

ERISA Attorney Marcia Wagner Comments On The President's Veto Of Bipartisan ESG Joint Resolution

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Marcia S. Wagner, Esq., President/Founder of The Wagner Law Group in Boston, is one of the nation's most notable ERISA

attorneys. She founded The Wagner Law Group over 25 years ago after a decade of practicing employee benefits law. She graduated summa cum laude and Phi Beta Kappa from Cornell University and is a graduate of the Harvard Law School.

Wagner is one of a handful of “go-to” lawyers for ERISA law, regulation, and litigation. Indeed, as her online bio describes, “a recent Court decision cited her expert testimony as having been pivotal to the outcome, finding her ‘experience with 403(b) plans impressive and her testimony consistent, reasonable, logical and ultimately, highly credible.’”

When President Biden vetoed the bipartisan ESG Joint Resolution, it was only natural to ask her a few questions.

What is ESG explained in simple terms?

ESG stands for environmental, social, and governance as factors to be taken into account in making investments. Beyond that, there is no agreement upon the definition of ESG factors. The current debate over ESG factors is limited to retirement plans. The practice of taking ESG factors into account has been in existence for some period of time, and consideration of those factors by other very large investors such as endowment funds has not been called into question, although there are obviously significant differences between large endowments and retirement plans. Climate control is a frequently mentioned ESG factor, but it could also apply to a lack of diversity.

What is the main purpose of ESG?

The main purpose of ESG is to take into account factors that may not have an immediate effect upon an organization’s profitability, but which the persons making the investment decisions may have

an effect upon an organization's profitability. At least in concept and presumably for the most part in practice, ESG factors are evaluated in the same manner as economic factors. In extreme cases, such as investments in certain Russian industries, investment decisions might be made on purely moral grounds. Whether such decisions would be permissible under the DOL regulations which the Congressional resolutions sought to eliminate, is questionable, but that type of issue is outside the scope of the current debate.

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What's the difference between allowing ESG investments in retirement plans and requiring such investments?

The DOL regulations do not require ESG factors to be taken into account in evaluating investments. Rather, the regulations would permit ESG factors to be taken into account. The DOL regulations attempted to take a neutral position on the consideration of ESG factors.

Why do you believe incorporating ESG factors should—or should not—be considered a fiduciary duty?

As counsel to a plan fiduciary with responsibility for making investment decisions for a plan, we would advise a plan fiduciary of

the permissibility of taking ESG factors into account, which itself could depend upon several factors, such as the type of plan, the composition of the plan sponsor's work force, and the turnover rate. It should be considered a fiduciary duty to the extent the plan fiduciary needs to take ESG factors into account to the same extent as a prudent expert in the area and to the extent consideration of such factors is required to act in the best interest of plan participants.

Explain the intent of the bipartisan effort that was vetoed.

The intent of the resolutions, focusing upon the text of the resolutions, would be to overturn the DOL regulation and prohibit the DOL from issuing future regulations focusing upon environmental factors and potential litigation. However, it also had to be clear to Republicans that even if they could convince two Democrat senators to join them, President Biden would almost certainly veto the legislation, with almost no possibility of securing enough votes to override the President's veto. Perhaps for political purposes, the Republican Party wanted to make it as clear as possible that President Biden is a supporter of ESG. If that was not the objective, it appears to be purely political theater. If the opponents of ESG hope to obtain victory on this issue, their best hope is in the courts, not in Congress.

Explain the intention of President Biden's veto.

The intent of President Biden also cannot be looked at solely in the abstract. If he did not veto this Congressional resolution, he would have faced a severe backlash from the progressive segment of the Democrat party. That is not to say that President Biden does not in fact fully support the permissibility of taking into account ESG

factors to the extent permissible under the DOL regulations as a necessary measure to protect retirement plan investors., but simply to recognize the political reality.

Who supports the efforts to elevate ESG factors in retirement investments and why do they advocate for it?

Supporters of ESG believe that the opponents of ESG are misstating the position of the DOL in the challenged regulations, and that the DOL regulations allow them, where appropriate, to take ESG factors into account in the same manner as other investors. Not surprisingly, supporters of ESG do not regard support of ESG factors as radical in nature.

Who does not support efforts to elevate ESG factors in retirement investments and why do they advocate against it?

Expressing it in their terminology, opponents of ESG regard it as “woke”—a radical politically driven agenda by left wing elitists who favor climate control regulation in all aspects of government, the effect of which will be harmful to the economy, particularly the fossil fuel segment.

Considering the possibility this new regulation will be revoked and/or reversed in two years under a new administration, what does this all mean for 401k plan sponsors and the employees that save in their company’s retirement plan?

While the possibility certainly exists that a new administration would seek to revoke and or reverse the ESG regulation, until that

contingency occurs, I would advise plan administrators to administer their plans in accordance with the current regulations. Solely as a matter of efficiency, plans need to be administered in a consistent fashion, and the current DOL regulations do not mandate any type of analysis in making investment decisions. If a relevant plan fiduciary believed that consideration of ESG factors was inappropriate, it would not be obligated to do so.

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