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Trump Administration Looking at Environmental, Social and Governance Factors for Retirement Investments

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As part of the Trump administration's interest in promoting private investment in energy infrastructure, on April 10 an Executive Order was issued requiring the DOL to look at data on retirement plan investments in the energy sector and to review existing guidance on fiduciary responsibilities for proxy voting.

Background

As reported in our April 27, 2018 *For Your Information*, over the years, DOL has addressed the interaction of fiduciary standards with "environmental, social, and governance" (ESG) investing. DOL has also articulated views on shareholder activism and socially directed shareholder policy voting initiatives on the part of retirement plans. DOL has vacillated on its approach on these topics, however, based on the party in control of the White House.

Under the Clinton administration in 1994, DOL said a fiduciary can invest plan assets taking into account ESG factors if the investment (1) has an expected rate of return commensurate to rates of return of alternative investments with similar risk characteristics, and (2) is otherwise an appropriate plan investment (referred to as the "all things being equal" test). It also affirmed that the interests of participants and beneficiaries may involve shareholder activities intended to influence corporate activities that enhance the value of the plan's investments. Under the Bush administration in 2008, the DOL issued guidance emphasizing the need to focus on the investment's economic value to the plan. DOL under the Obama administration took the view that the 2008 guidance "unduly discouraged" fiduciaries from considering ESG factors and essentially reinstated the principles in its 1994 guidance. And in 2018 the DOL under the Trump administration issued a Field Assistance Bulletin that warned fiduciaries against too readily treating ESG factors as economically relevant considerations.

The DOL further recognized that shareholder activities (i.e., proxy voting) designed to monitor or influence the management of corporations in which the plan owns stock can be consistent with fiduciary duties if there is a “reasonable expectation that such activities (by the plan alone or together with other shareholders) are likely to enhance the economic value of the plan’s investment” in the company, considering the costs involved.

Trump Administration takes its interest in ESG investing a step further

With the Trump administration taking a keen interest in the energy sector and the development of new energy infrastructure, it issued an Executive Order that directs the Secretary of Labor to, “within 180 days of the date of this order, complete a review of available data filed with the Department of Labor by retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) in order to identify whether there are discernible trends with respect to such plans’ investments in the energy sector.” And further, to “complete a review of existing Department of Labor guidance on the fiduciary responsibilities for proxy voting to determine whether any such guidance should be rescinded, replaced, or modified to ensure consistency with current law and policies that promote long-term growth and maximize return on ERISA plan assets.”

While not explicit, one could infer that the Assistant to the President for Economic Policy is looking to determine whether or not there are any discernable trends away from energy investments and, if so, whether any fiduciary-related guidance is controlling that trend.

In closing

It is hard to say what effect, if any, the results of the Executive Order will have on plan investments. As a result of a recent spate of plan investment options lawsuits, it is difficult to imagine plan fiduciaries selecting and/or limiting investments to those that do not provide a good return, including those that do, or do not, include fossil fuels.

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