



April 20, 2022

The Honorable Tommy Tuberville
United States Senate
Washington, D.C. 20510

Dear Senator Tuberville,

This is in response to your March 29, 2022, letter to Secretary of Labor Martin J. Walsh regarding the Employee Benefits Security Administration's (EBSA) Compliance Assistance Release (CAR) 2022-01 on 401(k) Plan Investments in "Cryptocurrencies." In CAR 2022-01, the Department of Labor (Department) cautioned fiduciaries to exercise extreme care before adding cryptocurrency options to 401(k) plan investment menus at this early stage in the history of cryptocurrencies.

The Department's release of CAR 2022-01 was prompted by recent reports of firms marketing investments in cryptocurrencies to 401(k) plans as potential investment options for plan participants. The release notes that cryptocurrency investments present significant risks of fraud, theft, and loss, and cautioned fiduciaries about the potentially speculative and volatile nature of these investments, the unique challenges these investments pose for inexperienced investors, custodial and recordkeeping issues, valuation concerns, and regulatory risks. In the CAR 2022-01 release, EBSA also announced its intention to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies and related products. The release provided advance notice to plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows that they should expect to be questioned about how they squared their actions with their duties of prudence and loyalty, considering the significant risks that 401(k) plan investments in the largely unregulated cryptocurrency marketplace present to the retirement savings and retirement security of America's workers.

EBSA is not taking a novel position by asserting that ERISA imposes obligations on fiduciaries of plans with self-directed brokerage accounts or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. The Department has long indicated that fiduciaries have responsibilities with respect to brokerage windows. A 2012 Field Assistance Bulletin (FAB) specifically noted that "fiduciaries of such plans with platforms or brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan are still bound by ERISA section 404(a)'s statutory duties of prudence and loyalty to participants and beneficiaries who use the platform or the brokerage window...including taking into account the nature and quality of services provided in connection with the platform or the brokerage window...." (FAB 2012-02R, Question 39, at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2012-02r>). In light of ERISA's stringent and longstanding obligations of prudence and loyalty, it is reasonable to expect plan fiduciaries to be able to respond to questions about their decisions to make cryptocurrency investments available to plan participants and beneficiaries, whether as designated investment alternatives or through a self-directed brokerage account or similar arrangement. If such investments are made available, plan fiduciaries should be prepared to discuss their decision-making process and explain whether the investments are subject to any limitations or protections set forth in the plan.

The CAR is limited by its terms to cryptocurrency investments and focuses on the need for ERISA fiduciaries to exercise extreme care at this stage of cryptocurrency's development. The CAR does not, and should not be read to, address other types or classes of investments. That said, we are aware of legislative proposals aimed at limiting or prohibiting investment in, or that finance, certain types of companies or businesses of the People's Republic of China. Executive Order 14032 also generally prohibits U.S. persons from purchasing or selling securities of issuers identified as Communist Chinese Military-Industrial Companies. It does not appear the legislative proposals or the Executive Order include exemptions for ERISA fiduciaries responsible for 401(k) plans with brokerage windows.

I hope you find this information helpful. Should you or your staff have any additional questions, please contact the Office of Congressional and Intergovernmental Affairs at (202) 693-4600.

Sincerely,

Ali Khawar

Ali Khawar
Acting Assistant Secretary