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In this Issue:

Exercise "Extreme Care" Before Offering Cryptocurrency as a 401(k) Plan Investment Option, DOL Warns

In Compliance Assistance Release No. 2022-01, the Department of Labor's Employee Benefits Security Administration (EBSA) announced it will be conducting "an investigative program aimed at plans that offer participant investments in cryptocurrencies and related products, and to take appropriate actions to protect the interests of plan participants and beneficiaries with respect to these investments."

Background

As noted in the Compliance Assistance Release, ERISA fiduciaries "must act solely in the financial interests of plan participants and adhere to an exacting standard of professional care." Those "exacting responsibilities" apply to 401(k) plan fiduciaries when considering whether to offer a cryptocurrency investment option.

"Serious Concerns"

According to the Compliance Assistance Release, EBSA has "serious concerns about the prudence of a fiduciary's decision to expose a 401(k) plan's participants to direct investments in cryptocurrencies, or other products whose value is tied to cryptocurrencies." These types of investments "present significant risks and challenges to participants' retirement accounts, including significant risks of fraud, theft, and loss" for a number of reasons specified in the Compliance Assistance Release. In particular:

- Speculative and Volatile Investments: Cryptocurrencies are still relatively new and have been subject to extreme price volatility. This type of volatility can have a "devastating" impact on participants' retirement savings, particularly for those who are approaching retirement age.
- Challenge for Plan Participants to Make Informed Investment Decisions: If plan fiduciaries offer cryptocurrencies as an investment option, they are effectively telling participants they are a prudent investment option. However, "inexpert" participants may be lured by the promise of high returns without appreciating the related risks associated with cryptocurrencies.
- Custodial and Recordkeeping Concerns: Unlike other plan assets held in trust or custodial accounts, cryptocurrency exists as "lines of computer code in a digital wallet." As such, they are more vulnerable to loss and theft.
- Valuation Concerns: Department of Labor (DOL) is concerned about the reliability and accuracy of cryptocurrency valuations.
- Evolving Regulatory Environment: Noting that cryptocurrency has been used in drug deals, money laundering, and other illegal transactions, the DOL notes there is a risk that law enforcement agencies could shut down or restrict the use of platforms and exchanges, thus affecting the ability to use or trade Bitcoins.

Regarding the investigative program mentioned above, the Compliance Assistance Release notes that if fiduciaries allow cryptocurrency investment options directly or through a brokerage window, they "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."

Department of Labor Releases Request for Information on Climate-Related Financial Risk

The Request for Information asks commenters to weigh in on what the Department of Labor could do to address the impact of climate change on retirement savings.

Overview

On February 14, 2022, the Department of Labor (DOL) released a Request for Information (RFI) on "Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk." The RFI was issued in furtherance of President Biden's May 20, 2021, Executive Order on Climate-Related Financial Risk and solicits public input on actions that can be taken by DOL to protect individuals' retirement savings from the negative impacts of climate change.

The RFI covers a wide array of retirement-related topics, focusing on ERISA plans and plans for federal workers but also touching on non-ERISA arrangements. One of the key topics addressed in the RFI is a potential expansion of data collection on the Form 5500. For instance, the RFI states that the Form 5500 could try to collect information about whether and how plan investment policy statements specifically address climate-related financial risk, whether service providers disclose or meet metrics related to such financial risks, and whether and how plans have factored climate-related financial risk into their analysis of individual investments or investment courses of action.

The RFI also indicates that the Form 5500 could try to collect data on whether and how plan fiduciaries voted on proxy proposals involving climate-related financial risk. In addition, the RFI asks commenters to weigh in on whether ERISA plan administrators should be required to publicly report on the steps they take to manage climate-related financial risk in a form that is more easily accessible to the public and timelier than the Form 5500.

The RFI poses some questions relating to non-ERISA arrangements, asking whether the absence of prudence and loyalty obligations with respect to IRAs and other non-ERISA arrangements leaves those arrangements vulnerable to climate-related financial risks, and whether there are legal or regulatory impediments that hinder managers of investments held in non-ERISA arrangements from taking steps to properly mitigate against climate-related financial risks to those investments.

The RFI also demonstrates DOL's interest in supporting climate-related education by asking commenters to respond to questions regarding the potential need to educate retirement plan participants about climate-related financial risks, and whether DOL should play a role in supporting or providing such education.

Outlook

The RFI is a clear sign that the Biden Administration is prioritizing action on climate change. While many of the RFI's questions are unlikely to lead to actual

government proposals in the future, the RFI is still an opportunity for interested parties to share their opinions on what the federal government should or should not be doing with respect to climate change. Comments on the RFI are due May 16, 2022.

Supreme Court Declines to Hear ERISA Preemption Challenge to CalSavers State-Run Auto-IRA Program

The Supreme Court rejected a request to review a Ninth Circuit Court of Appeals ruling that ERISA does not preempt California's state-run auto-IRA program, CalSavers. Even though the decision involved only CalSavers, it is being viewed as a victory for the 11 states that have enacted auto-IRA programs.

Overview

On February 28, 2022, the U.S. Supreme Court denied a petition to review the Ninth Circuit Court of Appeals decision in *Howard Jarvis Taxpayers Association v. The California Secure Choice Retirement Savings Program*. The Court's denial brought an end to the long-running lawsuit brought by Howard Jarvis Taxpayers Association (HJTA), which argued that CalSavers, California's state-run auto-IRA program, is preempted by the Employee Retirement Income Security Act of 1974 (ERISA).

In general, CalSavers is an automatic enrollment payroll deduction IRA program for employees who do not have access to an employer-sponsored retirement program. The CalSavers program is managed and administered by the state of California. HJTA first filed its suit in the District Court for the Eastern District of California, which held in favor of the state program in March 2020. HJTA then appealed to the Ninth Circuit Court of Appeals, which in May 2021 affirmed the District Court's decision.

In its decision, the Ninth Circuit reasoned that CalSavers is not an ERISA plan because the state of California, not eligible employers, established and maintains the program, and the types of determinations that employers must make with respect to the program are merely mechanical in nature, such as determining which employees are age 18 and older and thus eligible to participate in the program. The Ninth Circuit also held that CalSavers does not have an impermissible reference to, or connection with, ERISA because the program does not regulate ERISA plans or the benefits provided under such plans.

Following the Ninth Circuit's decision, HJTA appealed to the Supreme Court in October 2021. This was the first time the Supreme Court has been asked to consider a challenge to a state-run auto-IRA program on ERISA preemption grounds. On February 28th, the Supreme Court denied HJTA's invitation to review the case.

Outlook

CalSavers and other state-run retirement savings programs are seeing the Supreme Court's decision as a victory for themselves and other states who have proposed, are in the process of developing, or have already launched similar programs. The Court's action may even encourage state legislatures to move forward with proposals for state-run retirement savings programs, although legislative activity in this regard has increased in recent years despite the pending ERISA preemption challenge.

According to the Congressional Research Service, seven states (Colorado, Maine, Maryland, New Jersey, New Mexico, New York, and Virginia) have enacted auto-IRA programs. California is one of four states, along with Connecticut, Oregon, and Illinois that have implemented auto-IRAs. Seattle and New York City also have enacted auto-IRA programs.

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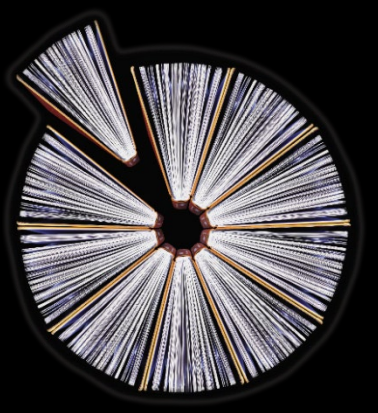

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