Benefits Report – May 2025

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Cryptocurrency No Longer a Non-Starter for 401(k) Plans – Real World Implications

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On May 28, 2025, the U.S. Department of Labor Employee Benefits Security Administration (EBSA) released its first compliance assistance bulletin under the new presidential administration, Compliance Assistance Release No. 2025-01 (the "New Guidance"), announcing and memorializing EBSA's revocation of its 2022 guidance cautioning against 401(k) plan investments in cryptocurrencies (Compliance Assistance Release No. 2022-01 (the "Prior Guidance").

The Prior Guidance was issued by EBSA during the last presidential administration in response to a growing number of firms marketing cryptocurrencies as potential 401(k) plan investment options. Citing concerns that cryptocurrencies may have volatile returns, are subject to an evolving regulatory environment, present unique challenges for participants in making informed investment decisions, and have unique custodial, recordkeeping and valuation concerns, EBSA cautioned plan fiduciaries to exercise "extreme care" before considering adding a cryptocurrency to a 401(k) plan investment menu. Notably, in light of EBSA's concerns, the Prior Guidance warned plan fiduciaries that EBSA expected to conduct an investigative program aimed at plans offering participant investments in cryptocurrencies and related products. More specifically, EBSA informed 401(k) plan investment fiduciaries permitting cryptocurrency investments that they "should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the [associated] risks . . ." This resulted in an immediate and significant chilling effect on pursuing cryptocurrency offerings in 401(k) Plans.

It comes as little surprise that the new presidential administration is a proponent of cryptocurrency, with Vice President Vance announcing the same day as the release of the New Guidance that "crypto finally has a champion and an ally in the White House… crypto and digital assets… are part of the mainstream economy,

and are here to stay." But what does the New Guidance mean for plan fiduciaries and the prudent analysis they must undertake in considering whether cryptocurrencies are an appropriate 401(k) plan investment options?

The New Guidance focuses on the reference to "extreme care" in the Prior Guidance as a rationale for its revocation, stating that "extreme care" is not a standard found in ERISA, and differs from ordinary fiduciary principles thereunder. Under ERISA, the fiduciary principles describing standards of care are the duties of loyalty and prudence. Specifically, ERISA's duty of loyalty provides that fiduciaries must act solely in the interest of plan participants and beneficiaries with the exclusive purpose of providing benefits and defraying reasonable plan expenses, and the duty of prudence provides that fiduciaries are to carry out their duties with the care, skill, prudence, and diligence that a prudent person familiar with such matters would use (described by the courts as an expert standard).

The New Guidance emphasizes that the Prior Guidance deviated from EBSA's "historic neutral approach to investment types and strategies" (e.g., imposing a uniform standard of care for different investments), and that revocation of the Prior Guidance "restores [EBSA's] historical approach by neither endorsing, nor disapproving of, plan fiduciaries who conclude that the inclusion of cryptocurrency in a plan's investment menu is appropriate."

For a responsible 401(k) plan fiduciary, the revocation of the Prior Guidance does not give the green light to add cryptocurrency as an investment option; rather, it simply places cryptocurrency on a level playing field with any other potential investment option. In other words, it removes EBSA's prior heightened scrutiny of cryptocurrency as a 401(k) plan investment option. This means a potential cryptocurrency investment should be reviewed and vetted by plan fiduciaries in the same manner as any other investment, by conducting a prudent process and adhering to the duty of loyalty. Such process may include analyzing and documenting whether the investment option:

- *provides participants with diversified alternatives, expanding on risk and return characteristics;*
- *offers returns that can be effectively monitored (correlated to a benchmark);*
- *possesses reasonable expenses;*
- *provides adequate disclosure for participants to evaluate the investment; and*
- *is permitted under the plan's investment policy statement.*

In issuing the New Guidance, EBSA did not dismiss the concerns listed in the Prior Compliance release regarding returns, regulatory development, participant comprehension, and unique custodial, recordkeeping and valuation considerations, which will still present challenges when evaluating cryptocurrencies in the same way as other investment options. However, EBSA was clear that it no longer "disapproves" of cryptocurrency as an investment consideration, and a plan fiduciary's decision should consider all relevant facts and circumstances and will "necessarily be context specific" (referencing *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014)). In other words, the appropriateness of cryptocurrency as an investment should focus on the specific needs of the plan, the unique characteristics of the population, and the reasonableness of the fiduciaries' judgment.

In light of these changes, those in charge of plan administration must carefully review the applicable disclosure obligations and work closely with the plan actuary and legal counsel to ensure accurate and timely compliance. Plan fiduciaries that wish to consider cryptocurrency as a potential 401(k) plan investment option should work with their investment advisor to evaluate whether such an investment option is appropriate for their plan, taking into account the relevant facts and circumstances for their plan population, and analyzing the

various considerations solely in the interest of plan participants in a prudent manner with a well-documented demonstration of their decision-making process. This should include a process to appropriately monitor the cryptocurrency investment, understand and evaluate the reasonableness of its fees, and assess whether sufficient education on the investment can be provided to the participant population.

If you have questions about the New Guidance, please contact us.

Roundup of Annual Funding Notice Requirements for Defined Benefit Plans: Single-Employer, Multiemployer and SFA Plan


Sarah Bowen

To enhance retirement security and increase transparency, defined benefit plans covered by the Pension Benefit Guaranty Corporation ("PBGC") are required to timely furnish an annual funding notice ("AFN") to participants, beneficiaries, the PBGC and certain other persons for the purposes of enhancing retirement security and increasing transparency by ensuring that workers receive timely and accurate information regarding the funded status of their pension plans. The AFN must disclose certain information regarding the plan's funded status, as set forth in Section 101(f) of ERISA, including, among other things, the plan's funded percentage, assets and liabilities, funding and investment policies, and participant and beneficiary demographics.

Recent legislative and regulatory developments, including the American Rescue Plan Act of 2021 ("ARPA") and the SECURE 2.0 Act of 2022 ("SECURE 2.0"), have significantly updated the AFN requirements, particularly for plans receiving Special Financial Assistance ("SFA") under ARPA. This article outlines the key changes made to the AFN requirements since the U.S. Department of Labor ("DOL") issued its final rule (https://www.govinfo.gov/content/pkg/FR-2015-02-02/pdf/2015-01884.pdf) regarding AFN requirements in 2015, as applicable to single-employer plans, multiemployer plans, and multiemployer plans that have received SFA.

Background

- FAB 2023-01. On April 25, 2023, the DOL issued Field Assistance Bulletin 2023-01 (FAB 2023-01), which provides guidance on the AFN disclosure requirements applicable to multiemployer defined benefit plans that receive SFA or are eligible to receive SFA from the PBGC under ARPA. The DOL provided that, pending further guidance, it will consider compliance with FAB 2023-01 as constituting a reasonable, good faith interpretation of the AFN requirements with respect to SFA-related disclosures.
- SECURE 2.0. Section 343 of SECURE 2.0 amended the AFN requirements under ERISA Section 101(f) for plan years beginning after December 31, 2023 (the 2024 notice year and onwards). The AFN is generally required to be distributed no later than 120 days following the end of the plan year to which it relates, unless the plan qualifies as a small plan (plans with one hundred or fewer participants on each day of the preceding plan year). Small plans must distribute the AFN by the plan's Form 5500 filing deadline, including

any extensions. Large calendar yar plans were first required to furnish an AFN compliant with the updated disclosure requirements by April 30, 2025.

- FAB 2025-02. On April 3, 2025, the DOL issued Field Assistance Bulletin 2025-02 (FAB 2025-02), which provides guidance on the AFN requirements under SECURE 2.0 and includes updated model AFNs for single-employer plans (https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2025-02-appendix-1) and multiemployer plans (https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2025-02-appendix-2). Acknowledging that some plans may have already prepared or distributed their 2024 AFN, the guidance provides that, pending additional guidance, the DOL will consider compliance with FAB 2025-02 to be a "reasonable, good faith interpretation" of the AFN requirements under ERISA, as amended by SECURE 2.0. However, the guidance notes that if the plan administrator concludes that the AFN does not comply with FAB 2025-02, the DOL expects the plan to take "appropriate corrective action." Accordingly, plan administrators should consult with their actuary and legal counsel to determine whether the plan's AFN complies with FAB 2025-02, and, to the extent it does not, determine the appropriate corrective actions.

Updated AFN requirements for Single-Employer Plans

Under SECURE 2.0, single-employer plans must update their AFN for plan years beginning after December 31, 2023, to comply with the following changes:

- Funded Percentage. Prior to SECURE 2.0, single-employer plans reported the plan's funded percentage using the plan's Funding Target Attainment Percentage ("FTAP"), based on the actuarial value of plan assets (reduced by any carryover or prefunding balances) and liabilities at the beginning of a plan year. SECURE 2.0 requires single-employer plans to report the plan's funded percentage based on the percentage of plan liabilities funded as of the end of the plan year, and the preceding two plan years, based on the fair market value of plan assets and the value of plan liabilities based on a market-related interest assumption. FAB 2025-02 provides that plans may use reasonable estimates, based on standard actuarial techniques, to determine year-end plan liabilities for the notice year, but not the two preceding years. And that the fair market value of plan assets on the last day of the two preceding plan years should be as reported on the plan's Form 5500 for such year, unless the plan administrator knows or has reason to know that the value of assets reported is not correct.
- "At-risk" Disclosure. SECURE 2.0 removed the "at-risk" disclosure requirements. FAB 2025-02 clarifies that plans are no longer required to calculate or disclose "at-risk" liabilities or apply at-risk rules when calculating year-end liabilities for purposes of the AFN.
  • Demographic Information. SECURE 2.0 requires plans to disclose participant and beneficiary counts as of the end of the notice year and the two preceding plan years, instead of the beginning of the plan year as previously required. Although plans are required to report actual participant counts as of the plan year end, FAB 2025-02 acknowledges that large plans may have difficulty determining the final counts for the notice year by the AFN distribution deadline. Accordingly, FAB 2025-02 provides that, pending additional guidance, large plans that use reasonable, good faith count estimates for the notice year will be deemed to satisfy the AFN demographic disclosure requirements, provided the AFN clearly identifies the counts as estimates. Actual participant counts must be used for the two preceding plan years reported in the AFN. FAB 2025-02 further clarifies that small plans may not use count estimates, as small plans are required to distribute the AFN by the plan's Form 5500 filing deadline, at which time the plan is expected to have determined the final year-end counts for the notice year.

- Funding Policy. SECURE 2.0 requires plans to disclose the average return on plan assets for the notice year. • Average Return on Assets. SECURE 2.0 requires plans to disclose the average return on assets for the notice year but does not provide how the average is to be calculated FAB 2025-02 provides that, pending further guidance, plans may use one of the following calculation methods to determine the average return on assets, but notes that other calculation methods may also be acceptable.
- Method 1. The plan may use the actual rate of return for the notice year determined by the plan's actuary based on the same methodology used by single-employer plans to determine the actual rate of return for the Schedule SB to Form 5500, but applied to the notice year instead of the prior plan year.
- Method 2. The plan may use the rate of return for the notice year determined by the plan's actuary using the same methodology used by multiemployer plans to calculate the "estimated investment return – current (market) value" for the Schedule MB to Form 5500, but based on the one-year period ending on the last day of the notice year rather than the one-year period ending on the valuation date.

Updated AFN requirements for Multiemployer Plans

Under SECURE 2.0, multiemployer plans must update their AFN for plan years beginning after December 31, 2023, to comply with the following changes:

- Demographic Information. SECURE 2.0 requires plans to disclose participant and beneficiary counts as of the end of the notice year and the two preceding plan years, instead of the beginning of the plan year as previously required. Although plans are required to report actual participant counts as of the plan year end, FAB 2025-02 acknowledges that large plans may have difficulty determining the final counts for the notice year by the AFN distribution deadline. Accordingly, FAB 2025-02 provides that, pending additional guidance, large plans that use reasonable, good faith count estimates for the notice year will be deemed to satisfy the AFN demographic disclosure requirements, provided the AFN clearly identifies the counts as estimates. Actual participant counts must be used for the two preceding plan years reported in the AFN. FAB 2025-02 further clarifies that small plan may not use count estimates, as small plans are required to distribute the AFN by the plan's Form 5500 filing deadline, at which time the plan is expected to have determined the final year-end counts for the notice year.
- Average Return on Assets. SECURE 2.0 requires plans to disclose the average return on assets for the notice year but does not provide how the average is to be calculated. FAB 2025-02 provides that, pending further guidance, plans may use one of the following calculation methods to determine the average return on assets, but notes that other calculation methods may also be acceptable.
- Method 1. The plan may use the actual rate of return for the notice year determined by the plan's actuary based on the same methodology used by single-employer plans to determine the actual rate of return for the Schedule SB to Form 5500 but applied to the notice year instead of the prior plan year.
- Method 2. The plan may use the rate of return for the notice year determined by the plan's actuary using the same methodology used by multiemployer plans to calculate the "estimated investment return – current (market) value" for the Schedule MB to Form 5500, but based on the one-year period ending on the last day of the notice year rather than the one-year period ending on the valuation date.

Updated AFN requirements for SFA Multiemployer Plans

The new model AFN does not include language for multiemployer plans that are eligible for or have received SFA. Pending further guidance, plans should continue to comply with FAB 2023-01. FAB 2025-02 provides that the DOL will treat compliance with FAB 2023-01 as constituting a "reasonable, good-faith interpretation" of the AFN requirements with respect to SFA-related disclosures.

FAB 2023-01 provides that multiemployer plans that have received SFA must comply with the following SFA-related disclosure requirements in the AFN:

- Funded Percentage. Plans must exclude the amount of SFA received from the plan's funded percentage and actuarial value of plan assets reported in the AFN. FAB 2023-01 provides that plans may include additional information explaining why the funded percentage stated in the notice is lower than participants and beneficiaries might have expected given that the plan received SFA. FAB 2023-01 provides model language that plans may use to explain what the funded percentage is when the SFA amount is taken into account.
  • Market Value of Assets. FAB 2023-01 provides that plans must include the amount of SFA received in the year-end fair market value of plan assets reported in the AFN. If the year-end fair market value of the plan's assets for any of the three disclosed years includes SFA, the AFN must include a statement explaining that the plan received SFA, and that the actuarial value of assets used to determine the funded percentage does not include the SFA account's assets. FAB 2023-01 provides model language to be included in the AFN.
- Zone Status. Plans that receive SFA are deemed to be in critical status through the plan year ending in 2051, and FAB 2023-01 provides model language to include in the AFN regarding the plan's zone status. However, FAB 2023-01 notes that if a plan that received SFA merges with a second plan that has not received SFA, and the second plan is designated as the ongoing plan after the merger, the ongoing plan is not deemed to be in critical status even if the merger occurs prior to 2051.
- Investment Policy. The AFN's description of the plan's investment policy must explain the required restrictions and limitations that apply to SFA under ERISA including the requirement to invest one year of projected benefit payments and administrative expenses in investment grade fixed income. FAB 2023-01 clarifies that the asset allocation percentages reported in the AFN are not required to be separately identified for SFA funds, but notes that the AFN should include an explanation that SFA is included in the allocations and provides model language.
- Material Events. FAB 2023-01 clarifies that any amount of SFA, including supplemented SFA, received in a plan year constitutes a material event that must be reported on the AFN for such year. The AFN must disclose the amount of SFA and the date it was paid to the plan. If the plan received additional SFA under a supplemented application, the explanation must state the amount and date of the SFA received under the initial and supplemented applications separately, and explain why the plan is receiving supplemented SFA. For the plan year in which the plan first receives SFA, the AFN must also include a brief description of the SFA conditions under applicable PBGC regulations and, if applicable, a statement regarding the reinstatement of suspended benefits and/or make-up payments. FAB 2023-01 provides model language for plans to use.
- Insolvency Rules. FAB 2023-01 clarifies that a plan that receives SFA must continue to include a summary of the insolvency rules in the plan's AFN. FAB 2023-01 also provides optional model language for insolvent plans to use if the plan, as of the last day of the notice, is eligible for SFA and either has an SFA application under review or has not yet applied for SFA.

Conclusion

Recent legislative and regulatory updates have expanded and clarified the information that defined benefit plans must disclose in their AFNs. In light of these changes, those in charge of plan administration must carefully review the applicable disclosure obligations and work closely with the plan actuary and legal counsel to ensure accurate and timely compliance.

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