NEW DOL GUIDANCE: ENVIRONMENTAL/SOCIAL/ GOVERNANCE INVESTMENT CONSIDERATIONS

Hodgson Russ Employee Benefits Newsletter
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The Department of Labor (DOL) published new guidance to assist Employee Benefits Security Administration's (EBSA's) national and regional offices in interpreting prior guidance regarding the environmental, social or governance (ESG) factors plan fiduciaries may consider when making investment decisions. As plan investments come under greater participant scrutiny in terms of fees and overall prudence, concerns for socially responsible plan investing also continue to be expressed both by participants and fiduciaries. There are previous interpretive bulletins that provide guidance on the concepts of economically targeted investments (ETIs) and consideration of ESG factors in making investment decisions. The most recently issued guidance (Field Assistance Bulletin 2018-01 (the "FAB")) does not replace the prior guidance, but it expresses a narrower view on the extent to which ESG factors may be considered in making plan investment decisions, while still adhering to fundamental ERISA fiduciary standards of prudence.

The DOL view still is that plan fiduciaries generally "are not permitted to sacrifice investment return or take on additional investment risk as a means of using plan investments to promote collateral social policy goals." That said, consideration of ESG factors in making plan investment decisions is permissible and, under the proper circumstances, ESG factors can be "more than mere tie-breakers." However, the FAB cautions that fiduciaries "must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision," and reminds fiduciaries that plan fiduciaries "must always put first the economic interests of the plan in providing retirement benefits."

Where a plan permits participants to choose from a menu of investment fund options, the FAB states that "adding one or more funds to a platform in response to participant requests for an investment alternative that reflects their personal values does not necessarily result in the plan forgoing the placement of one or more other non-ESG themed investment alternatives on the platform." A "prudently selected, well managed, and properly diversified ESG-themed investment alternative" can be added to the investment fund line-up without requiring the plan to remove or forego adding other non-ESG-themed investment options to the platform. Nonetheless, the FAB notes that a "decision to designate an investment alternative may not be influenced by non-economic factors unless the investment ultimately chosen for the plan, when judged solely on the basis of its economic value, would be equal to or superior to alternative available investments."

In choosing qualified default investment alternatives (QDIAs), the relevant regulations offer no indication that "fiduciaries should choose QDIAs based on collateral public policy goals." The FAB, however, cautions that a "decision to favor the fiduciary's own policy preferences in selecting an ESG-themed investment option for a 401(k)-type plan without regard to possibly different or competing views of plan participants and beneficiaries would raise questions about the fiduciary's compliance with ERISA's duty of loyalty."

The DOL has previously acknowledged that a retirement plan's investment policy statement (IPS) can include language that speaks to the use of ESG factors in making plan investment decisions. With respect to QDIAs, however, the FAB cautions makes it clear that an IPS is not required to include guidelines on ESG investments. Furthermore, to the extent an IPS includes ESG investment guidelines, the FAB cautions fiduciaries, including ERISA Section 3(38) investment managers, that they must adhere to those guidelines only to the extent the IPS and the ESG guidelines are consistent with ERISA fiduciary standards. Where it is imprudent to comply with aspects of an IPS, the fiduciary must disregard it.

To the extent has an IPS that incorporated ESG investment guidelines or otherwise takes into account ESG factors in selecting specific plan investments, investment fund options, or QDIAs, the FAB represents important new guidance on how fiduciaries should be approaching ESG investment decisions.