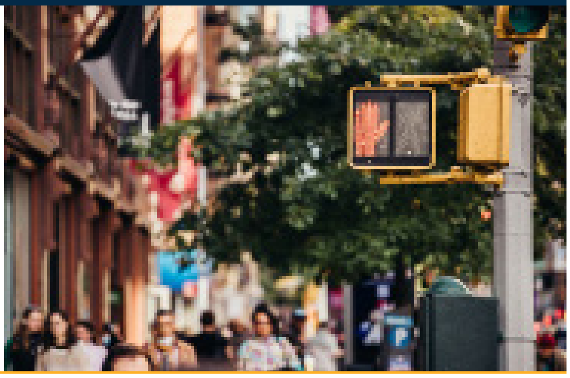
Client Alert | March 31, 2023

Biden Vetoes Anti-ESG Measure



On March 20, 2023, President Joseph R. Biden issued his first presidential veto to reject the recent joint Congressional resolution that would have repealed the U.S. Department of Labor's (DOL) January 2023 "ESG Rule." Just a few days later, on March 23, the U.S. House of Representatives failed to override the veto, meaning that, for now, the DOL's ESG Rule remains intact.

Summary of the DOL's ESG Rule

The DOL's ESG Rule, which became effective on Jan. 30, 2023, provides a principles-based approach with respect to fiduciary investment decision-making processes. Consistent with ERISA, the regulation requires that ERISA plan fiduciaries focus on relevant risk-return factors and not subordinate the interests of participants and beneficiaries to objectives unrelated to the provision of benefits under the plan. The ESG Rule allows fiduciaries to determine which factors are relevant to risk and return analyses without mandating consideration of any factors in particular. The regulation makes it clear that risk and return factors *may* include the economic effects of climate change and other environmental, social or governance factors.

Other Attacks on the ESG Rule

Notwithstanding President Biden's veto, there are two ongoing lawsuits attacking the ESG Rule. In January 2023, 25 state attorneys general joined by a fossil-fuel company, a fossil-fuel advocacy group and a Manhattan Institute fellow are suing the DOL in the Northern District of Texas in an attempt to block the ESG Rule on the grounds that the regulation violates the Administrative Procedures Act and that the DOL exceeded its statutory authority in promulgating the rule. In February 2023, two Wisconsin-based 401(k) plan participants filed a lawsuit in the Eastern District of Wisconsin on similar grounds.

In addition, certain Republican members of the U.S. House of Representatives have indicated that they are working on legislation to amend ERISA to make it more difficult to consider ESG factors with respect to plan investments.

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Key Considerations

These developments highlight just how politicized ESG has become. Nevertheless, even in the absence of a DOL regulation that specifically contemplates ESG factors, to the extent that the economic effects of climate change and other environmental, social or governance factors bear on the risk and return analysis of an investment, the ERISA duties of prudence and loyalty would permit consideration of such factors with respect to investment decisions.

In addition to addressing ESG considerations, the ESG Rule also underscores that a fiduciary's duty to manage plan assets includes the appropriate exercise of shareholder rights related to those shares, including the right to vote proxies. In effect, fiduciaries should vote proxies unless there are good reasons not to.

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