

American Airlines Moves to Dismiss Suit Challenging Inclusion of ESG Funds in Retirement Plan

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In August 2023, American Airlines, Inc. moved to dismiss a class action lawsuit filed against the airline for allegedly jeopardizing employees' retirement savings by investing in environmental, social and governance (ESG) funds managed by BlackRock and others. The [complaint](#), filed by an American Airlines pilot, alleges that the airline's ESG investment strategy violates the Employee Retirement Income Security Act (ERISA) by pursuing a political agenda in breach of ERISA's fiduciary duties requiring companies to maximize financial benefits for retirement plan participants.

Seeking to represent a class of participants in the airline's 401(k) plan, the pilot filed suit against both American Airlines and the American Airlines Employee Benefits Committee. According to the complaint, many of the ESG funds included in the plan are more expensive than, and underperform, similar non-ESG investment funds. According to the complaint, "The ESG funds and investments Defendants included and retained as investment options have been largely imprudent holdings that should be removed from the Plan." The suit also alleges that the defendants breached their fiduciary duties by failing to investigate and monitor the fund managers' proxy voting and shareholder activism.

In support of its claims, the proposed class [referred to a letter](#) penned by 19 Republican attorneys general sent to BlackRock CEO Larry Fink in

August 2022, stating, among other things, that the fund's support for ESG was putting retirement funds at risk and violating federal benefits laws.

In the [Motion to Dismiss](#), American Airlines argued that the pilot lacked standing to sue because he did not invest in the ESG funds listed in his complaint. Standing aside, American Airlines also argued that the complaint failed to state a claim on the grounds that the challenged ESG funds are accessible only through a self-directed brokerage account (SDBA), which enables participants who do not want to be restricted to the investment options selected by the plan fiduciaries to open their own brokerage account and choose their own mutual funds, exchange-traded funds and individual stocks at their own risk. No fiduciary is responsible for the selection or monitoring of the individual investments within a participant's brokerage account, the airline argued.

Taking the Temperature: As we've frequently noted, ESG investing has become a political football in the United States, with lawmakers on both sides using it to advance their own agendas; BlackRock's CEO said that he had stopped using the acronym "ESG" as it had been [weaponized](#) by political figures on both sides of the ESG discussion. More recently, House Republicans on the Financial Services Committee [introduced four bills](#) targeting business and market activities that implicate ESG issues. Other efforts to hobble ESG-related considerations in investing have included the [withdrawal of billions in assets under management](#) in Republican-controlled states, the [alliance of 19 Republican governors](#) to oppose the Department of Labor rule that permits retirement plan fiduciaries to consider ESG-related factors in their decision-making, and the passing of laws by [Republican state legislatures](#) mandating divestment of state funds from asset managers deemed to "boycott energy companies" or restricting investment managers from casting proxy votes for the purpose of furthering "non-pecuniary interests." In [a report](#) on its 2022-2023 proxy voting year released on August 23, BlackRock disclosed that it supported approximately 7% of the ESG-related shareholder proposals submitted in the past proxy year. In fact, median shareholder support for ESG shareholder proposals in the U.S. fell from 25% in the 2021-22 proxy year to 15% in the

2022-2023 proxy year. BlackRock said its analysis showed that nearly 70% of ESG proposals received less than 25% support.

The American Airlines putative class action demonstrates yet another approach to opposing ESG investments. ERISA litigation may be an effective mechanism to pressure companies to reconsider how they invest retirement funds. Indeed, the claims alleged against American Airlines will require a fact intensive inquiry, meaning that the ultimate determination of the case will be left to the trier of fact at trial. In addition to costly and time-consuming litigation, American Airlines, if the motion to dismiss is denied, will have to defend the claims in a venue (Texas) that has largely been supportive of the anti-ESG movement, a factor Plaintiff likely considered before initiating his action. More broadly, this type of ‘non-climate aligned’ litigation is an emerging trend, especially within the U.S.

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