April 12, 2022

The Honorable Ali Khawar
Acting Assistant Secretary
Department of Labor
200 Constitution Ave NW
Suite N-5677
Washington, DC 20210

Dear Acting Assistant Secretary Khawar:

The undersigned organizations write with regard to Compliance Assistance Release ("CAR") 2022-01, issued by the Employee Benefits Security Administration ("EBSA") on March 10, 2022. As you know, the subject of the CAR is "401(k) Plan Investments in 'Cryptocurrencies.'"

First, we wish to share that we have greatly appreciated the openness of EBSA to have informal listening sessions with stakeholders on a broad range of issues. This openness has been very helpful and has underscored EBSA's dedication to improving the retirement system. We thank you for that. It is in the context of this openness that we write to you about CAR 2022-01 and ask respectfully that this release be withdrawn and that the Department instead develop guidance in this area through notice-and-comment rulemaking.

Please note that, at this time, we express no view on the appropriateness of retirement plan investments in cryptocurrency. Rather, as described herein, we are troubled by what we perceive to be a trend at EBSA away from rulemaking based on a robust notice and comment process, including review by the Office of Information and Regulatory Affairs ("OIRA"). We are very aware that the line between helpful sub-regulatory guidance and indirect rulemaking is not a clear one. But we respectfully suggest that recent sub-regulatory guidance has been more in the nature of rulemaking in need of notice and comment and OIRA review, such as with respect to recent best practices guidance, as discussed below.

We believe that this trend is not helpful to the retirement system. Not using the notice-and-comment process can undermine the quality of guidance issued, causing fiduciaries to try to apply wording found in sub-regulatory guidance that has not been informed by input from the regulated community regarding how a proposed standard, as written, might be confusing or hard to administer--or even contrary to the interest of plan participants (i.e., have an unintended effect). Moreover, we believe that this trend is inconsistent with the Administrative Procedure Act's ("APA") requirements regarding notice and comment and with the Administration's requirements regarding OIRA review.

<u>The Department's new cryptocurrency position is inconsistent with current law, and adopted retroactively without notice and comment or OIRA review.</u> A prominent example of this trend is the recent guidance on cryptocurrency. The closing sentence of CAR 2022-01 reads as follows:

> The plan fiduciaries responsible for overseeing [cryptocurrency and related] investment options or allowing such investments through brokerage windows should expect to be

questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described above.

Again, we are not expressing any view on the appropriateness of retirement plan investments in cryptocurrency, but we are troubled in the following respects. First, brokerage window investments are not designated investment alternatives. Notably, Department of Labor regulation 2550.404a-5(h)(4) expressly excludes brokerage windows from the definition of a designated investment alternative. Moreover, the Department's existing supplemental guidance under 404a-5 -- Field Assistance Bulletin ("FAB") 2012-02R -- makes clear that, while there may be a fiduciary duty to evaluate the brokerage window provider, there does not exist a fiduciary duty to monitor or evaluate the underlying investments that plan participants make in the window. For background on this issue, see FAB 2012-02R, Q&A 39 ("fiduciaries of … 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, self-directed brokerage account, or similar plan arrangement, including taking into account the nature and quality of services provided in connection with the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement").

This understanding of the law was confirmed as recently as last summer by witnesses testifying before the Advisory Council on Employee Welfare and Pension Benefit Plans (commonly referred to as the ERISA Advisory Council).[1]

Indeed, most windows are not set up to even monitor or block investments at this level of specificity. And we understand that it would be time-consuming and expensive to modify systems to be able to track direct cryptocurrency investments in brokerage windows – and far more difficult to track "related products" (as discussed below) The issued guidance is thus not only inconsistent with current law and current established practices, but would also modify the law retroactively, such that a past failure to monitor brokerage window investments in a newly announced specified manner will be investigated as a likely violation of ERISA. Such a change in the law is not only inappropriate and impracticable, but at a minimum would have to be done prospectively with notice and comment and OIRA review.

In fact, in Q&A 39 cited above, the Department stated with respect to a brokerage window question: "The Department understands plan fiduciaries and service providers may have questions regarding the situations in which fiduciaries may have duties under ERISA's general fiduciary standards apart from those in the regulation. The Department intends to engage in discussions with interested parties to help determine how best to assure compliance with these duties in a practical and cost-effective manner, including, if appropriate, through amendments of relevant regulatory provisions." No such engagement occurred prior to the issuance of the CAR.

[1] Available at: https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2021-understanding-brokerage-windows-in-self-directed-retirement-plans.pdf (accessed Apr. 1, 2022)).

In addition to concerns about its legality and enforceability, the guidance creates confusion for plan fiduciaries regarding whether only "direct" investment in cryptocurrencies (as opposed to indirect investment in cryptocurrencies through vehicles such as publicly traded mutual funds or exchange traded funds) would be questioned, similar to the Department's recent supplemental statement questioning direct investment by plan participants and beneficiaries in private equity investments. In fact, the guidance appears to threaten enforcement with respect to "related products" without defining what that term means.

We are concerned about the practical consequences of the Department's guidance for plan sponsors. As noted, plan sponsors have not been charged previously with fiduciary responsibility for investments made through brokerage windows. The Department's guidance now puts plan sponsors in the untenable position of having to choose between extending their fiduciary responsibility to such investments, contrary to longstanding guidance, or accepting the likelihood of a plan investigative audit, along with the very real expenditures, both in time and money, associated with such audits. At the same time, also as noted, adequate mechanisms currently do not exist for identifying and excluding cryptocurrencies from brokerage windows, let alone explicitly defining cryptocurrency investments that could be problematic. As noted, this is particularly true for products such as mutual funds and exchange traded funds that offer exposure to cryptocurrencies but are not direct investment in cryptocurrencies *per se*. As these types of investments proliferate, it will be increasingly difficult for plan sponsors to identify, evaluate, and exclude such investments from brokerage windows. Plan sponsors are not equipped to bear this burden and, as noted above, doing so would call into question the extent of their fiduciary responsibilities over the investment offerings within brokerage windows.

Standard of care. We are also concerned about the CAR's admonition that fiduciaries should use "extreme care" when considering adding cryptocurrency as an investment option in a plan's fund lineup. This is not the legal standard applicable to fiduciaries under ERISA, which is and remains that fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." The CAR's reference to "extreme care" creates confusion regarding the legal standard to which fiduciaries are subject.

Concerns about the Department deciding which investments are appropriate. Finally, we are concerned about the Department issuing guidance on which investments are inherently appropriate or inappropriate. We are not aware of any legal basis on which the Department can proceed down this path, and this would set a concerning precedent for future announcements by any Administration about what investments are permissible.

The CAR should be withdrawn. Respectfully, we ask that the cryptocurrency guidance be withdrawn, pending a robust notice and comment period. At a minimum, it is critical that the announcement of a new fiduciary standard with respect to brokerage windows be withdrawn.

Best practices guidance being used in lieu of rulemaking. We have seen a growth in the use of best practices guidance and investigation and litigation-generated settlements with single parties in lieu of rulemaking, such as with respect to missing participants, cybersecurity matters, and

fiduciary obligations with respect to employer securities. These pronouncements of the Department's positions are not a substitute for regulatory guidance. On the contrary,

> (1) guidance on best practices, and
> (2) single-party settlements reached through investigation and litigation in areas in which the Department has not undertaken formal rulemaking, which are in some cases utilized by EBSA agents as binding statements on the law in its investigations,

can be viewed as setting forth the Department's enforcement expectations without engaging in notice and comment on what the law is and without OIRA review. Further, the utilization of this guidance by agents in investigations in review of fiduciary acts occurring prior to the issuance of the guidance makes the absence of the necessary process of notice and comment rulemaking even more concerning. Indeed, the industry has recognized the Department's recent approach to investigating plan fiduciaries on topics for which it has not issued formal guidance as "regulation by enforcement."

For example, there has been a longstanding need for clarity on fiduciary responsibilities in trying to locate missing participants. The best practices guidance issued by the Department on this issue had a number of ambiguities and set forth a host of practices that would be impracticable to fully comply with. Despite this, upon investigation by the Department, plan sponsors are being held to these standards retroactively for fiduciary acts which occurred years prior to the issuance of the Department's recent best practices guidance on missing participants. This is an excellent example of why we have the APA and OIRA review. Such process would – and still can -- allow for a dialogue with interested parties so that the guidance is clearer and has established workable standards and contains a means for fiduciaries to move into compliance with these newly announced standards in a timely fashion. We are concerned this recent trend permits the Department to not only enforce standards that have not been subjected to the process of formal rulemaking, but also results in the Department missing out on the balance and rigor of rulemaking altogether on important industry topics.

Different type of issue: proposed prohibited transaction exemption ("PTE") application rules. An example of a different issue is the proposed rules regarding PTE applications. In our view, this was a significant proposal that should have been reviewed by OIRA. In our view, OIRA review, as required by the Administration, leads to better guidance, which in turn leads to a stronger retirement system.

We very much appreciate your consideration of our views.

American Bankers Association
American Benefits Council
American Council of Life Insurers
The Defined Contribution Alternatives Association
The ERISA Industry Committee
Insured Retirement Institute
Investment Company Institute
Securities Industry and Financial Markets Association
The Small Business Council of America
The SPARK Institute
United States Chamber of Commerce

cc:
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