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Securities Regulation Daily Wrap Up, FIDUCIARY DUTIES—Congress disapproves 'woke' Labor Dept. ESG rule, (Mar. 1, 2023)

Securities Regulation Daily Wrap Up

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The Senate narrowly passed a resolution disapproving the DOL's latest rule allowing ERISA fiduciaries to mull ESG investing objectives in making fund investments; the House had previously voted almost entirely on party lines to advance the resolution.

Two Senate Democrats joined Republicans in a 50-46 vote to disapprove the Department of Labor's recently finalized rule that allows ERISA fiduciaries to mull environmental, social, and governance (ESG) factors in making investment decisions. Democrats had pitched the ESG rule as a return to the pre-Trump Administration status quo, while Republicans and some Democrats painted the rule as catering to special interests in the investment community. However, the disapproval resolution (H.J. Res. 30), brought under the Congressional Review Act, is expected to encounter a presidential veto. Previously, the House had voted almost entirely on party lines to advance the resolution.

DOL disapproval bill. The CRA resolution states simply that Congress disapproves of the DOL's rule titled Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights. The latest DOL ESG rule relaxed several requirements that were put in place during the prior Administration that had required investments to be selected based solely on "pecuniary factors."

The final rule release stated the objective thus: "The Department's conclusion, supported by many public commenters, is that the current regulation creates uncertainty and is having the undesirable effect of discouraging ERISA fiduciaries' consideration of climate change and other ESG factors in investment decisions, even in cases where it is in the financial interest of plans to take such considerations into account."

Key provisions in the final rule include:

- The deletion of language regarding the "pecuniary/non-pecuniary" dichotomy.
- Providing that an investment decision must be based on factors a fiduciary reasonably determines to be relevant to a risk and return analysis but clarifying that those factors may include the economic effects of climate change and other ESG factors on the particular investment.

House and Senate debate. Senate Consideration of the disapproval resolution was notable less for the fact that Sen. John Barrasso (R-Wyo), Ranking Member of the Senate Energy & Natural Resources Committee, led the GOP critique of the DOL's ESG rule, for mostly the same reasons as did GOP members of the House (see below), but instead for the divisions that emerged within the Democrats' majority bloc.

For example, Sen. Jon Tester (D-Mont) issued a statement explaining why he would vote for the disapproval resolution. "At a time when working families are dealing with higher costs, from health care to housing, we need to be focused on ensuring Montanans' retirement savings are on the strongest footing possible," said Sen. Tester. "I'm opposing this Biden Administration rule because I believe it undermines retirement accounts for working Montanans and is wrong for my state."

Senator Joe Manchin (D-WVa), Chair of the Senate Energy & Natural Resources Committee, spoke to members about several issues, including implementation of the Inflation Reduction Act's clean energy provisions (he voted for the IRA), but he said that despite his sharing the concerns of many about climate change, the U.S. cannot be fossil-free for quite some time. Manchin suggested that the far left wants to go further than the IRA:

"…I rise today to warn against our Administration's unrelenting campaign to weaken our energy security, our national security, and our economic security to advance truly their environmental and social agenda," said Sen. Manchin. "The ESG rule that we're going to vote on later today is just another example of how our Administration prioritizes a liberal policy agenda over protecting and growing, protecting and growing, the retirement accounts of 150 million Americans that will be in jeopardy."

Senate Democrats opposed to the disapproval resolution tended to emphasize the dark money funding ties between the fossil fuel industry and Congressional Republicans. Senator Sheldon Whitehouse (D-RI) said GOP members were driven by the "E" in "ESG," meaning "emissions," which the senator said tells who is behind the attack on ESG, namely the fossil fuel industry.

According to Sen. Brian Schatz (D-Hawaii), the Biden Administration's rule for ERISA fiduciaries simply returned policy to a neutral stance that does not tell pension funds how to deploy their resources. He also suggested that the disapproval resolution would make clean energy investments more difficult.

Senator Elizabeth Warren (D-Mass) called the disapproval resolution a GOP attempt to override free markets by advancing a political view over capitalism and giving GOP-appointed federal judges a means to undermine the administrative state. She also called on Democrats to stick together in opposing the disapproval resolution.

In the House, the resolution's sponsor, Rep. Andy Barr (R-Ky), summed up its intended effect: "This measure simply states that retirement plan sponsors be required to prioritize maximum financial returns for investors ahead of nonpecuniary factors like environmental, social, and governance standards, a political agenda."

Representative Virginia Foxx (R-NC) had begun the House debate by emphasizing lawmakers' role in setting DOL policy. "By paving the way for ESG investing in employer-sponsored retirement plans, President Biden is threatening the retirement savings of Americans," said Foxx. "Such a fundamental change to ERISA should be debated and considered in Congress, not enacted through executive fiat illegally."

In rebuttal, Rep. Robert Scott (D-Va) said the DOL's ESG rule was neither a mandate nor did it alter the applicable fiduciary standard. "Let's be clear. Consideration of ESG factors is not at odds with making a profit. In fact, workers' profit is still central, but if a company has negative externalities, such as carbon-intensive business practices, vulnerability to sea level rise, high liability risks, or a record of mistreating workers who may go on strike, its stock could suffer in the long term," said Scott.

The House passed the disapproval resolution by a vote of 216-204, with Rep. Jared Golden (D-Me) being the only Democrat to join Republicans in passing the resolution (Rep. Golden, however, like Sen. Manchin, did vote for the IRA, the Biden Administration's signature climate change and clean energy bill). The Senate voted 50-46 to pass the disapproval resolution. The Biden White House has issued a veto threat on the disapproval resolution.

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