



## Rewards Policy Insider 2023-22



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## DOL Releases Opinion Addressing Plan Sponsor's Diversity Program for Investment Managers

In a recent Advisory Opinion, the Department of Labor (“DOL”) concluded that ERISA allows a plan sponsor to operate a program to reimburse investment management fees for certain diverse investment managers as part of the sponsor’s larger effort to advance racial equity in the financial services industry.

## Background

DOL periodically issues written advisory opinions to an individual or organization for the purpose of interpreting and applying ERISA to a specific set of facts. While only the party that requests the opinion may rely on it, advisory opinions generally signal DOL’s thinking on a particular ERISA-related matter.

Recently, a financial services provider (“company” or “employer”) requested an advisory opinion, asking DOL to address several questions relating to the company’s Action for Racial Equity Asset Manager Program (“Program”), under which it pays some or all of the investment management fees for “diverse” investment managers retained by its employee benefit plans. The Program is a part of the company’s larger efforts to advance racial equity practices in the financial services industry. The Program itself is meant to address the systematic disadvantages of investment managers that qualify as “diverse” (e.g., minority and/or female ownership) in the context of the company’s own defined benefit plans, defined contribution plans, and welfare benefit plans that hold investment assets. Generally, the Program allocates a pre-determined amount to the plans on a plan-by-plan basis to pay some or all of the investment management fees for these diverse managers, subject to a series of conditions.

Each plan involved in the Program has an investment committee appointed by the employer, which selects an investment manager. The committee compares manager candidates based on a number of factors, including proposed fees and the potential the employer would pay for all or part of those fees in accordance with the Program. The employer itself does not have any influence over the committee’s decision-making process.

## Advisory Opinion 2023-01A

In response to the employer’s request, on September 29, 2023, DOL released Advisory Opinion [2023-01A](#), addressing several fundamental aspects of ERISA in the context of the Program. DOL concluded that the Program is permitted under ERISA to reimburse some or all of the fees of diverse investment managers from corporate assets for employee benefit plans for which the company is the plan sponsor. With respect to the employer’s question of whether it is considered a fiduciary by reimbursing a diverse investment manager’s fees, DOL reasoned that these activities are “settlor” – rather than fiduciary – functions. Settlor activities include decisions that relate to the establishment, design, and termination of plans and are generally not considered fiduciary activities under ERISA. Citing a prior advisory opinion, DOL stated that plan sponsor decisions on plan document provisions that govern the circumstances under which the plan sponsor will pay fees and expenses are generally settlor decisions.

In response to the employer’s question of whether its plans’ investment committees would violate ERISA by considering as part of its selection process the potential reimbursement of investment fees to a diverse investment manager, DOL concluded that members of the plans’ investment committees will not violate their fiduciary duties under ERISA solely by considering that a

particular investment manager's fees could be reduced or paid in full by the employer as part of the Program as merely one factor in the manager selection process. DOL highlighted ERISA's requirement that a fiduciary must engage in an objective process and should not consider any one factor to the exclusion of any other relevant factor when selecting a service provider.

DOL also noted that the advisory opinion should not be read as expressing the view that a program modeled after the employer's Program is *required* for a fiduciary to select a diverse investment manager. Thus, while DOL gave the company the green light with respect to its Program, plan sponsors may also choose to pursue other ways of improving diversity among plan investment managers, while being mindful of ERISA's fiduciary duty requirements.

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## **ESG Roundup: Republicans Introduce Bills Targeting ESG Investing; DOL Wins Surprise Victory in Texas Court Case**

The partisan debate over environmental, social, and governance ("ESG") investing shows no signs of slowing down. In September, four House Republicans introduced bills designed to resurrect the Trump Administration's ESG regulation and institute other changes in the law to discourage ESG investing. In the midst of this congressional pushback on ESG, a Texas district court recently sided with the Department of Labor ("DOL") in upholding the Biden Administration's 2022 ESG regulation in a challenge brought by 26 states.

### **Background**

In 2020, the Trump Administration amended DOL's 1979 "investment duties" regulation for the first time to address ESG and proxy voting investment issues under ERISA (the "2020 Rule"). Under the 2020 Rule, a fiduciary was required to make an investment decision based solely on pecuniary factors. However, if a fiduciary was unable to distinguish between two investment decisions based on pecuniary factors alone, the fiduciary could use non-pecuniary factors to "break the tie." When President Biden took office in 2021, the Administration made sustainability and climate change one of its priorities. As part of this effort, it paused enforcement of the 2020 Rule and released its own proposal to amend the investment duties regulations once again. That proposal was finalized in November 2022 (the "2022 Rule"). Under the 2022 Rule, risk and return factors that a fiduciary considers with respect to a particular investment decision may generally include ESG factors. This back-and-forth between presidential administrations is a reflection of the larger debate over whether ESG factors should be considered in investment decisions.

### **Package of Bills Demonstrates GOP Opposition to ESG**

In a show of their opposition to the Biden Administration's 2022 Rule and ESG investing in general, House Republicans recently introduced a package of four bills designed to ensure that financial institutions focus on maximizing returns in retirement plans governed by ERISA. The bills, which were introduced on September 6, 2023, are:

- **The Retirement Proxy Protection Act** ([H.R. 5337](#)), introduced by Rep. Erin Houchin (R-IN). The bill would codify the 2020 Rule's proxy voting rules, which generally required a fiduciary to exercise its fiduciary duties when exercising shareholder rights and voting proxies, and when selecting and monitoring a third party that advises on the exercise of shareholder rights.
- **No Discrimination in My Benefits Act** ([H.R. 5338](#)), introduced by Rep. Bob Good (R-VA). The bill would amend ERISA to require a plan fiduciary to discharge his or her duties by selecting, monitoring, and retaining any fiduciary, counsel, employee, or service provider of the plan according to (1) existing ERISA fiduciary duties; and (2) without regard to race, color, religion, sex, or national origin. Rep Good has explained that the purpose of the bill is to combat the 2022 Rule's erosion of fiduciary laws by promoting investments in social factors.
- **Roll Back ESG to Increase Retirement Earnings Act** ([H.R. 5339](#)), introduced by Rep. Rick Allen (R-GA). The bill would resurrect and codify in ERISA a large portion of the 2020 Rule, including the requirement that a fiduciary must base investment decisions solely on pecuniary factors.
- **Providing Complete Information to Retirement Investors Act** ([H.R. 5340](#)), introduced by Rep. Jim Banks (R-IN). The bill would implement a new notice requirement for brokerage windows – which allow plan participants to select investments beyond the plan's designated investment alternatives – that would explain the difference between choosing from investments selected by ERISA fiduciaries and choosing from investments through a brokerage window. Rep. Banks has stated that the bill would serve to notify retirees with brokerage windows of the higher risks associated with ESG investments.

On September 14, 2023, the House Committee on Education and the Workforce held a markup of the bills and approved each bill along a party-line vote. While the bills could eventually be brought to a vote on the House floor, consideration by the Senate appears unlikely, because of their highly partisan subject matter.

## Texas Court Sides with DOL in Challenge to 2022 Rule

On September 21, 2023, the U.S. District Court for the North District of Texas granted summary judgment for DOL in a lawsuit brought by 26 states alleging that the 2022 Rule violated ERISA and the Administrative Procedure Act ("APA"). In [Utah v. Walsh](#), the judge explained that while he was "not unsympathetic" to the plaintiffs' concerns about ESG investing trends, the 2022 Rule ultimately does not violate either statute. The court held that the 2022 Rule does not violate ERISA because the statute does not automatically foreclose the consideration of non-pecuniary factors by fiduciaries, which allows DOL to interpret ERISA, as it did when it issued the 2022 Rule. With respect to the plaintiff's claim that the 2022 Rule violates the APA – which requires federal agencies to sufficiently explain why they issued regulations – the court held that the Biden Administration's DOL had provided adequate explanations for its changes to the 2020 Rule. Those explanations included, for example, that the 2020 Rule had a "chilling effect" on fiduciaries' consideration of pertinent information when making investment decisions because it was not clear whether and when ESG factors could be considered.

While DOL still faces other legal challenges to the 2022 Rule, until those cases are decided, the 2022 Rule still stands.

## IRS Issues Updated Retirement Plan Limits for 2024

As it does every year at about this time, the IRS has published inflation-adjusted limits for tax-qualified retirement plans for 2024. The year-over-year increases are not as large as last year but are still significant.

### Background

The following table summarizes some of the key limits relating to 401(k) and 403(b) plans, defined contribution plans, and defined benefit pension plans.

	2022	2023	2024
401(k), 403(b), and 457 plan elective deferrals	\$20,500	\$22,500	\$23,000
Age 50 catch-up contribution limits	\$6,500	\$7,500	\$7,500
415(c) Annual Addition Limit for Defined Contribution Plans	\$61,000	\$66,000	\$69,000
415(b) Annual Benefit Limit for Defined Benefit Plans	\$245,000	\$265,000	\$275,000
401(a)(17) Covered Compensation Limit	\$305,000	\$330,000	\$345,000
Social Security Wage Base	\$147,000	\$160,200	\$168,600

For additional information, see [Notice 2023-75](#), and the Social Security Administration's [website](#).

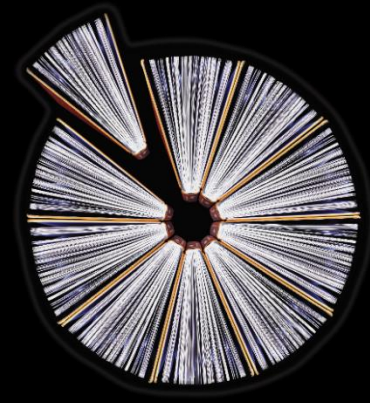


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