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# Trust Legislative & Regulatory Update

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Training Conference*

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## *Executive, Legislative, Regulatory Priorities*

- White House: Climate & Crypto
- Congress: Retirement Reform
- Agencies: Policy Path Paradigm

## *Regulatory Highlights*

- Fiduciary Investment/Rollover Advice *(DOL)*
- Crypto-asset Activities *(Fed, FDIC, OCC, DOL)*
- National Trust Bank “Fiduciary Capacity” *(OCC)*
- Deposit Insurance Coverage for Trusts *(FDIC)*
- ESG Investing *(DOL)*
- Climate-Related Financial Risks *(DOL)*

- **Executive Order on Climate** *(May 2021)*
  - Elevated urgency for prompt action & efficacy
  - Climate change presents “physical” and “transition” risks to assets and investments
  - Banks have “failed” to account for climate risks
  - DOL must protect US “life savings and pensions” from threats of climate risk

- **Executive Order on Crypto** *(March 2022)*
  - Deliberative, measured, paced (except CBDC)
  - US Gov't strategy for digital assets/crypto
  - Federal agencies must look at (i) national security issues, (ii) economic implications, (iii) central bank digital currency
  - Examine for potential regulatory changes

## *Congressional Priorities*

- **Securing a Strong Retirement Act** *(SECURE 2.0)*
  - Broad, bipartisan retirement reforms
  - 403(b) plan authority to invest in bank collective funds
  - Auto-enrollment in retirement plans (opt-out possible)
  - Retirement savings “lost and found”
  - BUT – would require 401(k)/DB paper statements

## *Congressional Priorities*

- **Retirement Improvement/Savings Act** (*RISE Act*)
  - Also bipartisan; overlaps SECURE 2.0
  - Retirement “Lost & Found” Online Database
  - Facilitates part-time workers into 401(k)s
  - Financial incentives to enroll in retirement plans
  - Plan: combine SECURE/RISE into omnibus retirem’t bill



## *Federal Banking/Financial Agencies' Priorities*

- Policy Path – Push, Ply, or Ponder?
  - Administration Directives (e.g., Climate)
  - SEC: Climate Disclosure Rulemaking
  - Banking Agencies: CRA vs. Climate Redlining
  - DOL: Fiduciary Proposal vs. Climate RFI

# *Federal Banking/Financial Agencies' Priorities*

- SEC Chairman Gary Gensler: *(Push)*

*“When it comes to [climate] disclosure . . . [i]t’s now time for the Commission to take the baton.” (Remarks before the PRI Climate & Global Financial Markets Webinar) (July 28, 2021)*

- OCC Acting Comptroller Michael Hsu: *(Ply)*

*OCC recognizes “inherent tension between the goals of lending to underserved communities and managing climate-related financial risks.” (MayerBrown Newsletter) (March 4, 2022)*

- DOL RFI on Climate-Related Financial Risks: *(Ponder)*

*“What are the most significant climate-related risks to retirement savings and why?” (DOL RFI on Climate-Related Financial Risks) (February 14, 2022)*

## *Fiduciary Investment/Rollover Advice (DOL)*

- DOL's Five-Part Test, PTEs, IB 96-1 officially reinstated (for now)
- DOL PTE 2020-02 (Class Exemption)
  - Aligned with SEC's Regulation Best Interest (Reg BI)
  - Marketing/solicitation not "investment advice"
  - BUT: Rollovers likely "investment advice"

## *Fiduciary Investment/Rollover Advice (DOL)*

- **DOL Fiduciary: Rollover Issues**
  - Rollover cost comparisons: plan vs. IRA
  - Lack of standard/scalable ways to obtain plan information
  - Unclear how to obtain plan information
  - Lack of regulatory guidance on evaluation/comparison
  - Industry advocacy/ABA extension request lead DOL to extend rollover documentation/disclosure requirements deadline to June 30, 2022

## *Fiduciary Investment/Rollover Advice (DOL)*

- **DOL Fiduciary: FAQs on PTE 2020-02**
  - **Q5: DOL taking further action** on (i) Five-Part Test, (ii) amending PTE 2020-02, and (iii) amending/revoking other class exemptions
  - **Q7: “Advice”** includes rollover advice when it’s an intended future ongoing relationship
  - **Q15: Factors to consider/document** for rollover to IRA

## *Fiduciary Investment/Rollover Advice (DOL)*

- DOL Fiduciary Rule (Proposal Forthcoming)
  - Will likely “simplify” (read *collapse*) Five-Part Test
  - Rollovers likely to be deemed “fiduciary” activity
  - Will likely impact PTE 2020-02 & other class PTEs
  - Will likely be strongly opposed by retirement industry (and possibly some consumer groups?)

- **OCC on Crypto Regulation**

- National bank/federal thrift may provide cryptocurrency custody services for customers
- Fiduciary or non-fiduciary capacity OK
- May use subcustodian to hold assets
- **Must receive OCC non-objection** to engage in crypto

## *Crypto-asset Activities (Fed, FDIC, OCC, DOL)*

- **Joint Statement on Crypto-Asset Policy** *(Nov. 2021)*
  - Policy “sprints” to provide roadmap for regulation
  - Develop taxonomy for bank use of crypto-assets
  - Identify and assess key risks, and legal permissibility
  - Analyze and clarify applicable regs/guidance



## *Crypto-asset Activities (Fed, FDIC, OCC, DOL)*

- **Crypto-Asset Legality/S&S/Protect Retail**
  - Custody, safekeeping, ancillary custody services
  - Customer purchase & sale of crypto-assets
  - Crypto-assets as loan collateral
  - Crypto-assets on bank balance sheet
  - Stablecoin issuance/distribution

## *Crypto-asset Activities (Fed, FDIC, OCC, DOL)*

- **DOL Alert on Crypto Investments** *(March 10, 2022)*
  - 401(k) plan investments in cryptocurrencies
  - “Extreme care” required to add cryptocurrency option
  - DOL: “serious concerns” about prudence of investment
  - DOL “expected to conduct” investigation program of plans offering cryptocurrency/similar investments

## *Crypto-asset Activities (Fed, FDIC, OCC, DOL)*

- **Agency Vigilance of Crypto-asset Activity**
  - Administration: Executive Order prioritizes crypto/DA
  - Industry: crypto-assets rapidly evolving
  - Members: national banks moving into crypto activity
  - Hill/Agencies: move to regulate crypto-anything
  - States: promoting crypto/digital-centric business

## *National Trust Bank “Fiduciary Capacity” (OCC)*

- **Federal Authority: 12 USC 92a; Part 9**
  - A national trust bank chartering issue
  - “Fiduciary capacity” to include “any other similar capacity” OCC authorizes pursuant to 12 USC 92a
  - OCC considers whether activity is analogous to express Part 9 capacities
  - Specifically: (i) investment discretion, and (ii) standards of conduct customarily associated with being a fiduciary

## *National Trust Bank “Fiduciary Capacity” (OCC)*

- **OCC Interpretive Letter 1176** (January 2021)
  - National trust bank is **not** limited to fiduciary activities as defined under OCCs Part 9
  - National trust bank need not act primarily in a fiduciary capacity
  - National trust bank “**may** engage” in **any** activities permissible for state trust bank, even if **not** fiduciary in nature under federal law and OCC’s Part 9 (e.g., nonfiduciary custody of crypto-assets)

## *National Trust Bank “Fiduciary Capacity” (OCC)*

- **OCC Interpretive Letter 1179** (November 2021)
  - Intended to clarify Interpretive Letter 1176’s use of “may” engage
  - OCC retains discretion to determine if activities considered “trust” or “fiduciary” under state law are considered “trust”/”fiduciary” under *federal law*
  - Places check on possible misuse of national trust charter to engage solely in activities deemed nonfiduciary under federal law

## *Deposit Insurance Coverage for Trusts (FDIC)*

- **Background**

- Different DI rules for revocable/irrevocable trusts
- DI determinations laborious and complex
- FDIC responds to 10,000+ inquiries annually
- “Suggests continued confusion about insurance limits”

## *Deposit Insurance Coverage for Trusts (FDIC)*

- **FDIC Policy Goals & Approach**
  - Provide depositors/banks with trust account coverage rules that are easier to understand
  - Streamline detailed, time-consuming review of trusts, facilitating prompt payment of deposit insurance
  - Simplify current, complicated trust rules



## *Deposit Insurance Coverage for Trusts (FDIC)*

- **Final Rule on Deposit Insurance for Trusts**
  - Final rule published on January 28, 2022
  - Rule becomes effective April 1, 2024
  - Two-year+ lag intended to provide depositors, banks, and FDIC the time to prepare for the changes to deposit insurance coverage for trusts

## *Deposit Insurance Coverage for Trusts (FDIC)*

- **Deposit Insurance Calculation for Trusts**
  - Up to \$250,000 per eligible beneficiary, up to five total, regardless of contingencies/proportionate interest
  - Eligible beneficiaries include natural persons, charities, and beneficiaries of *future trusts*
  - Total “trust account” insurance would be limited at each FDIC-insured bank to \$1,250,000 per owner
  - Applies to **both** revocable and irrevocable trust accounts

- **DOL Proposed Rule on ESG Investing**
  - Executive Orders direct DOL to revise current rule
  - Would eliminate sole focus on “pecuniary” factors
  - Would make clear that fiduciaries may consider climate change and other ESG factors in investment decisions
  - When considering projected returns, prudence “may often **require**” evaluation of eco. effects of climate change/ESG

- **DOL Proposed Amendments**

- Allow ESG factors that are “material to the risk-return analysis,” including climate change, governance factors, workplace practices
- Allow tie-breaker test to look at “collateral benefits other than investment returns”
- Remove limitation on ESG strategies in QDIAs

## *ESG Investing (DOL)*

- ABA Comment Letter on DOL ESG Proposal
  - Principles-based, not prescriptive, regulation
  - Allow, but do not **require**, consideration of ESG factors
  - Avoid references to specific ESG factors

## *Climate-Related Financial Risk (DOL)*

- **DOL Request for Information** *(Feb. 14, 2022)*
  - RFIs often precede proposed rules; no obligation to issue
  - DOL RFI follows WH directive on climate change goals
  - Solicits public input on “EBSA’s future work relating to retirement savings and climate-related financial risk
  - RFI is separate initiative from ESG investing proposal

## *Climate-Related Financial Risk (DOL)*

- RFI Questions for Public Input
  - **How** should DOL address climate-related financial risk?
  - **What data** should be collected from sponsors/servicers?
  - Should plan administrators **publicly report** the steps taken to manage climate-related financial risk?
  - Should public reporting include the **results** and **outcomes** of the steps taken?

## *Climate-Related Financial Risk (DOL)*

- **ABA: No DOL Action Required**
  - ERISA fiduciaries *already* take into account the full range of relevant factors (including climate) in investment & risk management decision-making
  - Reporting reqm't would artificially segment/highlight climate risks over other (possibly more important) risks
  - Fixated focus on one risk may breach fiduciary duty



## *Outlook: What to Expect in 2022*

- Administration: Sustained, Stepped-Up Urgency on Agenda
- Congress: Retirement Reform Hinges on Leadership
- Agencies: The Drive from WH Directives to Final Rules
- Challenges:
  - Prioritizing climate-related financial risk above other fiduciary/investment risks
  - Identifying/distinguishing/separating fiduciary from non-fiduciary status and activity

# *Trust Legislative & Regulatory Update*

## ***Question-&-Answer/Discussion***