What's up with the 'ESG' rule: Wagner Law Group

By Wagner Law Group *Fri, Jan 22, 2021*

'Given that the slimmer Final Rule is no longer the stranglehold on ESG investing that the original proposal had been, the Biden Administration could decide not to expend its resources changing it,' wrote Ivelisse Berio LeBeau of Wagner Law Group.

*This is a brief summary of the **full text** of the Wagner Law Group's post-election assessment of the Department of Labor's intentions regarding a retirement plan sponsor's fiduciary duties when considering "Environmental, Social and Governance"-related funds for the plan.*

Late in 2020, the DOL amended its Investment Duties regulation for the first time in 40 years. In the end, the Final Rule on investment decision making that emerged from the filter of constituent comments does not prohibit fiduciaries of ERISA employee benefit plans from selecting investments that have ESG or other collateral objectives or benefits, and does not create different standards for consideration of such investment options.

Rather, the amended regulation requires that fiduciaries make investment choices based on consideration of pecuniary factors, which is consistent with the DOL's existing guidance. The Final Rule does, however, shift focus from considering investment options under the totality of the facts and circumstances to considering only defined pecuniary factors to the exclusion of non-pecuniary factors. This could be a distinction without a difference, however, given the expanded interpretation in the Preamble and the flexibility incorporated into the final regulatory language.

The Biden Administration flagged this rule for review under the umbrella of an Executive Order focused on public health, the environment and climate change. Given that the slimmer Final Rule is no longer the stranglehold on ESG investing that the original proposal had been, the Biden Administration could decide not to expend its resources changing it.

Instead, it could opt for reminding benefit plan fiduciaries that, despite the prior administration's efforts, the DOL does not restrict fiduciary consideration of relevant factors in selecting investments for employee benefit plans, including when considering investment vehicles with ESG or other collateral benefits or goals.