



GOP senators aim to reverse DOL positions on ESG, crypto investing

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Republican senators are stepping up efforts to counter proposed Department of Labor (DOL) rules that would make it easier for ERISA fiduciaries to consider environmental, social and governance (ESG) factors when selecting plan investments. Other legislative proposals would nullify recent DOL guidance warning about cryptocurrency as a defined contribution (DC) plan investment option. While unlikely to advance this year with Democrats in charge of Congress, these GOP bills may foreshadow a major effort next year if Republicans take control of either chamber after this fall's midterm elections.

Key Republican lawmakers team up against ESG

Recently introduced by Sen. Mike Braun, R-IN, and seven GOP colleagues, the Maximize Americans' Retirement Security Act ([S 4613](#)) would essentially reinstate the Trump administration's DOL rule that curtailed plan fiduciaries' ability to choose funds based on ESG considerations, such as climate risk. The bill would amend ERISA to require that plan fiduciaries select investments based "solely on pecuniary factors," which are factors expected to have a material effect on an investment's risk and return. The bill allows for the consideration of nonpecuniary factors if fiduciaries cannot distinguish between investments by using pecuniary factors alone. However, fiduciaries would have to provide participants extensive documentation explaining the decision to consider nonpecuniary factors.

Congressional Republicans supporting the bill sharply criticize the use of ESG factors in retirement plan investment decisions as politically motivated and contrary to ERISA's fiduciary standards. These critics say any regulation encouraging plan fiduciaries to consider ESG factors is inappropriate and could allow fiduciaries to subordinate participants' financial interests. Democrats largely support ESG options, arguing that such factors are just as material as traditional financial considerations.

DOL's ESG agenda continues apace

DOL [hopes to finalize](#) by year-end an October 2021 [proposal](#) to give fiduciaries more flexibility to consider ESG factors when selecting investment options and making proxy-voting decisions. The

proposal would also lift the restrictions on investments that incorporate nonpecuniary factors from being considered qualified default investment alternatives (QDIAs).

DOL also is mulling whether to propose additional rules to protect retirement savings from climate-related threats. In a February [request for information](#) (RFI), DOL asked about the impact of climate change on a variety of savings arrangements, including ERISA plans, IRAs and the federal government's Thrift Savings Plan (TSP). Last month, the TSP — the nation's largest DC retirement plan — opened a limited mutual fund window allowing enrollees to select sustainable funds in addition the plan's core investment options.

Battle over cryptocurrency investments in DC plans

DOL [warned](#) earlier this year that 401(k) plan fiduciaries should “exercise extreme care” when considering cryptocurrency as a potential investment option. Although DOL stopped short of saying cryptocurrency is inherently imprudent, the guidance prompted pushback in the form of a bill from Sen. Tommy Tuberville, R-AL. The Financial Freedom Act ([S 4147](#)) would clarify that ERISA's fiduciary standards do not limit DC plan fiduciaries' ability to select any particular types of investment, as long as participants can choose from broad range of investment options. The bill would also prohibit DOL from issuing regulations or guidance limiting the types of investments that plan participants could invest in through brokerage windows.

Besides Tuberville's legislation, a proposal under development by other Senate Republicans would amend ERISA's fiduciary provisions to list specific “covered investments,” including digital assets, private equity and annuities. The proposal would let a 401(k) fiduciary offer these asset classes without any presumption that such investments are imprudent.

Related resources

Non-Mercer resources

- [S 4613](#), the Maximize Americans' Retirement Security Act (Congress, July 26, 2022)
- [S 4147](#), the Financial Freedom Act (Congress, May 5, 2022)
- [Compliance Assistance Release 2022-01](#), 401(k) plan investments in cryptocurrencies (DOL, March 10, 2022)
- [RFI](#) on possible agency actions to protect life savings and pensions from threats of climate-related financial risk (Federal Register, Feb. 14, 2022)
- [Proposed regulations](#), Prudence and loyalty in selecting plan investments and exercising shareholder rights (Federal Register, Oct. 14, 2021)

Mercer Law & Policy resources

- [DOL sends strong warning to 401\(k\) plan fiduciaries about cryptocurrency](#) (March 16, 2022)
- [ERISA Advisory Council pulls back the curtain on brokerage windows](#) (March 2, 2022)
- [DOL digs deeper into climate change impact on retirement plans](#) (Feb. 17, 2022)
- [DOL proposes to warm the climate for ESG investing](#) (Oct. 26, 2021)

Other Mercer resources

- [Cryptoassets update — worth buying?](#) (April 8, 2021)
- [Cryptocurrencies on the cusp of mainstream?](#) (July 14, 2020)
- [Digital assets](#)

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