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Memorandum

Department of Labor Will Not Enforce Two Investment-Related Fiduciary Rules Issued at the End of Trump Administration

March 11, 2021

On March 10, 2021, the Department of Labor ("DOL") issued a statement that it will not enforce two plan fiduciary investment-related rules promulgated under ERISA that were published in the final months of the Trump Administration.[1] These rules addressed (1) the consideration of financial and non-financial factors in selecting plan investments and (2) proxy voting and shareholder rights.

Background

On November 13, 2020, the DOL published a final rule amending the investment duties regulation to provide that ERISA plan fiduciaries may not consider non-pecuniary factors (*e.g.*, environmental, social and governance ("ESG")) in making investment decisions, except in rare circumstances where all else is equal.[2] On December 16, 2020, the DOL published a separate final rule on fiduciary duties regarding proxy voting and shareholder rights, which rule also amended the investment duties regulation. The DOL indicated the rule was, in part, meant to clarify that plan fiduciaries should not consider non-pecuniary factors in proxy voting decisions. Further, under the rule, plan fiduciaries are not required to vote proxies if there is no benefit to the plan. In practice, both rules provide that plan fiduciaries should only consider pecuniary factors in making investment decisions.

Reason for Announcement

Upon taking office, President Biden issued an Executive Order[3] directing federal agencies to review regulations promulgated, issued or adopted during the Trump Administration that are or may be inconsistent with protecting public health and environment (specifically climate change). On March 10, 2021, the DOL explained that it had heard from a wide variety of stakeholders that (1) the fiduciary rules published during the Trump Administration may not properly reflect fiduciary duties under ERISA; (2) the rules were rushed and that the DOL did not take into account evidence submitted by commenters on the use of ESG considerations in improving long-term investment returns; and (3) the rules have created confusion and already resulted in a "chilling effect" on the appropriate consideration of ESG factors in making investment decisions. For these reasons, the DOL announced that it would not enforce either rule until it was able to issue further guidance.

[1] *See* DOL statement here.

[2] *See* our prior alerts on the proposed rule here and on the final rule here.

[3] Executive Order 13990 of January 20, 2021, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis."

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