

July 6, 2023

The Clash Over ESG in Retirement Plans: Congressional Republicans Continue Attack on 2022 ESG Rule

It has been almost five months since the U.S. Department of Labor (DOL) adopted a rule clarifying that environmental, social and governance (ESG) factors may be considered just like any other relevant factor as part of the risk-return analysis in choosing investments for retirement plans like 401(k) plans (the so-called 2022 ESG Rule) took effect. The 2022 ESG Rule reversed the ESG investing rule adopted under the Trump administration, which received a large volume of negative feedback during the rulemaking process from a diverse array of commentators. The 2022 ESG Rule has received widespread support from the same community for its return to the DOL's historic neutral posture on specific investment considerations and the elimination of confusing and costly extra requirements under the Trump administration's rule. Despite this support from affected institutions, the 2022 ESG Rule continues to be in the crosshairs of Congressional Republicans who have repeatedly sought to invalidate it through resolutions pursuant to the Congressional Review Act (CRA), the latest of which was the subject of the first veto of President Biden's administration in March.

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As reiterated multiple times during the hearings the House Committee on Oversight and Accountability convened on ESG this spring (see our alerts [here](#) and [here](#)), Republican lawmakers assert that the 2022 ESG Rule constitutes a mandate on fiduciaries to use ESG characteristics in evaluating and selecting investments, thereby prioritizing collateral policy objectives over the financial interests of participants and beneficiaries. These assertions have been made notwithstanding the neutral language of the rule and the express requirement that participants' best interests be put first in all investment decisions. Following unsuccessful bids to rescind the 2022 ESG Rule through the CRA process, Republican members of Congress have returned to other tactics they have tried in the past, including recently proposing amendments to ERISA (H.R. 4237) that would require an exclusive focus on material financial factors. Additionally, Congressional Republicans have proposed broad ESG restrictions on the federal Thrift Savings Plan (the largest defined contribution plan in the world) that are similar to those restrictions playing out in the states.

- **H.R. 4237 – “Ensuring Sound Guidance Act”**

- On June 21, 2023, Reps. Andy Barr (R-KY) and Rick Allen (R-GA) introduced H.R. 4237, the “Ensuring Sound Guidance Act,” which proposes to amend ERISA to specify that a retirement plan fiduciary shall be considered acting solely in the interest of the participants and beneficiaries only if:
 - the fiduciary's action with respect to such investment is based only on pecuniary factors (the weight of which appropriately reflect a prudent assessment of the impact of such factors on risk and return), and
 - the fiduciary does not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives and sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals.
- The legislation would permit fiduciaries to use non-pecuniary factors in limited tiebreaker situations in which the fiduciary is unable to distinguish between investment alternatives on the basis of pecuniary factors alone. In doing so, however, the fiduciary would be subject to strict documentation requirements similar to those contained in the now superseded 2020 ESG regulation that the Trump administration finalized (2020 ESG Rule). Also similar to the 2020 ESG Rule, H.R. 4237 would prohibit funds being used as default investment alternatives where the principal investment strategies include, consider or indicate the use of one or more non-pecuniary factors.

- The bill also proposes to amend the Investment Advisers Act of 1940 to specify that pecuniary factors may not be subordinated to or limited by non-pecuniary factors unless the customer provides informed, written consent that such non-pecuniary factors may be considered.
- As noted above, H.R. 4237 incorporates multiple components from the 2020 ESG Rule as well as from similar legislation that Rep. Barr introduced last session that died in committee (H.R. 7151).
- **H.R. 3612 – “No ESG at TSP Act”**
 - On May 23, 2023, Rep. Chip Roy (R-TX) was joined by 17 Republican colleagues in introducing H.R. 3612, “No ESG at TSP Act”. Although not subject to ERISA (and the 2022 ESG Rule), the TSP is the largest defined contribution plan in the world with over \$817 billion in total assets and roughly 6.5 million participating federal employees and servicemembers, offering roughly the same type of retirement savings vehicle that many private sector companies offer their employees under 401(k) plans. H.R. 3612 would prohibit the Federal Retirement Thrift Investment Board (the Board) from offering through the TSP’s brokerage window, any mutual fund, ETF or other investment vehicle that invests in bonds or equities and that makes investment decisions based on ESG criteria (as defined in the legislation), to the extent that those criteria are unrelated to maximizing monetary returns for investors. In addition, the legislation would prohibit the Board from offering through the window any mutual fund, ETF or other investment vehicle that is marketed as making investment decisions based on ESG criteria.
 - H.R. 3612 bears much similarity to a predecessor bill Rep. Roy introduced last session (H.R. 7896), except that the latest iteration now includes a private enforcement mechanism that would permit a participant or beneficiary to bring an action against the Board to obtain appropriate equitable relief, enjoin any act or practice that violates the prohibitions above, and permit a participant or beneficiary to obtain actual or compensatory damages to redress any such violations.
 - On June 22, 2023, Sens. Mike Lee (R-UT) and Rick Scott (R-FL) introduced companion legislation in the Senate (S. 2147).

Expected Outcomes

At this time, the 2022 ESG Rule remains in effect, which means ERISA plan fiduciaries may continue to consider any relevant factors (including ESG factors) in evaluating and selecting an investment. While it is unlikely that H.R. 4237 will advance out of committee, when considered along with the two lawsuits against the DOL (mentioned in our prior alerts [here](#) and [here](#)) that are still ongoing, it is clear that the 2022 ESG Rule will likely continue to be subject of strong opposition for the foreseeable future. In addition, many Republican-led states have adopted or proposed similar limitations on the investment of their public retirement plans (in the same spirit as H.R. 3612 for the TSP), continuing to feed the debate over how retirement assets may be invested (For the latest information about what’s happening at the state level, be sure to visit our award-winning website, [Navigating State Regulation of ESG Investments](#)). Plan fiduciaries are urged to continue to follow this national debate, as future elections may materially impact the ability of fiduciaries to consider the full range of relevant information in making investment decisions for retirement plans.

About Our Practice

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