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US Government Reopens Discussion of Private Pension Investments Expectations

The Department of Labor has taken two recent actions that indicate where the approach to retirement investment policy may go under the new administration.

Key Points:

- The DOL under the second Trump administration has initiated policy changes targeted at previous ESG- and cryptocurrency-related rules for plans subject to ERISA.
- The DOL has announced plans for regulation to replace the Biden DOL's 2022 rule on ESG considerations (which itself replaced a 2020 rule from the first Trump administration).
- While the new DOL's statement on cryptocurrency underscores a "neutral" approach to investment considerations under ERISA, continued tug-of-war on the role of ESG may inform how the agency seeks to frame its new rulemaking on the subject.

Policy on the appropriate management of retirement funds has not been spared the tide of changes in the political landscape. While the language of the Employee Retirement Income Security Act of 1974 (ERISA) sets the standard for plan fiduciaries to act "solely in the interest of participants and beneficiaries,"[i] the practical implications have been caught up in the national debate around evolving investment concepts — such as environmental, social, and governance (ESG) — and evolving investment products — such as cryptocurrency.

In May 2025, the US Department of Labor (DOL) kicked off two expected actions with regards to retirement policy priorities, reversing the Biden administration's course on both ESG and cryptocurrency. Understanding these developments, and what they portend, is important for fiduciaries of ERISA plans — which include private sector company-sponsored retirement plans (such as a company's own defined benefit pension plans and 401(k) plans) and union pension plans — in navigating regulatory compliance at a time when financial markets continue to undergo significant evolution.

A Brief Timeline of DOL Positions on ESG

Since 1979, the DOL's "Investment Duties" regulation (codified at 29 CFR 2550.404a-1) has guided ERISA fiduciaries on prudent investment behavior. Over the past four decades, the Department has periodically reassessed how fiduciary duties apply to ostensibly ESG-focused investments.

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In 2020, during the first Trump administration, the DOL amended the regulation, citing a "rapid increase" in ESG investments and raising concerns about insufficient rigor in ESG-related investment decisions. The revised rule (the 2020 rule) required fiduciaries to base investment decisions solely on "pecuniary factors," which the DOL described as factors the fiduciary "prudently determines [are] expected to have a material effect on risk and/or return of an investment." The rule also barred funds using non-pecuniary objectives or goals from being used as Qualified Default Investment Alternatives (QDIAs). While it allowed consideration of non-pecuniary factors to break ties between economically indistinguishable investments, it required extensive documentation of such decisions.

Following a change in administration, President Biden signed executive order 14030, directing the DOL to revisit the 2020 rule. The result was a new regulation in December 2022 (the 2022 rule), which:

- removed references to "pecuniary" and explicitly allowed consideration of ESG factors, such as the economic impacts of climate change, when relevant to risk-return analysis;
- eliminated special restrictions on ESG-themed QDIAs; and
- replaced the tiebreaker provision with a more flexible standard, allowing fiduciaries to consider collateral benefits beyond investment returns without the documentation burden.

The Biden DOL framed these changes as necessary to clarify fiduciary discretion and counteract the chilling effect of the 2020 rule on ESG considerations. For more information on the 2022 rule, see our previous Client Alert.

Political and Legal Challenges to the 2022 Rule

By this point, the state-level "anti-ESG" movement had kicked off in earnest in many Republican-leaning jurisdictions, and they quickly challenged the 2022 rule. Congress passed a resolution to overturn the rule under the Congressional Review Act, which President Biden promptly vetoed, and a coalition of states led by Utah challenged the 2022 rule in the Northern District of Texas.

The Texas court upheld the 2022 rule, finding no violation of ERISA or the Administrative Procedures Act. The plaintiffs appealed to the Fifth Circuit, where the case remains pending. However, on May 28, 2025, the DOL submitted a status report to the court stating it would cease defending the 2022 rule and initiate a new rulemaking. The report offered no details on the contents of the forthcoming rule, but indicated it would appear in the Department's spring regulatory agenda. It remains unclear whether the DOL intends to rescind the 2022 Rule, reinstate the 2020 Rule, or propose an entirely new framework.

A Brief Overview of Cryptocurrency Developments

In March 2022, the Biden DOL issued Compliance Assistance Release No. 2022-01, cautioning plan fiduciaries to "exercise extreme care" before adding cryptocurrency options to retirement plan menus. The release cited concerns about volatility, valuation challenges, fraud, and other risks.

On May 28, 2025, the Trump DOL formally rescinded that guidance, arguing that the "extreme care" standard lacks basis in ERISA and "differs from ordinary fiduciary principles thereunder." The DOL noted that historically it had "articulated a neutral approach to particular investment types and strategies" and that the DOL was restoring that historical approach in the context of cryptocurrency investments.

What Comes Next?

The May 28, 2025, actions from the DOL align with general priorities of President Trump's current administration, including various executive orders that have been issued to-date. For cryptocurrency, the focus is on facilitating digital financial markets; therefore, returning to a generally neutral stance may signify the ultimate extent of the DOL's actions under ERISA for crypto-related investments. However, the DOL has officially noted that it will be pursuing additional rulemaking in the ESG space. While no content was provided, there are several hints of what may be to come.

Many of the states that have pursued "anti-ESG" agendas have continued to use some form of the "pecuniary factors" language. Given this language was initially proposed during the first Trump administration, we could likely see some version of this language return.

However, several US states that have leveraged this language have modified definitions to presume that certain environmental or social topics are non-pecuniary, or otherwise explicitly exclude the consideration of certain such matters. This is a more aggressive approach than taken in the 2020 rule from the Trump administration, which recognized that "there are instances where one or more environmental, social, or governance factors will present an economic business risk or opportunity."

In contrast to ERISA, these US state laws are generally setting investment expectations for their own state and local government funds, rather than principles broadly applicable across pension programs, including those in the private sector.[ii] The DOL would likely face an uphill battle in establishing such a prescriptive requirement under ERISA. In addition to needing to navigate the prior and (pending results of litigation) existing rules in any rulemaking under the Administration Procedures Act, any more prescriptive approach that expressly bans the consideration of particular classes of factors may face additional challenges, e.g., under First Amendment grounds.

Instead, the May 2025 cryptocurrency release may suggest an alternative trajectory for the new DOL's treatment of ESG as well. In that release, the current DOL underscored the department's historically neutral approach to investment strategies. Arguably, DOL's approach to ESG considerations should be similarly neutral.

ERISA already mandates fiduciaries to act solely in the interests of plan participants and beneficiaries. Any rulemaking must take this mandate into account. And, while there may be merit in reiterating that the purpose of any ESG considerations must be calculated to improve expected risk-adjusted returns, this assessment will inherently vary between investments and investment strategies. This is a truism across

many investment strategies and key performance indicators, which likely explains the DOL's historically neutral approach.

Nevertheless, given how fraught ESG consideration remains in contemporary US politics and their relevance to various fund managers, any ultimate revisions will likely be subject to challenge. The scope of such challenge will depend on the proposed text ultimately issued; an initial timeline for such a proposal would be included in the spring regulatory agenda, assuming DOL keeps to that expected schedule. We will continue to monitor, but interested parties may want to consider engaging with counsel to identify the best course of action in their particular situation.

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Endnotes

[i] Employee Retirement Income Security Act Section 404(a)(1).

[ii] It is important for fiduciaries to remain vigilant about the differences between state laws governing retirement plans sponsored by state and local governments and the laws governing plans subject to ERISA. Often, a fund manager must consider both types of laws when determining its investment approach and objectives.