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President Biden Expected to Issue First Veto to Preserve DOL ESG Investment Rule

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President Biden **will likely issue** the first veto of his presidency after Congress passed a measure that would repeal a **Department of Labor rule** that allows retirement plan fiduciaries to consider ESG-related factors in investment decisions.

On March 1, Senators Jon Tester (D-MT) and Joe Manchin (D-WV) joined Senate Republicans in passing **H.J. Res. 30**, which provides that “Congress disapproves” of the DOL’s ESG rule and that “such rule shall have no force or effect.” Senator Tester **stated** that he disapproves of the DOL rule because “it undermines retirement accounts for working Montanans.” Similarly, Senator Manchin **described** the rule as “prioritiz[ing] politics over getting the best returns for millions of Americans’ retirement investments.”

Before the bill passed, the White House **warned** that “[i]f the President were presented with H.J. Res. 30, he would veto it.” The President defends the DOL rule as “reflect[ing] what successful marketplace investors already know – there is an extensive body of evidence that environmental, social, and governance factors can have material impacts on certain markets, industries, and companies.” Now that the bill has passed both chambers, the only question is whether—or, more likely, when—the President will follow through on his promise to veto.

Taking the Temperature: While the passage of H.J. Res. 30 may be largely symbolic given President Biden’s expected veto, it remains significant because, until now, the political battle over ESG investing has largely been waged at the state level. Recently, Republican state attorneys general sued the DOL over this same rule, claiming that the rule conflicts with ERISA fiduciary duties, is arbitrary and capricious, and exceeds the

DOL's regulatory authority. States also continue to take conflicting positions on the propriety of consideration of ESG factors in investing. Florida Governor Ron DeSantis (R), for example, lauded Florida legislation intended to prohibit, among other things, fund managers working with state and local governments from considering ESG factors when making investment decisions. On the other hand, the new Arizona Attorney General, Kris Mayes (D), announced that Arizona will no longer investigate banks and other financial institutions over ESG-related investing. Despite the predominantly state-level battles to date, H.J. Res. 30 is not Congress' first foray into ESG-related debates: Republicans on the House Financial Services Committee recently established an ESG Working Group to "combat the threat to our capital markets posed by those on the far-left pushing environmental, social, and governance (ESG) proposals;" U.S. Senate Banking Committee Ranking Member Pat Toomey (R-Pa.) requested that 12 ESG ratings firms share all non-proprietary methodologies used when calculating ESG ratings, "including the specific E, S, and G factors that you measure and how those factors are weighed;" and Republican members on the House Committee on the Judiciary have written a letter to the steering committee members of Climate Action 100+, Ceres and CalPERS, requesting documents and seeking information regarding antitrust compliance in connection with participation in the industry organization.