



Spring 2022

# Fiduciary File™

## Plan fiduciaries should be ready to address these “hot topics” this Spring:

- (1) DOL threatens fiduciaries over cryptocurrency in 401(k)/403(b) plans
  - a. Compliance Assistance Release 2022-01 (March 2022) includes explicit threat to investigate fiduciaries who make cryptocurrency available
  - b. DOL has “serious concern” about volatility, complexity, recordkeeping, liquidity, loss of access, valuation, and absence of regulatory framework
  - c. “[DOL] expects to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies **and related products**, and to take appropriate action to protect the interests of plan participants and beneficiaries .... The plan fiduciaries responsible for overseeing such investment options **or allowing such investments through brokerage windows should expect to be questioned ....**”
  - d. Fidelity’s new crypto fund flouts this DOL guidance, putting fiduciaries in the crosshairs
- (2) Crypto guidance puts brokerage windows back in the fiduciary spotlight
  - a. DOL’s prior effort to regulate brokerage windows was limited
  - b. Crypto guidance signals new effort to require fiduciary monitoring of investments obtained through brokerage windows
  - c. Fiduciaries “allowing such investments through brokerage windows should expect to be questioned”
  - d. Fiduciaries should evaluate whether windows permit investment in crypto “or related products”
- (3) Trends (and lessons) in ERISA fee litigation after *Hughes v. Northwestern Univ.*
  - a. In *Hughes*, Supreme Court permitted claims in excessive fee cases to proceed past motion to dismiss
  - b. Post-*Hughes*, most courts have denied motions to dismiss share-class claims, even when revenue sharing is used for plan expenses or rebated to participants
    - i. *Davis v. Salesforce.com* (9th Cir. 2022)
    - ii. *Kong v. Trader Joe’s Co.* (9th Cir. 2022)
    - iii. *Goodman v. Columbia Regional Healthcare* (M.D. Ga. 2022)
  - c. Fiduciaries’ defense strategies may need to be adjusted, and defense costs are likely to increase
- (4) Prepare for participant’s questions about lifetime income illustrations
  - a. SECURE Act (2019) requires ERISA-covered defined contribution plans to include lifetime income illustrations annually in benefit statements
  - b. First illustration is due with the second quarterly benefit statement in 2022 (*i.e.*, for quarter ending June 30, 2022)
  - c. Illustrations may upset participants due to incomplete assumptions on which they are based
  - d. Fiduciaries should work with consultants and recordkeepers to address participants’ questions
- (5) Another benefit of benchmarking: ammunition to compare services and defeat excessive fee allegations
  - a. Case Study: *Cunningham v. USI Insurance Services* (S.D.N.Y. 2022)
    - i. Participants alleged fiduciaries violated their duties by employing USI Consulting Group to provide services and charging excessive fees
    - ii. District court granted fiduciaries’ motion to dismiss because USI Consulting Group provided more services than comparable consultants, so plaintiffs’ fee comparisons were inapplicable
  - b. Lesson: Benchmarking that considers services performed by vendors, in addition to fees (*e.g.*, Fiduciary Decisions), can protect fiduciaries



**Gregory L. Ash**  
Spencer Fane LLP  
913.327.5115  
gash@spencerfane.com