

## Under Fire From Biz Groups, DOL Stands By Crypto Guidance

By Kellie Mejdrih

*Law360 (April 22, 2022, 6:31 PM EDT)* -- The U.S. Department of Labor has no plans to withdraw cryptocurrency guidance for retirement plan fiduciaries that business groups have criticized as an end-run around the formal rulemaking process, the acting head of the DOL's employee benefits arm told Law360 in an exclusive interview Friday.

The U.S. Chamber of Commerce and other groups sent a letter April 12 to Ali Khawar, acting assistant secretary for the DOL's Employee Benefits Security Administration, asking that the agency yank a compliance assistance release issued in March. The guidance covers fiduciary obligations involving cryptocurrency in retirement plans regulated by the Employee Retirement Income Security Act.

Much of the business groups' ire was directed at language included in the guidance on allowing crypto investments through brokerage windows, which are accounts within 401(k) plans that allow trading in funds and stocks through an investment broker.

The guidance document amounted to "the announcement of a new fiduciary standard with respect to brokerage windows," and "recent sub-regulatory guidance has been more in the nature of rulemaking in need of notice and comment and [Office of Information and Regulatory Affairs] review," the business groups said in their letter.

However, Khawar told Law360 Friday that fiduciary duties under ERISA — outlined in Section 404 of the law — still apply: "The department's never said you don't have any obligations with respect to a brokerage window," he said.

"We never said Section 404 of ERISA ends where the brokerage window begins," Khawar said. "And so we don't view this as the sea change that it's been described as."

Khawar said the agency was partially motivated to create the guidance based on what's happening in the cryptocurrency space.

"People are seeing Superbowl commercials that are not just advertising that cryptocurrency is an investment, but ... actively encouraging them to put their tax-advantaged retirement dollars in these assets," he said.

Khawar added that the mere reference to brokerage windows in its guidance on crypto doesn't mean the agency is changing its rules around them.

"The industry is quite focused on this brokerage window question," Khawar said. "But again, this is like five words in multipage guidance. And what we're essentially saying is, your obligations don't stop just because there's a brokerage window there. That's not inconsistent with what we've said before."

Benefits attorneys say the guidance set off alarm bells because they've watched brokerage windows grow in popularity, in particular with large group plans, in the absence of clarity from regulators.

The last major action from the DOL on brokerage windows was in 2012, when the DOL repealed and replaced guidance that suggested plan sponsors would have to carefully monitor the investments in brokerage windows and potentially include them in fee disclosures. The agency's replacement guidance said that fiduciaries of plans with brokerage windows "are still bound by ERISA section 404(a)'s statutory duties of prudence and loyalty to participants."

The DOL also issued a request for information in 2014 asking how ERISA-covered plans offered and used brokerage windows. Then, in 2021, the DOL asked the Advisory Council on Employee Welfare and Pension Benefit Plans, a civilian advisory council that includes major participation from industry groups, to study brokerage windows, building on the 2014 action.

But in a report on brokerage windows sent to Labor Secretary Marty Walsh earlier this year, the council said that most of its members "did not believe that guidance in this area was needed."

Khawar said Friday that the DOL requested the advisory council report to better understand what the brokerage window landscape looked like, not to set the stage for regulation.

But the uncertainty surrounding brokerage windows has led benefits attorneys to advise caution to their ERISA plan clients.

"While I have cautioned my clients that the Department of Labor has concerns about brokerage windows, they've become commonplace, especially with regard to large plan sponsors," said Lisa Tavares, partner at Venable LLP. "So to not have settled this issue and this has become predominant in plans, is problematic, that's what people are reacting to."

Brenda R. Berg, a partner at Holland & Hart LLP, said one of the major concerns from plans is that "in general, we don't monitor individual investments in brokerage windows, and there hasn't been fiduciary focus or compliance requirements on that. And so I thought, this could signal something different from the DOL perspective."

She said that lately, the DOL has been issuing more guidance that ends up having significant impact in an enforcement context.

"Essentially, they're issuing guidance on us that ends up being best practices, or in their view best practices, that then could be applied by a court or could be applied in the DOL audits," Berg said. "And it's clear that the DOL intends to apply it in their audits because they said that. That was the first time I've seen that so directly."

Khawar said that plan sponsors should consider the brokerage window reference in the context of a compliance assistance release focused on cryptocurrency.

"What the compliance assistance release is focused on is cryptocurrency. It's been maybe 9½, maybe 10 years, since we've really opined in any particular way on what exactly those fiduciary obligations look like in the context of brokerage windows. What we've said most recently is don't assume that you're entering a safe house or something like that," Khawar said, referring to using a brokerage window to offer cryptocurrency.

"People shouldn't really be interpreting this as a broader statement about what your obligations are — or are not — in other contexts," he said.

--Editing by Abbie Sarfo.

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