# ESG Daily, ESG NEWS—Surveying numerous bills aimed at limiting Thrift Savings Plan investments, (Jun 23, 2023)

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ESG and national security concerns lie at the heart of a raft of GOP bills that would shunt Thrift Savings Plan investments away from certain types of investments.

GOP lawmakers have led multiple legislative efforts to curtail ESG investing by the federal Thrift Savings Plan (TSP), an investment vehicle housed within the Treasury Department that offers 401(k)-like investment options to employees of the federal government and uniformed services members. The several TSP bills introduced to date would limit or bar ESG investments and/or curb investments with national security overtones, with the latter type of curb receiving at least some bipartisan support.

The latest TSP bill, introduced by Sen. Mike Lee (R-Utah) (Rep. Chip Roy (R-Texas) sponsors the House version), is the most comprehensive of the several bills introduced or reintroduced in the 118th Congress. “This investing scheme, championed by woke corporations and facilitated by the Biden Administration, aims to undermine reliable American energy and advance radical ideologies, including the Administration’s political agenda,” said Sen. Lee in a press release announcing his bill. “It is unacceptable for taxpayer funds to be channeled into these woke scams.”

**Removing ESG investments.** Senator Lee’s No ESG at TSP Act would bar the TSP Board from offering mutual funds or ETFs via the TSP’s mutual fund window that “make[] investment decisions based on ESG criteria, to the extent that those criteria are unrelated to maximizing returns for investors.” The bar also would apply to funds that are marketed as ESG funds. “ESG criteria” would be broadly defined to include climate change, limits on investments in fossil fuel industries, social or diversity criteria (e.g., sex, race, ethnicity, LGBTQIA+ status, and the socio-economic status of company executives, directors, employees, and customers), political criteria, and corporate governance standards that deviate from those required under federal and state law.

Although differently phrased and applying in a somewhat different context, the Lee bill’s “unrelated to maximizing returns for investors” requirement is similar in character to the Trump Administration’s Department of Labor rule that, for purposes of ERISA fiduciaries, put the focus on whether fund investments were based solely on pecuniary factors, with some room for consideration of nonpecuniary factors. The Trump-era rule described “pecuniary factors” in more general terms and without express reference to maximization of returns; thus, “pecuniary factors” was defined to mean “a factor that a fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan’s investment objectives and the funding policy established pursuant to section 402(b)(1) of ERISA.”

Arguably, the Lee bill’s phraseology, like that of the Trump-era DOL rule, would appear to leave at least some room for ESG-themed investments that are related to maximizing returns, although the Lee bill’s language, like that of the Trump-era DOL rule, also appears to strongly discourage such investments. In the ERISA context, the Biden Administration replaced the Trump-era rule with a rule that more explicitly permits consideration of ESG factors by ERISA fiduciaries.

Under the Lee bill, the TSP would have to establish a process to remove noncompliant investments from the TSP’s mutual fund window. Likewise, participants would have to make an election regarding how to reinvest funds for which they received a credit because the investment was removed. If a participant fails to make this election, their credit would be invested in a government securities fund.

The Lee bill also would authorize the bringing of civil actions in U.S. district courts by TSP participants or beneficiaries against the TSP Board for equitable relief, injunctive relief, or to obtain actual or compensatory damages for violations

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of the investment limits. The relevant statute governing the TSP already permits various lawsuits to be brought by the Secretary of Labor against certain fiduciaries, by participants or beneficiaries or fiduciaries against other fiduciaries, and by participants and beneficiaries to recover benefits or to enforce other claims.

**ESG and national security goals.** Several other TSP bills would achieve similar goals. For example, the Stop TSP ESG Act (H.R. 3406), sponsored by Rep. Ken Buck (R-Colo), would bar asset managers from exercising voting rights of securities held by the TSP. The relevant statute section (5 U.S.C. 8438(f)) is currently drafted to provide that: "The Board, other Government agencies, the Executive Director, an employee, a Member, a former employee, and a former Member may not exercise voting rights associated with the ownership of securities by the Thrift Savings Fund." The bill would extend this prohibition to "a qualified professional asset manager," which could be any asset manager, bank, or insurance company, but would appear to target the largest asset managers, such as Blackrock, Vanguard, Fidelity, and State Street, who may seek to influence corporate policy at companies via the proxy process.

A press release issued by Sen. Ted Cruz (R-Texas), sponsor of the Senate companion bill, accused the TSP's manager of exerting improper influence over investment decisions. Said Sen. Cruz: "As the managing entity of TSP, BlackRock is leveraging the financial weight of the federal retirement system to push their woke ESG and DEI ideology through other peoples' investments. BlackRock's manipulation and brazen politicization of federal retirement accounts is wrong and should not be tolerated."

The Taxpayers and Savers Protection (TSP) Act (H.R. 3455), sponsored by Rep. Michael Waltz (R-Fla), generally would bar the TSP from buying a "security of concern." The term "security of concern" would be mean a security listed on an exchange in a country of concern, by a company incorporated in a country of concern, or for which more than 50 percent of the company's revenue is generated in a country of concern. A "country of concern" is any country reported to Congress by the Director of National Security as a threat to U.S. national security. The bill has been previously introduced in different forms, but its main target is investments in China.

Senator Marco Rubio (R-Fla) has introduced a companion bill (S. 1650) which, like its House counterpart, has at least some bipartisan support. "It is absolutely unacceptable that the Chinese Communist Party and government continues to profit from the retirement accounts of U.S. government employees and members of the military," said Sen. Rubio. "Congress can't sit on the sidelines and allow the TSP Board to fund Beijing's rise at the expense of our nation's future prosperity and national security interests."

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