7 November 2023

# Ways & Means Committee Holds ESG Hearing

The November 7 House Ways & Means Committee hearing, "Ensuring that 'Woke' Doesn't Leave Americans Broke: Protecting Seniors and Savers from ESG Activism," evidenced a clear partisan split over whether environmental, social, and governance (ESG) factors should be allowed to be considered by retirement plan fiduciaries. Republicans argued that the best financial interests alone should steer fiduciaries, while Democrats favor consideration of ESG factors and protested that there are more important retirement policy topics to be considered by the Committee, including building on the SECURE 2.0 bill.

The Obama administration allowed for some consideration of ESG factors in retirement plan decision-making, then the Trump administration required plan fiduciaries to select investment and investment courses of action based solely on financial considerations, and the Biden administration is now allowing ESG factors to again be considered. In March, Congress passed a resolution rolling back the Department of Labor (DoL) regulation clarifying that retirement plan managers can consider ESG factors when making investment decisions, and President Biden issued his first veto to reject the resolution. The ESG rule has also been considered in court cases. There was minimal discussion at the hearing of the Administration's October 31 retirement security rule on the Definition of an Investment Advice Fiduciary.

Republicans said ESG goals shouldn't play an equal or greater role over maximizing investment return in making plan decisions. In an opening statement, Chairman Jason Smith (R-MO) said, "The tax code imposes strict requirements on every professional who manages tax-advantaged retirement plans in order to protect our seniors. The law states that state governments and the private sector must manage these accounts for the exclusive benefit of retirees. This standard has been in place for decades, and it predates rulemaking by the Department of Labor on fiduciary duties. Working families need that protection to prevent Wall Street money managers from putting climate alarmism and far-left policies ahead of their retirement security. But over the last couple of years, we've seen the ESG agenda turn into a pressure campaign…"

Democrats said the Committee's focus should be on issues other than "woke" retirement plans, especially with a government shutdown looming in 10 days. Ranking Member Richard Neal (D-MA) said members should be focusing on retirement plans and how Congress can expand on the achievements of SECURE 2.0. Automatic enrollment and the Saver's Credit are necessary to provide retirement savings opportunities to lower-income workers, and that should be the focus, not ESG, he said. Rep. John Larson (D-CT) said the Committee should instead be holding a hearing on Social Security.

Witnesses:

- Preston Rutledge, Principal and Founder, Rutledge Policy Group, LLC
- Jason Isaac, Director, Life:Powered
- Marlo Oaks, State Treasurer, Utah
- Mason Bolay, Senior Vice President, First Bank & Trust Company
- Brandon Rees, Deputy Director, AFL-CIO Office of Investment

Testimony highlights:

- Rutledge said the 2022 Biden Administration guidance removed some terminology and lifted the ban on an ESG-themed fund as a plan's default investment but did not change the principle that fiduciaries may not accept lower returns or higher risks in pursuit of collateral benefits.
- Isaac said ESG-labeled funds have $170 billion in total assets under management and typically underperform other funds, with clean-energy stocks underperforming the market over the past decade.
- Oaks said ESG is a dangerous investment scheme that has created an impulse to pressure corporations to solve complex global and societal issues including climate change and income inequality, which should instead be in the purview of the government.
- Bolay said instead of ESG regulations Congress should make sure that farmers have risk management tools at their disposal and advocated for a strong renewal of the Farm Bill.
- Rees said consideration of ESG factors by retirement plans is already regulated by DoL and urged Congress to focus on other retirement-related crises.

During questioning, Chairman Smith asked why it is important that trustees manage funds for the exclusive benefit of savers and how the retirement system would be threatened if retirement plan managers put ESG considerations ahead of financial considerations. Rutledge said it is the interest earned on an account that makes up a very substantial portion of retirement savings, and the focus must be on maximizing investment performance. He said an ESG investment may represent the best opportunity for gain available; the principle is maximizing return with the level of risk that the plan is willing to endure. Asked how ESG management fees compare to those in other funds, Isaac said they are typically higher, and maintained that they charge more just for the label of ESG.

Rep. Mike Thompson (D-CA) said investors should be able to account for climate and other factors in their plans, as insurers do, and should not be discouraged from investing in clean energy resources. He asked if current law imposes fiduciary duty to act on behalf of their clients and whether anti-ESG laws could cause harm to future retirees. Rees said DoL has long regulated fiduciaries.

Rep. Darin LaHood (R-IL) asked Isaac if ESG targets distorted decisions. Isaac said many executives have their compensation tied to ESG goals.

Rep. Bill Pascrell (D-NJ) said the hearing is based on the false premise that retirees are not concerned with environmental, social, and other factors. There is no evidence of ESG harming investors, he said, adding that the hearing is a partisan attempt to stoke fear. Isaac said ESG is affecting returns on assets for average Americans.

Under questioning from Rep. Linda Sanchez (D-CA), Rees said areas of focus for retirement policy should be strengthening Social Security, increasing employer contributions to retirement savings accounts, and allowing fiduciaries to consider ESG factors because they are relevant to investment returns.

Rep. Ron Estes (R-KS) suggested that ESG is hurting investors by prioritizing nonfinancial factors over financial outcomes, and that parity between other factors and those factors needed for maximum returns is dangerous. Rep. Greg Steube (R-FL) said that, with ESG, the savings of average Americans are a vehicle for environmentalists to pursue their political goals in the private financial sector. The Biden administration has been supportive with its ESG guidance, he said, but the law is clear that tax-advantaged retirement plans must be managed for the exclusive benefit of beneficiaries and managers may not pursue nonfinancial goals in their investments.

Rep. Judy Chu (D-CA) said the Republican majority is waging a war over an issue that is not an actual threat to workers or retirees. Plans are permitted, but not required, to consider ESG factors and fiduciaries are required by law to act in beneficiaries' best financial interests. She also discussed reverse policies in the form of state-level bans (including in Florida) that prevent retirement plans from investing in funds with ESG requirements.

Testimony from the hearing is at https://waysandmeans.house.gov/event/hearing-on-ensuring-that-woke-doesnt-leave-americans-broke-protecting-seniors-and-savers-from-esg-activism/

Opening statements by Chairman Smith and Ranking Member Neal are at
https://waysandmeans.house.gov/chairman-smith-opening-statement-hearing-on-protecting-seniors-savers-from-esg-activism/
https://democrats-waysandmeans.house.gov/media-center/press-releases/neal-opening-statement-retirement-hearing