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Republicans Reintroduce House Bill to Limit ESG Considerations in Retirement Investing

August 1, 2023

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On June 21, two Republican members of Congress renewed efforts to enact legislation that arguably would restrict investment managers from taking into account ESG considerations in investing on behalf of retirement funds. U.S. Representatives Andy Barr (R-Ky.) and Rick Allen (R-Ga.) reintroduced the Ensuring Sound Guidance (ESG) Act, which would require investment advisers and ERISA retirement plan sponsors to consider "only pecuniary factors" in acting in the best interests of clients.

The bill, **H.R. 4237**, would amend the Investment Advisers Act of 1940 and the Employee Retirement Income Security Act of 1974 (ERISA). Text of the bill has not yet been made available on the 118th Congress's legislation portal. But the previous version of the bill, introduced in 2022 as **H.R. 7151**, stated that a client's best interests would be determined using only pecuniary factors, unless the client specifically requested that non-pecuniary factors be considered. The previous version of the bill defined "pecuniary factor" as "a factor that a fiduciary prudently determines is expected to have a material effect on the risk and 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)."

"We must take significant action to protect retail investors and retirees from the cancer within our capital markets that is ESG, which prioritizes higher-fee, less diversified and lower return investments," **Barr said in a statement**. If introduced, the ESG Act would represent a challenge to a **November 2022 Department of Labor rule** providing that, consistent with the fiduciary duties of prudence and loyalty under ERISA, retirement plan fiduciaries may consider ESG factors when selecting investment and exercising shareholder rights, such as voting

proxies. According to a fact sheet accompanying the DOL rule, “a fiduciary's duty of prudence must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis and that such factors may include the economic effects of climate change and other ESG considerations on the particular investment or investment course of action.”

Taking the Temperature: The reintroduced proposed ESG Act is yet another challenge to the Biden Administration’s Department of Labor rule, which overturned previous restrictions on the ability of retirement plan fiduciaries to consider ESG-related factors in their investment decisions. Earlier this year, Congress passed a joint resolution that “disapproved” of the DOL rule. The measure was vetoed by President Biden in March. In January, twenty-five Republican state attorneys commenced an action in the Northern District of Texas against the DOL seeking to “hold unlawful and set aside” the rule governing how retirement plan managers can consider climate change and other ESG factors. In February, two participants in ERISA-regulated plans commenced an action in the Eastern District of Wisconsin claiming that the DOL rule exceeds the authority granted under ERISA.

The proposed ESG Act forms part of the evolving landscape of political resistance to climate change legislation and initiatives. We have observed that, prior to President Biden’s veto, Republican governors of 19 states announced an alliance led by Florida Governor Ron DeSantis to push back against the Biden Administration’s purported ESG “agenda.” In addition to initiatives seeking to resist legislation and regulation, the last year has seen anti-ESG groups challenge financial institutions and their investment strategies. Recent examples include the Consumers’ Research’s campaign against Bank of America, a letter from several Republican Attorneys General to over 50 U.S. asset managers suggesting that ESG investment practices violated federal and state antitrust and consumer protection laws, and efforts by Republican-led state legislatures to impose penalties on financial institutions deemed insufficiently supportive of the energy industry.

As we have observed on numerous occasions, it is difficult to see how a position that asset managers must disregard all ESG factors when making investment decisions can be squared with well-established fiduciary duties to consider all material risk factors. As BlackRock recently observed, climate risk and the economic opportunities from climate transition are top concerns for many clients and its participation in ESG initiatives is “entirely consistent with our fiduciary obligations.”