



Employee Benefits In Focus

Pitta LLP
For Clients and Friends
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THE ERISA ADVISORY COUNCIL HAS A NEW MEMBER – MARCELLE J. HENRY

We are pleased to announce that our partner, Marcelle J. Henry, has been appointed by Secretary of Labor Martin J. Walsh to serve on the U. S. Department of Labor’s (“DOL’s”) Advisory Council on Employee Welfare and Pension Benefit Plans (the “ERISA Advisory Council”).

The ERISA Advisory Council is a federal advisory committee established under Section 512 of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). The ERISA Advisory Council advises the Secretary of Labor with respect to carrying out the Secretary’s functions under the Federal Advisory Committee Act and submits recommendations with respect to those functions. In this capacity, Council members help shape policy and application of employee benefits nationwide.

Marcelle will remain in our New York City office, continuing her service to our clients full time, except for the limited number of days a year that she participates in ERISA Advisory Council meetings in Washington, D.C. We are delighted and proud that Secretary Walsh has selected Marcelle to be a member of the 2022 ERISA Advisory Council. Please join us in congratulating Marcelle on her achievement.

The DOL’s press release announcing the new 2022 members can be found [here](#).

ARE RETIREMENT PLANS READY TO INVEST IN CRYPTOCURRENCIES?

On March 10, 2022, the U.S. Department of Labor’s (“DOL’s”) Employee Benefits Security Administration (“EBSA”) published Compliance Assistance Release No. 2022-01, titled “401(k) Plan Investments in ‘Cryptocurrencies’” (the “Release”). The Release is consistent with President Joe Biden’s executive order mandating that federal regulatory agencies ensure consumer and investor protection as it relates to investment in digital assets. Pursuant to the Release, the DOL may take enforcement action against fiduciaries who expose “a 401(k) plan participant to direct investments in cryptocurrencies, or other products whose value is tied to cryptocurrencies.” Under the Release, cryptocurrencies include a “wide range of ‘digital assets’ including those marketed as ‘tokens,’ ‘coins,’ ‘crypto assets,’ and any derivatives thereof.”

In the Release, the DOL explains that under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), fiduciaries must adhere to a strict standard of professional care and are obligated to abide by the duties of prudence and loyalty. Such a standard and dual duties are often characterized by the courts as the “highest known to the law.” Indeed, when a fiduciary considers whether to include cryptocurrencies as an investment option, they are subject to the “exacting responsibilities” outlined above. Accordingly, pursuant to the Release, when a plan fiduciary chooses to include crypto investment options in a defined contribution plan

menu of investment options to be made available to participants, the plan fiduciary is required to both ensure that those investments are prudent on a continuing basis and examine other investment alternatives. Citing the recent Supreme Court case *Hughes v. Northwestern University*, 142 S.Ct. 737 (2022), the Release underscored that even in a defined contribution plan where participants pick their own investments, fiduciaries are still required “to conduct their own independent evaluation to determine which investments may be prudently included in the plan’s menu of options” and, “failure to remove imprudent investment options is a breach of duty.” *Hughes* at 742.

The Release advised that “the Department has serious concerns about the prudence of a fiduciary’s decision to expose a 401(k) plan’s participants” to investments directly or indirectly tied to cryptocurrencies. The DOL outlined a number of specific concerns including “[f]raud, theft, and loss” as well as the fact that cryptocurrency as an investment vehicle is “highly speculative” and “subject to extreme price volatility.” In addition, the Release cites concerns that it would be difficult for investors to “separate the facts from the hype” when attempting to objectively evaluate cryptocurrencies. EBSA “expects to conduct an investigative program aimed at plans that offer participants investments in cryptocurrencies and related products, and to take appropriate action to protect the interests of plan participants and beneficiaries with respect to these investments.”

As time goes on, and more guidance is promulgated, hopefully, the regulatory landscape for and approach to cryptocurrency will become clearer. In the meantime, however, plan fiduciaries are advised to take into consideration the concerns cited by the DOL when considering whether to invest plan assets in cryptocurrencies.

DOL PROHIBITED TRANSACTION EXEMPTION 2020-02 AND RELATED GUIDANCE TRIGGERS LAWSUITS

The U.S. Department of Labor (“DOL”) is currently facing two lawsuits challenging the lawfulness of prohibited transaction exemption 2020-02 (“PTE 2020-02”) and related guidance issued in the form of frequently asked questions (“FAQs”) in April 2021. PTE 2020-02 and the FAQs regulate fiduciary obligations in the context of plan rollovers.

The first lawsuit filed on February 9, 2022, by the American Securities Association (“ASA”) against the DOL and the Secretary of Labor, alleged that the FAQs are unlawful and violate the Administrative Procedure Act (“APA”) because they, in effect, promulgate new guidance. See, Complaint at 2, *Am. Sec. Ass’n v. U.S. Dep’t of Labor*, No. 8:22-cv-00330 (M.D. Fla. Feb. 09, 2022). ASA averred that the DOL failed to comply with the APA’s required notice-and-comment process when it issued the FAQs which ASA contended significantly changed the exemption by imposing new obligations. For detailed information on the FAQs, please refer to our article entitled “DOL Announces Additional Transition Relief for Prohibited Transaction Exemption 2020-02” by clicking the [following link](#). The second lawsuit, also filed in February 2022 by the

Federation of Americans for Consumer Choice Inc., a group representing insurance and annuity distributors, raised similar arguments to those of ASA's. See, Complaint, *Federation of Americans for Consumer Choice, Inc. v. U.S. Dep't of Labor*, No. 3:22-cv-00243 (N.D. Tex. Feb 02, 2022).

PTE 2020-02, issued by the DOL on December 18, 2020, marked a new prohibited transaction exemption under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the Internal Revenue Code of 1986 ("IRC") for investment fiduciaries relating to employee benefit plans and individual retirement accounts ("IRAs"). The exemption specifically protects prohibited transactions that are the result of rollover advice as well as advice regarding how to invest assets within a plan or IRA. Originally set to become effective on February 16, 2021, only certain parts of PTE 2020-02 have begun to be enforced as of February 1, 2022, while other remaining parts are set to be enforced beginning on July 1, 2022.

In adopting PTE 2020-02, the DOL also issued a technical amendment to the Code of Federal Regulations which restored a 1975 five-part investment advice fiduciary rule. Under the five-part test, a person is defined as an investment-advice fiduciary when the person: "[1] renders advice to the plan as to the value of securities or other property . . . [2] on a regular basis . . . [3] pursuant to a mutual agreement, arrangement or understanding . . . that such services [4] will serve as a primary basis for investment decisions . . . and that . . . person will [5] render individualized investment advice to the plan based on the particular needs of the plan[.]" 29 C.F.R. § 2510.3-21(c)(1) (1975).

In its complaint, ASA argued that the FAQs imposed new obligations and singled out FAQ No. 7 and FAQ No. 15 as "egregious." ASA took issue with FAQ No. 7 because it dispenses with the "regular basis" prong of the five-part test in the context of rollovers. Under the IRC, rollovers are transactions where cash or other assets are withdrawn from one eligible retirement plan and all or part of the assets are contributed, within 60 days, to another eligible retirement account. Further, ASA argued that "under FAQ No. 7, a financial professional can be considered an investment-advice fiduciary when making a rollover recommendation even though he has not provided any advice on "a regular basis to the plan" and thus FAQ No. 7 "transforms countless one-time rollover recommendations into the acts of a fiduciary, despite the plain meaning of the five-part test, the Department's prior interpretation of its rules, and the common law understanding of a 'fiduciary'[".]"

With respect to FAQ No. 15, ASA argued that it "imposes a host of burdensome documentation and investigation requirements on financial institutions when making rollover recommendations, despite the fact that" PTE 2020-02 contains no such requirements. As for the impact of the requirements outlined in FAQ No. 15, ASA argued that while it has members that will comply with the exemption, the requirements are "burdensome, expensive, and time consuming" which will preclude members from utilizing "the Exemption to engage in the activities the Exemption explicitly permits."

ASA ultimately argued that the policies referenced in the FAQs violate the APA because the DOL did not comply with the required notice and comment process. ASA concluded that the policies should be vacated and the DOL enjoined from implementing or enforcing them in any manner.

Similarly, the Federation of Americans for Consumer Choice Inc. alleged that the preamble to PTE 2020-02 was a violation of the APA because it expanded the definition of a fiduciary, violating federal law as Congress never gave the DOL authority to change the definition of a fiduciary under ERISA.

While we await the resolution of the above two challenges, we should be mindful that until or unless one of the courts rule differently, plan sponsors should continue to abide by the DOL's PTE 2020-02.

A FEW REMINDERS **(Based on calendar-year plans)**

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines which may be applicable to your plan.

APRIL

DC PLANS

- **Required Minimum Distributions (“RMDs”)**
 - April 1, 2022 is the deadline for first minimum required distributions to participants who reached their required beginning date in 2021.
- **Refunds of 2021 Elective Deferrals Exceeding 402(g) Limit**
 - April 15, 2022 is the deadline for plans to return 2021 excess elective deferrals contributed to a 401(k) plan (*i.e.*, elective deferrals that exceeded 402(g) limit).

DB PLANS

- **Actuary's Certification of 2022 Adjusted Funding Target Attainment Percentage (“AFTAP”)**
 - April 1, 2022 is the deadline for an actuary to certify a single-employer plan's 2022 AFTAP.
- **RMDs**
 - April 1, 2022 is the deadline for first minimum required distributions to participants who reached their required beginning date in 2021.
- **Pension Benefit Guaranty Corporation (“PBGC”) Form 4010 (Notice of Underfunding)**
 - April 15, 2022 is the deadline for certain underfunded single-employer plans to file the Form 4010 with the PBGC.
- **Endangered Status or Critical Status Notice**

- A plan in either Endangered, Critical or Critical and Declining Status must furnish the notice of its status to participants no later than thirty (30) days after the actuary's zone certification which was due at the end of March 2022.
- **PBGC Reconciliation of Estimated Variable-rate Premium Filing**
 - April 30, 2022 is the deadline by which the PBGC reconciliation filing is due without incurring late-payment penalties "for plans that filed an estimated variable rate premium for 2021."

MAY

DC PLANS

- **Quarterly Benefit Disclosure Statement**
 - May 15, 2022 is the deadline by which a plan must furnish the quarterly benefit disclosure statement of plan fees and expenses actually charged.

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