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What are the Insurance Implications of Proposed Anti-ESG Legislation in Texas and Elsewhere?

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Insights for Insurers

In a recent *Law360* article, we explored some of the implications of a recently proposed anti-ESG bill being considered by the Texas legislature. However, we thought the issue merited some follow up analysis.

The activity in Texas is a reflection to some extent of our divided times, the broad scope of environmental, social, and governance (ESG), the lack of agreement on what is encompassed by the term ESG, and the reality that ESG often implicates political party agendas. ESG pushback, however, is not unique to Texas, and it is not always along strict party lines. A bill to prevent pension fund managers from basing investment decisions on ESG factors passed in the U.S. House of Representatives and Senate (with a couple of Democratic senators joining). According to the bill's sponsor, Republican Senator Mike Braun, the bill made the primary criterion financial return on investment. It was passed to counter a Department of Labor rule allowing consideration of ESG criteria. President Biden vetoed the bill and there does not appear to be enough votes to override Biden's veto.

ESG is not exempt from the laws of physics. Anti-ESG efforts are in some ways a reflection of Sir Isaac Newton's third law that states "for every action (force) in nature there is an equal and opposite reaction." The depth and pace of ESG activity make anti-ESG reactions inevitable. It may not be equal, but there is opposition to some aspects of ESG. Although the momentum remains, the depth, pace, and concentrated focus on ESG—as well as the financial consequences—means that considerable opposition and anti-ESG measures will continue to be lodged. One significant reason for the fast pace of ESG is that companies that historically would have offered a counter-balance have offered less resistance and have even pushed aspects of ESG due to internal pressures associated with a work force and management base that, by the numbers, is increasingly composed of more Millennials and Generation Z individuals.

Although most companies are impacted by ESG, insurers are impacted on multiple fronts—as businesses generally, as insurance underwriters, as large institutional investors, and, of course, on the claims side. Like many companies, they have multiple stakeholders with a wide range of views on ESG, and on many specific issues, there are disparate views within a given stakeholder.

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There may be something bigger at play insofar as the regulation of insurance is concerned. Since the passage of the McCarran-Ferguson Act of 1945, Congress has left regulating the "business of insurance" to the states. However, in the wake of the terrorists attacks of 2001 and the financial crises of 2008, the federal government has played a larger role in regulating insurance. The Biden administration's self-described "all of government" approach to ESG has set the stage for the various instruments of government to impose increased regulation on insurers and others. The Federal Insurance Office of the Department of the Treasury, for example, has signaled the federal government's possible transition from limited involvement in regulation of the business of insurance to potentially wide-ranging federal oversight that could greatly diminish or virtually supplant many aspects of state regulation of insurance.

Insurers are potentially subject to state legislative acts and the state department of insurance regulation of the fifty states. There has been a lot of coordination through the National Association of Insurance Commissioners, and for the most part, insurers historically have been able to navigate through differences in state regulation. Sometimes, regulation is a consideration in terms of what states insurers write in, and what products insurers are willing to write in, a given state. We are going to see the relative role of federal and state regulation of insurance continue to play out on the ESG playing field. We may also see clashes between what regulators require and the considerations of rating agencies.

Finally, as the ESG debate rages on, it would be helpful for those on all sides of the ESG equation to take a deep breath and consider the secondary, collateral, and unintended consequences of proposed laws and regulations. One thing is for sure, insurance compliance officers will remain busy.