



Employee Benefits In Focus

Pitta LLP
For Clients and Friends
May 20, 2022 Edition



PREVENTING AND MITIGATING FRAUD IN PENSION AND HEALTH AND WELFARE FUNDS

Fiduciaries are tasked with taking preventive measures to mitigate and avert fraud which could result in large financial losses to benefit plans. In order to avoid civil and criminal liability arising from these potential losses, fiduciaries are strongly advised to implement as many practicable measures as possible as part of their everyday operation and administration of the plan. Below is a list of common types of fraud along with prudent measures fiduciaries are encouraged to take in order to mitigate and prevent fraud on their plans.

Pension Fund Fraud

Types of Fraud	Recommended Prudent Measures
<p>Internal Fraud is often perpetrated by employees of an organization; however, officers and management of an organization can also be charged with perpetrating an internal fraud (e.g., an individual within the fund colluding or circumventing controls).</p>	<ul style="list-style-type: none"> • Create strong Internal Controls (i.e., institute policies, procedures, processes, systems and actions meant to aid in detecting and preventing errors) and adopt the DOL’s Cybersecurity Program Best Practices which can be found here. • Conduct antifraud training and awareness. • Make available anonymous reporting hotlines where employees are free to report fraud. • Perform internal audits (e.g., an internal auditor investigates the effectiveness of the internal controls instituted to detect, mitigate and prevent fraud risks).
<p>External Fraud is perpetrated by parties outside of the internal operations of a plan (e.g., participants or other third parties). One example is a family member’s failure to inform a plan of the passing of a pensioner so that they can continue to collect the monthly benefit payments.</p>	<ul style="list-style-type: none"> • Subscribe to the Social Security Administration Death Master File (“DMF”) which lists the social security number for each person who has died. • Hire experts that examine newspapers for obituaries of pensioners in order to bolster the DMF measure. • Conduct pension verification reviews (i.e., requiring pensioners to periodically prove that they are still alive by providing either a notarized signature, or a copy of a recently filed tax return).

Health and Welfare Fund Fraud

Health and welfare funds are also susceptible to fraud like those of pension funds. For instance, a health fund may be providing medical coverage for non-covered individuals such as a nondependent child, divorced spouse or someone who has never been entitled to benefits like a sibling or a grandchild or even a dependent of a non-covered individual. To avoid these types of fraud, funds should conduct dependent eligibility audits which could result in substantial savings of fund assets. Fiduciaries may choose to conduct these audits internally or hire an outside firm specializing in conducting such audits.

If conducting dependent eligibility audits in-house, fiduciaries are advised to start by requesting that covered employees fill out a short questionnaire identifying their dependents and certifying that the information they are providing is accurate. Fiduciaries may also request that covered employees fill out more detailed questionnaires inquiring about more specific information regarding their dependents and requesting that employees provide a notarized statement along with written proof for every dependent. The questionnaires should then be reviewed by staff for any suspicious answers and, subsequently, fiduciaries should take follow-up actions, such as starting the process of confirming findings and, if appropriate, terminating non-covered individuals.

Fraud, unfortunately, is a recurring problem, and fiduciaries are well advised to consider implementing preventative measures and approaches including, but not limited to, the ones described above.

ERISA ADVISORY COUNCIL VOTES TO TACKLE CYBER-RISKS IN 2022

Recognizing the importance of cybersecurity to both plan sponsors, participants and regulators, on Monday, May 9, 2022, the ERISA Advisory Council voted to make cyber-risks research a priority in 2022. The decision appears to be in response to the current environment where electronic disclosures as well as electronic communications between plan sponsors and participants have become commonplace. In fact, it is this increased use of digital and social media mediums by benefit plan sponsors and participants that has in turn increased the vulnerabilities to cyber-attacks.

In the Department of Labor's ("DOL's") April 2021 guidance, titled Cybersecurity Program Best Practices, the DOL provides plan fiduciaries with twelve tips to use in preventing and mitigating cybersecurity risks by their record keepers and other service providers responsible for plan-related IT systems and data. These best practices would assist fiduciaries in protecting data in use (*i.e.*, data being processed, accessed or read), data in motion (*i.e.*, data that is being transported), and data at rest (*i.e.*, data that is not being accessed or used) which is especially important when the confidentiality, integrity and/or availability of non-public information is at stake. A copy of the DOL's Cybersecurity Program Best Practices can be accessed by clicking the [following link](#).

While the industry awaits the ERISA Advisory Council's cyber-risks reports, plan sponsors are well advised to follow the DOL's Cybersecurity Program Best Practices guidelines.

IS THE DEPARTMENT OF LABOR'S ANTI-CRYPTO GUIDANCE FORESHADOWING OF A REGULATORY CHANGE?

As previously reported in our April 2022 issue, cryptocurrencies and their inclusion in retirement plans have come into the spotlight after the Department of Labor's ("DOL's") Employee Benefits Security Administration published Compliance Assistance Release No. 2022-01, titled "401(k) Plan Investments in 'Cryptocurrencies'" (the "Release"). In the Release, the DOL issued a clear warning to fiduciaries regarding the risks of offering cryptocurrencies as potential investment options for retirement plan participants. One such risk cited in the Release was price volatility, which seems to have come to fruition given the recent drop in value of cryptocurrencies. Importantly, the Release warned that fiduciaries "responsible for overseeing [cryptocurrency] 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 outlined in the Release. The DOL's comment regarding oversight of brokerage windows is significant as some commentators have read it as foreshadowing new obligations on plan fiduciaries that did not previously exist because it would be unlikely for the DOL to arbitrarily single out cryptocurrencies. The Release's warning did not fall on deaf ears, and it appears to have had a resounding effect on both the judicial as well as the legislative landscapes.

Judicial Landscape

The Release's impact on the judicial landscape is demonstrated by the halting of a settlement of an 18,000-person class action lawsuit brought against T. Rowe Price Group Inc. ("T. Rowe") over five years ago. In this class action, plan participants and beneficiaries alleged that T. Rowe and affiliates violated the Employee Retirement Income Security Act of 1974's, as amended ("ERISA's") fiduciary duty by engaging in prohibited transactions through the offering of only T. Rowe Price's in-house investment funds in the participants' 401(k) plan. See, Complaint, *Feinberg, et al., v. T. Rowe Price Group, Inc., et al.*, 1:17-cv-00427 (MJG) (D. Md. February 14, 2017), ECF No. 1. Specifically, the complaint alleged that the decision of T. Rowe, as the investment advisor, to offer its own in-house funds in the 401(k) plans was made without "a prudent or loyal process" as T. Rowe and affiliates failed to consider non-proprietary alternatives and whether those alternatives would better serve Plan participants. In so doing, the Complaint alleged, T. Rowe and affiliates made a windfall through this "exclusive relationship" of favoring its own in-house investment funds in its 401(k) plan.

On December 16, 2021, after significant litigation, the parties reached a Class Action Settlement Agreement ("Settlement Agreement") providing among other remedies, that T. Rowe was to pay the Class \$7 million dollars as well as include a brokerage window feature in the plan whereby participants could invest in non-proprietary investment funds for the first time. Under the Settlement Agreement, the brokerage

window feature could be removed only if a professional independent fiduciary determined that offering it would violate ERISA's duty of prudence, or if there had been a change in law or regulation regarding "fiduciary monitoring or reporting requirements for investment offerings available through a brokerage window making such monitoring or reporting materially more burdensome or costly." However, following the issuance of the Release, T. Rowe wrote a letter in response to Plaintiff's motion for an award of attorney's fees, reimbursement of expenses and service awards to class representatives, requesting that the court consider the Release in determining the settlement value because the Release raised questions about possible changes to the regulatory environment that, if came to pass, could lead T. Rowe to presume that there has been the type of change in law or regulation regarding fiduciary monitoring of brokerage windows contemplated by the Settlement Agreement. See, Response to Plaintiffs' Motion for Award of Attorney Fees, *Feinberg, et al.*, 1:17-cv-00427 (MJG) (D. Md. April 25, 2022), ECF No. 246. While acknowledging that the DOL's guidance is limited to cryptocurrencies, T. Rowe averred that the investment industry believed that it would be difficult to limit the duties to select and monitor individual investments offered through a brokerage window to investments in cryptocurrencies only. *Id.* Accordingly, T. Rowe stated that it was evaluating the DOL's guidance for any indications that there had been a change in the regulatory environment contemplated by the Settlement Agreement and requested that the court consider the DOL's guidance in discerning the settlement value. *Id.*

T. Rowe's arguments, however, may be unsupported by the DOL and its stated intention in publishing the Release. This is so because Acting Assistant Secretary, Ali Khawar has recently been quoted in a Bloomberg Law article as stating that the Release was not written to create a "backdoor way to regulate brokerage windows in a whole new way." Furthermore, he added that the Release "does not say and was not intended to say that what you now have to do is, if you have a thousand options available in a brokerage window, you need to go and review every one of them and make sure that you would personally invest in them as a fiduciary." For some, Khawar's statements clearly suggest that the Release was not intended to create new obligations; however, given the surfacing of several reasonable interpretations of the Release, clarifying guidance seems necessary and pressing.

Legislative Landscape

While the Release's real impact on the legislative landscape is yet to be ascertained, cryptocurrencies appear to be at center stage in the Senate as reports have surfaced that the Senate may be discussing cryptocurrencies and their potential regulation and deregulation as it pertains to 401(k) plans. For example, on May 4, 2022, Senators Elizabeth Warren (D-Mass.) and Tina Smith (D-Mass) issued a letter rebuking Fidelity Investments Inc. for its decision to soon implement a new product aimed at investing 401(k) savings in cryptocurrencies. Meanwhile, on May 5, 2022, Senator Tommy Tuberville (R-Ala.) introduced the Financial Freedom Act (S. 4147), a bill that seeks to shield sponsors from regulatory requirements to oversee the investments participants choose on their own through a brokerage window.

With the rising popularity of cryptocurrencies, it was only a matter of time until they would appear as an investment alternative for retirement savings plans. The DOL's stance suggests that at least for now, it very much disfavors the use of cryptocurrencies as a plan investment in retirement plans.

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 that may be applicable to your plan.

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.

JUNE

DC PLANS

- Corrective Distributions for Failed Actual Deferral Percentage (“ADP”) and Actual Contribution Percentage (“ACP”) Tests for Certain Eligible Automatic Contribution Arrangements (“EACAs”)**
 - June 30, 2022 is the deadline by which certain EACAs must process corrective distributions for failed ADP/ACP tests without incurring a 10% excise tax.

- Legal Advice Disclaimer:** The materials in this **Client Alert** report are provided for informational purposes only and are not intended to be a comprehensive review of legal developments, to create a client–attorney relationship, to provide legal advice, or to render a legal opinion. Readers are cautioned not to attempt to solve specific legal problems on the basis of information contained in this **Client Alert**. If legal advice is required, please consult an attorney. The information contained herein, does not necessarily reflect the opinions of Pitta LLP, or any of its attorneys or clients. Neither Pitta LLP, nor its employees make any warranty, expressed or implied, and assume no legal liability with respect to the information in this report, and do not guarantee that the information is accurate, complete, useful or current. Accordingly, Pitta LLP is not responsible for any claimed damages resulting from any alleged error, inaccuracy, or omission. This communication may be considered an advertisement or solicitation.

- To Our Clients:** If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

- **To Our Clients and Friends:** To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.