

Legislative and Regulatory Report

A monthly review of the latest information of importance to retirement plan sponsors

February 2023

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District Court invalidates DOL interpretation of a fiduciary

On February 13, the U.S. District Court for the Middle District of Florida (11th Circuit) [issued a decision](#) that invalidates the Department of Labor's interpretation of a fiduciary in the context of rollover advice. Just over a year ago, the American Securities Association (ASA) sued to invalidate 2 specific frequently asked questions issued by the DOL regarding the fiduciary definition and Prohibited Transaction Exemption 2020-02. The court upheld other aspects of the DOL's guidance, specifically the rollover documentation requirements set forth in FAQ-15. A similar case brought by the Federation of Americans for Consumer Choice (FACC) in Texas (5th Circuit) is still awaiting a decision.

Labor Secretary to leave the administration

On February 16, it was [confirmed](#) that Labor Secretary Marty Walsh will leave his post at the DOL to become the head of the National Hockey League Players' Association. Walsh's exit has potential implications for several rulemakings at the DOL, including the anticipated revival of the Obama-era fiduciary rule. Deputy Secretary Julie Su is in line to serve as Acting Secretary until a replacement is confirmed. While no formal announcements regarding a replacement have been made, [recent reporting](#) suggests that Su and Sara Nelson, International President of the Association of Flight Attendants-CWA, AFL-CIO, are leading candidates to replace Walsh. DeMaurice Smith, the Executive Director of the National Football League's union, is another potential candidate for the position.

House passes a financial exploitation bill

On January 30, the House unanimously passed H.R. 500, the [Financial Exploitation Prevention Act](#). The bill would give the financial industry better tools to address suspected financial exploitation and abuse of seniors and those with mental and physical disabilities. First, the bill requires the Securities and Exchange Commission to report to Congress on recommendations for legislative and regulatory changes to combat financial exploitation of seniors and vulnerable adults. Second, the bill permits a registered open-ended investment company or transfer agent for that company, including mutual funds, to delay the redemption period of any redeemable security if it's reasonably believed that such redemption was requested through the financial exploitation of a security holder who is a senior or an individual unable to protect their own interests. The bill now heads to the Senate for further consideration.

Congress divided on DOL's ESG rule

On February 1, Sen. Mike Braun (R-IN) [announced](#) plans to use the Congressional Review Act to undo the DOL's recently effective ESG rule. The effort is supported by all Republican members of the Senate and has a companion effort led by Rep. Andy Barr (R-KY) in the House. At this time, the effort's [prospects for success are low](#) because President Biden would probably veto the resolution if it passes.

In response, on February 23 a group of Democratic lawmakers led by Rep. Suzan DelBene (D-WA) [introduced](#) the Freedom to Invest in a Sustainable Future Act. The legislation would affirm the DOL's recently finalized ESG rule giving workplace retirement plans the freedom to consider ESG factors in their investment decisions or offer ESG investment options.

The Department's "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" rule, commonly referred to as the ESG rule, reverses a Trump-era rule and clarifies that ERISA plan fiduciaries can consider climate change and other environmental, social and governance (ESG) factors when they make investment decisions and when they exercise shareholder rights, including voting on shareholder resolutions and board nominations, among other provisions. The final rule was effective January 30, 2023.

References and source material used in this publication

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"House Committee Takes Up Anti-ESG Resolution," National Association of Plan Advisors, <https://www.napa-net.org/news-info/daily-news/house-committee-takes-anti-esg-resolution> (Feb. 27, 2023).

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Keeping watch

You can find the most recent information on issues affecting governmental defined contribution plans, plan sponsors and plan participants on the Employer page of our plan website, NRSforu.com/plansponsor.



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