New Senate Bill Would Protect Crypto 401(k) Investments

Insights
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After federal officials fired a shot across the bow of the crypto world by strongly criticizing the practice of including cryptocurrency as a 401(k) investment option, a new proposal introduced in the U.S. Senate last week fired right back and aims to protect such a right. The Financial Freedom Act (S. 4147), introduced on May 5 by Senator Tommy Tuberville (R-AL), would prohibit the Department of Labor from restricting the types of investments that workers can invest in through their self-directed brokerage accounts like 401(k)s – and would clear the path for retirement investors to put some cryptocurrency into their nest egg. What do employers need to know about this latest development?

Department of Labor Fires First Shot

USDOL picked a fight with the crypto world in March when it issued a strong and direct warning that including cryptocurrency in a 401(k) plan might run afoul of existing standards. The agency noted that "extreme care" should be exercised before adding such an option to a 401(k) plan's investment menu for plan participants.

While the warning from USDOL's Employee Benefits Security Administration did not amount to an explicit ban, it made clear that fiduciaries who are considering including cryptocurrencies within 401(k) menu options would need to conduct a thorough evaluation before offering crypto – and should expect an EBSA investigation if they decide to include such an offer. It certainly had a chilling effect on the practice – and employers were waiting for the industry response.

New Senate Bill Responds in Kind

The first official response from the government emerged last week when Senator Tuberville introduced the Financial Freedom Act. As noted, it aims to protect sponsors from regulatory scrutiny and allows investors to choose their own path when it comes to crypto investments. If passed, it would amend federal benefits law to ensure fiduciaries are permitted to select "any particular type of investment alternative" for their menu of options – provided they provide the 401(k) participant an opportunity to choose from a broad range of investment alternatives. It also would ensure that no particular type of investment is considered either "favored or disfavored" for any other reason than its risk-return characteristics – a clear shield for cryptocurrency in light of USDOL's recent announcement.

Further, it prohibits USDOL from issuing any regulations or guidance constraining or prohibiting the range or type of investments that may be offered through a typical brokerage window.

"The Biden administration has taken it upon itself to dictate what assets are viewed worthy of retirement investment," said Tuberville in an announcement accompanying the bill's introduction, "taking the decision away from individual investors by issuing regulatory guidance targeting cryptocurrency. This is government overreach at its finest."

What's Next?

The bill was introduced on May 5 and immediately referred to the Committee on Health, Education, Labor and Pensions. At this time, it has no co-sponsors and it appears unlikely to gain traction in the current Congress. Moreover, it is unlikely at this time that federal benefits law (ERISA) would be amended in such a broad manner in a dispute over cryptocurrency. After all, as written, the Financial Freedom Act would go much further than protecting crypto investments.

But the good news for employers is that it continues the conversation. It's a clear signal that some in Congress, and the larger business community, are in favor of more flexibility when it comes to the use of cryptocurrency as an investment vehicle. We expect this isn't the last time we'll hear about this debate, and predict that this particular bill may be revisited if there is a change in leadership in Congress in 2023.

Conclusion

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 author of this Insight, or any attorney in our Cryptocurrency and Blockchain Taskforce.

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