
Another Objection to DOL's ESG Proposal

By Wagner Law Group Thu, Aug 13, 2020

The Department of Labor's recent move to chill the use of "Environmental, Social and Governance" investments in retirement plans has drawn broad criticism--including this comment from the Wagner Law Group, a pension law specialist.

The Department of Labor ("DOL") is poised to significantly change its rules on how ERISA plan fiduciaries should evaluate investment opportunities. The employee benefit plan community, including the Wagner Law Group, responded to the DOL's proposed amended rule by raising concerns that it could fundamentally affect how plan fiduciaries are expected to make investment decisions.

We pointed out that it would establish new and inconsistent standards for fiduciary consideration of environmental, social and corporate governance factors ("ESG Factors"). You can read The Wagner Law Group's Comment Letter [here](#).

As explained in the preamble, the Proposed Rule, published in the Federal Register on June 30, 2020, would amend the DOL's longstanding regulation titled "Investment duties," 29 C.F.R. §2550.404a-1, to address the emergence of ESG investment funds and the DOL's stated concern that plan fiduciaries might be improperly considering ESG Factors in making investment decisions.

The DOL recognized that over the years its advice on fiduciary consideration of incidental or secondary effects of investments has varied; the DOL proposed sweeping changes to its regulation on investment duties to "provide clarity and certainty regarding the scope of fiduciary duties surrounding non-pecuniary issues."

The proposed rule, however, goes beyond its stated objectives to affect how fiduciaries make all investment decisions. As explained in our Comment Letter, the proposal starts by stating that fiduciaries may only consider pecuniary factors in evaluating investment options, and then defines "pecuniary factors" narrowly, thereby excluding from consideration any factor that does not fit into the definition.

This new definition of "pecuniary factor" and the DOL's new position that fiduciary investment decisions can only be based on defined "pecuniary factors" would be impractical in application and would be a significant departure from current law and guidance which requires fiduciaries to act solely in the interests of a plan and its participants in considering the totality of relevant circumstances.

In addition, the Proposed Rule would require fiduciaries to consider “available alternative investments” in making investment decisions, without guidance as to what this would mean, and without recognizing that the best practice of comparing investment alternatives is not universally applicable to all circumstances.

As explained in our Comment Letter, we are concerned that this standard would inject uncertainty and add additional layers of analysis to investment decision-making without necessarily improving the process or the results.

The Proposed Rule does not define ESG Factors. Nonetheless, it crafts new standards treating ESG Factors as inherently non-pecuniary, and thus unacceptable considerations, unless strict higher standards are met to demonstrate pecuniary characteristics. The proposal further creates inconsistent standards for fiduciaries considering ESG Factors in selecting investment options for self-directed individual account retirement plans.

On a parallel front, the DOL has initiated investigations around the country into employee benefit plan investments that include ESG components, seeking extensive documents and information about both investment funds and the investing employee benefit plans. This development has also caused concern. It is rare, if not unprecedented, for the DOL to engage in a national enforcement effort targeting only investments with specific characteristics while there is a pending proposed regulation on the same topic, especially a proposal that changes the existing DOL guidance on the subject.

Whether or not the DOL successfully implements the Proposed Rule, the DOL's simultaneous investigative efforts in this arena, coupled with the Proposed Rule's shortened 30-day comment period, signal that the DOL has honed in on exploring the influence of ESG Factors in retirement plan investing.

The Wagner Law Group submitted its Comment Letter to express our concern that adopting the Proposed Rule would make it more difficult for our clients to understand how they are expected to comply with their investment fiduciary duties.