DOL's ESG rule under attack by Republican lawmakers

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A joint resolution will be reintroduced in the Senate and House that would nullify the Department of Labor's new rule permitting retirement plan fiduciaries to consider climate change and other environmental, social and governance factors when selecting investments and exercising shareholder rights.

Every Senate Republican, led by Sen. Mike Braun of Indiana, along with Sen. Joe Manchin, D-W.V., and Rep. Andy Barr, R-Ky., said in a news release Wednesday that they will reintroduce the joint resolution under the Congressional Review Act, though they did not specify when.

The CRA lets Congress disapprove — by a simple majority vote — a final rule issued by a federal agency if it has not been in effect for more than 60 legislative days. Also, if a joint resolution of disapproval is enacted, the CRA stipulates that a rule may not be issued in "substantially the same form" as the disapproved rule unless it is specifically authorized by a subsequent law.

The Labor Department in November finalized its rule — Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights. The rule, which went into effect Monday, allows ERISA fiduciaries to consider ESG. It also maintains the department's position that fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals.

The rule is a reversal of two rules promulgated late in the Trump administration that said retirement plan fiduciaries could not invest in "non-pecuniary" vehicles that sacrifice investment returns or take on additional risk and outlined a process a fiduciary must undertake when making decisions about casting a proxy vote.

Mr. Braun and Mr. Barr first introduced the resolution in December during the last congressional session.

"President Biden is jeopardizing retirement savings for millions of Americans for a political agenda," Mr. Braun said in a statement. "In a time when Americans' 401(k)s have already taken such a hit due to market downturns and record high inflation, the last thing we should do is encourage fiduciaries to make decisions with a lower rate of return for purely ideological reasons. That's why we are proud to stand up against this rule for the millions of Americans who depend on these funds for their retirement."

Elected Republicans in Washington and across the U.S. are in stark opposition to the new ESG rule, which stakeholders say is more neutral than the Trump-era rules, which were viewed as anti-ESG, and the October 2021 proposal on which it was based, which was seen as pro-ESG.

Republican attorneys general from the 25 states filed a lawsuit Jan. 26 in U.S. District Court in Amarillo, Texas, arguing that the Labor Department's rule undermines key protections for retirement savers, oversteps the department's authority under the Employment Retirement Income Security Act, and is arbitrary and capricious.

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