Miller & Chevalier

EB Flash: DOL Strengthens Fiduciary Duties Related to ESG Investments

Employee Benefits Alert
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The Department of Labor (DOL) yesterday issued proposed regulations on investment duties for plan fiduciaries regarding environmental, social and governance (ESG) investing. The rulemaking underscores that plan fiduciaries cannot invest in ESGs that have investment strategies that "subordinate return or increase risk for the purpose of non-pecuniary objectives."

"Private employer-sponsored retirement plans are not vehicles for furthering social goals or policy objectives that are not in the financial interest of the plan," said Secretary of Labor Eugene Scalia in a press release. "Rather, ERISA plans should be managed with unwavering focus on a single, very important social goal: providing for the retirement security of American workers.

"This proposal ensures that fiduciaries act with a single-minded focus on the interests of beneficiaries," Acting Assistant Secretary of Labor for the Employee Benefits Security Administration Jeanne Klinefelter Wilson said in a press release. "Providing further clarity on fiduciaries' responsibilities in ESG investing will help safeguard the interests of participants and beneficiaries."

The DOL cites five core additions to the regulation:

- New regulatory text to codify the Department's longstanding position that ERISA requires plan fiduciaries to select investments and investment courses of action based on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action.
- An express regulatory provision stating that compliance with the exclusive-purpose (*i.e.*, loyalty) duty in ERISA section 404(a)(1)(A) prohibits fiduciaries from subordinating the interests of plan participants and beneficiaries in retirement income and financial benefits under the plan to non-pecuniary goals.
- A new provision that requires fiduciaries to consider other available investments to meet their prudence and loyalty duties under ERISA.
- The proposal acknowledges that ESG factors can be pecuniary factors, but only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. The proposal adds new regulatory text on required investment analysis and documentation requirements in the rare circumstances when fiduciaries are choosing among truly economically "indistinguishable" investments.
- A new provision on selecting designated investment alternatives for 401(k)-type plans. The proposal reiterates the Department's view that the prudence and loyalty standards set forth in ERISA apply to a fiduciary's selection of an investment alternative to be offered to plan participants and beneficiaries in an individual account plan (commonly referred to as a 401(k)-type plan). The proposal describes the requirements for selecting investment alternatives for such plans that purport to pursue one or more environmental, social, and corporate governance-oriented objectives in their investment mandates or that include such parameters in the fund name.

The 62-page text of the proposed rules is posted here. It does not specify a date certain for publication in the Federal Register, but that should occur in a matter of weeks, if not days. A 30-day comment period will follow.

A DOL press release is posted here.

A DOL Fact Sheet on the rules is posted here.