to present participants with a diverse menu of investment options. In addition, as the Supreme Court recently reiterated in [*January's Hughes v. Northwestern University decision*](#), plan fiduciaries have a continuing duty to monitor 401(k) plan investments and remove imprudent ones from the menu. An investment can be imprudent for a number of reasons, including undue risk and excessive fees and costs.

In the recent Compliance Assistance Bulletin related to cryptocurrencies, EBSA highlighted several issues that it will focus on. Among those are the volatility, valuation complexities, and unique custody and recordkeeping aspects of digital assets in comparison with more traditional investments. It also expressed a concern that plan participants may not be in a position to make informed investment decisions regarding digital assets such as cryptocurrencies. Given these statements, EBSA's investigations will likely evaluate the prudence of including particular digital assets in a 401(k)-plan menu.

What Does an EBSA Investigation Entail?

EBSA can initiate an investigation of an employee benefit plan for a number of reasons, including complaints from participant or service providers, media reports, and its

analysis of data collected from annual plan filings. EBSA will also conduct investigations pursuant to specific enforcement initiatives that focus on a particular area of concern. An employer or fiduciary typically learns that a plan is under investigation when it receives a letter requesting documents, or a subpoena for documents or testimony, from EBSA. During the investigation, EBSA may also conduct an on-site visit and ask to conduct interviews of managers and employees.

Service providers to a plan under investigation – such as trustees, financial institutions, and third-party administrators – will also likely receive documents requests or subpoenas from EBSA. Moreover, instead of focusing on a single benefits plan, EBSA may open an investigation of a service provider in order to examine some or all of the plans that service provider handles. If, upon investigation, EBSA believes that a particular digital asset investment option in a 401(k) plan is imprudent, the Solicitor's Office may file a lawsuit against the fiduciaries of the plan in federal court. EBSA also issues civil monetary penalties equal to twenty percent of any money recovered. In addition, fiduciaries who breach their duties of professional care are personally liable for any losses to the plan resulting from the breach.

What Should You Do?

Employers or financial institutions that offer cryptocurrencies in 401(k) plans should thoroughly weigh the risks and benefits of including cryptocurrencies in their 401(k) plan, as [discussed](#) in a previous Insight. As with all investment options, employers and other fiduciaries should continue to monitor and evaluate the prudence of each cryptocurrency included in the 401(k)-plan menu. Lastly, whether you are an employer, fiduciary, or a service provider to a 401(k) plan, you should immediately seek the assistance of legal counsel if you receive a letter or subpoena from EBSA.

We'll continue to monitor developments in this area, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have any questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Cryptocurrency and Blockchain Taskforce](#) or [Employee Benefits and Tax Practice Group](#).