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Lawmakers Propose Amending ERISA To Allow ESG Investing

By **Emily Brill**

Law360 (May 20, 2021, 9:00 PM EDT) -- Three Democratic congresswomen introduced legislation Thursday that would amend the Employee Retirement Income Security Act to give legal protection to retirement plan sponsors who consider investments' social responsibility, environmental impact and corporate governance practices when deciding where to direct workers' savings.

The Financial Factors in Selecting Retirement Plan Investment Act would repeal Trump administration regulations widely seen as limiting plan managers' ability to take investments' environmental, social and governance, or ESG, value into account when making decisions, while enshrining managers' ability to weigh these factors in the nation's foremost benefits law.

Sponsored by U.S. Sens. Tina Smith, D-Minn., and Patty Murray, D-Wash., and U.S. Rep. Suzan DelBene, D-Wash., the legislation arrives two months after the Biden administration tabled the Trump regulations and five months after ESG investment funds had their strongest year yet, netting a quarter of all newly invested money in 2020, according to the research firm Morningstar.

"We're putting forth this legislation because we know there's a growing demand for sustainable investing, and because we believe Congress should act now to provide the legal certainty necessary to make sure workplace retirement plans are able to offer these options to workers across the country," Smith said in a statement Thursday.

The bill would give plan managers the ability to use an investment vehicle's ESG value as a tie-breaker when choosing between funds of comparable financial performance, according to a fact sheet on the legislation. Plan managers were allowed to do this until last year's Trump regulations, which "largely repealed" that "longstanding principle," the fact sheet states.

The bill also allows plan managers to consider a fund's social or environmental benefits when deciding whether the fund makes financial sense for the plan, incorporating ESG factors into an analysis of the fund's long-term value.

That approach to ESG investing had been in place under the Obama administration before the Trump administration altered it, first through guidance in 2018 and then through regulations last year.

The lawmakers' proposal marks the latest volley in what Morgan Lewis LLP employee benefits partner Julie Stapel once called a "pingpong match between presidential administrations" on the issue of socially conscious investing by retirement plans.

The Clinton and Obama administrations had issued guidance encouraging ESG investing by retirement plans, while the George W. Bush and Trump administrations issued guidance — and, in the Trump administration's case, regulations — discouraging it.

The Trump administration's decision to issue regulations enshrining the Republican stance on ESG investing was seen as an escalation at the time. Now, Democratic lawmakers are seeking to up the ante during the Biden administration by changing ERISA itself — not just the U.S. Department of Labor's interpretation of it — to entrench their stance on this investment technique.

"One of the primary issues hindering plans that want to offer sustainable investment options is an uncertain and regularly changing legal environment," the fact sheet said. "The Financial Factors in Selecting Retirement Plan Investment Act seeks to provide legal certainty to plans that choose to consider ESG factors in their investment decisions or offer ESG investment options to plan participants."

--Editing by Leah Bennett.