Biden, lawmakers seek to reverse Trump-era ESG investing, proxy rules

By Brian J. Kearney, Margaret Berger and Geoff Manville
May 25, 2021

President Biden and congressional Democrats are moving to overturn Trump-era rules intended to make environmental, social and corporate governance (ESG) investing and proxy voting more difficult. A new executive order (EO 14030) on climate-related financial risk directs the Department of Labor (DOL) to quickly consider rescinding, suspending or amending two controversial 2020 regulations for fiduciaries selecting plan investments and exercising proxy and other shareholder rights. On the same day President Biden issued the EO, Senate and House Democrats introduced legislation to let ERISA-governed retirement plans consider ESG factors.

Executive order pushes DOL to issue new ESG rules

The new EO urging DOL action to undo the Trump-era fiduciary rules on plan investments and proxy rights comes two months after the agency announced a nonenforcement policy for both regulations. The Biden administration included the rules on its list of agency actions under review for consistency with the president's climate change agenda.

The rules require fiduciaries to make investment and shareholder decisions based on pecuniary factors, without sacrificing investment returns or otherwise subordinating participants' interests to further nonpecuniary goals. Although the rules don't prohibit fiduciaries from considering ESG factors when making investment or shareholder decisions, the rules' preambles caution fiduciaries against concluding too hastily that ESG factors are pecuniary or taking an overly expansive view of what issues are in a plan's economic interest.

The EO says climate change threatens the US financial system and Americans' financial security, so DOL (and several other agencies) need to consider ways to mitigate this threat. In addition to revisiting the rules on selecting plan investments and exercising shareholder rights, the order directs DOL to identify other actions it can take to protect pensions and retirement savings from climate-related financial risk. By Nov. 16, DOL must report to the president on any actions taken in response to the order.

Bill would allow use of ESG criteria in plan investments

The Financial Factors in Selecting Retirement Plan Investments Act (HR 3387) would formally repeal the rule on selecting plan investments and amend ERISA to state explicitly that plan fiduciaries may consider ESG factors in making investment decisions. Fiduciaries could also consider collateral ESG factors as tiebreakers when deciding between otherwise comparable investment options. When selecting funds that use ESG factors, fiduciaries would not have to maintain any additional documentation and could designate such funds as qualified default investment alternatives.

The bill, sponsored by Senate Health, Education, Labor and Pensions Committee Chair Patty Murray, D-WA, Sen. Tina Smith, D-MN, and Rep. Suzan DelBene, D-WA, may not be able to overcome Republican opposition. The proposal nonetheless provides important support for the Biden administration's efforts.

Related resources

Non-Mercer resources

- EO 14030 on climate-related financial risk (White House, May 20, 2021)
- Fact sheet (White House, May 20, 2021)
- HR 3387, Financial Factors in Selecting Retirement Plan Investments Act (Congress, May 20, 2021)
- Press release (Sen. Tina Smith, May 20, 2021)

Mercer Law & Policy resources

- DOL issues nonenforcement policy for investment, proxy rules (March 10, 2021)
- DOL final proxy-voting rule less stringent than proposed (Feb. 22, 2021)
- DOL finalizes more fiduciary investment guidance (Dec. 22, 2020)
- DOL finalizes rule on selecting plan investments (Dec. 3, 2020)

Other Mercer resources

- Responsible investment

Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.