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Crypto Remains Massive Compliance Risk for Retirement Fiduciaries

Last week, Binance, a crypto exchange, was hit with a record-breaking Treasury settlement.

Reported by PAUL MULHOLLAND

Wagner Law Group, an ERISA law firm, has previously cautioned retirement plan fiduciaries on the risks of using cryptocurrency investments in their plans, in large part because of the industry's frequent compliance issues.

On November 20, the Securities and Exchange Commission charged Kraken, a crypto exchange, for operating as an unregistered securities exchange. This prompted Wagner Law Group partner Kimberly Shaw Elliott to caution fiduciaries of the risks of crypto assets, given their compliance issues:

"The SEC's new enforcement activity should be a clear warning to not only unregistered crypto providers and the advisers who recommend crypto investments, but also to retirement plan fiduciaries who approve those investments," she wrote. "Is it prudent to place faith in the seller or holder of crypto who does not go through the rigors of registration?"

The Department of the Treasury issued a record-breaking multi-billion dollar fine against Binance the next day, further compounding the fiduciary risks of crypto assets.

The fines totaled approximately $4.3 billion against Binance Holdings Ltd., a crypto exchange, among other penalties. The SEC had, in June, charged Binance with operating as an unregistered securities exchange, and those allegations have not yet been resolved.

Of the Binance fine, Marcia Wagner, the founder and managing partner of Wagner Law Group, says, "I do not believe that the amount of the fine, per se, will have an effect upon a plan fiduciary's decision whether to include or possibly remove or reduce the level of crypto assets in some form on its investment platform, but the fact of the SEC action against Binance, as well as other recent events such as the fraudulent activities of FTX, would clearly be a factor a plan fiduciary would need to take into account as part of its due diligence in determining the prudence of such an investment."

She added that, "since the Department of Labor guidance regarding cryptocurrency, in my experience, clients have not shown an interest in including crypto assets on their investment platform, if for no other reason than the litigation risk if a crypto asset fund on a plan's investment platform went sideways. That litigation risk is now obviously heightened."

According to the Department of Justice, Binance pleaded guilty to a wide range of money laundering, sanctions and unlicensed money transmitting as part of its settlement.

The fines break down into two parts: one for about $3.4 billion, issued by the U.S. Financial Crimes Enforcement Network for money-laundering violations, and another for $969 million, issued by the Office of Foreign Asset Control, for more than 1.5 million individual violations of U.S. sanctions policy.

According to the settlement reached with the OFAC, though Binance was fined $968 million, the maximum statutory penalty for its alleged sanctions-related offenses was actually $592 billion. OFAC found that Binance's violations "were egregious and were not voluntarily self-disclosed." These violations took place from August 2017 through October 2022.

Most of the trading volume, or about $600 million, involved transactions with Iranian persons. The rest of the volume included people in Syria, North Korea, Cuba and Russian-occupied territories of Ukraine, including Crimea, according to the OFAC.

The OFAC found that Binance encouraged U.S. users to use virtual private networks or to provide foreign passports, if they were multinationals, as a way to maintain the appearance of compliance with U.S. law. This practice, according to the OFAC, was endorsed and pushed by Binance's then-chief compliance officer.

According to FinCEN's order, the CCO wrote once to another employee at Binance, "We try to ask our US users to use VPN / or ask them to provide (if [they] are an entity) non-US documents / On the surface we cannot be seen to have US users but in reality, we should get them through other creative means."

Binance consented to the appointment of an independent compliance monitor from the OFAC for five years. The Treasury Department also imposed a $150 million suspended fine against Binance that will be levied if Binance does not comply with the Treasury Department's compliance program.

A Treasury Department release stated that "Binance was required to report suspicious transactions to FinCEN through suspicious activity reports (SARs). FinCEN's investigation revealed that Binance's former Chief Compliance Officer told personnel that the CEO's policy was to not report such activity, and Binance never filed a single SAR with FinCEN."

The statement continued, "Binance willfully failed to report well over 100,000 suspicious transactions that it processed as a result of its deficient controls, including transactions involving terrorist organizations, ransomware, child sexual exploitation material, frauds, and scams."

The OFAC noted in its order that one employee of Binance noted in business communications that effectively blocking IPs for high-risk jurisdictions would be necessary to work with institutional and other large investors.

Tags cryptocurrency, digital assets, OFAC, Treasury Department,