

DOL Guidance on Cybersecurity

In April 2021, the Department of Labor (DOL) issued [cybersecurity guidance](#) for plan sponsors, recordkeepers, and participants to help protect Americans' retirement plan assets from cybercrime. This guidance fills a regulatory gap following several high-profile cases of theft from participant retirement plan accounts.

RECORDKEEPERS

The DOL issued a [12-part checklist for service providers](#) to include in their cybersecurity program. Items include conducting annual risk assessments, third-party audits, data encryption, and ongoing monitoring & training.

PARTICIPANTS

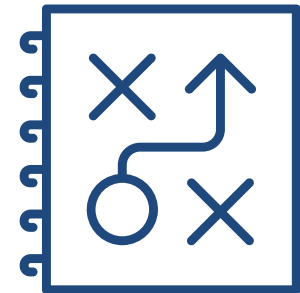
DOL issued a short overview of [Online Security Tips](#) including reminders for participants such as the importance of registering their online account, password protection protocols, and general safety tips related to free Wi-Fi and phishing attacks.

PLAN SPONSORS

DOL issued [Tips for Hiring a Service Provider with Strong Cybersecurity Practices](#). It includes an overview of what plan sponsors should include in their contracts with service providers and questions to include in a request for proposal from a service provider. This serves as a roadmap for ongoing monitoring of any service provider that has retirement plan data.

ACTION PLAN

- ✓ Update RFP templates to include questions about cybersecurity
- ✓ Educate committee on guidance as it pertains to their responsibilities
- ✓ Identify service providers to whom this guidance applies
- ✓ Monitor service provider adherence initially and ongoing
- ✓ Educate participants on cybersecurity best practices



DOL Enforcement of ESG Funds

In March 2021, the DOL announced that the current rules related to investing based on environmental, social and governance (“ESG”) factors that were announced as final rules ([Financial Factors in Selecting Plan Investments](#) & [Fiduciary Duties Regarding Proxy Voting and Shareholder Rights](#)) during the end of the Trump administration will not be enforced.¹ Additional DOL guidance is expected.



SELECTING & MONITORING ESG²

- Fiduciaries have a duty of loyalty which requires them to put the interests of participants and beneficiaries first; here, that means that fiduciaries **may not sacrifice investment returns or assume greater investment risks as a means of promoting ESG.**
- **Fiduciaries must document their decisions,** including the tools, metrics or information which demonstrates that even where ESG factors are considered, it is for the economic interests of participants and beneficiaries.

PLAN SPONSOR TAKEAWAYS

1. Seek additional training and education regarding ESG, if needed, from your advisor.
2. Review current investment policy statement to ensure alignment with status of the current regulations and DOL enforcement policy.
3. Review procedures for investment selection and monitoring with your advisor to ensure alignment with the status of the current regulations and enforcement policy.
4. Continue to monitor for additional guidance and be prepared to make updates once the additional guidance is published.

1) The ESG Final Rule and Proxy Voting Final Rule will not be enforced by the DOL, but there is a possibility that there could be a private right of action (in other words, a lawsuit) for not following those rules. As such, continuing to follow the final rules may be the most conservative approach until further guidance is issued.
2) Financial Factors in Selecting Plan Investments and Fiduciary Duties Regarding Proxy Voting and Shareholder Rights will not be enforced by the DOL, but those rules replaced Field Assistance Bulletin 2018-01 and Interpretive Bulletin 2016-01, thus creating a lack of clarity until further guidance is issued.
Learn more: [DOL Enforcement of its Final Rules on ESG Investments & Proxy Voting](#)

ERISA Litigation

2020 saw an 80% increase in ERISA class action lawsuits from 2019, and more than 100% the number of lawsuits files in 2018.¹ This trend is not slowing in 2021.

EXCESS FEES

Kimberly-Clark Corp. 401(k) and Profit-Sharing Plan participants filed a proposed class action ERISA lawsuit against KC for failing to monitor the fees paid by the plan to ensure that they were reasonable, adequately disclose fees associated with the plan to participants, and paid for a duplication of services and higher fees with no additional benefit to the participants.

PARTICIPANT DATA

Shell Oil Co. 401(k) plan participants accused the plan fiduciaries of not protecting participant data and allowing its recordkeeper to use it to cross-sell its products and to share with salespeople at its affiliated companies, using that data to sell nonplan financial services. While the judge granted Fidelity's motion to dismiss those claims, the argument that participant data is plan asset is something to watch.

INVESTMENTS

American Red Cross Savings Plan participants filed a lawsuit alleging the plan sponsors failed to adequately review the investment portfolio to ensure that each investment option was prudent, maintaining certain funds in the plan despite the availability of identical or similar options with lower costs and/or better performance histories. This, coupled with revenue sharing, cost the plan and its participants millions of dollars.

WHAT CAN YOU DO?

- ✓ Answer participant inquiries in a timely manner
- ✓ Benchmark fees & services on an ongoing basis
- ✓ Have a prudent investment selection/monitoring process
- ✓ Educate participants on plan features, fees, and investments
- ✓ Document everything in detail

A note of caution:

2020 saw an increase in the number of smaller plans facing these lawsuits. Common allegations include¹:

- Not using the lowest cost share classes of funds or enough index funds;
- Offering underperforming funds or funds affiliated with the recordkeeper;
- Paying for record-keeping as a percentage of assets under management rather than per participant;
- Not submitting requests for proposal to multiple record-keepers.

1) 2020 ERISA Litigation Trends Hint At What's Ahead This Year, Groom Law Group, January 3, 2021.