



PERSONAL FINANCE

Biden ESG rule survives challenge in court. 'Tonal shift' may be biggest victory, lawyer says

PUBLISHED WED, SEP 27 2023•8:59 AM EDT



Greg Iacurci
@GREGIACURCI

WATCH LIVE

KEY POINTS

A Trump-appointed federal judge in Texas upheld a Biden administration rule about using ESG funds in 401(k) plans and other retirement plans.

The judge, Matthew Kacsmaryk, wrote that the rule's substance is similar to a Trump-era regulation that it replaced.

The Biden administration's pro-ESG messaging is likely the more significant win, lawyers said.





A Biden administration [ESG rule](#) for workplace retirement plans survived a recent court challenge by 26 red states.

But the most significant victory for the White House likely isn't in upholding the legal substance of its rule; instead, it's in the messaging around use of [ESG investment funds](#) in 401(k) plans, according to retirement experts.

More from Personal Finance:

[Corporate pensions are at healthiest in more than a decade](#)

[This account is like an 'extra strength' Roth IRA](#)

[46% of 401\(k\) investors are clueless about investments](#)

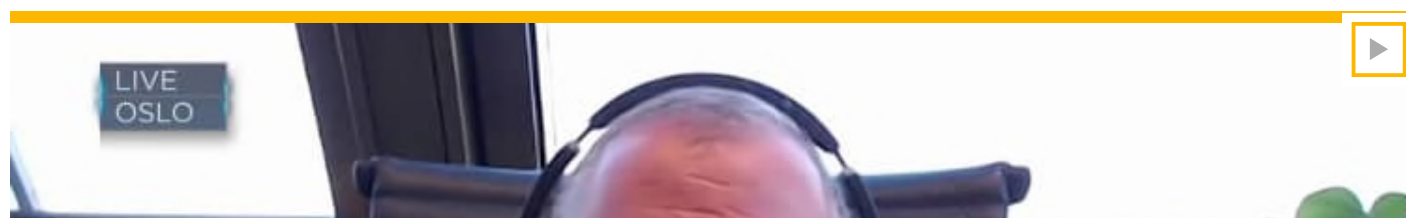
'Tonal shift' is the biggest win

ESG investing — also known as impact or sustainable investing — allocates money according to environmental, social and governance principles. Climate-focused mutual funds, for example, might seek to invest in green energy technology or avoid fossil fuel companies.

The Biden administration [rule](#) — which took effect Jan. 30 — was one facet of a White House [effort](#) to address climate change. President Biden also signed the [Inflation Reduction Act](#) into law, the [biggest piece](#) of climate legislation in U.S. history.

Biden's ESG rule replaced a regulation [issued](#) by the Trump administration. The latter was expected to have a chilling effect on ESG uptake in 401(k) plans at a time when adoption was [already relatively scarce](#).

Just 4.2% of 401(k) plans offered an ESG fund to workers in 2021, according to the Plan Sponsor Council of America, a trade group. They hold about a hundredth of 1% of 401(k) assets, PSCA said.





VIDEO 04:22

Climate commitments are 'not political,' says Nicolai Tangen

Republican state attorneys general sued the U.S. Department of Labor, which promulgated the rule, claiming it violated the Employee Retirement Income Security Act of 1974 and the Administrative Procedure Act.

A Trump-appointed federal judge in the Northern District of Texas dismissed that argument.

Of course, the decision may be appealed. For now, the ruling preserves the Biden administration's positive vibes about ESG investing, experts said.

"In an area where perception is reality, I do think the tonal shift is a significant thing," said Andrew Oringer, a retirement law expert and partner at The Wagner Law Group.

"If you're a fiduciary who wants to take into account ESG, and you feel the Department of Labor isn't against you, maybe you're more willing to do it," Oringer added. "Whereas if you're a fiduciary who wants to take it into account and you feel the DOL is gunning for you, maybe you're not as willing to proceed."

(Fiduciary is a legal term that refers to the individuals choosing investment funds for a 401(k)-type plan.)

The laws are 'substantially the same'

From a legal standpoint, the Biden and Trump rules are, at their core, "substantially the same," said Mark Iwry, a non-resident senior fellow at the Brookings Institution and former deputy assistant secretary for retirement and health policy at the U.S. Department of the Treasury during the Obama administration.



“The 2022 Rule changes little in substance from the 2020 Rule and other rulemakings,” he wrote in his Sept. 21 [opinion](#), referring to the Biden and Trump-era ESG regulations, respectively.

That’s because ERISA, a federal retirement law, disallows employers from picking investments for ideological reasons. Instead, they must be chosen according to a financial or economic analysis of what’s best for the plan and its investors.

So, employers can consider ESG factors if they “reasonably determine” those factors materially affect the financial risk and return analysis of an investment, Iwry said.

And in the case of a “tie” — for example, a dead heat between a climate fund and one or more traditional funds — employers can weigh in favor of non-economic factors, such as ESG and employee preferences for such funds, experts said.

These have been longstanding views of the Labor Department, and consistent with both the Biden and Trump rules, experts said.

“There’s only so much you can diverge from what [ERISA] requires,” Oringer said.

So why promulgate a new rule in the first place? While there are subtle differences, the answer largely gets back to tone, experts said.

“The Biden administration was concerned that the spin around the Trump rule might have chilled plans’ willingness to consider ESG factors in evaluating plan investments,” Iwry said.

“The new rule effectively declares, ‘There’s no chill in the air.’”

Roadblocks remain



Mischa Keijser | Image Source | Getty Images

ESG funds have [gained popularity](#) more broadly among retail investors. U.S. ESG funds held \$286 billion in 2022, about triple the total from 2018, according to Morningstar.

But some roadblocks remain for 401(k) uptake, experts said.

For one, 401(k) investors have filed a flurry of class-action lawsuits in recent years against employers over their investment options. Employers may be nervous about adding ESG funds in such an environment, experts said.

Most immediately, the Trump-era ESG rule “spooked” the community and “I think that spooking still persists,” Oringer said.

They may also be cautious about proceeding with ESG because of the possibility of another tonal shift from the Labor Department in future Democratic and Republican administrations, Oringer said.

“We certainly don’t have — and may never have — a settling in of that pendulum,” he said.

Fast Money Halftime Report

WATCH IN THE APP

UP NEXT | **The Exchange** 01:00 pm ET



MARKETS



CNBC TV



WATCHLIST



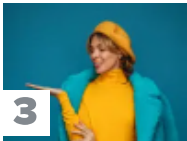
MENU



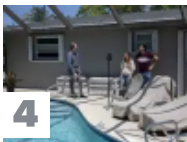
Stocks making the biggest moves midday: Costco, Paramount, MillerKnoll, ChargePoint and more



If you use any of these 9 phrases, you have 'better etiquette skills' than most: Public speaking expert



Mortgage demand shrinks as interest rates hit the highest level in nearly 23 years



Landmark marijuana financing bill clears big hurdle in the Senate



[Subscribe to CNBC PRO](#)

[CNBC Councils](#)

[CNBC on Peacock](#)

[Supply Chain Values](#)

[Closed Captioning](#)

[News Releases](#)

[Corrections](#)

[Ad Choices](#)

[Podcasts](#)

[Help](#)

[Licensing & Reprints](#)

[Select Personal Finance](#)

[Join the CNBC Panel](#)

[Select Shopping](#)

[Digital Products](#)

[Internships](#)

[About CNBC](#)

[Site Map](#)

[Careers](#)

[Contact](#)





GET IN TOUCH

Advertise With Us

PLEASE CONTACT US



CNBC Newsletters

Sign up for free newsletters and get more CNBC delivered to your inbox

SIGN UP NOW

Get this delivered to your inbox, and more info about our products and services.

[Privacy Policy](#)

[Do Not Sell My Personal Information](#)

[CA Notice](#)

NEW [Terms of Service \(Updated August 24, 2023\)](#)

© 2023 CNBC LLC. All Rights Reserved. A Division of NBCUniversal

Data is a real-time snapshot *Data is delayed at least 15 minutes. Global Business and Financial News, Stock Quotes, and Market Data and Analysis.

Market Data Terms of Use and Disclaimers

Data also provided by